

State of Florida



Public Service Commission

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COMMISSION
CLERK

-M-E-M-O-R-A-N-D-U-M-

DATE: September 9, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (Lee, Dowds)
Office of the General Counsel (Susac, Teitzman, Rojas)
Office of Market Monitoring & Strategic Analysis (Betha)

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

Docket No. 030852-TP – Implementation of requirements arising from Federal Communications Commission's Triennial UNE Review: Location-Specific Review for DS1, DS3 and Dark Fiber Loops, and Route-Specific Review for DS1, DS3 and Dark Fiber Transport.

AGENDA: 09/21/04 – Regular Agenda – Procedural/Close Docket - Interested Parties May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\030851.RCM.DOC

Case Background

On August 21, 2003, the Federal Communications Commission (FCC) released its *Triennial Review Order*¹, which contained revised unbundling rules and responded to the D.C.

¹ In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, rel. August 21, 2003 (*Triennial Review Order or TRO*).

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

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Circuit Court of Appeals' remand decision in *USTA I*.² The *TRO* eliminated enterprise switching as a UNE on a national basis. For other UNEs (e.g., mass market switching, high capacity loops, dedicated transport), the *TRO* provided for state review on a more granular basis to determine whether and where impairment existed, to be completed within nine months of the effective date of the order. In addition, the *TRO* imposed new obligations on ILECs (e.g., commingling, and conversion of special access to Enhanced Extended Links (EELs)). The *TRO* did not address the issue of UNE pricing, or retail rates charged by ILECs or CLECs.

In response to the *TRO*, Docket Nos. 030851-TP and 030852-TP were opened on August 22, 2003. Docket No. 030851-TP was initiated to address local circuit switching for mass market customers, and Docket No. 030852-TP was initiated to address the location-specific review for DS1, DS3, and dark fiber loops and route-specific review for DS1, DS3, and dark fiber transport.

The hearing in Docket No. 030851-TP was held February 24-27, 2004. Shortly thereafter, on March 2, 2004, the D.C. Circuit Court of Appeals released its decision in *United States Telecom Ass'n v. FCC*³ which vacated and remanded certain provisions of the *TRO*. In particular, the D.C. Circuit held that the FCC's delegation of authority to state commissions to make impairment findings was unlawful, and further found that the national findings of impairment for mass market switching and high-capacity transport were improper and could not stand on their own. Accordingly, the Court vacated the *TRO*'s subdelegation to the states for determining the existence of impairment with regards to mass market switching and high-capacity transport. The D.C. Circuit also vacated and remanded back to the FCC the *TRO*'s national impairment finding with respect to these elements.

In light of *USTA II*, Order No. PSC-04-0252-PCO-TP, was issued March 8, 2004, in Docket No. 030852-TP, holding the docket in abeyance indefinitely pending the outcome of litigation regarding the D.C. Circuit Court of Appeals' decision. By Order No. PSC-04-0305-PCO-TP, issued in Docket No. 030851-TP on March 18, 2004, this docket was also held in abeyance until further action was deemed appropriate. Informal status conference calls with the parties in both dockets were held April 5, May 11, June 8, and July 7, 2004.

The D.C. Circuit Court stayed the vacatur of the *TRO* rules for 60 days and later extended that stay for another 45 days, until June 15, 2004. On June 16, 2004, the D.C. Circuit issued its mandate vacating and remanding certain *TRO* provisions. Various parties have filed petitions for certiorari with the Supreme Court.

As a result of the Court's mandate, the FCC released an *Order and Notice*⁴ on August 20, 2004, requiring ILECs to continue providing unbundled access to mass market local circuit switching, high capacity loops and dedicated transport until the earlier of the effective date of final FCC unbundling rules or six months after Federal Register publication of the *Order and*

² *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA I*).

³ 359 F. 3d 554 (D.C. Cir. 2004) (*USTA II*), pets. for cert. filed, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

⁴ *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313; *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, rel. August 20, 2004 (*Order and Notice*).

Notice. Additionally, the rates, terms, and conditions of these UNEs are required to be those that applied under ILEC/CLEC interconnection agreements as of June 15, 2004.⁵ In the event that the interim six months expires without final FCC unbundling rules, the *Order and Notice* contemplates a second six-month period during which CLECs would retain access to these network elements for existing customers, at transitional rates. Besides establishing interim measures, the *Order and Notice* seeks comment on, among other things, alternative unbundling rules that will respond to *USTA II*. On August 23, 2004, certain ILECs filed a *Mandamus Petition*⁶ with the D.C. Circuit Court of Appeals in response to the FCC's *Order and Notice*.

This recommendation addresses the procedural issues of whether Docket Nos. 030851-TP and 030852-TP should be closed and whether the Commission should prepare summaries of the records in these dockets and forward the summaries to the FCC in response to the *Order and Notice*.

⁵ Except to the extent the rates, terms, and conditions have been superseded by 1) voluntarily negotiated agreements, 2) an intervening FCC order affecting specific unbundling obligations (e.g., an order addressing a petition for reconsideration), or 3) a state commission order regarding rates.

⁶ *United States Telecom Association v. FCC*, Petition for a Writ of Mandamus to Enforce the Mandate of the Court, August 23, 2004 (*Mandamus Petition*).

Discussion of Issues

Issue 1: Should these dockets be closed?

Recommendation: Yes. In light of the Court's *USTA II* decision, no further Commission action is necessary or required in Docket Nos. 030851-TP and 030852-TP, and thus the dockets should be closed. Additionally, staff recommends that the Commission not prepare summaries or forward the records in these dockets to the FCC, but rather serve to facilitate any such filings by the parties and provide any other reasonable assistance to effect such efforts. (P. Lee, Dowds, Bethea, Susac, Teitzman)

Staff Analysis: *USTA II* is clear that the decision-making regarding impairment is reserved for the FCC, not the states. In this regard, the D.C. Circuit Court stated that the *TRO* improperly delegated FCC authority to the states to make findings on whether impairment exists absent access to a given element being provided to a CLEC. Specifically, the Court states:

We therefore vacate, as an unlawful subdelegation of the Commission's §251(d)(2) responsibilities, those portions of the Order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements, and in particular we vacate the Commission's scheme for subdelegating mass market switching determinations. (This holding also requires that we vacate the Commission's subdelegation scheme with respect to dedicated transport elements, discussed below.)⁷

Staff recognizes that petitions for certiorari have been filed with the Supreme Court. If certiorari is granted, it is unlikely that a Supreme Court decision will be issued for one to two years. Even if *USTA II* is ultimately overturned, the information and data gathered in Docket Nos. 030851-TP and 030852-TP will have become dated, not reflective of current markets, and consequently should not be the basis for future Commission decision-making, if any. Accordingly, staff believes no further action is necessary or required in Docket Nos. 030851-TP and 030852-TP, and thus they should be closed.

Staff notes that the FCC's *Order and Notice* seeks comment on alternative unbundling rules to implement the *USTA II* decision. Specifically, the *Order and Notice* recognizes that state commissions initiated proceedings to implement the *TRO* and developed voluminous records containing relevant information. The FCC encourages state commissions and other parties to file summaries of the state proceedings, especially highlighting factual information relevant to the Court's guidance under *USTA II*. To avoid duplication, the FCC encourages state commissions and parties that participated in the state proceedings, to coordinate the filing of information.⁸

Staff has misgivings with attempting to summarize the records in Docket Nos. 030851-TP and 030852-TP, since the Commission rendered no findings of fact in these dockets. Staff is concerned that such summaries may be interpreted or construed as specific Commission

⁷ *USTA II* at 18.

⁸ *Notice and Order* at para. 15.

findings. Moreover, staff notes that even if the information in these dockets were summarized, much of the salient record information and data is confidential, filed under protective agreements. Thus, the Commission could not release that information to the FCC. We believe it makes sense that such data should come directly from the parties. The various parties are aware of the data and information filed in each state proceeding. Accordingly, staff believes it is more appropriate for the parties to present their case to the FCC, submitting the information and data included in the records of these dockets to support their respective positions. Staff recommends that the Commission should not prepare summaries or forward the records in these dockets. However, staff is ready to facilitate such filings by the parties and believes we should provide information or a link to the docketed record and any other reasonable assistance to effect such efforts.

In conclusion, staff recommends that Docket Nos. 030851-TP and 030852-TP be closed as no further Commission action is necessary or required as a result of *USTA II*. Additionally, staff recommends that the Commission not prepare summaries or forward the records in these dockets to the FCC, but rather serve to facilitate any such filings by the parties and provide any other reasonable assistance to effect such efforts.