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Petition of Sprint Spectrum L.P. d/b/a Sprint PCS, Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration to Establish an Intercarrier Agreement with Verizon New York, Inc.
Case 01-C-0767
New York Public Service Commission
November 20, 2002

Issued and Effective December 3, 2002

ORDER ON PETITION FOR REHEARING

Before Helmer, Chairman, Dunleavy, Bennett, Weiss and Galvin, Commissioners.

BY THE COMMISSION:

INTRODUCTION AND OVERVIEW

By **Arbitration Order** issued **August 23, 2002,** we resolved various issues related to the contemplated interconnection agreement between Sprint Spectrum L.P. d/b/a Sprint PCS and Verizon New York Inc. On September 23, 2002, Sprint submitted a petition for rehearing or clarification of that order. Verizon has responded in opposition to the petition. For the reasons described below, the petition is denied.

As fully recounted in the **Arbitration Order**, the issues presented for arbitration were narrowed over the course of the proceeding. Of the four issues remaining for decision at case-end, the one that received the greatest attention from the parties and in our order, and the only one raised on rehearing, involves the rate to be paid by Verizon to Sprint for terminating traffic originating on Sprint's network ("reciprocal compensation").

Applicable federal law establishes a rebuttable presumption that such reciprocal compensation payments by one interconnected party to the other are to be symmetric, set on the basis of the incumbent local exchange carrier's (ILEC's) costs of terminating calls, but it allows competing local exchange carriers (CLECs) the option of seeking higher, asymmetric payments. To do so, a CLEC must submit a study persuasively showing that its own costs of termination, properly measured, exceed the ILEC's. [FN1] Sprint submitted a cost study that, it claimed, supported reciprocal compensation at a rate of 3.9 cents per minute, in contrast to the 0.107 cents per minutes implied by Verizon's recently approved unbundled network element (UNE) rates or the slightly lower "Plan B" rates that Verizon has offered to charge and pay to all carriers pursuant to an applicable FCC order (0.10 cents per minute, scheduled to decline to 0.07 cents per minute in June 2003). [FN2]

FN1. Further and more detailed background on the subject, including the manner in which reciprocal compensation is calculated, is set forth in the **Arbitration Order** and will not be reiterated here except as may be needed for discussion of the specific issues now raised.

FN2. See, for further explanation and citations, **Arbitration Order** p. 6.

We found, first, that Sprint bore the burden of proof in the proceeding, both because the FCC imposes it on carriers seeking asymmetric reciprocal compensation and because we impose it on the carrier whose costs are at issue and which therefore has the best access to pertinent information. We went on to find that Sprint had failed in several respects to sustain that burden of proof and that reciprocal compensation rates therefore should be set in accordance with the presumption of symmetry. Sprint's petition challenges several aspects of that determination; we discuss them in turn.

TECHNOLOGY ASSUMPTIONS

A cost study submitted in support of a claim for asymmetric reciprocal compensation must be based on Total Element Long-Run Incremental Cost (TELRIC). That method of analysis requires, among other things, assuming the use of the most efficient telecommunications technology currently available. We found that Sprint had failed to meet that standard because its study had not contemplated use of "third generation" (3G) wireless technology. Sprint requests rehearing, renewing its argument that 3G technology need not have been considered in its study.

Sprint argues that the standard we applied was not whether the technology was "currently available," as the FCC requires, but the higher (and hence erroneous as a matter of law) standard of whether it was "reasonably foreseeable." It asserts that the only evidence before us showed that Sprint could not have purchased or deployed the elements needed to provide 3G technology at the time its study was prepared.

Sprint charges as well, as an error of fact, that 3G technology could not even have been considered reasonably foreseeable. Alleging that the information submitted by Verizon comprised only press releases and hearsay and at most suggested only that a new technology was being developed, Sprint asserts that at the time its study was filed, the technology was still being tested to determine its commercial feasibility and that its potential failure, as well as its potential success, could have been considered "reasonably foreseeable." New technology is constantly being developed, Sprint continues, and one cannot predict when a new technology will be introduced; a cost study, however, must be based what is currently available at a particular time.

In response, Verizon notes our emphasis in previous decisions that TELRIC studies should not be based on "fantasy networks" and argues that we used the term "reasonably foreseeable" not as a standard different from the FCC's but as a way of determining whether a technology may properly be considered "currently available." It cites as well to our reference to two earlier decisions (with which Verizon nevertheless disagrees in some respects) showing that technologies still at the stage of development and trial do not meet the "reasonably foreseeable" test.

Verizon argues as well that the distinction between "reasonably foreseeable" and "currently available" is in any event a red herring, inasmuch as 3G is actually in service, in Sprint's network and others, and that even in April 2001, when Sprint prepared its cost study, some wireless companies had already entered into contracts with vendors for 3G equipment. Citing public statements by Sprint regarding 3G deployment [FN3] as well as proprietary information on when Sprint ordered 3G-compatible equipment, Verizon sees no indication that Sprint regarded 3G deployment as contingent or uncertain. It therefore maintains that 3G technology was "currently available" when Sprint prepared, filed, and attested to its cost study.

FN3. As a procedural matter, Verizon notes that Sprint's own public statements cannot be regarded as hearsay and are properly subject to our administrative notice.

Our decision in the **Arbitration Order** was consistent with our earlier decisions, there cited, construing the FCC's "currently available" standard for TELRIC purposes. Those decisions went against Verizon; and while Verizon may continue to object, on factual grounds, to how we there applied the standard, it fairly and accurately elucidates, as a matter of law, what the standard is. Our application of the same standard to the record here clearly suggested that a TELRIC-compliant study prepared at the time Sprint conducted its study should have included 3G technology, and Sprint has shown no error of fact or law in that result nor any new information warranting a change. Its petition on this point is denied.

QUANTITY OF EQUIPMENT

A TELRIC study must reasonably demonstrate the amount of equipment needed to serve the relevant

demand, recognizing that the equipment will not be 100% utilized. [FN4] We found Sprint's study flawed in that regard, for it had failed to size forward-looking investment with reference to expected peak-load demand--a step taken by Verizon in estimating switching costs in the UNE Proceeding and contemplated as well by our cost manuals adopted in Case 28425. In addition, the study lacked persuasive assurance that current customers would not bear an undue share of the costs of future growth; it included, for example, only a limited analysis of fill factors. We recognized that these failings might not be fatal to the study, which might be subject to adjustments that would produce a reasonable result, but observed that they nevertheless seriously weakened the effort overall.

FN4. The extent to which a particular category of equipment is used is referred to as the "fill factor."

Sprint asserts that our findings here run contrary to the record. With respect to sizing for peak-load demand, it cites evidence that it "engineers its network to meet expected busy hour demand"; sees no distinction between "peak load" and "busy hour"; notes that it provided detailed evidence on its network and its demand; and observes that Verizon offered no engineering evidence to the contrary. As for allocating costs between present and future customers, Sprint cites assertedly uncontradicted evidence that the three-year horizon used in its study "represents the longest period of time over which reasonably accurate cost projections can be made." [FN5]

FN5. Sprint's Petition, p. 8.

Verizon responds that it is not enough for Sprint to say it engineers its network to meet expected busy hour demand; it is necessary as well to specify the time as of which that demand is estimated and the average utilization at that time that results from Sprint's engineering decisions. Noting the need for any network to include a reasonable degree of spare capacity and the extensive consideration given these matters in the UNE Proceeding, Verizon argues that Sprint simply avoids these issues. It adds that Sprint's study suggests a network designed to accommodate considerable future growth, creating a prima facie case that it was oversized, and that Sprint failed to bear its burden of proving that concern unfounded. Finally, Verizon argues that the issue is not the length of the study period but whether the assumed network includes costs that should be recovered in future, not present, rates. Again contrasting the UNE Proceeding, Verizon sees no persuasive treatment of that question.

Sprint's arguments in its petition show no error in our decision, and the concerns we raised there are unallayed. The record provides no assurance that the network assumed in Sprint's study is properly sized and that costs properly recovered in future rates are not in fact being recovered in present rates. As we noted in the **Arbitration Order**, these failings, were there no others, might not be fatal and might be subject to remedy through reasonable adjustments; but nothing now presented makes them in any way less significant.

DIFFERENCES BETWEEN ORIGINATING AND TERMINATING MINUTES

Sprint's costing model determined the cost per minute of use (MOU) on the basis of the total minutes of use delivered to or originated by Sprint's customers, disregarding possible cost differences between originating and terminating minutes. We regarded that as a "serious flaw," inasmuch as "reciprocal compensation recognizes the specific costs associated with terminating costs," [FN6] and we considered unproven Sprint's conjecture that wireless networks in fact incur termination costs that exceed origination costs.

FN6. **Arbitration Order**, p. 19.

In its petition, Sprint maintains that it complied with FCC guidelines, which do not require distinguishing between originating and terminating minutes. It adds that the only evidence on the record was its own testimony that any such distinction would show higher costs associated with termination; that Verizon offered no evidence to the contrary; and that we failed to explain our grounds

for rejecting its testimony. It therefore maintains that it bore its burden of proof on this point and asks that we either allow rehearing on it or clarify our findings.

Verizon responds that reciprocal compensation is to be based on the "additional costs of terminating eligible calls." [FN7] Accordingly, the only costs to be taken into account are those of termination, which cannot be presumed equal to those of origination. It notes, as it did earlier, that the UNE Proceeding set separate switch usage rates for origination and termination; cites its own testimony in this proceeding that the costs of origination and termination differ for wireless as they do for wireline; and contends that Sprint failed to provide substantial contrary evidence.

FN7. Verizon's Reply, p. 12, citing 47 U.S.C. § 252(d)(2)(A)(ii) (emphasis supplied by Verizon).

The exercise here is to determine the additional cost of terminating calls, and there is ample basis for concluding that termination costs differ from origination costs. In landline service, origination costs are higher, and Sprint's effort to show the contrary with respect to wireless service was and remains conjectural. As the party with the burden of proof, it was obligated to provide a quantitative showing of the level of termination costs, and it could not discharge its burden with a study of average costs accompanied by qualitative speculation that, if costs differ, it is termination costs that are higher. Sprint's petition on this point shows no error in our earlier decision, and it is denied.

TRAFFIC-SENSITIVE AND NON-TRAFFIC-SENSITIVE COSTS

The FCC rules limit reciprocal compensation to the additional traffic-sensitive (TS) costs of transport and termination; non-traffic-sensitive (NTS) costs are to be excluded. Sprint's study excluded as non-traffic-sensitive only the cost of the hand set; it maintained that all other network components were properly considered traffic-sensitive.

The parties considered the issue at considerable length, and their arguments are fully described in the **Arbitration Order**. [FN8] Among other things, Verizon posited the existence of an NTS "baseline" network that had to be in place in order for a company to stand ready to serve. Sprint disputed Verizon's analysis, suggesting it implied that there would be no TS costs at all in a sparsely populated area.

FN8. **Arbitration Order**, pp. 30-37.

We concluded that while wireless termination costs overall might be more traffic-sensitive than landline termination costs, "it would be both surprising and unreasonable to conclude that all wireless [termination] costs (except those of the handset) are traffic-sensitive." [FN9] We rejected what we took to be Sprint's premise that no part of the wireless network (other than the handset) was dedicated to individual customers and that only such dedicated investment could be considered NTS; we noted, among other things, that in the UNE Proceeding, we explicitly allocated the cost of switching--a shared resource--between TS and NTS components. We observed as well that Sprint's analysis was as vulnerable as Verizon's to an attack based on the extreme case; Sprint's theory, taken to its limit, implied that zero usage meant zero cost, even if the network stood ready to serve. We held, finally, that:

FN9. Id., p. 38.

As the party with the burden of proof, Sprint was obligated to show the allocation of costs between traffic-sensitive and non-traffic-sensitive components. It took the view that all costs are traffic-sensitive. Verizon has gone forward with a presentation that calls that result into question, at least prima facie, and Sprint has failed to rebut it. Accordingly, Sprint has, again, not carried its burden of proving asymmetric reciprocal compensation to be warranted. [FN10]

FN10. Id., p. 39.

In its petition, Sprint, suggesting we regarded this as the primary issue, asserts it "submitted extensive

testimony describing the engineering function and operation of each element contained in the study, its relationship to individual end users and its role in the call path of a wireless call." [FN11] Verizon, it argues, did not dispute those descriptions and "failed to identify a single element of the network as non-traffic-sensitive." [FN12] Sprint goes on to assert that we, too, failed to identify the elements we considered to be NTS and to articulate the test we applied in determining that Sprint included NTS elements in its study. It insists it complied with the FCC's standard, which allows for recovery on the basis of a showing that the elements in the cost study "vary, to some degree, with the level of traffic that is carried on the wireless network." [FN13]

FN11. Sprint's Petition, p. 10.

FN12. Id.

FN13. In the Matter of Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking, CC Docket No. 01-92 (released April 27, 2001), ¶104.

Sprint denies that its analysis was limited to whether a particular element was a shared resource, arguing that the test it applied was "whether an additional unit of the element would be necessary to complete a call where the number of subscribers remains constant and the total minutes of use increase." [FN14] Verizon, meanwhile, failed to rebut Sprint's "substantial showing, supported by extensive engineering testimony"; it offered only the inference that because its own network included many NTS elements, Sprint's network must likewise do so. Sprint alleges error in our reliance on Verizon's conclusory statements and in our holding that the burden of proof had not shifted to Verizon. It asks for rehearing on the issue of which elements of a wireless network are TS and properly included; alternatively, it asks us to identify the elements of a wireless network we deem properly included or to specify the test for determining whether an element of a wireless network is traffic-sensitive.

FN14. Sprint's Petition, p. 11, citing the initial testimony of its witness Sabatino, p. 2.

In response, Verizon characterizes Sprint's position as being "that as long as a facility would have to be augmented to any extent in order to handle increased volumes of traffic, then the facility itself (i.e., its entire cost) must be deemed 'traffic-sensitive.'" [FN15] Verizon contends that position leads to absurd results (as Verizon showed earlier in the case); conflicts with the FCC statement cited by Sprint (which contemplates recovery of the costs of a facility only to the extent the facility is traffic-sensitive); and is belied by Verizon's testimony demonstrating qualitatively that any wireless network must include some non-traffic-sensitive costs.

FN15. Verizon's response, p. 13 (emphasis in original).

Because Sprint failed to analyze the extent to which its network is traffic sensitive, Verizon continues, it failed to bear its burden of proof. Verizon objects to what it sees as Sprint's effort now to shift the burden of proof to Verizon, by having it identify non-traffic-sensitive elements of the network; it insists it is Sprint's burden to identify the traffic-sensitive elements and the extent to which their costs are traffic-sensitive. Verizon had, at most, the burden of going forward with a prima facie case showing that some costs in Sprint's study were not recoverable, and, it continues, it met that burden with its qualitative analysis showing that a substantial portion of Sprint's costs were NTS. Verizon objects as well to Sprint's suggestion that we should identify the wireless elements we deem excludable as NTS, charging Sprint with attempting to pass the burden of proof to us, and it sees no need for us to clarify the test of traffic-sensitivity. It maintains the test is clear--"the costs of an element are traffic-sensitive to the extent that they vary with increased traffic loadings" [FN16]--and it is Sprint's task, which it failed to carry out, to show that extent.

FN16. Id., p. 17 (emphasis in original).

Sprint shows no error or other basis warranting modification of our determination. As the party with the burden of proof, it is required to show the extent to which components of its network are

traffic-sensitive. That requires a quantitative analysis of how the costs of the component should be allocated between TS and NTS portions. Instead of performing such an analysis, [FN17] Sprint insists that if a component varies at all with usage, it should be regarded as 100% traffic sensitive. But that premise, unsupported by the FCC statement cited by Sprint, is belied as well both by Verizon's qualitative arguments and by precedent and cannot be relied on to discharge Sprint's burden. Sprint's petition on this point is denied.

FN17. Department Staff members invited such an analysis in an inquiry e-mailed to the parties, but Sprint's response suggested it lacked the New York State-specific data needed to perform it. (E-mailed notes from Kathleen Burgess to J.K. Hage III and Joseph A. Post, April 16, 2002; reply from Mr. Hage, April 22, 2002.)

The Commission orders:

1. The petition for rehearing filed in this proceeding by Sprint Spectrum L.P. d/b/a Sprint PCS is denied.

2. This proceeding is continued.

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