

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 1st day of March, 2004.

CASE NO. 03-1507-T-GI

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

COMMISSION ORDER

Currently pending before the Commission in this proceeding is the Triennial Review Order Implementation Collaborative's (TRIC's) second report recommending that the Commission enter an order:

(1) Providing that any challenge to the FCC's impairment determinations in the *Triennial Review Order* filed after October 2, 2003, will be resolved by a date that is 9 months from the date such challenge is filed.

(2) Deferring consideration of issues related to implementation of a batch hot cut process, including pricing and performance metrics and remedies, until such time as other jurisdictions in Verizon's operating area or elsewhere have concluded similar proceedings.

(3) Adopting the FCC's definition of the activities that constitute routine network modifications, as set forth in ¶¶ 632, 634 & 636-37 of the *Triennial Review Order*. The TRIC provided the FCC's definitions and they are attached hereto as Appendix A.

(4) Providing that additions or changes to the FCC's list of routine network modifications can be sought through any appropriate Commission proceeding, such as arbitration proceedings brought pursuant to 47 U.S.C. § 252, formal complaint proceedings under *W. Va. Code* § 24-2-7, or proceedings in which declaratory relief is sought.

(5) Providing that issues related to pricing of routine network modifications will be addressed in an appropriate, separate proceeding.

(6) Continuing the TRIC, on an informal basis, to assist the Commission in complying with the requirements of the *Triennial Review Order*, including:

(a) Directing that TRIC continue to monitor developments related to implementation of batch hot cut processes in other jurisdictions and communicate such developments informally among

TRIC membership.

(b) Directing that TRIC submit such further filings as are necessary in order to commence a proceeding regarding implementation of a batch hot cut process in West Virginia at an appropriate time; and

(7) Dismissing, as resolved, this general investigation.

Background

On August 21, 2003, the FCC released its *Triennial Review Order* refining the rules that determine what telecommunications network elements must be unbundled by incumbent local exchange carriers (ILECs) and the rules regarding how this analysis must be framed. The ultimate question to be determined is whether a competitor's market entry will be "impaired" if it does not have access to a particular unbundled network element (UNE).

By Order issued September 24, 2003, the Commission instituted this proceeding.

By Order issued December 15, 2003, the Commission acknowledged TRIC's first report, confirmed the exemption of rural incumbent local exchange carriers (rural ILECs) from the Federal Communications Commission's (FCC's) impairment findings regarding certain network elements, and provided rural ILECS with a fifteen-day period for the filing of any challenges to those impairment findings in areas served by non-rural ILECs.

On December 19, 2003, the TRIC filed a petition for corrections to the December 15, 2003, Order.

A corrective order was issued on January 2, 2004.

On January 16, 2004, the TRIC filed its Second Report and Recommendations. The second report included the following discussions.

1. "Lock Out" Period for Challenging FCC Impairment Determinations.

In the TRIC's October 29, 2003, initial report to the Commission, the TRIC advised that neither Verizon-WV nor Frontier-WV, the two largest ILECs in West Virginia, intended to challenge the FCC's "impairment" determination for the following facilities: mass market local circuit switching; enterprise high capacity loops (dark fiber, DS-3 and DS-1); and dedicated transport for certain facilities (dark fiber, DS-3 and DS-1 facilities). *TRIC Initial Report*, at 3. Based on those representations, as well as comments from the remaining ILECs who are also rural telephone companies, the majority of TRIC members recommended that the Commission simply adopt the FCC's determination for West Virginia.

In the December 15, 2003, Order, the Commission concluded that it was not necessary to formally adopt the FCC's determination at this time. In addition, the Commission gave the rural ILECs an additional 15 days to file notice whether they intended to challenge the FCC's impairment determinations for facilities in areas served by Verizon-WV and Frontier-WV. [See FootNote ¹](#)

In TRIC's second report, it stated that at TRIC's December 18, 2003, meeting, members discussed whether there is any need to recommend that the Commission establish a "lock-out" period for challenging the FCC's impairment determinations. The discussion was prompted by CAD's concern that

state commissions are given until July 2, 2004, to conclude proceedings challenging the FCC's impairment determinations. *See, e.g., Triennial Review Order*, at ¶¶ 339, 417 & 527. However, the FCC's order did not specifically address ILEC challenges that are made after the order's effective date (*i.e.*, October 2, 2003), and before the July 2, 2004, deadline. TRIC member Verizon-WV indicated that it had no objection to the Commission allotting itself 9 months to resolve future challenges to the FCC's impairment determinations. Other TRIC members generally supported this concept and decided to recommend to the Commission that it adopt such a procedural schedule for any future filings challenging an FCC impairment determination.

2. Batch Hot Cuts.

Several TRIC members submitted written comments as to whether the Commission is obliged to undertake a batch hot cut proceeding pursuant to the *Triennial Review Order*. The written comments reflected a significant difference of opinion among TRIC members.

On the one hand, CAD, FiberNet, MCI and Staff expressed the opinion that the Commission must implement a batch hot cut process regardless of whether an ILEC challenges the FCC impairment determination for mass market local circuit switching. Verizon-WV and Sprint, on the other hand, expressed the view that no inquiry is necessary unless an ILEC challenges the FCC's impairment determination for this switching element. TRIC's second report stated that these positions did not change at TRIC's December 18, 2003, meeting, although Sprint clarified that its position was driven by practical considerations rather than a legal interpretation of the relevant provisions of the FCC's *Triennial Review Order*.

TRIC's second report stated that while TRIC members continue to have differences of opinion regarding whether the Commission is obliged to implement a batch hot cut process in the absence of an ILEC challenge to the FCC's impairment determination, all members agreed that a proceeding regarding such a process need not be undertaken at present. Instead, TRIC members recommend that the Commission defer to other jurisdictions in the Verizon region that have batch hot cut inquiries underway (*e.g.*, New Jersey, New York, Pennsylvania) and, at such time as those jurisdictions' proceedings have concluded, establish a separate proceeding to determine whether the process implemented in those jurisdictions should be implemented in West Virginia, with or without modifications. TRIC members agreed that, as part of that proceeding, state-specific pricing issues and performance metrics and remedies should be established.

3. Network Modifications.

Finally, the second TRIC report addressed how to implement the FCC's decision regarding routine network modifications and its impact on Verizon's "no facilities, no build" policy. TRIC reported that its members' written comments produced sharp differences of opinion on this issue.

TRIC reported that Verizon-WV's comments stated that the company had revised its "no facilities, no build" policy to be consistent with the FCC's new rules. Verizon-WV noted that it had posted a model interconnection agreement amendment implementing the FCC's rules to its website and that it had sent an industry letter announcing the

amendment's availability with October 2, 2003, deemed the request date for purposes of any arbitration requests.

In contrast, TRIC reported that AT&T, FiberNet and NTELOS argued that Verizon-WV's actions in response to the Triennial Review Order do not comply with the FCC's decision. These CLECs claimed that Verizon-WV is seeking to impose a \$1000 NRC for any network modification required to provision a DS-1 or higher facility. The CLECs asserted that there is no cost basis for the NRC Verizon-WV is seeking to charge, that the costs of any routine network modifications are already built into the TELRIC rates for unbundled network elements ("UNEs") previously established by the Commission, and that the NRC Verizon-WV is imposing is anticompetitive in that it makes obtaining a DS-1 loop more costly than it was under Verizon-WV's old policy. [See FootNote 2](#) For its part, Staff noted concerns regarding implementation of the FCC's network modifications decision and opined that CLECs should bear the financial responsibility for the ILEC's unrecovered costs of making routine network modifications.

TRIC reported that its members' positions did not change at the December 18, 2003, meeting, but the group identified 3 major areas that the Commission must address in connection with the FCC's network modifications decision. First, what activities constitute routine network modifications? Second, what is the appropriate price that CLECs should pay for routine network modifications made by the ILEC? Third, what is the appropriate proceeding for Commission consideration of these issues?

With respect to the first issue, TRIC reported broad consensus among members that the FCC description of those activities that it considers routine network modifications, while not exhaustive, sufficiently describes the majority of situations carriers are likely to face. The TRIC members agreed to recommend that the Commission adopt the FCC's definition of the activities that constitute (or do not constitute) routine network modifications, set forth in ¶¶ 632, 634 & 636-37 of the *Triennial Review Order*. Further, TRIC members agreed to recommend that the Commission note that additions or changes to the FCC's list of routine network modifications can be sought through any appropriate Commission proceeding, such as arbitration proceedings brought pursuant

to 47 U.S.C. § 252, formal complaint proceedings under *W. Va. Code* § 24-2-7, or proceedings in which declaratory relief is sought.

With regard to pricing for routine network modifications, TRIC members recommended that such issues be addressed in a proceeding separate from this general investigation. However, there was a split of opinion as to the proper proceeding in which such pricing issues could be raised.

Staff suggested that the TRIC recommend that the Commission initiate a general investigation regarding such issues. Verizon-WV suggested that the FCC made it clear that pricing of routine network modifications should be brought only in the context of interconnection agreement arbitration proceedings under 47 U.S.C. § 252, citing ¶¶ 700-701 of the *Triennial Review Order*. AT&T noted that Verizon-WV's current NRC for routine network modifications is a problem because CLECs cannot obtain the desired facility unless they agree to Verizon-WV's price, which AT&T believes is exorbitant. CAD suggested that interconnection proceedings under 47 U.S.C. § 252 should not be the exclusive avenue for addressing pricing for routine network modifications. CAD noted that Verizon-WV itself had petitioned the Commission to establish rates for so-called "gap/merger/remand" UNEs in the context of a generic proceeding (Verizon-WV, Case No. 01-1696-T-PC).

The second TRIC report reflected members' unanimous agreement, however, that the instant proceeding is not appropriate for determining pricing issues related to routine network modifications. TRIC stated that the Commission can determine the appropriate forum for addressing this issue in response to a filing from any carrier or other proper party.

DISCUSSION

Upon review of all of the foregoing, the Commission finds that it is reasonable and appropriate to act on the TRIC's recommendations (summarized on page 1-2, above). This case shall be dismissed as resolved.

Accordingly, any challenge to the FCC's impairment determinations in the *Triennial Review Order* filed after October 2, 2003, will be resolved by a date that is 9 months from the date such challenge is filed.

The Commission hereby defers consideration of issues related to implementation of a batch hot cut process, including pricing and performance metrics and remedies, until

such time as other jurisdictions in Verizon's operating area or elsewhere have concluded similar proceedings.

We hereby adopt the FCC's definition of the activities that constitute routine network modifications, as set forth in ¶¶ 632, 634 & 636-37 of the *Triennial Review Order*, and attached hereto as Appendix A.

The parties may seek changes or additions to the FCC's list of routine network modifications through arbitration proceedings brought pursuant to 47 U.S.C. § 252, formal complaint proceedings under *W. Va. Code* § 24-2-7, or proceedings in which declaratory relief is sought.

Upon receipt of filings seeking Commission determination of issues related to pricing of routine network modifications, the Commission will determine the appropriate proceeding or forum for addressing the issues.

The TRIC shall continue to assist the Commission on an informal basis in complying with the requirements of the *Triennial Review Order*. The TRIC shall continue to monitor developments related to implementation of batch hot cut processes in other jurisdictions and communicate such developments informally among TRIC membership. At an appropriate time, the TRIC shall submit necessary filings to commence a proceeding regarding implementation of a batch hot cut process in West Virginia.

FINDINGS OF FACT

1. Currently pending before the Commission in this proceeding is the Triennial Review Order Implementation Collaborative's (TRIC's) second report recommending that the Commission enter an order:

(1) Providing that any challenge to the FCC's impairment determinations in the *Triennial Review Order* filed after October 2, 2003, will be resolved by a date that is 9 months from the date such challenge is filed.

(2) Deferring consideration of issues related to implementation of a batch hot cut process, including pricing and performance metrics and remedies, until such time as other jurisdictions in Verizon's operating area or elsewhere have concluded similar proceedings.

(3) Adopting the FCC's definition of the activities that constitute routine network modifications, as set forth in ¶¶ 632, 634 & 636-37 of the *Triennial Review Order*. The TRIC provided the FCC's definitions and they are attached hereto as Appendix A.

(4) Providing that additions or changes to the FCC's list of routine network modifications can be sought through any appropriate Commission proceeding, such as arbitration proceedings brought pursuant to 47 U.S.C. § 252, formal complaint proceedings under *W. Va. Code* § 24- 2-7, or proceedings in which declaratory relief is sought.

(5) Providing that issues related to pricing of routine network modifications will be addressed in an appropriate, separate proceeding.

(6) Continuing the TRIC, on an informal basis, to assist the Commission in complying with the requirements of the *Triennial Review Order*, including:

(a) Directing that TRIC continue to monitor developments related to implementation of batch hot cut processes in other jurisdictions and communicate such developments informally among TRIC membership.

(b) Directing that TRIC submit such further filings as are necessary in order to commence a proceeding regarding implementation of a batch hot cut process in West Virginia at an appropriate time; and

(7) Dismissing, as resolved, this general investigation.

2. By Orders issued December 15, 2003, and January 2, 2004, the Commission acknowledged TRIC's first report, confirmed the exemption of rural incumbent local exchange carriers (rural ILECs) from the Federal Communications Commission's (FCC's) impairment findings regarding certain network elements, and provided rural ILECS with a fifteen-day period for the filing of any challenges to those impairment findings in areas served by non-rural ILECs.

3. On January 16, 2004, the TRIC filed its Second Report and Recommendations.

4. In TRIC's second report, it stated that at TRIC's December 18, 2003, meeting, members discussed whether there is any need to recommend that the Commission establish a "lock-out" period for challenging the FCC's impairment determinations. The discussion was prompted by CAD's concern that state commissions are given until July 2, 2004, to conclude proceedings challenging the FCC's impairment determinations. *See, e.g., Triennial Review Order*, at ¶¶ 339, 417 & 527. However, the FCC's order did not specifically address ILEC challenges that are made after the order's effective date (*i.e.*, October 2, 2003), and before the July 2, 2004, deadline. TRIC member Verizon-WV indicated that it had no objection to the Commission allotting itself 9 months to resolve future challenges to the FCC's impairment determinations. Other TRIC members generally supported this concept and decided to recommend to the Commission that it adopt such a procedural schedule for any future filings challenging an FCC impairment determination.

5. TRIC's second report stated that while TRIC members continue to have differences of opinion regarding whether the Commission is obliged to implement a batch hot cut process in the absence of an ILEC challenge to the FCC's impairment determination, all members agreed that a proceeding regarding such a process need not be undertaken at present. Instead, TRIC members recommend that the Commission defer to other jurisdictions in the Verizon region that have batch hot cut inquiries underway (*e.g.*, New Jersey, New York, Pennsylvania) and, at such time as those jurisdictions' proceedings have concluded, establish a separate proceeding to determine whether the process implemented in those jurisdictions should be implemented in West Virginia, with or without modifications. TRIC members agreed that, as part of that proceeding, state- specific pricing issues and performance metrics and remedies should be established.

6. The second TRIC report addressed how to implement the FCC's decision regarding routine network modifications and its impact on Verizon's "no facilities, no build" policy. TRIC reported that its members' written comments produced sharp differences of opinion on this issue. TRIC identified 3 major areas that the Commission must address in connection with the FCC's network modifications decision. First, what activities constitute routine network modifications? Second, what is the appropriate price that CLECs should pay for routine network modifications made by the ILEC? Third, what is the appropriate proceeding for Commission consideration of these issues?

7. The TRIC members agreed to recommend that the Commission adopt the FCC's definition of the activities that constitute (or do not constitute) routine network modifications, set forth in ¶¶ 632, 634 & 636-37 of the *Triennial Review Order*. Further, TRIC members agreed to recommend that the Commission note that additions or changes to the FCC's list of routine network modifications can be sought through any appropriate

Commission proceeding, such as arbitration proceedings brought pursuant to 47 U.S.C. § 252, formal complaint proceedings under *W. Va. Code* § 24-2-7, or proceedings in which declaratory relief is sought.

8. TRIC members recommended that pricing for routine network modifications be addressed in a proceeding separate from this general investigation. However, there was a split of opinion as to the proper proceeding in which such pricing issues could be raised. TRIC members stated that the Commission can determine the appropriate forum for addressing this issue in response to a filing from any carrier or other proper party.

CONCLUSIONS OF LAW

1. It is reasonable and appropriate to act on the TRIC's recommendations and to dismiss this case as resolved.

2. Any challenge to the FCC's impairment determinations in the *Triennial Review Order* filed after October 2, 2003, will be resolved by a date that is 9 months from the date such challenge is filed.

3. The Commission shall defer consideration of issues related to implementation of a batch hot cut process, including pricing and performance metrics and remedies, until such time as other jurisdictions in Verizon's operating area or elsewhere have concluded similar proceedings.

4. The Commission will adopt the FCC's definition of the activities that constitute routine network modifications, as set forth in ¶¶ 632, 634 & 636-37 of the *Triennial Review Order*, and attached hereto as Appendix A.

5. The parties may seek changes or additions to the FCC's list of routine network modifications through arbitration proceedings brought pursuant to 47 U.S.C. § 252, formal complaint proceedings under *W. Va. Code* § 24-2-7, or proceedings in which declaratory relief is sought.

6. Upon receipt of filings seeking Commission determination of issues related to pricing of routine network modifications, the Commission shall determine the appropriate proceeding or forum for addressing the issues.

7. The Commission shall require the TRIC to continue to assist the Commission on an informal basis in complying with the requirements of the *Triennial Review Order*. The TRIC shall continue to monitor developments related to implementation of batch hot

cut processes in other jurisdictions and communicate such developments informally among TRIC membership. At an appropriate time, the TRIC shall submit necessary filings to commence a proceeding regarding implementation of a batch hot cut process in West Virginia.

ORDER

IT IS THEREFORE ORDERED that any challenge to the FCC's impairment determinations in the *Triennial Review Order* filed after October 2, 2003, will be resolved by a date that is 9 months from the date such challenge is filed

IT IS FURTHER ORDERED that consideration of issues related to implementation of a batch hot cut process, including pricing and performance metrics and remedies, is hereby deferred until such time as other jurisdictions in Verizon's operating area or elsewhere have concluded similar proceedings.

IT IS FURTHER ORDERED that the FCC's definition of the activities that constitute routine network modifications, as set forth in ¶¶ 632, 634 & 636-37 of the *Triennial Review Order*, and attached hereto as Appendix A, is hereby adopted.

IT IS FURTHER ORDERED that the parties may seek changes or additions to the FCC's list of routine network modifications through arbitration proceedings brought pursuant to 47 U.S.C. § 252, formal complaint proceedings under *W. Va. Code* § 24-2-7, or proceedings in which declaratory relief is sought.

IT IS FURTHER ORDERED that upon receipt of filings seeking Commission determination of issues related to pricing of routine network modifications, the Commission will determine the appropriate proceeding or forum for addressing the issues.

IT IS FURTHER ORDERED that the TRIC continue to assist the Commission on an informal basis in complying with the requirements of the *Triennial Review Order*. The TRIC shall monitor developments related to implementation of batch hot cut processes in other jurisdictions and communicate such developments informally among TRIC membership. At an appropriate time, the TRIC shall submit necessary filings to commence a proceeding regarding implementation of a batch hot cut process in West Virginia.

IT IS FURTHER ORDERED that upon entry hereof, this case is dismissed as resolved.

IT IS FURTHER ORDERED that the Commission's Executive Secretary shall serve a copy of this order on all parties of record by First Class United States Mail, and upon Commission Staff by hand delivery.

JML/ljm
031507cc.wpd

APPENDIX A
page 1 of 2

DEFINITION OF ROUTINE NETWORK MODIFICATIONS [See FootNote 1](#)

I. General Rule.

Incumbent LECs must make the following routine network modifications to unbundled transmission facilities used by requesting carriers where the requested transmission facility has already been constructed. By “routine network modifications” we mean that incumbent LECs must perform those activities that incumbent LECs regularly undertake for their own customers.

Triennial Review Order, at ¶ 632.

II. Activities That Are Routine Network Modifications.

By way of illustration, we find that loop modification functions that the incumbent LECs routinely perform for their own customers, and therefore must perform for competitors, include but are not limited to:

- * Rearranging or splicing of cable;
 - * Adding a doubler or repeater;
 - * Adding an equipment case;
 - * Adding a smart jack;
 - * Installing a repeater shelf;
 - * Deploying a new multiplexer or reconfiguring an existing multiplexer;
 - * Accessing manholes;
 - * Splicing into existing cable;
 - * Deploying bucket trucks to reach aerial cable; and
 - * Installing equipment casings.
-

APPENDIX A
page 2 of 2

The foregoing routine modifications apply to all transmission facilities, including copper loops, as well as dark fiber loops and transport.

Triennial Review Order, at ¶¶ 634, 637-38.

III. Activities That Are Not Routine Network Modifications.

- * Construction of new wires (*i.e.*, installation of new aerial or buried cable); and
- * Requests for altogether new transmission facilities, whether serving an existing customers or along a new route.

Triennial Review Order, at ¶ 636.

Footnote: 1

¹ *The 15-day period expired on December 30, 2003. To-date, no rural ILEC has filed such a notice.*

Footnote: 2

² *Under Verizon-WV's former policy, CLECs could not obtain DS-1 and higher loops if any modifications were required to provision such facilities. Instead, CLECs could order the loops as "special access" circuits, at rates much higher than UNE rates for similar facilities, and after the minimum service period expired, convert the loops to UNE loops. This process was described in detail in Verizon-WV's § 271 proceeding. See "Commission Order," Verizon-WV, Case No. 02-0809-T-P, at 56-65 (Jan. 9, 2003).*

Footnote: 3 ¹ *Source: "Report and Order," I/M/O Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket 01-338, FCC 03-36. Paragraphs 632, 634 & 636-37 (Rel. Aug. 21, 2003) ("Triennial Review Order").*