

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE CONSIDERATION)
OF THE TRIENNIAL REVIEW ORDER OF THE)
FEDERAL COMMUNICATIONS COMMISSION) PSC DOCKET NO. 03-446
RELATED TO ACCESS TO UNBUNDLED)
NETWORK ELEMENTS)
(OPENED OCTOBER 21, 2003))

ORDER NO. 6385

This 6th day of April, 2004, the Commission determines and Orders the following:

1. By PSC Order No. 6295 (Oct. 21, 2003), the Commission initiated this docket to consider the determinations "delegated" to the state utility commissions in the Federal Communications Commission's ("FCC's") August 2003 *Triennial Review Order* ("TRO").¹ On December 1, 2003, Verizon Delaware, Inc. ("Verizon") filed a petition here challenging the FCC's presumptive national finding of "impairment"² as it relates to: (1) "mass market" circuit switching in northern New Castle County; and (2) interoffice dedicated transport along thirty-six specified routes (also all located in northern New Castle County). The designated Hearing Examiner scheduled hearings on Verizon's petition for April 13 and 14, 2004.

¹In the Matter of the Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report & Order on Remand and Further NPRM, FCC 03-36, 18 FCC Rcd. 16978 & 19020 (rel. Aug. 21, 2003 & errata Sept. 17, 2003).

²Under the Federal Telecommunications Act of 1996 (as interpreted by the TRO), if the ability of a competitive local exchange carrier ("CLEC") to enter a particular market is "impaired" without access to a particular network element, then the incumbent local exchange carrier ("ILEC"), such as Verizon, must offer unbundled access to such element at forward-looking, cost-based "TELRIC" rates.

2. On March 2, 2004, however, the United States Court of Appeals for the District of Columbia Circuit, in *United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir 2004) (Nos. 00-1012, et al.) struck down major portions of the TRO by: (1) vacating the FCC's delegation to state commissions of decision-making authority over several granular "impairment" determinations; (2) questioning the standards under which state commissions were to make "impairment" determinations for mass market switching and certain dedicated transport elements; and (3) vacating the FCC's nationwide impairment determinations with respect to these network elements.

3. Based on the D.C. Circuit Court's decision, the Hearing Examiner in this case, by memorandum dated March 15, 2004, recommended that the Commission suspend this proceeding to see what further actions emanate from the FCC or the federal courts (including the Supreme Court). This recommendation is supported by Staff and appears consistent with action taken by other jurisdictions in the mid-Atlantic region, including Maryland, New Jersey, and the District of Columbia. The Hearing Examiner and Staff also recommended that Staff continue to meet with the parties to explore the implications of the D.C. Circuit Court's decision (and any subsequent federal action in this matter) on local exchange competition in Delaware and to also explore the various carriers' views concerning what regime (federal, state, or private unregulated contract) might govern Verizon's sale of network elements if and when the decision of the Court of Appeals becomes effective.

4. AT&T Communications of Delaware, LLC, and WorldCom, Inc. (MCI), opposed a delay on the proceedings already scheduled in this docket, noting that the TRO currently remains legally operative and that the record developed in the proceedings might be beneficial even if the Court of Appeals' opinion forced the FCC to redo its unbundled network analysis. The Commission considered the parties' positions at its meeting on March 16, 2004, and determined to accept the course of action recommended by the Hearing Examiner and Staff. In doing so, the Commission accepts their reasoning. However, the Commission emphasizes that this decision to suspend is not necessarily a determination to terminate this docket. Rather, it is a decision simply to now forego the present procedural schedule - and the original action deadline of (or near) July 2, 2004 - in order to see how this matter plays out in the courts and before the FCC over the next few weeks or months. Nothing in this Order prevents the Commission from revisiting this decision and reinstating these proceedings if circumstances, or court rulings, might later suggest pursuing a different course.

Now, therefore, **IT IS ORDERED:**

1. That, by and in accordance with the affirmative vote of a majority of the Commissioners, the Commission hereby suspends this proceeding until further Order of this Commission.

2. That the Commission Staff shall meet informally with the parties to this case for the purposes described in the body of this Order and shall periodically report to the Commission regarding the discussions and any Staff recommendations.

3. That the Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:

/s/ Arnetta McRae
Chair

Vice Chair

/s/ Joann T. Conaway
Commissioner

/s/ Donald J. Puglisi
Commissioner

/s/ Jaymes B. Lester
Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary