

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Petition for Forbearance from) WC Docket No. 03-157
the Current Pricing Rules for)
the Unbundled Network Element Platform)
)

**COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES**

David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA Telecommunications
Committee
bergmann@occ.state.oh.us
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Phone (614) 466-8574
Fax (614) 466-9475

NASUCA
8300 Colesville Road (Suite 101)
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

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I. Introduction

Pursuant to the Public Notice in this proceeding,¹ the National Association of State Utility Consumer Advocates (“NASUCA”)² submits these comments on the Petition for Expedited Forbearance (“Petition”) filed on July 1, 2003 by the Verizon Telephone Companies (“Verizon”)³:

Verizon’s Petition should be picked up, shaken a few times, scolded, and thrown into regulatory oblivion where it belongs.⁴ Verizon asks the Federal Communications Commission (“Commission”) to forbear from enforcing the total element long run

¹ Public Notice, DA 03-2189 (rel. July 3, 2003). An Order released July 15, 2003 extended the date for comments to August 18, 2003 and for reply comments to September 2, 2003.

² NASUCA is an association of 42 consumer advocates in 40 states and the District of Columbia. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

³ On July 31, 2003, SBC Communications, BellSouth Inc. and Qwest filed a joint Petition for Expedited Forbearance. This Petition requested sought the same relief requested by the Verizon Petition, and added no new information to support the relief. The joint Petition merely attached the Verizon Petition as support.

⁴ At its Summer 2003 meeting, the National Association of Regulatory Commissioners (“NARUC”) adopted a resolution urging the Commission to reject Verizon’s Petition. See <http://www.naruc.org/Resolutions/2003/summer/telecom/verizon.shtml>. NASUCA supports this resolution.

incremental cost (“TELRIC”) standard⁵ -- specifically as applied to the unbundled network element platform (“UNE-P”) -- less than a year after the Supreme Court upheld the Commission’s use of the standard.⁶ And Verizon asks the Commission to forbear from allowing competitive local exchange carriers (“CLECs”) to collect access charges for their UNE-P lines, despite the fact that long distance access service is one of the services that is provided over those UNE-P lines.

Verizon’s Petition is based on the intertwined propositions that TELRIC pricing is below the incumbent’s cost and that TELRIC pricing has contributed materially to a supposed massive decline in investment in the telecommunications industry. Verizon argues the first proposition despite the Supreme Court’s upholding of the TELRIC standard, and despite the fact that -- in the face of the continuing decline in TELRIC prices across the country (cited in detail in Verizon’s unsigned and unattributed Attachment B), no lower court -- state or federal -- has found the use of TELRIC in pricing a specific incumbent’s UNEs to be unjust, unreasonable or unlawful. Verizon argues the second proposition -- that TELRIC caused the telecom meltdown -- without a single shred of evidence. Verizon does so in the face of ample evidence that incumbent local exchange carrier (“ILEC”) (and CLEC) investment continues under the TELRIC-priced UNE-P regime.

In fact, all of this is old news. Incumbents have been complaining about the TELRIC standard for years. This latest attack on the UNE-P is significant, however, because it comes just a few months after the Commission itself decided **not** to eliminate

⁵ 47 C.F.R. 51.505.

⁶ *Verizon Communications v. FCC*, 535 U.S. 467, 122 S. Ct. 1646 (2002).

the platform, as the incumbents had requested. The Commission did not declare a key element of the UNE-P -- local switching for the mass market -- no longer subject to unbundling, as the ILECs wished. Instead, the Commission deferred to the states the task of assessing whether there is impairment of competition in the absence of UNEs -- including the “piece parts” of the UNE-P, consistent with *USTA*.⁷ Virtually all of Verizon’s arguments in the Petition were presented to the Commission -- in one form or another, by one LEC or another -- and rejected in the Triennial Review Order.

Verizon’s -- and the other incumbents’⁸ -- desire to eliminate the UNE-P is understandable. UNE-P-based competition represents much of the residential local service competition seen around the country.⁹ If TELRIC were priced below cost, and if the UNE-P were draining the revenue lifeblood from the incumbents¹⁰ -- as Verizon argues it is -- one would expect the incumbents to be suffering financially. Yet the incumbents’ reports to industry analysts show good health, far better than the CLECs

⁷ *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002); see Public Release, CC Docket No. 01-338 (Feb. 20, 2003). The state proceedings on mass market switching are required to be completed within nine months of the effective date of the Triennial Review Order. *Id.*

⁸ See, e.g., Glenn Bischoff, “Daley: SBC will seek repeat of Illinois law in some states,” *TelephonyOnline.com*, (May 21 2003), available at http://telephonyonline.com/ar/telecom_daley_sbc_seek/; see also *Voices for Choices et al. v. Illinois Bell Tel. Co. et al.*, No. 03-C-3290, Memorandum Opinion (ND Ill., June 9, 2003), slip op.

⁹ See *In the Matter of Application by SBC Communications, Inc. for Authorization to Provide In-Region InterLATA Services in the States of Illinois, Indiana, Ohio, and Wisconsin*, WC Docket No. 03-167, Application (July 17, 2003), Heritage Ohio Affidavit, Attachment E at 2 and Table 2 (CLECs serve approximately 494,000 residential lines in Ohio; approximately 463,000 residential lines, or 94.9%, are served via UNE-P).

¹⁰ Including, according to Verizon, by depriving the incumbents of access charge revenues.

who are supposedly arbitraging huge profits from the local service.¹¹

Verizon alleges that the current pricing rules for the UNE-P suffer from multiple flaws.¹² The flaws are actually three: First, Verizon alleges that TELRIC “produces UNE rates that are lower than any real world carrier can match.”¹³ Second, Verizon asserts that “the problems in TELRIC are exacerbated by applying it to” the UNE-P.¹⁴ And third, Verizon states that these problems are “compounded” by allowing “UNE-P carriers” to collect per-minute access charges from long distance carriers.¹⁵

Verizon also asserts that the current pricing rules¹⁶ have three effects: First, the current pricing rules are responsible for the approximate \$2 trillion decline in the market capitalization of the telecommunications industry.¹⁷ Second, the current pricing rules “have contributed materially to the massive decline in investment” in the industry.¹⁸ And

¹¹ See *In the Matter of Triennial Review of Unbundled Network Elements*, WC Docket 01-338, AT&T *ex parte* filings (October 2, 2002 and October 29, 2002). Recent reports to the Public Utilities Commission of Ohio show that SBC Ohio is earning, in these days of record low interest rates, a respectable 9.43% return on equity on its Ohio operations. Ohio’s other large ILECs (Cincinnati Bell, Sprint and Verizon, which face little if any residential competition) are enjoying even greater profits. Source: Annual Reports to the Public Utilities Commission of Ohio.

¹² Summary, at i. It is often difficult to track the arguments in Verizon’s text according to the points made in the Summary. These comments accept Verizon’s Summary as the intended statement of its arguments.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at ii.

¹⁶ It should be clear that although Verizon blames “the current pricing rules (along with the overly broad unbundling requirements)” (*id.*) for the problems of the telecommunications industry, Verizon never makes an attempt to show what specific impact the TELRIC pricing of the UNE-P and access charges for UNE-P carriers contribute to those problems. Further, Verizon makes no projection of the impact that the relief it seeks -- eliminating the UNE-P -- will have on the industry.

¹⁷ *Id.* at ii.

¹⁸ *Id.*

third, the rules have prevented the development of a rational wholesale market allowing entrants to take advantage of the “below-cost TELRIC rates.”¹⁹

Verizon fails to meet its burden as to any of these six propositions -- three flaws and three effects -- upon which its petition depends.²⁰ The Petition must be denied.

II. Verizon’s argument that TELRIC “produces UNE rates that are lower than any real world carrier can match” is not based on law or fact.

The premise of Verizon’s argument -- that it is necessary to look to “real world carriers” to match TELRIC rates -- is utterly without basis. The whole premise of unbundling is that the incumbents would not willingly share the pieces of their networks. And where the incumbent has been supported by decades of monopoly status, any “market-based” rate -- which would be set by the incumbent in all the regalia of its market power -- would not be such as to encourage competitive entry. On the other hand, to compare the incumbents’ prices for UNEs to the prices that nascent competitors would have to charge for the use of their new networks is also absurd.

In *Verizon*, the Supreme Court stated,

We cannot say whether the passage of time will show competition prompted by TELRIC to be an illusion, but TELRIC appears to be a reasonable policy for now, and that is all that counts. See *Chevron*, 467 U.S. at 866. The incumbents have failed to show that TELRIC is unreasonable on its own terms, largely because they fall into the trap of mischaracterizing the FCC's departures from the assumption of a perfectly competitive market ... as inconsistencies rather than pragmatic features of the TELRIC plan. Nor have they shown it was unreasonable for the FCC

¹⁹ *Id.* at iii.

²⁰ “Telecom Investment Bonanza” by Bruce Fein, former General Counsel to the Commission, (<http://www.techcentralstation.com/1051/printer.jsp?CID=1051-071103D>) is a succinct page and a half rebuttal of the central postulates of Verizon’s argument. The importance of the UNE-P to residential competition requires this more extensive response to Verizon’s Petition.

to pick TELRIC over alternative methods, or presented evidence to rebut the entrants' figures as to the level of competitive investment in local-exchange markets. In short, the incumbents have failed to carry their burden of showing unreasonableness to defeat the deference due the Commission. We therefore reverse the Eighth Circuit's judgment insofar as it invalidated TELRIC as a method for setting rates under the Act.

533 U.S. at 523. Verizon has the same heavy burden in attempting to persuade the Commission to abandon the pricing standard, even if only for the UNE-P. Indeed, Verizon's basic arguments here go to TELRIC generally, not to specific flaws that require abandoning TELRIC just for the UNE-P.²¹ *Verizon* shows that these are not new arguments.

Based on the Supreme Court's holding, it certainly appears that Verizon's argument about the costs of "real world carriers" has been deemed to be irrelevant *as a matter of law*. To make matters worse for Verizon, the argument also has no basis in fact.

In contrast to Verizon's claims and those of other Bell Operating Companies ("BOCs") that TELRIC UNE rates are below cost, or to Verizon's current complaint that TELRIC "fails to compensate incumbents fairly for the use of their networks,"²² is the recent study by Beard, Ford and Klein, "The Financial Implications of the UNE-Platform: A Review of the Evidence."²³ The study, based on "realistic revenue and current cost figures usable for financial analysis ... suggests that the wholesale business, taken alone,

²¹ See Petition at 2-3. See also Petition at 3-5 for a few UNE-P-specific complaints.

²² Summary at i.

²³ Hereafter referred to as "Beard, Ford and Klein," forthcoming in *CommLaw Conspectus*, *Journal of Communications Law and Policy* (Fall/Winter 2003); available at <http://www.telepolicy.com/finapp.pdf>.

is profitable for the BOCs.”²⁴ Specifically, Beard, Ford and Klein calculate that the BOCs receive implied pre-tax returns of 16%-27% on the UNE-P.²⁵

Further, Yale M. Braunstein of the University of California at Berkeley reviewed SBC’s UNE-P costs and revenues.²⁶ Professor Braunstein found that current California UNE-P rates “still leave room for a profit in this wholesale business of between 9% and 42%.”²⁷ As Professor Braunstein stated, “[I]t is clear that one can conclude that SBC is earning a reasonable profit on its wholesale service.”²⁸

Indeed, Beard, Ford and Klein also show the inherent flaw in the accounting-cost-based financial analyses relied upon by Verizon (see Petition at 3) and its RBOC cronies: “In general, accounting costs are not equal to economic costs, and profitability in the *economic* sense is the appropriate yardstick for, and basis of, firm decisions.”²⁹ The use of economic rather than accounting or embedded costs in the TELRIC analysis was specifically upheld by the Supreme Court.³⁰

Thus, as the NARUC resolution states, “[t]he merits of the Verizon petition hinge upon the reasonableness of the pricing of UNE-P....” The Commission may have

²⁴ Beard, Ford and Klein at 1; see also *id.* at 7-8. See also CompTel, “Wholesale Lies: The Truth About RBOC UNE-P Costs” (May 2003), available at http://www.comptel.org/filings/belowcoststudy_may21_2003.pdf.

²⁵ Beard, Ford and Klein at 20.

²⁶ Yale M. Braunstein, “The Role of UNE-P in Vertically Integrated Telephone Networks: Ensuring Healthy and Competitive Local, Long-Distance and DSL Markets,” (May 2003), available at http://www.sims.berkeley.edu/%7Ebigyale/UNE/UCB_Study_UNE_May_2003.pdf.

²⁷ *Id.* at 7.

²⁸ *Id.* at 7, n.7.

²⁹ Beard, Ford and Klein at 6 (emphasis in original).

³⁰ *Verizon*, 533 U.S. at 501.

determined to re-examine the TELRIC methodology,³¹ yet that is no reason to forbear from applying the methodology to UNE-P or to other elements before that re-examination is completed.

III. Verizon does not show that the problems in TELRIC are exacerbated by applying it to the UNE-P.

Verizon argues that “the artificially low UNE-P rates resulting from TELRIC allow carriers using UNE-P to resell services over existing facilities, not at the resale pricing standard prescribed by Congress, but at discounts of 50% or more without having any facilities of their own or adding anything unique of value.”³² Verizon mistakes both the law and the facts. First, the law directs that when a service is resold, the competitor can provide only that service; for that resale the law provides an avoided-cost resale discount.³³

Second, the law also allows competitors to lease network elements, and to combine those elements; the Supreme Court upheld the Commission’s decision to require the incumbents *not* to “break apart” currently combined elements.³⁴ The law gives no indication that Congress intended to require that competitors have facilities of their own if they leased UNEs.³⁵ The leasing of UNEs and combinations of UNEs -- including the UNE-P -- requires the competitor to attempt to sell whatever combination of services it

³¹ *Id.*

³² Petition at 3-4.

³³ 47 U.S.C. § 252(d)(3).

³⁴ *AT&T Corp. v Iowa Utils. Bd.*, 525 U.S. 366,395, 179 U.S. 721 (1999) (“*Iowa Utilities*”); *Verizon*, 535 U.S. 534-535.

³⁵ *Iowa Utilities*, 525 U.S. 392-393.

can over those leased facilities. The size of the TELRIC “discount” is, once again, a matter that has been upheld by the Supreme Court.

Verizon also complains that under UNE-P, “the incumbent must still bear the full costs of operating and maintaining the network.”³⁶ Yet the TELRIC standard explicitly includes not only direct costs but an allocation of joint and common costs,³⁷ which includes the maintenance of the network.

IV. Verizon’s arguments on access charges are unconvincing.

Verizon asserts that “[t]he fiction embodied in the current rules that the UNE-P carrier provides exchange service on the line only further compounds the problem. In reality, it is the ILEC as the underlying facilities provider that is actually providing the exchange access service and bearing the costs of doing so.”³⁸ Yet Verizon presents no information to show that there are any costs of “exchange access service” that are not already included in the costs of the elements -- particularly switching -- that make up the UNE-P.³⁹

³⁶ Summary at i.

³⁷ 47 C.F.R. § 51.505(c).

³⁸ Petition at 4.

³⁹ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996), ¶ 363.

V. The current pricing rules are not responsible for the decline in the market capitalization of the telecommunications industry.

Verizon's arguments on market capitalization are built on, somewhat mixing metaphors, sleight of hand with a house of cards. Based on the opinion of a single analyst in 2000 that "the FCC's TELRIC fiat ... devalue[d] three quarters of the Nation's telecom infrastructure by two-thirds,"⁴⁰ Verizon attempts to draw a causal connection between that speculation and the telecom meltdown of 2002: "Indeed, the market capitalization of the telecommunications and equipment manufacturing sectors has declined by some \$2 trillion since 2000 alone."⁴¹ Yet Verizon's own sources show that the decline in market capitalization is as much a result of overall macroeconomic conditions as of something attributable to causes within the telecom industry, much less attributable to TELRIC pricing, and even less to TELRIC pricing of the UNE-P.

The Starr article cited by Verizon⁴² makes clear the extent and many causes of the telecom implosion, to the extent they came from within the industry, and deserves quotation at length:

The dimensions of the collapse in the telecommunications industry during the past two years have been staggering. Half a million people have lost their jobs. In that time, the Dow Jones communication technology index has dropped 86 percent; the wireless communications index, 89 percent. These are declines in value worthy of comparison to the great crash of

⁴⁰ Petition at 5, citing *Hearings before the Subcomm. On Telecommunications Trade & Consumer Protection of the House Commerce Commission.*, 106th Cong. 2 (May 25, 2000) (written statement of Scott Cleland).

⁴¹ *Id.*

⁴² P. Starr, "The Great Telecom Implosion," *The American Prospect* 2024 (September 9, 2002) ("Starr, *Implosion*"), cited in Verizon Petition at 5, n.9, accessible at <http://www.prospect.org/print-friendly/print/V13/16/starr-p.html>. The *Business Week* article also cited by Verizon (Petition at 5, n.9) makes no causal connection between TELRIC and the industry collapse; the article focuses instead on the influence of certain telecom analysts on the boom and bust. See http://www.businessweek.com/magazine/content/02_31/b3794001.htm.

1929. Out of the \$7 trillion decline in the stock market since its peak, about \$2 trillion have disappeared in the capitalization of telecom companies. Twenty-three telecom companies have gone bankrupt in a wave capped off by the July 21 collapse of WorldCom, the single largest bankruptcy in American history.

And the storm is not over. Many other firms, including some of the biggest, are teetering under a heavy load of debt. Altogether, the industry owes a trillion dollars, "much of which will never be repaid and will have to be written off by investors," Federal Communications Commission Chairman Michael Powell told the Senate Commerce Committee on July 30.

To be sure, some of the vanished stock-market wealth consists of -- quaint expression -- "paper" profits. But a trillion here, a trillion there and soon you're talking about real money. Long-term growth depends on capital flowing to productive purposes; when it is dissipated in such vast quantities, the costs affect the economy as a whole -- not just those unlucky enough to see their investments and jobs vanish.

...

[T]he telecom crisis overlaps with the recent spate of corporate scandals, and most of the attention has fallen on criminal misconduct. The stories about accounting fraud and insider deals at WorldCom, Global Crossing and Adelphia may suggest that if only their executives were more ethical, things would be fine.

But the scandals are just one expression of the general crisis affecting telecom companies no matter how ethically managed. That crisis did not happen all by itself. Reforms adopted during the 1990s were supposed to create a deregulated telecom industry with large numbers of firms generating entrepreneurial innovations and economic growth. A new consensus held that an industry once thought to be a natural monopoly would actually flourish under competition. The policy has had some successes. But now that the industry is imploding, it is time to re-examine the original vision and ask whether there is a better guide to the future.

...

Although the Internet mania helped to set it off, the telecom boom differed in several ways. First, compared with fizzy dot-coms, telecom companies seemed to be developing tangible assets that had to be valuable in the information age: fiber-optic networks, routers and other telecom equipment, satellites, wireless systems, and upgraded telephone and cable TV networks capable of providing high-speed Internet connections.

Second, the telecom industry was not only well-established but had long been the very embodiment of stability and guaranteed returns. Even after the breakup of the Bell system in 1984, AT&T and the regional Bell operating companies (the "Baby Bells") had remained bulwarks of the economy.

Third -- and this was the key distinction between the dot-com and telecom booms -- governments all over the world, led by the United States, were opening up their telecom markets to competition. Public policy was inviting new entrants to jump in. Competition meant that returns were no longer guaranteed, but the simultaneous rise of the Internet and advent of deregulation created an unprecedented opportunity to make money -- and, as many discovered, to lose it.

After Congress passed the Telecommunications Act of 1996, capital flooded into telecom, as existing firms and new ones began building networks over land, undersea and in the air. "Business plans all looked alike," one industry insider recalls. "Massively parallel systems were being built up."

By 2000, however, companies began to realize that there simply wasn't enough business to go around, and they raced "to gain market share" in a burst of "hypercompetition" and "vicious price wars" that drove down revenues, as Powell explained it in his July 30 testimony.

Around this time, some executives started to engage in the practices that have since led them to contemplate long prison terms instead of the "long boom" predicted for the New Economy. To inflate their profits, some counted operating expenses as capital investment. Or two companies with excess capacity would sell each other the right to use a share of each other's networks. In such a swap, for example, each firm might book \$150 million in revenue from the transaction when, in fact, there was no real revenue at all. Not only did such a swap allow each firm to deceive investors about its business, it also created the impression that the industry as a whole was \$300 million larger than it actually was.

But such gimmicks couldn't sustain the illusion of growth and profitability indefinitely. While telecom firms were expanding, they had taken on enormous amounts of debt; one firm after another began having difficulty repaying these obligations and went into bankruptcy. Today, throughout the industry, demands have failed to match expectations, businesses are losing money, stocks have plummeted and a radical consolidation is in the offing.

Starr, *Implosion*, at 1-3. Notably, the Starr article does not mention UNE-P pricing in its extensive discussion of the cause of the implosion. Verizon's attempts to blame the

telecom implosion on TELRIC -- in particular on the TELRIC pricing of the UNE-P -- are the worst kind of *post hoc, ergo propter hoc* fallacy.

VI. The current pricing rules have not contributed materially to a decline in investment in the industry.

To begin, it is difficult to see “a decline in investment” -- as Verizon obviously does -- as a separate complaint against applying TELRIC to the UNE-P. This is because, if market capitalization in the industry declines, as just discussed, it is obviously more difficult for industry participants to obtain financing for investments. But Verizon apparently sees a specific pernicious disincentive to investment in the current pricing rules.

Verizon describes the supposed disincentives to investment resulting from TELRIC pricing of the UNE-P.⁴³ According to Verizon, no carrier would ever build facilities under a UNE-P regime. Yet Verizon’s support for that argument both goes too far and not far enough. First, Verizon makes clear that the CLEC decline in investment is part of, and not severable from, the previously-discussed telecom implosion: the overall decline in telecom investment and the decline in BOC investments accompanied the decline for the CLECs.⁴⁴ Yet the decline in CLEC investment has not nearly brought the sector investment down anywhere near to zero, which Verizon implies would be the case

⁴³ Petition at 6-7

⁴⁴ *Id.* at 7-8.

in a UNE-P world.⁴⁵

As an example of the questionable nature of its arguments, Verizon asserts that “evidence filed with the Commission in its *Triennial Review* proceeding demonstrated that a number of carriers had begun to transfer lines off their own switches and onto UNE-P arrangements.”⁴⁶ The specific “evidence” in question is revealed again in Attachment B to the Petition: “[B]etween June and September of [2002], nine carriers in four Verizon states (Pennsylvania, New York, Virginia and Maryland) have migrated several hundred business lines from their own facilities to UNE-P. SBC has also begun to receive requests for conversions of UNE-loop lines to the UNE-P.” Attachment B at 30, n. 79. Clearly, in the absence of other compelling business reasons, such “transfers” make little economic sense, because they result in stranded capacity on the CLECs’ own switches. Thus it is safe to assume that such compelling business reasons were the cause of the transfers, rather than the supposedly under-cost prices of the UNE-P.

More importantly, the numbers are hardly indicative of a trend: Even if the “several hundred” business lines were as much as 900, then that is, on average, 100 lines for each of the nine CLECs. If those lines were evenly distributed in the four states, that is all of twenty-five lines per state per CLEC. If the “several hundred” were in fact less than four hundred, that would be around ten lines per state per CLEC.

⁴⁵ Verizon’s quotation from a Z-Tel Annual Report (the “UNE-P-based business model allows us to avoid significant capital investments in network facilities,” *id.* at 8, citing Z-Tel’s 2001 Annual Report at ii) omits the last half of the sentence in question: The “UNE-P-based business model allows us to avoid significant capital investments in network facilities and therefore the unmanageable level of long term debt that has proven lethal to so many telecom concerns in recent years.” *Id.*

⁴⁶ Petition at 9, citing the “UNE Rebuttal Report 2002” at 31, n. 161.

The issue of “UNE-L to UNE-P migration” is significant for the ILECs. One would expect that if this “trend” had continued, Verizon would be trumpeting it from the rooftops. The fact that Verizon merely repeats this limited information dating from almost a year ago is evidence that there is no such trend.

The decline in investment in the telecom industry is significant. However, Verizon’s attempt to pin the blame on the UNE-P is a self-serving move to take advantage of a national tragedy.

Yet recent indications are that the implosion may soon come to an end. A Standard & Poor’s report announced on August 7, 2003 states that “spending on communications equipment by U.S. telecommunications providers ... is approaching more sustainable long-term historical levels following the destabilizing impact of a massive buildout in 1999 and 2000 and sharp cutbacks of 15% in 2001 and 30% in 2002.”⁴⁷ The report also notes that the 1999 and 2000 numbers -- from which Verizon measures the decline in investment -- were anomalous: “Supply and demand in the equipment industry are approaching a better balance, as spending rates by service providers approach the historical average of approximately 15% of their revenue, compared to 30% at the peak in 2000 and steep dropoffs in the following years.”⁴⁸

Verizon’s arguments are also contradicted by two recent studies performed by the Phoenix Center for Advanced Legal and Economic Public Policy Studies. The first study, “The Truth About Telecommunications Investment After the Telecom Act” (June 24,

⁴⁷ “Communications Equipment Makers to Reverse Two Years of Sharp Declines in 2003, Says S&P Equity Analyst in New Industry Study” (August 7, 2003), accessible at <http://www2.standardandpoors.com/NASApp/cs/ContentServer?pagename=sp/Page/PressReleasesPg&r=1&l=EN&b=5&s=21>.

⁴⁸ *Id.*

2003)⁴⁹ notes that “[d]espite recent declines in investment caused in part by the near-total collapse of facilities-based CLECs, telecommunications investment remains well above historical levels.” More to the point, the second study, “Competition and Bell Company Investment in Telecommunications Plant: The Effects of UNE-P” (July 9, 2003)⁵⁰ shows that although “BOC net investment fell by about 7% in 2002, investment dollars were more heavily allocated to states with greater levels of UNE-P competition, and this additional investment offsets the total decline in investment by about 50%.”

At base, Verizon’s argument assumes that, in the absence of the UNE-P, the competitive carriers would invest at levels sufficient to jumpstart the economy. It also assumes that, when they do not have to offer the UNE-P, the ILECs would also invest. But if one assumes that the CLECs would not be able or willing to invest, any ILEC investment would then be in support of the ILEC’s monopoly or dominant position.

Clearly, the telecom implosion was not caused, primarily or at all, by applying TELRIC pricing to the UNE-P. Thus Verizon’s Petition again collides head-on with the Supreme Court’s finding in *Verizon*: It “suffices to say that a regulatory scheme [UNEs priced at TELRIC] that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities.”⁵¹

⁴⁹ Available at <http://www.phoenix-center.org/PolicyBulletin/PolicyBulletin4Final.pdf>.

⁵⁰ Available at <http://www.phoenix-center.org/PolicyBulletin/PolicyBulletin5.pdf>.

⁵¹ *Verizon*, 535 U.S. 517; see also *id.*, n.33.

VII. The pricing rules have not prevented the development of a rational wholesale market.

To begin, this Verizon argument depends on acceptance of two propositions already shown to be false: the below-cost and decreased-investment arguments. But the single page dedicated to the “rational wholesale market” argument in Verizon’s Petition contains at least two additional points that deserve mention.

The first is Verizon’s statement that, in the current market, “incumbents have strong reasons to enter into rational, voluntary wholesale arrangements at compensatory rates.”⁵² Here again, the Supreme Court’s findings in *Verizon* destroy any basis for the argument. The Court found the incumbents’ notions of “compensatory” rates to be contrary to the competitive purposes of the Act:

[A] policy promoting lower lease prices for expensive facilities unlikely to be duplicated reduces barriers to entry (particularly for smaller competitors) and puts competitors that can afford these wholesale prices (*but not the higher prices the incumbents would like to charge*) in a position to build their own versions of less expensive facilities that are sensibly duplicable.

Verizon, 535 U.S. 503 (emphasis added).

Further, Verizon’s comparison to the accepted method for pricing AT&T’s facilities when the long distance market was opened to competition (Petition at 11) ignores the difference between the relative simplicity of the long distance market and its facilities and the complexity of the local market and *its* facilities. It also ignores the fact that the current unbundling and pricing is being undertaken under the new statutory regime ushered in with the 1996 Act, under a pricing mechanism upheld by the Supreme Court.

⁵² Petition at 11.

VIII. Verizon has not met its burden on forbearance.

Verizon's view of forbearance is inconsistent with the decision of the Court of Appeals for the D.C. Circuit in *CTIA*.⁵³ In *CTIA*, cellular carriers sought forbearance from the Commission's number portability regulations. The D.C. Circuit upheld the Commission's decision **not** to forbear, stating:

The statutory test for forbearance has three prongs that must *all* be satisfied before the Commission is obligated to forbear from enforcing a regulation or statutory provision: (1) "enforcement is not necessary to ensure that the charges, practices, classifications, or regulations ... are just and reasonable and are not unjustly or unreasonably discriminatory"; (2) "enforcement ... is not necessary for the protection of consumers"; and (3) "forbearance ... is consistent with the public interest." See 47 U.S.C. 160(a). The three prongs of § 10(a) are conjunctive. *The Commission could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied.*

330 F.3d 509 (emphasis added).

In *CTIA*, the Circuit Court also found that

it is reasonable to construe "necessary" as referring to the existence of a strong connection between what the agency has done by regulation and what the agency permissibly sought to achieve with the disputed regulation.

330 F.3d 512. There is a clear and strong connection between TELRIC pricing and the standard set forth in 47 U.S.C. 251(c). That connection resulted in the Supreme Court's decision in *Verizon*. Thus enforcement of the TELRIC standard for the UNE-P is necessary for the protection of the consumers who have taken the competitive

⁵³ *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502 (D.C. Cir. 2003) ("*CTIA*").

opportunities offered by UNE-P carriers. Verizon's argument to the contrary⁵⁴ is entirely dependent on the two incorrect premises of below-cost pricing and harm to investment.

Thus Verizon's argument fails on one of the three prongs and thus fails in the whole. Yet it is also clear that Verizon fails on the other two prongs, principally because its arguments on these prongs are also based on the same incorrect premises. For example, Verizon complains that, rather than protect anyone against discrimination, TELRIC "discriminates against *incumbents* by providing CLECs access to network facilities at rates below the costs that the incumbent itself must bear when it uses those facilities."⁵⁵ And the only thing Verizon adds to the debate on the public interest is the claim that the 1996 Act's UNE-sharing provisions make the nation vulnerable to terrorism because sharing does not require construction of redundant networks.⁵⁶

IX. Conclusion

Verizon would have this Commission forbear from requiring incumbents to provide the combination of network elements that is the source of most residential competition in this country, based on the forward-looking cost standard upheld by the United States Supreme Court. Verizon has presented no shred of credible evidence to meet the statutory requirements for forbearance. Verizon's Petition should be denied on an expedited basis.⁵⁷

⁵⁴ Petition at 20-23.

⁵⁵ *Id.* at 20 (emphasis in original).

⁵⁶ *Id.* at 23-24.

⁵⁷ NASUCA expects to make the same arguments when the Commission sets the SBC/BellSouth/Qwest Petition for public comment, and expects the Commission to reject that Petition for the same reasons.

Respectfully submitted,

David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA Telecommunications
Committee

bergmann@occ.state.oh.us

Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Phone (614) 466-8574
Fax (614) 466-9475

NASUCA
8300 Colesville Road (Suite 101)
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

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