ORIGINAL

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Vice President and General Counsel
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DOCUMENT

October 27, 2003

Public Version

[redacted]

VIA UPS OVERNIGHT DELIVERY
James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market
Docket No. I-00030100

Dear Mr. McNulty:

On Friday, October 24, 2003, Verizon Pennsylvania Inc and Verizon North Inc. filed with the Commission a Motion To Dismiss The Petitions To Initiate 90-Day Proceedings, Or In The Alternative To Strike Portions Of Testimony And Response To Petitions To Initiate Proceedings, and Direct Testimony of Debra M. Berry. However, in that filing, Verizon inadvertently failed to note that some of those documents contained information that is proprietary to Verizon. Therefore, we are enclosing a replacement original and three copies of those same documents with proprietary information indicated. I am also enclosing an expurgated version for your use.

We regret any inconvenience this may have caused. Please do not hesitate to contact me if you have any questions.

Very truly yours,

Julia A. Conover

JAC/dkf
Enc.

Via E-Mail and UPS Overnight Delivery
cc: Honorable Michael Schnierle
Attached Certificate of Service

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

Investigation into the	:	
Obligation of Incumbent	:	Docket No.
Local Exchange Carriers	:	I-00030100
to Unbundle Local Circuit	:	
Switching for the Enterprise Market	:	

MOTION OF VERIZON PENNSYLVANIA INC. AND VERIZON NORTH INC. TO DISMISS THE PETITIONS TO INITIATE 90- DAY PROCEEDINGS, OR IN THE ALTERNATIVE TO STRIKE PORTIONS OF TESTIMONY, AND RESPONSE TO PETITIONS TO INITIATE PROCEEDINGS

EXPURGATED VERSION

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October 24, 2003

RJP

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I. INTRODUCTION

Verizon Pennsylvania Inc. ("Verizon PA") and Verizon North Inc. ("Verizon North") (collectively "Verizon") respond to the Petitions to Initiate 90-day proceedings filed by two separate groups of competitive local exchange carriers ("CLECs").

As the Commission is aware, the Federal Communications Commission ("FCC") has already concluded that "competitors are not impaired with respect to DS1 enterprise customers that are served using loops at the DS1 capacity and above." [1] The FCC made this "national finding" because there are "few barriers to deploying competitive switches to service customers in the enterprise market at the DS1 capacity and above . . . ." *Id.* The FCC has given state commissions 90 days from the effective date of the FCC's *Triennial Review Order ("TRO")* to petition the FCC to waive this national finding regarding enterprise switching. *Id.* ¶ 455. A state commission that wishes to do so must make "an affirmative finding" demonstrating impairment for enterprise switching and can do so only by applying specific and mandatory criteria. *Id.*¶¶ 456-57.

In its October 2 Procedural Order, the Commission "tentatively concluded" that there was no impairment for enterprise switching, and directed any "CLEC seeking to persuade the Commission to make a showing to rebut the national finding." *Procedural Order* at 8.

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[1] *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 03-36 (rel. August 21, 2003) ("*TRO*") ¶ 451.

While there are a significant number of CLECs operating in Pennsylvania, only two petitions to initiate proceedings were filed (by a collection of five CLECs). These petitions are filled with theories, opinions, and fist-shaking at the FCC. But they are devoid of the detailed and specific facts this Commission sought as part of its Procedural Order – the same specific facts that the FCC will require if ***this*** *Commission* attempts before the FCC to make an "affirmative finding" of impairment for enterprise switching.

This Commission is under no obligation to conduct a 90-day proceeding. Both petitions are facially deficient, and for the reasons set forth in more detail below, should be dismissed out of hand. If the Commission determines not to dismiss these inadequate petitions, then the Commission must strike the irrelevant material that is far beyond the proper scope of this proceeding – whether there are specific facts related to the FCC's mandatory criteria that rebut the FCC's national finding of no impairment for enterprise switching.[2] Given all that the FCC has asked this Commission to do in the next nine months, the Commission does not have the luxury of squandering its resources on issues that have no bearing on its determination.

II. BACKGROUND

On August 21, 2003, the Federal Communications Commission (FCC) released its long-awaited *TRO*. Among many other findings, the *TRO* made a national finding of "no impairment" for unbundled switching used to serve enterprise customers at DS1 capacity

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[2] For ease of the Commission's reference, Verizon is including in separate sections of this unitary pleading the pertinent factual and legal background and then (1) a Motion to Dismiss (Section III), (2) a Motion to Strike (Section IV), and (3) a Response to the respective Petitions (Section V). Verizon also submits its Statement 1.0, the Direct Testimony of Debra M. Berry, in support of any factual statements made in this pleading.

and above, and set forth a limited and specific process by which state commissions might challenge this finding before the FCC via a "90-day proceeding."[3]

The *TRO's* "national finding" of no impairment for enterprise switching was based on evidence that there are "few barriers to deploying competitive switches to service customers in the enterprise market at the DS1 capacity and above . . . ." *TRO* ¶ 451. The FCC found that there was no operational or economic impairment without access to unbundled switching for such customers, and concluded that "denial of access to unbundled switching would not impair a competitor's ability to serve the enterprise markets, including all customers which are served by the competitor over loops of DS1 capacity and above." *Id* ¶ 452-53.

The FCC's national finding can only be displaced ***by the FCC itself***, upon review of petitions for waiver filed with the FCC by state commissions, based on factors explicitly enumerated in the *TRO*. *TRO* ¶ 428, note 1315. Any such petition must be filed within 90 days from the effective date of the Order, or by December 31, 2003.[4] *TRO* ¶ 455. The FCC directed that state commissions may petition the FCC to rebut the

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[3] The FCC's finding of "no impairment" means that the FCC has found that circuit switching for DS1 capacity and above does not qualify under 47 U.S.C. § 251(d)(2)(B) as a network element that must be unbundled under the federal Telecommunications Act. Therefore it also do not qualify for TELRIC pricing, which is authorized by the Act only for elements that qualify for unbundling under section 251 of the Act. *See id* ¶ 656 ("Contrary to the claims of some of the commenters, TELRIC pricing for . . . network elements that have been removed from the list of section 251 UNEs is neither mandated by the statute nor necessary to protect the public interest. Rather, Congress established a pricing standard under section 252 for network elements unbundled pursuant to section 251 **where impairment is found to exist.**") (emphasis in original). A finding of no impairment also eliminates any obligation on the part of an ILEC to "bundle" the network element with other network elements.

[4] The *TRO* was published in the Federal Register Tuesday, September 2, 2003 and, pursuant to ¶ 830, was effective in 30 days, on October 2, 2003.

national finding of "no impairment" based on "specific" operational and economic evidence that differentiates the state from the national situation in which the FCC found no impairment. *TRO* ¶ 421. The only evidence that is relevant to demonstrate operational impairment is evidence to show that the "incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive LECs." *TRO* ¶ 456. The only evidence that is relevant to demonstrate economic impairment is evidence that weighs "competitive LECs' potential revenues from serving enterprise customers in a particular market against the cost of entry into that market." TRO ¶ 457. As will be demonstrated below, the Petitioners have not put forth the necessary detailed, state-specific evidence on these issues that would be essential to support a Commission petition for waiver to the FCC. Finally, the FCC was explicit that the economic analysis in any 90-day proceeding cannot be based on any one carrier's individual business plan. *TRO* ¶ 457.

The Commission is not free to reconsider the policy determinations and factual criteria set forth by the FCC, but rather must conform its inquiry to them. According to the FCC:

> While we delegate to the states a role in the implementation of our federal unbundling requirements for certain network elements that require ... [a] more granular approach, we make clear that any action taken by the states pursuant to this delegated authority must be in conformance with the Act and the regulations we set forth herein.[5]

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[5] *TRO* ¶ 186.

Only factual showings that conform to the factors explicitly enumerated in the TRO are properly raised in a 90-day proceeding.

This Commission issued a *Procedural Order* on October 2 that, among other things, directed any "CLEC seeking to persuade the Commission to make a showing to rebut the national finding" of no impairment with respect to local switching combined with DS1 capacity and higher loops to file a Petition to Initiate setting forth all applicable matters of law, policy and fact. "Given the national finding of no impairment, we tentatively conclude there is no impairment in Pennsylvania. Therefore, any CLEC desiring to contest the presumption of nonimpairment must bear the burden of proving impairment." (*Procedural Order* at 8).

Two Petitions to Initiate Proceedings were filed. The first was a joint filing of Arc Networks, Inc. d/b/a InfoHighway ("InfoHighway") and Metropolitan Telecommunications Corporation of PA ("MetTel"). The second was filed by a group of CLECs calling themselves the Pennsylvania Carriers' Coalition ("PCC"), consisting of Full Service Computing Corporation t/a Full Service Network ("FSN"), Remi Retail Communications, LLC ("Remi"), ATX Licensing, Inc. ("ATX") and Line Systems, Inc. ("LSI").

III. MOTION TO DISMISS

In light of the FCC's tentative finding of no impairment for enterprise switching, CLECs advocating impairment were required by this Commission to "make a showing to rebut" the FCC's national finding on no impairment. Neither Petition has offered a sufficient legal or factual basis to rebut the FCC's national finding. Having failed to meet this initial burden, the Petitions should be summarily dismissed.

A. The Commission Should Dismiss The InfoHighway/MetTel Petition For Failure To State A Claim

InfoHighway and MetTel ask this Commission to do three things: (1) seek a waiver from the FCC from the finding of "no impairment" as to their "installed base" of customers currently being served over DS1 or higher UNE-P arrangements; (2) require Verizon to continue to charge its current (TELRIC-based) switching rate going forward until this Commission determines the "lawfulness" of the switching rates for switching that may be required under a basis other than section 251 of the Act; and (3) take "notice" that 90 days is not sufficient time for them to make their case. All three of these contentions should be dismissed for failure to state a claim.

InfoHighway's and MetTel's request that the Commission file a petition for waiver regarding the embedded base should be dismissed because these petitioners have not even attempted to come forth with the detailed and specific factual evidence regarding operational and economic impairment that this Commission would have to present to the FCC if it were to file such a petition for waiver. Indeed, rather than coming forward with the mandatory state-specific evidence, these petitioners are asking this Commission to review the ***same*** generic type of evidence and arguments that were duly considered by the FCC, and to find that the FCC "fundamentally misunderstood" the facts that were before it and the FCC's "logic is deficient." (Declaration of Karoczkai, etc. at 5 and 9). This Commission is not sitting as a Court of Appeals to review and second-guess the FCC's findings, but rather "any action taken by the states pursuant to

this delegated authority must be in conformance with the Act and the regulations we set forth" in the *TRO*.[6]

The only specific argument regarding "impairment" that the InfoHighway/MetTel testimony puts forward is the claim that the "parallel delivery" process discussed at length by the FCC is "not as seamless or efficient as the FCC's description would have one believe," and that it will therefore be "labor intensive and time consuming" for these parties to move their existing customers to another switching provider. (Declaration of Karoczkai, etc. at 11-12). The parallel delivery process is how service is generally initiated for CLEC high capacity loops, instead of the traditional "hot-cut" that is used for ordinary voice loops. Parallel delivery "generally involves the initiation of service to the competitors' new digital loop while the incumbent's service remains in place. . . [W]here enterprise customers are being converted from the digital facilities, the competing carrier installs and initiates service on a new digital loop in parallel with the customer's existing service. . . . [T]he incumbent's service is disconnected only after the competitor's service over a new loop has been initiated." *TRO* ¶ 451. The FCC found that as a result of this parallel delivery process "competitive carriers neither incur the costs of hot cuts nor experience the quality degradation associated with the cut over process to serve customers with loops with DS1 capacity and above." *Id.* The petitioners' contention that the FCC was wrong and failed to consider the petitioners' arguments is not sufficient to state a claim for a 90 day case.

InfoHighway and MetTel have not even attempted to come forward with any of the state-specific evidence the FCC stated was required to demonstrate operational or

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6 *TRO* ¶ 186.

economic impairment for this Commission to petition for a waiver of the finding of no impairment. On operational impairment, they raise no issue with Verizon's specific performance in provisioning loops in Pennsylvania (which, as discussed in the responsive section of this pleading, is very good). They do not allege difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC (which, as discussed in the responsive section of this pleading, they would not be able to demonstrate). They do not allege difficulties in obtaining cross-connects in an incumbent's wire center (where again Verizon's metrics demonstrate good performance, as discussed in the response). *TRO* ¶ 456.

They make no effort to demonstrate economic impairment, either, as they come forward with no evidence addressing "competitive LECs' potential revenues from serving enterprise customers in a particular market against the cost of entry into that market." *TRO* ¶ 457. In short, they have failed to state a claim under the FCC's strict standards for a 90-day case. In fact, these petitioners candidly admit that they have not really attempted to demonstrate impairment, lamenting that the FCC has set them to an "impossible task" and that they cannot "prepare and submit the impairment data needed." (Declaration of Karoczkai, etc. at 15). Petitioners' claim that they are "certain that there are many areas throughout the state of Pennsylvania in which carriers are economically impaired from providing DS1 enterprise service in the absence of ULS" is insufficient on its face.

Similarly, InfoHighway's and MetTel's request that this Commission require Verizon to continue to charge its current (TELRIC-based) switching rates for switching even where the FCC has ruled that switching is not required to be unbundled under

section 251 of the Act must be dismissed. The FCC has made clear that TELRIC pricing only applies to UNEs required under section 251. "Contrary to the claims of some of the commenters, TELRIC pricing for . . . network elements that have been removed from the list of section 251 UNEs is neither mandated by the statute nor necessary to protect the public interest. Rather, Congress established a pricing standard under section 252 for network elements unbundled pursuant to section 251 ***where impairment is found to exist."*** [7] Both the statute and the *TRO* make clear, moreover, that jurisdiction to review the pricing for any switching that might be required under section 271 of the Act (relating to long distance authority) lies exclusively with the FCC. First, section 271 of the Act itself makes clear that ***only the FCC*** may determine if section 271's obligations have been met, and that a state commission's role is limited to "consultation" before 271 authority is given.[8] Second, in the *TRO*, the FCC stated that "[i]n the event that a BOC has already received section 271 authorization, section 271(d)(6) grants ***the Commission*** enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271."[9] As to the pricing of a network element that must be unbundled solely by virtue of a 271 obligation, the *TRO* is clear that state commissions have ***no*** role. The pricing is not based on TELRIC but on the "just and reasonable" standard of sections 201 and 202, and this standard "is a fact-specific inquiry that ***the Commission*** will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)."[10]

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7 (emphasis in original). *See id* ¶ 656

8 47 U.S.C. § 271.

9 *TRO* ¶ 665.

10 *Id.* ¶ 664. This standard can be satisfied, for example, by evidence that a rate has

Finally, the claim that this Commission should take "notice" that the FCC has somehow set these petitioners an "impossible" task is baseless on its face and should be dismissed. It is for the Courts of Appeals reviewing the FCC's decision to determine if the 90-day procedure is faulty. This Commission does not have the jurisdiction to do so.

B. The Commission Should Dismiss The Pennsylvania Carriers' Coalition Petition For Failure To State A Claim

While longer than the other petition, the PCC petition is equally devoid of any relevant state-specific facts and also fails to make a prima facie case that this Commission should petition the FCC for a waiver of the "no impairment" finding with respect to enterprise switching.

The PCC petitioners also seek to second guess the FCC's findings with regard to the parallel provisioning process. For example, they argue that the FCC was wrong in finding that DS1 facilities are not pre-wired to ILEC switches, and that all "existing" DS1 loops are already wired to the ILEC's switch. (PCC Petition at 6). The FCC meant that the new facilities used in the parallel provisioning process were not pre-wired. Of course existing loops in service using the ILEC switch would be connected to the ILEC switch, but that would not be unique to Pennsylvania and was certainly something the FCC was aware of when it made its decision. The PCC petitioners also claim, without a shred of evidence, that spare facilities are sometimes not available and that their end users might experience some complexities in the provisioning of the parallel facilities, but again these issues are not unique or specific to Pennsylvania. Finally, they complain that Verizon does not have a process to cut over an existing DS1 loop if there is no spare facility, but aside from the technical infirmity of this argument (discussed in Verizon's response to

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been adopted as a result of an arms-length agreement.

the petition) the lack of such a process is not something unique to Pennsylvania or even to Verizon, but is something that the FCC was well aware of, which is why it discussed the parallel provisioning process.

The PCC petitioners have not even attempted to come forward with any of the state-specific evidence the FCC stated was required to demonstrate operational or economic impairment and have not provided the type of evidence this Commission would need to petition for a waiver of the finding of no impairment. On operational impairment, they raise only generalities that could apply anywhere and provide no specific facts regarding Verizon's performance in provisioning DS1 loops in Pennsylvania (which, as discussed in the responsive section of this pleading, is very good). They do not allege difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC (which, as discussed in the responsive section of this pleading, they would not be able to demonstrate). They do not allege difficulties in obtaining cross-connects in an incumbent's wire center (where again Verizon's metrics demonstrate good performance, as discussed in the response). *TRO* ¶ 456.

They make no real effort to demonstrate economic impairment, either. *TRO* ¶ 457. While they submit a barely explained one-page document apparently constituting a "business case" for how many DS1 customers a CLEC must have to turn a profit using Verizon's facilities, they submit no evidence on the issues the FCC stated were relevant to an economic impairment analysis, such as the revenue opportunities for such customers or their willingness to enter into long term contracts. They failed to attempt to demonstrate the revenues CLECs have gained from entering the enterprise market,

including revenues derived from local exchange and data services or the prices CLECs are charging enterprise customers in different parts of the state. *TRO* ¶ 457.

The PCC petitioners' complaints about their own business strategies are irrelevant. In the *TRO* the FCC emphasized that unbundling cannot be ordered "merely because certain competitors or entrants with certain business plans are impaired." *TRO* ¶ 115. The FCC concluded that the only CLEC costs that are applicable for purposes of impairment are those that for CLECs in general "are sufficient to prevent economic entry." Costs that "any new entrant would bear" – such as the cost of a switch – may not be considered. *TRO* ¶ 454 n. 1392. An economic investigation in any 90-day proceeding must be focused on all CLECs, not just the petitioners here. Although no other CLECs have requested a 90-day case, any impairment determination must still be based on whether CLECs in general are impaired, not whether a single CLEC believes it is impaired, given its particular business plan. In short, they have failed to state a claim under the FCC's strict standards for a 90-day case.

IV. MOTION TO STRIKE

Even if the Commission determines not to dismiss the petitions and to make a decision on the merits, it still should strike those portions of the petitions and testimony that are not properly considered in the limited 90 day proceeding authorized by the *TRO*. Given the TRO's explicit instructions regarding the kind of showing that is required to rebut the national finding of no impairment, and the short time available for this inquiry, the Commission must limit parties to putting forth cases that are within the scope of the Order.

First, the Commission should strike all of the PCC's references to state law bases to require unbundling, such as Chapter 30 or the *Global Order*. The FCC was very specific on the factors the Commission can present in a petition for waiver, and they relate only to the question of whether there is impairment under section 251 of the Act. This Commission cannot petition the FCC on the basis of state law. Therefore, state law arguments are irrelevant to this limited and highly expedited proceeding. In addition, as discussed in more detail later in this brief, any attempt to expand unbundling obligations under "state law" to situations where the FCC has made a national finding of no impairment would be preempted. The FCC was clear that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations," and state commissions may not impose additional unbundling obligations in the context of their review of interconnection agreements. *TRO*, ¶¶ 187 & 194. Nor can separate state unbundling requirements serve as a justification for an examination of network elements that the FCC has decided should not be unbundled. "We limit the states' delegated authority to the specific areas and network elements identified in this Order." *TRO*, ¶ 189. The FCC recognized that it was possible that some state unbundling requirements would be inconsistent with the FCC's Triennial Review determinations, but properly concluded such requirements could not serve as a basis for modifying the FCC's unbundling determinations. Instead, states must "amend their rules and . . . alter their decisions to conform to our rules." *TRO*, ¶ 195. Accordingly, the Commission should strike the PCC Petition, pages 10-14 and p. 17, paragraph 6 and the PCC Testimony p. 29-40.

The Commission should also strike all references to section 271 of the Act and whether it provides an independent basis to require unbundling. As discussed above, the requirements of section 271 and the pricing to be applied are exclusively within the FCC's jurisdiction. Accordingly, the Commission should strike the InfoHighway/MetTel Declaration p. 14, line 4 through p. 15, line 9.

Finally, the Commission should strike all of the petitioners' arguments contending that the FCC was wrong, misunderstood the evidence or reached an erroneous conclusion. Those arguments are only properly made to the Courts of Appeals. The FCC's findings are binding on this Commission.

V. VERIZON'S RESPONSES TO PETITIONS

A. There Is Ample Evidence To Show That Pennsylvania Fits Squarely Within The FCC's Finding Of "No Impairment" For Circuit Switching For Enterprise Customers

The Petitioners have come forward with no real evidence to demonstrate that competitors are impaired without access to unbundled switching for customers using loops of DS1 capacity or above. In fact, 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.

The PCC makes the unsupported claim that CLECs are not deploying switches in Pennsylvania, but the evidence shows otherwise. The record of competitive switch deployment in Pennsylvania establishes that competitors are already serving customers of all kinds using their own switches on a widespread basis throughout the Commonwealth. 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.[11] This Pennsylvania-specific information is consistent with the record nationwide, where competing carriers operate approximately 1,300 circuit switches, including more than 500 within Verizon's 30-state region.[12]

It is also evident even from the patterns of UNE leasing that CLECs in Pennsylvania are actually using their own switching to serve enterprise customers with DS1 and higher capacity loops. Putting aside for the moment those CLECs that use both their own switching and their own loop facilities, Verizon's own records of UNE provisioning demonstrate that the vast majority of CLECs serving customers with Verizon high-capacity loops are doing so through their own switching or some other non-Verizon source of switching. This fact is evident from comparing the number of DS1 and higher UNE platform arrangements that Verizon provisions with the number of DS1 and higher loops and EELs that Verizon provisions without providing the switching. Verizon PA and Verizon North combined provides competitors approximately **[BEGIN VERIZON PROPRIETARY]** **[END VERIZON PROPRIETARY]** DS1 or faster loops, comprised of **[BEGIN VERIZON PROPRIETARY]** **[END VERIZON PROPRIETARY]** stand-alone DS1 or DS3 loops plus **[BEGIN VERIZON PROPRIETARY]** **[END VERIZON PROPRIETARY]** EELs with a DS1 or DS3 loop at the end. In comparison, CLECs are using Verizon's switching, i.e. DS1 & ISDN-PRI UNE-Ps or resale, to serve less than **[BEGIN VERIZON PROPRIETARY]** **[END VERIZON PROPRIETARY]** customers. This means that for about 99%

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11 Verizon St. 1.0 (Berry Direct) at 2.

12 *See* VZ St. 1.0 (Berry Direct) at 2-3 (Citing Telcordia, February 2003 LERG; NPRG CLEC Report 2003 at Chapter 5).

of all DS1 and higher UNE loops that competitors use in Pennsylvania, they have chosen to use their own (or some other competitor's) switching, not Verizon's.[13]

Clearly, CLECs are not impaired in serving this market without Verizon switching. Rather, the vast majority of CLECs are using their own switching and therefore did not petition this Commission to initiate a 90 day case. Indeed, Petitioners ATX and FSN both admitted the having their own switches in Pennsylvania from which they serve DS1 customers. (Testimony at 3, 9). All of these facts belie the PCC petitioners' completely unsupported assertion that deployment of switches that could serve DS1 customers has "decreased dramatically" in recent years, and shows to the contrary that CLECs are still actively serving such customers with their own switching.

As a factual matter, Verizon's unbundled switches cannot be a barrier to entry in the enterprise market, since for virtually all of the loops that make up this market, CLECs have affirmatively declined to use a Verizon switch. In Verizon's multi-state footprint, it has provided hundreds of thousands of "high capacity" loops to CLECs, and of this number, less than one percent are being provided in conjunction with a Verizon switch. Remarkably, this minute percentage actually overstates the extent to which CLECs are using Verizon switches in conjunction with high capacity loops, since it does not include any of the large number of high capacity loops that CLECs provide themselves.[14]

While the PCC petitioners argue that CLECs are limited in their ability to serve high capacity customers with their own switching, PCC member ATX had quite a

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13 VZ St. 1.0 (Berry Direct) at5- 6.

14 While in its TRO the FCC observed that there was strong disagreement between CLECs and BOCs regarding the actual number of lines that CLECs provision using their own high capacity loops, by either count this number was in the millions. *TRO* ¶¶ 299-300.

different story to tell the FCC during the Triennial Review. ATX told the FCC that "ATX has learned (as have most other CLECs that ATX is familiar with) that local switching facilities *can* be used to compete for larger customers desiring high-speed digital services, while unbundled local switching is appropriate to serve the needs of smaller analog customers."[15] ATX's claims in this case that it actually uses its own switches instead of UNE P to serve such customers confirms ATX's statement.

Additionally, in determining whether CLECs are impaired by not having access to unbundled switching for the enterprise market, the FCC stated that the state commissions should consider a BOC's performance metrics and standards.[16] The petitioners have cited no performance metrics in support of their claims, because these metrics squarely refute their claims. A review of Verizon PA's most recent Carrier-to-Carrier (C2C) reports in Pennsylvania for the last three months, June, July and August, demonstrates that Verizon PA is providing the CLECs with very good service in these areas. For example, Verizon PA has consistently satisfied the 95% standard for OR-1-06 "% On Time LSRC/ASR Facility Check DS-1" in each month. In some months 99% of the orders were processed on time. As for provisioning, a review of the key timeliness and quality metrics demonstrates that Verizon PA is providing very good service to CLECs on DS-1 loops. Verizon PA has consistently provided parity service on PR-4-01 "%

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15 Letter from Michael A. Peterson of ATX to FCC Commissioner Kevin Martin dated January 22, 2003 in docket 01-338 (available on FCC's searchable website).

16 *TRO* ¶ 456 ("state commissions must consider whether incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive LECs . . . state commissions [should]consider evidence, [including] performance metrics and standard for BOCs . . . .")

Missed Appointment -Verizon - DS-1" and PR-6-01 "% Installation Troubles Reported with 30 Days." Verizon PA has also provided the CLECs with excellent service on collocation, and no CLEC has alleged that it has had difficulties in obtaining collocation space in Verizon's Pennsylvania territory. Finally, Verizon knows of no complaints from the CLECs regarding cross connects related to DS-1 UNE Loop products in Pennsylvania. Verizon also maintains information regarding collocation space availability on its website which currently shows the vast majority of Verizon's central offices to have space available for collocation.[17]

This objective evidence, none of which was cited by the Petitioners, demonstrates that there has been significant switch deployment by CLECs in Pennsylvania, that a far greater number of CLECs are providing DS1 and higher capacity service using their own switches than are using Verizon's switching, and that Verizon's performance in the provisioning areas tagged as relevant by the FCC has consistently been excellent.

B. Specific Response To The InfoHighway and MetTel Petitions

1. Petitioners Have Stated No Basis To Find Impairment

These petitioners apparently argue impairment and ask this Commission to seek a waiver only for their embedded base of customers and not for the purchase of new DS1 loops in the future. They have come forward with no evidence, however, to demonstrate impairment for their embedded base, or to differentiate Pennsylvania from the national situation already considered by the FCC when it made its finding of no impairment without unbundled access to switching for DS1 and higher customers.

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[17] VZ St. 1.0 (Berry Direct) at 8-9.

Petitioners' primary complaint has to do with the process for migrating an existing DS1 or higher UNE platform arrangement to non-Verizon switching. In this regard, Petitioners appear to concede that alternative switching sources are available, thus conceding that there is no impairment. They simply complain that it would be too troublesome and expensive for them to migrate service to another switching provider.

The number of existing customers in the embedded base of the Petitioners is very small.[18] Indeed, the evidence discussed above shows this number to be only a very small fraction of the high capacity customer served by CLECs in Pennsylvania using Verizon's loops and CLEC switching. To the extent the Petitioners are simply concerned with the mechanics of transition away from the UNE environment for Verizon's switching, the *TRO* does set forth a transition implementation framework under the negotiation provisions of the Act and existing interconnection agreements. *TRO* ¶¶ 700-706. If the dispute is simply over the price for them to continue to use Verizon's switching on a temporary or permanent basis, it is not a proper subject for an impairment argument in a 90 day case. Indeed, whether Verizon is complying with the transition framework is not a proper issue to be raised in a 90 day proceeding (and is premature at this point in any event).

Petitioners' specific criticisms of the migration process amount to nothing more than an attempt to have this Commission second-guess decisions that have already been made by the FCC. First Petitioners complain about the quality of the parallel

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[18] Petitioners have designated the numbers as "Highly Confidential," but the numbers have been provided to the Commission and Verizon's counsel. The numbers are of the same order of magnitude as shown in Verizon's records. Therefore, even using the petitioners' numbers it is evident that the vast majority of DS 1 and higher CLEC loops are using non-Verizon switching.

provisioning process that the FCC discussed in detail, and contend that it is "not as seamless or efficient as the FCC's description would have one believe." (Petition at 11). The FCC considered this process in detail, and the petitioners have added nothing Pennsylvania-specific to this argument. While petitioners complain about the "complexity" of the process of installing or modifying service for DS1 and higher customers, the fact is that these services are more complex than ordinary voice services and it is not surprising that more work would be required by the carriers and the end user to coordinate all of the equipment necessary for service. Not only will there be multiplexing equipment on the telephone company end, but the end-user will also have complex customer premises equipment that needs to be configured to the service being provided. It is natural that there be more cost and work involved in provisioning more complex service, but as the FCC recognized, these customers also provide more revenue opportunities and may enter into long term contracts.

Petitioners also claim that there is no "migration" process to transfer the existing loop if spare facilities are not available or appropriate for parallel provisioning. Petitioners claim for example that the FCC "fundamentally misunderstood the barriers to serving the installed DS1 customer base of the Petitioners," because there is "no process . . for migrating existing DS1 circuits from the ILECs' switch to a competitively provided switching facility." (Declaration at 5). They claim a "flash cut" will result in the return of the customers for Verizon. Id. Petitioners' argument is flawed as a technical matter. It is precisely because a DS1 capacity or higher loop cannot be disconnected and reconnected in a typical hot cut process due to the complex equipment on both ends of

the loop that parallel provisioning is the accepted standard for provisioning such loops.[19] The FCC discussed the parallel provisioning process in detail and was well aware that there was no means to cut over the existing high capacity facility. Petitioners contend that the FCC's "logic" in determining that there is no impairment caused by the process to migrate DS1 customers is "deficient." (Declaration at 9) They claim that the FCC failed to acknowledge that the lack of a "process" to migrate such loops itself creates operational impairment, and that even if alternative facilities are available there would be unspecified "operational and technical barriers" and "significant delay, disruption, confusion and cost" to switching their customers to another company's switching. (Id. at 10) These are all efforts to second guess the FCC's national finding, which is not a proper undertaking in this 90 day proceeding.

While Petitioners claim that "the outcome of this proceeding could radically change whether and to what extent competitors companies operate in the state of Pennsylvania," (Id. at 8) the evidence shows that this is not true – which is precisely why the FCC found no impairment. In fact the vast majority of CLECs are already providing high capacity service using their own switching and will not be negatively affected by the removal of Verizon's unbundling obligation.

2. This Commission Lacks Jurisdiction To Review "Post-UNE Prices" For Local Switching, But Even If It Had Such Authority It Could Not Do So In This 90-Day Proceeding (InfoHighway/MetTel Petition at 4; Testimony at 5, 8, 14).

Petitioners contend that Verizon PA has an independent obligation to provide local switching under section 271 of the Act, and that this Commission should assume

[19] Verizon St. 1.0 (Berry Direct) at 6-7.

jurisdiction over what the price should be for this switching when it is no longer required as a UNE, and should require the current TELRIC switching rates to remain in effect in the interim. (Declaration at 14). Plainly if an element is not required to be unbundled under section 251, TELRIC pricing cannot apply, but in any event the determination of what is required under section 271 and what prices apply is exclusively within the FCC's jurisdiction.

The FCC has made clear that TELRIC pricing only applies to UNEs required under section 251. "Contrary to the claims of some of the commenters, TELRIC pricing for . . . network elements that have been removed from the list of section 251 UNEs is neither mandated by the statute nor necessary to protect the public interest. Rather, Congress established a pricing standard under section 252 for network elements unbundled pursuant to section 251 ***where impairment is found to exist."*** [20] Both the statute and the *TRO* make clear, moreover, that jurisdiction to review the pricing for any switching that might be required under section 271 of the Act (relating to long distance authority) lies exclusively with the FCC. First, section 271 of the Act itself makes clear that ***only the FCC*** may determine if section 271's obligations have been met, and that a state commission's role is limited to "consultation" before 271 authority is given.[21] Second, in the *TRO*, the FCC stated that "[i]n the event that a BOC has already received section 271 authorization, section 271(d)(6) grants ***the Commission*** enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271."[22] As to the pricing of a network element that must be

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20 (emphasis in original). See id ¶ 656

21 47 U.S.C. § 271.

22 *TRO* ¶ 665.

unbundled solely by virtue of a 271 obligation, the *TRO* is clear that state commissions have ***no*** role. The pricing is not based on TELRIC but on the "just and reasonable" standard of sections 201 and 202, and this standard "is a fact-specific inquiry that ***the Commission*** will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)."[23]

There is no basis, therefore, for Petitioners to demand that the Commission require TELRIC pricing to continue to apply to switching that is not required to be unbundled under section 251.

3. This Commission Has No Authority To Address Petitioners' Procedural Complaints About The 90 Day Process Established By The FCC

Petitioners contend that the FCC "erred in adopting a universal finding of no impairment to serve the DS1 market" because it failed to provide adequate time and tools to rebut that finding. (Declaration at 5) They argue that the FCC has required this Commission to do the "impossible." (Id.at 7). These arguments are not properly made to this Commission. Rather, Petitioners should assert them to the Court of Appeals, where these Petitioners are active participants.

The Petitioners' complaint that the FCC requires them to provide date for specific customer and geographic markets when the relevant market definitions will only be established in the 9 month chase is also irrelevant. (Declaration at 8 and 16). If Petitioners have a complaint with the process established by the FCC, it is more properly raised with the court of appeals rather than this Commission.

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[23] *Id.* ¶ 664. This standard can be satisfied, for example, by evidence that a rate has been adopted as a result of an arms-length agreement.

4. The Claim That The Second Circuit Has Stayed The Obligation To Abide By The 90-Day Deadline Is Incorrect (InfoHighway/MetTel Petition at 3-4 and Testimony at 2).

Petitioners InfoHighway and MetTel claim that an administrative stay entered by the United States Court of Appeals for the Second Circuit binds this Commission and stays the portions of the *TRO* that address the 90 day proceeding on enterprise switching. While they recognize that this Commission has determined to proceed with the 90-day schedule, they suggest this Commission is in danger of making some sort of legal error by failing to abide by this supposed "stay." In fact, there is no stay and the 90 day deadline is binding.

The court that entered the stay upon which these petitioners rely lacked jurisdiction to do so, and only entered its *administrative* stay – a stay that was entered without any review on the merits by any judge – because InfoHighway and MetTel (represented by the same counsel that represents them in this case) withheld from the Second Circuit the fact that all petitions for review of the FCC's *TRO* had been consolidated in another circuit pursuant to 28 U.S.C. § 2112(a). The CLECs seeking a stay in the Second Circuit waited six weeks after the FCC had released its TRO before seeking this stay, and two weeks after *all* petitions for review of the TRO (past, present, and future) had been ordered transferred to the United States Court of Appeals for the Eighth Circuit by the Judicial Panel on Multidistrict Litigation pursuant to the procedures of 28 U.S.C. § 2112(a). Perhaps most significantly, these CLECs filed their stay petitions with the Second Circuit shortly after the Eighth Circuit transferred all petitions for review to the D.C. Circuit.

There can be no dispute that the Second Circuit lacked jurisdiction to enter the administrative stay. Once the Judicial Panel on Multidistrict Litigation consolidated all petitions for review of the *TRO* in the Eighth Circuit, "[a]ll courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection," are required to "transfer those proceedings to the court in which the record is so filed." 28 U.S.C. § 2112(a)(5). And after all appeals of the *TRO* were consolidated in the Eighth Circuit, that court determined, "[f]or the convenience of the parties and in the interests of justice," to "transfer the consolidated cases, including all docketed and undocketed cases transferred to the Eighth Circuit from other circuits, to the United States Court of Appeals for the D.C. Circuit."[24] This transfer order included "[a]ll pending motions, including the Motion to Stay."[25]

Thus, the stay petitions subsequently filed by the CLECs in the Second Circuit must, as a matter of law, also be transferred, since they "are instituted with respect to the same order," (28 U.S.C. § 2112(a)(5)) and Verizon understands that they have been transferred and the issue is being briefed in the DC Circuit but the DC Circuit has not granted any stay.

Similarly, petitioners demand that they be allowed to submit evidence beyond the 90 day deadline is baseless (Declaration at 16).The FCC has established a strict 90 day deadline for this Commission to file a petition for waiver with the FCC, and subsequently provided evidence will not be considered.

C. Response To The Pennsylvania Carriers' Coalition's Petition

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24 Order, Eschelon Telecom, Inc. v. FCC, No. 03-3212 (8th Circ. Sept. 30, 2003) (per curiam).

25 *Id.*

1. Petitioners Have Stated No Basis To Find Impairment

The PCC petitioners have come forward with no evidence to demonstrate impairment, or to differentiate Pennsylvania from the national situation already considered by the FCC when it made its finding of no impairment without unbundled access to switching for DS1 and higher customers. Petitioners' primary complaint has to do with the process for migrating an existing DS1 or higher UNE platform arrangement to non-Verizon switching. In this regard, Petitioners appear to concede that alternative switching sources are available, thus conceding that there is no impairment. They simply complain that it would be too troublesome and expensive for them to migrate service to another switching provider.

All of the PCC Petitioners' claims boil down to disagreements with the FCC's findings on migration for DS1 and higher capacity loops. While thinly disguised as complaints about Pennsylvania provisioning, closer scrutiny reveals that these complaints would be equally applicable to any jurisdiction and are matters the FCC was well aware of when it issued its national finding of no impairment.

For example, petitioners contend that the FCC was wrong in finding that DS1 loops are not generally pre-wired to the ILEC's switch because existing loops in service are pre-wired. The obvious fact that existing service using the ILEC switch is connected to the ILEC switch is true for any jurisdiction and is something the FCC would have been aware of in making its decision.

Petitioners also complain that if no parallel facilities are available, then Verizon will decline to provide a high capacity loop to that customer. However, petitioners give no specifics whatsoever about any attempts to order service that were turned down

because of no facilities. Certainly it is possible anywhere for the CLEC to get a response of no facilities, and petitioners have not demonstrated that this happens any more frequently in Pennsylvania than elsewhere. In any event, the *TRO* has changed the rules regarding Verizon's obligation to build new facilities for the CLECs.

Petitioners go to great lengths to argue that even if spare facilities are available, Pennsylvania is somehow different regarding the parallel provisioning process. For example, they complain that end users do not have the capacity on their customer premises equipment to handle the existence of two facilities. First, this is not a real problem because generally the new facility is turned up only after the old one is disconnected and the equipment is not running two systems at once. Second, there is no reason to believe (and petitioners certainly have given no reason) that end users in Pennsylvania would be any different in this regard than end users anywhere else.[26] Yet, the FCC in the TRO found the parallel provisioning process to be satisfactory, especially in light of the increased revenue and long term commitment to be gained from a high capacity customer.

The PCC petitioners complaints about Verizon's past efforts to work with Remi and others to make the DS1 UNE P product meet their needs for call detail records are also completely irrelevant to the impairment issue. (Testimony at 20-21). The question is whether CLECs are impaired without access to Verizon's switching. The fact that the vast majority of CLECs are serving DS1 and higher customers without using Verizon's switching shows that they are not impaired.

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[26] Verizon St. 1.0 (Berry Direct) at 6-7.

The PCC attempts to discount this substantial evidence of switch deployment by claiming that a local switch primarily serves the surrounding geographical area and cannot be extended to serve larger areas, but this claim is untrue. (PCC Testimony at 10). In fact, a single switch can serve an entire LATA or state, or multiple LATAs and/or states.[27] For example, AT&T claims that the switches of its CLEC affiliate, TCG, can "connect virtually any qualifying customer in a LATA."[28] Therefore, even competitors with switches located in Philadelphia and Pittsburgh are capable of serving the entire state. In fact, it is not even necessary for the CLEC switch to be located in this state to serve customers in Pennsylvania. The PCC petitioners have not presented sufficient evidence to prove their vague and unsubstantiated claims that without Verizon's switching it is too expensive to serve high capacity customers in certain undefined "rural" areas.

All of the PCC's impairment arguments are really claims of why their particular business plans need UNE P – not why CLECs in general need it. The FCC was explicit that the economic analysis in any 90-day proceeding cannot be based on any one carrier's individual business plan. *TRO* ¶ 457. The fact that this single CLEC (or group of similar CLECs in this case) contends that it cannot afford an additional switch does not demonstrate impairment. To the contrary, the cost of a switch is precisely the kind of cost any new entrant must bear, and therefore *cannot* be considered in the Commission's

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27 *See UNE Remand Order* ¶ 261 ("[S]witches deployed by competitive LECs may be able to serve a larger geographic area than switches deployed by the incumbent LEC, thereby reducing the direct, fixed cost of purchasing circuit switching capacity and allowing requesting carriers to create their own switching efficiencies.").

28 VZ St. 1.0 (Berry Direct) at 5 (citing Panel Direct Testimony of AT&T Communications of NJ, L.P. et al., Docket No. TO00110893 (February 25, 2003), at 75.)

impairment analysis.[29] Also, the fact that the PCC members' "business plan" purportedly relies on a UNE-P arrangement with high capacity loops is a legally insufficient basis to order unbundling. The FCC has stated that it "cannot order unbundling merely because certain competitors or entrants with certain business plans are impaired."[30] The fact that the many other CLECs in Pennsylvania that are unquestionably offering DS1 and higher capacity service to business customers have not sought a 90-day proceeding strongly suggests that any economic data would most assuredly verify the FCC's conclusion of no impairment.

2. The PCC's Claims Regarding EELs With Concentration Are Unfounded

The PCC petitioners incorrectly claim that Verizon PA is not offering the "EELS with concentration" required by the *Global Order*. (Testimony at 25). An Enhanced Extended Loop ("EEL") is a combination of loop and transport where a CLEC uses its own switch. Petitioners apparently are raising the same argument MCI has made in the NMP case, that Verizon should not only provide EELs with concentration, but should also own the concentrating equipment for the CLEC.[31]

The Commission in the *Global Order* required Verizon PA to offer "[v]oice grade and DS-0 loops with DS-1 [and DS-3] transport with concentration," through December

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29 *TRO* ¶ 454 n. 1392 ("We also note that these costs [to prove impairment] may only be considered a barrier to entry if they are sufficient to prevent economic entry, and thus they would not be considered 'the kinds of costs any new entrant would bear.'").

30 *TRO* ¶ 115.

31 *Verizon Pennsylvania Inc. Petition and Plan for Alternative Form of Regulation Under Chapter 30, Petition to Amend Network Modernization Plan*, P-00930715F0002.

31, 2003.[32] The Commission made clear that its EEL requirements were contingent on "the CLEC's usage of EEL combinations [being] consistent with federal law and any applicable FCC decisions."[33] Verizon PA for many years has had a tariffed offering of this product, but has always required the CLECs to provide the concentrating equipment.[34]

In the Triennial Review the FCC rejected the demand to require "TELRIC-priced EELs with concentration," stating

> We decline . . . to establish at this time rules requiring concentration. The record demonstrates that DS0 EELs could increase loop costs and may raise several additional operational issues. Accordingly, we are not convinced, based on the limited record before us, that we should require incumbent LECs to include concentration when they provide UNEs to requesting carriers.[35]

In light of the *TRO,* the entire issue of concentrated EELs will have to be reevaluated and any concentration requirement is likely preempted (and is certainly no longer consistent with federal decisions as the *Global Order* recognized must be the case). In any event, however, the *TRO* precludes imposing the additional requirement that Verizon PA actually own the concentrating equipment for the CLEC. Moreover, since the FCC does not even require concentrated EELs, the lack of concentrated EELs cannot be a state-specific reason to find impairment.

Finally, the petitioners' complaints about concentrated EELS are contrary to the evidence, which shows that under Verizon's current tariff and policy on concentration

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32 *Global Order* at 91-92.

33 *Id.*

34 VZ St. 3.0 at 52-53.

35 *TRO* ¶ 492.

equipment Verizon is currently provisioning over 5,000 high capacity EELs – a number that far outstrips the number of high capacity UNE P arrangements in service.

3. Petitioners' Claims Under State Law Are Preempted, And In Any Event Are Not Within The Scope Of A 90 Day Proceeding.

Since it is unquestionable that the FCC has made a national finding that switching does not qualify for unbundling under section 251 of the Telecommunications Act for DS1 or higher customers, and since Petitioners were not able to muster the necessary evidence to rebut this finding of no impairment, Petitioners attempt to argue that the unbundled access they seek is required under state law. First they argue that the UNE Platform consisting of high capacity loops is required by the *Global Order*. Second, they argue that the "basic service function" language of 66 Pa.C.S. § 3005(e) still requires switching to be unbundled.

None of these arguments are properly considered in a 90 day proceeding. The only purpose of this proceeding is for the Commission to determine whether it has sufficient evidence to seek a waiver of the FCC's decision that competitors are not impaired without access to switching in this instance. State law is not one of the basis upon which this Commission can make the required showing to the FCC. To the contrary, the only evidence that is relevant is the evidence of operational and economic impairment specifically enumerated by the FCC.

More importantly, if the impairment test is not satisfied and the FCC's national finding that switching for high capacity customers should not be unbundled continues to apply, this Commission would be preempted from requiring unbundling under state law. The FCC expressly "limit[ed] the states' delegated authority to the specific areas and

network elements identified in this Order."[36] The FCC determined that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations."[37] Accordingly, the FCC rejected arguments by some carriers that "states may impose any unbundling framework they deem proper under state law, without regard to the federal regime."[38]

The FCC cited "long-standing federal preemption principles" to conclude that states may not "enact or maintain a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in this Order."[39] In particular, the FCC found that the state authority preserved by the Act under the savings provision in Section 251(d)(3) is narrow and "is limited to state unbundling actions that are consistent with the requirements of section 251 and do not 'substantially prevent' the implementation of the federal regulatory regime."[40] The FCC cautioned that any state attempt to require unbundling where the FCC has already made a national finding of no impairment or declined to require unbundling would be unlikely to survive scrutiny under a preemption analysis:

> If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it

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36 *Id.* ¶ 189.

37 *Id.* ¶ 187.

38 *Id.* ¶ 192. The FCC eliminated the provisions of 47 C.F.R. § 51.317 that previously gave states discretion to create additional unbundled network elements ("UNE"). See Appendix B – Final Rules, 47 C.F.R. § 51.317. States no longer have this discretion.

39 *TRO* ¶ 192.

40 *Id.* ¶ 193.

> unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of section 251(d)(3)(C).[41]

The FCC further noted that even *existing* state requirements that are inconsistent with the FCC's new framework would frustrate its implementation and therefore cannot stand: "[i]t will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules."[42]

The FCC expressly rejected the argument that a state commission's unbundling requirements are not preempted if they share a common regulatory goal with the federal scheme, but differ from the FCC's rules.[43] That argument is contrary to "long-standing federal preemption principles."[44] The U.S. Supreme Court has repeatedly held that state regulations are preempted, even if they share a "common goal" with federal law, where they differ in the *means* chosen to further that goal. "The fact of a common end hardly neutralizes conflicting means."[45] In fact, the Seventh Circuit recently ruled that a tariff requirement imposed by the Wisconsin Public Service Commission was preempted by the Act, even though the tariff requirement "promotes the procompetitive policy of the

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41 *Id.* ¶ 195.

42 *Id.*

43 *Id.* ¶ 193.

44 *Id.* ¶ 193, n.614 ("AT&T's argument that the validity of state unbundling regulations [under section 251(d)(3)] must be measured solely against the Act and its purposes fails to recognize that the [FCC] is charged with implementing the Act and its purposes are fully consistent with the Act's purposes").

45 *Crosby v. National Foreign Trade Council,* 530 U.S. 363, 379 (2000) (citing cases). *See also Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861, 874-86 (2000) (preempting state tort action that would have required all automobile manufacturers immediately to install airbags in favor of any other passive restraint systems because it "stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed" and thus conflicted with "important means-related federal objectives").

federal act."[46] The court held that "[a] conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's Supremacy Clause to resolve the conflict in favor of federal law."[47] Thus, even if a state commission's unbundling requirements share with the federal Act a common goal of promoting competition, this is insufficient to overcome federal preemption principles.

The states, in short, cannot reverse an FCC policy determination by requiring unbundling in an area in which the FCC has already concluded that unbundling would be contrary to the goals and requirements of the Act. Section 251(d)(3) of the Act makes this clear by prohibiting state commissions from establishing access and interconnection regulations unless such regulations would be "consistent with the requirements of [§ 251]" and would not "substantially prevent implementation of [§ 251] and the purposes of this part."[48] The FCC recognized as much in the *UNE Remand Order* when it explained that § 251(d)(3) does not permit states to add additional unbundling obligations that do not "meet the requirements of section 251 *and the national policy framework instituted in this Order.*"[49]

Therefore, *any* unbundling requirement that goes beyond the FCC's regulations would alter the careful balance established by the FCC, and thus would "substantially prevent implementation of [§ 251] and the purposes of this part." As a result, a state may

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46 *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 445 (7th Cir. August 12, 2003).

47 *Id.* at 443.

48 47 U.S.C. § 251(d)(3)(C); see also id. §261(c).

49 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking (rel. November 5, 1999) (the "*UNE Remand Order*"), ¶ 154

not impose broad unbundling requirements in an area when the FCC and the federal courts have already determined that the policies of the Act either preclude unbundling entirely, or else require strict limitations on the scope of the unbundling obligation.

The CLECs cannot look to state law to continue to demand the unbundling that the FCC has flatly rejected. As an initial matter, whether or not this Commission has independent state law authority to consider the unbundling sought here (which it does not), it is beyond question that such authority cannot override limitations on unbundling established by the FCC and the federal courts, as discussed in detail above. The FCC has made a national finding that circuit switching for DS1 and higher customers should not be unbundled unless very specific impairment criteria are met. This Commission is preempted from attempting to override the FCC and order unbundling. That prerogative lies solely with the FCC upon a petition by this Commission based on the specifically enumerated types of evidence.

The PCC petitioners rely on the UNE P requirements from the *Global Order,* but to the extent those requirements were based on authority the Commission believes flowed from the Telecommunications Act, the Commission cannot interpret the Act differently from the FCC, but rather is bound by the FCC's interpretation of the Act's requirements. It cannot create a federal UNE where the FCC has specifically considered the issue and found the element is not required to be unbundled, as the FCC has done with circuit switching in this instance in the *TRO.* Even if it has some authority delegated to it under this federal statute, this Commission cannot exceed that delegation by ruling otherwise.

(emphasis added).

To require unbundling under the Telecommunications Act, a detailed "necessary and impair" analysis is mandatory, and the TRO has specified the factors to be considered in such an analysis Moreover, since TELRIC pricing is a federal concept authorized only for elements for which impairment has been demonstrated under section 251of the Act, the Commission has no authority to require TELRIC pricing.[50]

The only other source the CLECs have cited for potential state law unbundling authority is 66 Pa. C.S. § 3005(e)(1), which requires an ILEC to "unbundle each basic service function on which the competitive service depends and ... make the basic service functions separately available to any customer..." Even if this statute applied here, it still could not be used to require unbundling in a manner that is inconsistent with the federal regime regarding unbundling, so any attempt to order unbundling in the face of the FCC's national finding of no impairment would still be preempted. Moreover, the basic service function language of Chapter 30 does not authorize TELRIC pricing – that is a creature of the Telecommunications Act and FCC regulations. In any event, the issues under this statute are not properly considered in a 90 day proceeding under the TRO.

VI. CONCLUSION

For the foregoing reasons, the Petitions to Initiate 90-day proceedings filed by InfoHighway and MetTel and by the PCC should be dismissed. In the alternative, the Commission should strike all material from the petitions and accompanying testimony that is not relevant to the 90 day inquiry and should deny the petitions on the merits.

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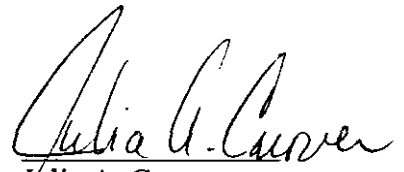
50 *TRO* ¶ 656.



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October 24, 2003

VERIZON PENNSYLVANIA INC. AND VERIZON NORTH INC.
STATEMENT NO. 1.0

INVESTIGATION INTO THE
OBLIGATION OF INCUMBENT LOCAL
EXCHANGE CARRIERS TO UNBUNDLE
LOCAL CIRCUIT SWITCHING FOR THE
ENTERPRISE MARKET

DOCKET NO. I-00030100

VERIZON PENNSYLVANIA INC.
AND VERIZON NORTH INC.

STATEMENT NO. 1.0

(DIRECT TESTIMONY)

WITNESS: Debra M. Berry

DATED: October 24, 2003

EXPURGATED VERSION

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I. INTRODUCTION

Q. PLEASE STATE YOUR NAME AND IDENTIFY THE PARTIES ON BEHALF OF WHOM THIS TESTIMONY IS SUBMITTED.

A. My name is Debra M. Berry. This testimony is submitted on behalf of Verizon Pennsylvania Inc. ("Verizon PA") and Verizon North Inc. ("Verizon North") (collectively "Verizon").

Q. PLEASE STATE YOUR BUSINESS ADDRESSES, EMPLOYMENT INFORMATION AND BACKGROUND.

A. I am employed by Verizon as Director-Regulatory Planning and my business address is 1717 Arch Street, Philadelphia, Pennsylvania, 19103. My responsibilities include developing Verizon's regulatory policies, directing filings, and other regulatory activities involving the Pennsylvania and Delaware State Commissions. I joined Diamond State Telephone Company in 1970 where I held a variety of positions including Supervising Service Foreman, supervising installation and repair technicians, and Manager of the Customer Service Center. After a period of time with Diamond State Telephone and then Bell Atlantic in Arlington Virginia and BELLCORE in Washington, D.C., I achieved my current position of Director-Regulatory in 1990. I earned a Masters of Business Administration from St. Joseph's University in May 1997.

Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSON ("COMMISSION" OR "PUC")?

A. Yes. Most recently I testified before this Commission on behalf of Verizon in the proceeding to set statewide access rates for the two Verizon companies. I have also testified on behalf of Verizon North in its Chapter 30 case and on behalf of Verizon PA in its Petition to Amend its Network Modernization Plan.

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS PROCEEDING?

A. The purpose of my testimony is to provide the factual information necessary to respond to the Petitions to Initiate Proceedings filed by Arc Networks, Inc. d/b/a InfoHighway ("InfoHighway"), Metropolitan Telecommunications Corporation of PA ("MetTel"), Full Service Computing Corporation t/a Full Service Network ("FSN"), Remi Retail Communications, LLC ("Remi"), ATX Licensing, Inc. ("ATX") and Line Systems, Inc. ("LSI"). These petitions ask the Commission to initiate a so-called "90-day proceeding" as described in the FCC's *Triennial Review Order* ("*TRO*")[1] to determine whether this Commission should make a filing with the FCC on or before December 31, 2003 to seek a waiver from the FCC's national finding of "no impairment" regarding unbundled switching for the enterprise market. I understand that much of the response to these petitions will be in the form of legal

[1] *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications*

argument and will be contained in the legal pleading (Motion to Dismiss, or in the Alternative to Strike Portions of Testimony, and Response to Petitions to Initiate Proceedings).

II. COMPETITIVE SWITCH DEPLOYMENT IS WIDESPREAD IN PENNSYLVANIA

Q. THE PENNSYLVANIA CARRIERS' COALITION ("PCC") WITNESSES CLAIM THAT CLECS ARE NOT DEPLOYING SWITCHES IN PENNSYLVANIA. (PCC TESTIMONY AT 23). DO THEY SUPPORT THEIR CLAIM WITH ANY EVIDENCE?

A. No. They just make this bald statement with nothing whatsoever to back it up.

Q. WHAT DOES THE EVIDENCE ACTUALLY SHOW?

A. The record of competitive switch deployment in Pennsylvania establishes that competitors are already serving customers of all kinds using their own switches on a widespread basis throughout the Commonwealth. 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. The location of CLEC switches is available from the Local Exchange Routing Guide ("LERG").[2]

This Pennsylvania-specific information is consistent with the record

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Capability, CC Docket No. 98-147, FCC 03-36 (rel. August 21, 2003) ("TRO").

[2] *See* Telcordia, *February 2003 LERG*.

nationwide, where competing carriers operate approximately 1,300 circuit switches, including more than 500 within Verizon's 30-state region.[3]

Q. THE PCC WITNESSES CONTEND THAT A LOCAL SWITCH PRIMARILY SERVES THE NEARBY SURROUNDING GEOGRAPHICAL AREA, AND CANNOT BE EXTENDED TO SERVE LARGER AREAS (PCC TESTIMONY AT 10). DO YOU AGREE?

A. No. A single switch can serve an entire LATA or state, or multiple LATAs and/or states.[4] For example, AT&T claims that the switches of its CLEC affiliate, TCG, can "connect virtually any qualifying customer in a LATA."[5] Therefore, even competitors with switches located in Philadelphia and Pittsburg are capable of serving the entire state.

Q. IS IT NECESSARY FOR THE CLEC SWITCH TO BE LOCATED IN THIS STATE TO SERVE CUSTOMERS IN PENNSYLVANIA?

A. No. For the reasons stated in response to the previous question, the geographic reach of a switch can easily cross state boundaries. In fact, CLEC Global NAPS stated in the recent virtual NXX investigation before this Commission that "Global

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[3] *See* Telcordia, *February 2003 LERG; NPRG CLEC Report 2003* at Chapter 5.

[4] *See UNE Remand Order* ¶ 261 ("[S]witches deployed by competitive LECs may be able to serve a larger geographic area than switches deployed by the incumbent LEC, thereby reducing the direct, fixed cost of purchasing circuit switching capacity and allowing requesting carriers to create their own switching efficiencies.").

[5] Panel Direct Testimony of AT&T Communications of NJ, L.P. et al., Docket No. TO00110893 (February 25, 2003), at 75.

has no switch in Pennsylvania and backhauls its Pennsylvania traffic on its own network to it's facility in Reston, VA for switching."[6]

III. COMPETITORS ARE USING THEIR OWN SWITCHING TO PROVIDE HIGH CAPACITY SERVICE TO ENTERPRISE CUSTOMERS

Q. DOES VERIZON HAVE EVIDENCE THAT CLECS IN PENNSYLVANIA ARE ACTUALLY USING THEIR OWN SWITCHING TO SERVE ENTERPRISE CUSTOMERS WITH DS1 AND HIGHER CAPACITY LOOPS.

A. Yes. Putting aside for the moment those CLECs that use both their own switching and their own loop facilities, Verizon's own records of UNE provisioning demonstrate that the vast majority of CLECs serving customers with Verizon-provisioned high-capacity loops are doing so through their own switching or some other non-Verizon source of switching. In fact, about 99% of the high capacity loops provisioned by Verizon to CLECs are using non-Verizon switching.

This fact is evident from comparing the number of DS1 and higher UNE platform arrangements Verizon provisions with the number of DS1 and higher loops and EELs Verizon provisions without providing the switching. Verizon PA and Verizon North combined provide competitors approximately **[BEGIN VERIZON PROPRIETARY]** **[END VERIZON PROPRIETARY]** DS1 or faster

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[6] *Generic Investigation Regarding Virtual NXX Codes*, Docket No. I-00020093

loops, comprised of **[BEGIN VERIZON PROPRIETARY]** **[END VERIZON PROPRIETARY]** stand-alone DS1 (or higher) loops plus **[BEGIN VERIZON PROPRIETARY]** **[END VERIZON PROPRIETARY]** EELs with a DS1 (or higher) loop at the end. In comparison, CLECs are using Verizon's switching, i.e. DS1 & ISDN-PRI UNE-Ps or resale, to serve fewer than **[BEGIN VERIZON PROPRIETARY]** **[END VERIZON PROPRIETARY]** high capacity lines. This means that for about 99% of all DS1 and higher UNE loops that competitors use in Pennsylvania, they have chosen to use their own (or some other competitor's) switching, not Verizon's. As noted, this is a conservative percentage because it does not include those CLECs that are serving customers using both their own high capacity loops and switching. Clearly, CLECs are not impaired in serving this market without Verizon switching.

IV. DS1 AND HIGHER LOOP MIGRATION ISSUES

Q. THE PETITIONERS COMPLAIN ABOUT VERIZON'S PROCESS FOR PROVISIONING DS1 AND HIGHER LOOPS TO CLECS. DO YOU HAVE ANY RESPONSE TO THEIR CLAIMS?

A. Yes. I understand that Verizon will be arguing in its legal pleadings that these petitioners have raised arguments that were already duly considered by the FCC and are not unique to Pennsylvania.

(Global NAPS Comments, November 18, 2002) at 1.

As the FCC recognized, parallel provisioning is the accepted standard for DS1 and higher capacity loops. It does not make sense to attempt to cut over an existing DS1 or higher loop instead of provisioning a parallel facility because the complexity of the equipment on the ILEC's and the end user's side makes it unlikely that the existing loop will still work once disconnected. This is why parallel provisioning is recommended and used for DS1 and higher facilities.

Petitioners' complain that even if spare facilities are available, end users do not have the capacity on their customer premises equipment to handle the existence of two facilities. This claim is unfounded. First, this is not a real problem because generally the new facility is turned up only after the old one is disconnected and the equipment is not running two systems at once. Second, there is no reason to believe that end users in Pennsylvania would be any different in this regard than end users anywhere else.

Q. PETITIONERS CLAIM THAT IT SHOULD BE POSSIBLE TO DO A TRADITIONAL HOT CUT ON A HIGH CAPACITY LINE TO TRANSFER THE SAME FACILITY FROM ONE SWITCH TO ANOTHER. IS THIS ACCURATE?

A. No. Petitioners' argument is flawed as a technical matter. It is precisely because a DS1 capacity or higher loop cannot be disconnected and reconnected in a typical hot cut process due to the complex equipment on both ends of the loop that parallel provisioning is the accepted standard for provisioning such loops.

V. VERIZON'S PERFORMANCE ON OPERATIONAL CRITERIA

Q. IN DETERMINING WHETHER CLECS ARE IMPAIRED BY NOT HAVING ACCESS TO UNBUNDLED SWITCHING FOR THE ENTERPRISE MARKET, THE FCC HELD THAT THE STATE COMMISSIONS SHOULD CONSIDER A BOC'S PERFORMANCE METRICS AND STANDARDS.[7] HAVE THE PETITIONERS CITED ANY PEFORMANCE METRICS IN SUPPORT OF THEIR CLAIMS?

A. No. The petitioners have pointed to no metrics that demonstrate that they are receiving discriminatory service on any DS-1 related products or collocation.

Q. WHAT DOES A REVIEW OF VERIZON'S PERFORMANCE METRICS IN THESE AREAS REVEAL?

A. A review of Verizon PA's most recent Carrier-to Carrier (C2C) reports in Pennsylvania for the last three months, June, July and August, demonstrates that Verizon PA is providing the CLECs with very good service. For example, Verizon PA has satisfied the 95% standard for OR-1-06 "% On Time LSR/ASR Facility Check DS-1" in each month. In some months 99% of the orders were processed on time. As for provisioning, a review of the key timeliness and quality metrics demonstrates that Verizon PA is providing very good service to CLECs on DS-1

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[7] *TRO* Para 456 ("state commissions must consider whether incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive LECs . . . state commissions [should]consider evidence, [including] performance metrics and standard for BOCs . . . .")

loops. Verizon PA has consistently provided parity service on PR-4-01 "% Missed Appointment -Verizon - DS-1" and PR-6-01 "% Installation Troubles Reported with 30 Days." Verizon PA has also provided the CLECs with excellent service on collocation, and no CLEC has alleged that it has had difficulties in obtaining collocation space in Verizon's Pennsylvania territory. Finally, Verizon knows of no complaints from the CLECs regarding collocation cross connects related to DS-1 UNE Loop products in Pennsylvania.

Q. DOES VERIZON PROVIDE PUBLIC INFORMATION AS TO COLLOCATION SPACE AVAILABILITY?

A. Yes. Verizon maintains information regarding collocation space availability on its website at : http://www22.verizon.com/wholesale/attachments/space-exhaust/WebUpdatePA.pdf. The website currently shows that only 13 of Verizon's (PA and North combined) 387 central offices, or 3.4%, are closed to collocation or restricted to virtual collocation.

Q. DOES THAT CONCLUDE YOUR DIRECT TESTIMONY?

A. Yes.

CERTIFICATE OF SERVICE

I, Julia A. Conover, hereby certify that I have this day served a replacement proprietary copy of the Motion of Verizon Pennsylvania Inc. and Verizon North Inc. To Dismiss The Petitions To Initiate 90-Day Proceedings, Or In The Alternative To Strike Portions Of Testimony, And Response To Petitions To Initiate Proceedings, and a replacement proprietary copy of Verizon Pennsylvania Inc.'s and Verizon North Inc.'s Direct Testimony of Debra M. Berry, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 27th day of October, 2003.

VIA E-MAIL AND/OR UPS OVERNIGHT DELIVERY

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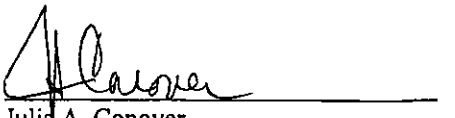

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COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
Office Of Administrative Law Judge
P.O. Box 3265, Harrisburg, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

October 27, 2003

In Re: **I-00030100**

(See letter dated 10/22/2003)

Incumbent Local Exchange Carriers

Investigation into the obligations of incumbent local exchange carriers to unbundled local circuit switching for the enterprise market.

Hearing Notice

This is to inform you that a hearing on the above-captioned case will be held as follows:

Type: Initial

Date: Friday, November 7, 2003

Time: 9:00 a.m.

Location: **Hearing Room 4**
Plaza Level
Commonwealth Keystone Building
400 North Street
Harrisburg, Pennsylvania

Presiding: **Administrative Law Judge Michael C. Schnierle**
P.O. Box 3265
Harrisburg, PA 17105-3265
Telephone: (717) 783-5452
Fax: (717) 787-0481

Attention: You may lose the case if you do not come to this hearing and present facts on the issues raised.

If you intend to file exhibits, 2 copies of all hearing exhibits to be presented into evidence must be submitted to the reporter. An additional copy must be furnished to the Presiding Officer. A copy must also be provided to each party of record.

Individuals representing themselves do not need to be represented by an attorney. All others (corporation, partnership, association, trust or governmental agency or subdivision) must be represented by an attorney. An attorney representing you should file a Notice of Appearance before the scheduled hearing date.

If you are a person with a disability, and you wish to attend the hearing, we may be able to make arrangements for your special needs. Please call the scheduling office at the Public Utility Commission:

- Scheduling Office: 717-787-1399.
- AT&T Relay Service number for persons who are deaf or hearing-impaired: 1-800-654-5988.

pc: Judge Schnierle
Steve Springer, Scheduling Officer
Beth Plantz
Docket Section
Calendar File

COMMONWEALTH OF PENNSYLVANIA

OFFICE OF SMALL BUSINESS ADVOCATE
Suite 1102, Commerce Building
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Harrisburg, Pennsylvania 17101

Carol E. Pennington
Acting Small Business Advocate

(717) 783-2525
(717) 783-2831 (FAX)

October 28, 2003

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, P.O. Box 3265
Harrisburg, PA 17120

Re: Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market and to Unbundle Network Elements
Docket Nos. I-00030100 and I-00030099

Development of an Efficient Loop Migration Process
Docket No. M-00031754

Dear Secretary McNulty:

Enclosed for filing is an executed copy of the Confidentiality Agreement signed by the Office of Small Business Advocate expert witness in the three proceedings listed above. The OSBA witness information is as follows:

Mr. Allen Buckalew
J.W. Wilson & Associates, Inc.
Rosslyn Plaza C- Suite 1104
1601 North Kent Street
Arlington, VA 22209
(703) 243-1049
(703) 243-3389 (fax)

Copies of each of the documents listed above are being served today on all known parties in this proceeding. A Certificate of Service to that effect is enclosed.

Sincerely,

Angela T. Jones
Assistant Small Business Advocate

Enclosures
cc: Hon. Michael C. Schnierle

Parties of Record

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APPENDIX A-1

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

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

Docket No. I-00030100

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

The undersigned is the Consultant of OSBA (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of _____ (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (*See* ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: 10/24/03

Allen G. Buckalew
Signature

Allen G. Buckalew
Print Name

OSBA
Status relative to Retaining Party

J. W. Wilson & Assoc. Inc.
Employer

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APPENDIX A-2

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements

Docket No. I-00030~~054~~ 0097

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

The undersigned is the Consultant of OSBA (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of _____ (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (*See* ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: 10/24/03

Allen G Buckalew
Signature

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APPENDIX A-3

PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg PA 17105-3265

Development of an Efficient Loop Migration Process

Docket No. M-00030~~099~~ 1754

CONFIDENTIALITY AGREEMENT

TO WHOM IT MAY CONCERN:

The undersigned is the Consultant of OSBA (retaining party) and is not, or has no knowledge or basis for believing that he/she is: (1) an officer, board member, stockholder, partner or owner other than stock of any competitor of _____ (producing party) or an employee of any competitor of the producing party who is primarily involved in the pricing, development, and/or marketing of products or services that are offered in competition with those of the producing party; or (2) an officer, board member, stockholder, partner, or owner than stock of any affiliate of a competitor of the producing party. (*See* ¶5 of Protective Order).

The undersigned has read the Protective Order and understands that it and this Confidentiality Agreement deal with the treatment of Proprietary Information and Highly Confidential Proprietary Information. The undersigned agrees to be bound by, and to comply with, the terms and conditions of said Protective Order as a condition of access to the Proprietary Information and Highly Confidential Proprietary Information. Further, the undersigned, if an independent expert, represents that he/she has complied with the provisions of ordering paragraph number 5(a)(ii) of the Protective Order prior to executing this Confidentiality Agreement.

DATE: 10/24/03

Allen G. Buckalew
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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for The Enterprise Market	:	**Docket No. I-00030100**
Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Network Elements	:	**Docket No. I-00030099**
Development of an Efficient Loop Migration Process	:	**Docket No. M-00031754**

CERTIFICATE OF SERVICE

I certify that I am serving a copy of the foregoing document by first class mail upon the persons addressed below:

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Administrative Law Judge
Pennsylvania Public Utility Commission
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Harrisburg, PA 17105-3265

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Assistant Small Business Advocate

Date: October 28, 2003

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October 30, 2003

RECEIVED

OCT 3 0 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

DOCKETED

NOV 05 2003

DOCUMENT

VIA UPS OVERNIGHT DELIVERY

James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor
Harrisburg, PA 17120

Re: *Investigation into the Obligation of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market*, Docket No. I-00030100

Dear Mr. McNulty:

On October 24, 2003 Verizon Pennsylvania Inc. ("Verizon PA") and Verizon North Inc. ("Verizon North") (collectively "Verizon") filed its response to the Petitions to Initiate 90-day proceedings filed by the Pennsylvania Carriers' Coalition ("PCC"), consisting of Full Service Computing Corporation t/a Full Service Network ("FSN"), Remi Retail Communications, LLC ("Remi"), ATX Licensing, Inc. ("ATX") and Line Systems, Inc. ("LSI").

When Verizon filed its response, it believed that the attachment to the PCC testimony consisted only of a one-page document, which was all that appeared in the electronic copy that was provided. Verizon has since discovered that the paper copy of the attachment actually contained an additional four pages.

Counsel for the PCC has indicated that the PCC will not oppose Verizon's submission of a short letter to clarify the record on this issue and set forth Verizon's position on the additional four pages of the exhibit.

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Verizon's pleading (Motion to Dismiss, Motion to Strike and Response) at page 11 stated that the PCC provided a "one-page document apparently constituting a 'business case' for how many DS1 customers a CLEC must have to turn a profit using Verizon's facilities." While Verizon's reference to a "one-page document" was inaccurate as to the number of pages contained in PCC's attachment, these four additional pages do not at all change Verizon's central point: The PCC carriers have not submitted adequate evidence to make a case of economic impairment under the requirements of the *TRO*. *TRO* ¶ 457.

The attachment purports to demonstrate how many DS1 customers FSN believes it must serve under its own business plan for its costs to be less than FSN's rates, both using the UNE platform and using FSN's own switch (either with the DS1 port provided from a collocation arrangement or from an FSN site). And this "study," which lacks detail or even an adequate explanation, does not address the FCC's mandatory factors that this Commission must consider in deciding whether it wishes to challenge the FCC's national finding of no impairment.

In order to rebut the FCC's national finding of no impairment for enterprise switching, the Commission must consider "all likely revenues to be gained from entering the enterprise market (not necessarily any carrier's individual business plan), including revenues derived from local exchange and data services." *TRO* ¶ 457. The Commission must also consider "the prices that entrants are likely to be able to charge." *Id.* FSN's business case fails to provide adequate evidence as to any of these relevant, mandatory factors.

The "study" ignores the additional revenues that can be obtained from entering the enterprise market. And the "study" merely posits, without explanation, a dollar amount that FSN contends it would charge customers. Other portions of the "business plan," which, contrary to the FCC's directive, is focused exclusively on FSN's individual business plan, are equally vague and speculative.[1]

[1] For example, FSN assumes the "average" customer distance from the switch is 37 miles, but there is no basis to assume that would be the case for all CLECs. FSN assumes it would purchase transport from Verizon rather than self-provisioning, but there is no basis to assume that would be the case for all CLECs. FSN assumes its line mix would be exclusively DS1's, but there is no basis to assume that would be the case for all CLECs. FSN assumes it would pay $400,000 for a switch rather than buying a less expensive switch or sharing with another carrier, but there is no basis to assume that would be the case for all CLECs.

Accordingly, FSN's "business case" is based entirely on FSN's own business strategy, and does not even address the other CLECs that make up the enterprise market, which contravenes the FCC's directive that economic considerations must include more than a single carrier's business plan. But even if FSN's "study" convincingly demonstrated that its business plan without unbundled switching was uneconomic – which it does not – this conclusion too would be irrelevant for purposes of this Commission's analysis because unbundling cannot be ordered "merely because certain competitors or entrants with certain business plans are impaired." *TRO* ¶ 115. The FCC has emphasized that the *only* CLEC costs that are applicable for purposes of impairment are those that for CLECs *in general* "are sufficient to prevent economic entry." Costs that "any new entrant would bear" – such as the cost of a switch – may not be considered an impairment. *TRO* ¶ 454 n. 1392.

The FCC concluded that "[t]he record demonstrates that competitive LECs are competing successfully in the provision of switched services, using a collocation network with associated backhaul transport, to medium and large enterprise customers, without unbundled local circuit switching." *TRO* ¶ 453. The overwhelming majority of active CLECs in Pennsylvania have not challenged this national finding. Of the five CLECs that have, only one has even bothered to submit evidence regarding its costs and revenues, and this evidence is irrelevant and/or speculative and unfounded. All of these facts strongly suggest that CLECs "have the opportunity to earn revenues that outweigh the costs associated with entry" and are therefore not impaired. *TRO* ¶ 458. FSN's business case does not alter this conclusion.

Very truly yours,

Julia A. Conover

JAC/dkf

Via E-Mail and UPS Overnight Delivery
cc: Michael C. Schnierle, ALJ
Attached Certificate of Service

CERTIFICATE OF SERVICE

I, Julia A. Conover, hereby certify that I have this day served a copy of the October 30, 2003 letter of Verizon Pennsylvania Inc. and Verizon North Inc. in the 90-Day Proceeding docketed at I-00030100, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 30th day of October, 2003.

VIA E-MAIL AND/OR UPS OVERNIGHT DELIVERY

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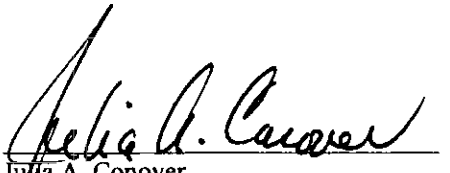

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COMMONWEALTH OF PENNSYLVANIA

DATE: October 30, 2003

SUBJECT: I-00030100;I-00030099;M-00031754

TO: Office of Administrative Law Judge

FROM: James J. McNulty, Secretary

Investigation into Obligations of Incumbent Local Exchange Carriers et al

---

Attached is a copy of an Amended Petition to Initiate Proceedings, filed by ARC Networks, Inc. d/b/a Infohighway and Metropolitan Telecommunications Corporation of Pa, in connection with the above docketed proceedings.

This matter is assigned to your Office for appropriate action.

Attachment

cc: FUS
LAW

was

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ORIGINAL

October 31, 2003

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OCT 31 2003

PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

VIA OVERNIGHT MAIL AND ELECTRONIC MAIL

DOCUMENT

Mr. James J. McNulty, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, Pennsylvania 17105

Re: Docket Nos. I-00030100: Opposition and Response of ARC Networks, Inc. d/b/a InfoHighway Communications Corp.

Dear Mr. McNulty:

Please find attached an original and three (3) copies of the Opposition and Response to the Motion of Verizon Pennsylvania Inc. and Verizon North Inc. to Dismiss, or in the Alternative to Strike Portions of Testimony filed on behalf of ARC Networks, Inc. d/b/a InfoHighway Communications Corp. in Docket No. I-00030100.

Please date-stamp the duplicate copy of this filing and return it in the enclosed self-addressed, postage-paid envelope. If you have any questions regarding this filing, please contact the undersigned counsel at (202) 887-1284.

Respectfully submitted,

Heather T. Hendrickson

Enc.
cc: Janet Tuzinski – FUS Telecom Manager
Service List (via electronic and overnight mail)

74

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for The Enterprise Market	)	Docket No. I-00030100

OPPOSITION AND RESPONSE OF ARC NETWORKS, INC. D/B/A INFOHIGHWAY COMMUNICATIONS CORP. TO THE MOTION OF VERIZON PENNSYLVANIA INC. AND VERIZON NORTH INC. TO DISMISS, OR IN THE ALTERNATIVE TO STRIKE PORTIONS OF TESTIMONY

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October 31, 2003

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

ORIGINAL

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for The Enterprise Market	)	Docket No. I-00030100

OPPOSITION AND RESPONSE OF ARC NETWORKS, INC. D/B/A INFOHIGHWAY COMMUNICATIONS CORP. TO THE MOTION OF VERIZON PENNSYLVANIA INC. AND VERIZON NORTH INC. TO DISMISS, OR IN THE ALTERNATIVE TO STRIKE PORTIONS OF TESTIMONY

I. INTRODUCTION

ARC Networks, Inc. d/b/a InfoHighway Communications Corp.("InfoHighway"), by its undersigned counsel and pursuant to the Pennsylvania Public Utility Commission's ("PUC" or "Commission") October 24, 2003 Prehearing Order in the above referenced docket,[1] hereby submits its Opposition and Response to Verizon Pennsylvania Inc.'s and Verizon North Inc.'s ("Verizon") "Motion to Dismiss the Petition to Initiate 90 Day Proceedings, Or In the Alternative to Strike Portions of Testimony and Response to Petitions to Initiate Proceedings" (hereinafter collectively, "Verizon Response") and accompanying Reply Affidavit of Peter Karoczkai (attached hereto).[2]

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[1] Prehearing Order, Docket No. I-00030100 (October 24, 2003) ("Prehearing Order").

[2] InfoHighway and Metropolitan Telecommunications Corp. of PA ("MetTel") filed a joint Petition to Initiate Proceedings on October 17, 2003. MetTel is not a party to this filing and has determined, based on the current stay of the enterprise market aspects of the Federal Communications Commission's ("FCC's") Triennial Review Order and its pending motion for clarification of that stay, not to proceed as a party in this proceeding at this time. *See* Letter to

InfoHighway submits that the Commission should deny Verizon's Motion to Dismiss and Motion to Strike. In addition, InfoHighway addresses herein (and in the Rebuttal Declaration of Peter Karoczkai, filed with the ALJ today) Verizon's assertions that there is no impairment for competitors seeking to serve DS1 enterprise customers in the state of Pennsylvania. In this pleading InfoHighway addresses the point raised in Verizon Response in the same order in which Verizon presented them: (1) Motion to Dismiss; (2) Motion to Strike; and (3) Verizon's Response to the Petitions.

II. OPPOSITION TO VERIZON'S MOTION TO DISMISS

Verizon argues that the two Petitions to Initiate Proceedings, one filed jointly by InfoHighway and MetTel (referred to herein as "InfoHighway Petition") and one filed by the Pennsylvania Carriers' Coalition ("PCC") should be dismissed for "failure to state a claim."[3] The Commission should immediately deny Verizon's Motion to Dismiss.

Verizon argues that the "InfoHighway Petition's "request that the Commission file a petition for waiver regarding the embedded base should be dismissed because these petitioners have not even attempted to come forth with the detailed and specific factual evidence regarding operational and economic impairment that this Commission would have to present to the FCC if it were to file such a petition for waiver."[4] Verizon both mischaracterizes the specific evidence and arguments set forth in InfoHighway's Petition, and misapprehends the threshold showing required by the Triennial Review Order[5] ("TRO") for this Commission to

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James J. McNulty, Secretary, Pennsylvania Public Utility Commission, from Metropolitan Telecommunications Corp. of PA, Docket No. I-00030100 (filed October 31, 2003).

3 Verizon Response, 5-6.

4 Verizon Response, 6.

5 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the*

initiate and undertake a 90 day proceeding. Accordingly, Verizon's Motion to Dismiss should be denied.

As InfoHighway explained in its Petition to Initiate Proceedings, in the TRO the Federal Communications Commission ("FCC") made a national finding of non-impairment with respect to enterprise customers.[6] The FCC relied principally upon (1) incumbent local exchange carrier ("ILEC") claims that competing carriers have installed as many as 1,300 switches, although many were installed by now-bankrupt competitive local exchange carriers ("CLECs") and thus are unavailable; (2) a single record submission suggesting that UNE-P carriers may not experience the same "hot cut" problems with enterprise customers as they do with mass market customers; and (3) the FCC's assumption that, because enterprise customers can generate more significant revenue streams than mass market customers, UNE-P carriers are better able to cover the costs of providing service to these customers without access to a local switching UNE.[7]

In recognition of the fact that its non-impairment finding may be incorrect with respect to some market segments, the FCC created a procedural mechanism whereby enterprise UNE-P carriers can present data to individual state commissions showing that they are impaired without access to ILEC-supplied local switching. Specifically, the TRO provides that state commissions may undertake "a geographically specific analysis could possibly demonstrate that competitive carriers are impaired without access to unbundled incumbent LEC local circuit switching for DS1 enterprise customers in a particular market," and the FCC noted that UNE-P

Telecommunications Act of 1996, CC Docket No. 96-98; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (Aug. 21, 2003).

6 *Id.*, ¶¶451-58

7 *Id.*, ¶¶451-52 & fn.1379-80.

carriers could suffer specific "cost and operational disadvantages" that could make it economic to serve enterprise customers only through ILEC-supplied local switching in certain market segments.[8]

In conducting its impairment analysis in this proceeding, the Commission must consider the following operational criteria: ILEC performance in provisioning loops, difficulties associated with obtaining collocation space, and difficulties associated with obtaining cross-connects in the ILECs wire center.[9] To rebut the finding that CLECs are not economically impaired by the lack of access to ULS, state commissions can consider the following economic characteristics: cost of entry into a particular market; potential revenues from serving enterprise customers in a particular market, and prices carriers are likely to be able to charge based on consideration of the ILEC's retail rates.[10] At bottom, the FCC concluded that State commissions ***must consider all relevant factors in determining whether entry is uneconomic in the absence of unbundled access to local circuit switching.***"[11]

Verizon fundamentally misunderstands the burden placed upon carriers petitioning this Commission to rebut the national finding of no impairment. At the end of this proceeding, the Commission must make an affirmative finding of impairment and petition the FCC for a waiver of its national rule based upon that finding. This waiver may be only for a specific segment of the market, such as the installed base of the competitive carriers. Contrary to Verizon's assertion, CLECs who desire the Commission to undertake this 90 day review do not have the "initial burden" in their petitions seeking initiation of a review process to provide a

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8 *Id.*, ¶454

9 TRO at ¶ 456.

10 TRO, ¶ 457.

11 TRO, ¶ 458 (emphasis added).

complete "legal or factual basis to rebut the FCC's national finding" of impairment. If Verizon's characterization of the petitioner's obligations were, in fact valid, it would have been unnecessary for the FCC to have specifically provided a 90 day period state commissions to conduct enterprise market impairment proceedings. Under Verizon's illogical interpretation of the TRO there would be no need for the Commission to avail itself of even the extremely brief 90-day procedural mechanism provided in the TRO. Instead, according to Verizon's unique interpretation of the TRO, carriers would be required to file on Day-One a complete case capable of rebutting the FCC's national finding of no impairment. The state commission would merely read that initial filing and decide whether the CLEC had rebutted the FCC's national finding. If the state commission concluded that the initial filing achieved that result, it would petition the FCC for waiver and there would be no need to spend 90 days developing a record to determine whether or not operational or economic impairment exists.

Neither the TRO nor the Commission's Procedural Order in this case require InfoHighway, or any other petitioner, to make an initial filing containing all of the information and analysis necessary for the Commission to rebut the FCC's national finding of no impairment.[12] The purpose of this proceeding is to examine the evidence of operational and economic impairments brought forth by petitioners and conclude, after development of the record through discovery, cross-examination of witnesses, and briefing, whether it can be concluded that impairment exists.

Accordingly, given the criteria the TRO requires this Commission to consider, and given this Commission's proper conclusion that any CLEC desiring to contest the

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[12] Indeed, the Procedural Order requires CLECs "to address applicable matters of law, policy, and facts, including the requirements of the TRO" in their petitions, but does not require them to go further. Procedural Order, 9.

presumption of no impairment "should be heard,"[13] the Commission should immediately deny Verizon's Motion to Dismiss the Petitions to Initiate 90 day proceedings. InfoHighway, contrary to Verizon's claim, has indeed provided sufficient factual evidence regarding impairment, including specific evidence regarding the woefully deficient parallel delivery process which DS1 carriers must rely upon,[14] for this Commission to proceed with its review and at the end of that review to conclude that the evidence warrants seeking a waiver of the FCC's national finding of no impairment.

Verizon also argues that InfoHighway's request that the Commission exercise its authority to require Verizon to continue to charge its current rates, that have been deemed to be just and reasonable in compliance with Sections 201(b) and 202(a) of the Act, should be dismissed. In arguing that InfoHighway's request that the Commission require Verizon to continue to charge its current just and reasonable rates until such time as any replacement rates can be examined in a follow-on proceeding conducted by this Commission, Verizon again completely mischaracterizes what the TRO did (and did not) say.

The TRO acknowledges that Bell Operating Companies ("BOCs") such as Verizon have a continuing obligation to provide local circuit switching at regulated rates.[15] Verizon also is subject to the pricing authority of this Commission. While the PUC no doubt has pricing authority to establish rates for Verizon's post-251 local switching element under both federal and state law, InfoHighway hereby clarifies that it is not asking the Commission to exercise that authority in the context of this proceeding at this time. The proceeding the determine the post-251 pricing obligations of Verizon should be open to any and all interested

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13 Procedural Order, 8.

14 See Initial Joint Declaration, 11-13.

15 *TRO* ¶¶653-664.

parties – not merely those carriers with a specific interest in the enterprise market switching issue – and should be conducted in a timeframe that affords the Commission the ability to engage in reasoned fact-finding and analysis. The 90 days allocated by the TRO for the enterprise market impairment determination is insufficient to ensure a fully-considered determination. Accordingly, InfoHighway requests that the Commission defer consideration of the issue of Verizon's post-251 pricing obligations at this time.

III. OPPOSITION TO MOTION TO STRIKE

Without specifying which portions of the pleadings it is referring to, Verizon asks the Commission generally to "strike all of the petitioners' arguments contending that the FCC was wrong, misunderstood the evidence or reached an erroneous conclusion."[16] The Commission should deny Verizon's motion to generally strike portions of the pleadings addressing the FCC's TRO and the proper interpretation and application of that order. Besides failing to specifically identify which portion of either InfoHighway's or the PCC's pleadings it seeks to have stricken, Verizon has failed to articulate an appropriate basis for striking such references. This Commission has expressly directed petitioners to "address applicable matters of law, policy, and facts, *including the requirements of the TRO.*"[17] Accordingly, InfoHighway's references to the TRO and its interpretation of the TRO's requirements are responsive to the Commission's Procedural Order and should not be stricken.

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16 Verizon Response, 14.

17 Procedural Order, 9 (emphasis supplied).

IV. REBUTTAL OF VERIZON'S RESPONSE

A. INFOHIGHWAY HAS STATED A BASIS TO FIND IMPAIRMENT

Verizon concludes 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."[18] In support of this assertion Verizon cites the existence of "54 known local circuit switches" owned by 24 carriers in Pennsylvania. Verizon fails to indicate, however, whether these "known" switches are actually operational, the nature and extent of the services they are being used to provide, or how many lines are served over such facilities. Further, in stunningly twisted logic, Verizon cites the very low number of customers being served by CLECs over DS1 and ISDN-PRI UNE-P or resold circuits as evidence of the lack of impairment in the entire state of Pennsylvania.[19] In addition, Verizon points to 3 months of performance metrics (June, July and August 2003) and in particular only 3 specific metrics during those 3 months, as evidence of its stellar performance in provisioning DS1 facilities to CLECs. Based upon this "evidence" Verizon concludes that "CLECs are not impaired" in serving the enterprise market without access Verizon local switching. Verizon's conclusion that there is no impairment is incorrect and will be refuted during the course of this proceeding.

As InfoHighway demonstrated in its Petition to Initiate Proceedings, a major source of impairment is the parallel provisioning process and the lack of any kind of reliable or accurate hot cut process for migrating DS1 facilities from an ILEC to a CLEC. [20] In its Response, Verizon never denies that the parallel provisioning process is disruptive, time consuming and fraught with error. Rather, in her Direct Testimony, Ms. Berry, without

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18 Verizon Response, 14.

19 Verizon Response, 17.

20 Joint Declaration, 12.

articulating either the basis for her opinion or her qualifications to offer it, merely states that parallel provisioning is the accepted service delivery method for DS1 and higher capacity loops and that it does not make sense to use any other process.[21] Verizon never counters the evidence set forth in InfoHighway's Petition, which will be supplemented through the course of this proceeding, that the parallel provisioning process is the major source of impairment in the enterprise DS1 market. In fact, Ms. Berry admits the parallel provisioning process can result in end user disconnects because "the new facility is turned up only after the old one is disconnected and the equipment is not running two systems at once."[22] Ms Berry testifies that the traditional hot cut process will not work for DS1 loops because there is "complex equipment on both ends of the loop" that makes it very difficult to transfer a DS1 facility from one carrier to another[23] yet she does not offer any proof to refute InfoHighway's evidence that the parallel provisioning process results in impairment. It is precisely this complex process of transferring a circuit from the ILEC to a CLEC that was described by InfoHighway and MetTel in great detail in the Petition to Initiate Proceedings that forms the basis for a finding that impairment exists.

V. THE STAY ISSUED BY THE SECOND CIRCUIT IS BINDING UPON THIS COMMISSION

Incredibly, in the face of a stay order that could not be clearer, Verizon argues that the temporary stay issued by the U.S. Court of Appeals for the Second Circuit[24] does not exist. This will come as shocking news to Judge Calabresi of the Second Circuit Court of Appeals, whose name appears on the Stay Order. InfoHighway submits that despite Verizon's

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21 Direct Testimony of Debra M. Berry, 7.

22 *Id.*

23 *Id.*

24 *See* Manhattan Telecommunications Corp. v. FCC, Order Granting Temporary Stay, Docket No. 03-40606(L) (Oct. 8, 2003); InfoHighway Communications Corp. v. FCC, Order Granting Temporary Stay, Docket No. 03-40608(L) (Oct. 8, 2003) ("Stay").

arguments to the contrary, and despite this Commission's determination to proceed notwithstanding the stay, this Commission is bound by the Second Circuit's Stay. Accordingly, while the Stay is in effect, the law provides that the portion of the TRO stayed by the Second Circuit, including the ninety day "mechanism by which State Public Service Commissions conduct impairment analyses" is suspended until such time as the Stay is lifted, made permanent or the various petitions for review filed regarding that portion of the TRO are ruled upon. This Commission's decision to go forward with this proceeding effectively renders the Second Circuit's Stay a nullity. In the face of this Commission's determination not to suspend Docket No. I-00030100, however, InfoHighway believes it is compelled to participate in this proceeding in order to maintain its rights.[25]

VI. CONCLUSION

For the foregoing reasons the Commission should deny Verizon's Motion to Dismiss, Motion to Strike, and should seek a waiver from the FCC of its national finding of no impairment for DS1 enterprise customers as it applies to the existing installed DS1 customer base of competitive providers. The Commission should defer to a separate proceeding issues

[25] In an effort to clarify the confusion that Verizon and the other BOCs have attempted to sow with respect to the applicability of the Stay, InfoHighway and MetTel, on October 28, 2003, filed a joint motion for clarification of the meaning and scope of the stays. Joint Motion for Clarification of Stays, Docket Nos. 03-40606, 03-40608, (2nd Cir., filed October 28, 2003).

regarding the lawfulness of Verizon's post-251 pricing of local switching and other elements it is required to make available pursuant to section 271 of the federal Telecom Act.

Respectfully submitted,

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Counsel to InfoHighway Communications Corp.

October 31, 2003

CERTIFICATE OF SERVICE

I, Ross Buntrock, hereby certify that I have this day served a copy of the foregoing "Opposition and Response of ARC Networks, Inc., d/b/a InfoHighway Communications Corp. to the Motion of Verizon Pennsylvania Inc. and Verizon North Inc. to Dismiss, or in the Alternative to Strike Portions of Testimony" in the 90-Day Proceeding docketed at I-00030100, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Washington, D.C., this 31st day of October, 2003.

VIA E-MAIL AND/OR UPS OVERNIGHT DELIVERY

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Regina L. Matz, Esquire
Thomas, Thomas, Armstrong
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October 31, 2003

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

DOCUMENT

VIA EMAIL AND OVERNIGHT MAIL

Mr. James J. McNulty
Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, Pennsylvania 17105

Re: Docket No. I-00030100

Dear Mr. McNulty:

The purpose of this letter is to advise the Commission of the filing by Metropolitan Telecommunications Corporation of PA ("MetTel"), a co-petitioner in the above-captioned proceeding, of a Joint Motion for Clarification of Stays in the U.S. Court of Appeals for the Second Circuit ("Motion for Clarification"). A copy of the Motion for clarification is appended to this letter. This letter also serves as notice that MetTel will refrain from further participation in the Commission's 90-day enterprise market impairment proceeding while the stays remain in effect.

The Motion for Clarification, filed on October 28, 2003, seeks issuance of an order confirming that the stays apply to the Triennial Review Order's ("TRO") 90-day enterprise market impairment proceedings and require that such proceedings – including the above-captioned docket – be suspended until such time as Second Circuit, or the D.C. Circuit, issues a ruling on whether to make the stays permanent. MetTel maintains that while the stays remain in effect, the Commission has no authority to proceed with the above-captioned proceeding.

12

An original and three (3) copies of this filing are enclosed. Also enclosed is a duplicate copy of this filing. Please date-stamp the duplicate copy of this filing and return it in the enclosed self-addressed, postage-paid envelope.

Sincerely,

Genevieve Morelli
Ross Buntrock
Heather Hendrickson
Counsel for MetTel

Attachment
cc: Attached Service List

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MANHATTAN TELECOMMUNICATIONS CORP. d/b/a METROPOLITAN TELECOMMUNICATIONS Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	No. 03-40606

INFOHIGHWAY COMMUNICATIONS CORP. Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	No. 03-40608

JOINT MOTION FOR CLARIFICATION OF STAYS

The petitioners in the above-captioned appeals – InfoHighway Communications Corp. and Manhattan Telecommunications Corp. d/b/a Metropolitan Telecommunications – hereby move for clarification of the meaning and scope of the stays this Court granted earlier this month in the above-captioned appeals. Certain incumbent local exchange carriers ("ILECs") have launched attacks on the Court's stays, and blatantly misrepresented them to state public utility commissions. The result is that several state commissions have indicated that they plan to

move forward with the 90-day proceedings despite the stays. The petitioners respectfully request that this Court immediately issue an order clarifying that the stays are intended to, and do, halt the 90-day state commission proceedings ordered by the FCC in the underlying agency action, the so-called *Triennial Review Order.*

On September 30, 2003, the petitioners asked this Court to stay the FCC's so-called enterprise customer prohibition, including the 90-day proceedings that the FCC authorized state public utility commissions to conduct in order to determine whether a petition should be filed with the FCC seeking to preserve the ability of UNE Platform carriers to provide local telephone service to enterprise customers. The petitioners focused the Court's attention on the material deficiencies of the 90-day proceedings, including, *inter alia*, the FCC's requirement that UNE Platform carriers make specific showings based on market definitions that will not be established until six months after the close of the 90-day window. In the Motion Information Statement, the petitioners identified the relief sought as a stay of those portions of the *Triennial Review Order* which "prohibit the use of unbundled network element platforms to service Enterprise customers *and the mechanism by which State Public Service Commissions conduct impairment analyses*." The italicized phrase was an explicit reference to the 90-day proceedings that the petitioners strongly criticized in their stay motions. Judge Calabresi's grant of the motions stayed both the enterprise customer prohibition and the 90-day state commission proceedings.

Since the stays were granted, Verizon, an intervenor in these appeals, has pursued a systematic plan of misinformation to persuade state commissions to ignore Judge Calabresi's stays by moving forward on schedule with the 90-day proceedings even while the stays remain in effect. In a Joint Reply filed with this Court on October 20, 2003, the petitioners quoted from,

and attached copies of, several Verizon submissions to state commissions. *See* Joint Reply of Petitioners InfoHighway Communications Corp. and Manhattan Telecommunications Corp., Nos. 03-40606 & 40608, filed October 20, 2003 at 3-4 (citing and attaching copies of Verizon letters to state commissions in Massachusetts and New Jersey). In those submissions, Verizon urged the state commissions not to suspend the 90-day proceedings despite the stays, attacking Judge Calabresi's stays as being outside this Court's jurisdiction and as being erroneous and procedurally defective.

More evidence has come to light in the past week. Last Friday Verizon submitted a filing with the Pennsylvania Public Utility Commission containing, if anything, even more aggressive misstatements than its previous filings with Massachusetts and New Jersey. *See* "Motion of Verizon Pennsylvania Inc. and Verizon North Inc. to Dismiss the Petitions to Initiate 90-Day Proceedings, or in the Alternative to Strike Portions of Testimony, and Response to Petitions to Initiate Proceedings," Docket No. I-00030100, before the Pennsylvania Public Utility Commission (Oct. 24, 2003) ("Verizon Motion") (Attachment One). In response to filings by the petitioners alerting the Commission to this Court's stays, the Verizon Motion stated that "there is no stay and the 90 day deadline is binding." *See* Verizon Motion at 24. Verizon asserted that this Court "lacked jurisdiction" to grant the stays, and that such stays were entered "without any review on the merits" by Judge Calabresi or any other judge. *Id.*

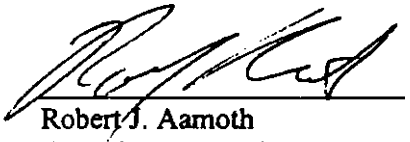
Further, Verizon accused the petitioners of improperly hiding from this Court the fact that the appeals of the *Triennial Review Order* have been consolidated pursuant to 28 U.S.C. § 2112(a). Verizon Motion at 24. In fact, as Verizon well knows, the petitioners filed transfer motions with this Court on October 1, 2003 – several days before the stays were entered – advising the Court of precisely this fact. Among other things, Verizon also misrepresented to the

Commission that the above-captioned cases have already been transferred to the D.C. Circuit, that the issue is being briefed in the D.C. Circuit, and that the D.C. Circuit has yet to rule on the stays. *See* Verizon Motion at 25. In fact, based on recent discussions with the Clerk's Office, it is our understanding that the above-captioned appeals have not been transferred, and the petitioners are aware of no briefing schedule before the D.C. Circuit.

The effect of Verizon's persistent attacks and misstatements in multiple states has been to confuse state commissions as to the validity and scope of this Court's stays, thereby promoting non-compliance with lawful orders of this Court as state commissions move forward to implement the FCC-ordered 90-day proceedings. For example, the Pennsylvania Commission has issued a scheduling order in its 90-day proceeding whereby written rebuttal testimony must be submitted by October 31, 2003 with a hearing on November 7, 2003 and briefs on November 17, 2003. *See* Prehearing Order, Docket No. I-00030100, before the Pennsylvania Public Utility Commission, Oct. 24, 2003 (Attachment Two). Other state commissions, including Maine, Massachusetts and New Hampshire, also are moving forward with the 90-day proceedings pursuant to the stayed portions of the *Triennial Review Order*. *See* Procedural Memorandum, D.T.E. 03-59, Massachusetts Department of Telecommunications and Energy, Oct. 14, 2003 ("nothing in the temporary stay orders or in the underlying motions for stay indicate that the court has stayed the 90-day investigation") (Attachment Three); Procedural Order, Docket No. 2003-629, before the Maine Public Utilities Commission (Oct. 15, 2003) ("the Second Circuit Court's Temporary Stay Order does not preclude us from determining whether we will have a 90-day proceeding"); (Attachment Four); Letter to R. Munnelly, Counsel for DSCI, from D. Howland, New Hampshire Public Utilities Commission (Oct. 22, 2003) ("nothing in the Second Circuit's order mandates that the instant [90-day proceeding] be stayed") (Attachment Five).

The petitioners respectfully ask this Court to clarify the confusion that the ILECs have created surrounding Judge Calabresi's stays by issuing an order confirming that the stays apply to the 90-day proceedings and require that such proceedings be suspended until such time as this Court, or the D.C. Circuit, issues a ruling on whether to make the stays permanent. The petitioners have informally advised staff at several state commissions that the instant motion will be filed. A clarification is needed urgently because the petitioners, and other UNE Platform carriers, will suffer severe irreparable harm, as stated in their respective stay motions, if any state commission moves forward with the 90-day proceedings according to the schedule ordered by the FCC in the *Triennial Review Order*.

Respectfully Submitted,



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October 27, 2003

CERTIFICATE OF SERVICE

I, Robert J. Aamoth, hereby certify that on this 27th day of October, 2003, the foregoing Joint Motion for Clarification. was served upon the following parties via First Class Mail:

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ATTACHMENT 1

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the	:	
Obligation of Incumbent	:	Docket No.
Local Exchange Carriers	:	I-00030100
to Unbundle Local Circuit	:	
Switching for the Enterprise Market	:	

MOTION OF VERIZON PENNSYLVANIA INC. AND VERIZON NORTH INC. TO DISMISS THE PETITIONS TO INITIATE 90- DAY PROCEEDINGS, OR IN THE ALTERNATIVE TO STRIKE PORTIONS OF TESTIMONY, AND RESPONSE TO PETITIONS TO INITIATE PROCEEDINGS

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October 24, 2003

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I. INTRODUCTION

Verizon Pennsylvania Inc. ("Verizon PA") and Verizon North Inc. ("Verizon North") (collectively "Verizon") respond to the Petitions to Initiate 90-day proceedings filed by two separate groups of competitive local exchange carriers ("CLECs").

As the Commission is aware, the Federal Communications Commission ("FCC") has already concluded that "competitors are not impaired with respect to DS1 enterprise customers that are served using loops at the DS1 capacity and above."[1] The FCC made this "national finding" because there are "few barriers to deploying competitive switches to service customers in the enterprise market at the DS1 capacity and above . . . ." *Id.* The FCC has given state commissions 90 days from the effective date of the FCC's *Triennial Review Order ("TRO")* to petition the FCC to waive this national finding regarding enterprise switching. *Id.* ¶ 455. A state commission that wishes to do so must make "an affirmative finding" demonstrating impairment for enterprise switching and can do so only by applying specific and mandatory criteria. *Id.*¶¶ 456-57.

In its October 2 Procedural Order, the Commission "tentatively concluded" that there was no impairment for enterprise switching, and directed any "CLEC seeking to persuade the Commission to make a showing to rebut the national finding." *Procedural Order* at 8.

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1 *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, FCC 03-36 (rel. August 21, 2003) ("*TRO*") ¶ 451.

While there are a significant number of CLECs operating in Pennsylvania, only two petitions to initiate proceedings were filed (by a collection of five CLECs). These petitions are filled with theories, opinions, and fist-shaking at the FCC. But they are devoid of the detailed and specific facts this Commission sought as part of its Procedural Order – the same specific facts that the FCC will require if ***this Commission*** attempts before the FCC to make an "affirmative finding" of impairment for enterprise switching.

This Commission is under no obligation to conduct a 90-day proceeding. Both petitions are facially deficient, and for the reasons set forth in more detail below, should be dismissed out of hand. If the Commission determines not to dismiss these inadequate petitions, then the Commission must strike the irrelevant material that is far beyond the proper scope of this proceeding – whether there are specific facts related to the FCC's mandatory criteria that rebut the FCC's national finding of no impairment for enterprise switching.[2] Given all that the FCC has asked this Commission to do in the next nine months, the Commission does not have the luxury of squandering its resources on issues that have no bearing on its determination.

II. BACKGROUND

On August 21, 2003, the Federal Communications Commission (FCC) released its long-awaited *TRO*. Among many other findings, the *TRO* made a national finding of "no impairment" for unbundled switching used to serve enterprise customers at DS1 capacity

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[2] For ease of the Commission's reference, Verizon is including in separate sections of this unitary pleading the pertinent factual and legal background and then (1) a Motion to Dismiss (Section III), (2) a Motion to Strike (Section IV), and (3) a Response to the respective Petitions (Section V). Verizon also submits its Statement 1.0, the Direct Testimony of Debra M. Berry, in support of any factual statements made in this pleading.

and above, and set forth a limited and specific process by which state commissions might challenge this finding before the FCC via a "90-day proceeding."[3]

The *TRO's* "national finding" of no impairment for enterprise switching was based on evidence that there are "few barriers to deploying competitive switches to service customers in the enterprise market at the DS1 capacity and above . . . ." *TRO* ¶ 451. The FCC found that there was no operational or economic impairment without access to unbundled switching for such customers, and concluded that "denial of access to unbundled switching would not impair a competitor's ability to serve the enterprise markets, including all customers which are served by the competitor over loops of DS1 capacity and above." *Id* ¶ 452-53.

The FCC's national finding can only be displaced ***by the FCC itself***, upon review of petitions for waiver filed with the FCC by state commissions, based on factors explicitly enumerated in the *TRO*. *TRO* ¶ 428, note 1315. Any such petition must be filed within 90 days from the effective date of the Order, or by December 31, 2003.[4] *TRO* ¶ 455. The FCC directed that state commissions may petition the FCC to rebut the

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[3] The FCC's finding of "no impairment" means that the FCC has found that circuit switching for DS1 capacity and above does not qualify under 47 U.S.C. § 251(d)(2)(B) as a network element that must be unbundled under the federal Telecommunications Act. Therefore it also do not qualify for TELRIC pricing, which is authorized by the Act only for elements that qualify for unbundling under section 251 of the Act. *See id* ¶ 656 ("Contrary to the claims of some of the commenters, TELRIC pricing for . . . network elements that have been removed from the list of section 251 UNEs is neither mandated by the statute nor necessary to protect the public interest. Rather, Congress established a pricing standard under section 252 for network elements unbundled pursuant to section 251 **where impairment is found to exist.**") (emphasis in original). A finding of no impairment also eliminates any obligation on the part of an ILEC to "bundle" the network element with other network elements.

[4] The *TRO* was published in the Federal Register Tuesday, September 2, 2003 and, pursuant to ¶ 830, was effective in 30 days, on October 2, 2003.

national finding of "no impairment" based on "specific" operational and economic evidence that differentiates the state from the national situation in which the FCC found no impairment. *TRO* ¶ 421. The only evidence that is relevant to demonstrate operational impairment is evidence to show that the "incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive LECs." *TRO* ¶ 456. The only evidence that is relevant to demonstrate economic impairment is evidence that weighs "competitive LECs' potential revenues from serving enterprise customers in a particular market against the cost of entry into that market." TRO ¶ 457. As will be demonstrated below, the Petitioners have not put forth the necessary detailed, state-specific evidence on these issues that would be essential to support a Commission petition for waiver to the FCC. Finally, the FCC was explicit that the economic analysis in any 90-day proceeding cannot be based on any one carrier's individual business plan. *TRO* ¶ 457.

The Commission is not free to reconsider the policy determinations and factual criteria set forth by the FCC, but rather must conform its inquiry to them. According to the FCC:

> While we delegate to the states a role in the implementation of our federal unbundling requirements for certain network elements that require ... [a] more granular approach, we make clear that any action taken by the states pursuant to this delegated authority must be in conformance with the Act and the regulations we set forth herein.[5]

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[5] *TRO* ¶ 186.

Only factual showings that conform to the factors explicitly enumerated in the TRO are properly raised in a 90-day proceeding.

This Commission issued a *Procedural Order* on October 2 that, among other things, directed any "CLEC seeking to persuade the Commission to make a showing to rebut the national finding" of no impairment with respect to local switching combined with DS1 capacity and higher loops to file a Petition to Initiate setting forth all applicable matters of law, policy and fact. "Given the national finding of no impairment, we tentatively conclude there is no impairment in Pennsylvania. Therefore, any CLEC desiring to contest the presumption of nonimpairment must bear the burden of proving impairment." (*Procedural Order* at 8).

Two Petitions to Initiate Proceedings were filed. The first was a joint filing of Arc Networks, Inc. d/b/a InfoHighway ("InfoHighway") and Metropolitan Telecommunications Corporation of PA ("MetTel"). The second was filed by a group of CLECs calling themselves the Pennsylvania Carriers' Coalition ("PCC"), consisting of Full Service Computing Corporation t/a Full Service Network ("FSN"), Remi Retail Communications, LLC ("Remi"), ATX Licensing, Inc. ("ATX") and Line Systems, Inc. ("LSI").

III. MOTION TO DISMISS

In light of the FCC's tentative finding of no impairment for enterprise switching, CLECs advocating impairment were required by this Commission to "make a showing to rebut" the FCC's national finding on no impairment. Neither Petition has offered a sufficient legal or factual basis to rebut the FCC's national finding. Having failed to meet this initial burden, the Petitions should be summarily dismissed.

A. The Commission Should Dismiss The InfoHighway/MetTel Petition For Failure To State A Claim

InfoHighway and MetTel ask this Commission to do three things: (1) seek a waiver from the FCC from the finding of "no impairment" as to their "installed base" of customers currently being served over DS1 or higher UNE-P arrangements; (2) require Verizon to continue to charge its current (TELRIC-based) switching rate going forward until this Commission determines the "lawfulness" of the switching rates for switching that may be required under a basis other than section 251 of the Act; and (3) take "notice" that 90 days is not sufficient time form them to make their case. All three of these contentions should be dismissed for failure to state a claim.

InfoHighway's and MetTel's request that the Commission file a petition for waiver regarding the embedded base should be dismissed because these petitioners have not even attempted to come forth with the detailed and specific factual evidence regarding operational and economic impairment that this Commission would have to present to the FCC if it were to file such a petition for waiver. Indeed, rather than coming forward with the mandatory state-specific evidence, these petitioners are asking this Commission to review the ***same*** generic type of evidence and arguments that were duly considered by the FCC, and to find that the FCC "fundamentally misunderstood" the facts that were before it and the FCC's "logic is deficient." (Declaration of Karoczkai, etc. at 5 and 9). This Commission is not sitting as a Court of Appeals to review and second-guess the FCC's findings, but rather "any action taken by the states pursuant to

this delegated authority must be in conformance with the Act and the regulations we set forth" in the *TRO*.[6]

The only specific argument regarding "impairment" that the InfoHighway/MetTel testimony puts forward is the claim that the "parallel delivery" process discussed at length by the FCC is "not as seamless or efficient as the FCC's description would have one believe," and that it will therefore be "labor intensive and time consuming" for these parties to move their existing customers to another switching provider. (Declaration of Karoczkai, etc. at 11-12). The parallel delivery process is how service is generally initiated for CLEC high capacity loops, instead of the traditional "hot-cut" that is used for ordinary voice loops. Parallel delivery "generally involves the initiation of service to the competitors' new digital loop while the incumbent's service remains in place. . . [W]here enterprise customers are being converted from the digital facilities, the competing carrier installs and initiates service on a new digital loop in parallel with the customer's existing service. . . . [T]he incumbent's service is disconnected only after the competitor's service over a new loop has been initiated." *TRO* ¶ 451. The FCC found that as a result of this parallel delivery process "competitive carriers neither incur the costs of hot cuts nor experience the quality degradation associated with the cut over process to serve customers with loops with DS1 capacity and above." *Id.* The petitioners' contention that the FCC was wrong and failed to consider the petitioners' arguments is not sufficient to state a claim for a 90 day case.

InfoHighway and MetTel have not even attempted to come forward with any of the state-specific evidence the FCC stated was required to demonstrate operational or

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[6] *TRO* ¶ 186.

economic impairment for this Commission to petition for a waiver of the finding of no impairment. On operational impairment, they raise no issue with Verizon's specific performance in provisioning loops in Pennsylvania (which, as discussed in the responsive section of this pleading, is very good). They do not allege difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC (which, as discussed in the responsive section of this pleading, they would not be able to demonstrate). They do not allege difficulties in obtaining cross-connects in an incumbent's wire center (where again Verizon's metrics demonstrate good performance, as discussed in the response). *TRO* ¶ 456.

They make no effort to demonstrate economic impairment, either, as they come forward with no evidence addressing "competitive LECs' potential revenues from serving enterprise customers in a particular market against the cost of entry into that market." *TRO* ¶ 457. In short, they have failed to state a claim under the FCC's strict standards for a 90-day case. In fact, these petitioners candidly admit that they have not really attempted to demonstrate impairment, lamenting that the FCC has set them to an "impossible task" and that they cannot "prepare and submit the impairment data needed." (Declaration of Karoczkai, etc. at 15). Petitioners' claim that they are "certain that there are many areas throughout the state of Pennsylvania in which carriers are economically impaired from providing DS1 enterprise service in the absence of ULS" is insufficient on its face.

Similarly, InfoHighway's and MetTel's request that this Commission require Verizon to continue to charge its current (TELRIC-based) switching rates for switching even where the FCC has ruled that switching is not required to be unbundled under

section 251 of the Act must be dismissed. The FCC has made clear that TELRIC pricing only applies to UNEs required under section 251. "Contrary to the claims of some of the commenters, TELRIC pricing for . . . network elements that have been removed from the list of section 251 UNEs is neither mandated by the statute nor necessary to protect the public interest. Rather, Congress established a pricing standard under section 252 for network elements unbundled pursuant to section 251 ***where impairment is found to exist.***"[7] Both the statute and the *TRO* make clear, moreover, that jurisdiction to review the pricing for any switching that might be required under section 271 of the Act (relating to long distance authority) lies exclusively with the FCC. First, section 271 of the Act itself makes clear that ***only the FCC*** may determine if section 271's obligations have been met, and that a state commission's role is limited to "consultation" before 271 authority is given.[8] Second, in the *TRO*, the FCC stated that "[i]n the event that a BOC has already received section 271 authorization, section 271(d)(6) grants ***the Commission*** enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271."[9] As to the pricing of a network element that must be unbundled solely by virtue of a 271 obligation, the *TRO* is clear that state commissions have ***no*** role. The pricing is not based on TELRIC but on the "just and reasonable" standard of sections 201 and 202, and this standard "is a fact-specific inquiry that ***the Commission*** will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)."[10]

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7 (emphasis in original). *See id* ¶ 656

8 47 U.S.C. § 271.

9 *TRO* ¶ 665.

10 *Id.* ¶ 664. This standard can be satisfied, for example, by evidence that a rate has

Finally, the claim that this Commission should take "notice" that the FCC has somehow set these petitioners an "impossible" task is baseless on its face and should be dismissed. It is for the Courts of Appeals reviewing the FCC's decision to determine if the 90-day procedure is faulty. This Commission does not have the jurisdiction to do so.

B. The Commission Should Dismiss The Pennsylvania Carriers' Coalition Petition For Failure To State A Claim

While longer than the other petition, the PCC petition is equally devoid of any relevant state-specific facts and also fails to make a prima facie case that this Commission should petition the FCC for a waiver of the "no impairment" finding with respect to enterprise switching.

The PCC petitioners also seek to second guess the FCC's findings with regard to the parallel provisioning process. For example, they argue that the FCC was wrong in finding that DS1 facilities are not pre-wired to ILEC switches, and that all "existing" DS1 loops are already wired to the ILEC's switch. (PCC Petition at 6). The FCC meant that the new facilities used in the parallel provisioning process were not pre-wired. Of course existing loops in service using the ILEC switch would be connected to the ILEC switch, but that would not be unique to Pennsylvania and was certainly something the FCC was aware of when it made its decision. The PCC petitioners also claim, without a shred of evidence, that spare facilities are sometimes not available and that their end users might experience some complexities in the provisioning of the parallel facilities, but again these issues are not unique or specific to Pennsylvania. Finally, they complain that Verizon does not have a process to cut over an existing DS1 loop if there is no spare facility, but aside from the technical infirmity of this argument (discussed in Verizon's response to

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been adopted as a result of an arms-length agreement.

the petition) the lack of such a process is not something unique to Pennsylvania or even to Verizon, but is something that the FCC was well aware of, which is why it discussed the parallel provisioning process.

The PCC petitioners have not even attempted to come forward with any of the state-specific evidence the FCC stated was required to demonstrate operational or economic impairment and have not provided the type of evidence this Commission would need to petition for a waiver of the finding of no impairment. On operational impairment, they raise only generalities that could apply anywhere and provide no specific facts regarding Verizon's performance in provisioning DS1 loops in Pennsylvania (which, as discussed in the responsive section of this pleading, is very good). They do not allege difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC (which, as discussed in the responsive section of this pleading, they would not be able to demonstrate). They do not allege difficulties in obtaining cross-connects in an incumbent's wire center (where again Verizon's metrics demonstrate good performance, as discussed in the response). *TRO* ¶ 456.

They make no real effort to demonstrate economic impairment, either. *TRO* ¶ 457. While they submit a barely explained one-page document apparently constituting a "business case" for how many DS1 customers a CLEC must have to turn a profit using Verizon's facilities, they submit no evidence on the issues the FCC stated were relevant to an economic impairment analysis, such as the revenue opportunities for such customers or their willingness to enter into long term contracts. They failed to attempt to demonstrate the revenues CLECs have gained from entering the enterprise market,

including revenues derived from local exchange and data services or the prices CLECs are charging enterprise customers in different parts of the state. *TRO* ¶ 457.

The PCC petitioners' complaints about their own business strategies are irrelevant. In the *TRO* the FCC emphasized that unbundling cannot be ordered "merely because certain competitors or entrants with certain business plans are impaired." *TRO* ¶ 115. The FCC concluded that the only CLEC costs that are applicable for purposes of impairment are those that for CLECs in general "are sufficient to prevent economic entry." Costs that "any new entrant would bear" – such as the cost of a switch – may not be considered. *TRO* ¶ 454 n. 1392. An economic investigation in any 90-day proceeding must be focused on all CLECs, not just the petitioners here. Although no other CLECs have requested a 90-day case, any impairment determination must still be based on whether CLECs in general are impaired, not whether a single CLEC believes it is impaired, given its particular business plan. In short, they have failed to state a claim under the FCC's strict standards for a 90-day case.

IV. MOTION TO STRIKE

Even if the Commission determines not to dismiss the petitions and to make a decision on the merits, it still should strike those portions of the petitions and testimony that are not properly considered in the limited 90 day proceeding authorized by the *TRO*. Given the TRO's explicit instructions regarding the kind of showing that is required to rebut the national finding of no impairment, and the short time available for this inquiry, the Commission must limit parties to putting forth cases that are within the scope of the Order.

First, the Commission should strike all of the PCC's references to state law bases to require unbundling, such as Chapter 30 or the *Global Order*. The FCC was very specific on the factors the Commission can present in a petition for waiver, and they relate only to the question of whether there is impairment under section 251 of the Act. This Commission cannot petition the FCC on the basis of state law. Therefore, state law arguments are irrelevant to this limited and highly expedited proceeding. In addition, as discussed in more detail later in this brief, any attempt to expand unbundling obligations under "state law" to situations where the FCC has made a national finding of no impairment would be preempted. The FCC was clear that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations," and state commissions may not impose additional unbundling obligations in the context of their review of interconnection agreements. *TRO*, ¶¶ 187 & 194. Nor can separate state unbundling requirements serve as a justification for an examination of network elements that the FCC has decided should not be unbundled. "We limit the states' delegated authority to the specific areas and network elements identified in this Order." *TRO*, ¶ 189. The FCC recognized that it was possible that some state unbundling requirements would be inconsistent with the FCC's Triennial Review determinations, but properly concluded such requirements could not serve as a basis for modifying the FCC's unbundling determinations. Instead, states must "amend their rules and . . . alter their decisions to conform to our rules." *TRO*, ¶ 195. Accordingly, the Commission should strike the PCC Petition, pages 10-14 and p. 17, paragraph 6 and the PCC Testimony p. 29-40.

The Commission should also strike all references to section 271 of the Act and whether it provides an independent basis to require unbundling. As discussed above, the requirements of section 271 and the pricing to be applied are exclusively within the FCC's jurisdiction. Accordingly, the Commission should strike the InfoHighway/MetTel Declaration p. 14, line 4 through p. 15, line 9.

Finally, the Commission should strike all of the petitioners' arguments contending that the FCC was wrong, misunderstood the evidence or reached an erroneous conclusion. Those arguments are only properly made to the Courts of Appeals. The FCC's findings are binding on this Commission.

V. VERIZON'S RESPONSES TO PETITIONS

A. There Is Ample Evidence To Show That Pennsylvania Fits Squarely Within The FCC's Finding Of "No Impairment" For Circuit Switching For Enterprise Customers

The Petitioners have come forward with no real evidence to demonstrate that competitors are impaired without access to unbundled switching for customers using loops of DS1 capacity or above. In fact, 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.

The PCC makes the unsupported claim that CLECs are not deploying switches in Pennsylvania, but the evidence shows otherwise. The record of competitive switch deployment in Pennsylvania establishes that competitors are already serving customers of all kinds using their own switches on a widespread basis throughout the Commonwealth. 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.[11] This Pennsylvania-specific information is consistent with the record nationwide, where competing carriers operate approximately 1,300 circuit switches, including more than 500 within Verizon's 30-state region.[12]

It is also evident even from the patterns of UNE leasing that CLECs in Pennsylvania are actually using their own switching to serve enterprise customers with DS1 and higher capacity loops. Putting aside for the moment those CLECs that use both their own switching and their own loop facilities, Verizon's own records of UNE provisioning demonstrate that the vast majority of CLECs serving customers with Verizon high-capacity loops are doing so through their own switching or some other non-Verizon source of switching. This fact is evident from comparing the number of DS1 and higher UNE platform arrangements that Verizon provisions with the number of DS1 and higher loops and EELs that Verizon provisions without providing the switching. Verizon PA and Verizon North combined provides competitors approximately 9,440 DS1 or faster loops, comprised of 4,247 stand-alone DS1 or DS3 loops plus 5,193 EELs with a DS1 or DS3 loop at the end. In comparison, CLECs are using Verizon's switching, i.e. DS1 & ISDN-PRI UNE-Ps or resale, to serve less than 100 customers. This means that for about 99% of all DS1 and higher UNE loops that competitors use in Pennsylvania, they have chosen to use their own (or some other competitor's) switching, not Verizon's.[13]

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11 Verizon St. 1.0 (Berry Direct) at 2.

12 *See* VZ St. 1.0 (Berry Direct) at 2-3 (Citing Telcordia, February 2003 LERG; NPRG CLEC Report 2003 at Chapter 5).

13 VZ St. 1.0 (Berry Direct) at5- 6.

Clearly, CLECs are not impaired in serving this market without Verizon switching. Rather, the vast majority of CLECs are using their own switching and therefore did not petition this Commission to initiate a 90 day case. Indeed, Petitioners ATX and FSN both admitted the having their own switches in Pennsylvania from which they serve DS1 customers. (Testimony at 3, 9). All of these facts belie the PCC petitioners' completely unsupported assertion that deployment of switches that could serve DS1 customers has "decreased dramatically" in recent years, and shows to the contrary that CLECs are still actively serving such customers with their own switching.

As a factual matter, Verizon's unbundled switches cannot be a barrier to entry in the enterprise market, since for virtually all of the loops that make up this market, CLECs have affirmatively declined to use a Verizon switch. In Verizon's multi-state footprint, it has provided hundreds of thousands of "high capacity" loops to CLECs, and of this number, less than one percent are being provided in conjunction with a Verizon switch. Remarkably, this minute percentage actually overstates the extent to which CLECs are using Verizon switches in conjunction with high capacity loops, since it does not include any of the large number of high capacity loops that CLECs provide themselves.[14]

While the PCC petitioners argue that CLECs are limited in their ability to serve high capacity customers with their own switching, PCC member ATX had quite a different story to tell the FCC during the Triennial Review. ATX told the FCC that "ATX has learned (as have most other CLECs that ATX is familiar with) that local switching facilities *can* be used to compete for larger customers desiring high-speed

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[14] While in its TRO the FCC observed that there was strong disagreement between CLECs and BOCs regarding the actual number of lines that CLECs provision using their own high capacity loops, by either count this number was in the millions. *TRO* ¶¶ 299-300.

digital services, while unbundled local switching is appropriate to serve the needs of smaller analog customers."[15] ATX's claims in this case that it actually uses its own switches instead of UNE P to serve such customers confirms ATX's statement.

Additionally, in determining whether CLECs are impaired by not having access to unbundled switching for the enterprise market, the FCC stated that the state commissions should consider a BOC's performance metrics and standards.[16] The petitioners have cited no performance metrics in support of their claims, because these metrics squarely refute their claims. A review of Verizon PA's most recent Carrier-to-Carrier (C2C) reports in Pennsylvania for the last three months, June, July and August, demonstrates that Verizon PA is providing the CLECs with very good service in these areas. For example, Verizon PA has consistently satisfied the 95% standard for OR-1-06 "% On Time LSRC/ASR Facility Check DS-1" in each month. In some months 99% of the orders were processed on time. As for provisioning, a review of the key timeliness and quality metrics demonstrates that Verizon PA is providing very good service to CLECs on DS-1 loops. Verizon PA has consistently provided parity service on PR-4-01 "% Missed Appointment -Verizon - DS-1" and PR-6-01 "% Installation Troubles Reported with 30 Days." Verizon PA has also provided the CLECs with excellent service on collocation, and no CLEC has alleged that it has had difficulties in obtaining collocation space in Verizon's Pennsylvania territory. Finally, Verizon knows of no complaints from

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15 Letter from Michael A. Peterson of ATX to FCC Commissioner Kevin Martin dated January 22, 2003 in docket 01-338 (available on FCC's searchable website).

16 *TRO* ¶ 456 ("state commissions must consider whether incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC, or difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive LECs . . . state commissions [should]consider evidence, [including] performance metrics and standard for BOCs . . . .")

the CLECs regarding cross connects related to DS-1 UNE Loop products in Pennsylvania. Verizon also maintains information regarding collocation space availability on its website which currently shows the vast majority of Verizon's central offices to have space available for collocation.[17]

This objective evidence, none of which was cited by the Petitioners, demonstrates that there has been significant switch deployment by CLECs in Pennsylvania, that a far greater number of CLECs are providing DS1 and higher capacity service using their own switches than are using Verizon's switching, and that Verizon's performance in the provisioning areas tagged as relevant by the FCC has consistently been excellent.

B. Specific Response To The InfoHighway and MetTel Petitions

1. Petitioners Have Stated No Basis To Find Impairment

These petitioners apparently argue impairment and ask this Commission to seek a waiver only for their embedded base of customers and not for the purchase of new DS1 loops in the future. They have come forward with no evidence, however, to demonstrate impairment for their embedded base, or to differentiate Pennsylvania from the national situation already considered by the FCC when it made its finding of no impairment without unbundled access to switching for DS1 and higher customers.

Petitioners' primary complaint has to do with the process for migrating an existing DS1 or higher UNE platform arrangement to non-Verizon switching. In this regard, Petitioners appear to concede that alternative switching sources are available, thus conceding that there is no impairment. They simply complain that it would be too troublesome and expensive for them to migrate service to another switching provider.

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[17] VZ St. 1.0 (Berry Direct) at 8-9.

The number of existing customers in the embedded base of the Petitioners is very small.[18] Indeed, the evidence discussed above shows this number to be only a very small fraction of the high capacity customer served by CLECs in Pennsylvania using Verizon's loops and CLEC switching. To the extent the Petitioners are simply concerned with the mechanics of transition away from the UNE environment for Verizon's switching, the *TRO* does set forth a transition implementation framework under the negotiation provisions of the Act and existing interconnection agreements. *TRO* ¶¶ 700-706. If the dispute is simply over the price for them to continue to use Verizon's switching on a temporary or permanent basis, it is not a proper subject for an impairment argument in a 90 day case. Indeed, whether Verizon is complying with the transition framework is not a proper issue to be raised in a 90 day proceeding (and is premature at this point in any event).

Petitioners' specific criticisms of the migration process amount to nothing more than an attempt to have this Commission second-guess decisions that have already been made by the FCC. First Petitioners complain about the quality of the parallel provisioning process that the FCC discussed in detail, and contend that it is "not as seamless or efficient as the FCC's description would have one believe." (Petition at 11). The FCC considered this process in detail, and the petitioners have added nothing Pennsylvania-specific to this argument. While petitioners complain about the "complexity" of the process of installing or modifying service for DS1 and higher

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[18] Petitioners have designated the numbers as "Highly Confidential," but the numbers have been provided to the Commission and Verizon's counsel. The numbers are of the same order of magnitude as shown in Verizon's records. Therefore, even using the petitioners' numbers it is evident that the vast majority of DS 1 and higher CLEC loops are using non-Verizon switching.

customers, the fact is that these services are more complex than ordinary voice services and it is not surprising that more work would be required by the carriers and the end user to coordinate all of the equipment necessary for service. Not only will there be multiplexing equipment on the telephone company end, but the end-user will also have complex customer premises equipment that needs to be configured to the service being provided. It is natural that there be more cost and work involved in provisioning more complex service, but as the FCC recognized, these customers also provide more revenue opportunities and may enter into long term contracts.

Petitioners also claim that there is no "migration" process to transfer the existing loop if spare facilities are not available or appropriate for parallel provisioning. Petitioners claim for example that the FCC "fundamentally misunderstood the barriers to serving the installed DS1 customer base of the Petitioners," because there is "no process . . for migrating existing DS1 circuits from the ILECs' switch to a competitively provided switching facility." (Declaration at 5). They claim a "flash cut" will result in the return of the customers for Verizon. Id. Petitioners' argument is flawed as a technical matter. It is precisely because a DS1 capacity or higher loop cannot be disconnected and reconnected in a typical hot cut process due to the complex equipment on both ends of the loop that parallel provisioning is the accepted standard for provisioning such loops.[19] The FCC discussed the parallel provisioning process in detail and was well aware that there was no means to cut over the existing high capacity facility. Petitioners contend that the FCC's "logic" in determining that there is no impairment caused by the process to migrate DS1 customers is "deficient." (Declaration at 9) They claim that the FCC failed

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[19] Verizon St. 1.0 (Berry Direct) at 6-7.

to acknowledge that the lack of a "process" to migrate such loops itself creates operational impairment, and that even if alternative facilities are available there would be unspecified "operational and technical barriers" and "significant delay, disruption, confusion and cost" to switching their customers to another company's switching. (Id. at 10) These are all efforts to second guess the FCC's national finding, which is not a proper undertaking in this 90 day proceeding.

While Petitioners claim that "the outcome of this proceeding could radically change whether and to what extent competitors companies operate in the state of Pennsylvania," (Id. at 8) the evidence shows that this is not true – which is precisely why the FCC found no impairment. In fact the vast majority of CLECs are already providing high capacity service using their own switching and will not be negatively affected by the removal of Verizon's unbundling obligation.

2. This Commission Lacks Jurisdiction To Review "Post-UNE Prices" For Local Switching, But Even If It Had Such Authority It Could Not Do So In This 90-Day Proceeding (InfoHighway/MetTel Petition at 4; Testimony at 5, 8, 14).

Petitioners contend that Verizon PA has an independent obligation to provide local switching under section 271 of the Act, and that this Commission should assume jurisdiction over what the price should be for this switching when it is no longer required as a UNE, and should require the current TELRIC switching rates to remain in effect in the interim. (Declaration at 14). Plainly if an element is not required to be unbundled under section 251, TELRIC pricing cannot apply, but in any event the determination of what is required under section 271 and what prices apply is exclusively within the FCC's jurisdiction.

The FCC has made clear that TELRIC pricing only applies to UNEs required under section 251. "Contrary to the claims of some of the commenters, TELRIC pricing for . . . network elements that have been removed from the list of section 251 UNEs is neither mandated by the statute nor necessary to protect the public interest. Rather, Congress established a pricing standard under section 252 for network elements unbundled pursuant to section 251 ***where impairment is found to exist.***"[20] Both the statute and the *TRO* make clear, moreover, that jurisdiction to review the pricing for any switching that might be required under section 271 of the Act (relating to long distance authority) lies exclusively with the FCC. First, section 271 of the Act itself makes clear that ***only the FCC*** may determine if section 271's obligations have been met, and that a state commission's role is limited to "consultation" before 271 authority is given.[21] Second, in the *TRO*, the FCC stated that "[i]n the event that a BOC has already received section 271 authorization, section 271(d)(6) grants ***the Commission*** enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271."[22] As to the pricing of a network element that must be unbundled solely by virtue of a 271 obligation, the *TRO* is clear that state commissions have ***no*** role. The pricing is not based on TELRIC but on the "just and reasonable" standard of sections 201 and 202, and this standard "is a fact-specific inquiry that ***the Commission*** will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)."[23]

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20 (emphasis in original). See id ¶ 656

21 47 U.S.C. § 271.

22 *TRO* ¶ 665.

23 *Id.* ¶ 664. This standard can be satisfied, for example, by evidence that a rate has

There is no basis, therefore, for Petitioners to demand that the Commission require TELRIC pricing to continue to apply to switching that is not required to be unbundled under section 251.

3. This Commission Has No Authority To Address Petitioners' Procedural Complaints About The 90 Day Process Established By The FCC

Petitioners contend that the FCC "erred in adopting a universal finding of no impairment to serve the DS1 market" because it failed to provide adequate time and tools to rebut that finding. (Declaration at 5) They argue that the FCC has required this Commission to do the "impossible." (Id.at 7). These arguments are not properly made to this Commission. Rather, Petitioners should assert them to the Court of Appeals, where these Petitioners are active participants.

The Petitioners' complaint that the FCC requires them to provide date for specific customer and geographic markets when the relevant market definitions will only be established in the 9 month chase is also irrelevant. (Declaration at 8 and 16). If Petitioners have a complaint with the process established by the FCC, it is more properly raised with the court of appeals rather than this Commission.

4. The Claim That The Second Circuit Has Stayed The Obligation To Abide By The 90-Day Deadline Is Incorrect (InfoHighway/MetTel Petition at 3-4 and Testimony at 2).

Petitioners InfoHighway and MetTel claim that an administrative stay entered by the United States Court of Appeals for the Second Circuit binds this Commission and stays the portions of the *TRO* that address the 90 day proceeding on enterprise switching. While they recognize that this Commission has determined to proceed with the 90-day

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been adopted as a result of an arms-length agreement.

schedule, they suggest this Commission is in danger of making some sort of legal error by failing to abide by this supposed "stay." In fact, there is no stay and the 90 day deadline is binding.

The court that entered the stay upon which these petitioners rely lacked jurisdiction to do so, and only entered its *administrative* stay – a stay that was entered without any review on the merits by any judge – because InfoHighway and MetTel (represented by the same counsel that represents them in this case) withheld from the Second Circuit the fact that all petitions for review of the FCC's *TRO* had been consolidated in another circuit pursuant to 28 U.S.C. § 2112(a). The CLECs seeking a stay in the Second Circuit waited six weeks after the FCC had released its TRO before seeking this stay, and two weeks after *all* petitions for review of the TRO (past, present, and future) had been ordered transferred to the United States Court of Appeals for the Eighth Circuit by the Judicial Panel on Multidistrict Litigation pursuant to the procedures of 28 U.S.C. § 2112(a). Perhaps most significantly, these CLECs filed their stay petitions with the Second Circuit shortly after the Eighth Circuit transferred all petitions for review to the D.C. Circuit.

There can be no dispute that the Second Circuit lacked jurisdiction to enter the administrative stay. Once the Judicial Panel on Multidistrict Litigation consolidated all petitions for review of the *TRO* in the Eighth Circuit, "[a]ll courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection," are required to "transfer those proceedings to the court in which the record is so filed." 28 U.S.C. § 2112(a)(5). And after all appeals of the *TRO* were consolidated in the Eighth Circuit, that court determined, "[f]or the

convenience of the parties and in the interests of justice," to "transfer the consolidated cases, including all docketed and undocketed cases transferred to the Eighth Circuit from other circuits, to the United States Court of Appeals for the D.C. Circuit."[24] This transfer order included "[a]ll pending motions, including the Motion to Stay."[25]

Thus, the stay petitions subsequently filed by the CLECs in the Second Circuit must, as a matter of law, also be transferred, since they "are instituted with respect to the same order," (28 U.S.C. § 2112(a)(5)) and Verizon understands that they have been transferred and the issue is being briefed in the DC Circuit but the DC Circuit has not granted any stay.

Similarly, petitioners demand that they be allowed to submit evidence beyond the 90 day deadline is baseless (Declaration at 16).The FCC has established a strict 90 day deadline for this Commission to file a petition for waiver with the FCC, and subsequently provided evidence will not be considered.

C. Response To The Pennsylvania Carriers' Coalition's Petition

1. Petitioners Have Stated No Basis To Find Impairment

The PCC petitioners have come forward with no evidence to demonstrate impairment, or to differentiate Pennsylvania from the national situation already considered by the FCC when it made its finding of no impairment without unbundled access to switching for DS1 and higher customers. Petitioners' primary complaint has to do with the process for migrating an existing DS1 or higher UNE platform arrangement to non-Verizon switching. In this regard, Petitioners appear to concede that alternative

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24 Order, Eschelon Telecom, Inc. v. FCC, No. 03-3212 (8th Circ. Sept. 30, 2003) (per curiam).

25 *Id.*

switching sources are available, thus conceding that there is no impairment. They simply complain that it would be too troublesome and expensive for them to migrate service to another switching provider.

All of the PCC Petitioners' claims boil down to disagreements with the FCC's findings on migration for DS1 and higher capacity loops. While thinly disguised as complaints about Pennsylvania provisioning, closer scrutiny reveals that these complaints would be equally applicable to any jurisdiction and are matters the FCC was well aware of when it issued its national finding of no impairment.

For example, petitioners contend that the FCC was wrong in finding that DS1 loops are not generally pre-wired to the ILEC's switch because existing loops in service are pre-wired. The obvious fact that existing service using the ILEC switch is connected to the ILEC switch is true for any jurisdiction and is something the FCC would have been aware of in making its decision.

Petitioners also complain that if no parallel facilities are available, then Verizon will decline to provide a high capacity loop to that customer. However, petitioners give no specifics whatsoever about any attempts to order service that were turned down because of no facilities. Certainly it is possible anywhere for the CLEC to get a response of no facilities, and petitioners have not demonstrated that this happens any more frequently in Pennsylvania than elsewhere. In any event, the *TRO* has changed the rules regarding Verizon's obligation to build new facilities for the CLECs.

Petitioners go to great lengths to argue that even if spare facilities are available, Pennsylvania is somehow different regarding the parallel provisioning process. For example, they complain that end users do not have the capacity on their customer

premises equipment to handle the existence of two facilities. First, this is not a real problem because generally the new facility is turned up only after the old one is disconnected and the equipment is not running two systems at once. Second, there is no reason to believe (and petitioners certainly have given no reason) that end users in Pennsylvania would be any different in this regard than end users anywhere else.[26] Yet, the FCC in the TRO found the parallel provisioning process to be satisfactory, especially in light of the increased revenue and long term commitment to be gained from a high capacity customer.

The PCC petitioners complaints about Verizon's past efforts to work with Remi and others to make the DS1 UNE P product meet their needs for call detail records are also completely irrelevant to the impairment issue. (Testimony at 20-21). The question is whether CLECs are impaired without access to Verizon's switching. The fact that the vast majority of CLECs are serving DS1 and higher customers without using Verizon's switching shows that they are not impaired.

The PCC attempts to discount this substantial evidence of switch deployment by claiming that a local switch primarily serves the surrounding geographical area and cannot be extended to serve larger areas, but this claim is untrue. (PCC Testimony at 10). In fact, a single switch can serve an entire LATA or state, or multiple LATAs and/or states.[27] For example, AT&T claims that the switches of its CLEC affiliate, TCG, can

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26 Verizon St. 1.0 (Berry Direct) at 6-7.

27 *See UNE Remand Order* ¶ 261 ("[S]witches deployed by competitive LECs may be able to serve a larger geographic area than switches deployed by the incumbent LEC, thereby reducing the direct, fixed cost of purchasing circuit switching capacity and allowing requesting carriers to create their own switching efficiencies.").

"connect virtually any qualifying customer in a LATA."[28] Therefore, even competitors with switches located in Philadelphia and Pittsburgh are capable of serving the entire state. In fact, it is not even necessary for the CLEC switch to be located in this state to serve customers in Pennsylvania. The PCC petitioners have not presented sufficient evidence to prove their vague and unsubstantiated claims that without Verizon's switching it is too expensive to serve high capacity customers in certain undefined "rural" areas.

All of the PCC's impairment arguments are really claims of why their particular business plans need UNE P – not why CLECs in general need it. The FCC was explicit that the economic analysis in any 90-day proceeding cannot be based on any one carrier's individual business plan. *TRO* ¶ 457. The fact that this single CLEC (or group of similar CLECs in this case) contends that it cannot afford an additional switch does not demonstrate impairment. To the contrary, the cost of a switch is precisely the kind of cost any new entrant must bear, and therefore *cannot* be considered in the Commission's impairment analysis.[29] Also, the fact that the PCC members' "business plan" purportedly relies on a UNE-P arrangement with high capacity loops is a legally insufficient basis to order unbundling. The FCC has stated that it "cannot order unbundling merely because certain competitors or entrants with certain business plans are impaired."[30] The fact that

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28 VZ St. 1.0 (Berry Direct) at 5 (citing Panel Direct Testimony of AT&T Communications of NJ, L.P. et al., Docket No. TO00110893 (February 25, 2003), at 75.)

29 *TRO* ¶ 454 n. 1392 ("We also note that these costs [to prove impairment] may only be considered a barrier to entry if they are sufficient to prevent economic entry, and thus they would not be considered 'the kinds of costs any new entrant would bear.'").

30 *TRO* ¶ 115.

the many other CLECs in Pennsylvania that are unquestionably offering DS1 and higher capacity service to business customers have not sought a 90-day proceeding strongly suggests that any economic data would most assuredly verify the FCC's conclusion of no impairment.

2. The PCC's Claims Regarding EELs With Concentration Are Unfounded

The PCC petitioners incorrectly claim that Verizon PA is not offering the "EELS with concentration" required by the *Global Order*. (Testimony at 25). An Enhanced Extended Loop ("EEL") is a combination of loop and transport where a CLEC uses its own switch. Petitioners apparently are raising the same argument MCI has made in the NMP case, that Verizon should not only provide EELs with concentration, but should also own the concentrating equipment for the CLEC.[31]

The Commission in the *Global Order* required Verizon PA to offer "[v]oice grade and DS-0 loops with DS-1 [and DS-3] transport with concentration," through December 31, 2003.[32] The Commission made clear that its EEL requirements were contingent on "the CLEC's usage of EEL combinations [being] consistent with federal law and any applicable FCC decisions."[33] Verizon PA for many years has had a tariffed offering of this product, but has always required the CLECs to provide the concentrating equipment.[34]

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31 *Verizon Pennsylvania Inc. Petition and Plan for Alternative Form of Regulation Under Chapter 30, Petition to Amend Network Modernization Plan*, P-00930715F0002.

32 *Global Order* at 91-92.

33 *Id.*

34 VZ St. 3.0 at 52-53.

In the Triennial Review the FCC rejected the demand to require "TELRIC-priced EELs with concentration," stating

> We decline . . . to establish at this time rules requiring concentration. The record demonstrates that DS0 EELs could increase loop costs and may raise several additional operational issues. Accordingly, we are not convinced, based on the limited record before us, that we should require incumbent LECs to include concentration when they provide UNEs to requesting carriers.[35]

In light of the *TRO,* the entire issue of concentrated EELs will have to be reevaluated and any concentration requirement is likely preempted (and is certainly no longer consistent with federal decisions as the *Global Order* recognized must be the case). In any event, however, the *TRO* precludes imposing the additional requirement that Verizon PA actually own the concentrating equipment for the CLEC. Moreover, since the FCC does not even require concentrated EELs, the lack of concentrated EELs cannot be a state-specific reason to find impairment.

Finally, the petitioners' complaints about concentrated EELS are contrary to the evidence, which shows that under Verizon's current tariff and policy on concentration equipment Verizon is currently provisioning over 5,000 high capacity EELs – a number that far outstrips the number of high capacity UNE P arrangements in service.

3. Petitioners' Claims Under State Law Are Preempted, And In Any Event Are Not Within The Scope Of A 90 Day Proceeding.

Since it is unquestionable that the FCC has made a national finding that switching does not qualify for unbundling under section 251 of the Telecommunications Act for DS1 or higher customers, and since Petitioners were not able to muster the

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35 *TRO* ¶ 492.

necessary evidence to rebut this finding of no impairment, Petitioners attempt to argue that the unbundled access they seek is required under state law. First they argue that the UNE Platform consisting of high capacity loops is required by the *Global Order.* Second, they argue that the "basic service function" language of 66 Pa.C.S. § 3005(e) still requires switching to be unbundled.

None of these arguments are properly considered in a 90 day proceeding. The only purpose of this proceeding is for the Commission to determine whether it has sufficient evidence to seek a waiver of the FCC's decision that competitors are not impaired without access to switching in this instance. State law is not one of the basis upon which this Commission can make the required showing to the FCC. To the contrary, the only evidence that is relevant is the evidence of operational and economic impairment specifically enumerated by the FCC.

More importantly, if the impairment test is not satisfied and the FCC's national finding that switching for high capacity customers should not be unbundled continues to apply, this Commission would be preempted from requiring unbundling under state law. The FCC expressly "limit[ed] the states' delegated authority to the specific areas and network elements identified in this Order."[36] The FCC determined that "states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations."[37] Accordingly, the FCC rejected arguments by some carriers that "states may impose any unbundling framework they deem proper under state law, without regard to the federal regime."[38]

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36 *Id.* ¶ 189.

37 *Id.* ¶ 187.

38 *Id.* ¶ 192. The FCC eliminated the provisions of 47 C.F.R. § 51.317 that previously

The FCC cited "long-standing federal preemption principles" to conclude that states may not "enact or maintain a regulation or law pursuant to state authority that thwarts or frustrates the federal regime adopted in this Order."[39] In particular, the FCC found that the state authority preserved by the Act under the savings provision in Section 251(d)(3) is narrow and "is limited to state unbundling actions that are consistent with the requirements of section 251 and do not 'substantially prevent' the implementation of the federal regulatory regime."[40] The FCC cautioned that any state attempt to require unbundling where the FCC has already made a national finding of no impairment or declined to require unbundling would be unlikely to survive scrutiny under a preemption analysis:

> If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of section 251(d)(3)(C).[41]

The FCC further noted that even *existing* state requirements that are inconsistent with the FCC's new framework would frustrate its implementation and therefore cannot stand: "[i]t will be necessary in those instances for the subject states to amend their rules and to alter their decisions to conform to our rules."[42]

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gave states discretion to create additional unbundled network elements ("UNE"). See Appendix B – Final Rules, 47 C.F.R. § 51.317. States no longer have this discretion.

39 *TRO* ¶ 192.

40 *Id.* ¶ 193.

41 *Id.* ¶ 195.

42 *Id.*

The FCC expressly rejected the argument that a state commission's unbundling requirements are not preempted if they share a common regulatory goal with the federal scheme, but differ from the FCC's rules.[43] That argument is contrary to "long-standing federal preemption principles."[44] The U.S. Supreme Court has repeatedly held that state regulations are preempted, even if they share a "common goal" with federal law, where they differ in the *means* chosen to further that goal. "The fact of a common end hardly neutralizes conflicting means."[45] In fact, the Seventh Circuit recently ruled that a tariff requirement imposed by the Wisconsin Public Service Commission was preempted by the Act, even though the tariff requirement "promotes the procompetitive policy of the federal act."[46] The court held that "[a] conflict between state and federal law, even if it is not over goals but merely over methods of achieving a common goal, is a clear case for invoking the federal Constitution's Supremacy Clause to resolve the conflict in favor of federal law."[47] Thus, even if a state commission's unbundling requirements share with the federal Act a common goal of promoting competition, this is insufficient to overcome federal preemption principles.

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43 *Id.* ¶ 193.

44 *Id.* ¶ 193, n.614 ("AT&T's argument that the validity of state unbundling regulations [under section 251(d)(3)] must be measured solely against the Act and its purposes fails to recognize that the [FCC] is charged with implementing the Act and its purposes are fully consistent with the Act's purposes").

45 *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 379 (2000) (citing cases). *See also Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861, 874-86 (2000) (preempting state tort action that would have required all automobile manufacturers immediately to install airbags in favor of any other passive restraint systems because it "stood as an obstacle to the gradual passive restraint phase-in that the federal regulation deliberately imposed" and thus conflicted with "important means-related federal objectives").

46 *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 445 (7th Cir. August 12, 2003).

47 *Id.* at 443.

The states, in short, cannot reverse an FCC policy determination by requiring unbundling in an area in which the FCC has already concluded that unbundling would be contrary to the goals and requirements of the Act. Section 251(d)(3) of the Act makes this clear by prohibiting state commissions from establishing access and interconnection regulations unless such regulations would be "consistent with the requirements of [§ 251]" and would not "substantially prevent implementation of [§ 251] and the purposes of this part."[48] The FCC recognized as much in the *UNE Remand Order* when it explained that § 251(d)(3) does not permit states to add additional unbundling obligations that do not "meet the requirements of section 251 *and the national policy framework instituted in this Order.*"[49]

Therefore, *any* unbundling requirement that goes beyond the FCC's regulations would alter the careful balance established by the FCC, and thus would "substantially prevent implementation of [§ 251] and the purposes of this part." As a result, a state may not impose broad unbundling requirements in an area when the FCC and the federal courts have already determined that the policies of the Act either preclude unbundling entirely, or else require strict limitations on the scope of the unbundling obligation.

The CLECs cannot look to state law to continue to demand the unbundling that the FCC has flatly rejected. As an initial matter, whether or not this Commission has independent state law authority to consider the unbundling sought here (which it does not), it is beyond question that such authority cannot override limitations on unbundling

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48 47 U.S.C. § 251(d)(3)(C); see also id. §261(c).

49 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking (rel. November 5, 1999) (the "*UNE Remand Order*"), ¶ 154 (emphasis added).

established by the FCC and the federal courts, as discussed in detail above. The FCC has made a national finding that circuit switching for DS1 and higher customers should not be unbundled unless very specific impairment criteria are met. This Commission is preempted from attempting to override the FCC and order unbundling. That prerogative lies solely with the FCC upon a petition by this Commission based on the specifically enumerated types of evidence.

The PCC petitioners rely on the UNE P requirements from the *Global Order,* but to the extent those requirements were based on authority the Commission believes flowed from the Telecommunications Act, the Commission cannot interpret the Act differently from the FCC, but rather is bound by the FCC's interpretation of the Act's requirements. It cannot create a federal UNE where the FCC has specifically considered the issue and found the element is not required to be unbundled, as the FCC has done with circuit switching in this instance in the *TRO.* Even if it has some authority delegated to it under this federal statute, this Commission cannot exceed that delegation by ruling otherwise.

To require unbundling under the Telecommunications Act, a detailed "necessary and impair" analysis is mandatory, and the TRO has specified the factors to be considered in such an analysis Moreover, since TELRIC pricing is a federal concept authorized only for elements for which impairment has been demonstrated under section 251of the Act, the Commission has no authority to require TELRIC pricing.[50]

The only other source the CLECs have cited for potential state law unbundling authority is 66 Pa. C.S. § 3005(e)(1), which requires an ILEC to "unbundle each basic service function on which the competitive service depends and ... make the basic service

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50 *TRO* ¶ 656.

functions separately available to any customer..." Even if this statute applied here, it still could not be used to require unbundling in a manner that is inconsistent with the federal regime regarding unbundling, so any attempt to order unbundling in the face of the FCC's national finding of no impairment would still be preempted. Moreover, the basic service function language of Chapter 30 does not authorize TELRIC pricing – that is a creature of the Telecommunications Act and FCC regulations. In any event, the issues under this statute are not properly considered in a 90 day proceeding under the TRO.

VI. CONCLUSION

For the foregoing reasons, the Petitions to Initiate 90-day proceedings filed by InfoHighway and MetTel and by the PCC should be dismissed. In the alternative, the Commission should strike all material from the petitions and accompanying testimony that is not relevant to the 90 day inquiry and should deny the petitions on the merits.

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October 24, 2003

ATTACHMENT 2

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Investigation into the Obligations of Incumbent Local Exchange Carriers to Unbundle Local Circuit Switching for the Enterprise Market	: : :	Docket No. I-00030100

PREHEARING ORDER

A prehearing conference in the above-captioned matter was held on October 24, 2003, in Harrisburg, Pennsylvania.

Schedule

The following schedule was agreed upon by all parties in attendance:

October 31, 2003 Written rebuttal testimony due from petitioning parties.

November 7, 2003 Hearing on all testimony in Harrisburg, PA.

November 17, 2003 Briefs due

The due dates for the filing of testimony and briefs are "in hand" dates. That is, the due dates are the dates when the documents must be received by the Commission and the other parties, and not merely placed in the mail. Testimony and briefs may be exchanged by email; however, email shall be followed by delivery of hard copy by overnight mail delivery. The Commission's Office of Trial Staff may follow up with first class mail in lieu of overnight mail.

Other

Settlement of all or some of the issues in this proceeding is encouraged Given the time constraints upon this proceeding, all parties are expected to demonstrate good faith in the conduct of discovery and in the presentation of their respective cases.

ORDER

1. The above schedule of this proceeding is adopted.

2. The parties shall, in addition to complying with 52 Pa. Code §§5.501, et seq., serve one copy of their briefs on Maryanne Martin of the Commission's Law Bureau. when they file them. The parties also shall serve on Ms. Martin a copy of each brief in either Word (2002 or earlier version) (preferred) or Word Perfect (version 8.0 or earlier). Such service shall be made by email to Ms. Martin at: mrmartin@state.pa.us.

Date:_____

_____
MICHAEL C. SCHNIERLE
Administrative Law Judge

ATTACHMENT 3

The Commonwealth of Massachusetts

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

PROCEDURAL MEMORANDUM

TO: D.T.E. 03-59 Service List
(via E-mail and Regular Mail)

FROM: Jesse Reyes, Hearing Officer

RE: Effect of Second Circuit Temporary Stay Order

DATE: October 14, 2003

On September 25, 2003, the Department directed participants to file offers of proof in this proceeding by October 9, 2003. On October 8, 2003, the United States Court of Appeals for the Second Circuit granted a temporary stay of provisions of the Triennial Review Order that permit states 90 days to petition the Federal Communications Commission for a waiver of its rules pertaining to the availability of switching as an unbundled network element for requesting carriers that serve enterprise customers. InfoHighway Communications Corporation v. FCC, No. 03-40608 (2d Cir. Oct. 8, 2003)(order granting temporary stay pending hearing of motion for stay); Manhattan Telecommunications Corporation v. FCC, No. 03-40606 (2d Cir. Oct. 8, 2003)(same).

On October 9, 2003, DSCI Corporation and InfoHighway Communications Corporation filed a letter with the Department, as well as copies of the temporary stay orders, in lieu of filing an offer of proof, stating their belief that the effect of the orders is to stay state proceedings as well. The letter also stated that the carriers would not file an offer of proof pending a further ruling on the motion for stay.

The Department concludes that nothing in the temporary stay orders or in the underlying motions for stay indicate that the court has stayed the 90-day investigation in D.T.E. 03-59. Further, it is imprudent to stay this proceeding based only on the possibility that the provisions of the Triennial Review Order may be modified, given the short deadline under the current rules. Therefore, I direct DCSI and InfoHighway, as well as any other participants that withheld their offers of proof as a result of the stay orders, to file their offers of proof no later than **5:00 p.m. on October 15, 2003**.

Please contact Jesse Reyes (617) 305-3735 if you have any questions.

ATTACHMENT 4

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2003-629

MAINE PUBLIC UTITLIES COMMISSION
Investigations into Implementation of the
Federal Communication Commission's
Triennial Review Order

October 15, 2003

PROCEDURAL ORDER

On October 9, 2003, InfoHighway Communications Corporation (InfoHighway) filed a letter in this proceeding informing the Commission of a Temporary Stay Order issued by the Second Circuit Court of Appeals relating to the Federal Communications Commission's *Triennial Review Order* (TRO). InfoHighway takes the position that this proceeding should be stayed pending the D.C. Circuit Court of Appeals' resolution of InfoHighway's request for a permanent stay.

We believe that the Second Circuit Court's Temporary Stay Order does not preclude us from determining whether we will have a 90-day proceeding or not. At most, the Order may preclude us from proceeding with the substantive analysis required by the TRO. Thus, we will not suspend our requirement that CLECs make a *prima facie* showing of the need to conduct a 90-day proceeding. All such filings must be submitted no later than **October 21, 2003.**

If, after review of the submissions, we determine that conducting a 90-day proceeding is necessary, we will consider at that time any motions to stay our proceeding due to activities at the D.C. Circuit Court of Appeals.

BY ORDER OF THE HEARING EXAMINER

Trina M. Bragdon
Hearing Examiner

ATTACHMENT 5

October 22, 2003

Robert J. Munnelly, Jr.
Murtha Cullina LLP
99 High Street, 20th Floor
Boston, MA 02110-2320

Re: DT 03-174, FCC Triennial Review of No-impairment for DS-1 Switching
Procedural Schedule

Dear Mr. Munnelly:

The Commission received your letter, dated October 9, 2003, indicating that DSCI and InfoHighway, petitioners in this docket, would not be filing an Offer of Proof pursuant to the procedural schedule agreed upon with Staff at the October 3, 2003 technical session and reported in the Staff's memorandum to the Commission on October 6, 2003 (Memorandum). The reason given was that an order by the Second Circuit Court of Appeals had temporarily stayed the docket. The Commission has also received your letter dated October 20, 2003, indicating that DSCI and Info Highway would file their Offer of Proof, with a reservation of rights, on October 22, 2003.

The order of the Second Circuit Court of Appeals appears to be a temporary administrative stay until the merits of the motion can be addressed. It is possible that the Second Circuit Court, or the D.C. Circuit Court of Appeals (the Court which may ultimately hear the matter), will find merit in the motions to stay. At this time, however, the Commission concludes that nothing in the Second Circuit's order mandates that the instant docket be stayed. Further, given that the FCC Triennial Review Order (TRO) requires the Commission to request a waiver of the national rule on switching by December 31, 2003, suspending our review at this time could be problematic. Therefore, the Commission will proceed with this investigation pursuant to its state statutory authority, which, inter alia, includes the duty to keep informed regarding utility compliance with provisions of law, RSA 374:4, and the authority to investigate service quality, RSA 374:7.

The procedural schedule proposed in the Memorandum shall be adjusted as follows:

DSCI/Info Highway Offer of Proof	October 22, 2003
Commission ruling	October 29, 2003
Discovery Requests to Staff	November 4, 2003
Discover Requests issued to Parties	November 7, 2003
Discovery Responses	November 21, 2003
Rebuttal Testimony	December 10, 2003
Optional Proposed Findings of Fact	December 12, 2003
Hearings	December 16, 2003
Briefs (up to 10 pages)	December 18, 2003

Very truly yours,

Debra A. Howland
Executive Director and Secretary

cc: Service List

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Caption [use short title]

Docket Number(s): 03-40606/03-40608

Manhattan Telecommunications Corp.

v.

Motion for: Clarification of Stays

Federal Communications Commission and United States of America

Set forth below precise, complete statement of relief sought:

Movants request that the Ct. confirm that the stays granted 90-day in this case apply to the state commission proceedings and those proceedings are suspended until this Ct. rules on whether to make the stays permanent.

InfoHighway Communications Corporation

v.

Federal Communications Commission and United States of America

MOVING PARTY:

- ☐ Plaintiff
- ☐ Defendant
- ■ Movant
- ☐ Appellee/Respondent

OPPOSING PARTY:

MOVING ATTORNEY: Robert J. Aamoth
[name of attorney, with firm, address, phone number and e-mail]

Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500, Washington, DC 20036
(202) 955-9600
raamoth@kelleydrye.com

OPPOSING ATTORNEY [Name]: John Rogovin* (See attached rider)
[name of attorney, with firm, address, phone number and e-mail]

Federal Communications Commission
445 12th Street, S.W., Washington, DC 20554
(202) 418-1735
jrogovin@fcc.gov

Court-Judge/Agency appealed from: Federal Communications Commission

Please check appropriate boxes:

Has consent of opposing counsel:
A. been sought? ☐ Yes ■ No
B. been obtained? ☐ Yes ■ No

Is oral argument requested? ☐ Yes ■ No
(requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☐ No
If yes, enter date _____

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Signature of Moving Attorney:

Date: 10/27/03

Has service been effected? ■ Yes ☐ No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED** **DENIED.**

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk of Court

Date: _____

By: _____

Form T-1080 (Revised 10/31/02).

InfoHighway Communications Corporation

and

Manhattan Telecommunications Corp.
d/b/a Metropolitan Telecommunications

Joint Motion for Clarification of Stays

FormT-1080 - Rider

Moving Attorneys

Genevieve Morelli
Todd D. Daubert
Michael Hazzard

KELLEY DRYE & WARREN LLP
1200 19th Street, N.W.
Suite 500
Washington, DC 20036
(202) 955-9600

Opposing Attorneys:

John Ashcroft
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

CERTIFICATE OF SERVICE

I, Heather T. Hendrickson, hereby certify that I have this day served a copy of the foregoing "Letter Regarding the Joint Motion for Clarification of Stays in the U.S. Court of Appeals for the Second Circuit" in Docket No. I-00030100, upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Washington, D.C., this 31st day of October, 2003.

VIA E-MAIL AND/OR UPS OVERNIGHT DELIVERY

Patricia Armstrong, Esquire
Regina L. Matz, Esquire
Thomas, Thomas, Armstrong
& Niesen
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Harrisburg, PA 17108

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