PUC-77

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PENNSYLVANIA PUBLIC UTILITY COMMISSION

Uniform Cover and Calendar Sheet

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1. **REPORT DATE:** December 17, 2003	2. **BUREAU AGENDA NO.** DEC-2003-L-0144*REV
3. **BUREAU:** Law	
4. **SECTION(S):**	5. **PUBLIC MEETING DATE:** December 18, 2003
6. **APPROVED BY:** **Director:** B. Pankiw, 7-5000 **Mgr/Spvr:** F. Wilmarth, 2-8841 **Legal Review:**	DOCKETED FEB 10 2004
7. **PERSONS IN CHARGE:** M. Martin, 7-4518 K. Joyce , 5-3819	DOCUMENT FOLDER
8. **DOCKET NO.:** I-00030100	

9. (a) CAPTION (abbreviate if more than 4 lines)
(b) Short summary of history & facts, documents & briefs
(c) Recommendation

(a) Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market

(b) Six CLECs submitted petitions to persuade the Commission that the FCC's national finding of no impairment without access to local circuit switching on an unbundled bases should not apply in Pennsylvania. Verizon filed an answer supporting the FCC's finding on this issue. Following the presentation of testimony and formal proceedings, the OALJ certified the record to the Commission for disposition.

(c) The Law Bureau recommends that the Commission deny the CLEC petitions and not seek a waiver of the FCC's finding of no impairment.

10. MOTION BY: **Commissioner** Chm. Fitzpatrick — **Commissioner** Thomas - Yes
Commissioner Pizzingrilli - Yes
SECONDED: **Commissioner** Bloom — **Commissioner** Holland - Yes

CONTENT OF MOTION: Staff recommendation adopted.

Statement of Commissioner Glen R. Thomas attached.

PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG, PENNSYLVANIA 17105-3265

Investigation into the Obligations of
Incumbent Local Exchange Carriers to
Unbundle Local Circuit Switching for
the Enterprise Market

PUBLIC MEETING:
DECEMBER 18, 2003
DEC-2003-L-0144
Docket No. I-00030100

STATEMENT OF COMMISSIONER GLEN R. THOMAS

This matter represents the first substantive action by this Commission to implement the Federal Communication Commission's (FCC) Triennial Review Order (TRO). The TRO, among other things, sets a transition for states to follow in pursuit of facilities based telephone competition as contemplated by the Federal Telecommunications Act of 1996. This transition will, in many ways, define Pennsylvania's telecommunications landscape over the next decade and it is critically important that this Commission resolve these cases in a manner that allows consumers to benefit from a competitive telecommunications market. These are crucial policy decisions that must be made within the context of the TRO, federal law, state law and the record presented to us.

On February 20, 2003, the FCC adopted revised rules concerning an incumbent local exchange carrier's (ILECs) obligation to make unbundled network elements (UNEs) available to competing carriers[1] In that report and order, the FCC found 1) that an ILEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS1 capacity and above loops "except where the state commission petitions [the FCC] for waiver of this finding in accordance with the conditions set forth in [47 C.F.R. § 51.319(d)(3)(i)] and the [FCC] grants such waiver." 47 C.F.R. § 51.319(d)(3); *see also TRO* paras. 451-458 and 2) that competitive local exchange carriers (CLECs) are not impaired without unbundled access to local switching to serve enterprise customers because there are few barriers to deploying competitive switches to serve customers in the enterprise market and thus no operational or economic impairment on a national basis. *TRO,* para. 451.

In the Order, the FCC established a rebuttable presumption of no impairment, a 90 day proceeding for the states to allow parties the opportunity to rebut the presumption and rather specific criteria for state commissions to use in determining whether the presumption is overcome. The FCC clearly set a high bar for those trying to rebut the

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[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order (rel. aug. 21, 2003) (FCC03-36, as corrected by FCC 03-227) (Triennial Review Order or TRO)

presumption of non-impairment. The economic and operational criteria that must be satisfied are formidable. Proving an impairment case in this proceeding is even more daunting considering 90-daylimit imposed by the FCC.

Although the FCC created a very high burden for those arguing impairment, they did not create an insurmoutable bar. However, based on the record before us, I do not believe that the petitioners were able to meet this rigorous burden and, therefore, I concur with the recommendation before us. However, I note that there are areas in the record that might have led to a finding impairment had additional evidence been presented addressing the economic criteria set forth in the FCC's TRO Order. [2] Given the great difference in Pennsylvania's urban and rural telecommunications market, I suspect that evidence could have been presented to support a finding of economic impairment in certain areas of the Commonwealth. However, specific information supporting that claim and similar ones was not part of the record and the information that was presented did not meet the thresholds established by the FCC.

I would like to remind the parties and the Commission that the FCC Rules and TRO Order provide for continuing review.[3] Specifically, the Rules state, "After the 90-day period, states may wish, pursuant to state-determined procedures to revisit whether competitive LEC's are impaired without access to unbundled local circuit switching to serve enterprise customers due to changes in the specified operational and economic criteria." *See* TRO Order, Para. 455. The Commission and the parties could exercise this authority if appropriate.

Although this is the first substantive decision that this Commission is rendering under the TRO, it will certainly not be the last. As this Commission considers future matters under the TRO, it will be important for us to look closely at the data and make difficult decisions relative to impairment and other issues. Although the FCC has given us specific criteria in certain areas, we do have flexibility in other areas. To the extent that well-supported evidence can be presented to the Commission that is tailored to the FCC's parameters, the Commission will have an improved ability to successfully guide Pennsylvania's transition to facilities based competition.

12/18/03
Date

Glen Thomas
GLEN R. THOMAS
Commissioner

[2] TRO Order, paras. 456 -457.

[3] We noted that petition for continuing review regarding the 9 month proceeding would not be accepted earlier than October 2, 2004, absent extraordinary circumstances for the continuing review October 3 Order, Footnote 13.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

December 18, 2003

REFER TO OUR FILE
I-00030100

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DOCUMENT FOLDER

DOCKETED
DEC 30 2003

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market

To Whom It May Concern:

This is to advise you that an Order has been adopted by the Commission in Public Meeting on December 18, 2003 in the above entitled proceeding.

An Order has been enclosed for your records.

Very truly yours,

James J. McNulty
Secretary

Enclosure
Certified Mail
JEH

SEE ATTACHED LIST
FOR ADDITIONAL PARTIES

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Public Meeting held December 18, 2003

Commissioners Present:

Terrance J. Fitzpatrick, Chairman
Robert K. Bloom, Vice Chairman
Glen R. Thomas, Statement attached
Kim Pizzingrilli
Wendell F. Holland

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market

Docket No. I-00030100

ORDER

BY THE COMMISSION:

Background

In 1996, Congress adopted a national policy of promoting local telephone competition through the enactment of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *amending* the Communications Act of 1934, *codified at* 47 U.S.C. §§151, *et seq.* ("Act"). [1] The Act relies upon the dual regulatory efforts of the Federal Communications Commission ("FCC") and its counterpart in each of the states, including the Commission, to foster competition in local telecommunications markets. To this end, Section 251 of the Act requires incumbent local exchange carriers ("ILECs") to provide competitive local exchange carriers ("CLECs") with non-discriminatory access to ILEC networks and services. 47 U.S.C. §251(c).

[1] Also, in 1993, the Pennsylvania General Assembly amended the Public Utility Code by adding "Chapter 30," 66 Pa. C.S. §§3001-3009, which first introduced Pennsylvanians to competition in the provision of telecommunications services and flexibility in terms of pricing and profits.

On February 20, 2003, the FCC adopted revised rules concerning an ILEC's obligation to make UNEs available to competing carriers. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange* Carriers, CC Docket No. 01-338, Report and Order (rel. Aug. 21, 2003) (FCC 03-36, as corrected by FCC 03-227) ("*Triennial Review Order*" or "*TRO*").[2] The FCC found, among other things, that an ILEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS1 capacity and above loops "except where the state commission petitions [the FCC] for waiver of this finding in accordance with the conditions set forth in [47 C.F.R. § 51.319(d)(3)(i)] and the [FCC] grants such waiver." 47 C.F.R. § 51.319(d)(3); *see also* TRO at ¶¶ 451-458. The FCC found that CLECs are not impaired without unbundled access to local switching to serve enterprise customers because there are few barriers to deploying competitive switches to serve customers in the enterprise market, and thus no operational or economic impairment on a national basis. TRO at ¶451.

On October 3, 2003, this Commission entered an order in the instant proceeding that initiated an investigation to determine whether we should petition the FCC for a waiver of the national finding. We tentatively adopted the FCC's finding, but established a procedure to allow interested parties an opportunity to demonstrate on the record why we should consider filing a waiver petition.

Six CLECs submitted the requisite formal petitions to persuade the Commission that the national finding of no impairment did not or should not apply in Pennsylvania. One joint petition was filed by Full Service Computing Corporation t/a Full Service

[2] The Commission has petitioned for review of the *Triennial Review Order* in the United States Court of Appeals for the District of Columbia Circuit at Docket No. 03-1393. The grounds of the appeal concern the jurisdiction of State commissions. The appeal has been consolidated with other cases at lead Docket No. 00-1012.

Network ("FSN"), Remi Retail Communications, LLC ("Remi"), ATX Licensing, Inc. ("ATX"), and Line Systems, Inc. ("LSI") (collectively "Pennsylvania Carriers' Coalition" or "PCC"). A second joint petition was filed by ARC Networks, Inc. d/b/a InfoHighway Communications Corp. ("InfoHighway") and Metropolitan Telecommunications Corporation of PA ("MetTel") (herinafter collecectively "ARC"). Formal responses to one or both petitions were filed by Verizon Pennsylvania Inc. and Verizon North Inc. (collectively "Verizon"), Rural Company Coalition,[3] the Commission's Office of Trial Staff ("OTS"), the Office of Small Business Advocate ("OSBA"), and the Office of Consumer Advocate ("OCA"). Verizon also filed a motion to dismiss the petitions to initiate the 90-day proceeding, or in the alternative, to strike portions of testimony and responses.

Following presentation of testimony and formal proceedings before the Office of Administrative Law Judge, the OALJ certified the record to the Commission for disposition. Thereafter, the following participants filed final briefs: Pennsylvania Carriers' Coalition, ARC, Verizon, Rural Company Coalition, and Office of Trial Staff.

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[3] The RCC Companies participating herein are ALLTEL Pennsylvania, Inc., Armstrong Telephone Company – North, Armstrong Telephone Company – Pennsylvania, Bentleyville Telephone Company, Buffalo Valley Telephone Company, Commonwealth Telephone Company, Conestoga Telephone and Telegraph Company, D&E Telephone Company, Hickory Telephone Company, Lackawaxen Telecommunications Services, Inc., Laurel Highland Telephone Company, North Penn Telephone Company, North Pittsburgh Telephone Company, Palmerton Telephone Company, Pennsylvania Telephone Company, Pymatuning Independent Telephone Company, South Canaan Telephone Company, Venus Telephone Corporation, and Yukon-Waltz Telephone Company.

The Rural Company Coalition correctly submits that the intent of this investigation was to consider the continued availability of unbundled local circuit switching for serving the enterprise market in Pennsylvania. We did not and do not intend for this proceeding to apply to incumbents who have an exemption under 47 U.S.C. § 251(f)(1). See TRO at ¶119. Pursuant to the *Triennial Review Order*, a requesting carrier is not precluded from addressing the issues of necessity and impairment in the rural exempt territories upon removal of the exemption. TRO at ¶455. In other words, the lifting of an exemption would constitute "a change in operational and economic criteria." RCC Br. at 4. For status of rural ILEC's obligations under 47 U.S.C. § 251(d), see *Petition of Rural Incumbent Local Exchange Carriers for a 36-month Suspension of Interconnection Requirements Limited to Only Those Requirements Set Forth in §251(b)(1) and (c) of the Telecommunications Act of 1996*, Order (entered Jan. 15, 2003, *as clarified)*, Docket No. P-00971177, *reversed-in-part* by *Armstrong Telecoms., Inc. v. Pennsylvania Pub. Util. Comm'n*, 2003 Pa. Commw. LEXIS 782.

The OSBA filed a letter in support of the OTS brief.[4] The matter is now ripe for our review of the record and determination of the merits.

Discussion

A. FCC Findings in the *Triennial Review Order*

In its *Triennial Review Order*, the FCC concluded that the characteristics of the enterprise market support use of self-provisioned switching in combination with unbundled loops (or loop facilities) without the imposition of substantial barriers upon the CLEC. The FCC found that CLECs are serving at least 13 million business lines through self-deployed switches -- approximately 89 percent of all unbundled loops (UNE-L) served by competitive switches. The FCC held that while enterprise market characteristics do not eliminate all of the cost and operational disadvantages that competitive carriers may face when using their own switches to serve enterprise customers, the elimination of cut over cost differentials supports a finding of no impairment. TRO at ¶453.

B. Operational Barriers

In the *Triennial Review Order*, the FCC listed criteria for use by State commissions in determining whether operational factors are impairing competitors under the FCC's impairment standard. TRO at ¶456. The FCC asks State commissions to consider: 1) the ILEC's performance in provisioning loops, 2) difficulties in obtaining collocation space due to lack of spaces or delays in provisioning by the ILEC, and 3) whether difficulties in obtaining cross-connects in an ILEC's wire center are making entry uneconomic for CLECs. TRO at ¶456.

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[4] The OCA advised that it was not filing a brief.

The FCC reasoned that the above-listed factors can raise barriers to entry, but that the FCC lacked sufficient specific evidence concerning whether and where there will be significant enough barriers to constitute impairment. In the instant proceeding, the Commission must consider whether these factors are impairing entrants in the enterprise market and whether unbundling will overcome this impairment. TRO at ¶456.

i. Petitioners' Proposed Findings and Conclusions

Regarding the enterprise market, Petitioners cite to language in the *TRO* wherein the FCC stated that: 1) the facilities used to provide DS1 capacity or above services are not pre-wired to ILEC switches, allowing CLECs to avoid the costs and service disruptions associated with hot cuts; and 2) due to the parallel delivery process, the ILEC's service to the customer is disconnected only after the CLEC's service over a new loop has been initiated, thereby avoiding service disruptions involved with hot cuts.

Petitioners and OTS argue that these findings, important to the FCC's finding of no impairment, are not true in Pennsylvania. Petitioners point out that hot cuts are still used in Pennsylvania and all existing DS1 enterprise customer loops in Pennsylvania in Verizon's network are pre-wired to the switch or the switch's distribution frame. Furthermore, any migration using a hot cut process is only available for migrating an ILEC customer to a CLEC switch if spare loop facilities are available from Verizon's central office to the customer premise. If no spare facility is available, then Verizon has no established process to migrate the customer and CLECs will not be able to provide switch-based local service, absent the DS1 Platform. PCC Revised St. 1.0 at 30; ARC St. 1.0 at 9-10.

In either case, Petitioners argue that in order to migrate service to a competitive switching facility, a "hot cut" is unavoidable in Pennsylvania. Consequently, Petitioners assert that the FCC's finding of non-impairment should be waived for Pennsylvania. They maintain that all the problems with hot cuts found by the FCC to constitute

impairment in the mass market, including service delays, service interruption, and service degradation are equally applicable to the enterprise market at issue and constitute operational impairment. PCC Revised St. 1.0 at 33.

Petitioners assert that because Verizon has not developed a process in Pennsylvania to migrate a DS1 loop from its switch to a CLEC switch at the central office, it has shifted the hot cut process to the customer premises. According to PCC, this manual hot cut process for DS1 loops at the customer premises creates aggravated problems where the period of time the customer is out of service may easily span hours and cause other service degradation that is usually blamed on the CLEC as the new carrier. PCC Revised St. 1.0 at 32-33; PCC St. 1.1 at 13-14. PCC further asserts that CLECs incur substantial costs in attempting to avoid lengthy service disruptions which ultimately affect the decision as to whether the CLEC can economically serve the customer. PCC Revised St. 1.0 at 34.

Thus, Petitioners' primary complaint has to do with the process for migrating an existing DS1 or higher UNE platform arrangement to non-Verizon switching. Petitioners acknowledge that alternative switching sources are available, but complain that it would be too troublesome and expensive for them to migrate service to another switching provider. They maintain that they are impaired because Verizon does not have a reliable process in place to cut over CLEC customers from Verizon's UNE-P in a seamless manner to alternative arrangements that employ non-ILEC switching. Petitioners allege that even if there is a spare loop facility available, the migration process results in impairment in Pennsylvania because of service delays, service interruptions or service degradation caused by the hot cut process. While still involving a manual hot cut process, the parallel service delivery process relied on by the FCC to alleviate service

disruption to enterprise customers in the migration process is generally not available in Pennsylvania.[5]

In support of the Petitioners' argument, OTS maintains that the CLECs have established a prima facie case of operational impairment. OTS avers that the unavailability of the DS1 Platform would require that a CLEC provide its own switching capacity, either through installation of switches or through collocation arrangements at the ILEC's switching facilities to serve every single DS1 customer. OTS Br. at 6-7. PCC Revised St. 1.0 at 14.

In addition, OTS opines that the Commission should consider a fairness argument in that Verizon should not be permitted to profit from its own delays and its own disregard of our *Global Order*.[6] OTS and Petitioners note the difficulty that Petitioners have had in using the DS1 Platform during the four years since the *Global Order*, which required Verizon to provide it. Apparently, during this time, Verizon had to create software to accommodate the provisioning and billing of this offering. OTS argues that had Verizon provided the CLECs with billing capabilities at an earlier time, the revenue opportunities may have enabled the CLECs to expand through switch installations so that they would be less dependent on Verizon switching. Until recently, this wholesale product was only usable if the customer was willing to spend costly sums to install PRI capability so that the CLEC could be provided with the call detail records that would allow for customer billing. PCC Revised St. 1.0 at 20-21. OTS also points to labor as another operational factor to consider citing to a chart demonstrating the eight steps required for the CLEC to migrate the customer. ARC St. 1.0 at 12-13; OTS 2.

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[5] PCC further argues that while there are local switches in active operation in Pennsylvania, and admits some of which are actively serving DS1 customers, these switches were installed years ago and are located only in the two urban centers -- Philadelphia and Pittsburgh.

[6] *Joint Petition of Nextlink et al.*, Opinion and Order (entered Sep. 30, 1999), Docket Nos. P-00991648 and P-00991649 (*Global Order*).

ii. Verizon's Proposed Findings and Conclusions

Verizon disagrees with the arguments set forth by the Petitioners and OTS. Initially, Verizon notes that the FCC directed the state commissions to consider the particular criteria listed in the *Triennial Review Order*, which include performance metrics as evidence of operational impairment. TRO at ¶456. Pursuant to the *Triennial Review Order*, Verizon refers to evidence in the record demonstrating its high proficiency in provisioning stand alone high capacity loops to CLECs in Pennsylvania. Verizon points to carrier-to-carrier (C2C) reports that evince good performance. In addition, Verizon contends that 99 percent of the unbundled DS1 and higher stand alone loops Verizon provisions in Pennsylvania are used in conjunction with non-Verizon switches and that Verizon's metrics establish good performance in provisioning those loops. VZ St. 1.0 at 6, 8-9. For example, Verizon PA has satisfied the 95 percent standard for OR-1-06 percent On Time LSR/ASR Facility Check DS-1 in each month. In some months, 99 percent of the orders were processed on time. Verizon also maintains that it has consistently proved parity services on PR-4-01 "% Missed Appointment –Verizon –DS-1" and PR-6-01 "% Installation Troubles Reported with 30 Days.[7]

Second, Verizon takes issue with Petitioners' alleged operational issue regarding parallel provisioning and the lack of a procedure to perform hot cuts for high capacity loops. Verizon asserts that parallel provisioning is acceptable to the FCC and maintains neither argument is included among the requisite criteria this Commission should consider. Consequently, according to Verizon, the Petitioners are essentially attempting to reverse the FCC's own findings by asking this Commission to conclude that the parallel provisioning process and the absence of a high capacity hot procedure constitute a basis of impairment. Flowing from this argument is the Petitioners' repeated claims

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[7] We do not find the above referenced performance metrics helpful. OR-1-06 merely references the order confirmation timeliness, not the provision of the service itself. While PR-4- 01 measures timeliness of the provisioning of existing process orders, migration availability issues presented by Petitioners are not

that the parallel delivery process is labor intensive and time consuming. While Verizon admits that the process of installing or modifying service for DS1 and higher customers is more complex than ordinary voice service, Verizon argues that this is not a basis for impairment.

Verizon also avers that there is ample evidence that competitors are not impaired, and that the situation in Pennsylvania is no different from the national situation in this regard. Competing carriers operate at least 54 known local circuit switches that are physically located within Pennsylvania, and approximately 24 competing carriers of all sizes have deployed local circuit switches in Pennsylvania. Verizon St. 1.0 at 3. In fact, Verizon asserts that Petitioners ATX and FSN both admitted to having their own switches in Pennsylvania from which they serve DS1 customers, (PCC Revised St. 1.0 at 3 & 9), and that about 99 percent of all DS1 and higher UNE loops that competitors use in Pennsylvania use their own switching, not Verizon's.

Lastly, Verizon points out that Petitioners have not alleged any difficulties in obtaining collocation space or delays in obtaining cross-connects in Verizon's or any other ILEC's wirecenter. VZ Br. at 10-11.

B. Economic Criteria

For a state to rebut the FCC's finding of no impairment, the FCC listed the criteria that must be examined in determining whether economic factors are impairing competitors under the FCC's impairment standard. TRO at ¶457. According to the *Triennial Review Order*, state commissions must: 1) weigh CLECs' potential revenues from serving enterprise customers in a particular geographic market against the cost of entry into that market, including all likely revenue to be gained from entering the enterprise market (not necessarily any carrier's individual business plan), including

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addressed by this metric. After reviewing PR-6-01, it is unclear whether the "troubles," as described by the Petitioners, fall within the parameters of "trouble" as described in PR-6-01.

revenue derived from local exchange and data services; 2) consider the prices entrants are likely to be able to charge, after considering the prevailing retail rates the ILECs charge to different classes of customers in the different parts of Pennsylvania; and 3) consider the CLEC's cost of entry into a particular geographic market, including costs imposed by both operational and economic barriers to entry. TRO at ¶457.

i. Petitioners Proposed Findings and Conclusions

Petitioners generally define two markets: 1) the Philadelphia and Pittsburgh Urban Centers comprising one market, and 2) the rest of the Commonwealth as the second market. While PCC suggests that economic impairment exists throughout the state, it is easier for CLECs to provide high capacity service using their own switching in Philadelphia and Pittsburgh.[8] PCC avers that impairment becomes overwhelming as one moves outside of Philadelphia and Pittsburgh markets and into the more rural areas of Pennsylvania. To support this statement, PCC states that it is generally economically unviable for ATX to extend its switch coverage outside of the Philadelphia metropolitan area. PCC Revised St. 1.0 at 27-28. In agreement, OTS avers that entry into the more rural markets of Pennsylvania is not economically feasible without access to the DS1 Platform. OTS Br. at 14; PCC Revised St. 1.0 at 7-11, 35, & 36.

Utilizing a business case prepared by FSN, PCC maintains that CLECs will be economically impaired, particularly outside of the urban center market, without a DS1 Platform. PCC admits that while it may be economically viable to raise the investment necessary to install a switch in areas dense with DS1 customers, the economies break down outside the urban centers. PCC asserts that the availability of a DS1 Platform would significantly enhance its ability to expand its DS1 customer base and that removal of viable wholesale access will not yield forced deployment, but will result in companies,

[8] ARC relies on upon the evidence of operational impairment in this proceeding and did not put forth an argument in its brief regarding economic criteria as a basis of impairment.

like ATX, being excluded from offering service in markets incapable of economically justifying the deployment of multiple switches. Ultimately, customers in those markets will be denied competitive alternatives. PCC Revised St. 1.0 at 26-27.

PCC addressed what an entrant is likely to be able to charge for local service in consideration of Verizon's prevailing retail rates for an average DS1 customer. According to PCC Exhibit 1, FSN, as an average entrant, charges DS1 customers a rate of $440 per month for local service, in contrast to Verizon's prevailing local rate of $533.83 for a DS1 customer. PCC theorizes that while entrants will adopt different pricing strategies, an entrant must provide a deep discount to attract a potential DS1 customer. Without the DS1 Platform, the ability of CLECs to serve enterprise customers will be threatened.

PCC next reiterates its argument that Verizon has not complied with the *Global Order* and that operational impairment exists when a CLEC cannot serve a customer or if the CLEC runs the risk of losing customers through operational problems caused by its largest competitor. PCC asserts that Verizon has refused to comply with our requirements and the requirements of Verizon's own tariff to provide EELs with concentration per the *Global Order*.[9]

Lastly, PCC avers that in evaluating the impairment issue, the Commission should not overlook the importance of the availability of DS1 unbundled local circuit switching as a critical facilitator in the transition to next-generation switching technology, commonly referred to "soft switching," as well as in deployment of VoIP and other packet-switched transport technologies. PCC maintains that in the absence of DS1 Platform, CLECs will be required to either commit to spending capital resources on "inferior legacy" equipment in an attempt to replicate the ILEC's network or freeze its

[9] We are not aware of the filing of any formal complaint to resolve this allegation.

business plans until next generation technology has matured to support the full features necessary for commercial roll-out.

ii. Verizon's Proposed Findings and Conclusions

In response to PCC's argument, Verizon asserts that FSN's study is faulty because it does not address the FCC's economic impairment criteria, is generally irrelevant because it only reflects FSN's unique business strategy, and, without explanation, posits a dollar amount that FSN would charge customers for a DS1 loop. Verizon asserts that the business case ignores revenues that could be gained from other high-capacity services or the additional revenues that can be obtained from entering the enterprise market.

In addition, Verizon argues that FSN's business case contains one price that it contends Verizon charges for a comparable DS1 loop and does not consider the prices to different classes of customers in the different parts of the state. This is contrary to the *Triennial Review Order* which specifies that "states should consider the prices entrants are likely to be able to charge, after considering the prevailing retail rates the incumbents charge to the difference classes of customers in the different parts of the state." TRO at ¶457.

Verizon further maintains unbundling will not be granted merely because certain competitors or entrants with certain business plans are impaired. See TRO at ¶115. Verizon argues that FSN's business case is based entirely on FSN's own business strategy and does not address the other CLECs that make up the enterprise market. Moreover, Verizon asserts that Petitioners have failed to specifically weigh the costs of entry versus all of the potential revenues for high capacity customers.

Analysis

At the outset, the Commission emphasizes that it has made the following determination based on the specific evidence submitted in this record. Relying on the record before us, we do not find any compelling justification to petition the FCC for a waiver of no impairment for local switching in the enterprise market. With this being said, however, pursuant to our *Global Order* of 1999 and 47 U.S.C. § 271(c)(2)(B)(vi), Verizon Pennsylvania Inc. (VZ-PA) has a continuing obligation to provide requesting carriers with access to its local circuit switching that will be discussed later in this order. The United Telephone Company of Pennsylvania d/b/a Sprint and Verizon North Inc., the two other Pennsylvania ILECs subject to the FCC's determination regarding switching for the enterprise market, are not affected by this continuing obligation.

In regard to the 90-day investigation, Petitioners rest the crux of their impairment claim on a challenge to the FCC's assumption regarding the existence of the parallel delivery process in Pennsylvania. A parallel delivery system permits the ILEC's service to the customer to be disconnected only after the CLEC's service over a new loop has been initiated, thereby avoiding service disruptions associated with hot cuts. TRO at ¶421. The FCC further stated that hot cuts will only cause service outages of ten to thirty seconds as their numbers are updated in the industry databases used to route calls. TRO at ¶451. Petitioners suggest this process, in fact, is not in place in Pennsylvania because customers generally do not purchase the necessary excess capacity for a parallel migration. Therefore, according to Petitioners, DS1 migration still involves a manual hot cut process. It is this hot cut process which the Petitioners complain about.

This complaint is not sufficient to demonstrate that CLECs would be impaired. Contrary to Petitioners' claims, they have not demonstrated that the parallel migration process is so complex that it forms a basis of impairment. Petitioners' claims rely on anticipatory difficulties and possible disruptions of service. We find that this uncertainty is not enough to establish impairment. Moreover, Petitioners fail to allege difficulties in

obtaining collocation due to lack of space or delays in provisioning or difficulties in obtaining cross-connects in any Verizon wire center. Given the lack of development of the record before us and the ambiguity as to a genuine conflict, we do not have any reason to petition the FCC for a waiver at this time.[10]

In making this determination, we observe that Verizon has recognized that parallel provisioning is the accepted standard for DS1 and higher capacity loops. In its testimony, Verizon maintains that parallel provisioning is recommended by the FCC for DS1 and higher facilities. VZ St. 1 at 6-7. Because Verizon relies on parallel provisioning as a ground for denying Petitioners' petition, we expect that Verizon will comply with the *TRO* and endeavor to provide parallel provisioning as the accepted standard for DS1 and higher capacity loops to eliminate potential service disruptions.

Continuing Obligations of Verizon Pennsylvania Inc.

As mentioned above, our determination to deny Petitioners' request for a waiver petition to the FCC does not relieve VZ-PA of its obligations under separate authority to provide requesting carriers with access to its local circuit switching. Access obligations are imposed independently by our order in the matter of *Joint Petition of Nextlink, et al.*, Opinion and Order (entered Sep. 30, 1999), Docket Nos. P-00991648 and P-00991649 (*Global Order*) and 47 U.S.C. § 271(c)(2)(B)(vi). *See also* Verizon Pennsylvania Inc. Tariff No. 216; 66 Pa. C.S. § 3005(e).

First, we previously decided in the *Global Order* that VZ-PA's obligation to provide UNE-P to CLECs service business customers with total billed revenue (TBR)

[10] In light of our holding, we note that the *Triennial Review Order* provides for a transitional period. Each requesting telecommunications carrier must transfer its end-user customers served using DS1 and above capacity loops and unbundled local circuit switching to an alternative arrangement within 90 days from the end of the 90-day state commission consideration period, unless a longer period is necessary to comply with a "change of law" provision in an applicable interconnection agreement. 47 C.F.R. §51.319 (d)(3)(ii)(A). See also 47 C.F.R. §51.319 (d)(5)(ii). But, see *infra*.

from local services and intraLATA toll services at or below $80,000 annually would continue through December 31, 2003. *Global Order* at 90; see also 66 Pa. C.S.§3005(e) (cited in support by PCC Br. at 53; OTS Br. at 17). Based on the positions of the parties, we assume that the TBR standard generally coincides with the enterprise market customers at issue in this case. In the *Global Order*, we invited VZ-PA to demonstrate that UNE-P would not be necessary to serve such end-user customers after December 31, 2003. *Id.* VZ-PA has not made a filing to date, therefore, the obligation continues.

Verizon argues that our *Global Order* requirement is inconsistent with the FCC's new framework set forth in the *TRO*, frustrates its implementation, and therefore, cannot stand under preemption principles. VZ Br. at 29-33. Verizon's argument is not without force, but the language in the *TRO* is not clear.[11]

On this issue, the *TRO* merely provides that it is "unlikely that [a state unbundling] decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of [47 U.S.C. §] 251(d)(3)(C)." TRO at ¶195 (emphasis added). Since the record in this case was developed for the specific purpose of deciding whether to petition the FCC for a waiver of the national no-impairment finding for switching in the enterprise market, it is an inadequate basis upon which to make a determination as to whether enforcement of the *Global Order* requirement would "substantially prevent" implementation of the purposes of the federal Act in opening local telecommunications markets to competition. See TRO at ¶194. Given the lack of record development and the uncertainty as to an actual conflict, as well as our open and

[11] The subject matter of our pending federal appeal of the *Triennial Review Order* concerns the jurisdiction of State commissions to supplement the national unbundling requirements or otherwise make access determinations under the federal Act. In this appeal, State Petitioners have argued that the *TRO* appears to preempt independent state access obligations in violation of 47 U.S.C. §251(d)(3) and the structure of the Act. The CLECs argue, however, that the preemption question is not ripe. *USTA v. FCC*, Docket Nos. 00-1012 and consolidated cases, Opening Brief of CLEC Petitioners (D.C. Cir., filed Dec. 1, 2003). The question of preemption is being litigated in federal court and we do not have sufficient information at this time to forecast the FCC's interpretation of its order.

unanswered invitation to VZ-PA to demonstrate that the *Global Order* requirement can be retired, we will not change the status quo vis-à-vis access at this time.

This decision to maintain the status quo is further supported by VZ-PA's undisputed continuing obligation under 47 U.S.C. § 271(c)(2)(B)(vi) to provide access to local circuit switching.[12] TRO at ¶653. Thus, VZ-PA must continue to provide access to local circuit switching to requesting carriers for the purpose of serving end-user customers using DS1 capacity and above loops.

The rate to be charged is a more complicated question. Under the *Global Order*, the rate to be charged is the rate contained in VZ-PA's Tariff No. 216. *Global Order* at 90. The Tariff No. 216 rates are "just and reasonable." 66 Pa. C.S. § 1301. Under Section 271, the rate to be charged must also be "just and reasonable" pursuant to the standards of 47 U.S.C. §201. TRO at ¶¶662, 665. The FCC asserts the Section 201 standard is one "fundamental to common carrier regulation that has historically been applied under most federal and state statutes." TRO at ¶663. Thus, the FCC appears to suggest that a rate that meets the Pennsylvania "just and reasonable" standard could satisfy the federal standard.

There remains a dispute as to which regulator determines whether a rate is just and reasonable under the federal standard. Parties to this litigation have taken different positions on the issue. ARC urges us to defer the pricing issue to a separate proceeding. ARC Br. at 8. Verizon argues the FCC has exclusive jurisdiction to review pricing under Section 271, apparently asserting that Verizon sets the rate in the first instance subject to

[12] The Verizon companies have filed a forbearance request with the FCC to be relieved of certain section 271 obligations. As of this writing, the request is pending in the matter of *Petition for Forbearance of the Verizon Telephone Cos. Pursuant to 47 U.S.C. § 160(c)*, CC Docket 01-338. See also TRO at ¶ 655, n. 1990 (declining to require VZ-PA to combine network elements under § 271).

review by the FCC in an enforcement proceeding under 47 U.S.C. § 271(d)(6). VZ Br. at 28.

We decline to embroil ourselves in this dispute at this time. For now, we believe it is sufficient to find that there are existing approved Pennsylvania-specific rates under Tariff No. 216. If there is a pressing need to address this issue, then the affected party should file a timely request for reconsideration. Accordingly, absent language to the contrary in an approved interconnection agreement (*e.g.*, a voluntary negotiated rate), VZ-PA shall charge the tariff rate for access to its network as long as the *Global Order* requirement remains in place.

Finally, we caution carriers against assuming VZ-PA's obligation to provide access to local circuit switching for the enterprise market and/or rate obligations will continue indefinitely. In addition to our determination not to petition for waiver, we emphasize that we have made a prior determination in the *Global Order* that questions the continued availability of a Pennsylvania-specific UNE-P requirement after December 31, 2003; **THEREFORE,**

IT IS ORDERED THAT:

1. The petition of ARC Networks, Inc. d/b/a InfoHighway Communications Corp. and Metropolitan Telecommunications Corporation of PA is denied.

2. The petition of Full Service Computing Corporation t/a Full Service Network, Remi Retail Communications, ATX Licensing, Inc., and Line Systems, Inc. is denied.

3. Verizon Pennsylvania Inc. remains obligated to provide requesting carriers with access to its local switching pursuant to our order in the matter *Joint Petition of Nextlink et al.*, Opinion and Order (entered Sep. 30, 1999), Docket Nos. P-00991648 and P-00991649 (*Global Order*), at the rates contained in Verizon's approved tariff.

4. Verizon's Motion to Dismiss and Motion to Strike Portions of the Testimony and Responses is denied as moot.

BY THE COMMISSION

James J. McNulty
Secretary

(SEAL)

ORDER ADOPTED: December 18, 2003

ORDER ENTERED: DEC 18 2003