D.T.E. 01-20 January 12, 2001

Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts.

VOTE AND ORDER TO OPEN INVESTIGATION

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I. INTRODUCTION

The Department of Telecommunications and Energy ("Department") established the recurring and non-recurring prices for Unbundled Network Elements ("UNEs") charged by Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") in a series of decisions issued in Phase 4 of the Department's Consolidated Arbitrations docket,[1] where the Department and its arbitrator were guided by the Federal Communications Commission's ("FCC') directives on how to calculate and apply the Total Element Long Run Incremental Cost ("TELRIC") methodology implementing the UNE pricing requirements of the Telecommunications Act of 1996 ("Act"). See In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket

No. 96-68, First Report and Order, 11 FCC Rcd 15499 at ¶ 672 et. seq. (1996) ("Local Competition Order"); 47 U.S.C. § 252(d)(1).

In addition, the Department established the avoided cost discount for the resale of Verizon's retail services in a series of decisions in Phase 2 of the Consolidated Arbitrations, where the Department and its arbitrator were guided by the FCC's avoided cost methodology, implementing the resale pricing requirements of the Act.[(2)]

At the time the Department adopted the FCC's TELRIC and avoided cost methods, and approved interim recurring prices for UNEs and an interim resale discount for Verizon's retail services, the FCC's methodologies were stayed by a decision issued by the U.S. Court of Appeals for the Eighth Circuit.[(3)] After the U.S. Supreme Court reinstated the FCC's UNE pricing rules and avoided cost discount rules,[(4)] the Department made the interim UNE rates and interim avoided cost discount permanent on March 19, 1999.[(5)] When the Department affirmed Verizon's TELRIC prices and avoided cost discount after the Supreme Court decision, the Department set up a five-year cycle for evaluating UNE rates and the avoided cost discount.[(6)] Because the UNE rates and avoided cost discount were first set in 1996, the five-year deadline for evaluating wholesale rates is now upon us.

II. DISCUSSION

Section 252(d)(1) of the Act requires that a state commission's determination of the just and reasonable rates for network elements shall be based on the cost of providing the network elements, shall be nondiscriminatory, and may include a reasonable profit.[(7)] Pursuant to this statutory mandate, the FCC determined that prices for UNEs must be based on the TELRIC of providing those elements.[(8)] Moreover, Section 252(d)(3) of the Act provides that wholesale rates shall be based on "retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." Pursuant to this mandate, the FCC adopted rules on how state commissions should calculate the Act's avoided cost discount.

As noted above, the U.S. Court of Appeals for the Eighth Circuit stayed and then vacated the FCC's pricing rules and avoided cost discount rules on jurisdictional grounds in September 1996, and in 1997 it vacated Rule 51.315(b).[(9)] The Supreme Court restored these rules, however, on January 25, 1999.[(10)]

On July 18, 2000, the U.S. Court of Appeals for the Eighth Circuit vacated and remanded the FCC's pricing rules and avoided cost discount rules on substantive grounds.[(11)] The Eighth Circuit affirmed the FCC's use of a forward-looking, incremental cost approach, but found that the use of TELRIC "violates the plain meaning of the Act." Specifically, the Court found that TELRIC inappropriately measures "the cost some imaginary carrier would incur by providing the newest, most efficient, and least cost substitute for the actual item or element which will be furnished by the existing ILEC pursuant to

Congress's mandate for sharing."[12] The Court found that the Act requires that network element prices be based on "the cost to the ILEC of providing its existing facilities and equipment either through interconnection or by providing the specifically requested existing network elements that the competitor will in fact be obtaining for use."[13] Regarding the FCC's avoided cost discount rules, the Eight Circuit stated that the "language of the statute is clear. Wholesale rates shall exclude 'costs that will be avoided by the local exchange carrier.' 47 U.S.C. § 252(d)(3). The plain meaning of the statute is that costs that are actually avoided, not those that could be or might be avoided, should be excluded from the wholesale rates."[14] Parties, including the FCC, have petitioned the Supreme Court for a writ of certiorari,[15] and, on September 22, 2000, the Eighth Circuit stayed its mandate pending the disposition of a petition for certiorari with the Supreme Court.[16]

The Department has determined that, pending a FCC ruling on remand of its pricing rules or a higher court ruling overturning the Eighth Circuit's findings, it will maintain the status quo for UNE prices and the wholesale discount. The status quo in Massachusetts is use of the FCC's TELRIC and avoided cost methods, and despite regulatory uncertainty surrounding it, TELRIC and the avoided cost wholesale discount are the only viable methods to rely upon at this time.

III. VOTE TO OPEN INVESTIGATION

Consistent with our findings in D.T.E. 98-15 (Phases II/III) for a five-year cycle to review UNE rates and the avoided cost discount, the Department votes to begin its review of UNE and resale pricing at this time in order to have new rates in place by the end of this calendar year. Accordingly, on its own motion, the Department hereby votes to open an investigation to review the UNE rates and avoided cost discount in Massachusetts. This investigation is docketed as D.T.E. 01-20.

To that end, this investigation will be divided into two parts: (1) Part A will concern the development of new UNE rates (both recurring and non-recurring); and Part B will concern the development of a new avoided cost discount. Both Parts will begin at the same time and run on parallel tracks. Part A will be divided into two phases: (1) Phase 1 will consider the appropriate TELRIC model; Phase II will review the appropriate inputs to that model. Accordingly, we hereby begin Part A, Phase I, and Part B by informing interested persons, who successfully petition to intervene in this investigation, that they may file with the Department proposed TELRIC models for calculating UNE rates and proposed avoided cost studies for calculating the wholesale discount. Any intervenors so filing must do so within thirty (30) calendar days of the issuance of this Order. Intervenors proposing TELRIC models that require substantial computing capacity to operate shall furnish the Department with the loan of appropriate computer equipment at the time of filing of the proposed models so that the Department may adequately review such models.

The Department invites all interested persons who are substantially and specifically affected by the issues under investigation to petition to intervene in this proceeding. Petitions to intervene in this docket must be filed with the Secretary of the Department by 5:00 P.M., on January 31, 2001. The Department will hold a procedural conference on February 8, 2000, beginning at 10:00 A.M., at its offices, to establish a procedural schedule for the orderly conduct of the investigation. The Department intends for this proceeding to be conducted as an adjudicatory proceeding, as defined in G.L. c. 30A, s. 1(1).

IV. ORDER

Accordingly, the Department

VOTES: To open an investigation into new TELRIC-based UNE rates and the avoided cost wholesale discount; and it is

ORDERED: That Verzion New England d/b/a Verizon Massachusetts must, and any interested carriers may, develop proposed TELRIC-based models for calculating UNE rates and proposed avoided cost studies for calculating the wholesale discount for the Department's consideration, and that these proposals shall be filed with the Department within thirty (30) days of the issuance of this Order; and it is

FURTHER ORDERED: That within three business days of the date of this Order, the Secretary of the Department shall serve a copy of this Order on all parties to the Phase 2 and Phase 4 proceedings of the Consolidated Arbitrations, and on all parties to D.T.E. 98-15 (Phases II/II); and it is

FURTHER ORDERED: That petitions to intervene in this investigation shall be filed with the Secretary of the Department by January 31, 2001; and it is

FURTHER ORDERED: That a procedural conference in this proceeding will be held at the offices of the Department on February 8, 2001 at 10:00; and it is

FURTHER ORDERED: That within three business days of the date of this Order, the Secretary of the Department shall publish the accompanying notice in the Boston Globe and the Boston Herald.

By Order of the Department,

James Connelly, Chairman

W. Robert Keating, Commissioner

Paul B. Vasington, Commissioner

Eugene J. Sullivan, Jr., Commissioner

Deirdre K. Manning, Commissioner

Notice of Investigation

D.T.E. 01-20

The Department of Telecommunications and Energy ("Department"), on its own

motion, has opened an investigation into the appropriate pricing, based upon Total Element Long Run Incremental Costs, for unbundled network elements and combinations of unbundled network elements to be charged by Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon"), as well as the Appropriate Avoided Cost Discount for Verizon's Resale Services, in the Commonwealth of Massachusetts.

To that end, this investigation will be divided into two parts: (1) Part A will concern the development of new TELRIC-based UNE rates (both recurring and non-recurring); and Part B will concern the development of a new avoided cost discount. Both Parts will begin at the same time and run on parallel tracks. Part A will be divided into two phases: (1) Phase 1 will consider the appropriate TELRIC model; Phase II will review the appropriate inputs to that model.

The Department invites all interested persons who are substantially and specifically affected by the issues under investigation to petition to intervene in this proceeding. Petitions to intervene in this docket must be filed with the Secretary of the Department at the following address by 5:00 P.M. on January 31, 2001:

Mary Cottrell, Secretary

RE: D.T.E. 01-20

Department of Telecommunications and Energy

One South Station, Second Floor

Boston, MA 02110

All petitions to intervene are to be submitted by electronic mail to Tina.Chin@state.ma.us and dte.efiling@state.ma.us, in addition to filing the petitions in writing to the above address.

In addition, the Department hereby begins Part A, Phase I, and Part B by informing interested persons, who successfully petition to intervene, that they may file, in hard copy and floppy disc format, with the Department at the above address, proposed TELRIC models for calculating UNE rates and proposed avoided cost studies for calculating the wholesale discount. Any intervenor so filing must do so within thirty (30) calendar days of the issuance of the Department's Vote and Order to Open Investigation, or by February 12, 2001. Intevenors proposing TELRIC models that require substantial computing capacity to operate shall furnish the Department with the appropriate computer equipment at the time of filing of the proposed models so that the Department may adequately review such models.

The Department will hold a procedural conference on February 8, 2001, beginning at 10:00 A.M., at the Department's offices, to establish a procedural schedule for the orderly conduct of the investigation, and, if necessary, to further define the scope of the proceeding. The Department intends for this proceeding to be conducted as an "adjudicatory proceeding," as defined in G.L. c. 30A, s. 1(1).

By Order of the Department,

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MARY L. COTTRELL, SECRETARY

1. [1] The existing recurring UNE rates are addressed in the following Department Orders: Phase 4 (2/4/96), Phase 4-A (2/5/97), Phase 4-B (5/2/97), Phase 4-C (6/27/97), Phase 4-D (6/27/97), D.T.E. 98-15 (Phase II, III) (3/19/99) (making UNE rates permanent), D.T.E. 98-57 (Phase II) (5/4/2000) (establishing UNE-P rates), Phase 4-N (10/13/99), Phase 4-R (8/17/2000) (setting dark fiber rates), and D.T.E. 98-57 (3/24/2000) (setting EEL rates). Additionally, on July 24, 2000, the Department approved an amendment to the interconnection agreement between Verizon and Z-Tel Communications, Inc., which, among other things, provides for a promotional discount of between 30 and 50 percent for local switching usage. The amendment specifically provided that the same promotional discounts shall be made available to other carriers operating in Massachusetts. The promotional discount was superceded by an October 13, 2000 filing by Verizon, which the Department approved, to modify the switching rates to make those rates equal to Verizon's rates in New York.

The Department addressed the non-recurring charges ("NRCs") that would apply to the ordering and provisioning of UNEs in several Phase 4 Orders, and ultimately adopted Verizon's NRC model, with certain modifications, as the appropriate model for NRCs in Massachusetts. The existing non-recurring UNE rates are addressed in the following Consolidated Arbitrations Orders: Phase 4-L (10/14/99), Phase 4-O (1/10/2000), and Phase 4-S (9/15/2000).

2. [2] Phases 2, 2-A, 2-B, 2-C Orders; Local Competition Order; 47 U.S.C. § 252(d)(1).

3. [3] See Iowa Utilities Board v. FCC, 96 F. 3d 1116 (8th Cir. 1996) (per curiam) (temporarily staying the Local Competition Order until the filing of the court's order resolving the petitioners' motion for stay).

4. [4] See AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

5. [5] Investigation of UNE Rates Tariff of Bell Atlantic, D.T.E. 98-15 (Phases II, III) (March 19, 1999).

6. [6] Id. at 15-16.

7. [7] 47 U.S.C. § 252(d)(1).

8. [8] Local Competition Order, 11 FCC Rcd at 15844-46; 47 C.F.R. §§ 51.501. See also Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket 96-98, FCC 99-355, at ¶ 135 (rel. Dec. 9, 1999) ("Line Sharing Order") (the FCC concluded that states should set the prices for line sharing, as a new network element, in the same manner as the state sets prices for other UNEs).

9. [9] Iowa Utilities Board v. FCC, 96 F. 3d 1116 (8th Cir. 1996) (per curiam) (temporarily staying the Local Competition Order until the filing of the court's order resolving the petitioners' motion for stay); Iowa Utilities Board v. FCC, 109 F.3d 418 (8th Cir.) (dissolving temporary stay and granting petitioners' motion for stay, pending a final decision on the merits of the appeal), motion to vacate stay denied, 117 S. Ct. 429 (1996); Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997) (vacating the FCC's pricing and combination rules).

10. [10] AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999).

11. [11] Iowa Utilities Board v. FCC, 219 F.3d 744 (8th Cir. 2000).

12. [12] Id. at 750.

13. [13] Id. at 751.

14. [14] Id. at 755.

15. [15] See, e.g., Iowa Utilities Board v. FCC, 219 F.3d 744 (8th Cir. 2000) *petition for cert. filed* (October 13, 2000) (No. 00-587).

16. [16] Iowa Utilities Board v. FCC, Docket No. 96-3321 (and consolidated cases), *Decision on Motion for Partial Stay of Mandate* (8th Cir. 9/22/00).