D.T.E. 01-20 April 4, 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.

INTERLOCUTORY ORDER ON PART B MOTIONS

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INTERLOCUTORY ORDER ON PART B MOTIONS

I. INTRODUCTION

On January 12, 2001, the Department of Telecommunications and Energy ("Department") issued its Vote and Order opening this investigation to review unbundled network element ("UNE") rates and the avoided cost discount for resale services in the Commonwealth of Massachusetts ("Vote and Order"). In the Vote and Order, the Department divided the investigation into two parts to run on parallel tracks: (1) Part A for the development of new TELRIC-based UNE rates (both recurring and non-recurring); and (2) Part B for the development of a new avoided cost discount. This Interlocutory Order concerns Part B of this proceeding.

At the time of the issuance of the Vote and Order, the U.S. Court of Appeals for the Eighth Circuit had stayed its July 18, 2000 decision in Iowa Utilities Board v. FCC, 219 F.3d 744 (8th Cir. 2000), which had vacated and remanded the Federal Communications Commission's ("FCC") UNE pricing and avoided cost discount rules on substantive grounds, pending the disposition of petitions for writ of certiorari to the Supreme Court.[(1)] For the resale discount, FCC rules require that the discount be based on costs that are avoidable, not costs that are actually avoided by the incumbent local exchange carrier. Regarding the avoided cost discount rules, the Eighth Circuit had stated that "the plain meaning of [47 U.S.C. § 252(d)(3)] is that costs that are actually avoided, not those that could be avoided or might be avoided, should be excluded from the wholesale rates."[(2)] Nevertheless, in the Vote and Order, the Department stated that, due to regulatory and judicial uncertainty surrounding the UNE pricing and avoided cost discount rules, it would continue to use the UNE pricing and avoided cost discount rules established by the FCC. Vote and Order at 5. Then, on January 22, 2001, the Supreme Court granted the petitions for writ of certiorari on the UNE pricing rules, but did not grant certiorari on the avoided cost discount rules.[(3)]

On February 8, 2001, the Department held a procedural conference in this docket. At the procedural conference, a procedural schedule for Parts A and B of this proceeding was issued.[(4)] On February 12, 2001, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") filed its initial avoided cost study along with pre-filed direct testimony in support of its study. Verizon's avoided cost study was based upon calendar-year 1999 data. On February 21, 2001, ServiSense.com, Inc. ("ServiSense") and Essential.com, Inc. ("Essential") filed a Motion to require Verizon to use calendar-year 2000 data in its avoided cost study ("ServiSense/Essential Motion"). On March 5, 2001, Verizon, and RNK, Inc. d/b/a RNK Telecom ("RNK") filed comments in reply to the ServiSense/Essential Motion.

Additionally, on February 27, 2001, Network Plus, Inc. ("Network Plus") filed a Motion to hold Part B of this proceeding in abeyance ("Network Plus Motion").[(5)] ServiSense, Essential, and the Association of Communications Enterprises ("ASCENT"), jointly, as well as Verizon and AT&T Communications of New England, Inc. ("AT&T"), filed comments in reply to the Network Plus Motion on March 9, 2001. On March 14, 2001, Network Plus responded to Verizon's reply. Additionally, AT&T's March 9, 2001 comments also contained a motion requesting the Department to dismiss Verizon's resale avoided cost study, to which Verizon filed a reply on March 22, 2001.

II. MOTIONS

A. Network Plus Motion

1. Positions of the Parties[(6)]

a. Network Plus

Network Plus begins by noting that the Department stated it would maintain the status quo, e.g. rely on the FCC's rules which were vacated by the Eighth Circuit, and would depart from this approach only in the event that a higher court overturned the Eighth Circuit decision or upon an FCC ruling on remand (Network Plus Motion at 3, citing Vote and Order). By submitting a study which is based upon its own reading of the Eighth Circuit decision and on speculation as to what the FCC's to-be-issued rules may provide, Network Plus argues that Verizon ignored the Department's status quo course of action (id. at 3-4).

Next, Network Plus argues that the uncertainty created by the Eighth Circuit decision concerning the applicable methodology to use to determine avoided costs for purposes of the wholesale discount supports its request for abeyance (id. at 4). Network Plus maintains that the FCC's ultimate course of action will impact the definition of the wholesale discount, and that without FCC rules to guide this proceeding, attempts to craft a wholesale discount would be "mere shots in the dark" (id. at 5, 7). Furthermore, by advocating the use of a function code detail as the study's starting point and determining which functions in particular categories are avoided rather than applying the FCC's methodology of using Part 32 main level accounts as well as the FCC's methodology which relies upon rebuttable presumptions of avoidability or unavoidability on certain categories, Network Plus claims that Verizon is attempting to usurp the FCC's role in prescribing rules to analyze ILEC costs in providing resale services (id. at 5-6). Accordingly, Network Plus insists that deferring this proceeding until the FCC promulgates new rules will help the parties and the Department ensure that Verizon's wholesale discount comports with the requirements of the Act, and does not understate or overstate its avoided costs (id. at 7-8).

Moreover, Network Plus notes that its request for deferral is similar to Verizon's argument raised in New York for suspending the New York Public Service Commission's proceeding evaluating Verizon UNE rates in New York (id. at 8). Yet, Network Plus contends, because the FCC will issue new rules on resale pricing soon, and because this proceeding has not yet required much investment by the parties, its argument for deferral of this proceeding is stronger than Verizon's argument in New York (id. at 9). Furthermore, Network Plus expects new resale pricing rules to be issued by summer, which is much shorter than the time period needed to resolve the uncertainties surrounding UNE pricing (id. at 10). If the time frame ends up being longer, Network Plus notes that the Department can reevaluate the situation to determine whether resumption of the proceedings is warranted (id.).

Additionally, Network Plus argues that given the importance of resale for the development of competitive telecommunications services, it is more prudent for the Department to wait for the FCC to act because an inappropriately low discount could discourage resale as an entry strategy (id. at 10-11). Accordingly, Network Plus asks the Department to hold Part B of this proceeding in abeyance until the FCC issues new rules on pricing for resale services. In the alternative, Network Plus requests that parties be permitted the opportunity to offer their own resale cost study by extending the current schedule by an additional four months (id. at 11-12).

In response to Verizon's contention that Network Plus should have appealed the procedural schedule rather than motion the Department to hold the proceedings in abeyance, Network Plus states that the gravamen of its motion is not opposition to the length of time provided in the procedural schedule for replying to a "status quo" avoided cost study, but rather opposes Verizon's proposal of an avoided cost study based upon a new methodology that is at odds with the type of study requested by the Department (Network Plus Reply at 1).

b. Verizon

Verizon argues that the cost standard for setting resale discounts under Section 252(d)(3) of the Act is a final ruling by the Eighth Circuit, and thus there is no uncertainty as to the cost standard that the Department must apply (Verizon Reply at 1, 5). Even though the FCC may issue new rules, Verizon states that there is no lawful action that the FCC can take that would re-impose its previous standard and no ambiguity regarding the cost standard that must guide the FCC's rules or the Department's review of the resale discount (id. at 5).

Furthermore, Verizon insists that its avoided cost study generally follows that methodological approach contemplated by the FCC and applied by the Department in Phase 2 of the Consolidated Arbitrations (id. at 3). Verizon states that its avoided cost study deviates from the FCC's now-vacated rules by comporting with the Act's requirements, as authoritatively determined by the Eighth Circuit, by quantifying the actual costs it will avoid in making services available for resale (id. at 4).

Verizon also contends that maintaining the current discounts allows resellers to obtain resold services at rates below those permitted under Section 252(d)(3) of the Act (Verizon Reply at 2). Verizon argues that it is inequitable to give Network Plus the continued benefit of the higher than lawful resale discount until the FCC acts, and urges the Department not to buy into Network Plus' delay tactics (id. at 6). Verizon distinguishes Verizon-NY's request for a stay since there is authoritative judicial interpretation of the resale pricing standard whereas in the case of UNEs, there is no final decision as of yet (id. at 6 fn.5).

Finally, Verizon claims that the necessity to proceed with the established Part B schedule is required in order to complete both Parts A and B by the end of the year (Verizon Reply at 6). Verizon argues that the Department and the parties cannot await the action of the FCC before beginning to consider the resale issue without rendering the Department's timetable for implementing new prices for UNEs and resale unattainable (id. at 6-7).

c. ASCENT, ServiSense and Essential

Pointing to the significant reduction in the discount, ASCENT, ServiSense and Essential ("Joint Commenters") contend that Verizon has seized the opportunity of the Eighth Circuit's decision as a basis for proposing the decrease, and urge the Department to grant the relief requested by Network Plus on the basis of administrative efficiency (Joint

Comments at 1). The Joint Commenters argue that by awaiting FCC action on remand, the Department can ensure consistency with the to-be issued FCC rules and avoid expending considerable efforts and expense by all parties should the FCC issue contrary rules (id. at 2). To proceed without the guidance from the FCC, the Joint Commenters contend, invites inconsistency, uncertainty about any final Department decision, and litigation (id.).

B. ServiSense/Essential Motion

1. Positions of the Parties

a. ServiSense/Essential

First, ServiSense and Essential state that use of more recent data, e.g. calendar year 2000 data, should yield materially different results than if a revised avoided cost discount is implemented using 1999 data (ServiSense/Essential Motion at ¶ 1-2, 4). For instance, ServiSense and Essential claim that 1999 data does not account for costs and revenues that are being, or should be, allocated to DSL line sharing because little DSL activity occurred in 1999 (id. at 3). Thus, ServiSense and Essential argue, the Department cannot accurately determine what costs will be avoided in the case of resale if stale information is used (id.).

Second, ServiSense and Essential contend that use of 1999 data will understate the resale discount and have an adverse impact on CLECs. ServiSense and Essential claim that Verizon's costs appear to have increased in the year 2000 and Verizon's per line revenues attributable to telecommunications services apparently have not increased much; thus, if one or both of these situations have occurred, the resale discount increases (id. at ¶ 4). Even if there are no material differences in the more recent data, ServiSense and Essential assert that it does not make sense to base a decision on 1999 data when 2000 data is, or will soon become, available (id.). Moreover, ServiSense and Essential maintain that if Verizon is allowed to use stale figures, resulting in an inaccurate and smaller discount, the Department will be discouraging competitive entrants in violation of federal and state policy (Motion at ¶ 6).

Third, ServiSense and Essential indicate that requiring Verizon to file an updated cost study and adjusting the Part B procedural schedule accordingly will have no impact on the final effectiveness of the new resale discount because there is considerable time between the currently scheduled end of hearings in Part B and the end of the year (id. at ¶ 7). ServiSense and Essential further argue that it would be unreasonable to have the resale discount adjusted before UNE pricing is adjusted because companies have made significant investments on the Department's statement that the resale discount would be in place for five years; thus, any changes in the resale discount and UNE rates should be at the same time to allow more certain market decisions (id. at ¶ 8, citing D.T.E. 98-15 (Phases II/III) at 8, 11 (1999)).

Finally, ServiSense and Essential claim that there is no cost associated with a grant of relief (id. at ¶ 11). ServiSense and Essential argue that, even if additional time and cost were required for Verizon to update its original case to calendar year 2000 data, this sort of update is a normal requirement in cases before the Department, and ServiSense and Essential insist that there is neither a material impact on Verizon nor an adverse impact on customers or the competitive marketplace (id.).

b. Verizon

Verizon urges the Department to deny the Motion filed by ServiSense and Essential. First, Verizon states that it complied with the Department's Vote and Order when it filed on February 12, 2001 its avoided cost studies for calculating the resale discounts based on data for the most current year available at the time, e.g. calendar year1999, and argues that the claim that use of calendar-year 2000 data will materially effect the resale discounts is unsupported (id. at 1-2). For instance, Verizon notes that ServiSense and Essential state, without citation or explanation, that Verizon's costs have increased and that its per line revenues have not increased as much (id.). Even if true, says Verizon, such statements are irrelevant because the avoided cost study looks at total revenues and compares them to avoided costs to determine the resale discount (id.). Thus, even though overall costs and revenues may change over time, Verizon maintains that the relative level of avoided costs associated with retail services available for resale does not necessarily shift significantly year to year (id.).

Second, Verizon claims that the fact that the FCC conditioned both the Bell Atlantic/GTE and the SBC/Ameritech mergers on the offering of a limited-time promotional discount of 32 percent for resold residential services has no bearing on this proceeding (id. at 2-3). Verizon notes that the FCC did not establish the promotional rate based on a cost analysis, or on Massachusetts-specific data (id. at 3).

Third, Verizon argues that there is no need to redo its cost studies to include DSL line sharing costs from 2000 because, as a non-regulated retail service provided by a separate affiliate, DSL is properly excluded from Verizon's cost study (id.).

Finally, Verizon states that complete calendar year 2000 data will not be available until April 2001, and that it would take another five to six weeks for Verizon to complete its analyses if required to redo the cost study (Reply at 3). However, Verizon states that there is no need to suspend the current investigation until this new data becomes available because the Department can review the currently-filed study to determine the categories of cost that Verizon will avoid when it makes its services available for resale, and if the Department determines that updated data should be used to compute the permanent discounts, Verizon could do so in its compliance filing (id. at 3-4).

c. RNK

RNK agrees with ServiSense and Essential that companies have made significant investments based upon the Department's statement that the current resale discount would be in place for five years "absent some compelling circumstance" that would disadvantage other carriers (RNK Comments at 1, citing D.T.E. 98-15 (Phases II, III) at 15-16 (1999)). RNK states that it has made substantial resale obligations to customers relying on the five year duration put forth by the Department, and to decrease the discount would undermine competition (id. at 2). Therefore, RNK urges the Department to delay examination of Verizon's resale discount. If the Department finds that review of the discount is warranted at this time, RNK claims that there is no compelling circumstance which obligates the Department to prematurely change the existing discount prior to at least the December 2001 end-date established in D.T.E. 98-15 (id.). Moreover, if the Department decides to impose new discounts as of January 2002, RNK notes that these discounts will be in effect until January 2007 (id. at 3). Consequently, RNK argues that the most recent data, e.g. calendar year 2000, should be used (id.).

C. AT&T Motion

1. Positions of the Parties

a. AT&T

AT&T argues that the Department's Vote and Order requires an avoided cost study that complies with the methodology established in the Local Competition Order[7] pending an FCC decision on remand or a higher court ruling overturning the Eighth Circuit's findings (AT&T Motion at 2). Because Verizon's avoided cost study does not comply with the Local Competition Order, AT&T contends that the study should be dismissed as a violation of the Department's Vote and Order (id. at 3).

Furthermore, AT&T argues that the Department should not allow Part B to go forward on the basis of Verizon's proposed methodology (id.). AT&T maintains that the Eighth Circuit's holding on avoided costs leaves many unanswered questions and, rather than wait for the FCC, AT&T contends that Verizon's study resolves critical issues in Verizon's favor (id. at 4-5). However, AT&T argues, there is no reason to believe that the FCC will agree with Verizon's one-sided approach when it promulgates rules to implement the Eighth Circuit's decision (id. at 5). Accordingly, AT&T urges the Department to dismiss Verizon's cost study and require Verizon to file a study that complies with the Vote and Order, or in the alternative, to dismiss the cost study and hold Part B in abeyance until the FCC promulgates new rules (id. at 7).

b. Verizon

Verizon claims that AT&T's Motion is based upon the same flawed premise as Network Plus' Motion, namely, that the Department's Vote and Order required Verizon to file a resale cost study in accordance with FCC rules despite the fact that those rules have been declared unlawful by the Eighth Circuit (Verizon Reply at 1). Verizon argues that such a reading is unwarranted, and that the Department should not consider using the FCC's invalidated rules but rather, should proceed with its examination of the study filed by Verizon which applies the resale pricing standard in § 252(d)(3) of the Act (id.).

III. ANALYSIS AND FINDINGS

When the Supreme Court did not grant certiorari on the FCC's resale discount rules, a degree of regulatory uncertainty was removed. Specifically, there is no longer any doubt that the Eighth Circuit's decision to vacate and remand the FCC's rule 609 is final.[(8)] Even though the Department's Vote and Order, which was issued prior to the Supreme Court's decision on the petitions for writ of certiorari, explicitly provided only two situations wherein the Department would stray from the status quo approach announced in that Order, the Department did not intend to imply that it would proceed with the Part B investigation using the vacated FCC rules regardless of whether the Supreme Court denied certiorari on the resale pricing rules. In fact, once regulatory uncertainty regarding the Eighth Circuit's decision on the resale pricing issue was removed, the Department was receptive to reviewing an avoided, as opposed to an avoidable, resale discount cost study. See Procedural Memo, dated February 5, 2001.[(9)]

Nevertheless, the Department agrees with Network Plus, AT&T and the Joint Commenters that, despite the Supreme Court's denial of certiorari on the resale pricing rules, uncertainty remains as to the FCC's forthcoming rules on remand. In previous orders setting out pricing rules, the FCC has been fairly detailed, and uncertainty about those details will impede our ability to efficiently review Verizon's proposed avoided cost study at this time. Indeed, the Eighth Circuit's decision provides little guidance to assist us in a detailed review of an avoided cost study, and the Department would be hard pressed to enforce the Eighth Circuit's decision until the FCC promulgates new rules for state commissions to follow.

In addition, were we to begin our review of Verizon's proposed avoided cost study at this time, we run the risk of adopting an avoided cost study that subsequently may be deemed inconsistent with the FCC's rules on remand, and, thus, would require the Department to conduct a second proceeding. Such administrative inefficiency would not benefit the Department, the parties, or the public interest. As AT&T aptly points out, the Eighth Circuit's ruling leaves many issues unanswered, and many assumptions unstated, that must be resolved in order to have a clear methodology to apply.

Moreover, even though Verizon's proposed cost study may follow the general approach contemplated by the FCC, we cannot dismiss the possibility that the FCC may alter that approach in its to-be-issued rules on remand. More importantly, we cannot predict what distinctions the FCC's new rules will make between avoided and avoidable costs, and how they will be applied specifically. Under these continuing uncertainties, we conclude that continuing our Part B investigation would be unwise. Accordingly, we are persuaded that the most prudent approach at this juncture is to hold the Part B proceedings in abeyance as suggested by Network Plus.

We are sympathetic to Verizon's concern that a delay in the Part B investigations allows resellers to continue to obtain resold services under the current higher discount until the FCC acts, but the Department never intended to implement a revised discount until December 2001, at the earliest. Our Order in D.T.E. 98-15 (Phases II/III) was clear that the resale discount would be in place for five years, or until December 2001. Furthermore, our continuing goal to complete both Parts A and B of this proceeding by year's end still stands, but that goal does not supercede administrative efficiency or the need to adapt schedules in response to judicial decisions.

Lastly, our decision to hold the Part B proceedings in abeyance in no way affects review of UNE rates in Part A of this docket. Circumstances surrounding Part A of this docket are distinguishable. To be precise, the Supreme Court has granted the petitions for writ of certiorari on the UNE pricing rules, and completion of the federal review and potential remand will surely extend beyond a matter of months. Thus, such a lengthy delay in our Part A proceedings is unwarranted at this time.

Next, given our findings above, we grant AT&T's request to dismiss Verizon's avoided cost study. Additionally, following the FCC's issuance of new rules on the avoided cost discount methodology to be employed by state commissions, we direct Verizon to use calendar-year 2000 data when Verizon re-submits its cost study, as requested by ServiSense and Essential. Despite our dismissal of Verizon's February 12th study here, we do not render any opinion of the merits of the methodology proposed therein, nor do we prohibit Verizon from proposing the use of that methodology in its subsequent filing to the extent that the FCC's new rules permit such an approach.

IV. ORDER

Accordingly, after review and consideration, it is

ORDERED: That the Motion by Network Plus, Inc. to hold Part B of the proceeding in abeyance is hereby granted; and it is

FURTHER ORDERED: That the avoided cost study and supporting documentation submitted on February 12, 2001 by Verizon New England, Inc. d/b/a Verizon Massachusetts is hereby dismissed; and it is

FURTHER ORDERED: That Verizon New England, Inc. d/b/a Verizon Massachusetts shall file an avoided cost study and supporting documentation based upon calendar-year 2000 data after the Federal Communications Commission issues new resale discount rules on remand; and it is

FURTHER ORDERED: That all parties comply with all other directives contained herein.

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

1. See Iowa Utilities Board v. FCC, Docket No. 96-3321 (and consolidated cases), *Decision on Motion for Partial Stay of Mandate* (8th Cir. September 22, 2000).

2. Iowa Utilities Board v. FCC, 219 F.3d 744, 755 (8th Cir. 2000)

3. See 121 S.Ct. 877-878 (U.S. January 22, 2001) (Docket Nos. 00-511, 00-555, 00-587, 00-590, 00-602).

4. On February 15, 2001, Verizon New England, Inc. d/b/a Verizon Massachusetts filed an Appeal of the Part A Procedural Schedule. In accordance with the Department's February 22, 2001 Interlocutory Order on Verizon's Appeal, a revised Part A procedural schedule was issued.

5. CTC Communications Corporation joins in this Motion. See Network Plus Motion at fn.1.

6. AT&T's comments in support of Network Plus' Motion are included in AT&T's Motion to Dismiss Verizon's Cost Study, and both are discussed, below, at Section II.C.

7. In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, FCC 96-325 (August 1, 1996) ("Local Competition Order").

8. Rule 609 defines "avoided retails costs" as "those costs that can be reasonably avoided when an incumbent LEC provides a telecommunications service for resale at wholesale rates to a requesting carrier." See 47 C.F.R. § 51.609.

9. In the February 5, 2001 procedural memorandum, any party submitting a resale discount cost study was asked to explain: (1) whether its study was an avoided cost study or an avoidable cost study; and (2) whether the study is consistent with federal law, and how.