STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 98-C-1357 - Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements.

RULING ON MODULE 3 SCHEDULE

(Issued August 24, 2000)

JOEL A. LINSIDER, Administrative Law Judge:

In this ruling, I consider the effect on the proceeding's schedule of two unrelated events--the decision by the United States Court of Appeals for the Eighth Circuit that vacated portions of the FCC's rules related to the pricing of unbundled network elements (UNEs), and the recent strike by employees of Verizon New York Inc. f/k/a Bell Atlantic-New York (Verizon).

EIGHTH CIRCUIT DECISION

Background

On July 18, 2000, the United States Court of Appeals for the Eighth Circuit issued its decision in Iowa Utilities Bd. et al. v. FCC.[1] Among other things, the court vacated 47 C.F.R. §51.505(b)(1), a portion of the FCC's rules related to the pricing of unbundled network elements.

By letter dated July 24, 2000, Verizon requested a suspension of discovery and testimony deadlines in the proceeding, pending an examination of the implications of the Eighth Circuit's decision. Various CLEC parties responded,

[1] Iowa Utilities Bd. et al. v. FCC, No. 96-3321 (8th Cir. July 18, 2000).

opposing that suspension, and Verizon replied, clarifying the nature of its request. In an e-mail sent to the parties on July 28, I suspended only the impending August 4 deadline for submitting supplemental initial testimony on specified issues.

In an ensuing ruling, issued August 1, I requested more extensive comment on the implications of the Eighth Circuit's decision. In particular, I invited comment on the significance here of Verizon's pricing obligations under the FCC's order approving the Bell Atlantic-GTE merger,[1] and I asked parties to identify specific prices that it might be feasible and desirable to set promptly in the event the proceeding as a whole were suspended. Pending further decision, discovery was to continue, and the schedule previously set was to remain in place.

Comments were submitted by Verizon, AT&T Communications of New York, Inc. (AT&T), WorldCom, Inc. (WorldCom), Sprint Communications Company, L.P. (Sprint), the CLEC Coalition[2] and Z-Tel Communications Inc. (Coalition), and the CLEC Alliance (Alliance).[3] Reply comments were submitted by Verizon, AT&T, WorldCom, the CLEC Alliance, Covad Communications Company (Covad), and the Competitive Telecommunications Association (CompTel).

Verizon strongly urges suspension of the proceeding; all other parties (collectively referred to as the CLECs) equally strongly call for its continuation. Comments on both

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[1] See, e.g., CC Docket No. 98-184, GTE Corporation and Bell Atlantic Corporation, Memorandum Opinion and Order (rel. June 16, 2000), FCC 00-221, ¶316.

[2] The CLEC Coalition comprises Allegiance Telecom of New York, Inc., Intermedia Communications, Inc., and NEXTLINK New York, Inc.

[3] The CLEC Alliance comprises CoreComm New York, Inc., CTSI, Inc. MGC Communications, Inc. d/b/a Mpower Communications Corp., Network Plus, Inc., RCN Telecom Services, Inc., and Vitts Networks, Inc.

sides raise numerous issues, some of them more related to the substance of the decisions to be reached in this proceeding than to the procedural and pragmatic question of whether it makes sense to go forward now. I will not burden this ruling with a detailed recounting of all arguments, but I have considered them to the extent pertinent. I have not taken into account, however, and it would be an inappropriate prejudgment to do so, the self-confident assertions on both sides that the outcome of the proceeding, if does go forward, will be favorable to their interests.

Arguments

1. Verizon

In urging suspension of the proceeding, Verizon stresses that it "already has in place a full set of Commission-approved, TELRIC compliant rates available to all CLECs that are, without doubt, lower than they would be had a proper costing methodology been applied."[1] It therefore sees no need to go forward with the proceeding in the face of what it regards as a significant degree of uncertainty over the applicable costing standard. It maintains that the TELRIC-based costing studies now in the record are inconsistent with the Eighth Circuit's holding that the Telecommunications Act of 1996 (the 1996 Act) requires costing on the basis of the existing local network rather than a reconstituted one, and that new studies would have to be filed if the Eighth Circuit's decision is the law.

Verizon rejects, on their merits or as in any event not reducing the degree of uncertainty, the CLECs' arguments that Eighth Circuit's decision is not binding in this proceeding (either because the court's mandate has not been issued or because its reach is limited to its own circuit) and that the

[1] Verizon's comments, pp. 1-2.

decision requires no change in the costing methods being used. In addition to emphasizing that approved, TELRIC-compliant rates are already in place, it argues that local competition in New York State is off to a robust start; contends the rates are not so stale as to warrant continuation of an effort to review them that might prove wasteful; and sees important differences between the present situation and earlier occasions in which the First Network Elements Proceeding was allowed to go forward despite uncertainty created by federal court decisions.

Verizon disputes any suggestion that it remains bound to TELRIC rates, whatever the meaning and effect of the Eighth Circuit's decision, on account of conditions imposed by the FCC in approving the NYNEX/Bell Atlantic and Bell Atlantic/GTE mergers. On the basis of its reading of the orders at issue, set forth in some detail, it contends no such obligation was imposed. It likewise sees no basis for any suggestion that continuation of this proceeding was a premise for the FCC's decision to allow Verizon into the long distance market pursuant to §271 of the 1996 Act.

Verizon would apply the suspension to all procedural steps, including discovery. It suggests allowing the parties to file additional comments after three to six months on whether the suspension should be continued.

Finally, Verizon argues that if the proceeding does in fact go forward, Verizon should be allowed to submit alternative cost studies that take the Eighth Circuit's decision into account. (It notes that it had reserved that right in its earlier pre-filed testimony.) It adds that it (and other parties) should be permitted, whenever the proceeding goes forward, to submit supplemental studies concerning the appropriate resale discount under the Eighth Circuit's decision.

2. CLECs

The CLECs play down the significance of the court's decision, arguing, variously, that the court's mandate has not been issued; that the effect of the decision outside the Eighth Circuit is limited and that appeals from the Commission's decision would go to district courts in the Second Circuit; that the decision may be appealed and may be stayed pending that appeal[1]; that the decision does not necessarily preclude use of the costing methods hitherto used in this proceeding; and that Verizon, in any event, remains bound to TELRIC pricing by the FCC orders approving the NYNEX/Bell Atlantic and Bell Atlantic/GTE mergers. Contending that current network element rates are too high, they argue that the proceeding must be allowed to go forward in order to reduce those rates and permit the development of robust competition.

Some CLECs argue that the current rates are based on a record for whose flaws Verizon is responsible and that this proceeding originated in a recognition of those flaws. They point as well to Verizon's opposition to suspension of the New Jersey UNE pricing case, challenging Verizon's effort to distinguish the two states on the grounds that the New Jersey commission's UNE rates decision had been remanded by the court, and attributing the apparent inconsistency instead to Verizon's need for New Jersey to set UNE rates so it may seek §271 approval in that state.

Discussion

It cannot be denied, and the parties do not really disagree, that the Eighth Circuit's decision introduces a degree of uncertainty into this proceeding and that it may take quite some time for the uncertainty to be resolved. It is the

[1] AT&T, for example, states flatly that "the Eighth Circuit's decision has not taken effect yet, and likely never will." (AT&T's comments, p. 1.)

implications of that uncertainty and of its likely duration that must be addressed here. Verizon emphasizes the magnitude of the uncertainty and warns of the risk of wasted effort if we proceed without regard to it. The CLECs stress the likelihood that the uncertainty will endure for quite some time, point to factors said to temper its severity, and warn of the consequences of not reviewing UNE rates until the matter is finally settled. Taking account of both the uncertainty and its likely duration, and recognizing our ability to respond as needed to changing circumstances, I conclude that the proceeding for now should be allowed to go forward.

In reaching that decision, I have disregarded, as I said earlier, the parties' arguments about whether the likely outcome of the proceeding would raise or lower UNE rates, and I have given no credence at all to the CLECs' attacks on the UNE rates now in place, which were set through a rate-setting process that was procedurally fair and substantively sound. My starting point is the Commission's determination that those rates should be revisited, for a variety of reasons, in this proceeding; and the issue here is how the process in which we are engaged as a result of that determination should be affected by the Eighth Circuit's decision.

The uncertainty associated with the decision has several dimensions. First, there are the status and ultimate course of the decision itself. The court's mandate has not been issued, and once it is issued, parties may request stays and seek review by the Supreme Court. If the Supreme Court grants review, considerable time may elapse before it renders a decision, and the Eighth Circuit's decision may or may not be stayed during that interval. In addition, there is uncertainty over what the FCC might do in response to the court's decision if and when it takes effect, and over how long that process might take. To suspend the proceeding until all of these

matters are finally resolved, it seems to me, would frustrate, by extended delay, the Commission's interest in reviewing the UNE rates set in the First Network Elements Proceeding.

It also would be at least premature to suspend the case at a time when much or all of the effort made to date and now contemplated for the future may be unaffected by the court's decision, not only because the decision itself continues to uphold forward-looking costing, but also because of the terms of the FCC's order authorizing the GTE/Bell Atlantic merger.[1] The conditions imposed on that merger, as set forth in Appendix D to the FCC's order, include an obligation to continue to make available the UNEs and UNE combinations required in certain other FCC orders "until the date of a final, non-appealable judicial decision providing that the UNE or combination UNEs is not required to be provided...in the relevant geographic area."[2] But in the order itself, the FCC explains that "compliance with this condition includes pricing these UNEs at cost-based rates in accordance with the forward looking cost methodology first articulated by the Commission in the Local Competition Order [i.e., including the rule vacated by the Eighth Circuit] until the date of any final and non-appealable judicial decision that determines that [Verizon] is not required to provide such UNEs at cost-based rates."[3]

Verizon denies that the FCC's conditions require continued pricing in accordance with the vacated rule, contending, among other things, that the text of the FCC's order simply summarizes the merger conditions, which are exhaustively set forth in Appendix D. But the FCC's statement in ¶316 seems

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[1] CC Docket No. 98-184, GTE Corporation and Bell Atlantic Corporation, Memorandum Opinion and Order (rel. June 16, 2000), FCC 00-221.

[2] Id., Appendix D, ¶39.

[3] Id., ¶316

to me to be unequivocal; and it is the FCC's order as a whole that governs the transaction. What the FCC order means may ultimately a matter for the FCC and the courts to decide, but for present purposes, the order provides an adequate basis for concluding that Verizon remains obligated, notwithstanding the Eighth Circuit's decision, to continue pricing UNEs on a TELRIC basis and will remain so obligated at least until the Eighth Circuit's order is sustained or becomes non-appealable.[1] For now, at least, there is no need for this proceeding to change course, and the studies hitherto submitted need not be modified in light of the decision.

In reaching this decision, of course, I recognize Verizon's point that the Eighth Circuit's decision cannot be ignored, and I in no way do so. Nor do I reach the various arguments about the extent to which the Eighth Circuit's decision is binding in jurisdictions outside the Eighth Circuit or about the interpretation of the Eighth Circuit's decision. I conclude only that in view of (1) the time it likely will take for those uncertainties to be resolved, (2) the effect of the FCC's merger conditions during that interval, and (3) the Eighth Circuit's sustaining of forward-looking pricing, I am persuaded that the proceeding should not be suspended at this time. If and when circumstances change--such as by the Eighth Circuit's decision being finally sustained or becoming non-appealable--the course of this proceeding can be reexamined in light of those new circumstances.

STRIKE-RELATE ISSUES

[1] AT&T would read the condition to mean that the pricing obligation would continue even then, inasmuch as the Eighth Circuit's decision does not negate the obligation to provide UNEs at cost-based rates. (AT&T's comments, pp. 10-11.) I need not reach that issue here.

During the recent strike at Verizon, its management employees, including counsel and witnesses in this proceeding, were required to perform duties that displaced, in whole or in part, their work on the case. I understand that some of those ad hoc duties are continuing as this ruling is being written. As a practical matter, those reassignments leave no alternative but to delay the case schedule.

I have already cancelled, via e-mail to the parties, the September 1 date for filing rebuttal testimony, and I here cancel the October 16 hearing date. To advance the process of setting a new schedule, parties should immediately begin discussions on scheduling matters, including the minimum reasonable interval between rebuttal testimony and hearings and the identification of dates in late October and early to mid-November that may be generally convenient or inconvenient for hearings. The results of those discussions should be reported to me, by telephone conference call or e-mail, within seven days of the date of this ruling, and I will then set a revised schedule.

(SIGNED) JOEL A. LINSIDER