

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
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Ken Nickolai
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Chair
Commissioner
Commissioner
Commissioner

In the Matter of a Commission Investigation
into ILEC Unbundling Obligations as a Result
of the FCC Triennial Review Order

ISSUE DATE: August 30, 2004

DOCKET NO. P-999/CI-03-961

In the Matter of a Commission Investigation
into Matters Related to the FCC's Interim
Triennial Review Order and the FCC's Request
for Comments

DOCKET NO. P-999/CI-04-1420

ORDER CLOSING DOCKET, OPENING
DOCKET AND SOLICITING COMMENTS

PROCEDURAL HISTORY

I. Introduction and Background

Congress adopted the Telecommunications Act of 1996¹ (the 1996 Act) to open all telecommunications markets to competition, including the local exchange market. (Conference Report accompanying S. 652). The 1996 Act opens markets by requiring each incumbent telephone company to –

- permit competitors to purchase its services at wholesale prices and resell them to customers,
- permit competitors to interconnect with its network on competitive terms, and
- offer unbundled network elements (UNEs) – that is, offer to rent elements of its network to competitors without requiring the competitor to also rent unwanted elements – on just, reasonable, and nondiscriminatory terms.²

The 1996 Act authorizes the Federal Communications Commission (FCC) to identify elements that are subject to unbundling. The FCC is to make this judgment based in part on whether a competitor's ability to provide service would be impaired if the incumbent failed to provide the specific element on an unbundled basis.³

¹ Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

² 47 U.S.C. § 251(c).

³ 47 U.S.C. § 251(d)(2)(B).

On October 2, 2003, the FCC's Triennial Review Order⁴ took effect, revising the rules governing the provision of unbundled network elements.⁵ Specifically, the Order refined the FCC's test for determining when a competitor's ability to provide service was impaired. The FCC articulated principles to be applied in determining which elements must be unbundled, found that certain determinations required fact-intensive, local evidentiary inquiries, and delegated the responsibility for those inquiries to the state commissions.

On October 3, 2003, the Commission issued its *Order Opening Investigation and Notice and Order for Hearing* in this case, beginning Minnesota's evidentiary proceeding on the unbundling issues committed to state determination under the Triennial Review Order.

On March 2, 2004, a court vacated and remanded several of the Triennial Review Order's unbundling rules, including the FCC's delegation of authority to state commissions to engage in a local analysis of impairment.⁶

On August 20, 2004, the FCC issued its *Order and Notice of Proposed Rulemaking*⁷ (Interim Triennial Review Order) requesting comments on how it should comply with the March 2, 2004 decision. Initial comments are due 21 days after the Order is published in the Federal Register.

This matter came before the Commission on August 26, 2004. At the hearing, a proposal to close the current docket was supported, or not opposed, by AT&T Communications of the Midwest, Inc. and TCG Minnesota, Inc. (AT&T), Eschelon Telecom of Minnesota, Inc. (Eschelon); McLeod USA Telecommunications, Inc. (McLeod); the Minnesota Department of Commerce; the Office of Attorney General's Residential and Small Business Utilities Division, Qwest Corporation; and US Link, Inc. (US Link). But AT&T, Eschelon, McLeod and US Link urged the Commission to consider filing comments with the FCC.

FINDINGS AND CONCLUSIONS

The Commission concurs with the parties that the March 2, 2004 decision eliminates the purpose for which Docket No. P-999/CI-03-961 was opened. Consequently the Commission will close that docket.

But as AT&T, Eschelon, McLeod and US Link note, the Commission must now determine whether and how to respond to the matters raised in the FCC's Interim Triennial Review Order. Consequently the Commission will open Docket No. P-999/CI-04-1420 for the purpose of

⁴ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Released August 21, 2003.

⁵ 47 U.S.C. §§ 251(c)(3), 252(d)(1); 47 C.F.R. § 51.307 *et seq.*

⁶ *United States Telecom Ass'n v. FCC*, 359 F.3d 553, 564-76 (D.C. Cir. 2004), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

⁷ CC Docket No. 01-338, *supra*.

receiving party comments on how it should respond, and related matters. Given the short deadline imposed by the FCC, the Commission must ask parties to file comments by September 7, 2004. The Commission will authorize its Executive Secretary to modify and establish deadlines as appropriate.

The Commission will so order.

ORDER

1. Docket No. P-999/CI-03-961, *In the Matter of a Commission Investigation into ILEC Unbundling Obligations as a Result of the FCC Triennial Review Order*, is closed.
2. Docket No. P-999/CI-04-1420, *In the Matter of a Commission Investigation into Matters Related to the FCC's Interim Triennial Review Order and the FCC's Request for Comments*, is opened for the purpose of determining whether and how the Commission should respond to the matters raised in the FCC's Interim Triennial Review Order, and related matters. Parties shall file comments in this matter by September 7, 2004. The Commission's Executive Secretary is authorized to modify and establish deadlines as appropriate.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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