

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department)	
of Telecommunications and Energy)	
on its own Motion to Implement the)	
Requirements of the Federal Communications)	D.T.E. 03-59
Commission's Triennial Review Order)	
Regarding Switching for Large Business)	
Customers Served by High-Capacity Loops)	

**JOINT COMMENTS OF DSCI AND INFOHIGHWAY
ON SCOPE, NATURE AND TIMING OF 90-DAY INVESTIGATION**

Pursuant to the August 26, 2003 procedural order ("August 26 Order") of the Department of Telecommunications and Energy ("Department" or "DTE"), DSCI Corporation ("DSCI") and InfoHighway Communications Corporation ("InfoHighway") (collectively, the "Carriers") jointly submit the following comments regarding the "scope, nature and timing of the Department's inquiry in this proceeding."¹

BACKGROUND

DSCI and InfoHighway are competitive local exchange carriers ("CLECs") authorized to provide local exchange service and other telecommunications services in the Commonwealth. Both carriers focus their offerings on small-to-medium-sized business customers in all density zones and offer a bundle of telecommunications and data services from a variety of facilities-based providers using a customer-friendly single bill format. Local voice services – the largest portion of the Carriers' offerings – are

¹ August 26 Order, p. 4. The Department issued a follow up letter order on September 9, 2003 ("September 9 Order") confirming that the DTE would conduct an enterprise switching proceeding and proposing specific dates for the tentative schedule announced in the August 26 Order.

generally provisioned using unbundled network elements (“UNEs”) purchased from the incumbent local exchange carrier (“ILEC” or “Verizon”). A substantial amount of the Carriers’ local voice service is provided using high capacity digital DS-1 loops² within Verizon’s UNE-P offering.³

DSCI and InfoHighway each are substantial purchasers of DS-1 UNE-P services for business customers, paying cost-based rates calculated in accordance with the approved TELRIC methodology.⁴ The Carriers have to date experienced operational problems in procuring UNE-P from Verizon at the DS-1 level. Given these problems, DSCI and InfoHighway each has allowed Verizon to provision certain UNE voice services via a surrogate service pending resolution of operational issues. Both DSCI and InfoHighway strive to maintain good relations with all of their facilities-based suppliers, including Verizon, and have worked hard to resolve disputes on a carrier-to-carrier basis without the need for regulatory intervention.

The Federal Communications Commission’s (“FCC”) recently-issued Triennial Review Order (“TRO”)⁵ established a regulatory framework that mandated state

² DS-1 is a data signal level specification for digital streams at the T-1 transmission rate of approximately 1.5 megabits per second. DS-1 is commonly used to handle up to 24 multiplexed voice-grade telephone signal streams. A single voice-grade telephone signal is classified as a DS-0 level.

³ UNE-P refers to a combination of UNEs that typically includes the local loop, local switching, shared transport and tandem switching.

⁴ See generally Investigation into the Appropriate Pricing, Based Upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, DTE 01-20 (establishing cost-based UNE rates in the Commonwealth).

⁵ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; and Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, FCC 03-36 (rel. August 21, 2003).

proceedings to review the continued existence of certain UNEs, including the switching component in UNE-P, thereby necessitating the participation of DSCI and InfoHighway in this docket.⁶

Among the TRO's key findings that could affect the Carriers' continued ability to access UNE-P offerings at TELRIC rates are the following:

- ✍ The FCC made a "national finding" that CLECs are not "impaired" by a lack of access to unbundled switching for enterprise customers served by DS-1 and above UNE loops (TRO, ¶¶ 419, 451).
- ✍ This national "no impairment" finding for enterprise customers assumes a lack of operational impairments, including no difficulty in ensuring seamless hot cuts from UNEs to alternative serving arrangements (TRO, ¶¶ 421, 451). The TRO, however, offers virtually no evidence to substantiate this far-reaching conclusion.⁷ The only way transition of the Carriers' embedded customer base will be "seamless" will be if they go back to the ILEC.
- ✍ State commissions are authorized to conduct proceedings to rebut the FCC's national finding and may file petitions with the FCC to waive such finding based on a record demonstrating an "affirmative finding of impairment" within 90 days of the TRO's effective date (TRO, ¶ 455).

⁶ See Joint Request of DSCI and InfoHighway to Proceed with 90-Day Investigation, September 5, 2003 (requesting the DTE to conduct a proceeding to review serving arrangements for enterprise customers). DSCI and InfoHighway also are separately participating in the docket reviewing access to UNEs for serving mass market customers (DTE 03-60).

⁷ The FCC's analysis rests entirely on a single Reply and supporting affidavit from one CLEC operating exclusively in the Bell South region, plus a single *ex parte* letter from AT&T. TRO, ¶¶ 1379-85. The Carriers have not experienced trouble free provisioning of UNE-P service at the DS-1 level in the Commonwealth and are confident that even with Verizon's best efforts, transitioning their embedded base from UNE-P to other arrangements would take many months, if not years, rather than the short Transition Period provided in the TRO.

~~§§~~ As part of the proceedings, state commissions are asked to define the relevant “market,” based on various factors, and must define the so-called “cross over” point where customers currently served over multiple DS-0 lines will be sufficiently significant to qualify as enterprise customers subject to the above national finding (TRO, ¶ 455, 495-97) (market definition); 419 n. 1296 and 497 (cross over point)).

~~§§~~ Based on the presumed absence of operational difficulties, the FCC ruled that changes to switching or alternative serving arrangements, following a no impairment finding, should be completed within a Transition Period of 90 days or any longer period specified in the change of law provision of an applicable interconnection agreement (TRO, ¶ 532).

~~§§~~ In the event a no impairment finding remained in effect, the FCC found that the UNE must continue to be offered to CLECs, not necessarily at a TELRIC rate, but at a price that comports with “just and reasonable rate” principles established in 47 U.S.C. §§ 201(b) and 202(a) (TRO, ¶ 662-66).

On August 26, the Department opened the instant investigation of issues to be resolved in connection with unbundled switching (including UNE-P) to enterprise customers. The Carriers and another carrier (American Long Lines) each filed requests for the Department to conduct a 90-Day proceeding.⁸ Pursuant to the August 26 Order, the Carriers hereby comment on the “nature, scope and timing” of the instant investigation.

⁸ See September 9 Order.

COMMENTS

I. NATURE OF PROCEEDING

The Department requested that interested parties comment on the nature of the upcoming proceeding, in particular focusing on whether it should be conducted as a formal adjudicatory proceeding under G.L. c. 30A, §1(1) or, alternatively, as a less formal proceeding leading to a Department recommendation to the FCC in a manner akin to Verizon's Section 271 proceeding (DTE 99-271).

The Carriers request that the proceeding be conducted in a manner appropriate to its ultimate purpose. The Department will conduct the proceeding to determine whether CLECs serving customers using DS-1 and above loops are impaired and, thus, justify a waiver petition to the FCC. In the TRO, the FCC provided that a state must make an "affirmative finding of impairment showing that carriers providing service at DS-1 capacity and above should be entitled to unbundled access to local circuit switching in a particular market."⁹ Thus, the procedures must be sufficient to develop facts that the Department can rely on in substantiating a waiver petition and that the FCC would be able to rely on in deciding a waiver petition. The 90-day proceeding, at minimum, must adduce facts sufficient to make the required showing.

Based on the above, the Carriers do not believe that the instant proceeding must be conducted as a formal adjudication under Chapter 30A. The Department may elect to conduct the proceeding in a less formal manner, akin to that employed in DTE 99-271, so long as the procedures elicit the factual, legal and policy information needed to support

⁹ TRO, ¶ 455.

the DTE's impairment recommendation and could be used by the FCC to evaluate such waiver petition.

II. SCOPE OF PROCEEDING

The Carriers strongly contend that access to local switching within the UNE-P platform at a DS-1 level remains impaired locally and that a transition to alternative serving arrangements in the absence of impairment cannot possibly be completed within the 90-day "Transition Period" specified in the TRO in the absence of contrary provisions in interconnection agreements. Furthermore, since the TRO requires that ILECs continue to offer UNE-P services in the absence of impairment, albeit at a "just and reasonable rate," the Department must not allow Verizon to kill off this competitive segment by raising its prices to unreasonable levels and forcing carriers to challenge these rates at an overburdened FCC or in the courts. The Department should stay the rates and use its deep knowledge of Verizon pricing principles and the local market to determine new "just and reasonable rates" for the Commonwealth, consistent with the standards articulated in the TRO.

The scope of the proceeding should include the following areas of inquiry needed to file a waiver petition to the FCC.

A. Defining the relevant market

The FCC requested that state PUCs determine the relevant markets for applying an impairment analysis. The Department's decision on the relevant market may well dictate the success of an impairment analysis. Moreover, as noted above, the Department will have to decide the cross over point where a customer is served by sufficient DS-0 lines that it should be considered an enterprise customer subject to the national presumed

finding of no impairment. These determinations are likely to be difficult to make and may well be hard to complete within the initial 90-day period specified in the TRO.

B. Rebutting national finding of no impairment for unbundled switching used to serve enterprise customers over high capacity (DS-1 and above) circuits

The Carriers contend that access to switching for UNE-P enterprise customers remains impaired, operationally and/or economically, and justifies a waiver petition to the FCC. The Carriers' serving arrangements and experience have been very different from the trouble-free existence for enterprise customers discussed in the TRO, facts that should be explored by the DTE. Evidence will include that Verizon has no process in place whatsoever to "hot cut" the Carriers' existing installed customer base served by DS-1 circuits to other facilities-based serving arrangements. Under current marketplace conditions, a "seamless" transition of customers from UNE-P only could occur if customers abandoned the CLEC market and moved back to Verizon. Moreover, evidence will show that the customers moved over to the Carriers based on the understanding that their services would not be subject to disruption. Thus, any transition that cannot be assured of being seamless will almost certainly force these customers back to Verizon.

Verizon's past and present operational issues with respect to the Carriers are strong evidence of continuing impairment. As suggested by Allegiance Telecom,¹⁰ the Department also should look at operational problems associated with alternatives to UNE-P that would need to be utilized in the event of non-impairment, including Verizon's provisioning of digital UNE – Loops.

¹⁰ See Statement of Allegiance Telecom, Docket 03-59 (September 5, 2003).

C. Procedural Mechanism for Determining “Just and Reasonable Rates” That Will Apply in the Event of a Complete or Partial “No Impairment” Finding

In the event of a no impairment finding, the FCC ordered that ILECs continue to offer UNEs at a rate to be determined based on “just and reasonable price” provisions under federal law. The Department should maintain the existing rates and open a proceeding to determine the appropriate going forward rates under the standards articulated by the FCC.¹¹ Allowing Verizon free rein to raise these prices without restriction, while a just and reasonable rate is being determined, will severely damage the long-term viability of the business telecom market.

D. Investigation and Extension of the Transition Period

The Carriers strongly contend that the Transition Period, following a no impairment finding, must be as long as necessary to ensure transition to alternative serving arrangements without customer disruption. The 90-day period specified in the TRO is completely unworkable. (This period can be extended based on change of law provisions in interconnection agreements and the Department should require this process to be employed wherever applicable.) Trying to cram a transition into an arbitrarily short period of time will cause untold disruption and harm to CLECs and, more importantly, their customers. The Transition Period should be allowed to continue at current prices until Verizon demonstrates it can handle enterprise hot cuts seamlessly with minimal disruption to the Carriers’ businesses and customers. The Department

¹¹ The Carriers note that change of law provisions in interconnection agreements often require that existing rates remain in effect pending discussions on how to effectuate new legal principles. The Department should investigate the applicability of such agreements in the event of a no impairment finding.

should investigate these issues in this proceeding and, if necessary, file for relief from the FCC.

III. TIMING

The Carriers appreciate the Department's effort in setting a proposed procedural schedule in the August 26 and September 9 Orders. The existing schedule may be sufficient to determine the central issue of whether access to Verizon's UNE-P service for DS-1 and above customers remains impaired. However, the definition of the relevant markets needed to undertake this analysis, the pricing consequences of a no impairment finding, and the appropriate period required to transition customers to other arrangements in the event of a no impairment finding may require more than the 90-day period specified in the TRO.

The Carriers will work hard to get as many issues as possible resolved in the initial 90-day period, including the core impairment decision. If the 90-day period is not sufficient, the Department's waiver petition to the FCC should include facts that justify a preliminary conclusion of impairment so that the Department and the parties can take the time to determine the facts needed for a final impairment decision.

CONCLUSION

For the above described reasons, the Carriers request that the Department:

- (1) undertake an investigation into the provision of UNEs for enterprise customers in accordance with the above-described guidelines;
- (2) determine the relevant market to be used in evaluating impairment to UNEs for enterprise customers;
- (3) file a petition with the FCC rebutting the national finding that access to unbundled switching is not impaired for use in serving enterprise customers over high capacity (DS-1 and above) loops;

(4) in the event of a no impairment finding, rule that a “just and reasonable” rate for UNE switching and/or UNE-P should remain at their current TELRIC rates, pending a determination of a rate for such UNEs that would comport with federal “just and reasonable” rate principles established in 47 U.S.C. §§ 201 and 202;

(5) in the event of a no impairment finding, file a petition with the FCC that would permit existing customers to remain on their current serving arrangements at current TELRIC rates pending determination of a new “just and reasonable” rate or, alternatively, determine that the transition from current arrangements to alternative serving arrangements should not be limited to an unworkably short period but would occur only after such time that Verizon demonstrates it can support and implement seamless hot cuts of DS-1 service to alternative carriers; and

(6) make other any findings, recommendations or waiver requests to the FCC that the Department deems necessary or appropriate.

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