ORDER NO. 89168

IN THE MATTER OF THE PETITION FOR EXPEDITED ARBITRATION OF INTERCONNECTION RATES, TERMS AND CONDITIONS WITH NEW FRONTIERS TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996.[1]	*	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND
IN THE MATTER OF THE PETITION FOR EXPEDITED ARBITRATION OF INTERCONNECTION RATES, TERMS AND CONDITIONS WITH XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT CO. OF MARYLAND PURSUANT TO SECTION 252(B) OF THE TELECOMMUNICATIONS ACT OF 1996.[2]	*	CASE NO. 9013 (Consolidated)
IN THE MATTER OF THE PETITION FOR ARBITRATION OF INTERCONNECTION RATES, TERMS AND CONDITIONS WITH CORE COMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252(B).[3]	*	

Issue Date: June 21, 2019

ORDER ON ARBITRATION APPEALS

On January 15, 2019, the Maryland Public Service Commission issued Order No. 88998 directing Verizon Maryland LLC ("Verizon") and Core Communications, Inc.

[1] Case No. 9011.
[2] Case No. 9012.
[3] Case No. 9013.

("Core") to refresh the record in this case and to streamline wherever possible the issues that must be addressed in order to resolve the parties' appeals and cross-appeals of the Proposed Order of Arbitration issued in this case by Public Utility Law Judge Robert McGowan ("the Arbitrator"). Specifically, the Commission directed the parties to file an updated joint stipulation and restatements of their respective positions, and address relevant changes of law, if any, respecting the issues remaining on appeal.[4]

I. BACKGROUND

On July 14, 2004, pursuant to Section 252 of the Telecommunications Act of 1996 ("the Act" or "the Telecommunications Act"),[5] Verizon filed a Petition for Arbitration of Interconnection Rates, Terms and Conditions with Core Communications, Inc. ("Verizon Petition for Arbitration"). In response, Core filed a Motion to Dismiss, Or In The Alternative Response to Verizon's Arbitration Petition.[6] The issues, which were numerous, included, among others, interconnection attachment compensation, network architecture, scheduling issues, inside wiring, dark fiber, unbundled signaling and databases, collocation, pricing, and terms of resale.[7] On these and other issues, Core and

[4] Order No. 88998 at 1. (Attachment A listed the issues that remained pending on appeal.)
[5] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified throughout Title 47 of the U.S. Code.
[6] ML# 93890.
[7] In this case, the arbitration petitions filed by New Frontiers Telecommunications, Inc. ("New Frontiers"), Verizon, Core collectively and Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Maryland, LLC ("Xspedius") were consolidated. The Commission consolidated the New Frontiers, Verizon, and Core arbitration petitions (along with an arbitration petition filed by XO Maryland LLC, (Case No. 9010 on September 3, 2004), noting that the petitions raise common issues and questions of law or fact, and that consolidation of the matters would result in just and efficient administration of the proceedings. (ML# 94289) On November 12, 2004, Verizon filed notice that it and XO Maryland LLC had entered into a new interconnection agreement via the Telecommunications Act of 1996 opt-in provision. Accordingly, Verizon formally notified the Commission of its withdrawal of its July 8, 2004 Petition for Arbitration with XO. (ML# 99980). In a joint letter filed by Verizon and New Frontiers on October 12, 2014, New Frontiers advised that Commission that it would not actively participate in this proceeding. The letter further noted that New Frontiers waived its right to dispute specific contract provisions as a result of its failure to negotiate or respond to the substance of Verizon's contract proposals during and after the statutory negotiations period. (ML# 94794).

Verizon, respectively, filed direct, reply, rebuttal, and surrebuttal testimony, and initial and reply briefs.

On February 24, 2006, the Arbitrator, Public Utility Law Judge Robert McGowan,[8] issued a Proposed Order of Arbitration in this matter arbitrating the parties' duties and responsibilities pursuant to the terms and conditions of their interconnection agreement, and directed the parties to file a new interconnection agreement incorporating the provisions adjudicated in the Proposed Order within 90 days.

A. Proposed Order of Arbitration and the Parties' Appeals

In describing the scope of this matter, the Arbitrator noted that the case involves disputes about the specific terms and conditions of the Interconnection Agreement ("ICA") that will govern the commercial relationship between Verizon, Core, and Xspedius. The Proposed Order addressed General Terms and Conditions, Glossary Issues, Interconnection Attachment–Intercarrier Compensation, Interconnection Attachment–Network Architecture, Scheduling Issues, Inside Wire, Dark Fiber Issues, Unbundled Signaling and Databases, Collocation Attachment, Pricing Attachment, and Resale Attachment. Following the Proposed Order of Arbitration, Verizon, Core, and Xspedius appealed.

1. Verizon

On appeal, Verizon requested, among other things, that the Commission modify or clarify certain aspects of the Proposed Order in this case. Verizon also requested that the Commission confirm that Core's ICAs must include the amendments resulting from

[8] "Public Utility Law Judge" replaces Hearing Examiner, which was the term used throughout the parties' pleadings.

Case No. 9023.[9] Verizon has since stipulated that some issues but not all of these issues, as discussed below, are moot or have otherwise been withdrawn.

2. Core

Similarly, Core also raised *numerous* issues on appeal. Among other issues, Core argued that the Commission should simplify the ICA general terms and conditions by adopting Core and Xspedius' proposed single, bilateral provision, that would apply equally to all parties for "essentially" all items contained in the ICA, and also argued that the Commission should reverse the Proposed Order's support for Verizon's "network reliability management" provisions and incorporate the ultimate decision reached by the Commission in Case No. 9023. Core has since stipulated that some issues but not all of these issues, as discussed below—are moot or have otherwise been withdrawn.

3. Xspedius

Xspedius filed a Reply Memorandum on Appeal,[10] in response to Verizon, but did not file a memorandum on appeal directly addressing the Proposed Order. Xspedius noted that Xspedius and Verizon did not arbitrate a two-year contract term with respect to their interconnection agreement. Therefore, Xspedius urged the Commission to confirm that the Arbitrator's decision on this issue applies only to the Core-Verizon ICA.[11] Xspedius also argued that changes to a tariff should not be automatically included in the parties' ICA,

[9] *Re Verizon Maryland Inc*., 97 Md. P.S.C. 183 (2006) (Verizon's consolidated arbitration concerning implementation of the new unbundled rules adopted in the FCC's *Triennial Review Order*–Report and Order on Remand and Further Notice of Rulemaking, Review of Section 251 *Unbundling Obligations of Incumbent Local Exchange Carriers*, ("Triennial Review Order" or "TRO") and *Triennial Review Remand Order*–Order on Remand, *Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* ("Triennial Review Remand Order" or "TRRO") (citations omitted).
[10] ML# 101331. Xspedius filed a Reply Memorandum on Appeal, in response to Verizon, but did not file a memorandum on appeal directly addressing the Proposed Order.
[11] ML# 101331 at 5.

and that Verizon must provide Xspedius with direct notice of any proposed changes. Xspedius urges the Commission to reject Verizon's opposition to the Arbitrator's decision requiring Verizon to provide Xspedius with direct notice of potential tariff changes.[12]

B. Core-Verizon Stipulation and Restatements of Positions

Since their appeals were filed, the Commission has twice requested that the parties refresh the record in this case: first pursuant to Order No. 86758 issued on December 12, 2014; and again pursuant to Order No. 88998 issued on January 15, 2019.[13] Following Verizon and Core's initial submission of restatements of positions on February 10, 2015, in Order No. 88998, the Commission noted that a number of the remaining issues, including Discontinuance of Service, Change of Law Provisions for Intercarrier Compensation, Rates for Interconnection Transport, and Automatic Incorporation of Commission-Approved Generic Rates, remained and potentially raised change of law concerns that may not have been previously addressed by the parties. Given the passage of time and many changes in the telecommunications industry while this matter remained pending, including since the initial restatement of positions by the parties in February 2015, in January 2019, the Commission directed the parties to again update the record to address any changes in the law that may be applicable to the issues remaining in this case.[14]

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[12] ML# 101331 at 6.

[13] Xspedius has not updated its positions on appeal, and did not participate in Core and Verizon's December 2014 and January 2019 stipulations.

[14] Additionally, noting that in the absence of adopting another interconnection agreement, which—as Verizon suggested—would better reflect the technological and legal developments that have occurred over the past decade, the parties were urged to streamline wherever possible the issues that must be addressed in order to resolve this appeal. (Core adopted the February 2000 interconnection agreement between Verizon MD and MCImetro Access Transmission Services LLC pursuant to 47 U.S.C. § 252(i) in January 2001. And, this case began when Verizon notified Core in January 2004 that it was terminating the parties existing

1. Core-Verizon Joint Stipulation

On March 18, 2019, Core and Verizon filed their Joint Stipulation on Pending Appellate Issues ("2019 Joint Stipulation").[15] Separately, Verizon filed its Restatement and Update on Pending Appellate Issues,[16] and Core filed its Restatement of Positions.[17] In their Joint Stipulation, Verizon and Core stipulated that the conforming ICA in this case shall not contain any provision that requires Verizon to provide unbundled network elements ("UNEs") to Core. Core and Verizon agreed that "[i]f Core desires to obtain UNEs in the future the ICA would have to be amended."[18]

Additionally, Core and Verizon stipulated that the following issues either were not appealed, were withdrawn as moot, or are no longer before the Commission: Default (Core 6), Good Faith Performance (Core 11), Intellectual Property (Core 13), Reservation of Rights (Core 18), Change of Law Provision for Intercarrier Compensation (Core 23, Core Appeal 2), Term (Core 25), Definition of "Applicable Law" (Core 26), Core's Imposition of Collocation Charges on Verizon (Core 94; Core Appeal 12), The Dark Fiber Ordering Process (Verizon II.A-D), Timing to Provide Meet-Point Usage Data (Verizon Appeal VII); and Intercarrier Compensation for VNXX Traffic (Core 36; Verizon Appeal IX). Also, Matrix Issues numbers 2 [relating to the applicability of the Bankruptcy Code (so far as it extends to Core's proposal only)], 4, and 10 in Core's Memorandum on Appeal dated April 6, 2006, were identified as moot in Core and

interconnection agreement in July 2004, and suggested that Core negotiate a new agreement. Verizon Petition for Arbitration, ML# 93478).

[15] ML# 224339.
[16] ML# 224337.
[17] ML# 224340.
[18] ML# 224339 at 1-2.

Verizon's 2015 stipulation and restatement of issues and do not require Commission resolution.[19]

Although Core and Verizon streamlined a number of issues, neither Core nor Verizon waived or withdrew certain other issues—with regard to which the parties' positions are firmly fixed—that remain pending on appeal.[20] The parties' restatement of their positions is as follows.

2. Restatement of Positions

In its Restatement and Update on Pending Appellate Issues,[21] Verizon notes that in the absence of a Commission decision resolving the parties' cross-appeals, a final "conforming" ICA has not—to date—been negotiated. Therefore, the parties continue to operate under the existing ICA. Verizon states that it remains willing to dismiss its petition for arbitration without prejudice as long as the Proposed Order is not considered binding on any party and any future negotiation or adoption would start anew without regard to the Proposed Order's findings and conclusions.[22]

Core submits that many of the parties' issues are "double-listed,[23] and many of these issues rise and fall on the "*CoServ*"–jurisdictional question.[24] Core indicates that the issues governed by *CoServ* include bankruptcy, assurance of payments, audits, discontinuance of service by Core, force majeure, Core's responsibility for fraud associated with its customers, insurance, limitations on liability, taxes, and technology. With regard

[19] Core-Verizon 2019 Joint Stipulation at 1.
[20] The outstanding issues, pursuant to Core and Verizon's Joint Stipulation, are listed in Attachment A.
[21] ML# 224337.
[22] ML# 224337 at 3.
[23] ML# 224340.
[24] *CoServ* refers to *CoServ, LLC v. Southwestern Bell Tel. Co.* 350 F.3d 482 (2003).

to these, Core asserts that *CoServ* limits state commission arbitrations to matters required by the Act or voluntarily included in negotiations by the parties.[25]

II. DISCUSSION

The issues remaining on appeal (including Xspedius' issues) are discussed below herein.[26]

1. Scope of Agreement—What is "Arbitratable" Under Section 251*:* Whether the Commission is only required to arbitrate issues for which "negotiation is mandated" expressly by Section 251 is *too* narrow (as Verizon asserts), or whether the Commission should affirm the Arbitrator's finding that the Commission cannot require the parties to negotiate issues either not required by the Act or not voluntarily negotiated by the parties; i.e., audits, discontinuance of service by Core, force majeure, Core's responsibility for fraud associated with its customers, insurance, and limitation on liability, taxes, and technology upgrades, as Core asserts.

In the Proposed Order, the Arbitrator noted Core's objection to the Commission's arbitration of a number of issues including audits, discontinuance of service by Core, force majeure, Core's responsibility for fraud associated with its customers, insurance, and limitation on liability, taxes, and technology upgrades, as well as ICA provisions relating to bankruptcy, termination of interconnection agreements, and assurance of payment (referred to as the "commercial framework" provisions).[27] The Arbitrator agreed with Core, concluding that "[the] Commission is not required to arbitrate issues the parties have not negotiated, including the commercial framework issues." If Core is correct, then the

[25] ML# 224340 at 3.
[26] The synopsis summarizes the appealing party's position, and any further restatement of the responding party amplifying its position. Issues that the parties have withdrawn as moot are not addressed.
[27] Proposed Order at 3.

Arbitrator's finding that the Commission cannot require the parties to negotiate issues either not required by the Act, or not voluntarily negotiated by the parties stands.

In support of its position, Core argued that under the Telecommunication Act of 1996 "general terms and conditions" are not among the issues that the Act specifically mandates the parties negotiate. Additionally, Core cited *CoServ, LLC v. Southwestern Bell Tel. Co.*,[28] asserting that "only issues voluntarily negotiated by the parties may be subject to mandatory arbitration."[29] Verizon disagreed, and insisted that failure to arbitrate these matters would subject Verizon to an "unworkable" relationship with Core.[30]

On appeal, Verizon insists that the Proposed Order's determination on this issue—that the Commission is only required to arbitrate issues for which "negotiation is mandated" expressly by Section 251—"is too narrow,"[31] adding that the commercial terms that it requests "are sufficiently related to Verizon's section 251 obligations to require them to be arbitrated."[32] Verizon also notes that although the Arbitrator concluded that the Commission is not required to arbitrate issues the parties have not negotiated, including commercial framework issues the Arbitrator observed that "many of the commercial terms at issue are already in Verizon's ICA with Core."[33] Verizon also cites *MCI Corp. v. BellSouth Tel., Inc.*("*MCI*"),[34] noting that in the *MCI* case, the Eleventh Circuit Court of Appeals concluded that "§ 252(b)(4)(C) requires state commissions to resolve each issue

[28] *CoServ*, 350 F.3d at 487.
[29] *See* Proposed Order at 4.
[30] *See* Proposed Order at 4.
[31] Verizon Restatement of Positions at 4.
[32] Verizon Restatement of Positions at 3.
[33] Verizon Restatement of Positions at 3.
[34] *MCI Corp. v. BellSouth Tel., Inc*., 298 F.3D 1269 (11th Cir. 2002).

set forth by the parties 'by imposing appropriate conditions as required to implement'" the arbitrated agreement.[35]

Verizon requests that the Commission reverse the Arbitrator's holding that the general terms and conditions at issue are not arbitrable, or in the alternative, requests that the new ICA include at least those terms that the Arbitrator did not arbitrate, but that are in the existing Verizon/Core ICA.[36]

Commission Decision

The Commission affirms the Arbitrator's determination that the Commission is not required to arbitrate issues that the parties have not negotiated, including standard commercial terms and commercial framework issues. In *CoServ*, the Fifth Circuit Court of Appeals held that "only issues voluntarily negotiated by the parties pursuant to § 252(a) are subject to the compulsory arbitration provision."[37] The Court added however that "[t]he jurisdiction of the [state commission] as arbitrator is not limited by the terms of § 251(b) and (c); instead, it is limited by the actions of the parties in conducting voluntary negotiations."[38] The Commission agrees with Verizon that commercial terms that are necessary to implement the ILEC's Section 251 obligations should be negotiated by the parties. However, if those that are not negotiated by the parties, they cannot be arbitrated by the Commission.

The Commission therefore finds Verizon's new standard terms and conditions, including the commercial framework issues, not voluntarily negotiated by the parties are

[35] *MCI*, 298 F.3d at 1274; Verizon Restatement of Positions at 5.
[36] *See* Verizon Memorandum on Appeal at 7.
[37] *CoServ*, 350 F.3 at 484.
[38] *Id.*

not subject to arbitration in this case. While the Commission will not arbitrate any *new* standard commercial terms proposed by Verizon, the Commission grants Verizon's request that the new ICA continue to include standard commercial terms that are contained in the existing Verizon/Core ICA. Also, as noted in the Proposed Order, Verizon and Core may continue operating under the same general commercial provisions they now employ in their existing ICA.

2. Term of the ICA: Whether the new ICA should include Verizon's section 2.3, which permits the ICA to remain in effect until the earlier of (a) the effective date of a successor ICA or (b) the date one year after the proposed termination of the ICA.

Verizon requests clarification of the Arbitrator's adoption of its standard two-year term for the length of the ICA, plus "a year of negotiation after the contract officially ends."[39] Verizon seeks clarification that the Proposed Order intended to incorporate Verizon's proposed Section 2.3, which permits the ICA to remain in effect until the earlier of (i) the effective date of a successor ICA, or (ii) the date one year after the proposed termination of the existing ICA.[40]

In response, Core argues that Verizon's provision on termination, if implemented, would end the effectiveness of the ICA one year following the date of termination and would create chaos.[41] Core adds that "[s]ince arbitration often takes longer than one year, Verizon's proposal would leave the parties … in an indefinite state of legal limbo."[42]

[39] Verizon Restatement of Positions at 4.
[40] Verizon Restatement of Positions at 4.
[41] Core Reply Memorandum on Appeal at 5.
[42] Core Reply Memorandum on Appeal at 5.

Commission Decision

On this issue, the Proposed Order states that "Verizon's language is … approved."[43] However, the Commission clarifies, as Verizon requests, that the parties' ICA should include Verizon's proposed Section 2.3 permitting the ICA to remain in effect until the earlier of (i) the effective date of a successor ICA, or (ii) the date one year after the proposed termination of the existing ICA. The intent of the provision is to incentivize the parties to negotiate rather than avoid negotiation in order to keep out-dated contract terms in place.

3. Special Notice of Tariff Changes: Whether Verizon must give special direct notice of tariff changes to Core outside the normal tariff process.

Verizon appealed the Arbitrator's determination that Verizon must give special direct notice of tariff changes to Core (and Xspedius) outside the normal tariff process, arguing that such special notice constitutes a burdensome and unnecessary requirement.[44] Verizon also argues that "existing tariff filing processes are sufficient" and "special notices would give Core an unfair preference that other CLECs do not receive."[45] In response, Core submits that special notice of tariff changes to CLEC does not provide them an unfair advantage. Rather, according to Core, by proposing that rate changes be implemented via the ICA's change of law provision, Core (and other CLECs) attempt to ensure that (1) the parties confer and seek agreement whenever a substantial Commission order (rate-related or otherwise) is issued, and (2) the parties actually implement exactly what the Commission orders.[46]

[43] Proposed Order at 17.
[44] Verizon Restatement of Positions at 5.
[45] Verizon Restatement of Positions at 5.
[46] Core Reply Memorandum on Appeal at 8.

Commission Decision

The Proposed Order in this case provides that (1) tariff changes shall be incorporated into the ICA only if there is language in the ICA permitting such incorporation, and (2) any party proposing to change substantive tariff language must provide direct notice to other parties affected by the change.[47] The Arbitrator stated further that "the party proposing a change has the burden of properly notifying other parties of impending significant changes to tariffs, third party guides, practices, handbooks, or any other document that may in turn materially affect that other party."[48]

The Commission affirms the Arbitrator's determination that special notice should be given whenever substantive tariff changes are proposed and finds that this requirement is neither burdensome nor unnecessary. If Verizon is concerned that implementing this requirement may give Core an unfair preference that other CLECs do not receive, it may give special notice of substantial tariff changes not only to Core, but to all CLECs.

4. Point of Interconnection under Federal Law: Whether the Arbitrator erred with regard to determinations relating to the Point of Interconnection ("POI").

On appeal, Verizon asserts that the Proposed Order made three errors regarding the POI: (1) by holding that Core could select a POI outside Verizon's network at the CLEC's switch, (2) by allowing that Core could require Verizon to use a different POI outside Verizon's network to hand off its traffic to Core, and (3) by permitting that Core could charge Verizon a "dedicated transport" charge to carry traffic from the POI to Core's switch.[49] In response, Core maintains that the Proposed Order "faithfully" implements

[47] Proposed Order at 8-9.
[48] Proposed Order at 22.
[49] Verizon Restatement of Positions at 5-6; Verizon Memorandum on Appeal at 16-21.

federal law and Commission precedent with respect to location of POI, the mutual transport duty, and pricing applicable to access toll connecting trunks.[50] Core further submits that despite Verizon's assertions, Core has never argued that Verizon must build additional facilities or extend its network to meet Core.[51] Core also argues that nothing in the FCC's rules require all mutual exchange, under the circumstances of this case, to occur at a Verizon switch site.[52]

Commission Decision

The Proposed Order soundly summarizes the Commission's finding in Case No. 8882 that define the act of interconnection as "the linking of two networks for the mutual exchange of traffic."[53] In that Order, the Commission added "but this does not mean that multiple points of interconnection for the 'mutual exchange of traffic' are prohibited."[54] The Commission noted further that the FCC's rules do not require a single point of interconnection for the mutual exchange of traffic, as Verizon asserts, rather they allow the requesting carrier to establish a single point of interconnection, at its option. As the Arbitrator noted, Core's proposal in this case is "closest" to the Commission's position in Case No. 8882. Since FCC rulings do not forbid Core's siting a POI on its own network, the Arbitrator's determination is affirmed.

The Proposed Order also allowed that Core (or another CLEC) could charge a

[50] Core Reply Memorandum at 6.
[51] Core Reply Memorandum at 6. Core notes that "all of Core's switches are (on) Verizon's network … connected with Verizon's switches over Verizon-owned and operated fiber facilities leased by Core." *Id*. at 6.
[52] Core Reply Memorandum at 7.
[53] *See In the Matter of the Petition of AT&T Communications of Maryland, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(B) Concerning Interconnection Rates, Terms and Conditions* (Case No. 8882) (Order No. 75250), 95 Md. P.S.C. 155, 161 (2004)
[54] *Id*. at 8.

dedicated transport rate—in addition to reciprocal compensation—for carrying Verizon originated traffic from the POI to the CLEC's switch. Again citing the Commission's decision in No. 8882, the Arbitrator noted that the Commission concluded that either "[a CLEC] or Verizon could charge a rate equal to the rate for unbundled dedicated transport anytime either party transported the other party's originating traffic between the POI and the terminating carrier's switch."[55] Having failed to distinguish its position here from any position previously taken in Case No. 8882, wherein the Commission permitted both the CLECs and Verizon to charge equal rates for unbundled dedicated transport, Verizon's appeal as to this issue is denied

5. Trunk Limit at Verizon's Tandem: Whether Core (and other CLECs) must obtain direct end-office trunks if CLEC traffic exceeds a certain threshold.

Verizon proposed language to Section 2.2.6 of the ICA that would limit CLECs to no more than 240 DSO interconnection trunks to any Verizon switch. The provision would further require that if CLECs exceed the 240 DSO trunk limit, Verizon would require them to construct direct end office trunks to absorb traffic until the tandem trunk utilization is below 24 DS1 trunks.[56]

On appeal, Verizon requests that the Commission clarify that Core (and other CLECs) must obtain direct end-office trunks if CLEC traffic exceeds a certain threshold.[57] Specifically, Verizon request that the Commission clarify that Core (Xspedius, and other

[55] Proposed Order at 33; *In the Matter of the Petition of AT&T Communications of Maryland, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(B) Concerning Interconnection Rates, Terms and Conditions* (Case No. 8882) (Order No. 75250), 95 Md. P.S.C. 155, 162 (2004)
[56] Proposed Order at 39.
[57] Verizon Restatement of Positions at 6. Verizon submits that the Proposed Order conflates Verizon's proposals, mischaracterizes the issue in dispute, and misstates undisputed language. (Verizon Memorandum on Appeal at 21.)

CLECs) must obtain direct end-office trunks if traffic exceeds a certain threshold and must establish a reasonable limit on the number of trunks per tandem.[58]

In response, Core argues that Verizon's proposed limits are based on a "false" factual premise that tandem trunks are in short supply due to CLECs trunking requests.[59] Instead, according to Core, "the volume of CLEC trunks is in steep decline due to bankruptcies and mergers."[60]

Commission Decision

The Commission clarifies, as Verizon requests that the parties' ICA should include the contract language specifying that the CLEC will obtain direct end office trunks when it reaches the 1-DS1-equivalent volume threshold at the tandem.[61] The Commission also accepts Verizon's proposal to increase the trunk limit to 672, as noted in its Memorandum on Appeal.[62] The CLEC's position that there should not be any tandem trunk limit is not justified, therefore Commission finds that Core's (and other CLECs') position on this issue to be unreasonable. The Proposed Order is therefore modified by setting a 672-tandem trunk limit for end office trunks.

6. Rates for Access Toll Connecting Trunks and Transport: Whether access toll connecting trunks, other entrance facilities, and transport must be provided by Verizon for interconnection at TELRIC rates.

In this case, the Arbitrator applied the Commission's ruling in Case No. 8882, that

[58] Verizon Restatement of Positions at 6.
[59] Core Reply Memorandum at 7.
[60] Core Reply Memorandum at 7. Xspedius adds that establishing a limit on the number of trunks to a particular tandem could leave Xspedius (and other CLECs) without the ability to send traffic to certain central offices, or "could create inherent conflicting requirements within the interconnection agreement." Xspedius Reply Memorandum on Appeal at 7.
[61] In its Memorandum on Appeal, Verizon refers to this as "agreed-upon" contract language. (*See* Verizon Memorandum on Appeal at 22.)
[62] Verizon Memorandum on Appeal at 23.

interconnection should be priced at total element long run incremental costs ("TELRIC") rates—a holding which Core relies on to support its position in favor of TELRIC rates for tandem access.[63] The Arbitrator noted at that time that Verizon had not appealed the Commission's decision in Case No. 8882, and there was nothing in Verizon's argument that would negate the Commission's finding in that case.

In its Memorandum on Appeal, Verizon submits that the Proposed Order incorrectly requires Verizon to provide access toll connecting trunks to Core at TELRIC rates.[64] Verizon maintains that it has no obligation to provide access toll connecting trunks as "interconnection" under 47 USC § 251(c)(2), and thus TELRIC pricing cannot apply.[65] Despite the fact the Verizon did not appeal the Commission's decision in Case No. 8882, Verizon asserts that the Arbitrator's reliance on that decision was in error. Core did not specifically respond to Verizon's challenge to TELRIC pricing for access exclusively with respect to toll connecting trunks, except to urge that the Commission deny Verizon's request to overturn, modify, or otherwise clarify the Proposed Order's conclusions.[66]

In Verizon's 2015 and 2019 Restatement of Positions, Verizon also asserts that more recently the United States Supreme Court has addressed this matter in the Court's *Talk America*[67] decision. Verizon submits that in *Talk America*, the Court determined that "other entrance facilities" that are not used for interconnection (such as backhaul facilities)

[63] Proposed Order at 54-55.
[64] Verizon Memorandum on Appeal at 23-25.
[65] Verizon Memorandum on Appeal at 24.
[66] Core Reply Memorandum at 8. In addressing the use of dedicated transport facilities, however, Core requested that the Commission clarify that TELRIC rates are appropriate for dedicated interconnection facilities, including but not limited to "access toll connecting trunks." *Id*. at 22.
[67] *Talk America, Inc. v. Michigan Bell Telephone Co. dba AT&T Michigan*, 564 U.S. 50 (2011).

are not subject to Section 251(c)(2) and are not available for TELRIC rates.[68] According to Verizon, "Access toll connecting trunks are *not* interconnection facilities subject to § 251(c)(2) under the *Talk America* decision, because they carry only interexchange (long distance) traffic, not local traffic between the ILEC (like Verizon) and the CLEC (like Core)."[69] Adding from the FCC's amicus brief—relied upon by the Court in *Talk America*—Verizon notes that: " … only facilities that are used to link the incumbent provider's telephone network with the competitor's network for the mutual exchange of traffic are interconnection facilities under 47 USC § 251(c)(2), because they 'enable[] customers of a competitive LEC to call the incumbent's customers, and vice versa …'"[70]

In the Proposed Order, the Arbitrator agreed with Verizon that entrance facilities are not subject to a mandatory rebundling requirement.[71] The Arbitrator found that "Verizon's interpretation of Section 251(c)(2) is convincing as long as it results in CLECs receiving interconnection equal to that Verizon offers itself and its affiliates, as required by Section 251(c)."[72] Accordingly, the Arbitrator directed that the language of the ICA shall be written to state that "entrance facilities shall not be unbundled; interconnection with CLECs shall be of a quality consistent with Verizon's interconnection with itself and affiliates."[73]

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[68] Verizon Restatement of Positions at 7. Verizon insists that under the Court's decision in *Talk America*, "only facilities that are used to link the incumbent provider's telephone network with the competitor's network for the mutual exchange of tariffs are interconnection facilities under 47 USC § 251(c)(2)." *Id.* at 7-8.
[69] Verizon 2015 Restatement of Positions at 7. (emphasis original)
[70] Verizon 2015 Restatement of Positions at 7, citing *FCC Amicus* at 2-3.
[71] Proposed Order at 43.
[72] Proposed Order at 44.
[73] Proposed Order at 44.

On appeal, Core supports the Proposed Order in part. Core submits that the Proposed Order correctly states that there "is no indication that the FCC has eliminated Verizon's obligation to use dedicated facilities for" interconnection. However, Core asserts that the Proposed Order does not indicate the pricing standard to be utilized. Core requests that the Commission clarify that TELRIC rates are appropriate for dedicated interconnection facilities, including but not limited to "access toll connecting trunks."

In Core's 2015 Restatement of Positions, Core also notes that there have been at least two significant judicial decisions relative to this issue since the Proposed Order was rendered: *Talk America* and *CoreTel Virginia.*[74]

Core submits that in *Talk America*, the Supreme Court ruled that incumbent LECs "must lease [their] existing entrance facilities for interconnection at cost-based rates."[75] Core asserts that in *CoreTel Virginia*, the Fourth Circuit expanded upon the Supreme Court's ruling in *Talk America* noting that "*Talk America* affirms that TELRIC pricing applies to interconnection facilities, including entrance facilities, which ILECs are required to provide pursuant to section 251(c)(2) of the Act."[76]

Verizon counters, however, that access toll connecting trunks were not addressed in the Fourth Circuit's *CoreTel Virginia* holdings, and therefore are of no avail to Core in this case.[77] Verizon notes that the Pennsylvania Public Utility Commission also recently considered the *Talk America* decision's impact on the pricing of access toll connecting trunks and determined that those facilities are not used for the "mutual exchange of traffic"

[74] *CoreTel Virginia v. Verizon Virginia, LLC*, 752 F.3d 364 (2014) (*CoreTel*).
[75] Core 2015 Restatement of Positions at 15.
[76] Core 2015 Restatement of Positions at 15. (citation omitted)
[77] Verizon's 2015 Restatement of Positions at 7.

under § 251(c)(2) of the Act, and therefore are not required to be provided by the ILEC at TELRIC rates.[78]

Commission Decision

In Case No. 8882, the Commission held that interconnection should be priced at TELRIC" rates.[79] Verizon argues, however, that that decision—as well as the Proposed Order predates the Supreme Court's decision in *Talk America*, a decision in which Verizon asserts the Court made clear that "other entrance facilities that are not used for interconnection … are not subject to Section 251(c)(2) and are not available at TELRIC rates."[80] Verizon argues that—based on the *Talk America* decision—the Commission should reverse its decision in Case No. 8882 (Order No. 79250) and also reverse the Arbitrator's holding in this case that access toll connecting trunks must be provided at TELRIC rates.

The Commission finds the Supreme Court's decision in *Talk America* dispositive with regard to this issue.

In *Talk America*, the Court notes that "[i]t is undisputed that both un-bundled network elements and interconnection must be provided at cost-based rates,"[81] rather than at—higher—switched access rates. Section 251(c)(2) of the Act establishes "interconnection" as "[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's

[78] Core 2019 Restatement of Positions at 8, citing Core Communications, Inc. v. Verizon Pennsylvania Inc. Dkt. No. C-2011-2225370 (Pa. PUC Opinion and Order entered April 20, 2017) at 31.
[79] In that case, the Commission concluded that "[i]f the terminating carrier provides interconnection service to the other carrier (i.e., service before its switch, dedicated transport, in effect) it is entitled to compensation (in addition to reciprocal compensation) at total element long run incremental costs ("TELRIC") rates, pursuant to ¶ 1062 of the *Local Competition Order*."
[80] Verizon Restatement of Positions at 7.
[81] Talk America at 54.

network," including (A) "for the transmission and routing of telephone exchange service and exchange access[]." As the Court explains, this provision mandates that incumbent LECs provide interconnection between their networks and competitive LEC's facilities, noting that "[t]his ensures that customers on a competitor's network can call customers on the incumbent's network, and vice versa."[82]

Although Core is correct in noting that incumbent LECs "must lease [their] existing entrance facilities for interconnection at cost-based rates," Verizon is correct that under the Supreme Court's ruling in *Talk America*, access toll connecting trunks are *not* interconnection facilities subject to § 251(c)(2) because they carry only interexchange (long distance) traffic, not local traffic between the ILEC and the CLEC.

Based on the Supreme Court's decision in *Talk America*, the Commission concludes that a facility is **not** an interconnection facility subject to TELRIC pricing if it is used solely for the purpose of originating or terminating interexchange traffic, and not for the mutual exchange of traffic between the CLEC and the ILEC. Verizon's appeal on this issue is granted. Therefore, the Arbitrator's holding on this issue is reversed.

7. Automatic Incorporation of Commission-approved Rates: Whether Commission-approved rate changes should be effective immediately, or subject to a change-of-law process under the ICA.

The Arbitrator concluded in this case that Core's proposal—that the rates applicable to services be set forth in the pricing schedule (Appendix A to the Pricing Attachment)—was reasonable.[83] The Arbitrator noted that under Core's proposal, change of law provisions in the ICA or the filing of new tariffs in response to Commission or FCC rulings

[82]Talk America at 54.
[83] Proposed Order at 88.

will update prices in an orderly fashion, as necessary, and that Core's proposal also avoids any dispute that could arise over the validity of, or when and how to use or stop using, Verizon's hierarchy of authorities.[84]

On appeal, Verizon argues that the Core-proposal—as adopted by the Proposed Order—makes Appendix A to the Pricing Attachment, rather than Commission-approved rates, the sole source of rates in the ICA, and asserts that that might be construed to require a change of law process under the ICA before rates approved by the FCC may supersede Appendix A rates.[85] In its Restatement of Positions, Verizon insists that Core's approach would require a cumbersome change of law process before the new rates could take effect.[86]

Core disputes what it argues is Verizon's assertion that Core seeks to secure an unfair advantage over CLECs in the event the Commission finds Verizon is entitled to higher rates than those currently charged under the agreement.[87] Rather, Core asserts that by proposing that rate changes be implemented via the ICA's change of law provision, Core "simply" attempts to ensure that the parties (a) confer and seek agreement whenever a substantial Commission order (rate-related or otherwise) is issued, and (b) the parties actually implement "exactly" what the Commission orders, rather than presuming that all Commission-ordered rate changes are effective immediately and automatically.[88]

Xspedius offered another proposal—one that would only permit Commission-approved rate changes to become effective prospectively, except allowing a six-month true

[84] Proposed Order at 88-89.
[85] Verizon Memorandum on Appeal at 28.
[86] Verizon Restatement of Positions at 9.
[87] Core Reply Memorandum at 8.
[88] Core Reply Memorandum at 8.

up period where no rates currently exist.[89]

Commission Decision

The Commission is satisfied that Core's proposal that change-of-law provisions in the parties' ICA or the filing of new tariffs in response to Commission or FCC rulings provides a reasonable (uncomplicated) way of updating prices. Verizon's proposal that would automatically incorporate new rates set by the Commission or the FCC deprives the parties of hard fought negotiations and thwarts the parties' incentive to negotiate directly rather than litigating for rate changes.

8. Discontinuance of Service by Verizon: Whether Verizon should be allowed to retain ICA provisions GTC §§ 4.7 and 50.1 that allows Verizon to withdraw, after 30 days' notice, a service it is no longer legally required to provide.

Verizon sought to retain General Terms and Conditions (GTC) sections 4.7 and 50.1 in the ICA, provisions that apply when Verizon is no longer required to provide a specific service or benefit, and allows Verizon to withdraw, after 30 days' notice, a service it is no longer legally required to provide.[90] Core and Xspedius objected to these provisions arguing that these provisions would permit Verizon (1) to unilaterally assess the effect of any change of law provision, and (2) take immediate advantage of its own "subjective" interpretation of such changes.[91] Core and Xspedius preferred solely inclusion of Verizon's GTC § 4.6, which requires the parties to negotiate and amend the ICA if any regulatory or legal decision affects any material provision of their agreement.

[89] *See* Proposed Order at 88.
[90] Proposed Order at 9.
[91] *See* Core Memorandum on Appeal at 3.

In response, Verizon submits that these provisions are necessary in order to prevent CLEC gaming and address a range of what might require disconnection of service.[92] The Arbitrator left all three notice provisions in place, and concluded that "[i]t is out of the question to replace GTC §§ 4.7 and 50.1 with only § 4.6" as the CLECs suggests.[93]

Commission Decision

At the time the Arbitrator adopted Verizon's 30-day notice provision with regard to intercarrier compensation for ISP and other traffic—when such payments are not required by law—there was no objection to Verizon's proposal. The Commission finds Verizon's proposal to be reasonable, unless—as noted in the Proposed Order—the proposal is superseded by mutual agreement of the parties. As the Arbitrator noted, GTC § 4,6 alone does not contain a provision to begin a 30-day notice period, it only refers to the expiration of such a period. By retaining all three notice provisions, the ICA a 30-day notice provision is guaranteed whenever Verizon seeks (or attempts) disconnection of service. Along with—rather than in lieu of—§ 4.6, whenever notice of termination is given, the CLECs or Verizon may also engage in negotiations or petition the Commission for relief.

9. Assurance of Payment: Whether Verizon should only be entitled to assurance of payment when a CLEC fails to demonstrate creditworthiness, admits inability to pay, or files for bankruptcy (as the CLECs assert), or whether the assurance of payment requirement be triggered by failure of a CLEC to make two payments to Verizon within a twelve-month period.

The Arbitrator determined that with regard to assurance of payment terms, Verizon must be able to show that a CLEC has missed "two consecutive monthly payments, without satisfactory explanation, before its may require a CLEC to post assurance of payment for

[92] Verizon Reply Memorandum on Appeal at 2.
[93] Proposed Order at 9.

the amount at issue."[94] The Proposed Order added, that "[t]hree non-consecutive missed payments, without satisfactory explanation, will also trigger Verizon's right to assurance of payment."[95]

Core argues that GTC section 6 proposes giving Verizon "unilateral power" to demand payment assurance in a wide variety of circumstances.[96] Core also argued that the subject matter of payment assurance is "outside the scope of section 251(b) and (c) of the Act, and is therefore not properly within the scope of this arbitration."[97]

Commission Decision

The Commission has determined that standard commercial terms and commercial framework issues not negotiated by the parties are not arbitrable. However, standard commercial terms that were negotiated by the parties are arbitable. In this case, the Arbitrator arbitrated the parties' dispute with regard to the "assurance of payment" provision.

While the CLECs object to Verizon's proposal that the assurance of payment provisions be triggered by failure to make two payments to Verizon in one 12-month period, the Commission agrees that such missed payments are objective signs of a CLECs inability to pay for the service rendered it. The Commission finds the Arbitrator's determination that Verizon must be able to show that a CLEC has missed two consecutive monthly payments, without satisfactory explanation, before it may require a CLEC to post assurance of payment is inherently reasonable.

[94] Proposed Order at 12 (emphasis original).
[95] Proposed Order at 12.
[96] Core Initial Brief at 15.
[97] Core Initial Brief at 15;

Moreover, the Proposed Order adds that "[g]iven that Verizon has the same payment obligations as the CLECs, it should have the same responsibility to provide assurance of payment on the same terms applicable to CLECs."[98] The Commission finds this mutuality of payment assurance reasonable, and affirms the Arbitrator's determination on this issue.

10. Interference or Impairment of Network Facilities: Whether Verizon's proposed GTC §§ 26.1-26.3 – relating to "basic network management" – is neutral and necessary to safeguard network reliability (as Verizon asserts), or whether the final results from Case No. 9023 be incorporated into the ICA instead.

On appeal, Core argues that the Commission should reverse the Arbitrator's determination with regard to Verizon's "network reliability management."[99] According to Core, Verizon's proposed GTC section 26.3 gives each party the unilateral and almost unrestricted right to "interrupt or suspend any Service …" in the event the party "reasonably determines" that the other party's "services, network, facilities, or methods of operation … will or are likely to interfere …" with the first party's provision of service.[100] Core insists that Verizon's criteria are "overbroad and vaguely defined."[101] In response, Verizon maintains that its proposed GTC section 26.3 is "neutral" and "necessary" to safeguard network reliability.[102] Verizon further insists that, contrary to Core's assertion that it would be "foolhardy" to give a party the right to interrupt service to the other, it would be foolhardy ***not*** to permit Verizon to interrupt a CLEC's service when it is impairing Verizon's own network.[103]

[98] Proposed Order at 13.
[99] Core Memorandum on Appeal at 11.
[100] Core Memorandum on Appeal at 11.
[101] Core Memorandum on Appeal at 11.
[102] Verizon Reply Memorandum at 9.
[103] Verizon Reply Memorandum at 9 (emphasis original)

Commission Decision

Xspedius and the Arbitrator reference a suggestion that the parties agreed to incorporate the final results of Case No. 9023 into their ICA.[104] In reviewing Case No. 9023, there is no direct reference either to ICA Sections 26.1 – 26.3 or to "impairment of network facilities." As the Arbitrator notes, Section 26.3 allows the impaired party—either Verizon or the CLEC—to suspend service if impairment is likely to interrupt service or cause damage to the network. Although on its face the provision does not favor on party over the other, CLECs—have little incentive to and therefore—are less likely to initiate interruption of service than Verizon. The Commission finds Verizon's proposed Section 26.3 relating to interference or impairment of network facilities is not unreasonable.[105] Therefore, Core's appeal of this issue is denied. The Proposed Order is affirmed.

III. CONCLUSION

Upon consideration of the parties' appeals and cross-appeals in this matter, the Commission hereby affirms in part, reverses, modifies, and clarifies in part, the Proposed Order of Arbitration in this matter.

The Commission affirms the Arbitrator's determination that special notice should be given whenever substantive tariff changes are proposed. The Commission finds the

[104] See Proposed Order at 16; Xspedius Initial Brief at 7. Core urged deletion of ICA Section 26.1 through 26.3 until Case No. 9023 was resolved.

[105] Although the term is not unreasonable, it should not be used by Verizon to interrupt service to CLECs for billing disputes and non-payment, since such issues (relating to termination of service) are governed by other provisions of the ICA.

mutuality of payment assurance with regard to special notice provision reasonable, and affirms the Arbitrator's determination on this issue.

The Commission reverses the determination in the Proposed Order that access toll connecting trunks should be subject to TELRIC pricing, and concludes that a facility is not an interconnection facility subject to TELRIC pricing if it is used solely for the purpose of originating or terminating interexchange traffic, and not for the mutual exchange of traffic between the CLEC and the ILEC.

The Commission clarifies, as Verizon requests that the parties' ICA should include the contract language specifying that the CLEC will obtain direct end office trunks when it reaches the 1-DS1–equivalent volume threshold at the tandem. The Commission accepts Verizon's proposal to increase the trunk limit to 672, and modifies the Proposed Order by setting a 672-tandem trunk limit for end office trunks.

The Commission affirms in part that standard commercial terms not voluntarily negotiated by the parties are not arbitratable. However, the Commission grants Verizon's request to include standard commercial terms from the parties existing ICA in any new ICA adopted by the parties.

Finally, the Commission clarifies, as Verizon requests, that the parties' ICA should include Verizon's proposed Section 2.3—permitting the ICA to remain in effect until the earlier of (i) the effective date of a successor ICA, or (ii) the date one year after the proposed termination of the existing ICA.

IT IS, THEREFORE, this 21st day of June, in the year Two Thousand Nineteen by the Public Service Commission of Maryland,

ORDERED: (1) That the Proposed Order of Arbitration is hereby affirmed in part, reversed, modified, and clarified in part, as discussed herein;

(2) That the Arbitrator's findings and conclusions in the Proposed Order as to all issues not reversed, modified or clarified herein, are affirmed;

(3) (a) That within 60 days of this Order, the Verizon Maryland LLC and Core Communications, Inc. shall file an update Interconnection Agreement reflecting provisions consistent with the Proposed Order of Arbitration and this Order, as discussed herein; or alternatively,

(b) That the Parties negotiate superseding terms and conditions consistent with this Order for consideration by the Commission.

/s/ Jason M. Stanek

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell

/s/ Odogwu Obi Linton

/s/ Mindy L. Herman
Commissioners