

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. 6578

This 22nd day of February, 2005, the Commission determines and Orders the following:

1. The Commission originally initiated this particular docket to provide a framework for it to perform the fact-finding responsibilities "sub-delegated" to the State utility commissions by the Federal Communications Commission ("FCC") in its Triennial Review Order ("TRO").¹ See PSC Order No. 6295 (Oct. 21, 2003). Under the TRO, the State commissions' marching Orders were to determine - on a targeted, "granular" market basis - whether competing local exchange carriers should have the ability to lease certain particular "unbundled network elements" ("UNEs") from incumbent local carriers (such as Verizon Delaware Inc. ("VZ-DE")). In performing these analyses, the State commissions were to apply threshold "triggers" and other criteria defined by the FCC in the TRO.

¹In the Matter of Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16,978 at ¶¶ 186-90 (FCC 2003) (describing the FCC's sub-delegations to State commissions), corrected by Errata, 18 FCC Rcd. 19,020 (FCC 2003) ("Triennial Review Order" or "TRO").

2. Before this Commission could complete the assigned tasks as applied to Delaware,² the United States Court of Appeals for the District of Columbia Circuit struck down the FCC's "sub-delegation" process that allowed State commissions to make "granular" determinations whether certain elements had to be made available as UNEs in particular "geographic" markets. See United States Telecom Assoc. v. FCC, 359 F.3d 554 (D.C. Cir. 2004).³ After the Court of Appeals felled the State "sub-delegations," the Hearing Examiner assigned to this matter recommended that the proceedings be suspended to see if the Supreme Court might review the question whether States could permissibly be delegated the duties assigned by the TRO.⁴ The Commission accepted that recommendation. PSC Order No. 6385 (Apr. 16, 2004). The Supreme Court declined to intervene on that issue (as well as other TRO rulings. See NARUC v. United States Telecom Assoc., 125

²In the TRO, the FCC also directed the State commissions to initiate investigations into the incumbent's use of a "batch hot cut process" to see if the implementation of such mass "cut-over" procedures might mitigate the need for competitors to have access to unbundled mass market local circuit switching as a UNE. TRO at ¶¶ 487-90. This Commission's Order No. 6295 did not speak to the development of such a "batch hot cut process" by VZ-DE. At that time, the Commission's intention was to conduct that investigation in a separate docket that would begin after utility commissions in other Verizon jurisdictions might have developed potential templates for such a process.

³The Court of Appeals' ruling also questioned the validity of nationwide findings related to the availability of particular UNEs when such findings relied on the ability of State commissions to make more granular determinations in particular markets. Thus, when the court found the delegations to the State commissions impermissible, uncertainty arose whether the particular UNEs which were to have been the focus of the States' granular fact-finding did, or did not, have to be made available to competing local exchange carriers. In addition, the Court of Appeals in its ruling also upheld several TRO determinations which had found, on a nationwide basis, that certain other network elements did not have to be provided to competitors.

⁴Memorandum to the Commission from Sr. Hearing Exam. Wm. F. O'Brien (Mar. 15, 2004).

S.Ct. 313 (2004); AT&T Corp. v. United States Telecom Assoc., 125 S.Ct. 316 (2004); and California v. United States Telecom Assoc., 125 S.Ct. 345 (2004) (all denying petitions for certiorari). After that, the Commission left this proceeding lie dormant in order to see how the FCC might restructure its UNE inquiry on remand from the Court of Appeals.

3. The FCC's first response was its Interim Order.⁵ That Order was intended to provide stability until the FCC could rethink its UNE regime in light of the Court of Appeal' rulings. The FCC has now released its Order on Remand, in which it revises its UNE rules to meet the Court of Appeals' rulings. In the Matter of Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Dckt. No. 04-313, Order on Remand (FCC rel. Feb. 4, 2005) ("Order on Remand"). The Order on Remand - with its amended rules scheduled to become effective March 11, 2005 - makes "national" findings about the availability of the particular UNEs which were, in the TRO, the subject of the States' "granular" investigations. Moreover, the Order on Remand ends the federal dictate for State commissions to superintend the development of "batch hot cut processes" to be used by incumbent local carriers.⁶

4. In light of the Order on Remand, the proceedings previously constructed in this docket are no longer required, or needed.

⁵In the Matter of Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order and Notice of Proposed Rulemaking, 19 Fcc Rcd. 16,783 (FCC 2004).

⁶Order on Remand at ¶¶ 210-17 & n. 569.

Moreover, questions related to VZ-DE's "hot cut" pricing (and the availability of various "cut over" procedures) are currently being examined in the re-opened Docket No. 96-324, Phase II. See PSC Order No. 6507 (Nov. 9, 2004). In addition, in PSC Docket No. 04-68, the Commission is also reviewing VZ-DE's assertion that, under various "change of law" provisions in several individual interconnection agreements, it is now entitled to have its contractual UNE obligations altered to conform to the changes wrought first by the TRO and now by the Order on Remand.⁷ Finally, in the TRO, the FCC also spoke to an incumbent's current obligation to perform "routine network modifications" to already constructed, unbundled transmission facilities that are to be used by requesting carriers.⁸ The Commission expects to call for a report on the status of such "routine network modification" issues (in the context of Delaware) by a separate entry entered by the Commission or the Hearing Examiner in the appropriate docket.

⁷The present proceedings in Docket No. 04-68 encompass less than two dozen interconnection agreements. However, as the Commission explained in PSC Order No. 6539 (Jan. 11, 2005), if VZ-DE or any other carrier party to any other interconnection agreement disagrees about whether the TRO or the Order on Remand has altered their contractual UNE obligations, the competing carrier or VZ-DE can ask the Commission to resolve the contractual dispute. Of course, the Commission, by this Order, does not attempt to resolve any issue about the impact of the TRO or the Order on Remand as applied to any particular "change of law" or "notice" language in any particular interconnection agreement.

⁸TRO at ¶¶ 632-40. See 47 C.F.R. § 51.319(e)(5)(i)-(ii).

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

1. That, for the reasons set forth in the body of this Order, the proceedings called for by earlier Orders entered in this matter are hereby terminated. This docket is now closed.

2. 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/ Jaymes B. Lester
Commissioner

Commissioner

ATTEST:

/s/ Karen J. Nickerson
Secretary