



More UNE Rules from the FCC

By Joshua E. Barbach

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December 15 brought the latest installation of court-mandated rulings, and the FCC's fourth attempt at writing UNE rules. As a result of the U.S. Appeals Court, D.C. decision to vacate significant portions of the FCC's Triennial Review Order (TRO), the FCC was forced to correct its apparent missteps. What looks like a simple defeat for CLECs may actually reflect an attempt to codify the FCC's definition of competition.

The recent unbundling rules adopted by the FCC are the direct response to the Appeals Court decision. This decision nixed the Commission's delegation of authority to state commissions for nationwide impairment findings for dedicated transport and mass market switching. Commissioner Abernathy states, "Regardless of one's policy views regarding the appropriate degree of mandatory unbundling, we must put an end to the debilitating cycle of court reversals and the resultant marketplace uncertainty."

The clarifications produced by the new rules appear to end discounted access to UNEs and eliminate ILEC obligations to provide unbundled access to mass market local circuit switching. Furthermore, the assessment of "impairment" is to be based on "reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets." It remains to be seen how much this ruling eliminates CLEC businesses. As Chairman Powell notes, although incumbents are "no longer legally compelled" to offer UNE-P, it can remain available for commercial negotiation.

Interpretations of this decision, however, clearly break into two camps. Recall that the rebuked TRO was a 3-2 vote. The two dissenters of this ruling were for the TRO, arguing against a loss of competitive leverage for alternative telecommunications carriers. Commissioner Copps was clear saying, "No amount of rhetoric about judicially sustainable rules and economically efficient competitors can hide the blockbuster job this Commission has done on competition. During its tenure, the largest long distance carriers have abandoned the residential market. And as a result of today's decision, other carriers will follow suit." Commissioner Adelstein, in his dissenting statement, leaves no doubt of his position, saying "the majority buries telecom competition six feet under. The only choice I was given was where to pound in the nails. I cannot support this decision, because it will force consumers and businesses to pay higher prices and have fewer choices."



The TRO, which seemed to be a victory for CLEC competition, may have forced things to swing to the other end of the spectrum. Ironically, it was Chairman Powell and Commissioner Abernathy who voted against the TRO. Such dissention reveals the disparity that exists within the FCC regarding the best way to approach UNE issues. This disparity has caused rejections of the three previous sets of FCC unbundling rules. These rules, however, seem carefully tailored to avoid another rejection. Commissioner Abernathy states: "...while the issues are extremely complex and defy facile solutions, the Order we are adopting succeeds in promoting facilities-based competition while faithfully complying with judicial mandates." To which Chairman Powell adds, "After repeated defeats in court, the Commission has heeded the call to apply a meaningful impairment analysis to switching."