

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Review of SBC Ohio's )  
TELRIC Costs for Unbundled Network ) Case No. 02-1280-TP-UNC  
Elements. )

FINDING AND ORDER

The Commission finds:

- (1) On March 5, 2004, SBC Ohio filed a motion for approval of interim rates for two-wire analog unbundled loops and a request for an expedited ruling on this motion. SBC Ohio also filed a motion for a protective order of certain information attached to the company's motion for approval.
- (2) SBC Ohio contends that its current request for approval of interim pricing is limited to only the most frequently ordered two-wire analog unbundled loops. The company contends that its earlier requests for interim price relief included a much broader range of unbundled network elements (UNEs). SBC Ohio submits that, on February 17, 2004, it submitted to the Commission's staff and all parties who signed nondisclosure agreements updated TELRIC cost studies supporting SBC Ohio's request for new UNE recurring and nonrecurring prices. SBC Ohio contends that the February 17, 2004, cost studies provide ample support for approval of interim new loop prices and that the parties to the case are well-acquainted with SBC Ohio's grounds for interim relief and have no credible basis to claim that 1997 cost inputs remain valid in 2004.

SBC Ohio submits that, absent the adoption of interim rates, the company will continue to lose approximately \$11 million dollars per month or an annualized amount of nearly \$132 million dollars per year on the UNE loops the company sells to its competitors at the current approved TELRIC loop rates. Although SBC Ohio contends that the February 17, 2004 cost studies comply with the applicable pricing standard and should be adopted, the company has no objection to the Commission considering, as a short term alternative, the adoption of interim rates that reflect a portion of the increase sought by SBC Ohio. A reasonable alternative would be the establishment of an interim rate that reflects at least 50 percent of the increase sought by SBC Ohio in its February 17, 2004 filing. In conjunction with the adoption of interim rates, SBC Ohio proposes that the Commission establish a firm procedural

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schedule with hearing dates for phase one soon after the June 18, 2004, prehearing conference to assure that interim prices will be in effect of a relatively brief period of time.

- (3) By entry issued on March 5, 2004, SBC Ohio's request to shorten the time to file a response to its motion for approval of interim prices was granted. Any party that intended to file a memorandum contra SBC Ohio's motion was instructed to do so by noon on Wednesday, March 10, 2004. The March 5, 2004 entry also determined that SBC Ohio did not request an expedited ruling on its motion for a protective order. Therefore, responses to this motion are to be filed by March 22, 2004.
- (4) Memoranda contra SBC Ohio's March 5, 2004 motion were filed by Revolution Communications LLC (Revolution), the Office of the Ohio Consumers' Counsel (OCC), and MCI metro Access Transmission Services, LLC and MCI WorldCom, Inc., AT&T Communications of Ohio/TCG Ohio, CoreCommNewco, Inc. and LDMI (collectively Joint CLECs). In its memorandum contra, the Joint CLECs submit that SBC Ohio's March 5, 2004 motion is improper and should be stricken or denied because: 1) the procedure invoked in this cause regarding the March 5, 2004 motion violates the parties' due process rights by unlawfully imposing a rate increase which has not been subject to Commission scrutiny or input from the parties; 2) SBC Ohio has not met the standards for interim/emergency rate relief, causing the granting of interim relief to be unlawful; and 3) the March 5, 2004 motion is nothing more than an untimely application for rehearing. The Joint CLECs submit that granting the motion will cause irreparable harm to SBC Ohio's competitors. Besides incorporating by reference the Joint CLECs legal arguments, Revolution also submits that granting the requested interim relief will violate the company's contractual rights and that the March 5, 2004 motion is nothing more than an untimely application for rehearing of the parties' interconnection agreement.

OCC asserts that the SBC Ohio motion is untimely, unlawful, and should be denied because: 1) further Commission action on interim rates in this proceeding is outside the statutory 30-day time period for reconsideration in this case and is thus unlawful; 2) there is no evidence in the record to support SBC Ohio's claims that the cost studies contain the most recent and best available information; 3) the March 5, 2004 motion for interim rates suffers from the same legal deficiencies as the prior request; 4) the regulatory lag requirements of Section 4909.42, Revised Code, do not apply in this case; 5) SBC Ohio's claimed

losses are unsupported and contradicted by the company's own actions; 6) the proposed limited interim rate increase would eliminate the profit margin for CLECs putting competition at risk; 7) and the Commission's actions give the appearance of unlawful, ex-parte cooperation with SBC Ohio.

- (5) The Telecommunications Act of 1996 (1996 Act) fundamentally changed telecommunications regulation and the federal/state relationship regarding telecommunication services in this country. The 1996 Act directed the Federal Communications Commission (FCC) to adopt broad national guidelines that the states were to use in implementing and fostering competition in the local exchange market. The FCC's initial order adopting the aforementioned national guidelines was released on August 8, 1996 in *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket 96-98 (96-98 Order). Among other things, the FCC's 96-98 Order introduced the TELRIC methodology as an appropriate vehicle for the states to use when determining an incumbent local exchange carriers' (ILECs') forward-looking costs. The United States Supreme Court upheld the use of the TELRIC methodology for determining an ILECs' forward-looking costs in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002). The Ohio Commission has, in turn, used the TELRIC methodology and the guiding FCC principles in establishing forward-looking rates for unbundled network elements.
- (6) Since the passage of the 1996 Act, the Commission's primary goal has been to provide residential and business customers in Ohio with new competitive local telecommunications offerings. To accomplish this goal, we have strived to implement policies which strike the appropriate balance to allow competitive local exchange carriers (CLECs) to establish footholds in the local service markets, while at the same time not unduly harming the ILECs which must continue to maintain and upgrade their networks to serve all customers. The Commission's main interest has been in stimulating real, long-term, facilities-based competition in Ohio. We believe that facilities-based competition provides superior benefits to both the state and telecommunications customers, in terms of innovation, product differentiation, increased investment, and network diversity.

We recognize that UNE pricing is a critical component of any policy which promotes facilities-based competition. If UNE prices are too high and do not accurately reflect the costs of provision, CLEC profit margins are squeezed and CLECs will not be able to gain the foothold necessary to transition to their

own facilities long term. On the other hand, if UNE prices are too low and do not accurately reflect the costs of provision, CLECs will have no incentive to deploy their own networks, and ILECs will likewise be discouraged from investing in new technologies.

- (7) The bulk of SBC Ohio's current TELRIC rates, including the input variables for cost of capital, depreciation, and joint and common costs as well as the rates for a variety of unbundled loops, were first adopted for SBC Ohio's predecessor, Ameritech Ohio, in 1999 based upon cost studies filed in 1997. These rates were established at a time when ILECs had no experience with providing UNEs to competitors. CLECs have used the 1999 TELRIC rates and modifications in law and policy to make inroads into the local telephone market. For example, the Commission is aware that, in SBC Ohio's service area, CLECs, purchasing UNEs at TELRIC rates, have captured approximately 20 and 25 percent of the residential and business markets, respectively. For the most part, the CLECs use UNE-P (a functional "platform" that combines all UNEs that comprise the local exchange network) to serve residential customers in SBC Ohio's service area. Specifically, today approximately 96 percent of the CLECs' residential access lines in SBC Ohio territory are being provisioned via UNE-P while the remainder is provisioned using UNE-L or resale. In other words, most of this competition is not facilities-based competition.
- (8) Recent developments reflect that the trend in UNE pricing is on the upswing. For example, the FCC, in *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket No. 01-338, released August 21, 2003 (*Triennial Review Order*), found it necessary to clarify the application of two components of TELRIC that have a major impact on UNE prices. Those two components are cost of capital and depreciation and are primary vehicles by which risks associated with new facilities and new services are reflected in UNE prices. Additionally, the FCC released, on September 15, 2003, a Notice of Proposed Rulemaking described as the FCC's first comprehensive review of the rules applicable to the pricing of UNEs pursuant to Section 252(d)(1) of the Communications Act of 1934 as amended by the Telecommunications Act of 1996. See *In the Matter of Review of the Commission's Rule Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173.

- (9) Reexamination of TELRIC components is not just occurring at the federal level, but at the state level as well. For example, the Indiana Utility Regulatory Commission has recently issued a decision that generally results in new, higher UNE rates. See *In the Matter of the Commission Investigation and Generic Proceeding of Rates and Unbundled Network Elements and Collocation for Indiana Bell Telephone Company Inc. Pursuant to the Telecommunications Act of 1996 and Related Indiana Statutes*, Cause No. 42393 (January 5, 2004). Likewise, we are aware that TELRIC reevaluations are also taking place at regulatory commissions in Illinois and in Michigan.
- (10) It has been nearly two years since SBC Ohio initiated this docket requesting the Commission to reevaluate Ohio TELRICs. SBC Ohio and its competitors are entitled to an updated rate that comports with federal law and Ohio public policy. Therefore, we have agreed to undertake a fresh look at the input assumptions and TELRIC costs for SBC Ohio's UNEs.
- (11) Recognizing that Ohio has one of the lowest UNE-L rates for 2-wire analog access lines in the country and, further, recognizing that these out-of-date TELRICs could hinder the development of a true competitive market, we find, upon consideration of SBC Ohio's March 5, 2004 motion and the memoranda in opposition filed by Joint CLECs, Revolution and the OCC on March 10, 2004, that it is reasonable to adopt interim rates specified below for 2-wire analog access lines, subject to a true-up mechanism, pending a decision on phase one in this matter.

As the United States Supreme Court has recognized, the Telecommunications Act of 1996 employs a "hybrid jurisdictional scheme" in which the FCC sets basic rate setting methodology "but leaving it to state utility commissions to set the actual rates." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 489 (2002). The FCC has long recognized that it is reasonable and lawful for state commissions to set interim rates pending the outcome of TELRIC proceedings. See e.g. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15,499, ¶¶ 782-786 (1996). Through Section 4905.04, Revised Code, the General Assembly bestowed on the Commission "such power and jurisdiction as is reasonably necessary for the Commission to perform the acts of a state commission pursuant to the 'Telecommunications Act of 1996.'" Managing proceedings being conducted under 47 U.S.C. § 252 and exercising discretion over interim matters arising in

those proceedings are plainly within the General Assembly's grant of authority to the Commission.

The Commission's Local Service Guidelines have always provided that the Commission, in its discretion, may utilize interim rates that are based on the best information available." *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (February 20, 1997 Entry on Rehearing, Appendix A, V.B.1.c.1). Contrary to the suggestions of the Joint CLECs, Revolution and the OCC, the Commission has ordered interim rates in various proceedings and that practice has not been challenged.<sup>1</sup> The Commission's ability to order interim rates here represents a lawful and reasonable exercise of the authority to act as a State commission under the 1996 Act as authorized by Section 4905.04, Revised Code. Cf. *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 32 Ohio St.3d 306, 313 (1987) (in affirming the Commission's interim decision affecting carrier-to-carrier compensation, the Court concluded that "the Commission has broad discretion in regulating and supervising the restructuring of the Ohio telecommunications industry"). The question becomes whether, in the Commission's discretion, there are reasonable bases for establishing interim rates in this case.

- (12) Contrary to the arguments of the Joint CLECS, Revolution and the OCC, the Commission does not consider SBC Ohio's new request an attempt to circumvent the rehearing process found in Section 4903.10, Revised Code, or as an improper collaterally attack on the Commission's prior decision to deny interim relief. A request for such interim relief does not involve a final determination of issues presented and the granting or denying of such relief is normally made without prejudice to consideration of later such requests. Any new information or changed circumstance, including the passage of time, could be used to justify the granting of interim relief that may have been previously denied in the same proceeding - separate and apart from any rehearing involving the prior request. For example,

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<sup>1</sup> See *In re arbitration of TCG/Ameritech Ohio* Case No. 96-694-TP-ARB (Opinion and Order December 12, 1996), *In re arbitration of AT&T/GTE North* Case No. 96-832-TP-ARB (Supplemental Opinion and Order December 22, 1998), *In re arbitration of AT&T/Ameritech Ohio* Case No. 96-752-TP-ARB (Order on Rehearing June 19, 1997), *In re arbitration of MCI/CBT* Case No. 97-152-TP-ARB (Order on Rehearing January 28, 1998), and *In re arbitration of OHIO TELNET.COM/ALLTEL* Case No. 00-1601-TP-ARB (Opinion and Order March 1, 2001). Also see Cf. *In the Matter of the Commission's Investigation Into the Implementation of Section 276 of the Communications Act of 1996 Regarding Pay Telephone Rates*, Case No. 96-1310-TP-COI (November 26, 2002 Entry).

the Commission is aware that the Supreme Court of Ohio has considered multiple requests for interim relief in the same proceeding and has granted relief previously denied a few months earlier. See *New Par v. Pub. Util. Comm.*, Supreme Court Case No. 01-1132 (May 29, 2002 Entry denying request to stay Commission order and related damages trial); (November 19, 2002 Entry granting second narrower request to stay damages trial). Given that interim relief may be considered at various stages of a proceeding, the key premise for the intervenors' pervasive argument - that SBC Ohio's new motion must be considered as an untimely rehearing request - is fundamentally flawed. In any case, the order issued today by the Commission is itself also subject to the rehearing process and this decision does not avoid the rehearing process. Additionally, we are delaying the effective date of the interim rate for 30 days, in order to allow parties to fully utilize the rehearing process relative to this decision.

The OCC also claims that the Commission "trampled its own procedural rules" and the OCC makes several unfounded allegations and advanced various fanciful theories about collusion and secret negotiations. These presumptuous and offensive extrapolations are all manufactured by OCC based on two unremarkable facts: (1) that the Commission in managing its own agenda rescheduled an Entry on Rehearing by delaying consideration one week, and (2) that an Entry was issued consistent with the express terms of Rule 4901-1-12(C) to shorten responses to SBC Ohio's motion by a day and one-half. The OCC ignores the fact that its own actions of filing an extraordinary writ before the Supreme Court of Ohio in an attempt to prevent the Commission from acting on that very same agenda item may have simply caused the Commission to devote additional time and consideration to the Entry on Rehearing. The agenda rescheduling and writ filing were also recited in SBC Ohio's new motion, with consternation, and were both articulated as reasons for SBC Ohio's decision to replace, not supplement, its application for rehearing with a new, narrowly-tailored request. March 5, 2004 Motion at 3. As for the quick response in issuing a procedural entry in response to SBC's motion, it is not uncommon for movants to informally notify the Commission in advance of filing motions. Ironically, just last week, the OCC conducted its own affairs in precisely the same manner by informally notifying the Legal Department of a motion for stay several hours prior to filing that request in the 03-2040 case; incidentally, that case was stayed by entry the same day. The fact that a procedural entry was issued in response to an expedited request, enabling the Commission to

timely address an issue related to an existing agenda item, is far from scandalous.

The Joint CLECS, Revolution and the OCC also ignore the fact that, compared to SBC Ohio's prior request, the company's new motion is more narrow than SBC Ohio's earlier request and only seeks an interim rate for 2-wire analog loops. Another significant difference is that the new motion requests that an interim rate become effective prospectively and be subject to a true-up, whereas SBC Ohio's earlier request sought a true-up back to the date of the application. The new motion is also supported by an affidavit containing more detailed factual support and explanation for the request. Further, several months have passed since the time that SBC Ohio's prior request was made, significantly prolonging the time this case has been pending without any interim rate relief.<sup>2</sup> Moreover, the Commission now has a more definitive schedule for completing phase one of this proceeding and the effective period of such an interim rate is now known to be a reasonably short amount of time. For reasons similar to those set forth above, the Joint CLECs' motion to strike is also denied.

- (13) At this time and for the limited purpose of ordering interim relief, the Commission concludes that SBC Ohio's new request and supporting affidavit demonstrate that its current costs appear to exceed the current 2-wire analog UNE loop rate, notwithstanding the arguments submitted in opposition by the Joint CLECs, Revolution and the OCC. Specific factors based on the company's relevant cost studies include ostensible changes in the cost of capital, depreciation rates and fill factors. Based on the current record and without prejudice to any final determination in this proceeding, the Commission finds that SBC Ohio has made a threshold showing that these factors have changed since the time of the Commission's initial SBC Ohio TELRIC pricing decision and the 1997-vintage cost inputs for that decision.

For example, the cost of capital adopted in the Commission's prior TELRIC decision for SBC Ohio was 9.74 percent - the cost of capital recommended by CLECs at that time. At the time of

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<sup>2</sup> In the context of traditional rate increases for retail customers, the General Assembly has generally imposed a 275-day deadline for the Commission to decide such cases and has provided that affected utility companies may implement the proposed rates subject to an undertaking to effectively ensure a true-up based on the Commission's final rate determination in the case. Ohio Rev. Code Ann. §§ 4909.19, 4909.42 (Baldwin 2004). Although these statutes do not apply directly here, ordering an interim rate subject to true-up in a wholesale rate application is analogous to, and consistent with, this statutory process and is an attempt to model the General Assembly's approach of balancing the interests of public utility companies and their customers.

the initial TELRIC decision, the Commission did not have the benefit of experience with local competition that it has today. More recently, the FCC has clarified that the added risk of a competitive market includes the risk of losing customers to other facilities-based carriers. *In the Matter of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Report and Order and Order on Remand ("TRO Order"), 18 FCC Rcd. 16,978 at ¶ 680 (2003) (reversed on other grounds). The FCC went on to conclude that States should establish a cost of capital that reflects competitive risks, recognizing that "increased competition would lead to increased risk, which would warrant an increased cost of capital." *Id.* at ¶ 681.

And the Commission has concluded that local services are subject to pervasive competition throughout Ohio and that customers have reasonably available alternatives. *In the Matter of the Commission Ordered Investigation of an Elective Alternative Regulatory Framework for Incumbent Local Exchange Companies*, Case No. 00-1532-TP-COI (00-1532) December 6, 2001 Opinion and Order at 15-21, April 25, 2002 Entry on Rehearing at 2-6. In so doing, the Commission evaluated thousands of pages of information and issued over one hundred pages of findings and analysis to explain and support its adoption of the rules. Currently, as reflected in the March 5, 2004, McKenzie affidavit filed in this proceeding, SBC Ohio has lost more than 786,000 UNE loops to competition in Ohio. And with competitive threats like VoIP telephony that have emerged after the Commission's assessment in the 00-1532 docket, it is manifestly evident that incumbent LECs face growing risk and uncertainty regarding retention of its customer base. In the context of SBC Ohio's request for interim relief, the Commission finds that the ever-increasing risk of competition and corresponding influence on SBC Ohio's cost of capital supports an interim rate increase.

Regarding depreciation, the Commission's prior TELRIC decision for SBC Ohio largely utilized regulatory depreciation rates. As with cost of capital, the FCC has more recently clarified how State commissions should address depreciation rates in the context of formulating TELRIC updated rates. Although the FCC declined to mandate a specific rule that economic depreciation lives must replace regulatory lives, the FCC did conclude that "the rate of depreciation over the useful life should reflect the actual decline in value that would be anticipated in the competitive market TELRIC assumes." *Triennial Review Order* at ¶ 689. The McKenzie affidavit shows that SBC Ohio's new cost studies recognize the impact of the

rapid pace of competitive and technology changes that are occurring in the current environment. This is another reason supporting the Commission's conclusion that an interim rate increase is justified by the current record and SBC Ohio's demonstrated need.

Another major driver for SBC Ohio's current application is fill factors. The Commission's original SBC Ohio TELRIC decision generally adopted fill factors that were based on projections of relatively high loop plant utilization. The current proceeding will examine fill factors in light of the actual competitive information and data that is now available. According to SBC Ohio's affidavit and cost studies, if the TELRIC rates are updated to reflect reasonably accurate fill factors based on actual experience, increased loop rates are required. The Commission finds, for purposes of considering the interim relief, that this additional factor also justifies an interim rate increase.

The Joint CLECs and Revolution do not oppose the motion on substantive grounds. The intervenors, although claiming that their due process rights have been abridged, do not claim that they need to do discovery or obtain additional information prior to effectively responding to the points made in SBC Ohio's motion and affidavit. Likewise, the intervenors do not proffer any evidence or facts specific to SBC Ohio's cost of providing 2-wire analog UNE loops.

Instead, those parties spend considerable time arguing about how SBC Ohio's motion fails to meet statutory standards that are clearly inapplicable, such as Section 4909.16, Revised Code, governing emergency retail rate relief and Sections 4909.18 and 4909.19, Revised Code, governing traditional retail rate increase applications. The intervenors are well aware that those statutes have no application to SBC Ohio's retail rates (due to its alternative regulation plan), let alone its wholesale rates.

- (14) Based on all of the foregoing, the Commission finds it appropriate to increase the 2-wire analog UNE loop rate in access areas B, C and D by \$3.00, \$2.50 and \$2.00, respectively, pending our conclusion of phase one of this proceeding. Subject to true-up based on the Commission's final rate determination in this proceeding, the interim rate for 2-wire analog UNE loops, in access area B will be \$8.84, in access area C will be \$10.38 and in access area D will be \$11.43. We also understand that the true-up mechanism could operate to cause a degree of uncertainty, especially for small CLECs. In this regard, the

Commission reserves the right to limit the extent of true-up recovery by SBC Ohio from CLECs if, in the Commission's opinion, such recovery would generate a hardship.

We note that these interim 2-wire loop rates remain at or below the corresponding rate levels currently in effect in Ohio's neighboring states and in the other SBC states. These are undisputed matters contained in SBC Ohio's motion and affidavit that are not contested by the intervenors in their responses. In addition, the new interim rates are below the TELRIC rates this Commission established for Cincinnati Bell Telephone Company in August 2002. *In the Matter of the Application of Cincinnati Bell Telephone Company for Approval of a Retail Pricing Plan Which May Result in Future Increases and For a New Alternative Regulation Plan*, Case No. 96-899-TP-ALT, Supplemental Finding and Order, August 27, 2002 at 2. Further, the temporary increase, on average, is only about 18 percent of the requested increase supported by SBC Ohio's cost studies. Given those factors, the Commission believes that the interim rates are reasonable.

- (15) Pending a thorough examination of proposed TELRIC components in phase one, the Commission is interested in maintaining a balance as far as CLEC market share in the residential arena. As noted above, today, CLECs are serving approximately 20 percent of the residential market in SBC Ohio's service territory, and the Commission is interested in maintaining, at a minimum, that approximate level of CLEC residential market share in the interim and pending a final decision in phase one. To that end, the Commission and its staff will continue to monitor the residential market in SBC Ohio's service area. SBC Ohio is instructed to submit to staff bi-monthly status reports of local competition in its service area. The first report is due on June 15, 2004. Subsequent reports will be due on August 15 and October 15, 2004. Should a bi-monthly report reflect that CLEC residential market share has decreased, the Commission will promptly consider suspension or adjustment of the interim rate increment. This also provides an additional safety net for any impact that the 2-wire interim loop rate may have on the current level of competition in SBC Ohio's territory.

The Commission will continue to monitor the efficacy of this interim pricing structure pending a final decision at the conclusion of phase one. SBC Ohio is instructed to keep the records necessary to audit and true-up these interim rates at the conclusion of phase one. Further, we clarify that the interim

rates adopted herein shall be effective 30 days from the date this finding and order is issued and further subject to applicable customer notification and contractual requirements for implementing rate changes. This effective date and conditions moot the premature claim by Revolution concerning improper contract modification, since its NAG agreement - as with most interconnection agreements - contains provisions addressing implementation of rate changes based on regulatory orders. Those contractual provisions will be followed by SBC Ohio.

- (16) The Commission's decision to grant interim rate relief is being made based on the current state of the record and the present circumstances. None of the interim conclusions made in today's order will prejudice the outcome of any issue to be decided in this case, nor can they be used by SBC Ohio to support its position on the merit issues in this or any other proceeding. Final determination of the merit issues will be based on the fully developed record after completing phase one of this proceeding.

As stated above, the temporary rate adder is only 18 percent on average of SBC Ohio's requested increase and it serves to minimize the effect on SBC Ohio's CLEC customers while providing some relief from regulatory lag. Further, the true-up mechanism will also ensure that no party is harmed by the interim rate since the CLECs will end up paying the final TELRIC rates established at the end of phase one of this proceeding. *See eg. U.S. West v. MFS Telenet, Inc.*, 193 F.3d 1112, 1117-1120 (9<sup>th</sup> Cir. 1999) (challenge of interim TELRIC rates is unripe and premature). When combined with the added safety net of prompt review and adjustment of the interim rate where SBC Ohio's line loss decreases, the Commission believes this approach continues our long-term policy of promoting local competition while also striking an appropriate balance between the immediate interests of SBC Ohio and its CLEC customers in this proceeding.

- (17) The Commission will endeavor to issue a final decision in phase one by November 1, 2004. Consequently, the hearing on phase one shall commence on July 6, 2004, at 10:00 a.m., in Hearing Room 11-B, 11<sup>th</sup> floor of the offices of the Commission, 180 East Broad Street, Columbus, Ohio 43215-3793.
- (18) As a final matter regarding OCC's intervention, the Commission finds it important to note that OCC's ability to challenge the interim rate remains questionable, as outlined in our December 17, 2003 Entry. At that time, the Commission referenced SBC Ohio's argument that Chapter 4911, Revised

Code, confers no legislative authority on the OCC to intervene in this matter. The OCC was granted qualified intervention, but only to the extent it has a real and substantial interest and did not unduly delay or unjustly prejudice any existing party. In its memorandum contra, the OCC generally challenges SBC Ohio's interim rate increase, even though consumers do not pay TELRIC/UNE rates. Likewise, the OCC objects that the interim rate could eliminate CLEC profit levels and it makes other claims for which it lacks standing. OCC's limited right to participate in this proceeding does not establish standing for purposes of challenging decisions that do not prejudice its clients' interests in a direct and immediate fashion. Consumers do not pay wholesale rates and are not directly affected by changes to those rates.

It is, therefore,

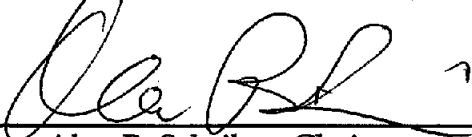
ORDERED, That SBC Ohio's motion for approval of interim rates for 2-wire analog unbundled loops is granted as modified in this finding and order. It is, further,

ORDERED, That SBC Ohio provide bi-monthly reports and that the interim rates discussed herein be subject to true-up. It is, further,

ORDERED, That the Joint CLECs' motion to strike is denied as set forth herein. It is, further,

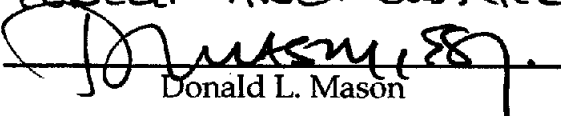
ORDERED, That a copy of this finding and order be served upon all parties of record.

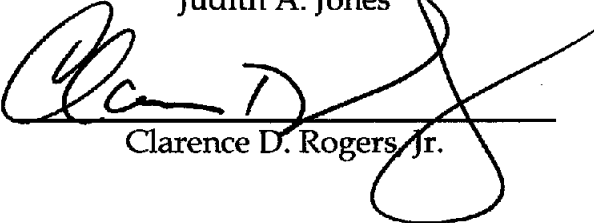
THE PUBLIC UTILITIES COMMISSION OF OHIO

  
Alan R. Schriber, Chairman

  
Ronda Hartman Fergus

*No see attached dissent*  
Judith A. Jones


*CONCUR AND DISSENT*  
  
Donald L. Mason

  
Clarence D. Rogers, Jr.

JRJ/vrm

Entered in the Journal

MAR 11 2004

  
Renee J. Jenkins  
Secretary

BEFORE

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Elements. )

DISSENTING OPINION OF COMMISSIONER JUDITH A. JONES

I disagree with the majority that this Commission should approve SBC Ohio's motion for approval of interim rate increases for 2-wire analog unbundled loops.

In the entry issued on December 17, 2003, the Commission determined that it was reasonable, at this time, to take a fresh look at the input assumptions and the total long run incremental costs (TELRIC) for SBC Ohio's unbundled network elements (UNEs). The Commission adopted a three-phase approach to review new TELRIC studies and adopted a procedural schedule.

Also, this entry denied SBC Ohio's request for interim rates subject to true-up pending a final decision in this matter.

Since the passage of the Telecommunications Act of 1996 (1996 Act), the Commission's primary goal has been to provide residential and business customers in Ohio with new competitive local telecommunications offerings. We have strived to implement policies which provide the appropriate balance to allow competitive local exchange carriers (CLECs) to establish footholds in local service markets, while at the same time allowing incumbent local exchange carriers (ILECs) to continue to maintain and upgrade their networks to serve all customers.

UNE pricing is a critical component of any policy that promotes facilities-based competition. According to information provided as part of SBC Ohio's 271 proceedings, CLECs purchasing UNEs at TELRIC rates have captured approximately 20 and 25 percent of the residential and business customers in SBC Ohio's service area. And approximately 96 percent of CLECs residential access lines in SBC Ohio's territory are being provisioned by UNE-P while the remainder of the access lines are provisioned using UNE-L or resale. Most of this competition is not facilities based. While our goal is to have facilities-based competition, we are currently in a transition phase. CLECs need to have a core of customers to justify investing in a facilities-based network and their main/only source of customers is from ILECs. The 1996 Act provided the means for new telecom companies to acquire customers and build their base and TELRIC has been the methodology used. The United States Supreme Court upheld the use of the TELRIC methodology for determining an ILEC's forward looking costs in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002). The Ohio Commission has used the TELRIC methodology and guiding FCC principles in establishing forward looking rates for unbundled network elements.

SBC Ohio is seeking approval of interim TELRIC rates. Interim rates are appropriate in circumstances where a state commission has not yet completed a review of a TELRIC study and established a forward-looking rate for an UNE that comports with the pricing standard of 47 U.S.C 252 (d)(1). However, the Commission already has in place TELRIC rates that comport with legal

requirements and there is no reason to adopt SBC Ohio's proposal for interim rates subject to true-up pending a decision in the reevaluation proceeding.

Before taking any action, the Commission should conduct a proceeding and require SBC Ohio to demonstrate that the company's costs have, in fact, increased since the last TELRIC proceeding. There must be a full and fair review by all parties as well as a full and fair evidentiary hearing. The stakes are high. Competition in the local telecommunication market is finally taking hold and the Commission should not rush to judgment regarding changing the conditions that are creating competition under the rules established by the 1996 Act. It is also important to keep in mind the disproportionate risk that falls on the CLECs in this case. Many of these companies are small businesses whose bottom lines are a great deal more precarious than those of SBC Ohio. If the interim rates prevent them from attracting customers, or force them to exit the market, a true-up will be of no use. Those opportunities will have been lost. And competition, and Ohio's economy, will be the worse for it. It is hard to see how SBC Ohio is threatened in this same way by having to wait a few months for the proceeding to determine reasonable rates. Given the importance of competition it seems prudent to move cautiously before risking the loss of competition. The Commission should continue its review of TELRIC studies and continue to proceed with the three-phase approach. The Commission should set a schedule and meet its commitments.

I do not approve of the haste of making this decision. I cannot support the requested increase in these rates without a full and fair review and without hard evidence supporting the request.

  
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Judith A. Jones, Commissioner

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

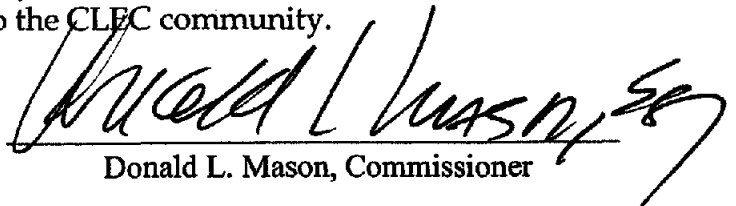
In the Matter of the Review of SBC Ohio's )  
TELRIC Costs for Unbundled Network ) Case No. 02-1280-TP-UNC  
Elements. )

CONCURRING AND DISSENTING OPINION OF COMMISSIONER DONALD L. MASON

I recognize the importance of the Commission ruling on the 2002 SBC UNE-P filing in a timely manner. Our Commission and staff have committed a considerable amount of time over the past two years to writing rules for alternative regulation which have benefited the applicant, SBC. Additionally, Commission and staff devoted considerable resources to the SBC long distance request. After considerable testing and retesting, we approved their application for entry into long distance. We have continued to try to be one of the leading Commissions in the area of encouraging investment in the Ohio telephone infrastructure. As such, we have stretched our personal resources to cover many matters over the last three years.

I have reviewed the UNE-P rates in the other former Ameritech SBC states and recognize that our rates are outdated. In 1999, when we approved the rates, the studies were already aged. Since then, other states have completed studies and have adopted rates which are far higher than the ones in effect in Ohio. I appreciate the efforts of the staff in working on the present UNE-P schedule.

I have a major concern in supporting the order in its entirety because it creates uncertainty in the ability of CLECs to package their products. In a competitive market, such as we are dealing with, the CLECs must have price certainty so they know how much to charge for their bundled products. I cannot accept the provision of the order that states the interim rates are subject to a true up. I hope that on rehearing, which is sure to come, CLECs can clarify to the Commission more about how they structure their products. My concern is that a CLEC will look at today's order and have no level of certainty about how to package its products. As this order stands, they may discover in November, when the final rates are approved, that they were packaging their products way below costs. There will be no way for the CLECs to recover their costs. I think this kind of uncertainty will discourage investment in infrastructure by the CLEC. I am also concerned that it will discourage the investment of capital into the CLEC community.

  
Donald L. Mason, Commissioner