provisioned switches);[6] and (2) the competitive wholesale facilities trigger (*i.e.*, two or more unaffiliated competitive wholesale suppliers of unbundled local switching in a given market). *Id.* at ¶¶ 498, 501, 504-05. If a state commission identifies an exceptional barrier to entry in a market, it may petition the FCC for a waiver of the self-provisioning trigger for the duration of the impairment. *Id.* at ¶ 503.

40. If neither the self-provisioning trigger, nor the competitive wholesale facilities trigger, is satisfied, the FCC directed state commissions to determine whether a market nevertheless allows self-provisioning of switching, taking into consideration evidence of actual competitive deployment of local switches, including consideration of operational and economic barriers to entry. *Id.* at ¶¶ 506-07.

41. The FCC directed state commissions to also consider: (1) the absence of sufficient collocation space in ILEC central offices; (2) ILECs' inability to provide cross-connections between two CLECs on a timely basis; (3) the cost of backhauling a circuit to a CLEC's distant switch from the customer's end office, especially where the end office serves low density areas; (4) loop provisioning problems other than the "hot cut" process; (5) whether entry would be economic using the most efficient technology available; (6) the impact of universal service payments and implicit support flows on a competitor's ability to serve a particular market; and (7) potential revenues. *Triennial Review Order*, at ¶¶ 508-20. State

[6]The "self-provisioning trigger" for local circuit switching is different from the "self-provisioning trigger" for enterprise local loops. For switching, three or more unaffiliated carriers are required, while for enterprise local loops the "self-provisioning trigger" requires only two or more unaffiliated carriers.

commissions may find no impairment if these, and other factors, demonstrate that self-provisioning of switches is feasible in a given market. *Id.* at ¶ 507.

42. If state commissions cannot reach a no impairment finding, the FCC directs them to consider whether a requesting carrier's impairment can be cured by a more limited unbundling rule, namely "rolling" (temporary) access to unbundled switching for a period of 90 days or more. *Id.* at ¶¶ 521-24. Where state commissions determine that rolling access would cure all relevant sources of impairment (for example, by allowing CLECs to aggregate customers in preparation for a batch cut-over), then the state commission must implement rolling access rather than permanent access to unbundled switching. *Id.* at ¶ 524.

Timing for state commission action.

43. Within nine months of the *Triennial Review Order*'s effective date (*i.e.*, by July 2, 2004), state commissions must either: (1) approve and implement a batch-cut process that will render the hot cut process more efficient and reduce hot cut costs, based on the FCC's impairment finding; or (2) issue detailed findings supporting a conclusion that current hot cut processes do not give rise to impairment in a particular market. *Triennial Review Order*, at ¶ 527.

(2) Enterprise Local Circuit Switching.

44. The FCC concluded that there are few barriers to deploying competitive switches to serve enterprise customers using loops at DS-1 and higher capacity. *Triennial Review Order*, at ¶ 451. Accordingly, the FCC concluded that there is no impairment and this element will not be required to be unbundled. *Id.*

45. Although the FCC concluded that this element need not be unbundled, it recognizes that a more granular analysis may reveal that CLECs are impaired absent unbundled access in a specific market for DS-1 or higher capacity enterprise customers. *Id.* at ¶¶ 454-55.

Time frame to rebut FCC's nationwide no impairment finding.

46. State commissions may file a petition seeking to rebut the FCC's nationwide determination within 90 days of the *Triennial Review Order*'s effective date – *i.e.*, by December 31, 2003. *Id.* at ¶ 455.

(3) Transitioning customer base upon a finding of no impairment.

47. When unbundled local circuit switching is no longer available as a UNE, the FCC required ILECs and CLECs to jointly submit details of an orderly, non-disruptive transition plan to migrate the current, unbundled local switching customer base to an alternative service arrangement. *Id.* at ¶¶ 528-32.

Enterprise customer base.

48. Under the FCC's order, competitors must transfer their enterprise customers to an alternative arrangement within 90 days after the close of the 90-day period within which state commissions may petition the FCC to rebut the nationwide "no impairment" finding – *i.e.*, by February 27, 2004. *Triennial Review Order*, at ¶ 532.

Mass market customer base.

49. If a state commission finds that there is no impairment in the mass market, after a more granular analysis, then CLECs must commit to an

implementation plan with the appropriate ILEC within two months after the state commission's "no impairment finding." *Id.* at ¶ 532. CLECs may continue to request access to unbundled local switching for five months after the state commission's "no impairment" finding, requests thereafter are disallowed. *Id.*

C. Subloops for Multi-unit Premises and Network Interface Devices.

50. The FCC determined, on a national basis, that CLECs are impaired without access to unbundled subloops associated with accessing customer premises wiring at multi-unit premises (*e.g.*,, apartment buildings). *Id.* at ¶ 347. In connection with this finding, the FCC concluded that inside wire subloops and network interface devices ("NIDs") must also be unbundled. *Id.* at ¶ 351. The FCC also clarified that no collocation requirements could be imposed by ILECs with respect to such subloops. *Id.* at ¶ 350. The FCC made no express provision for state commission findings rebutting its determination.

D. Dedicated Transport.

51. The FCC redefined dedicated transport in its *Triennial Review Order*, to mean "transmission facilities connecting [ILEC] switches and wire centers within a LATA." *Id.* at ¶ 365.[7] Accordingly, entrance facilities and dedicated transmission facilities that connect the ILEC's network to that of a CLEC for purposes of backhauling traffic are no longer required to be offered as UNEs. *Id.* The FCC's amended definition applies to all competitors, including wireless

[7]The FCC previously defined "dedicated transport" as ILEC "transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by [ILECs] or requesting telecommunications carriers, or between switches owned by [ILECs] or requesting telecommunications carriers." *Local Competition 1st R&O*, at ¶ 440, *reaffirmed in UNE Remand Order*, at ¶¶ 322-23.

carriers. *Id.* at ¶ 368.

52. For purposes of applying its impairment analysis, the FCC divided dedicated transport elements, according to their capacity, into: (1) OCn, (2) dark fiber, (3) DS-3 and (4) DS-1, transport facilities. *Id.* at ¶¶ 376, 380-93.

53. **OCn transport.** The FCC concluded that competitors are not impaired on a national level without access to unbundled OCn transport or interface facilities and thus, such transport is not available as a UNE. *Id.* at ¶ 389.

54. **Dark fiber transport.** On a national level, the FCC found that competitors are impaired without access to unbundled dark fiber transport facilities. *Id.* at ¶ 381. Carriers requesting dark fiber transport must purchase and deploy any necessary electronics or collocation. *Id.* at ¶ 382. The FCC's determination is subject to more granular analysis by state commissions. *Id.* at ¶¶ 384.

55. **DS-3 transport.** On a national level, the FCC found that competitors are impaired without access to unbundled DS-3 transport facilities. *Id.* at ¶ 386. However, the FCC limited the number of DS-3 transport circuits that a CLEC, or its affiliates, may obtain along a specific route to twelve. *Id.* at ¶ 388. As with dark fiber transport, the FCC's determination is subject to more granular analysis by state commissions. *Id.* at ¶¶ 387.

56. **DS-1 transport.** Likewise, the FCC found that competitors are impaired without access to unbundled DS-1 transport facilities on a national level,

subject to more granular analysis by state commissions. *Id.* at ¶¶ 390, 392.

Timing for state commission action.

57. The FCC delegated authority to state commissions to analyze route-specific deployment of dark fiber, DS-3 and DS-1 facilities to determine whether CLECs are impaired without access to such facilities. *Id.* at ¶ 417. The FCC directed state commissions to complete their analysis of these dedicated transport facilities within nine months from the *Triennial Review Order*'s effective date (*i.e.*, by July 2, 2004). *Id.*

58. If a state commission makes a "no impairment" finding for a particular route, ILECs will no longer be required transport facilities along that route, subject to a transition schedule that must be established by the state commission. *Id.*

Analysis to be employed by state commissions.

59. As with local loops,, the FCC specified the "triggers" that state commissions must employ in making their impairment findings regarding dedicated transport. The FCC directed state commissions to employ two triggers to guide their route specific analysis: (1) the self-provisioning trigger, and (2) the competitive wholesale facilities trigger. *Id.* at ¶¶ 394, 399-01.

60. The self-provisioning trigger does not apply to DS-1 transport. *Id.* at ¶ 409. For dark fiber and DS-3 transport, this trigger is met where three or more competitors, affiliated with neither each other or the ILEC, have deployed such transport facilities along a specific route between a tandem office and a central

office, regardless of whether these carriers make such transport available to other carriers.[8] *Triennial Review Order*, at ¶¶ 405-08.

61. The competitive wholesale facilities trigger is met if competing carriers have available two or more alternative transport providers, unaffiliated with one another or the ILEC, immediately capable and willing to provide transport at a specific capacity along a given route between ILEC switches or wire centers. *Id.* at ¶¶ 412-16.

E. Shared Transport.

62. The FCC defines "shared transport" to include transmission facilities shared by more than one carrier between end office switches, between end office switches and tandem switches, and between tandem switches in the ILEC's network. *Triennial Review Order*, at ¶ 533.

63. In its order, the FCC concluded that, to the extent a requesting carrier is impaired without access to unbundled circuit switching, that carrier is likewise impaired without access to unbundled shared transport. *Id.* at ¶ 534. The FCC directed state commissions to include shared transport in their impairment analysis of circuit switching. *Id.*

F. Packet Switching.

64. The FCC defines "packet switching" capability as "routing or forwarding packets, frames, cells or other data units based on address or other

[8]Again, the self-provisioning trigger for this element is different from the trigger for enterprise loops, which requires the presence of only two unaffiliated competitors self-providing the loops.

routing information contained in the packets, frames, cells or other data units" along with the functions performed by DSL access multiplexers ("DSLAMs"). *Triennial Review Order*, at ¶ 535.

65. In the order, the FCC concluded that, on a national basis, CLECs are not impaired if packet switching, including routers and DSLAMs, is not unbundled. *Id.* at ¶ 537. Accordingly, packet switching is not a UNE that must be offered by ILECs.

G. Signaling Networks.

66. The FCC defines a signaling system as systems that facilitate the routing of telephone calls between switches and notes that such systems are necessary components of providing circuit-based telecommunications services. *Id.* at ¶ 542. The FCC noted that, in the United States, the telecommunications network employs out-of-band signaling, meaning that the signaling network is physically separate from a carrier's voice network, utilizing the SS7 protocol. *Id.*

67. In its order, the FCC concluded that, to the extent competitors are impaired without access to unbundled circuit switching, they are likewise impaired without access to unbundled signaling networks. *Id.* at ¶ 544.

68. Although access to signaling systems may no longer be necessary, the FCC reiterated that ILECs must provide for interconnection between their signaling networks and the signaling networks of alternative providers, upon request. *Id.* at ¶ 548.

H. Call-Related Databases.

69. The FCC identified call-related databases as "databases that are used in signaling networks for billing and collection, or for the transmission, routing or other provision of telecommunications service." *Triennial Review Order*, at ¶ 549.

70. In its order, the FCC concluded that, to the extent CLECs are impaired without access to unbundled local circuit switching, they are likewise impaired without access to unbundled call-related databases. *Id.* at ¶ 551. However, even if state commissions make a "no impairment" finding for local circuit switching, ILECs' 911 and E911 databases continue to be UNEs. *Id.* at ¶ 557.

I. Operations Support Systems ("OSS").

71. The FCC retained its prior definition of OSS as consisting of five functions that are supported by an ILEC's databases and information: pre-ordering (including access to loop qualification information), ordering, provisioning, maintenance and repair, and billing. *Id.* at ¶ 561.

72. In the *Triennial Review Order*, the FCC concluded that competitors are impaired, on a national basis, if not provided with access to ILECs' OSS. *Id.* at ¶ 562. OSS therefore remains a UNE.

IV. SCOPE OF UNBUNDLING OBLIGATIONS.

A. Combinations of Network Elements.

73. The FCC retained its prior rules: (1) prohibiting ILECs from separating network elements that ordinarily are combined, except upon request; and (2)

requiring ILECs to provide combinations of UNEs – including EELs – when requested by competitors, including performing the necessary functions to make such combinations available. *Triennial Review Order*, at ¶¶ 569, 573-75.

74. The FCC also reaffirmed its prohibition against ILECs imposing additional conditions restricting access to EELs and other UNE combinations. Thus, ILECs may not require competitors to purchase special access circuits in order to obtain EELs, for example. *Id.* at ¶¶ 577-78.

B. Elimination Of The Commingling Restriction On EELs.

75. In its order, the FCC eliminated its restriction on commingling on EELs, which prevented competitors from connecting a UNE or UNE combination with facilities or services obtained at wholesale from an ILEC (*e.g.*,, switched and special access services). *Id.* at ¶ 579. Thus, CLECs may connect EELs to special access circuits to provide both local and long distance services. *Id.*, and *Id.* at ¶ 584.

C. Service Eligibility Criteria For High-Capacity EELs.

76. The FCC adopted certain local service eligibility criteria applicable to carriers seeking to: (1) convert a special access circuit to a high-capacity EEL; (2) obtain a new, high-capacity EEL; or (3) obtain part of a high-capacity loop-transport combination at UNE pricing (*i.e.*, a commingled EEL).

77. Per the FCC's order, carriers seeking such elements must satisfy the following criteria: (1) possession of a state certificate of authority to provide local voice service; (2) possession of at least one local number assigned to each circuit

and the ability to provide 911 or E911 capability to each circuit; (3) each circuit must terminate into a collocation arrangement at an ILEC central office within the same LATA as the customer premises; (4) each circuit must be served by an interconnection trunk in the same LATA as the customer premises and, for every 24 DS-1 EELs or equivalent, the requesting carrier must maintain at least one active DS-1 interconnection trunk for the meaningful exchange of local voice traffic; and (5) each circuit must be served by a Class 5 switch or other switch capable of providing local voice traffic. *Triennial Review Order*, at ¶ 597.

D. Modification Of Existing Network.

78. The FCC also concluded that ILECs should be required to make routine network modifications to unbundled transmission facilities used by requesting carriers where the transmission facility has already been constructed. *Id.* at ¶ 632. By "routine network modifications," the FCC explained that it meant that "[ILECs] must perform those activities that [ILECs] regularly undertake for their own customers." *Id.*

79. Such "routine network modifications" include rearranging or splicing of cable, attaching routine electronics to high-capacity loops (*e.g.*,, multiplexers, apparatus cases, and doublers), adding doublers or repeaters, adding equipment cases or smart jacks, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer. *Id.* at ¶¶ 634-35.

80. However, the FCC explained, "routine network modifications," did not include construction of new wires (*i.e.*, installation of new aerial or buried cable).

Id. at ¶ 632.

81. Further, the FCC noted that its pricing rules provide ILECs with the opportunity to recover the cost of the routine network modifications required in its order. *Id.* at ¶ 640. Moreover, the FCC noted that state commissions have discretion regarding whether such costs should be recovered through non-recurring or recurring charges. *Id.*

82. The FCC's decision regarding modifications of the ILEC's network addressed the "no facilities," "no build" policy addressed by the parties in Verizon West Virginia Inc.'s Section 271 proceeding before the Commission (Case No. 02-0809-T-P).[9]

V. TRANSITION PERIOD FOR APPLICATION OF UNE RULES.

83. In the *Triennial Review Order*, the FCC acknowledged that its unbundling rules would not be self-executing but would be implemented largely through carriers' interconnection agreements. *Triennial Review Order*, at ¶ 700. The FCC declined to unilaterally modify existing interconnection agreements or intervene in the contract modification process to implement its new unbundling rules. *Id.* at ¶ 701.

84. However, the FCC provided guidance for carriers making necessary changes to their interconnection agreements in response to the *Triennial Review Order*. *Id.* at ¶ 702. Where interconnection agreements contain no change of law provisions to implement new FCC rules, the FCC requires parties to renegotiate

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[9] *See, e.g.*, "Commission Order," *Verizon-WV*, Case No. 02-0809-T-P, Findings of Fact Nos. 55-62 (Jan. 9, 2003).

their agreements to implement the new unbundling rules in accordance with the statutory timetable for interconnection negotiation and arbitration, set forth in Section 252 of the Act. *Triennial Review Order*, at ¶ 703. The *Triennial Review Order*'s effective date (*i.e.*, October 2, 2003), is deemed the request date for negotiations to amend existing interconnection agreements. *Id.*

85. For parties to interconnection agreements containing change of law provisions, the FCC indicated that it expected the change of law process to implement the new unbundling rules would begin promptly and that parties would not delay such negotiations until the FCC's new rules become final and unappealable. *Id.* at ¶ 704.

VI. SUMMARY OF MATTERS REQUIRING COMMISSION ACTION.

86. As set forth herein, the FCC's *Triennial Review Order* requires, or warrants, Commission action to implement the new unbundling requirements set forth in that order. The following table provides a summary of the issues that must be addressed by the Commission, and the time frames within which Commission action is required:

Network Element	FCC Finding	Commission Action	Time Frame
Loops			
Mass Market: Stand alone copper loops and subloops	Impaired (must unbundle)	None	
Mass Market: Hybrid copper/fiber loops	Impaired (must unbundle)	None	
Mass Market: Fiber to the home ("FTTH") loops	Not impaired (unbundle narrowband only if ILEC overbuilds)	None	

Enterprise: OCn loops.	Not impaired (no unbundling)	None	
Enterprise: Dark fiber, DS-3 (up to 2 circuits per customer), DS-1 loops	Impaired on location-specific basis determined by states (must unbundle unless state determines otherwise)	Make location specific determinations using either or both "self-provisioning" & "competitive wholesale facilities" trigger	9 months from TRO effective date = 7/2/04
Subloops for multi-unit premises & NIDs	Impaired	None	
Dedicated Transport			
OCn facilities	Not impaired	None	
Dark fiber, DS-3 (up to 12 circuits) and DS-1 facilities	Impaired on location-specific basis determined by states	Analyze route-specific deployment of facilities (if no impairment finding results, establish a transition schedule)	9 months from TRO effective date = 7/2/04
Shared Transport	Impaired only if the competitor is impaired without access to local circuit switching	*See* local circuit switching.	
Local Circuit Switching			
Enterprise: DS-1 & higher loops	Not impaired, but states may petition for waiver of no impairment finding for particular local markets	May file petition w/ FCC seeking to rebut nationwide determination	90 days from TRO effective date = 12/31/03
Mass Market:	Impaired on location-specific basis determined by states	Either (1) conclude that current hot cuts process cause no impairment or (2) approve & implement a batch-cut process	9 months from TRO effective date = 7/2/04
Packet Switching	Not impaired	None	

Signaling Networks	Impaired only if the competitor is impaired without access to local circuit switching	*See* local circuit switching	
Call-related Databases (excluding 911/E911)	Impaired only if the competitor is impaired without access to local circuit switching	*See* local circuit switching	
911/E911 Databases	Impaired	None	
OSS Functions	Impaired	None	
EELs	Available to the extent the requested loop-transport elements are unbundled		

VII. CAD'S PROPOSAL FOR FURTHER COMMISSION PROCEEDINGS.

87. As the foregoing demonstrates, the *Triennial Review Order* sets forth a very compressed schedule for state commission determinations if any of the FCC's impairment findings are going to be challenged. However, many of the determinations that the FCC delegated to state commissions will not need to be addressed unless a carrier wishes to challenge the FCC's impairment decisions.

88. It is reasonable to expect that only ILECs are likely to challenge the FCC's impairment findings on such issues as mass market local switching and dedicated transport for dark fiber, DS-3 and DS-1 facilities. Similarly, it is reasonable to expect that only CLECs are likely to challenge the FCC's finding that enterprise local circuit switching for DS-1 and higher capacity facilities is not impaired. Moreover, any challenges to the FCC's determinations will likely be mounted with respect to specific markets or routes rather than the entire state.

89. CAD believes that many of the FCC's determinations will not be the subject of challenge in West Virginia. However, to the extent a carrier intends to challenge any particular finding, those carriers should be directed to provide notice of that intent, quickly, in order to allow the Commission to begin work on the issue(s) raised.

90. However, even if the FCC's impairment decisions are not the subject of any carrier's challenge, the Commission will need to address at least two major issues: (1) the establishment of a batch hot-cut process for mass market local circuit switching, something required if the FCC's impairment finding stands; and (2) implementation of the FCC's rejection of ILECs' "no facilities, no build" policies. The first determination is subject to the nine-month time frame established by the FCC. The second determination is not required to be made within the FCC's nine-month time frame but, as noted during Verizon-WV's Section 271 proceeding, is an important issue that affects CLEC operations in the state.

91. Accordingly, CAD recommends that the Commission adopt the following procedures for implementing its obligations under the *Triennial Review Order*:

a. Send a copy of this petition, and any Commission order initiating a general investigation based on this petition, to all ILECs and each facilities-based CLEC operating in West Virginia.[10]

[10]Based on the record in Verizon-WV's Section 271 proceeding, CAD believes that the following CLECs are operating on a facilities basis in West Virginia: FiberNet, LLC; Gateway Telecom, LLC, dba StratusWave; NTELOS, Inc.; MCImetro Access Transmission Services, LLC; ComScape Communications; Hardy Telecommunications, Inc.

b. Direct that each facilities-based CLEC file a notice with the Commission, within ten (10) days following issuance of the Commission's order, advising whether the carrier intends to challenge the FCC's no impairment determination with respect to enterprise local circuit switching for DS-1 and higher capacity facilities. If a carrier indicates that it intends to challenge the FCC's determination, it shall include in its notice a statement identifying each particular market in which it seeks to challenge the FCC's determination. In addition, the challenging carrier shall include a proposed procedural schedule for resolving its challenge on the merits, including proposed dates for the submission of any evidence in support of its challenge, submission of any rebutting evidence, discovery cut-offs, and proposed hearing dates and procedures regarding the submission of testimony.

c. Establish a *Triennial Review Order* implementation collaborative ("TRIC") – consisting of the aforesaid ILECs, facilities-based CLECs operating in West Virginia, Commission Staff and CAD and direct the TRIC to do the following:

(1) Conduct its first meeting within fifteen (15) days of the issuance of this order.

(2) At this first meeting, establish recommendations regarding the procedure whereby ILECs may challenge the FCC's impairment decisions that were delegated to state commissions, as well as a procedural schedule for addressing the issues relevant to such impairment analyses (*e.g.*, definition of relevant market, identification of specific routes under challenge).

(3) At this first meeting, establish recommendations regarding the procedure the Commission should adopt in addressing the batch hot-cut process for mass market local circuit switching contemplated by the FCC.

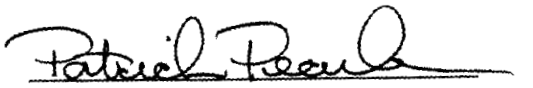
(4) At this first meeting, establish recommendations regarding the procedure the Commission should adopt in addressing the FCC's decision invalidating the "no facilities, no build" policy employed by Verizon-WV (addressed in Verizon-WV's Section 271 proceeding) and similar policies employed by any other ILECs in the state.

(5) Identify any other issues that should be addressed by the TRIC in conjunction with the duties delegated to the Commission by the FCC, and propose a procedural schedule for addressing such issues.

d. Cause a copy of the Commission's order to be published once, in a newspaper of general circulation statewide, and establish a link on the Commission's website to proceedings in this docket.

e. Establish such further requirements as the Commission deems reasonable and appropriate.

Respectfully submitted this 12th day of September, 2003.



PATRICK W. PEARLMAN
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304/558-0526; fax 558-3610
WV Bar No. 5755

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W VA PUBLIC SERVICE COMMISSION
SECRETARY'S OFFICE

INITIAL JOINT STAFF MEMORANDUM

TO: **SANDRA SQUIRE**
Executive Secretary

DATE: **SEPTEMBER 18, 2003**

FROM: **CHRIS HOWARD**
Staff Attorney

RECEIVED
03 SEP 19 PM 3:50
WV PUBLIC SERVICE COMM.
LEGAL DIVISION

RE: **CASE NO. 03-1507-T-PC**
Petition by CAD for Commission to initiate a General Investigation regarding implementation of the Federal Communications Commission's unbundling requirements of its Triennial Review Order

The Public Service Commission of West Virginia's Consumer Advocate Division (hereinafter referred to as CAD) has filed a petition with the Public Service Commission of West Virginia (hereinafter referred to as Commission) seeking to initiate a General Investigation regarding implementation of the Federal Communication Commission's (hereinafter referred to as FCC) unbundling requirements of its Triennial Order. Specifically CAD requests that a copy of the Petition and any Commission Order initiating a General Investigation be sent to all ILECs and each facilities-based CLEC operating in West Virginia. Subsequently, any CLEC may file notice with the Commission within ten (10) days following the issuance of the Commission Order, asserting whether or not it intends to challenge the FCC's no impairment determination with respect to enterprise local circuit switching for DS-1 and higher capacity facilities. Further, CAD recommends that a collaborative consisting of the aforesaid ILECs, facilities based CLECs operating in West Virginia, Commission Staff and CAD be created and ordered to conduct its first meeting with fifteen (15) days of the issuance of an order. CAD expounds on this meeting by establishing the topics and recommendations that are to be established at this first meeting.

Utilities Division Staff's Initial Recommendation

On September 16, 2003, Dannie Walker, Technical Analyst for the Commission's Utilities Division filed an initial recommendation. Mr. Walker states that David Ellis has assigned Diane Davis Calvert, Michael Fletcher, and Mr. Walker(hereinafter referred to as Technical Staff) to handle this matter. Mr. Walker indicates that technical staff shall review the filing and make recommendations when appropriate in this matter.

Legal Division Staff's Initial Recommendation

On September 18, 2003, Legal Staff met with Technical Staff and discussed the facts and circumstances of this matter with CAD staff. Legal Staff has reviewed the documents in this matter, including the Petition filed by CAD to initiate a General Investigation. Legal Staff concurs with the findings and recommendations of CAD in its Petition before the Commission, and requests that the Commission initiate a General Investigation in this matter and establish the collaborative as suggested by CAD. Further, Legal Staff recommends that CAD staff be appointed to chair this collaborative, as CAD has established the goals and objectives of this collaborative in its Petition, and is in the best position to chair this collaborative, to ensure that those objectives are achieved in this process.

The Staff is willing to participate in the task force and will file its final recommendation upon completion of its investigation.

CLH/s
Attachment

CWS CWS

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Clk

INTERNAL MEMORANDUM

RECEIVED
03 SEP 18 AM 8:46
WY PUBLIC SERVICE COMM.
LEGAL DIVISION

TO: Legal Division

FROM: Diane Davis Calvert DDC
Utilities Analyst Supervisor
Utilities Division

DATE: September 16, 2003

SUBJECT: **CASE NO. 03-1507-T-PC**
PETITION BY CAD FOR COMMISSION TO INITIATE A GENERAL INVESTIGATION REGARDING IMPLEMENTATION OF THE FEDERAL COMMUNICATIONS COMMISSION'S UNBUNDLING REQUIREMENTS OF ITS TRIENNIAL REVIEW ORDER

Transmitted herewith is the Utilities Division's initial memo in the above-captioned case. Please submit this memorandum to the Commission.

DDC/dlw
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PUBLIC SERVICE COMMISSION OF WEST VIRGINIA
UTILITIES DIVISION INITIAL RECOMMENDATION

FROM: Dannie L. Walker, Technical Analyst
Utilities Division

DATE: September 16, 2003

RECEIVED
03 SEP 18 AM 8:46
WV PUBLIC SERVICE COMM.
LEGAL DIVISION

SUBJECT: **CASE NO. 03-1507-T-PC**
PETITION BY CAD FOR COMMISSION TO INITIATE A GENERAL INVESTIGATION REGARDING IMPLEMENTATION OF THE FEDERAL COMMUNICATIONS COMMISSION'S UNBUNDLING REQUIREMENTS OF ITS TRIENNIAL REVIEW ORDER

I am in receipt of the subject case. David Ellis has assigned Diane Davis Calvert, Michael Fletcher and me to this proceeding. We shall review the filing and make recommendations as appropriate.

DLW/s
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DDC

03 SEP 25 AM 7:45
WV PUBLIC SERVICE COMM.
LEGAL DIVISION

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PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 24th day of September, 2003.

CASE NO. 03-1507-T-GI

GENERAL INVESTIGATION REGARDING
IMPLEMENTATION OF FCC UNBUNDLING
REQUIREMENTS IN TRIENNIAL REVIEW ORDER

COMMISSION ORDER

This case is pending on the Consumer Advocate Division's petition for the Commission to institute the above-captioned general investigation. By this Order, the Commission institutes this general investigation and takes other appropriate actions.

Background

On September 12, 2003, the Commission's Consumer Advocate Division (CAD) filed a Petition to Initiate a General Investigation. In support of its petition, CAD provided some statutory and regulatory background, beginning with that Section 251(c)(3) of the Communications Act of 1934, as amended (Act), which requires incumbent local exchange carriers (ILECs) to provide:

> [T]o any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of [an interconnection] agreement and the requirements of [Section 251] and section 252 [of the Act].

47 U.S.C. § 251(c)(3).

CAD explained that the Act defines "network element" as a "facility or equipment used in the provision of a telecommunications service," including:

> [F]eatures, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provisions of a telecommunications service.

47 U.S.C. § 153(29).

Section 251(d)(2) of the Act establishes the general standard that the FCC must use in determining those unbundled network elements (UNEs) that ILECs must make available to competitors. This section of the Act provides that:

> In determining what network elements should be made available for purposes of subsection (c)(3), the [FCC] shall consider, at a minimum, whether – (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

47 U.S.C. § 251(d)(2).

Under the Act, CAD explained, state commissions are authorized to review and arbitrate interconnection agreements for compliance with the requirements of Sections 251 and 252 of the Act, as well as the FCC's implementing rules. *See, generally*, 47 U.S.C. § 252. In addition, Section 251(d)(3) of the Act preserves states' independent state law authority to address unbundling issues to the extent that the exercise of such authority does not conflict with federal law. 47 U.S.C. § 251(d)(3).

The FCC established rules implementing the Act's unbundling and other requirements in August 1996. *See* "First Report and Order," *I/M/O Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325 (Rel. Aug. 8, 1996) (*Local Competition 1st R&O*).

Among other things, the rules adopted by the FCC in the *Local Competition 1st R&O* interpreted the Act's "necessary" and "impair" standards governing ILECs' unbundling obligations, established a minimum set of UNEs that ILECs must provide, and established a Total Element Long-Run Incremental Cost (TELRIC) methodology for states to use in setting costs for UNEs.

CAD noted that the FCC's decisions in the *Local Competition 1st R&O* have been the source of numerous appeals and seemingly endless further FCC rulings since the 1996 order's release.

In the midst of these various proceedings, the FCC initiated its triennial review of virtually all aspects of the unbundling regime established by the FCC in its *Local Competition 1st R&O*. *See* "Notice of Proposed Rulemaking," *I/M/O Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 01-361 (Rel. Dec. 20, 2001) (*Triennial Review NPRM*).

On February 20, 2003, the FCC issued a public notice advising that it had adopted rules based on the *Triennial Review NPRM*. The public notice provided a high-level summary of the major actions taken by the FCC in adopting these new rules. However, no order followed the public notice for months.

On August 21, 2003, the FCC finally released the *Triennial Review Order* previewed six months earlier.

SUMMARY OF TRIENNIAL REVIEW ORDER

CAD summarized the *Triennial Review Order* as the FCC's attempt to refine the rules that determine what network elements must be unbundled by ILECs and the rules regarding how this analysis must be framed. The ultimate question to be determined in the analysis for each UNE is whether a competitor's market entry will be "impaired" if it does not have access to the particular UNE. The following is a summary of the CAD's analysis of the FCC order.

Definition of "impairment."

In the *Triennial Review Order*, the FCC reformulated the standard for determining whether a competitor's market entry is "impaired" if unable to access a particular UNE. The FCC concluded that a requesting carrier is impaired "when lack of access to an [ILEC] network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic." *Triennial Review Order*, at ¶ 84. The question is whether the revenues a competitor expects to obtain from entering the market exceed the costs of entering and serving that market, factoring in all costs, including opportunity costs, and the risk of possible failure. *Id.*

The FCC identified a number of potential barriers to entry that must be considered: (a) prospective cost of capital; (b) economies of scale; (c) sunk costs; (d) first-mover

advantages; (e) absolute cost advantages; and (f) technical or operational barriers that are solely or primarily within the ILEC's control. *Id.* at ¶¶ 87-91.

The standard of evidence to demonstrate impairment.

The FCC concluded that "actual marketplace evidence" of impairment is the most probative, particularly granular evidence that competitors are providing retail service using non-ILEC facilities. *Id.* at 93. However, the mere existence of facilities deployment by other competitors in a market is not dispositive; also to be considered is the extent of deployment of such facilities, the submarket served, the relevant market's maturity and stability, and other practical considerations (*e.g.*, cost, quality, quantity, maturity). *Id.* at ¶ 94.

The FCC indicated that "intermodal competition" – competition from other types of providers, such as cable, satellite or wireless – is also probative evidence of "impairment," but is not dispositive. *Id.* at ¶¶ 97-98. The FCC concluded that whether the technology offered by such providers contributes to a wholesale market for the UNEs sought should be considered when technology offered via intermodal competition is limited in availability to only a few carriers. *Id.* at ¶ 98.

In its order, the FCC indicated that it will not consider, as relevant to its impairment analysis, the availability and requesting carriers' use of ILECs' tariffed services, or the fact that a UNE is used to provide an ILEC service that is subject to competition, or the fact that an ILEC has received pricing flexibility in a given market. *Id.* at ¶¶ 102-04.

The "granularity" of evidence and of markets.

In its *Triennial Review Order*, the FCC indicated that any approach to unbundling must be "granular" – *i.e.*, the analysis must consider market-specific variations. *Id.* at ¶ 118. The FCC indicated that it will consider customer class, geography, service, and types and capacities of facilities. *Id.*

With regard to customer class distinctions, the FCC indicated that it henceforth will distinguish between three classes of customers: (1) mass market (residential and very small business) customers; (2) small and medium enterprise (business) customers; and (3) large enterprise (business) customers. *Triennial Review Order*, at ¶ 123. The FCC attempted to further define these three customer classes. *Id.* at ¶¶ 124-29.

With regard to geographic variations, the FCC concluded that – at least for some