

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Verizon North Inc. and Verizon South Inc. :
:
:
Verified Petition for Certification pursuant :
to 220 ILCS 5/13-517(a) or Waiver pursuant :
to 220 ILCS 5/13-517(b). :
:
:
Docket No. 02-0560

**REPLY BRIEF ON EXCEPTIONS OF THE
STAFF OF THE ILLINOIS COMMERCE COMMISSION**

Carmen L. Fosco
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

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*Counsel for the Staff of the
Illinois Commerce Commission*

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Now comes the Staff of the Illinois Commerce Commission ("Staff"), by its undersigned attorneys, and pursuant to Section 200.830 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.830) respectfully submits this Reply Brief on Exceptions of the Staff of the Illinois Commerce Commission to the briefs on exceptions filed by Verizon North Inc. and Verizon South Inc. ("Verizon BOE") and the People of the State of Illinois, by the Attorney General, Lisa Madigan, ("AG BOE").

I. INTRODUCTION

With the exception of the certification issue, the arguments of Verizon North Inc. and Verizon South Inc. (collectively, "Verizon") in the Verizon BOE are virtually all premised on Verizon's incorrect and improper assertion that the People of the State of Illinois ("AG"), the Staff of the Illinois Commerce Commission ("Staff") and the Administrative Law Judge ("ALJ") -- via the Proposed Order -- improperly rely on the 17% penetration rate for digital subscriber line transportation service ("DSL TS") that Verizon submitted in support of its waiver request. As explained in Staff's Reply Brief, Verizon's assertions in this regard lack any merit whatsoever. See Staff Reply Brief at

16-19, 24-25. The simple fact of the matter is that Verizon presented a 17% penetration rate in its direct testimony (and not as part of an alternative penetration rate analysis) and has never withdrawn that testimony. The Proposed Order was absolutely correct in rejecting Verizon's bait and switch litigation tactics.

With respect to the Proposed Order's rejection of Verizon's request that the Commission certify that its current offerings satisfy the requirements of Section 13-517, Verizon urges the Commission to ignore the legal limitations on its ability to issue a declaratory ruling but fails to raise a single argument directly addressing the legal issue presented. The Proposed Order reached a correct result on this issue, and nothing in Verizon's brief on exceptions suggests otherwise.

Finally, it must be noted that although Verizon engages in an unfounded extensive attack on the AG's partial waiver proposal, it practically ignores the analysis by the parties and the Proposed Order fully supporting the rejection of Verizon's expansive request for a waiver in all areas where DSL is not currently deployed. The Proposed Order correctly found that "Verizon has failed to prove that a general waiver of its obligations under Section 13-517 should be granted." Proposed Order at 89. Section 13-517 requires Verizon to establish that its proposed waiver is "necessary" to avoid the statutory waiver conditions. The Proposed Order correctly applied this statutory requirement in finding that Verizon's failure to meet its statutory burden was exacerbated by its "all or nothing" approach, rather than an approach that would lead to the most limited waiver commensurate with the statute." *Id.* Thus, in addition to being wrong, Verizon's attack of the Proposed Order's adoption of the AG's partial waiver

proposal fails to directly address Verizon's failure to meet its burden with respect to its general waiver request.

Verizon' does not contend that the partial waiver adopted by the Proposed Order is prohibited by Section 13-517. Rather, Verizon contends that there should be a more expansive partial waiver. There is no requirement in Section 13-517 for the Commission or any party to establish that the most expansive waiver possible under the Act. If Verizon can establish that it is entitled to a more expansive waiver (a burden it has not met in this docket), then it is free to come in and seek such a waiver. But Verizon's attacks of the AG's proposal amount to an attempt to transfer the burden of proof from the carrier to other parties which is improper and contrary to Section 13-517. Verizon's waiver request does not satisfy the waiver requirements of Section 13-517, whereas the AGs partial waiver proposal does.

II. VERIZON ARGUMENT THAT THE PROPOSED ORDER'S ADOPTION OF THE AG'S PROPOSAL IS CONTRARY TO THE ACT AND THE RECORD LACKS MERIT

A. Penetration Rate Issues

Verizon attacks the Proposed Order's adoption of the AG's partial waiver proposal, and contends that the Proposed Order fails to apply the requirements of the Public Utility Act ("PUA"). See *generally* Verizon BOE at 3. Contrary to Verizon's assertions, the Proposed Order is fully consistent with Section 13-517 and is supported by the record.

Verizon first attacks that the Proposed Order's finding that the AG's proposal is based on Verizon's evidence. Verizon BOE at 4. Verizon's argument in this regard is that the AG should not have relied on Verizon's proposed 17% penetration rate. This

argument was fully addressed in Staff's Reply Brief as noted above, and Staff's response to this argument will not be repeated here. See Staff Reply Brief at 16-19, 24-25. Staff and the AG submitted analyses that relied on the 17% penetration rate contained in Verizon's presentation, and the Proposed Order correctly found "that Staff and the AG were fully within their rights to incorporate the 17% figure [submitted by Verizon] within their analyses to demonstrate the full flow through of the assumption." Proposed Order at 88. Staff would also note that Verizon submitted and relied on the 17% penetration rate in its direct and rebuttal testimony and did not submit alternative penetration rates scenarios in its case in chief. Rather, Verizon waited until surrebuttal testimony to mention actual penetration rates (preventing parties from offering responsive testimony), and even then only presented such information for "comparative purposes" and without restating its revenue projections based on such penetration rate. See Verizon Ex. 7.0 at 22-23.

Verizon also contends that the AG engaged in a "total mischaracterization of the evidence in the record" because the AG's Reply Brief stated that "Verizon used a 17% penetration rate in its revenue projections in its direct, rebuttal and surrebuttal testimony" See Verizon BOE at 6 ("AG refers to the 17% penetration rate as a (SIC) Verizon's 'revenue projections.'"), AG Reply Brief at 10 (emphasis added). Ironically, it is Verizon's contention that is a mischaracterization. There can be no question that Verizon did in fact use a 17% penetration rate to provide estimated revenues in this proceeding. See e.g., Verizon Ex. 2.0 at 16-17. Verizon also contends that its 17% penetration rate was presented to "eliminate controversy" and "avoid any contentious debate regarding the appropriate level of demand penetration." Verizon BOE at 6, 9.

Verizon now violates its own stated intent, fully attacking and debating the use by Staff and the AG of the 17% penetration rate proposed and submitted by Verizon to “avoid any contentious debate regarding the appropriate level of demand penetration.” *Id.* Such tactics are impermissible and must be rejected. See Staff Reply Brief at 16-19.

Staff would also note that the data presented by Verizon does not support the 7% penetration rate used by Verizon in its brief on exceptions. The record in this case suggests that it will take five years from deployment to reach full projected demand. See Verizon Ex. 4.0 at 25. Thus, Verizon’s assertions regarding so-called actual demand levels after three years are simply inapposite and present an apples to oranges comparison. Verizon’s data in this regard is further confused by the fact that it apparently reports no demand whatsoever at the end of year one. See Staff Trimble Cross Exhibit 1P. Further, there is no evidence in the record indicating how Verizon’s actual penetration rates were calculated, and Verizon’s numbers appear to be based on a percentage of total lines in an exchange (which would produce a low penetration rate) instead of a percentage of qualified lines or customers.

Verizon also criticizes the Proposed Order because, according to Verizon, it ignores that Staff and the AG were in possession of Verizon’s actual penetration rates. Verizon BOE at 8. Verizon goes on to argue that “[t]he only ‘taint’ that occurred was when Staff and (SIC) AG refused to consider data more reasonable to the position they advocate.” *Id.* Verizon misses the point. Verizon proposed a 17% percent penetration rate in its direct and rebuttal testimony. As in virtually every other case before the Commission, Staff (and the AG) accepted some of the numbers presented by the utility and contested others. The Proposed Order correctly concludes that Staff and the AG

were entitled to rely on Verizon's proposed penetration rate in analyzing its waiver request. This result properly holds Verizon to its own assertions and assumptions, and allows for the efficient handling of proceedings before the Commission. Further, the data contained in Staff Trimble Cross Exhibit 1P hardly constitutes detailed data regarding Verizon's actual experience regarding penetration rates.

B. Subsidy Issues

Verizon also attacks the Proposed Order's conclusion that the AG's proposal avoids interservice subsidies. Verizon BOE at 10, 12. As noted in Staff's BOE, Staff's proposal did not present interservice subsidy issues either. Verizon's attack on the proposed order is based on its use of a 7% penetration rate rather than the 17% penetration rate actually presented by Verizon. For the reasons cited above in Section A above with respect to penetration rate issues, Verizon's argument lacks merit.

Verizon also raises arguments based on Section 13-103 of the PUA. Verizon BOE at 10, 12-13. For the reasons stated in Staff's Reply Brief, these arguments lack merit. See Staff Reply Brief at 36-40.

C. The Proposed Order Did Not Adopt An Illegal And Improper Simplicity Standard

Verizon contends that the Proposed Order improperly adopts the AG's partial waiver proposal based on an improper simplicity standard. Verizon BOE at 10-11. First, the Proposed Order's rejection of Verizon's proposed waiver properly applies the explicit requirements of Section 13-517. This argument appears to also be based on the penetration rate issues which as already been addressed. In addressing the only alternative partial waiver proposals presented in this docket, Staff believes it is appropriate to consider the ease of application of the competing waiver proposals.

Although not an explicit requirement of Section 13-517, it is not contrary to law to consider whether one of two acceptable waiver proposals would be simpler to apply.

D. Section 13-517 Requires That A Waiver Be Limited To The Extent Necessary To Avoid The Relied Upon Waiver Conditions

Verizon contends that the Proposed Order applies an improper standard in attempting to achieve a limited waiver. Verizon BOE at 11. As explained in Staff's prior briefs, Section 13-517 limits a waiver to situations where a waiver is "necessary" to avoid the statutory waiver conditions. See Staff's Initial Brief at 5-8, 14-15, 70-71, 88-89, 113-115; Staff's Reply Brief at 13-15, 40-42; 220 ILCS 5/13-517(b). Thus, contrary to Verizon's assertion, there is explicit direction in Section 13-517 to limit waivers to the extent necessary to avoid the statutory waiver conditions.

E. Other Subsidy Issues

In addition to the subsidy issues addressed above, Verizon raises several other arguments under the general heading of subsidies. See Verizon BOE at 12.

F. The Proposed Order's Conclusion That The Obligations Imposed By Section 13-517 Are In The Nature Of An Unfunded Mandate Is Supported By The Language Of Section 13-517

Verizon contends that the Proposed Order errs in concluding that the obligations imposed by Section 13-517 are in the nature of an unfunded mandate. Verizon BOE at 13-14. Verizon's attack on the Proposed Order lacks merit. There is no question that Section 13-517 imposes obligations on Incumbent Local Exchange Carriers ("ILECs") for which there is no statutory funding mechanism. It is also clear that Section 13-517(b) only provides a waiver from these obligations if they would impose a "significant" adverse economic impact on users of telecommunications service generally or an "undue" economic burden on the company. The proposed order properly recognizes

that to the extent Section 13-517 may result in an adverse economic impact that is not significant or an economic burden that is not undue, its requirements are in the nature of an unfunded mandate. There is no error in this reasoning or the conclusion reached thereby.

G. Overall Economic Impact

Verizon contends that the Proposed Order improperly concludes that it is proper to consider the overall economic impact on Verizon in assessing whether compliance would impose an undue economic burden. Verizon BOE at 14-15. Under Verizon's interpretation of Section 13-517, the exact same analysis (and conclusion) would apply to the largest and smallest ILECs in Illinois in determining whether compliance would impose an undue economic burden – notwithstanding the vast financial differences of those carriers. This result is patently illogical and unreasonable. The consideration of the overall economic impact on a carrier is consistent with Section 13-517 in assessing whether there is an undue economic burden absent a waiver.

Verizon's assertion that this aspect of the Proposed Order is improper because it requires an analysis of Verizon's interstate data similarly lacks merit. Verizon BOE at 16. The Proposed Order nowhere suggests that Verizon's revenues and expenses from its operations in other states should be considered.

Staff would note that Verizon's cites to Staff testimony for the assertion that "the provision of DSL TS in the Waiver Areas would be unduly economically burdensome for the Company." Verizon BOE at 17. Verizon's neglects to point out that this analysis was based on Verizon's all or nothing approach, and does not mention the qualifications placed on Staff's testimony. Staff Reply Brief at 20. In short, this assertion does not undermine any of the findings or conclusions contained in the Proposed Order.

Verizon also contends that the Proposed Order is contrary to policy that cost causers should be the cost payers. Verizon BOE at 17. First, this is a waiver proceeding, not a proceeding to assign costs. Second, the Proposed Order is consistent with the waiver conditions imposed under Section 13-517. To the extent that these statutory requirements have some impact on the policy cited by Verizon, that is no basis to ignore the statutory requirements.

H. Verizon's BFR Process

Verizon contends that the Proposed Order misunderstands the purpose of Verizon's proposed BFR process. To the contrary. To the contrary, the Proposed Order properly recognizes that this Commission has no authority to approve a federal tariff proposal. Moreover, the BFR process proposed by Verizon does not fit within any of the statutory waiver conditions, and thus is irrelevant to this proceeding. See Staff Initial Brief at 48-49.

III. VERIZON HAS NOT ESTABLISHED ITS ENTITLEMENT TO A WAIVER

A. The Record Does Not Support Verizon's Waiver Request

Verizon contends that the record supports its waiver request. Verizon BOE at 19-22. Verizon raises no new arguments, and Staff will not repeat the arguments already made in its briefs and summarized in the Proposed Order. For the reasons previously stated, Verizon has failed to demonstrate that its proposed waiver is necessary to avoid the statutory waiver conditions. The record demonstrates that Verizon's waiver request is far too over inclusive, and as such fails to meet the statutory requirements set forth in Section 13-517(b). Verizon's Brief on Exceptions fails to address these failings. Verizon's main argument appears to be that the penetration rate

it submitted in support of its waiver request should now be disregarded. As previously explained, this argument lacks merit. Similarly, Verizon's arguments regarding changing technology are not supported by the record. While Staff submitted testimony that any waiver should be limited in duration because new technology could emerge changing the costs and revenue assumptions upon which the partial waiver is based, this is not the same as Verizon's argument that technology is changing so fast that it would present an undue burden to not grant a waiver of all areas not currently served with DSL TS. This latter proposition is simply not supported in the record.

B. The Proposed Order Correctly Concludes That Verizon's Certification Request Is An Improper Request For A Declaratory Ruling

Verizon essentially argues that it would be desirable for it to obtain a declaratory ruling certifying that its current offerings satisfy Section 13-517. This may or may not be true, but there is no reason to debate the point. Verizon has not raised a single argument alleging a flaw in this legal conclusion, nor has it cited to a contrary case or statute. The Proposed Order correctly concludes that Verizon's request for certification that its current offerings satisfy Section 13-517 is a request for a declaratory ruling beyond the legal authority of the Commission.

IV. CONCLUSION

WHEREFORE, for the reasons set forth herein, the exceptions of Verizon should be rejected. The Staff of the Illinois Commerce Commission respectfully requests that the Commission modify the *Proposed Order* as set forth herein and in Staff's Brief on Exceptions.

Respectfully submitted,

Carmen L. Fosco
Office of General Counsel
Illinois Commerce Commission
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

Counsel for the Staff of the
Illinois Commerce Commission

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