

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

In the Matter of)
)
Review of the Commission's Rules)
Regarding the Pricing of Unbundled) WC 03-173
Network Elements and the Resale of)
Service by Incumbent Local Exchange)
Carriers)

**COMMENTS OF THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

On September 15, 2003, the Federal Communications Commission (Commission) released a *Notice of Proposed Rulemaking (NPRM)* by which the Commission begins its first comprehensive review of the rules applicable to the pricing of unbundled network elements (UNEs) pursuant to 47 U.S.C. § 251(d)(1). *NPRM* at para. 1. The Commission initiated the proceeding to consider whether its pricing methodology is working as intended and, in particular, whether the methodology is conducive to efficient facilities investment. *Id.* at para. 2.

The Commission proposes to simplify its Total Element Long Run Incremental Cost (TELRIC) pricing methodology, while simultaneously improving the accuracy of its pricing signals. The Commission seeks comment on an approach that bases UNE pricings on a cost inquiry that is more firmly rooted in the real-world attributes of the existing network, rather than the speculative aspects of a purely hypothetical network. *Id.* at para. 3. In addition, the

Commission requests comment on resale pricing rules pursuant to 47 U.S.C. §§ 251(c)(4), 252(d)(3). *Id.* at para. 8. The stated objective is to modify or clarify the Commission’s rules in order to help state commissions more easily develop UNE prices and resale discounts that meet the statutory standards established by Congress and to provide more certainty and consistency in the results of these state proceedings. *Id.* at para. 9. The Commission further stated that it is particularly interested in the perspective of state commissions on the successes and failures of the current rules, and the possible modifications that would most help state commissions in fulfilling their important statutory role in setting UNE prices and resale discounts. *Id.*

In response to the Commission’s request, the Pennsylvania Public Utility Commission (PA PUC), through counsel, hereby submits comments.

Ratemaking Under the 1996 Act

The Commission has authority to establish a pricing methodology that State commissions must use when establishing rates. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). The Commission characterizes its methodology to be “guidelines,” see, *e.g.*, *NPRM* at para. 16, but these “guidelines” are mandatory. *Iowa Utils. Bd.* Due to the mandatory nature of the Commission’s methodology, and the fact that UNE rates are established by State commissions, the PA PUC urges the Commission to proceed cautiously in terms of the scope of its guidelines so as not to unduly interfere with the proper exercise of State commission discretion to determine “the just and reasonable rate.” 47 U.S.C. § 252(d)(1).

The Commission has reviewed its fundamental decision to use a methodology that sets prices on the basis of the forward-looking cost of providing UNEs. *NPRM* at paras. 29-37. It considered the merits of a forward-looking cost methodology as well as alternative pricing theories. Alternatives considered were historical cost, Efficient Component Pricing Rule, and Ramsey Pricing. The Commission concluded that its decision to use a forward-looking methodology is sound and declined to open an inquiry into alternative pricing theories. Instead, the NPRM solicits comments regarding, clarifications or modifications of the current rules that are based on forward-looking economic cost. *Id.* at para. 37.

The PA PUC submits that the Commission can best satisfy statutory requirements by continuing to adopt a forward-looking economic cost methodology, but should refrain from imposing the level of detail that the *NPRM* proposes to address. It is not proper or prudent for the Commission to develop mandates on every nook and cranny¹ of the establishment of rates. We do not question the relevancy of the questions posed, but rather take issue with the anticipated detailed scope of the Commission's mandate. The Commission's pricing methodology should not be overly complex or rigid. Similarly, the Commission should not reduce the establishment of rates by State commissions to a "fill in the blank" exercise that eliminates the exercise of informed judgment.

¹ For example, the *NPRM* considers whether the Commission should define the relevant network as one that incorporates upgrades planned by the ILEC over some objective time horizon such as 3 or 5 years as documented in an ILEC's actual engineering plans, adopt specific long-run assumptions upon which to base network inputs, define a standard of efficiency, determine whether it could obviate the need for discovery by identifying objective sources of inputs to be used, establish how much of the cost of digging trenches should be shared on a forward looking basis by the ILEC with other entities, etc. *NPRM* at paras. 54, 55, 57, 61, 69, 71.

Having adopted a forward-looking economic cost methodology, the Commission should refrain from further mandates. This “less is more” approach preserves the role of State commissions to actually establish rates.

The Commission has expressed its belief that State commissions stand to benefit directly to the extent that the Commission clarifies its TELRIC rules and provides more specific guidance so that state proceedings to determine UNE pricing and the resale discount become a less complex and speculative process. *NPRM* at 194. The PA PUC supports the Commission’s effort to assist the State commissions generally, but respectfully disagrees that additional layers of mandates are helpful. The effect of mandates, rather than being helpful, is to restrict a State commission’s ability to exercise informed judgment based on the circumstances presented by the parties.

A better approach is suggested by the Statement of Commissioner Michael J. Copps. The statement introduces the idea of dialog between the Commission and State commissions on these very important matters. Periodic forums, workshops, or task force reports could be very instructive, without being intrusive. Alternatively, it may be helpful if the FCC created one or more federally approved cost models, but refrained from defining inputs to the model. In other words, the PA PUC advocates guiding principles from the Commission, and suggestions for real world application.²

² Maintaining a larger measure of State commission independence will inevitably lead to more variety. This variety could well serve the Commission’s overall goal of determining what pricing determinations send the right signals. Over time, through the collection of data under the Commission’s Form 477

UNE Pricing

Goals of UNE Pricing

The Commission states that the goals of UNE pricing are to (1) send efficient entry and investment signals to all competitors, and (2) provide incumbent local exchange carriers (ILECs) an opportunity to recover the forward-looking cost of providing UNEs. *Id.* at para. 38. The Commission seeks comment on whether there are other goals the Commission should consider, specifically the goals of “transparency” and “verifiability.” By transparency, the Commission means that the logic and algorithms of a cost study or cost model should be revealed to and understandable by the parties and regulators. By verifiability, the Commission means that data or inputs that are used to estimate costs should be derived from public sources, or they should be able to be verified or audited without undue cost and delay. Thus, the Commission asks parties to comment on the importance of transparency and verifiability. *Id.* at 41.

The PA PUC submits that transparency and verifiability are important goals of UNE pricing. A methodology that emphasizes transparency and verifiability will greatly aid State regulators in evaluating the record developed by the parties and resolving disputes as to whether any given rate is based on cost and is just and reasonable. A caveat, however, is that it would not be wise to mandate that costs be derived from public sources; it is sufficient, and preferable, that the party

requirements and the collection of rate data, it might be possible for the Commission to analyze the relationship between competitive entry, network deployment, and rates.

presenting evidence allow that evidence to be subject to discovery, verified or audited, with appropriate proprietary protections.

General Theory of Network Assumptions

The Commission notes that UNE pricing proceedings “often last for years under our current rules.” *Id.* at para. 61. Accordingly, it seeks comment on ways in which UNE pricing proceedings can be streamlined. For example, the Commission asks whether it should select the appropriate topics of discovery for particular categories of cost disputes or establish other procedural requirements to facilitate resolution of UNE pricing proceedings. *Id.* at para. 61.

The PA PUC appreciates the Commission’s position that streamlined proceedings could benefit State commissions as well as the parties to the State proceedings. The problem with the Commission’s inquiry in this regard, however, is that it is inappropriate for the Commission to dictate the formal processes adopted by State commissions. The Commission cannot and should not dictate the scope or adequacy of State commissions formal processes. Procedural matters, such as the scope of discovery, are properly left to the State commission’s discretion, consistent with applicable State laws.

Cost of Capital

The Commission notes that States have the option of establishing UNE-specific costs of capital, but have not done so. The Commission asks for comments, particularly from State commissions, on the reasons why such an approach has not been implemented. *Id.* at para. 90.

The PA PUC has never considered (nor rejected) establishing UNE-specific costs of capital. The reason is simple. The PA PUC allows parties to make their best case. To date, no party has advocated for UNE-specific costs of capital.

Rate Changes Over Time

The Commission asks for comment on whether there might be mechanisms that could be used to adjust UNE prices over time, thereby reducing the need for State commissions to conduct a full UNE pricing proceeding every few years. The Commission suggests one approach might be similar to many price cap regimes, which periodically adjust rates based on productivity and inflation factors. *Id.* at para. 139. If use of productivity factors to adjust rates periodically is feasible, the Commission asks whether it should be mandatory or whether States should retain the ability to conduct a full UNE pricing proceeding at their discretion.

Assuming there exists a feasible mechanism to adjust UNE prices over time, the PA PUC submits that it should not be mandatory. The statutory authority State commissions have to establish rates, to arbitrate disputes, and to serve the public interest necessarily includes the ability to conduct a full UNE pricing proceeding at their discretion. See 47 U.S.C. §§ 251-252.

Resale Pricing

The Commission asks for comment on the need for the Commission to adopt new resale pricing rules. It asks whether the statutory language, as interpreted by the United States Court of Appeals for the Eighth Circuit, is sufficiently clear that further guidance from the Commission is unnecessary. *Id.* at para. 143.

The PA PUC believes that the statutory language, as interpreted by the Eight Circuit, is sufficiently clear that national regulations are unnecessary. The PA PUC has a pending proceeding at Docket No. R-00038516 in which the PA PUC is developing the resale discount based upon the statutory language, as interpreted by the federal courts.

Implementation Issues

The Commission seeks comment on whether it should establish a national timetable pursuant to which States will conduct new UNE cost proceedings to reset all rules in accordance with any new rules. *Id.* at 150.

The PA PUC submits that the Commission should not adopt a timetable. Rather, the Commission should leave it to the discretion of the UNE rate payee or rate payor to petition the State commission for a new proceeding. Imposing proceedings where they might not be wanted or necessary would be a waste of scarce resources. It is possible that the benefit to be gained by a new proceeding would be outweighed its costs and the risk of litigation.

The Commission also seeks comment on whether it may be appropriate to establish a true-up mechanism for the difference between what a competitor pays for network elements under the rates established pursuant to the current TELRIC rules and what that competitor would pay for the same facilities or services under rates established pursuant to any new rules the Commission may adopt in this proceeding. *Id.* at para. 151.

The PA PUC again submits that the Commission has identified a relevant issue, but that it is one that can be more efficiently handled in State commission proceedings upon the request of a litigant. The PA PUC is also concerned that a mandate for retroactive application of UNE rates established in the context of the instant *NPRM* would potentially violate the filed-rate doctrine, which precludes the retroactive revision of approved rates. A true-up places all current pricings into jeopardy and uncertainty. Instead, any appropriate rate adjustments should be made on a prospective basis by State commissions. Therefore, the Commission should not establish a true-up mechanism.

Conclusion

The PA PUC supports the Commission's continued adoption of a forward-looking economic cost methodology. The Commission should limit the scope of its mandates to all but this most basic finding. Too many Commission mandates will destroy the flexibility State commissions need to assess and respond to circumstances in the particular markets within their jurisdiction. Too many

mandates may also constitute an unlawful or inappropriate intrusion into State commission's statutory authority to establish rates. The PA PUC recognizes the complexity of establishing appropriate UNE rates and resale discounts. It would welcome the opportunity to dialog with the Commission and obtain suggestions.

RESPECTFULLY SUBMITTED,

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