

BEFORE THE 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  
ORDER NO. PSC-04-0178-PCO-TP  
ISSUED: February 20, 2004

ORDER GRANTING VERIZON FLORIDA INC.'S MOTION  
TO CLARIFY THE SCOPE OF THE PROCEEDING

**I. Case Background**

In response to the Federal Communications Commission's ("FCC's") August 21, 2003, Triennial Review Order ("TRO"), this Commission opened two dockets to ascertain whether a requesting carrier is impaired by lack of access to certain incumbent local exchange companies' network elements. Unbundled network elements ("UNEs") are those portions of telephone networks that incumbent local exchange companies ("ILECs") must, under applicable federal law, make available to competitive local exchange companies ("CLECs"). In the TRO, as it relates to this docket, the FCC held that whether an ILEC must offer unbundled local circuit switching as a UNE depends upon whether a CLEC would, according to the guidelines established by the FCC, be impaired in the provision of its telecommunications services without such. The TRO does not address the issues of UNE pricing or rates charged by ILECs or CLECs. This docket was initiated to implement those provisions of the TRO concerning whether CLECs are impaired without access to unbundled local circuit switching.

On January 7, 2004, Verizon Florida, Inc. ("Verizon") filed a motion to clarify the scope of the proceeding. On January 15, 2004, AT&T Communications of the Southern States, LLC (AT&T) and MCI metro Access Transmission Services LLC and MCI WorldCom Communications (MCI) filed their joint response to Verizon's motion.

**II. Verizon**

Verizon asks for clarification that the scope of this proceeding does not include a consideration of a "potential deployment" showing for Verizon, and that any evidence concerning alleged operational or economic impairment or impediments to entry is irrelevant to whether Verizon must, under the applicable analysis, continue to unbundle mass market circuit switching in the Tampa-St. Petersburg-Clearwater MSA. In support of its request, Verizon argues that the TRO directs state commissions to "apply a two-step process to determine whether CLECs are impaired in a particular market," with the first step being a "triggers" analysis and the second step, reached only if the "triggers" analysis is not satisfied, being a potential deployment analysis. In response to the TRO, Verizon has only put forth a "triggers" case; it has not put

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forth a potential deployment case. Verizon argues that, pursuant to the TRO, state commissions should only consider potential deployment in markets where neither the “self-deployment trigger” nor the “wholesale facilities trigger” is satisfied. Verizon further argues that state commissions should not engage in the potential deployment analysis unless there is a finding that neither of the “triggers” has been met and the ILEC nonetheless continues to seek mass market switching relief. In addition, Verizon notes that its requested clarification is authorized by Rule 28-106.305, Florida Administrative Code, to “. . . promote the just, speedy, and inexpensive determination of all aspects of the case.”

### **III. AT&T and MCI**

AT&T and MCI contend that Verizon’s motion for clarification is nothing more than an untimely motion for reconsideration of Order No. PSC-03-1200-PCO-TP, issued on October 22, 2003. Moreover, AT&T and MCI disagree with Verizon that “the operational and economic considerations are irrelevant to the ‘trigger’ analysis . . . .” They also argue that the scope of this proceeding has already been addressed, and the parties have filed testimony accordingly. They add that, “Any attempt to derail the process at this late date violates the spirit of the Commission’s Procedural orders in this case.” Lastly, they argue that Verizon’s motion is substantively and legally incorrect because it “deprive[s] the CLECs of the ability to present relevant evidence on the triggers issues . . . .”

### **IV. Discussion and Decision**

In the TRO, the FCC established two distinct tests for determining impairment in the mass market: (1) a “triggers” test and (2) a “potential deployment” test. If either of the two “triggers” is satisfied, or if the “potential deployment” test is met, the UNE at issue is removed from the national list.

The TRO is clear that our consideration involves a two-step process: first is an analysis of the triggers, and second, if the triggers are not satisfied, is an analysis of potential deployment under an impairment standard. As the FCC recently reiterated, in its brief filed in the United States Court of Appeals for the District of Columbia Circuit, the “triggers” analysis is a separate, discrete analysis from the “potential deployment” analysis, and is, essentially, a counting exercise. See, e.g., United States Telecom Association v. Federal Communications Commission, No. 00-1012 (D.C. Cir.)(Br. of Respondent FCC (“FCC Brief”) at 17). A state commission only proceeds to the more intensive “potential deployment” analysis if neither of the triggers identified in the TRO have been satisfied. TRO, FCC 03-36 at paragraph 506.

Under the “triggers” test, requesting carriers are not impaired if either of two triggers are satisfied: (a) if, in the relevant geographic market, there are three or more unaffiliated CLECs, including intermodal providers of service comparable in quality to that of the ILEC, serving mass market customers with their own switches (“local switching self-provisioning trigger”); or

(b) if, in the relevant geographic market, there are two or more unaffiliated CLECs, including intermodal providers of service comparable in quality to that of the ILEC, who have their own switches and are offering wholesale local switching to customers serving DSO capacity loops in that market (“wholesale trigger”). TRO at ¶¶ 405-416. In view of the fact that all parties to this proceeding have stipulated that the wholesale triggers are not met, only the local switching self-provisioning trigger is relevant here.

If the local switching self-provisioning trigger is satisfied, a state commission must find “no impairment.” TRO at ¶ 501; FCC Brief at 17. As the FCC explained its reasoning for use of the local switching self-provisioning trigger:

We find that, when three carriers, in addition to the incumbent LEC, have each made sunk investment in transport facilities on a route, that is a sufficient indication that sunk costs, economies of scale, and other barriers to deploying transport facilities do not present an insurmountable barrier on a particular route such that requesting carriers are not impaired without access to unbundled transport.

TRO at ¶ 405. See also TRO at ¶ 506.

In its brief to the D.C. Circuit in the TRO appeal, the FCC reiterated the mandatory nature of the triggers test and reiterated its relationship to the potential deployment test.

The Commission thus adopted deployment-based triggers (or standards) for the states to apply to make market-specific determinations. . . . If those triggers are satisfied, the element at issue must be withdrawn [from the UNE list] following a period of transition designed to avoid market disruption. If the triggers are not satisfied, state commissions are to undertake further analysis of potential deployment under the Commission’s general impairment standard.

FCC Brief at 17.<sup>1</sup> See also TRO at n. 1405 (additional factors “come into play only if our deployment triggers are not met.”) (emphasis added).<sup>2</sup>

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<sup>1</sup> In its brief to the D.C. Circuit, the FCC also explained its rejection of the argument, advanced by AT&T and MCI here, that the trigger does not address other potential impairment issues: “The Commission reasonably concluded that satisfaction of the trigger would show that multiple consecutive supply is possible and that there likely is no entry barrier reaching the level of impairment from any source. FCC Brief at 45.

<sup>2</sup> The fact that the TRO provides for a two-step process lends support to Verizon’s earlier proposal that the Commission conduct a separate, initial proceeding to address the “triggers” analysis, to be followed, only if necessary, by a “potential deployment” proceeding. However, in spite of the overall practicality of that proposed approach, we are faced with conducting our review in a very expedited manner. Hence, Verizon’s proposal for a separate proceeding to just address “triggers” was rejected, as set forth in Order

Indeed, AT&T and MCI have previously conceded that if the local switching self-provisioning trigger is satisfied, then the FCC has required the removal of switching from the UNE list. In their brief before the D.C. Circuit in the appeal of the TRO, AT&T and MCI state:

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.”

...[The FCC] 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.

AT&T and MCI Brief at pp. 35, 36 (citations omitted). As the FCC has made clear, AT&T and MCI are indeed correct. If the “automatic triggers” are met, “a state must find ‘no impairment.’” FCC Brief at 17.<sup>3</sup>

The one exception to a mandatory finding of “no impairment” where a trigger is met is discussed in paragraph 411 of the TRO. That paragraph provides for a state commission to petition the FCC for a waiver of the trigger where, despite satisfaction of the trigger, evidence of a “significant barrier to entry exists such that deploying additional facilities is entirely foreclosed.” An example of such an insurmountable barrier is “a municipality that has imposed a long-term moratorium on obtaining the necessary rights-of-way such that a competing carrier cannot deploy new facilities.” TRO at ¶ 411. See also FCC Brief at 45.

Based upon the foregoing, it is

ORDERED by Commissioner Charles M. Davidson, Prehearing Officer, that Verizon Florida Inc.’s Motion to Clarify the Scope of the Proceeding is granted, to the extent and as set forth herein; and it is further

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No. PSC-03-1200-PCO-TP. As such, both the “triggers” analysis and the “potential deployment” analysis for an ILEC that is presenting a “potential deployment” case will be conducted in the context of this established proceeding.

<sup>3</sup> See, e.g., Pennsylvania PUC, Procedural Order, Docket No. I-0030100 at 14 (“The Commission will find no impairment in a particular market if the evidence shows three or more non-affiliated competing providers are serving mass market customers in the particular market with use of their own switches.”).

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ORDERED that evidence of alleged economic or operational barriers to deploying transport facilities in the mass market (evidence that is relevant to Issue 5 in this docket) is not relevant to application of the local switching self-provisioning trigger (Issue 4); and it is further

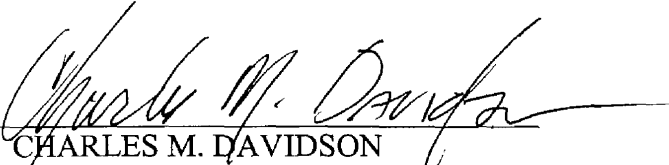
ORDERED that evidence that a “significant barrier to entry exists such that deploying additional facilities is *entirely foreclosed*” (i.e., evidence that deploying additional facilities is rendered impossible) is relevant to application of the local switching self-provisioning trigger; and it is further

ORDERED that evidence as to whether a particular competitive switch provider “counts” for purposes of application of the local switching self-provisioning trigger (e.g., is the competitive switch provider unaffiliated with the incumbent LEC) is relevant; and it is further

ORDERED that, with regard to Issues 4 and 5 in this docket, Verizon may properly limit its “case” to whether the local switching self-provisioning trigger is satisfied. Verizon is cautioned, however, that by choosing not to present a “potential deployment” case in this docket, it cannot later call for an opportunity to present a “potential deployment” case relating to this docket. If the TRO is reversed and ultimately “re-implemented” by the Commission, parties will be free to assert positions relating to any new or revised TRO from the FCC; and it is further

ORDERED that nothing in this order shall otherwise limit the ability of the parties to present evidence and argument as to market definition (Issues 1 and 2), the batch cut process (Issue 3), the potential for self provisioning of local switching (Issue 5), and the transitional use of unbundled local switching (Issue 6).

By ORDER of Commissioner Charles M. Davidson, as Prehearing Officer, this 20<sup>th</sup> day of February, 2004.

  
CHARLES M. DAVIDSON  
Commissioner and Prehearing Officer

( S E A L )

JLS/bk

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; or (2) 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 the Commission Clerk and Administrative Services, 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.