STATE OF NEW JERSEY
Board of Public Utilities
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		TELECOMMUNICATIONS
IN THE MATTER OF THE JOINT PETITION OF VERIZON COMMUNICATIONS INC. AND MCI, INC. FOR APPROVAL OF MERGER	))))	PROVISIONAL ORDER ON MOTION TO COMPEL
		BPU DOCKET NO. TM05030189

(SERVICE LIST ATTACHED)

BEFORE COMMISSIONER FREDERICK F. BUTLER:

The New Jersey Board of Public Utilities ("Board"), pursuant to N.J.S.A. 48:2-1 et seq., has been granted general supervision and regulation of and jurisdiction and control over all public utility systems which operate within the State of New Jersey, including telephone companies such as Verizon Communications, Inc. ("Verizon"). Moreover, the Board has specifically been granted the authority to review certain mergers and acquisitions by and of such public utilities, pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10. Pursuant to said authority, the within matter was initially opened to the Board upon the joint filing of a request by Verizon and MCI, Inc. and its affiliates ("MCI", jointly "petitioners") for Board approval of their proposed merger. In connection with this matter the Board issued a Prehearing Order which set forth a schedule for, *inter alia*, discovery, motions to intervene, and public and evidentiary hearings.

On September 1, 2005, following informal communications with petitioners, intervenor Qwest Communications Corporation ("Qwest") filed a motion to compel discovery responses from petitioners. Qwest filed a supplemental position and reply on September 8, 2005. Qwest currently seeks documents in response to ten data requests (four to Verizon and six to MCI) and subparts, ostensibly dealing with the merger's impact on Qwest's ability to obtain special access services in New Jersey at competitive prices. Specifically, Qwest seeks detailed data regarding Verizon's special access service plans, and the nature and degree to which MCI and other carriers have communicated with Verizon and/or influenced its special access pricing. Because

Qwest allegedly depends on Verizon special access services to provide end user services in New Jersey, it has expressed concern regarding the elimination of a substantial special access service competitor and the effect this may have on service pricing.

The requests in essence seek the production of any documents relating to the establishment or modification of three special access plans, as well as communications with MCI regarding those plans, and internal discussions and decision making regarding plan formulation, over an indefinite period. To this same end, Qwest also seeks to compel Verizon to identify those individuals responsible for setting special access rates and negotiating such rates with MCI.

Qwest has also asked for all MCI documents related to MCI's decision to build certain facilities, as that decision related to Verizon's or SBC's special access rates, as well as a wide range of documents related to internal communications or communications with Verizon concerning the aforementioned plans. MCI is also asked to identify persons responsible for setting and negotiating special access rates with Verizon, as well as documents related thereto over a three year period. Qwest also seeks details of oral communications between Verizon and MCI regarding such rates, descriptions of oral communications relating to Verizon's establishment of plan rates, as well as the identities of those MCI employees responsible for negotiating with Verizon. Finally, Qwest seeks unexpired contracts for special access services with Verizon and documents related thereto. See Attachments C and D to 9/1/05 Letter; 9/8/05 Letter.

Qwest contends that its concerns regarding special access pricing are clearly relevant to the Board's analysis under N.J.S.A. 48:2-51.1. It further contends that, not withstanding the fact that interstate special access is a federally tariffed product regulated by the Federal Communications Commission ("FCC"), the facilities at issue and the end user customers served by them are located in New Jersey. Qwest also argues that compliance with its data requests would not be overly broad or burdensome. It further points to administrative decisions in Virginia, California and Pennsylvania that supported, in whole or in part, motions similar to the instant matter.

Petitioners responded to Qwest's motion on September 7, 2005. They contend that Qwest's data requests seek information that is not relevant or reasonably calculated to lead to the discovery of admissible evidence because it pertains to services over which the Board has no jurisdiction, namely, interstate special access services regulated by the FCC. Petitioners point to administrative decisions in Minnesota and Arizona in support of their jurisdictional argument. Petitioners note that the physical location of the facilities used to provide such service and the end user customers has no bearing on the Board's jurisdiction over such services. Petitioners contend that the Board has never attempted to seek information in any proceeding concerning services over which it has no jurisdiction, and that the out-of-state decisions cited by Qwest are inapt or illustrative of the fact that its requests are unduly burdensome.

Petitioners emphasize this last point by arguing at length that compliance with Qwest's interrogatories would require a massively time-consuming document and e-mail search

covering over twenty years of company operations. Petitioners note that the interrogatories are not limited to specific types of documents, but are phrased as broadly as possible to encompass any written communication. Petitioners opine that such a search would take several weeks at a minimum. Petitioners also claim that Qwest's attempt to compel MCI to produce documents pertaining to Verizon's establishment of plan terms is unreasonable on its face. Petitioners further speculate that many of the individuals having knowledge of such documents may no longer work for MCI. Petitioners also contend that any request for descriptions of oral communications over a 20+ year period, on any topic, is overly broad on its face and impossible to comply with from a practical point of view. Petitioners further state that MCI has partially responded to Request No. 6.

DISCUSSION

After a careful review of the facts and relevant law in this matter, I am convinced that the information sought by Qwest is relevant to the subject matter of this proceeding and is discoverable under controlling legal standards. However, I also find that in their current form, Qwest's discovery requests are overly broad and unduly burdensome. They are therefore modified as set forth more fully below.

The purpose of discovery in an administrative proceeding is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal, by giving litigants access to information and facts which tend to support or undermine their position or that of their adversary. N.J.A.C. 1:1-10.1(a). Information is generally discoverable if it is reasonably calculated to lead to the discovery of admissible evidence. N.J.A.C. 1:1-10.1(b). However, the right to such access is not absolute. In considering a motion to compel the production of discovery, the judge shall weigh the specific need for the information, the extent to which the information is within control of the party and matters of expense, privilege, trade secret and oppressiveness. Except where so proceeding would be unduly prejudicial to the seeking party, discovery shall be ordered on terms least burdensome to the party from whom discovery is sought. N.J.A.C. 1:1-10.1(c).

N.J.S.A. 48:2-51.1 provides, in pertinent part: "In considering a request for approval of acquisition of control, the board shall evaluate the impact of the acquisition on competition, on the rates of the ratepayers affected by the acquisition of control, on the employees of the affected public utility of utilities, and on the provision of safe and adequate utility service at just and reasonable rates."

Pursuant to its statutory duty under N.J.S.A. 48:2-51.1, this Board must examine and evaluate any aspect of a proposed merger that could impact the rates paid by New Jersey ratepayers. This duty is a key component of the Board's review, as it addresses the merger consequence most likely to directly affect ratepayers' economic well-being, a rate increase. It appears clear from the record that the rates paid by companies like Qwest for the wholesale special access services at issue herein can directly affect the retail rates paid by Qwest's New Jersey customers who are served using these facilities. It follows that the proposed merger's effect on these special access rates,

through the elimination of a competing provider or otherwise, is an appropriate area of inquiry in this matter and well within the Board's purview.

Both sides assert that the Board lacks the authority to actually set special access rates, which are tariffed with the FCC and regulated by that body. However, wholesale rate setting and tariffing authority are not at issue in this motion. The fact that special access rates are regulated by the federal government does not preclude this Board from examining the effect of petitioners' proposed merger on such rates, when they will potentially influence the retail rates paid by New Jersey ratepayers. The Board's mandate to evaluate the effects of a merger simply does not impinge on the FCC's rate setting jurisdiction. Moreover, while the FCC may itself be considering the merger's impact on wholesale services on the national level, that does not abrogate this Board's duty to examine the impact of the merger on New Jersey retail ratepayers, which is indisputably a state issue. It follows that the discovery demands made by Qwest are reasonably calculated to lead to the discovery of admissible evidence.

However, I also find that Qwest's data requests as they currently stand are extraordinarily broad and burdensome. As petitioners point out, the requests are not restricted to any particular time frame, and potentially cover over twenty years of special access service plans and tariffs. Moreover, even as recently narrowed by Qwest, the requests call for the production of a very wide array of paper and electronic documents from multiple sources, including *any* document pertaining to Verizon's decisions to establish or modify a plan. It is reasonable to conclude that, even for a company the size of Verizon, an inordinate amount of time would be required to parse through the universe of documents and communications which are potentially responsive to Qwest's request in order to determine which must be produced.

Qwest's purported reason for seeking information regarding special access plans is to learn whether and to what extent MCI's presence as an independent provider and consumer of such services has influenced Verizon's pricing of its special access services. This is because Qwest is a consumer of such services, and is concerned about the availability of such services at competitive prices. However, it is not necessary to examine the entire twenty-year history of MCI's interaction with Verizon in this area, or to analyze every document concerning the establishment or modification of a plan, to pursue this legitimate line of inquiry. Nor is it necessary to obtain the documents and communications of every MCI and Verizon employee even tangentially involved with special access negotiating and planning. A time frame of reasonable length should provide the insight into Verizon's decision making sought by Qwest. Similarly, documents generated or received by the higher-level individuals actually tasked with setting rates that pertain to the relevant topic should provide sufficient facts to assist Qwest in this line of inquiry.

Accordingly, I find it reasonable, given the extremely large amount of work necessary to comply with Qwest's requests, and the short time before the beginning of hearings in this matter, to generally limit said requests to the most recent three-year period and to Verizon documents generated by directors or upper-level executives with special access rate-setting authority with respect to MCI. Moreover, document production need

not encompass all communications regarding special access rates, but should be limited to documents reflecting the extent to which MCI, and only MCI, influenced the establishment or modification of the plan in question. I also note that Qwest has voluntarily limited its line of questioning to the DS-1 Term Pricing Plan, DS-3 Term Pricing Plan and Facilities Management Services Plan. Tailoring the requests in this way, as set forth in more detail below, strikes an appropriate balance between Qwest's legitimate discovery needs and petitioners' legitimate desire to avoid unnecessary and onerous compliance obligations.

Therefore, except for Request No. 30 (discussed below), Verizon should respond to the Qwest interrogatories as set forth and modified in Attachment C of Qwest's Letter Brief dated 9/1/05 (numbers 10, 11 and 14 with subparts) but only subject to the following restrictions. No document need be produced if it was generated more than three years before the date of this Order. No document need be produced unless it was generated or received by a director-level employee with special access rate-setting authority. No document need be produced unless it directly reflects the extent to which MCI influenced the establishment or modification of the three plans at issue.

It should be further noted that Qwest's Request No. 30 to Verizon and Request No. 7 to MCI appear to be duplicative of prior data requests in terms of the information sought. They also appear to be related only to Qwest's apparent intention to conduct depositions of certain individuals. Such discovery devices are not generally employed in proceedings of this type, and no party has moved to be permitted to do so here. N.J.A.C. 1:1-10.2(c). Given the extremely broad and burdensome scope of data sought in these requests, I find it unreasonable to compel petitioners to answer them.

Furthermore, I find that other data requests served on MCI at issue herein are repetitive of the requests served on Verizon. The purported reason for Qwest seeking this information, as stated above, is to ascertain whether it will be placed at a competitive disadvantage in purchasing certain services after the merger which it purchases from Verizon now. Presumably, Verizon, rather than MCI, is best situated to provide relevant information in this regard, since it can best inform Qwest as to the factors that influence its own pricing. Because of this, and the heavy burden in time and resources involved in compliance, I do not believe that MCI should be compelled to answer all of Qwest's outstanding data requests.

Specifically, MCI appears to have already answered Request No. 2 in narrative form, and requiring MCI to provide further documentation in support thereof, including all documents relating to facility construction decisions, would be a Herculean task that would unnecessarily impose a significant burden on MCI. Similarly, Request No. 6, requiring MCI to account for and describe all oral communications between it and Verizon regarding certain special access plans, is facially unreasonable and, for practical purposes, impossible to comply with. Request No. 9 is a completely open ended and vague request that is largely duplicative of Request No. 5. I therefore decline to compel MCI to comply with these data requests.

Accordingly, MCI should respond to Qwest Request Nos. 5 and 8 as set forth and modified in Attachment D of Qwest's Letter Brief dated 9/1/05 but only subject to similar restrictions as those set forth above. No document need be produced if it was generated more than three years before the date of this Order. No document need be produced unless it was generated or received by a director-level employee with special access rate-setting or negotiating authority. Finally, no document need be produced unless it directly reflects the extent to which MCI influenced the establishment or modification of the three plans at issue. Moreover, to the extent MCI is in possession of unexpired contracts for special access services not already produced by Verizon, it should produce same.

Accordingly, I **HEREBY ORDER** that upon review of the aforementioned motion by Qwest Communications Corporation, said motion is **DENIED** in part and **GRANTED** in part in accordance with the terms of this Order, and that compliance herewith shall be undertaken on or before 12:30 PM, Thursday, September 15, 2005.

This provisional ruling is subject to ratification or other alteration by the Board as it deems appropriate during the proceedings in this matter.

DATED:

BY:

FREDERICK F. BUTLER
COMMISSIONER

SERVICE LIST

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