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IN THE MATTER OF

VERIZON VIRGINIA, INC.

CASE NO. PUC-2002-00046

**To verify compliance with the
conditions set forth in 47 U.S.C. § 271(c)**

HEARING EXAMINER'S RULING

June 5, 2002

On May 6, 2002, Cavalier Telephone, L.L.C. (“Cavalier”) filed a Motion to Dismiss Proceeding Initiated Pursuant to 47 U.S.C. § 271 (“Motion”). Cavalier argued that if the Commission refuses to hear interconnection disputes against Verizon Virginia, Inc. (“Verizon Virginia”) pursuant to 47 U.S.C. § 252, then it should not entertain a matter commenced by Verizon Virginia under another section of the same act. Cavalier maintained that such unequal application of the Telecommunications Act of 1996 violates the Fourteenth Amendment’s equal protection clause. Moreover, though the Commission’s Scheduling Order in this proceeding¹ held that Verizon Virginia’s 271 application before the Commission was not a formal proceeding, Cavalier asserted that “the proceeding that the Commission has authorized bears all the indicia of a formal proceeding.”² Consequently, Cavalier requested that the Commission dismiss this proceeding with prejudice and grant Cavalier all other such relief to which Cavalier may be legally or equitably entitled.

On May 20, 2002, Verizon Virginia filed a response to Cavalier’s Motion. Verizon Virginia contended that the Commission’s decision to decline § 252 arbitrations, yet consult with the FCC regarding Verizon Virginia’s compliance with § 271 has neither a discriminatory effect, nor is it motivated by a discriminatory purpose. Thus, the Fourteenth Amendment’s equal protection clause is not implicated. By their nature, arbitrations under § 252 affect both the CLEC and the ILEC. Accordingly, Verizon Virginia alleged that “to the extent that there is uncertain[ty] caused by unsettled interconnection disputes, all parties, including Verizon [Virginia], are equally affected and therefore all parties are equally ‘harmed.’”³ Furthermore, Verizon Virginia argued that the Commission’s reason for declining arbitrations under § 252, *i.e.*, concern that it might thereby waive its Eleventh Amendment sovereign immunity, provides a rational basis for its actions. In addition, Verizon Virginia pointed out that the Commission will not provide final judgment on Verizon’s § 271 application, but rather will make a consultative recommendation to the FCC. Finally, Verizon Virginia claimed that Cavalier’s request that the Commission direct Verizon Virginia to seek relief before the FCC, illustrated Cavalier’s confusion because, Verizon Virginia will be seeking relief under § 271 from the FCC. The

¹ *In the Matter of Verizon Virginia Inc.’s Compliance with the conditions set forth in 47 U.S.C. § 271(c)*, Case No. PUC-2002-00046, Preliminary Order on Verizon Virginia Inc.’s Compliance With the Conditions Set Forth in 47 U.S.C. § 271(c), (March 20, 2002) (“*Preliminary Order*”).

² Cavalier’s Motion at 4.

³ Verizon’s Response at 8.

current proceeding before the Commission is intended to aid the Commission in consulting with the FCC.

On June 4, 2002, Cavalier filed its reply to Verizon Virginia. Cavalier asserted that Verizon Virginia's alleged rational basis for declining arbitrations under § 252 has been undercut by the Supreme Court's recent decision in *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*,⁴ which Cavalier reads to jeopardize sovereign immunity in actions taken pursuant to § 271 as well as actions taken pursuant to § 252. As to whether all parties, ILECs as well as CLECs, are harmed by unsettled interconnection disputes, Cavalier argued that any delay serves to punish competitors such as Cavalier and "rewards Verizon [Virginia] with the opportunity to maintain its stranglehold on the Virginia markets."⁵ Further, Cavalier contended that the Commission's actions to extend the benefits of § 271 were deliberate as were its actions to refuse to conduct § 252 arbitrations. Thus, Cavalier asserted that the Commission's actions constituted intentional or purposeful discrimination.⁶ Finally, Cavalier submitted that the relief it requests is for Verizon Virginia to be placed in the same place as its competitors—for it to ask the FCC for appropriate action "without the benefit of a formal adjudication or an informal consultation by this Commission."⁷

This Commission has stated consistently that it will not entertain cases that might arguably implicate a waiver of the Commonwealth's Eleventh Amendment immunity from federal appeal under the Telecommunications Act.⁸ For this reason the Commission has declined to conduct § 252 arbitrations. Applying the same standard to Verizon Virginia's request pursuant to § 271, because the FCC, not the Commission, will make the final adjudication on Verizon Virginia's application, the Commonwealth's Eleventh Amendment immunity from federal appeal is not implicated. This analysis does not change as a result of the Supreme Court's decision in *Verizon Md. Inc. v. Public Serv. Comm'n of Md.* As Cavalier explained, the Supreme Court held "that 28 U.S.C. § 1331 provided a jurisdictional base for a suit brought by Verizon's Maryland affiliate against individual commissioners on a claim that their action conflicted with the mandates of federal law."⁹ Applying Cavalier's interpretation to Verizon Virginia's 271 application, the Commission will not be taking an action in conflict with the mandates of federal law because the FCC, not the Commission, will decide the matter. Whether the Commission's consultative report conflicts with federal law will be thoroughly reviewed by the FCC when it considers Verizon Virginia's § 271 application. Therefore, the Commission can continue this proceeding without waiving the Commonwealth's Eleventh Amendment immunity from federal appeal. Because the Commission applied the same standard to cases brought under §§ 252 and

⁴ 70 U.S.L.W. 4432 (May 20, 2002).

⁵ Cavalier's Reply at 2.

⁶ *Id.* at 2-3.

⁷ *Id.* at 3.

⁸ See, e.g., *Petition of Global NAPS South, Inc. for arbitration pursuant to § 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with Verizon Virginia Inc.*, Case No. PUC-2002-00001, Preliminary Order at 3 (February 20, 2002) (*quoting Application of AT&T Communications of Virginia, Inc., et al. For Arbitration with Verizon Virginia*, Case No. PUC-2002-00282, Order of Dismissal at 2 (December 20, 2000)).

⁹ Cavalier Reply at 1.

271, I agree with Verizon that the Commission has not violated the Fourteenth Amendment's equal protection clause. Accordingly,

IT IS DIRECTED that Cavalier's Motion is hereby denied.

Alexander F. Skirpan, Jr.
Hearing Examiner