Richard A. Chapkis
Vice President -- General Counsel, Southeast Region
Legal Department

verizon

FLTC0007
201 North Franklin Street (33602)
Post Office Box 110
Tampa, Florida 33601-0110

Phone 813 483-1256
Fax 813 204-8870
richard.chapkis@verizon.com

January 7, 2004

ORIGINAL

RECEIVED-FPSC
04 JAN -7 PM 4:34
COMMISSION
CLERK

Ms. Blanca S. Bayo, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 030851-TP
Implementation of requirements arising from Federal Communications Commission's triennial UNE Review: Local Circuit Switching for Mass Market Customers

Dear Ms. Bayo:

The following documents are enclosed for filing in the above matter:

00255-04 1. An original and 15 copies of the Rebuttal Testimony of Orville D. Fulp;
00256-04 2. An original and 15 copies of the Rebuttal Testimony of William E. Taylor;
00257-04 3. An original and 15 copies of the Rebuttal Panel Testimony on Batch Hot Cuts;
00254-04 4. An original and 15 copies of Verizon Florida Inc.'s Motion to Clarify the Scope of the Proceeding.

Service has been made as indicated on the Certificate of Service. If there are any questions regarding this filing, please contact me at 813-483-1256.

Sincerely,

Com-5
Sec-1

Richard Chapkis

Richard A. Chapkis

RAC:tas
Enclosures

Motion
DOCUMENT NUMBER-DATE
00254 JAN-7 04
FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were sent via electronic mail on January 7, 2004 and U.S. mail on January 8, 2004 to:

Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Nancy White c/o Nancy Sims
BellSouth Telecomm. Inc.
150 S. Monroe Street, Suite 400
Tallahassee, FL 32301-1556

Tracy Hatch
AT&T
101 N. Monroe, Suite 700
Tallahassee, FL 32301

Michael Gross
Florida Cable Telecomm. Assn.
246 East 6th Avenue
Tallahassee, FL 32303

Susan Masterton
Charles Rehwinkel
Sprint-Florida
1313 Blairstone Road
MC FLTLHO0107
Tallahassee, FL 32301

Donna McNulty
MCI WorldCom, Inc.
1203 Governors Square Blvd.
Suite 201
Tallahassee, FL 32301-2960

Lisa A. Sapper
AT&T
1200 Peachtree Street, NE
Suite 8100
Atlanta, GA 30309

Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter Reeves Law Firm
117 South Gadsden Street
Tallahassee, FL 32301

Floyd Self
Messer Caparello & Self
215 S. Monroe Street
Suite 701
Tallahassee, FL 32301

Marva Brown Johnson
KMC Telecom III, LLC
1755 North Brown Road
Lawrenceville, GA 30034-8119

Nanette Edwards
ITC^DeltaCom
4092 S. Memorial Parkway
Huntsville, AL 35802

Charles V. Gerkin, Jr.
Allegiance Telecom, Inc.
9201 North Central Expressway
Dallas, TX 75231

Terry Larkin
Allegiance Telecom Inc.
700 East Butterfield Road
Lombard, IL 60148

Matthew Feil
Scott A. Kassman
FDN Communications
390 North Orange Avenue
Suite 2000
Orlando, FL 32801

Norman H. Horton, Jr.
Messer Caparello & Self
215 S. Monroe Street
Suite 701
Tallahassee, FL 32301

Jake E. Jennings
NewSouth Comm. Corp.
NewSouth Center
Two N. Main Center
Greenville, SC 29601

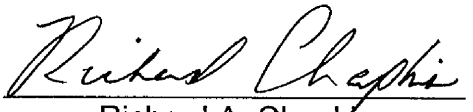
Jon C. Moyle, Jr.
Moyle Flanigan Law Firm
118 North Gadsden Street
Tallahassee, FL 32301

Jorge Cruz-Bustillo
Supra Telecommunications and Information Systems, Inc.
2620 S.W. 27th Avenue
Miami, FL 33133

Jonathan Audu
Supra Telecommunications and Information Systems, Inc.
1311 Executive Center Drive, Suite 220
Tallahassee, FL 32301-5027

Bo Russell
Nuvox Communications Inc.
301 North Main Street
Greenville, SC 29601

Thomas M. Koutsky
Z-Tel Communications, Inc.
1200 19th Street, N.W.
Suite 500
Washington, DC 20036



Richard A. Chapkis

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of Requirements Arising) From Federal Communications Commission's) Triennial UNE Review: Local Circuit Switching) For Mass Market Customers)	Docket No. 030851-TP Filed: January 7, 2004

MOTION OF VERIZON FLORIDA INC.
TO CLARIFY THE SCOPE OF THE PROCEEDING

Pursuant to Florida Administrative Code Rules 28-106.303 and 28-106.305,[1/] Verizon Florida Inc. ("Verizon") files this motion to clarify the scope of this proceeding.

INTRODUCTION

The Prehearing Officer should enter an order clarifying that evidence of alleged operational or economic barriers to CLEC entry into the mass market in Verizon's case is irrelevant because Verizon's showing is based solely on the FCC's objective "trigger" test and not on a "potential deployment" showing.

In the nine-month *TRO* case before the Commission, Verizon seeks the elimination of unbundled mass market switching in the Tampa-St. Petersburg-Clearwater metropolitan statistical area ("MSA") only on the ground that the preconditions established by the FCC in the "self-provisioning trigger" of the *TRO* have been met. In the *TRO*, the FCC determined that satisfaction of the self-provisioning trigger conclusively demonstrates the actual deployment of mass market circuit switches necessary to support a finding of no impairment. Given the large number of CLECs already providing mass market switching here, Verizon need not argue, and does not intend to argue during the nine-month case that, notwithstanding the absence of actual switch deployment, the operational and economic conditions are in place to

---

[1/] Rule 28-106.305 states, in relevant part: "The presiding officer before whom a case is pending may issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case." Granting Verizon's Motion will promote the efficient resolution of Verizon's *TRO* case.

support such deployment (the FCC's so-called "potential deployment" case). Accordingly, the Prehearing Officer should clarify that evidence concerning alleged operational or economic impairment or impediments to entry is entirely irrelevant to whether Verizon must continue to unbundle mass market circuit switching in the Tampa-St. Petersburg-Clearwater MSA.

"POTENTIAL DEPLOYMENT" EVIDENCE IS IRRRELEVANT TO VERIZON'S SHOWING

In their direct testimony, filed on December 4, 2003, CLECs sought to inject evidence into this case of a variety of alleged economic and operational impediments to competitive entry into the mass market. The impediments alleged by CLECs included issues associated with the cutting over of loops to a CLEC's switch, the cost of collocation space, the functionality of Verizon's Operations Support Systems ("OSS"), the deployment of Integrated Digital Loop Carrier ("IDLC") technology, and costs to CLECs of deploying their own switches.[2/] Although these issues may be relevant to BellSouth, which is presenting a potential deployment case in certain markets in its territory in Florida, they are plainly irrelevant to Verizon's case for the Tampa-St. Petersburg-Clearwater market – where eight CLECs already offer mass market switching services.[3/]

In the *TRO*, the FCC concluded that, although on a national basis CLECs are impaired without access to unbundled local circuit switching for mass market customers,

---

[2/] *See, e.g.,* Direct Testimony of Jay Bradbury (AT&T) at 22-50; Direct Testimony of Steven E. Turner (AT&T) at 10-43; Direct Testimony of Mark Van De Water (AT&T) at 1-72; Direct Testimony of Don J. Wood (AT&T) at 1-11; Direct Testimony of Sherry Lichtenberg (MCI) at 1-50; Direct Testimony of James D. Webber (MCI) at 14-56; Direct Testimony of Mark T. Bryant (MCI) at 53-91.

[3/] *See* Direct Testimony of Orville D. Fulp at 12-14 (Dec. 4, 2003) ("Fulp Direct"). Because allegations of economic and operational barriers to entry have no bearing on Verizon's satisfaction of the self-provisioning trigger, Verizon has not attempted in its rebuttal testimony to address the substance of the irrelevant arguments about alleged operational and economic impairments.

TRO ¶ 459,[4/] "a more granular analysis may reveal that a particular market is not subject to impairment in the absence of unbundled local switching." *TRO* ¶ 461. The FCC therefore directed the states to apply a two-step process to determine whether CLECs are impaired in a particular market.

First, state commissions must consider whether the conditions of either of two mandatory "triggers" have been met in the relevant market. These triggers are based on objective evidence of actual facilities-based competition in the market. Under the "self-provisioning trigger," a state "must find 'no impairment' when three or more unaffiliated competing carriers are serving mass market customers in a particular market with the use of their own switches." *TRO* ¶ 501. Under the "competitive wholesale trigger," states must find no impairment where there are two or more unaffiliated CLECs that offer wholesale switching service to other carriers in a particular market using their own switches. *Id.* ¶ 504. In determining whether a trigger has been satisfied, a state may examine ***only*** the "actual commercial development of particular network elements by competing carriers." *TRO* ¶ 498. Specifically, it may assess whether three or more unaffiliated competing carriers are serving the market with their own switches (the self-provisioning trigger), *id.* ¶ 501, or whether switching facilities are available from competing wholesale providers (the competitive wholesale facilities trigger), *id.* ¶ 504.

Second, if a state commission has determined that neither trigger is met in a particular market, it may then, where the ILEC continues to request mass market switching relief, conduct an analysis of whether economic and operational conditions in that market nonetheless support the potential deployment by CLECs of their own

---

[4/] Verizon has appealed the FCC's national finding of impairment, among other things, to the D.C. Circuit. Oral argument is scheduled for January 28, 2004.

switches to serve mass market customers. *Id.* ¶ 506. A state commission should undertake this much more complex "potential deployment" review only in markets where neither trigger is satisfied. *See, e.g., TRO* ¶ 425, n.1300 ("states must first employ triggers that examine actual deployment; only if the triggers are not met must states apply criteria to assess whether entry is uneconomic"); *id.* ¶ 494 ("If the [switching] triggers are not satisfied, the state commission shall proceed to the second step of the analysis, in which it must evaluate certain operational and economic criteria to determine whether conditions in the market are actually conducive to competitive entry . . . .").

Verizon has made clear from the outset of this proceeding that it will not rely on the alternative "potential deployment" test and has stated unequivocally that it seeks the elimination of unbundled mass market switching *only* on the basis of the self-provisioning trigger.[5/] The economic and operational issues raised by the CLECs in their direct testimony have no bearing on whether Verizon has met the self-provisioning trigger and thus whether Verizon must continue to unbundle mass market circuit switching in the Tampa-St. Petersburg-Clearwater MSA.

Operational and economic impairment issues are not relevant where the mass market switching triggers are met. As the FCC explained in a recent brief filed with the D.C. Circuit in defense of the TRO, once the trigger conditions are found to exist, the "[unbundled network] element at issue must be withdrawn following a period of transition designed to avoid market disruption." FCC Br. at 17.[6/] The FCC explained that it intended to "remove[] unbundling obligations with respect to switching for the . . .

[5/] *See* Letter from Richard A. Chapkis to Blanca S. Bayo of 10/10/03 ("Chapkis Letter"); *see also* Direct Testimony of Orville D. Fulp (Dec. 4, 2004) at 5.

[6/] Brief for Federal Communications Commission, *United States Telecom Association v. Federal Communications Commission*, No. 00-1012 (D.C. Cir. filed Dec. 31, 2003). See Exhibit 1.

mass market at locations where state commissions find that deployment-based triggers are met." FCC Br. at 15-16. The FCC likewise stated that under the *TRO*, the "Commission directed the states to eliminate compulsory access to unbundled circuit switching if deployment-based triggers were satisfied." FCC Br. at 38.

It cannot be reasonably argued that the *TRO* triggers are inadequate because they do not sufficiently consider operational impairment issues. The FCC also made this clear in its recent D.C. Circuit Brief. In that brief, the FCC notes that it "reasonably concluded that satisfaction of the trigger would show that multiple, competitive supply is possible and that there likely is no entry barrier reaching the level of impairment from any source." FCC Br. at 45 (citing *TRO* ¶¶ 498, 501). The "ultimate point of the statutory impairment criterion," as the FCC reiterates, is whether there are "three competitors in a market using self-deployed switching and loops." FCC Br. at 45 (citing *TRO* ¶ 501). The FCC thus confirms that alleged operational and economic impairment issues, such as those raised by the CLECs in their direct testimony, are irrelevant where, as here, the conditions identified in the *TRO* triggers have been met. In such cases, the existence of other competitive suppliers in a particular market conclusively demonstrates that competitive entry is possible, regardless of the arguments advanced by CLECs to obscure that fact.

Likewise, the CLECs themselves have recently acknowledged in their D.C. Circuit briefs that the *TRO* does not permit states to consider operational impairment issues where the triggers are met. For example, the CLECs criticized the *automatic* elimination of mass market switching when the triggers are met in a particular market, arguing (as they do here) that the FCC ignored that even where the triggers are met, there may be operational and economic impediments to competition: "Although the FCC correctly found that new entrants are impaired on a national basis without access

to unbundled switching for mass market customers, it nonetheless *required switching to be automatically removed from the mandatory UNE list when states find that certain 'triggers' are met in individual markets*—on the ground that the satisfaction of the triggers establishes a lack of impairment in that area." Opening CLEC Br. at 35[7/] (citations omitted) (emphasis added); *see also id.* at 36 ("Despite its finding of nationwide impairment, the FCC established automatic triggers for removing mass-market switching from the mandatory UNE list."). And more recently, in defending the FCC's delegation of authority to the states, the CLECs argued that "[t]here plainly can be no valid objection to requiring willing states to make [impairment] determinations *only* where . . . the FCC's triggers are not met." Joint CLEC Br. at 10 (emphasis added).[8/]

In light of the foregoing, the Prehearing Officer should make clear that in Verizon's case "potential deployment" evidence is irrelevant.

CONCLUSION

The option to bring a triggers case was explicitly intended by the FCC to minimize delays and administrative burdens in state *TRO* proceedings, *TRO* ¶ 498, which must be conducted in compressed timeframes. The CLECs' introduction of irrelevant information undermines the efficiencies to be gained by conducting a triggers (as opposed to a potential deployment) review. To avoid forcing the Commission, its Staff, and the parties to review and respond to irrelevant matter, Verizon asks the Prehearing Officer to enter an order that clarifies that testimony and other evidence concerning alleged operational or economic impediments to CLEC entry is irrelevant in

---

[7/] Opening Brief of CLEC Petitioners and Intervenors in Support, *United States Telecom Association v. Federal Communications Commission*, No. 00-1012 (D.C. Cir. filed Dec. 1, 2003) ("Opening CLEC Br."). See Exhibit 2.

[8/] Joint Brief of CLEC Petitioners in Support of Respondents, *United States Telecom Association v. Federal Communications Commission*, No. 00-1012 (D.C. Cir. filed Dec. 31, 2003) ("Joint CLEC Br."). See Exhibit 3.

Verizon's *TRO* case seeking the elimination of unbundled mass market switching in the Tampa-St. Petersburg-Clearwater MSA.

Respectfully submitted on January 7, 2004.

By: Richard Chapkis

Richard A. Chapkis
201 N. Franklin Street
P. O. Box 110, FLTC0007
Tampa, FL 33601-0110
(813) 483-1256

Attorney for Verizon Florida Inc.

ORAL ARGUMENT SCHEDULED FOR JANUARY 28, 2004

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 00-1012 (AND CONSOLIDATED CASES)

UNITED STATES TELECOM ASSOCIATION, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

R. HEWITT PATE
ASSISTANT ATTORNEY GENERAL

MAKAN DELRAHIM
DEPUTY ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JOHN A. ROGOVIN
GENERAL COUNSEL

JOHN E. INGLE
JOHN P. STANLEY
LAURENCE N. BOURNE
JAMES M. CARR
JOEL MARCUS
CHRISTOPHER L. KILLION
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

similar to standards that the ILECs had advocated. *See id.* n.275 (JA). The Commission's analysis also takes into account countervailing cost advantages that new entrants may possess. *Id.* ¶89 (JA). And the Commission's revised rules give greatest weight to evidence of actual deployment by facilities-based competitors in determining whether any relevant cost disparities that exist actually constitute impairment-causing barriers to entry. *Order* ¶¶93-95 (JA [7]

Third, the Commission phased out line sharing. *Order* ¶¶255-269 (JA -). In reaching this decision, the Commission considered all the revenues that a new entrant could expect to receive from use of the whole loop (*id.* ¶258 (JA)); the development of "line splitting" as a viable way for two CLECs to share a loop, one using the low frequency portion of the loop, the other using the high frequency portion (*id.* ¶259 (JA)); and the relevance of other broadband platforms (such as cable) to the costs and benefits of mandatory line sharing (*id.* ¶¶262-263 (JA).

The revised impairment framework results in a significantly shorter list of UNEs. The Commission removed unbundling obligations with respect to the highest capacity enterprise loops, as well as lower capacity enterprise loops at locations where state commissions find that deployment-based triggers are met. The Commission curtailed unbundling obligations with respect to mass market loops that have fiber components used in the provision of broadband services. The Commission removed unbundling obligations with respect to the highest capacity transport facilities, as well as lower capacity transport facilities along routes where state commissions determine that deployment-based triggers are met. The Commission removed

---

[7] *See also Order* ¶¶329-331, 359, 394-404, 498-500 (JA - , , - , -) (adopting deployment-based "triggers" for geographic market-specific impairment fact-finding by state commissions).

unbundling obligations with respect to switching for the enterprise market, as well as mass market switching at locations where state commissions find that deployment-based triggers are met. The Commission also removed all existing unbundling obligations with respect to packet switching, and, subject to grandfather provisions and a transition, eliminated ILEC line sharing duties. *See generally Order* ¶¶4, 7 (JA).

The FCC determined that CLECs remained impaired in serving mass market customers without access to unbundled switching. *Order* ¶¶7, 459-461 (JA). This determination stemmed in large part from the fact that the ILEC networks – developed in a monopoly environment – are designed to permit easy electronic connection and disconnection of customers served by ILEC switches, but require expensive and operationally difficult manual "hot cuts" to rewire connections between a customer's loop and a CLEC switch. *Order* ¶465 & n.1409 (JA).

The hot cut process "create[d] an insurmountable disadvantage to carriers seeking to serve the mass market" with their own switches (*id.* ¶475 (JA)), as demonstrated not only by commenters' submissions regarding costs and operational difficulties (*id.* ¶¶464-474 (JA)) but also by the "extremely limited deployment of [CLEC] circuit switches to serve the mass market" (*id.* ¶435 (JA)). Indeed, because there currently was no economically efficient way of connecting CLEC switches to mass market loops, the Commission found that ILEC switches shared many of the essential characteristics of voice grade loops, which all parties agree should be made available as UNEs. *See id.* ¶¶226, 429 & n.1316, 439 (JA).

Although the record supported a national impairment finding with respect to mass market switching, certain high-capacity loops, and some types of transport, the Commission recognized

the possibility that circumstances in some geographic markets might warrant a different finding. The Commission thus adopted deployment-based triggers (or standards) for the states to apply to make market-specific determinations. *See Order* ¶¶462-463, 493-505 (JA). If those triggers are satisfied, the element at issue must be withdrawn following a period of transition designed to avoid market disruption. *Id.* ¶¶528-532 (JA). If the triggers are not satisfied, state commissions are to undertake further analysis of potential deployment under the Commission's general impairment standard. With respect to switching, the Commission directed state commissions to institute procedures to address and mitigate the source of impairment. If the triggers for switching are not satisfied and if further analysis of potential deployment under the Commission's general "impairment" standard does not rebut the existence of impairment, states that undertake this process are directed to consider whether narrower "rolling" access requirements would cure the impairment, and, if so, to implement such requirements. *Id.* ¶¶463, 521-524 (JA). Under such a regime, CLECs would be given "rolling" access to unbundled switching for 90 days on the theory that CLECs could aggregate customers and obtain hot cuts in more efficient and less costly "batches." If states determine that such procedures are inadequate, they are directed to conduct "continuing reviews of impairment for unbundled switching." *Id.* ¶463 (JA). In the event that states decline to participate in this process, the FCC will assume their role. *Id.* ¶527 (JA

INTRODUCTION AND SUMMARY OF ARGUMENT

In the *Order*, the FCC revised its interpretation of the statutory impairment standard. It concluded that CLECs requesting unbundled access are impaired "when lack of access to an [ILEC] network element poses a barrier or barriers to entry, including operational and economic

was "unable to conclude ... that the availability of unbundled local circuit switching either depresses or stimulates infrastructure investment." *Id.* ¶449 (JA The Commission explained that the section 706 directive that it promote advanced telecommunications is not implicated in the decision to require unbundling of circuit switching, because such unbundling involves only "the legacy telephone network, and thus does not deter carriers' investment in advanced telecommunications capabilities." *Id.* ¶450 (JA). Indeed, the Commission concluded that 'incumbents have every incentive to deploy these [advanced packet switching networks], which is precisely the kind of facilities deployment we wish to encourage." *Id.* n.1365 (JA). Accordingly, the Commission concluded that the "at a minimum" language of section 251(d)(2) did not require it to override its impairment findings with respect to circuit switching. The Court should affirm that reasonable conclusion.

Finally, the ILECs maintain that the Commission should have addressed its hot cut concerns in a more "[n]arrowly-tailored" way. Br. 20-21 (citing *USTA*, 290 F.3d at 422-26). The FCC did address the impairment caused by hot cuts in a narrowly tailored way. The Commission directed the states to eliminate compulsory access to unbundled circuit switching if deployment-based triggers were satisfied. *Order* ¶¶498-505 (JA). After finding that incumbents do not now have efficient bulk hot cut processes (*id.* ¶474 (JA)), the Commission also directed states to develop batch cutover processes that could reduce hot cut burdens, make competitive entry more likely, and thereby increase the likelihood that the triggers would be satisfied. *See id.* ¶¶487-490 (JA). And the Commission directed states to examine whether, notwithstanding the absence of actual competition as reflected in the triggers, CLECs economically could deploy their own switches without impairment. *Id.* ¶¶506-520 (JA -).

(JA .[21] The Commission explicitly recognized that where the trigger counts a carrier deploying its own loops, the evidence might bear less heavily on the ability of a CLEC to access the incumbent's loops. *See id.* n.1560 (JA). "Nevertheless," the FCC concluded, "the presence of three competitors in a market using self-deployed switching and loops shows the feasibility of an entrant serving the mass market with its own facilities" (*ibid.*), which is the ultimate point of the statutory impairment criterion.

The CLECs next contend that the trigger unlawfully "does not address ... sources of impairment" other than hot cut issues. Br. 37. But the Commission reasonably concluded that satisfaction of the trigger would show that multiple, competitive supply is possible and that there likely is no entry barrier reaching the level of impairment from any source. *Order* ¶¶498, 501 (JA). In any event, the Commission also allowed states to petition for waiver if they "identify specific markets that facially satisfy the self-provisioning trigger, but in which some significant barrier to entry exists such that service is foreclosed even to carriers that self-provision switches." *Id.* ¶503 (JA).

The CLECs also claim that the trigger points themselves – three, in the case of self-provisioning competitors; two, in the case of switching wholesalers – are arbitrary because "the numbers appear to have been made up out of thin air." Br. 37. This claim fares no better than the ILECs' similar challenge to the FCC's line drawing, which was reasonably designed to ensure that unbundling is required only where the market cannot "support 'multiple, competitive'

[21] The Commission also specifically targeted impairment caused by hot cuts by directing the states to develop batch cut proceses. *See Order* ¶¶487-490 (JA -).

INITIAL BRIEF

ORAL ARGUMENT SCHEDULED FOR JANUARY 28, 2004

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-1012, 03-1310 (and consolidated cases)

UNITED STATES TELECOM ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

OPENING BRIEF OF CLEC PETITIONERS AND INTERVENORS IN SUPPORT

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD LLP
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7000

David L. Lawson
C. Frederick Beckner III
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for AT&T Corp.

Mark D. Schneider
Donald B. Verrilli, Jr.
Marc A. Goldman
Michael B. DeSanctis
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

William Single, IV
Jeffrey A. Rackow
MCI
1133 19th Street, N.W.
Washington, DC 20036
(202) 736-6933

Counsel for WorldCom, Inc.

Additional Counsel Listed on Inside Cover

December 1, 2003

reasons. First, the record demonstrates that numerous parts of the country have no cable modem or other alternative platforms at all.[22] Second, cable competition creates, at best, a broadband duopoly.[23] That is why, after several of the largest data CLECs were driven out of the market, the ILECs were, notwithstanding cable "competition," able to raise their prices by 25%. AT&T 2/3/03 Ex Parte 7 n.30 (J.A.__). Indeed, absent competition from data CLECs, the ILECs have incentives not to deploy inexpensive DSL service to prevent DSL from "cannibaliz[ing] the traditional services offered by ILECs," such as the second phone lines that consumers use for dial-up Internet access services. NERA Decl. ¶167 (J.A.__).

II. THE *ORDER*'S MECHANISMS FOR DETERMINING WHETHER SWITCHING SHOULD BE UNBUNDLED VIOLATE THE ACT.

A. MASS-MARKET SWITCHING

1. The FCC's treatment of unbundled switching for mass-market (residential and small business) customers is unlawful. Although the FCC correctly found that new entrants are impaired on a national basis without access to unbundled local switching for mass-market customers, *Order* ¶¶464-471, it nonetheless required switching to be automatically removed from the mandatory UNE list when states find that certain "triggers" are met in individual markets – on the ground that satisfaction of triggers establishes a lack of impairment in that area. *Id.* ¶¶493-520. But the triggers, by their terms, do not do that.

The FCC's impairment finding is unassailable. With the exception of those cable television systems that offer telephony, competitors have no economic alternative to the ILECs' bottleneck "voice-grade loops" to serve the mass-market, *id.* ¶¶226, 439. Those loops are

---

ILEC access lines nationwide as of December 2002, approximately 10.2 million were being used by CLECs to provide local voice service. *Local Telephone Competition Report* 1 & Table 4.

[22] *See* p.28 & n.14, *supra*; *see also, e.g.*, Covad 10/15/02 Ex Parte 3 n.12 (J.A.__).

[23] *See* p.28, *supra*.

hardwired to the ILECs' switches, and there is not now an efficient method of breaking the two apart. *Id.* ¶¶464-471. As a result, CLECs need access to the ILECs' switches every bit as much as they need access to their loops.

In this regard, the FCC found that competitors have deployed thousands of switches, now sitting with idle capacity, and that they have strong economic incentives to fill up those switches by connecting them to ILEC loops to serve mass-market customers. *Id.* ¶¶436-437, 447 n.1365, 449 n.1371, 466, 468. If CLECs could economically use their own switches, they obviously would do so. Nonetheless, virtually no carrier is doing so, and carriers initially attempting to do so were forced to "discontinue [those] plans" because of the direct costs and service disruptions caused by ILEC "hot-cut" processes for disconnecting loops from their switches and reconnecting them to CLEC switches. *Id.* ¶¶438, 440, 447 n.1365, 459, 465, 466-469.

The FCC also noted additional problems that CLECs face when they seek to use ILEC loops to serve the mass market absent unbundled switching. *See, e.g., id.* ¶480 (backhaul costs); *id.* ¶¶477-478 (collocation costs).

Despite its finding of nationwide impairment, the FCC established automatic triggers for removing mass-market switching from the mandatory UNE list. Under the "self-provisioning trigger," "a state must find 'no impairment' when three or more unaffiliated competing carriers each is serving mass-market customers in a particular market with the use of their own switch." *Id.* ¶501.[24]

The FCC adopted this trigger on the ground that it provides a "granular" test for determining whether the sources of impairment identified by the FCC have been eliminated in a

[24] In addition, under the "wholesale trigger," a state must find no impairment wherever "two or more competing carriers . . . offer wholesale switching service for that market using their own switch." *Id.* ¶504.

INITIAL BRIEF

ORAL ARGUMENT SCHEDULED FOR JANUARY 28, 2004

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-1012, 03-1310 (and consolidated cases)

UNITED STATES TELECOM ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

On Petition for Review of an Order of the
Federal Communications Commission

JOINT BRIEF OF CLEC INTERVENORS IN SUPPORT OF RESPONDENTS

Donald B. Verrilli, Jr.
Mark D. Schneider
Marc A. Goldman
Michael B. DeSanctis
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

William Single, IV
Jeffrey A. Rackow
MCI
1133 19th Street, N.W.
Washington, DC 20036
(202) 736-6933

Counsel for WorldCom, Inc.

David W. Carpenter
SIDLEY AUSTIN BROWN & WOOD LLP
10 South Dearborn Street
Chicago, IL 60603
(312) 853-7000

David L. Lawson
C. Frederick Beckner III
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for AT&T Corp.

Additional Counsel Listed on Inside Cover

December 31, 2003

Further, §261(b) provides that no section of the Act may be "construed" to limit state unbundling authority.

Thus, the Commission could simply have directed states to apply the general impairment standard to local markets – as the ILECs formerly urged. *Local Competition Order* ¶¶50-52. There plainly can be no valid objection to requiring willing states to make these determinations only where (1) the FCC has not found nonimpairment and (2) FCC's triggers are not met.

In all events, the *Order* provides ample constraints. In defining local markets, states must apply principles similar to those used to define geographic markets in antitrust law. *Compare Order* ¶495; 47 C.F.R. ¶ 51.319(d)(2) *with FTC v. PPG Indus.*, 798 F.2d 1500 (D.C. Cir. 1986). The ILECs did not advance a better approach, and the Commission reasonably concluded that there was no credible record evidence establishing how to draw market boundaries for mass-market switching. *Order* n.1536.

Nor does the *Order* authorize states to replicate the "open-ended inchoate framework" that *USTA* invalidated. ILEC Br. 28. States must apply locally the same impairment standard the FCC applies nationally – a standard the ILECs do not challenge. The FCC cannot be faulted for going further and specifying relevant criteria under that standard.

The ILECs' complaint is thus nothing more than rank speculation that states are determined to preserve UNE-P regardless of the record and can manipulate their delegated authority to do so. But state commissions, like federal agencies, are entitled to a presumption of regularity (*see supra*) and the ILECs point to nothing remotely sufficient to overcome that presumption. Should the ILECs object to any state's market definitions or impairment determinations, "[they] may seek a declaratory ruling from the Commission" (*Order* n.1552) or review in federal district court (§252(e)(6)).