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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

RECORDS AND REPORTING

In Re: Investigation into)
pricing of unbundled network)
elements)
_____)

Docket No. 990649-TP

Filed: August 7, 2000

**RESPONSE OF THE FLORIDA COMPETITIVE CARRIERS ASSOCIATION TO
VERIZON FLORIDA, INC.'S MOTION TO BIFURCATE AND SUSPEND
PROCEEDINGS AND SPRINT-FLORIDA'S MOTION TO BIFURCATE
PROCEEDING, FOR A CONTINUANCE AND LEAVE TO WITHDRAW COST
STUDIES AND CERTAIN TESTIMONY**

Pursuant to rule 28-106.204, Florida Administrative Code, the Florida Competitive Carriers Association (FCCA) files its Response to Verizon Florida, Inc.'s (Verizon) Motion to Bifurcate and Suspend Proceedings and to Sprint-Florida's (Sprint) Motion to Bifurcate Proceeding, for a Continuance and Leave to Withdraw Cost Studies and Certain Testimony.

Introduction

In its motion, Verizon asks the Commission to bifurcate and suspend procedural events with regard to Verizon in order to allow Verizon to prepare a different cost study. Sprint also asks to bifurcate the proceeding and for a continuance as to Sprint's testimony and cost studies, but does not seek an indefinite delay. While FCCA disagrees with the premise of their motions, FCCA does not object to the requests of Verizon and Sprint that their UNE prices be considered on a separate procedural track, as long as the Commission establishes a schedule now that will ensure a final

Commission decision (including any decision on reconsideration) on Verizon's and Sprint's UNE

- APP _____
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FPSC-RECORDS REPORTING

prices by July 31, 2001.¹

FCCA would object strenuously to a "suspension" of the entire proceeding, and notes that BellSouth has stated unequivocally that it is prepared to go to hearing in September on the studies and testimony that it has submitted in this proceeding. FCCA would also object strenuously to any delay in the consideration of Verizon's and Sprint's UNE rates greater than the delay that would result from the schedule described above.²

FCCA wishes to emphasize that, while it does not object to the bifurcation and limited delay described above for Verizon and Sprint, FCCA disputes the rationale contained in Verizon's and Sprint's motions. FCCA's willingness to delay consideration of Verizon's and Sprint's UNE prices stems—not from the view that the recent decision of the United States Court of Appeals for the Eighth Circuit in *Iowa Utilities Board v. FCC*, Case No. 96-3321 (8th Cir. July 18, 2000) requires this result—but from the fact that their requests are consistent with FCCA's desire for a thorough and orderly consideration of the ILECs' cost models and proposed UNE rates.

So that there can be no possibility that FCCA's concurrence in a bifurcation and limited delay for Verizon and Sprint can be construed as an indication that FCCA believes the Commission

¹Two additional conditions should attend the granting of a delay to Verizon. First, the Commission should make it clear that any new or revised cost study that Verizon prepares must provide a study and a proposed rate for each UNE listed in the stipulation entered by the parties in this docket (the existing study fails to do so). Second, if the Commission bifurcates the case and grants a continuance to Verizon, such that Verizon's study and testimony would be unavailable during the September hearing, the Commission should not permit Verizon to participate in the portion of the hearing that deals solely with BellSouth's cost study.

²Sprint wants to refile its cost studies in the April - June 2001 timeframe. As noted above, while FCCA does not object to a slight delay for Sprint and Verizon, Sprint's suggested timeframe would not permit a final decision by July 31, 2001.

is not in a position to proceed to hearing in September to consider BellSouth's cost model and rates, FCCA will respond briefly to some of the assertions in the motions.

Verizon Advocates the Wrong Priorities

Verizon and Sprint acknowledge that the opinion of the Eighth Circuit may be stayed, and that there is a question as to whether it will ultimately remain in effect. Verizon argues that the Commission's course should be to wait until all "uncertainty" has been removed before it acts. If the Commission were to accept the "absence of uncertainty" as the standard governing its conduct, it would have to also resign to being moribund in this case and elsewhere. Taking into account appeals and proceedings on remand, the issue of the cost methodology involved in the opinion of the Eighth Circuit likely will not be finally resolved for several years. The Commission can fashion UNE rates now and make any needed adjustments later -- delay for the sake of delay only serves to protect Verizon's incumbency. Verizon argues that the objective in this case is to avoid the possibility of having to conduct another ratemaking exercise (Motion, Page 3, footnote 2). FCCA asserts that there is a higher priority. The Commission's primary objective should be to avoid a situation in which, due to the absence of correctly designed UNE rates, the development of competition in the local exchange market in Florida would be stymied until legal battles are finally over several years from now.

The Motion Mistakenly Assumes That the Decision to Go Forward or Not is Verizon's to Make

On the one hand, in its motion, Verizon states, "This change must be addressed by the parties and the Commission." (Motion at 2). However, in the next sentence, Verizon makes a very different claim. Verizon asserts that ". . . it would be inappropriate for the Company to go forward with its

case presentation, as filed." (Motion at 2). Consistent with the latter sentence, at page 5 of its motion Verizon says it "... intends to withdraw its cost studies, proposed prices, and associated testimony."

Verizon was right the first time: the Commission and parties must address this issue.³ While FCCA does not object to a granting of Verizon's request to the extent described herein, FCCA emphasizes that in this context Verizon cannot simply and unilaterally decide to "withdraw." Verizon's situation is not analogous to one in which a party files a petition asking the Commission to grant relief, and then decides to withdraw its request. This case began with a petition by FCCA and others that the Commission granted by initiating a generic investigation of UNE rates and by requiring the ILECs to prepare, and submit for consideration, certain cost studies. Verizon's role is to comply with the Commission's directive.

Nor can this situation be compared to one in which a witness finds a mistake in his/her facts or calculations, and therefore cannot testify as to their accuracy or truthfulness. Verizon does not allege that it is "unable to support" the studies and testimony because they are based on erroneous data, or that they are flawed, or that they are otherwise not what they purport to be. Instead, Verizon asserts that to proceed now would be "inappropriate" because the testimony and studies are based on a standard that the court disapproved. Verizon's assertion--that to continue would be "inappropriate"-- is an issue that parties are entitled to challenge and dispute. Accordingly, whether the Commission can proceed to design rates based on the studies and testimony that have been submitted in this case is not a decision that Verizon can make unilaterally. It is an issue the Commission must resolve, after considering evidence and argument from all parties. (As stated

³Sprint recognizes this as it seeks permission to withdraw its cost studies and certain testimony. (Sprint Motion at 5).

above, FCCA does not object to a limited postponement for Sprint and Verizon).

In this regard, one assumption implicit in Verizon's motion is that the opinion of the Eighth Circuit necessarily will have a significant, substantive effect on the Commission's ratemaking proceedings. However, in its opinion the court strongly endorsed the application of a forward-looking cost study. The extent of the impact of any changes in details or technical nuances associated with variations on the overriding forward-looking theme can be gauged only by considering evidence and hearing argument.⁴

**The Commission Should Be Guided by the State of Competition,
not the State of Massachusetts**

In its motion, Verizon cited Massachusetts as an example of a jurisdiction that has apparently decided to delay its review of certain UNE rates, pending a decision by the United States Supreme Court or a decision on remand by the FCC. According to Verizon, Massachusetts has determined that to proceed would "not be an efficient use" of resources. However, whether the expenditure of resources would be "efficient" is strictly a function of circumstances and objectives. FCCA believes that a comparison of the effort expended to the gains realized would be a pertinent measurement of efficiency in this situation. FCCA submits that in Florida, where facilities-based competition has been frustrated by the absence of properly designed UNE rates, a proceeding to correct the situation and make the introduction of competition in the local market possible without waiting for additional years to pass is an "efficient" and highly desirable investment of resources.

⁴In this proceeding FCCA is sponsoring the rebuttal testimony of Joseph Gillan, who will testify that the practical effect of the use of TELRIC-based models in light of the Eighth Circuit's opinion is to define the upper bounds of permissible UNE rates in this proceeding. Only after considering this and other testimony could the Commission draw any conclusions regarding its ability to proceed to design UNE rates based on the record of this proceeding.

Verizon Mischaracterizes CompTel's Letter

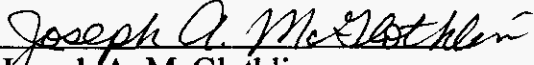
At pages 3-4 of its motion, Verizon refers to a letter in which CompTel asked state commissions to refrain from considering changes to existing UNE rates until the FCC issues a new costing rule on remand and conclusion of any appeal of the Eighth Circuit's decision. However, on inspection it is clear that CompTel's letter supports FCCA's position, not Verizon's. Verizon fails to mention that CompTel was urging state commissions to resist initiatives by ILECs to undermine or erode rates based on forward-looking costs. In its letter, CompTel stressed that the Eighth Circuit upheld the setting of UNE rates based on forward-looking incremental costs. The precise concern expressed by CompTel was that ILECs may regard the action of the Eighth Circuit in vacating the FCC's rule as creating a vacuum which they could attempt to exploit by urging states to implement rates based on embedded or historical costs. CompTel's message to the states was that, in light of the Eighth Circuit's forceful validation of forward-looking incremental costs, such efforts would be "worthless litigation." *See*, copy of letter of H. Russell Frisby, Jr., President of CompTel, to Bob Rowe, President of NARUC, dated July 19, 2000 (Attachment A).⁵

Conclusion

For the reasons stated herein, the FCCA disputes the premise of the motions, but does not

⁵One passage in Verizon's motion indicates that CompTel's concern that ILECs may regard a hiatus between FCC rules as an opportunity to advocate positions before state commissions that disregard the thrust of the Eighth Circuit's analysis is well founded. At page 5, Verizon states, ". . .in view of the current uncertainty over the applicability of TELRIC standard, the current rates are, if anything, below those that may ultimately apply under a different cost standard that does not rely on hypothetical network assumptions." The very prediction of such results implies an intent to incorporate embedded costs in the cost study—an approach that would be totally at odds with the Eighth Circuit's opinion.

object to a bifurcation and a limited delay in the consideration of Verizon's and Sprint's cost studies and UNE rates. FCCA objects to any postponement of the hearing on BellSouth's cost studies and proposed rates, now scheduled to begin on September 19, 2000.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of The Florida Competitive Carriers Association's Response to the Motions of Verizon and Sprint has been furnished by (*) hand delivery, (**) facsimile or U. S. Mail this 7th day of August 2000, to:

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Joseph A. McGlothlin



July 19, 2000

Bob Rowe
President
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue, Suite 800
Washington, D.C. 20005

Dear President Rowe:

I am writing to ask for the continued support of state commissions in preserving the pro-competitive structure for local competition in light of the recent decision by the U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit").

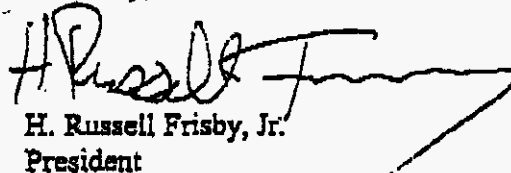
As you know, the Eighth Circuit yesterday issued a decision in *Iowa Utilities Board v. FCC* (Nos. 96-3321, et al.), regarding, in part, FCC pricing rules for unbundled network elements (UNEs) and interconnection, local exchange resale rates, and unbundled network element combinations, among other rules. These issues still remained after the Supreme Court's decision in *AT&T Corp. v. Iowa Public Utilities*, 525 U.S. 366 (1999).

It is important to note that the Eighth Circuit upheld the setting of rates for interconnection and unbundled network elements based on forward-looking incremental costs, an approach that both the FCC and the states have supported. Further, the court ruled that the statutory term "cost" is ambiguous and deferred to the FCC interpretation as reasonable. The court also rejected arguments that cost, as defined, plainly refers to historical cost. Moreover, while the Eighth Circuit vacated and remanded to the FCC its total element long run incremental cost (TELRIC) approach (§ 51.505(b)), the court also made clear that its decision to vacate TELRIC does not preclude the use of a forward-looking incremental cost methodology for setting rates.

Letter to Bob Rowe
President, NARUC
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CompTel is concerned that this decision may be used by incumbent LECs to engender worthless litigation before state utility commissions. CompTel calls on the states to reject such efforts. Instead, we urge state commissions to hold off on changes to existing forward-looking cost-based rates until such time as the FCC issues a replacement cost rule in a remand proceeding and any appeals of the Eighth Circuit's decision are adjudicated. In addition, CompTel recommends that states ensure that incumbent LECs do not use the Eighth Circuit's decision as an excuse for not entering into new interconnection agreements.

Sincerely,



H. Russell Frisby, Jr.
President

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