BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into pricing of unbundled network elements.	DOCKET NO. 990649-TP ORDER NO. PSC-00-1486-PCO-TP ISSUED: August 18, 2000

ORDER GRANTING MOTIONS TO BIFURCATE AND SUSPEND PROCEEDINGS

On December 10, 1998, in Docket No. 981834-TP, the Florida Competitive Carriers Association (FCCA), the Telecommunications Resellers, Inc. (TRA), AT&T Communications of the Southern States, Inc. (AT&T), MCIMetro Access Transmission Services, LLC and WorldCom Technologies, Inc. (MCI WorldCom), the Competitive Telecommunications Association (CompTel), MGC Communications, Inc. (MGC), Intermedia Communications Inc. (Intermedia), Supra Telecommunications and Information Systems (Supra), Florida Digital Network, Inc. (Florida Digital Network), and Northpoint Communications, Inc. (Northpoint) (collectively, "Competitive Carriers") filed their Petition of Competitive Carriers for Commission Action to Support Local Competition in BellSouth's Service Territory. Among other matters, the Competitive Carriers' Petition asked that this Commission set deaveraged unbundled network element (UNE) rates.

On May 26, 1999, this Commission issued Order No. PSC-99-1078-PCO-TP, granting in part and denying in part the Competitive Carriers' petition. Among other decisions, the Commission granted the request to open a generic UNE pricing docket for the three major incumbent local exchange providers, BellSouth Telecommunications, Inc. (BellSouth), Sprint-Florida, Incorporated (Sprint), and GTE Florida Incorporated (GTEFL). Accordingly, this docket was opened to address the deaveraged pricing of UNEs, as well as the pricing of UNE combinations and nonrecurring charges. An administrative hearing was held on July 17, 2000, on several of the issues identified in Order No. PSC-00-2015-PCO-TP, issued June 8, 2000. The remaining issues identified in the Second Revised Procedural Order No. PSC-00-0540-PCO-TP, issued March 16, 2000, will be considered at the September 19-22, 2000, hearing. By Order No. PSC-00-1335-PCO-TP, issued July 24, 2000, additional procedures regarding testimony were prescribed.

On August 2, 2000, Verizon Florida Inc. (formerly GTE Florida Incorporated, hereinafter Verizon) filed a Motion to Bifurcate and Suspend Proceedings. Also on August 2, 2000, Sprint-Florida,

Incorporated (Sprint-Florida) and Sprint Communications Company Limited Partnership (Sprint) filed a Motion to Bifurcate Proceeding, For a Continuance and Leave to Withdraw Cost Studies and Certain Testimony. On August 4, 2000, BellSouth Telecommunications Inc. filed its Response to Verizon and Sprint's Motions to Bifurcate and Suspend Proceedings. On August 7, 2000, the Florida Competitive Carriers Association (FCCA) filed its Response to Verizon's Motion to Bifurcate and Suspend Proceedings and Sprint's Motion to Bifurcate Proceedings, for a Continuance and Leave to Withdraw Cost Studies and Certain Testimony. Finally, on August 8, 2000, ALLTEL Communications Services Inc. (ALLTEL) filed its Response to Verizon's and Sprint-Florida's Motion to Bifurcate and Suspend Proceedings. Also on August 8, 2000, Sprint-Florida responded to BellSouth's Response.

On August 11, 2000, the parties presented oral argument and a status conference was held to address the issues raised in the motions and responses. The following is my decision on the Motions.

MOTIONS

Verizon's Motion

Verizon asks that the proceedings be bifurcated to allow costing and pricing issues to be heard separately for Verizon, and that the remaining procedural events with regard to Verizon be suspended until the issue of the appropriate methodology for pricing unbundled network elements is resolved at the federal level. In support of its Motion, Verizon states that while it has always opposed the FCC's total element long-run incremental cost (TELRIC) standard for determining UNE prices, its cost studies and proposed prices for UNEs and designated UNE combinations in this proceeding nevertheless comport with the TELRIC approach reflected in the FCC's Rules, including Rule 51.505.

Verizon further states that on July 18, 2000, the U. S. Court of Appeals for the Eighth Circuit vacated many of the FCC's UNE pricing rules[1], including Rule 51.505(b)(1) that provides in part "[t]he total element long-run incremental cost of an element should

[1] Iowa Utilities Bd. v. F.C.C., No. 96-3321, Order (8th Cir. July 18, 2000) The Eighth Circuit has not yet issued its mandate, although it can be anticipated that it will do so shortly.

be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers." (See 47 C.F.R. § 51.505(b)(1).) Verizon explains that the Court held the FCC's TELRIC standard to be impermissibly hypothetical, in violation of "the plain meaning of the Act." (Eighth Circuit Order at 7). Verizon states the Order explained that Congress intended UNE rates to be based on "the cost of providing the actual facilities and equipment that will be used by the competitor (and not some state of the art presently available technology ideally configured but neither deployed by the ILEC nor to be used by the competitor)." (Eighth Circuit Order at 8) Verizon argues that the Eighth Circuit's ruling effects a material change in the law controlling this proceeding. Verizon asserts that the change must be addressed by the parties and the Commission. Verizon concludes that its cost studies and associated prices submitted in this docket are based on the vacated FCC rules and it would be inappropriate for the Company to go forward with its case presentation, as filed.

Verizon states it is now analyzing the degree to which its cost methodology should be modified in light of the Eighth Circuit decision. It states that if that decision ultimately remains in effect, Verizon will necessarily need to complete new cost studies after the FCC issues new pricing rules on remand. Verizon asserts that even if a stay of the Eighth Circuit order is granted pending appeal, it is safe to say that there is considerable uncertainty as to the costing standard that this Commission must ultimately follow in setting new UNE prices. Verizon argues that it would not be a prudent or efficient use of the Commission's or the parties' resources to go forward with the effort to set new UNE rates for Verizon. Verizon states that it cannot continue to advocate rates that are rooted in a TELRIC methodology that has been deemed unlawful. Verizon adds that even if the FCC immediately issued new pricing rules, it would be impossible for Verizon to complete and offer for evaluation a new study within the existing procedural schedule for this docket.

Verizon argues that the only viable resolution to the dilemma is a delay in the proceedings as to Verizon. Therefore, it requests a suspension of the proceeding until the FCC issues any new cost rules on remand.

In addition, Verizon seeks a suspension of the remaining procedural dates only as to its own presentation in this docket.

Verizon states it understands that BellSouth wishes to move forward with UNE rate-setting based on the cost model it has already submitted. Verizon adds that it takes no position on the substantive merits of BellSouth's approach, but does not object to BellSouth continuing under the existing procedural schedule. Verizon states that if BellSouth wishes to proceed, bifurcation will be necessary to eventually establish a new procedural track for Verizon.

Verizon contends that until the Commission can determine rates under any new cost standard, its existing interim deaveraged loop rates would remain in place. Verizon adds that for UNEs other than the loops designated in the stipulation and associated Order, the rates under existing interconnection contracts would be maintained. Verizon states that there are a few items for which no rates have been established, including sub-loops, dark fiber facilities, and intrabuilding wire. During the interim, Verizon proposes to negotiate prices for these elements on a bona fide request (BFR) basis. Verizon contends that this is not a significant departure from its existing position in this proceeding.

Verizon contends that it does not believe that maintenance of the status quo (the existing UNE rates) in this interim period will prejudice any party to this proceeding. Verizon maintains that all required UNEs will continue to be made available and in view of the current uncertainty over the applicability of TELRIC standards, 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.

Finally, Verizon states that it intends to withdraw its cost studies, proposed prices, and associated testimony. Verizon states that it specifically is withdrawing its recurring cost study and all prefiled testimony of David Tucek; its non-recurring cost study and all testimony of Linda Casey; all testimony of Michael Norris (except as to Verizon's support of statutory state and federal tax rates as model inputs); and all testimony and exhibits of Dennis Trimble that reflect previously recommended prices or otherwise address issues remaining for the hearing currently scheduled for September. Verizon adds that it does not believe it will be necessary to withdraw any testimony associated with the issues addressed in the July 17 hearing in Phase I. Verizon states it still plans to file a posthearing statement setting forth its position on these issues on October 16, 2000.

Sprint-Florida and Sprint

Sprint-Florida and Sprint also request that the proceeding be bifurcated and that Sprint-Florida be granted a continuance and leave to withdraw its cost studies and certain testimony. In support of its motion, Sprint-Florida states that it filed TELRIC-based studies addressing recurring UNE prices on a deaveraged basis, together with appropriate non-recurring charges. Sprint-Florida states that its prices and charges were developed in accordance with the FCC's TELRIC methodology rules, including Rules 51.503 through 51.515.

Sprint-Florida states that the Eighth Circuit's decision found that the plain meaning of the Telecommunications Act of 1996 was violated because the FCC required that the costs - especially the loop costs - be based upon a "hypothetical network." Sprint-Florida asserts that a key element of the FCC's TELRIC methodology has been rejected which creates a great deal of uncertainty about Sprint-Florida's cost study and resulting UNE prices.

Sprint-Florida describes its studies as consistent with the FCC pricing rules and concludes that until it is precisely known whether the FCC's mandated use of a hypothetical network violates the 1996 Act, or if it does, what alternative methodology must be used, the Sprint-Florida cost study is not in compliance with the law as interpreted by the Eighth Circuit. Sprint-Florida asserts that because of the current uncertainty in the law, which may not be resolved by the time of the scheduled September hearings, Sprint-Florida is unable to adequately defend its cost studies. Sprint-Florida contends that even if it was to ignore the Eighth Circuit's decision and a decision was made based upon the FCC's mandated TELRIC methodology, all of the effort and time invested in doing so would be wasted if the Eighth Circuit's decision is either not stayed or affirmed. Sprint-Florida adds that because its use of the hypothetical network is so integral to the development of its cost studies, it would be impossible to revise the cost studies to reflect the impact of the Eighth Circuit decision in time to be considered within the current schedule for this proceeding. In the meantime, Sprint-Florida asserts that it will continue to honor its deaveraged UNE prices that are on file with the Commission in an effective tariff and available to all alternative local exchange companies (ALECs).

Sprint-Florida asserts that it is willing to file a new UNE cost study with the Commission in the April to June 2001 time frame

recognizing that the issues created by the Eighth Circuit's decision may take a significant amount of time to resolve.

Finally, Sprint-Florida asserts that if its Motion to Bifurcate this proceeding and for a continuance is granted, it will need to withdraw its current cost studies and certain testimony filed in support of those cost studies. In addition, Sprint intends to continue its participation in this proceeding as it is operating as an ALEC in Florida. I note that Sprint-Florida has provided to Commission staff and the parties a list of testimonies and exhibits it intends to withdraw from this proceeding.

RESPONSES

BellSouth

BellSouth does not necessarily object to the Motions, but raises two concerns. First, BellSouth believes this Commission can and should proceed with establishing rates for BellSouth. However, to the extent the Commission is not inclined to bifurcate the proceedings and instead wants to have a single proceeding to establish rates for BellSouth, Verizon, and Sprint-Florida at the same time, BellSouth argues that it has no choice but to oppose any request for a continuance.

Second, BellSouth states it is concerned about Sprint-Florida's and Sprint's apparent desire to bifurcate the proceedings, but at the same time to participate in the BellSouth proceeding in order to challenge BellSouth's cost studies. This is particularly true, BellSouth asserts, since Sprint's challenge is based, at least in part, upon Sprint-Florida's cost studies. BellSouth argues that if Sprint-Florida cannot defend its cost studies so as to proceed with hearings to establish rates, Sprint should not be permitted to rely upon those same cost studies in its rebuttal testimony filed against BellSouth. BellSouth argues that it should be made clear that any testimony referring to Sprint-Florida's cost studies will be stricken in the event that Sprint-Florida's and Sprint's motion for a continuance is granted.

Florida Competitive Carriers Association

The Florida Competitive Carriers Association (FCCA) states that while it disagrees with the premise of Verizon's and Sprint-Florida's motions, it does not object to the requests that their UNE prices be considered on a separate procedural track, so long as

a schedule is established that will ensure a final decision (including any decision on reconsideration) on Verizon's and Sprint-Florida's UNE prices by July 31, 2001. FCCA states that it would strenuously object to a "suspension" of the entire proceeding, and points out 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 further asserts that it also would object to any delay in the consideration of Verizon's and Sprint-Florida's UNE rates greater than the delay that would result from a schedule other than filing cost studies in April-June 2001 and a final decision by July 31, 2001.

FCCA emphasizes that while it does not object to the bifurcation and limited delay described above for Verizon and Sprint-Florida, it disputes the rationale contained in Verizon's and Sprint-Florida's motions. FCCA asserts its willingness to delay consideration of Verizon's and Sprint-Florida's UNE prices stems from the fact that their requests are consistent with its desire for a thorough and orderly consideration of the ILECs' cost models and proposed UNE rates and not from the view that the recent decision of the U.S. Court of Appeals for the Eighth Circuit requires this result.

FCCA stresses that its concurrence in a bifurcation and limited delay for the Verizon and Sprint-Florida proceeding should not be construed as an indication that it believes the Commission is not in a position to proceed to hearing in September to consider BellSouth's cost model and rates. The FCCA disagrees with Verizon and Sprint-Florida that the Eighth Circuit opinion creates an uncertainty in the law and that the uncertainty must be removed before we act. The FCCA notes that achieving certainty in the law may take several years. The FCCA argues that our 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.

FCCA argues that Verizon mistakenly assumes that the decision to go forward is Verizon's to make. FCCA asserts that the Commission and the parties must address the issue and notes that Sprint-Florida recognizes this point as it seeks permission to withdraw its cost studies and certain testimony.

In addition, FCCA contends that the Commission should be guided by the state of competition, not the State of Massachusetts. Specifically, FCCA disagrees with Verizon's suggestions that this Commission follow Massachusetts' example by delaying its review of certain UNE rates, pending a decision by the United States Supreme Court or a decision on remand by the FCC. The FCCA asserts that in comparing the efforts expended to measure the efficiency in this situation, to proceed expeditiously is an efficient and highly desirable investment of resources. FCCA argues that a proceeding in Florida would correct the situation where facilities-based competition has been frustrated by the absence of properly designed UNE rates and would introduce competition in the local market without waiting for additional years.

Finally, the FCCA argues that Verizon mischaracterizes a letter in which CompTel asked state commissioners 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. FCCA explains that CompTel was urging state commissions to resist initiatives by ILECs to undermine or erode rates based on forward-looking costs. FCCA argues that 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 they could attempt to exploit by urging states to implement rates based on embedded or historical costs. FCCA explains that CompTel's message was that, in light of the Eighth Circuit's validation of forward-looking incremental costs, efforts to base rates on other than forward looking costs would be "worthless litigation".

Therefore, FCCA disputes the premise of the motions, but does not object to bifurcation and a limited delay in the consideration of Verizon's and Sprint-Florida'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.

ALLTEL

ALLTEL disagrees with Verizon's assertion that the Eighth Circuit's decision effects a material change in the law controlling this proceeding. ALLTEL asserts that while the Eighth Circuit rejected the notion that cost should be based on a "hypothetical network," the opinion supports the idea that the deaveraged cost of UNEs should be based on forward-looking costs. ALLTEL argues that

if this Commission approves deaveraged UNE prices based on a forward-looking cost standard, using principally ILEC cost inputs, then its analysis and conclusions related to UNE pricing should conform with the Eighth Circuit's opinion and the 1996 Act. ALLTEL asserts that this can be accomplished without waiting to see what happens to the Eighth Circuit's opinion on rehearing or appeal.

ALLTEL asserts that establishing permanent deaveraged UNE pricing is very important to the development of local exchange competition in Florida. ALLTEL agrees that BellSouth should be allowed to proceed without delay. ALLTEL states it does not oppose a reasonable delay for Verizon and Sprint-Florida to revise their cost studies to conform to the Eighth Circuit opinion and the 1996 Act. ALLTEL argues, however, that this proceeding should not be suspended until after the Eighth Circuit's opinion endures motions for rehearing, and further rulemaking by the FCC if the decision by the Eighth Circuit stands.

DETERMINATION

It appears, based upon the filings, that the parties generally agree to a bifurcation of the proceedings to allow BellSouth to move forward as scheduled, but to continue the proceeding with respect to Verizon and Sprint-Florida. In addition, it appears that the parties agree that testimony relating to Verizon's and Sprint-Florida's cost studies should be withdrawn. The main concern of all parties is how long the proceedings should be continued. The FCCA stresses the need to have a final decision by no later than July 31, 2001, including any reconsideration, and Verizon and Sprint-Florida are willing to submit new cost studies in the April to June 2001 time frame.

Based upon the arguments presented and the apparent agreement, I find that the proceedings should be bifurcated to allow BellSouth to go forward as scheduled and continue the proceedings with respect to Verizon and Sprint-Florida. This finding is reasonable based upon both Verizon's and Sprint-Florida's assertions that they cannot continue to advocate rates that are rooted in the TELRIC methodology that has been deemed unlawful. Accordingly, I also find it reasonable to allow Verizon and Sprint-Florida to withdraw their cost studies and related testimony.

I acknowledge FCCA's desire to have a decision by July 31, 2001, but stress that such a time frame may be difficult to achieve. Moreover, I am convinced by FCCA's argument of the

importance of having adequate time to review and analyze revised cost studies that are submitted. If the FCCA proposal were adopted, I believe that when the cost studies are filed, our staff and the ALECs will be pressed to properly analyze the studies in a compressed time. Therefore, I find it reasonable to require Verizon and Sprint-Florida to submit cost studies by April 2, 2001, which comport to the state of the law at that time. We will then proceed in accordance with our authority under the Act and Chapter 364, Florida Statutes. At that time, Verizon and Sprint-Florida shall also file their direct testimony. I will issue a procedural order addressing other relevant dates at a later time. Finally, with the concurrence of the Chairman's office, a hearing is scheduled for June 27-29, 2001, on these studies. Staff will be expected to file a recommendation for a special agenda conference set for October 1, 2001.

I also find that Verizon's and Sprint-Florida's testimony on issues 7b, 7c, and 7d relating to cost of capital, depreciation, and taxes that was considered at the Phase I hearing should be withdrawn and refiled with their testimony. The remaining issues addressed in Phase I will be considered as scheduled.

I note that Verizon agrees to extend its interim deaveraged loop rates beyond the Commission-ordered date of June 30, 2000. I believe it appropriate for the Commission to address this extension at a later time.

Finally, I reserve ruling on BellSouth's assertion that Sprint's testimony be stricken until BellSouth files a Motion describing the specific testimony it means to have stricken.

Based on the foregoing, it is

ORDERED by Commissioner E. Leon Jacobs, Jr., as Prehearing Officer, that Verizon Florida Inc.'s Motion to Bifurcate and Suspend Proceedings and Sprint-Florida Incorporated's and Sprint Communications Company Limited Partnership's Motion to Bifurcate Proceeding, for a Continuance and Leave to Withdraw Cost Studies and Certain Testimony are hereby granted as set forth in the body of this Order. It is further

ORDERED that Verizon and Sprint-Florida will file their cost studies and direct testimony by April 2, 2001. It is further

ORDERED that Verizon's and Sprint-Florida's testimony on issues 7b, 7c, and 7d relating to cost of capital, depreciation, and taxes that was considered at the Phase I hearing should be withdrawn and refiled with their testimony.

By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 18th day of August, 2000.

E. LEON JACOBS, JR.
Commissioner and Prehearing Officer

(S E A L)

DWC

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1)

reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

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M E M O R A N D U M

August 17, 2000

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (CALDWELL) DWC

RE: DOCKET NO. 990649-TP - INVESTIGATION INTO PRICING OF UNBUNDLED NETWORK ELEMENTS.

1486-PCO

Attached is an ORDER GRANTING MOTIONS TO BIFURCATE AND SUSPEND PROCEEDINGS, to be issued in the above-referenced docket.

(Number of pages in order - 12)

PLEASE ISSUE THIS ORDER IMMEDIATELY

pg 1

DWC

Attachment

cc: Division of Economic Regulation
(Iyamu, Lee, Lester)
Division of Competitive Services
(Ollila, Arant, Davis, Dowds, King, Marsh)
Division of Policy Analysis & Interagency Liaison
(Fogleman, Smitha, Watts, Yu)
Division of Legal Services
(Keating, Knight)

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MUST GO TODAY

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