

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION**

In the Matter of the Review of)	
Unbundled Loop and Switching Rates; the)	DOCKET NO. UT-023003
Deaveraged Zone Rate Structure; and)	
Unbundled Network Elements, Transport,)	
and Termination)	

**COMMENTS OF VERIZON NORTHWEST INC. ON EFFECT OF INTERIM TRO
RULES ON THE COMMISSION'S REVIEW OF VERIZON NW'S RECURRING COSTS**

Introduction

Verizon Northwest Inc. ("Verizon NW") hereby respectfully submits these comments in response to the Commission's September 22, 2004 Notice of Opportunity to Comment on the effect of the Federal Communications Commission ("FCC") interim rules regarding UNE pricing.

As noted by the Commission, by order released August 20, 2004, the FCC instituted an expedited rulemaking to establish new, permanent unbundling rules in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").^{1/} The FCC "plans to issue [these revised permanent unbundling rules] before the close of 2004."^{2/} At the same time,

^{1/} See Order and Notice of Proposed Rulemaking, Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (rel. Aug. 20, 2004) ("*Interim Unbundling Order and NPRM*").

^{2/} *Id.* ¶ 21.

the FCC has established interim unbundling requirements for mass market switching, dedicated transport, and high capacity loops. While these interim requirements are in effect, state commissions are forbidden from *lowering* rates for these network elements (but can increase them). In addition, the FCC has proposed a transition plan for elements it decides no longer have to be unbundled. If it adopts that transition plan, the prices for “former UNEs” will go up, while elements that remain subject to unbundling will be subject to state-set TELRIC rates.^{3/}

In light of the FCC’s mandate that rates may only *rise* during the pendency of its new unbundling proceeding, a Commission decision reducing UNE rates would be preempted. Moreover, the FCC proposes to incorporate transitional pricing provisions for delisted UNEs into its permanent unbundling rules, so any conflicting pricing provisions this Commission might adopt would, likewise, be impermissible.

The Commission should thus hold this proceeding in abeyance pending the FCC’s adoption of permanent unbundling rules. If the Commission nonetheless decides to issue a decision on Verizon’s recurring UNE rates, it may only raise, and may not lower, UNE rates. Indeed, because all of the CLECs’ proposals would result in rates that are lower than current rates, the recent FCC ruling requires that they be rejected.

Background

The Commission initiated this proceeding “to review UNE rates that may be set either too high or too low based on their direct costs.”^{4/} The Commission has defined the scope of this

^{3/} In addition, as the Commission is aware, the FCC has also initiated a rulemaking with respect to TELRIC pricing, in which it has tentatively concluded that its TELRIC guidelines should be overhauled to “more closely account for the real-world attributes” of an incumbent local exchange carrier’s (“ILEC”) network. Notice of Proposed Rulemaking, *In the Matter of Review of the Commission’s Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, 18 FCC Rcd 18945, ¶ 52 (2003) (“*TELRIC NPRM*”).

proceeding “on an element-by-element basis,”^{5/} as refined most recently in April 2004.^{6/} It has limited this docket to consideration of recurring costs, and established a new docket to address nonrecurring costs at a later date.^{7/} On August 12, 2004, the parties filed their final briefs in this proceeding, and issues are now pending before the Commission for decision.

On March 2, 2004, the D.C. Circuit invalidated the FCC’s conclusion in the *Triennial Review Order*^{8/} that competitive local exchange carriers (“CLECs”) are impaired without unbundled access to mass market switching, dedicated transport, and high capacity loops.^{9/} As a result of the D.C. Circuit’s action, there is today no legally operative finding that any CLEC is entitled to obtain these unbundled network elements from Verizon NW on a permanent basis.^{10/}

In response to *USTA II*, in its *Interim Unbundling Order and NPRM*, the FCC began a rulemaking proceeding to establish new unbundling policies with respect to mass market

^{4/} Third Supplemental Order, Docket No. UT-023003, ¶ 11 (issued Aug. 13, 2002) (“*Third Supplemental Order*”).

^{5/} *Id.*

^{6/} See Twenty-first Supplemental Order, Docket No. UT-023003, Appendix B (issued Apr. 6, 2004); Erratum, Docket No. UT-023003 (issued Apr. 13, 2004).

^{7/} See Twelfth Supplemental Order, Docket No. UT-023003 (issued Aug. 5, 2003). The Commission has approved a settlement with respect to UNE rates for Qwest Corp., so that the only remaining issues concern the recurring UNE rates applicable to Verizon NW. See Twenty-second Supplemental Order, Docket No. UT-023003 (issued May 11, 2004).

^{8/} Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*”).

^{9/} *USTA II*, 359 F.3d at 568-78.

^{10/} In accordance with an agreement of the parties, the D.C. Circuit postponed the issuance of the mandate in *USTA II* until June 16, 2004.

switching, dedicated transport, and high capacity loops. The FCC has said that it plans to issue its permanent unbundling rules for those network elements on an expedited basis – “before the close of 2004.”^{11/}

Simultaneously with its initiation of an expedited rulemaking to establish permanent unbundling rules, the FCC created a two-part plan to govern the terms, rates, and conditions for mass market switching, dedicated transport and high capacity loops. First, for six months ending on March 13, 2005 (unless the new rules go into effect earlier), ILECs are required to continue “providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.”^{12/} The FCC’s order further mandates that the rates that applied on June 15, 2004 “shall remain in place” during this initial period – “except to the extent that they are or have been superseded by . . . (3) (with respect to rates only) a state public utility commission order *raising* the rates for network elements.”^{13/} Thus, during this period, this Commission cannot establish new rates for such elements (including UNE-P components) that are lower than those applicable as of June 15, 2004.

Second, the FCC proposed a “transition period” that would take effect for a second six-month period for all network elements that the FCC determined are no longer subject to

^{11/} *Interim Unbundling Order and NPRM* ¶ 21; *see also id.* Statement of Chairman Michael K. Powell at 41-42. On August 23, 2004, Verizon NW, its affiliates, and other parties filed a petition for writ of mandamus with the D.C. Circuit, challenging the FCC’s interim unbundling rules, asking the court to require the FCC to finally and promptly issue permanent unbundling rules that conform to the *USTA II* decision, and seeking a ruling that CLECs cannot be permitted to add new orders for UNE switching and high capacity facilities unless the FCC has first made impairment findings for these UNEs. The FCC responded on September 16, 2004.

^{12/} *Interim Unbundling Order and NPRM* ¶ 1; *see also id.* ¶ 29.

^{13/} *Id.* ¶ 1 (emphasis added).

unbundling.^{14/} During this proposed transition period, the rate for former UNE-P arrangements would be required to be “equal to the *higher* of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004 *plus one dollar*, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004 and six months after Federal Register publication of [the FCC’s rules], for this combination of elements *plus one dollar*.”^{15/} Similarly, for high capacity loops and dedicated transport no longer subject to unbundling, the FCC proposed rules for the transition period would require “a rate equal to the *higher* of (1) 115% of the rate the requesting carrier paid for that element on June 15, 2004, or (2) 115% of the rate the state public utility commission establishes, if any, between June 16, 2004, and six months after Federal Register publication of [the FCC’s rules], for that element.”^{16/} The net effect of the *Interim Order*, then, is that for the next six months – and likely for the next year – this Commission could not lower (and eventually would have to increase some of) the network element rates. Until the FCC completes its rulemaking and acts on its proposed transition plan, however, which UNEs (if any) remain subject to a decision in this docket remains unknown.

On September 22, 2004, the Commission issued a Notice of Opportunity to comment on the effect of the FCC’s interim rules. The Commission noted that rates in place as of June 15, 2004 are frozen, except that state commissions may order increases in rates for UNEs. The Commission accordingly requested comment on the effect of the *TRO* Rules on the recurring rates that will be decided in this proceeding.

^{14/} *Interim Unbundling Order and NPRM*, Statement of Chairman Powell at 41.

^{15/} *Id.* ¶ 29 (emphasis added).

^{16/} *Id.* These pricing requirements would apply only to the embedded customer base for all of the affected UNEs; CLECs would not be permitted to add new customers at these rates. *See id.*

Argument

As the FCC has recognized in its *TELRIC NPRM*, UNE cost cases are “extremely complex,” and “[t]he drain on resources for the state commissions and interested parties” resulting from such proceedings, “can be tremendous.”^{17/} Here, because the FCC has already constrained state commission UNE ratesetting, and because it plans to adopt permanent rules that will further affect UNE pricing, the Commission should hold these proceedings in abeyance until after the new FCC rules are released, which the FCC plans to do by the end of the year.

First, setting rates for UNEs when the Interim Rules already have constrained state pricing activities and expressly contemplate additional pricing rules would be pointless. The D.C. Circuit vacated the FCC’s unbundling requirement for mass-market switching, and there is no reason to assume that the FCC will reimpose it. Both *USTA II* and the FCC’s *Interim Unbundling Order and NPRM* make clear that the FCC must (finally) discontinue the “maximum unbundling” policy on which its thrice-vacated rules rested. Indeed, the FCC has expressly permitted incumbents to “presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport” in change-of-law proceedings.^{18/} Given this presumption that mass market switching will be eliminated in the new rules, setting new UNE rates now that include a switching component would likely be a waste of the Commission’s resources.

Second, the FCC is likely to provide new guidance concerning the proper application of TELRIC. In its *TELRIC NPRM*, the FCC has tentatively concluded that TELRIC should be substantially revised to “more closely account for the real-world attributes” of an ILEC’s

^{17/} *TELRIC NPRM* ¶ 6.

^{18/} *Interim Unbundling Order and NPRM* ¶ 23.

network.^{19/} Likewise, as noted, the *Interim Unbundling Order and NPRM* provides that UNE rates may only *rise* during the pendency of the new unbundling proceeding. During that period, proposing to reduce these rates (let alone ordering any reductions) would be futile. In addition to accommodating new FCC pricing guidelines, a stay would permit the parties to account for any new TELRIC principles in cost studies and testimony they file in this case (to the extent TELRIC filings are still appropriate after the FCC issues its permanent rules).

Finally, no party would be prejudiced by the abatement of this proceeding pending the FCC's issuance of its permanent unbundling rules. As noted above, the FCC has expressly stated that it plans to issue its permanent unbundling rules by the end of 2004.^{20/} Thus, it simply makes no sense at this time to devote resources to cost issues that may be moot or, at a minimum, cannot be changed in a manner that benefits the CLECs through the adoption of lower rates. Given that the Commission initiated this proceeding because of its belief – however mistaken – that currently “UNE rates [] may be set [] too high,”^{21/} it would make little sense to continue this proceeding at this time when the only possible result would be the imposition of *higher* rates.

Conclusion

For the foregoing reasons, the Commission should stay this proceeding until after the establishment of permanent unbundling rules. At a minimum, the Commission should defer further proceedings and set a status conference for January 2005, at which time it can address how best to proceed in light of the FCC's anticipated decision before the close of this year. In the

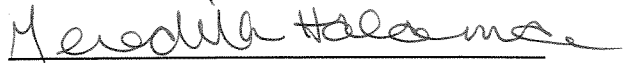
^{19/} *TELRIC NPRM* ¶ 52.

^{20/} *Interim Unbundling Order and NPRM* ¶ 21.

^{21/} *Third Supplemental Order* ¶ 11.

alternative, if the Commission nonetheless decides to proceed, its decision may only *raise* rates for those UNEs subject to the interim unbundling rules, including mass market switching, high capacity loops, and dedicated transport.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Meredith B. Halama", is written over a horizontal line.

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