

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

AT&T Communications of California, Inc. (U 5002 C),
TCG Los Angeles, Inc. (U 5462 C), TCG San Diego (U
5389 C) and TCG San Francisco (U 5454C),

Complainants,

vs.

Verizon California Inc. (U 1002 C),

Defendant.

Case 04-08-026
(Filed August 19, 2004)

Telscape Communications, Inc. (U 6589 C), Wholesale
Airtime, Inc. (U 5751 C), and Blue Casa
Communications, LLC (U 6764 C),

Complainants,

vs.

Verizon California, Inc. (U 1002 C),

Defendant.

Case 04-09-001
(Filed September 1, 2004)

ACN Communication Services, Inc. (U 6342 C), Covad
Communications Co. (U 5752 C), and Vycera
Communications, Inc. (U 5477 C),

Complainants,

vs.

Verizon California Inc. (U 1002 C),

Defendant.

Case 04-09-010
(Filed September 7, 2004)

**ADDITIONAL OPENING BRIEF OF VERIZON CALIFORNIA INC. (U 1002 C)
ON THE TRIENNIAL REVIEW REMAND ORDER**

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By ruling dated February 17, 2005,¹ ALJ Econome set aside the February 7 submission of this case to receive additional briefing on the “effect, if any,” of the Federal Communication Commission’s (“FCC”) Triennial Review Remand Order² (“TRRO”) on this case. Ruling at 2.

The TRRO only strengthens Verizon’s arguments in this proceeding. Binding federal law has been clear for years that packet switches are not subject to mandatory unbundling, and it is beyond any reasonable dispute that the replacement of a circuit switch with a packet switch eliminates any mandatory unbundled switching obligation.³ Both of these legal conclusions are reiterated yet again by the FCC in the TRRO.

Nor is the TRRO’s transition period, expressly referenced in the Ruling, at all relevant to this proceeding. As the Ruling points out, the TRRO “eliminates the incumbent local exchange carriers’ requirement to unbundle mass market local *circuit* switching,” (emphasis added), and the TRRO’s transition plan is by its very terms limited to local circuit switching. See *TRRO* ¶ 226, Ruling at 2.

Since the TRRO’s limited references to “packet switches” and “packet switching” only reinforce binding and express prior rulings of the FCC that prohibit the forced unbundling of packet switches, the order provides absolutely

¹ Administrative Law Judge’s Ruling Setting Aside Submission To Receive Additional Briefing on the Triennial Review Remand Order, dated February 17, 2005 (“Ruling”).

² In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, CC Docket No. 01-338, WC Docket No. 04-313, Order on Remand, (rel. Feb. 4, 2005) (“TRRO”).

³ Indeed, as discussed further below, the TRRO only reinforces the obvious fact that the *only* way Verizon can feasibly act on the FCC’s explicit incentives to deploy packet switches is to replace or upgrade an existing circuit switch. The notion that such replacement is a permissible means of eliminating unbundling obligations is *not* a novel interpretation of FCC rules which requires an express ruling on point, as MCI claims; rather it is the explicitly stated culmination of all the FCC’s rulings on this topic over the past nine years.

no support for the various unbundling theories proffered by the complainants in this case, including the unsupportable argument that existing interconnection agreements somehow mandate something different than federal law requires. Most important, the TRRO provides no basis for any further delay of the final resolution of this matter; to the contrary, it reinforces the need for prompt resolution. For this reason, Verizon respectfully requests that the ALJ reconsider the Ruling's further extension of the deadline for the Presiding Officer's Decision.

I. THE TRRO REITERATES THE FCC'S PRIOR DETERMINATION THAT PACKET SWITCHES ARE NOT SUBJECT TO UNBUNDLING

The TRRO is the FCC's third attempt to adopt lawful unbundling rules. Acknowledging prior direction from the courts, in the TRRO the FCC has used its "unbundling authority in a more targeted manner." *TRRO* ¶ 2. These latest rules are designed "to encourage the innovation and investment that come from facilities-based competition." *Id.* Accordingly, in the TRRO the FCC has made clear that it "impose[d] unbundling obligations *only* in those situations where we find that carriers genuinely are impaired without access to particular network elements and where unbundling does not frustrate sustainable, facilities-based competition." *Id.* (emphasis added).

As the FCC pointed out in its background section of the TRRO, prior to the TRRO the FCC had already "concluded that competitive LECs were not impaired without unbundled access to packet switching." *TRRO* ¶ 201. And since this "finding" by the FCC "was not challenged in the D.C. Circuit," *id.* ¶ 201, n.534, there can be no dispute on this dispositive point. The TRRO merely notes in passing what the FCC has said numerous times – the deployment of a packet

switch relieves an ILEC of any mandatory obligation to provide unbundled switching. The TRRO did not discuss in detail an unbundling determination that it had already made and which had not even been challenged by CLECs before the D.C. Circuit.

The majority of the TRRO's limited references to packet switches address the fact that these switches are easily available to CLECs and that they have been extensively deployed by these competing carriers. These facts were noted by the FCC as support for its conclusion that *circuit switches* cannot be subjected to mandatory unbundling. As the FCC observed, at year-end 2003, CLECs "had deployed more than 8,700 packet switches." *TRRO* ¶ 206, n. 545. These packet switches are a "more efficient technolog[y]," and CLECs are "able to use" their packet switches "to serve the mass market in many areas, and their similar deployment is possible in other geographic markets." *Id.* ¶ 199.⁴ Packet switches can also be used to serve the enterprise market, and they "can be used to provide advanced services to all classes of customers" *Id.* ¶¶ 209 & 206, n. 544. They "are less expensive than traditional circuit switches and more scalable," (*id.* ¶ 206) and "are newer, cheaper, and easier to deploy than traditional circuit switches." *Id.* 207, n. 551; *see also id.* ¶ 222, n. 612 (referencing "the innovation of ever-cheaper packet switches."). In fact, the FCC pointed out that CLECs have an advantage in that they can rely more extensively on this "newer, more efficient technology," than can ILECs, "whose networks

⁴ *See also id.* ¶ 204 (holding that evidence of CLEC deployment and use of circuit switches, packet switches, and softswitches demonstrates that CLECs are not impaired in the deployment of switches, and "that it is feasible for competitive LECs to use competitively deployed switches to serve mass market customers throughout the nation.")

have been deployed over decades.” *Id.* ¶ 207. All of these facts demonstrate yet again why the FCC has repeatedly declined to subject packet switches to mandatory unbundling.

II. THE TRRO REITERATES THE FCC’S REJECTION OF THE CLECS’ “FUNCTIONALITY” ARGUMENTS

Throughout this proceeding, CLECs have suggested that that for purposes of unbundling there is somehow a difference between “packet switches” and “packet switching.” In the TRRO, the FCC again lays this fanciful argument to rest by expressly stating: (1) CLECs are “not impaired without unbundled access to *packet switching* and (2) the FCC “do[es] not require *packet switches* to be unbundled.” *Id.* ¶¶ 201 & 220, n. 598. The FCC’s interchangeable use of the two terms eviscerates the CLEC contention that how a packet switch is actually used determines whether it must be unbundled. As the FCC has previously stated, the deployment of a packet switch eliminates the ILEC’s unbundled switching obligation – regardless of whether the packet switch is used to provide advanced services or voice services.

III. THE TRRO REITERATES THE FCC’S REJECTION OF THE CLECS’ ARGUMENT THAT VERIZON HAS AN INDEPENDENT OBLIGATION TO PROVIDE “UNBUNDLED SWITCHING,” REGARDLESS OF THE TYPE OF SWITCH VERIZON HAS DEPLOYED

Throughout this proceeding, CLECs have contended that they are entitled to a generic form of “unbundled switching,” and that this obligation is unaffected by whether the switch to be unbundled is a circuit switch or a packet switch. The FCC has previously rejected this argument in express language that CLECs have contended was somehow “dicta.” For the reasons Verizon has previously

explained, it was nothing of the kind. And in the TRRO, the FCC has again rejected this argument, reiterating its prior conclusion that ILECs “are not required to build TDM capability into new packet-based networks or into existing packet-based networks that never had TDM capability.” *Id.* ¶ 18, n. 49.⁵ An ILEC that deploys a packet switch has absolutely no obligation to provide any TDM capability to allow for “unbundled switching.” The deployment of a packet switch eliminates the ILEC’s unbundling obligation; an ILEC has no obligation to undertake any operational workarounds and/or accommodations to provide CLECs with unbundled switching. Verizon certainly has no lawful obligation to engage in the kind of extensive, difficult, and costly workarounds that would be required to perpetuate UNE-P in light of Verizon’s proposed packet switch deployment.

In the TRRO, the FCC made the simple statement that “we do not require packet switches to be unbundled” *Id.* ¶ 220, n. 598. This determination is not qualified by how or why the packet switch is deployed, nor is it dependent on the satisfaction of any of the invented obligations that CLECs have sought to impose on Verizon in this proceeding. This statement stands in stark contrast to this Commission’s interim decision requiring Verizon to provide unbundled packet

⁵ This conclusion also refutes the CLEC suggestion that the Nortel switches at issue in this proceeding are not really packet switches because they are succession switches that can also be used to provide traditional voice services. As Verizon has previously explained, given its legacy network, these “succession” switches are the only packet switches that Verizon can realistically deploy for local service. The FCC’s acknowledgement that packet switches can be deployed to carry traditional voice traffic but that ILECs have no obligation to ensure that these switches have this capability demonstrates that packet switches do not cease to be packet switches merely because they have the potential to provide a TDM function, as some CLECs have incorrectly contended. This conclusion also undermines claims that an ILEC has an obligation to undertake operational workarounds to provide unbundled switching to CLECs when the ILEC deploys a packet switch.

switching, and vividly illustrates the inappropriateness of that interim decision, as well as the very real investment disincentives that this anticompetitive outcome has generated.

IV. THE TRRO REITERATES THAT REPLACEMENT OF CIRCUIT SWITCHES WITH PACKET SWITCHES IS UNOBJECTIONABLE, AND INDEED THE ONLY WAY FOR VERIZON TO ACT ON THE FCC'S INCENTIVES

As Verizon stated in its post-hearing reply brief, the only way that ILECs – with their ubiquitous switching networks – can act on the FCC's explicit incentives to deploy packet switches is to replace or upgrade an existing switch. Verizon Reply Brief at 15 (filed February 7, 2005). The TRRO reiterates this logical and inevitable conclusion in its discussion of investment incentives, noting that:

“the incumbent LECs already operate ubiquitous legacy circuit switching networks . . . [and] given that we do not require packet switches to be unbundled, there is *no basis* for an argument that our treatment of circuit switches gives incumbent LECs a disincentive to *upgrade* their switches.” *TRRO* ¶ 220, n. 598 (emphasis added).⁶

In other words, the FCC in the TRRO recognizes again that ILECs have every incentive to replace existing switches with packet switches and thereby avoid unbundling obligations at those locations. This reference reiterates what the FCC said in greater detail in the Triennial Review Order, as Verizon has briefed at length.

⁶ Indeed, given the FCC's view that access to unbundled switching *discourages* CLEC investment, *TRRO* ¶ 220, ILEC elimination of unbundling in selected wire centers through switch upgrade programs can only be seen as a further incentive for CLEC investment in their own competitive switching facilities.

MCI's bald assertion that no "express ruling" by the FCC authorizes Verizon to do so is totally meaningless. MCI Opening Brief at 7 (filed January 31, 2005). Given the FCC's oft-repeated statements about creating incentives for ILEC packet switch deployment, the TRRO makes clear that there is no need for the FCC to issue an express ruling repeating what it has already made clear through incentives. Rather, incentives are assumed to be self-executing:

"[B]ecause the section 706 mandate *requires* the Commission to *encourage* the deployment of advanced telecommunications capability, the Commission is required to make a predictive judgment regarding the impact of its actions. . . [T]he Commission concluded that removing most unbundling obligations would promote deployment of such facilities."⁷

Clearly, in meeting its statutory obligation to encourage deployment of advanced services capability, the FCC reasonably assumed that ILECs would act on the incentives it offered.

Moreover, the FCC has never mentioned any qualifiers or conditions on the exercise of these incentives, such as the need to amend interconnection agreements, allow time for transition, and so forth. Plainly, the FCC would not have made the incentives so simple and clear unless it expected ILECs to act on them at their discretion. MCI's effort to point to the absence of express authorization is an unwarranted throwback to the long-gone days of "command and control" regulation, where carriers could take no action that was not

⁷ In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, CC Docket No. 01-338, CC Docket No. 96-98, CC Docket No. 98-147, Order on Reconsideration, (rel. Oct. 14, 2004) (emphasis added), cited in TRRO, ¶19, note 49.

expressly permitted or approved.⁸ That is clearly not the case here, and MCI's argument should be seen for what it is – a red herring.

V. PACKET SWITCHES ARE NOT COVERED BY THE TRRO'S "TRANSITION PLAN" FOR UNBUNDLED CIRCUIT SWITCHING

As the Ruling noted, the TRRO has provided a twelve-month transition plan for CLECs to make "alternative service arrangements" for their installed customer base. *TRRO* ¶ 226. But by its very terms, this "transition plan" applies *only* to "the embedded base of unbundled local circuit switching used to serve mass market customers" *id.*, and *only* to the transition from existing unbundling rules to "whatever new rules we may adopt." *Id.*, n. 626, citing the FCC's interim rules released last August.⁹ The FCC never discussed the need for any transition plan for unbundling obligations voided as a result of deployment of replacement packet switches, nor is Verizon seeking the adoption of any "new rules" here, only the enforcement of rules that have been in place for almost a decade. Nor is there any evidence in this case of any market disruption of the scale and scope sought to be avoided by the FCC in eliminating unbundled mass market local switching on a nationwide basis. Therefore, any effort to impose a transition in this proceeding would be an unlawful attempt to extend and perpetuate the unauthorized unbundling of packet switches.

⁸ The contrast between "incentives" and "command-and-control" dictates as the basis for utility action is well-established in Commission precedent. See, e.g., D.97-06-090 (eliminating the vestigial fiber pre-approval requirement as an "anachronistic throwback to command and control, cost-of-service regulation.") 1997 Cal. PUC LEXIS 520, *83 (Commissioner Knight, concurring).

⁹ *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, CC Docket No. 01-338, WC Docket No. 04-313, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783 (2004) ("Interim Order") at ¶¶ 20, 24 (discussing need for transition to avoid harmful disruption in telecommunications markets).

Moreover, CLECs have been on notice about this particular packet switch deployment for almost a year. No CLEC can therefore credibly claim surprise or offer any legitimate operational need for a transition. Instead, these carriers' entire approach has been, and continues to be, an insistence on extending UNE-P for as long as possible, even on packet switches where it has never been required – an outcome that is unlawful and certainly does not justify the improper imposition of a transition that the FCC adopted for a different network element.

VI. THE ALJ SHOULD RECONSIDER THE DECISION TO EXTEND AGAIN THE DEADLINE FOR THE PRESIDING OFFICER'S DECISION

Under the Ruling, the deadline for the Presiding Officer's Decision is now May 6, 2005. Under this schedule, more than a year will have passed from the time that Verizon first notified CLECs of their need to make alternative service arrangements until the Commission completes its review of this matter. The FCC will have eliminated unbundled circuit switching before this Commission resolves the much more straightforward question of whether the interconnection agreements at issue can be misconstrued to mandate the unbundling of packet switches in violation of federal law.

From the very start of this proceeding, the Commission has recognized the importance of resolving the matter promptly. Indeed, the Commission and the assigned ALJ acted extremely promptly – in just under a month – in imposing the “temporary” restraining order which has now been in effect for almost six months, and will likely remain in effect for another four months on top of that if

the current schedule is followed.¹⁰ Given that the TRRO does nothing but reiterate the FCC's prior conclusions – conclusions that preclude this Commission from either directly or indirectly requiring Verizon to provide unbundled switching off its packet switches – the order does not warrant yet another extension of the deadline for the Presiding Officer's Decision. At the very least, Verizon is entitled to more expedited resolution of its claims on the merits – compared to that afforded the complainants in this case – given the tens of millions of dollars of investment idled by this Commission's restraining order.

Accordingly, Verizon respectfully requests that the ALJ reconsider the Ruling's decision to extend this deadline, and accelerate, rather than delay, the ultimate resolution of this matter.

DATED: February 28, 2005

By: /s/ Elaine M. Duncan
ELAINE M. DUNCAN
WILLIAM B. PETERSEN
Attorneys for Verizon California Inc.
711 Van Ness Avenue, Suite 300
San Francisco, CA 94102
Tel: 415-474-0468
Fax: 415-474-6546
elaine.duncan@verizon.com

¹⁰ A Presiding Officer's Decision becomes final unless appealed within 30 days. Given the issues at stake, this one will surely be appealed. If issued on May 6 and appealed June 6, it would not be presented for a Commission vote until late June or July at the earliest. While this schedule may be within the statutory twelve-month period for resolving complaints, most complaints covered by this requirement do not hold millions of dollars of investment in limbo pending their outcome.

Certificate Of Service

I hereby certify that: I am over the age of eighteen years and not a party to the within entitled action; my business address is 112 Lakeview Canyon Road, CA501LB, Thousand Oaks, California 91362; I caused the following to be served:

ADDITIONAL OPENING BRIEF OF VERIZON CALIFORNIA INC. (U 1002 C)

ON THE TRIENNIAL REVIEW REMAND ORDER

via paper copy enclosed in a sealed envelope, by United States mail with first-class postage prepaid thereon.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 28th day of February, 2005 at Thousand Oaks, California.

/s/ Jasmin Milles

JASMIN MILLES

C.04-08-026/C.04-09-001/C.04-09-010 – SERVICE LIST