ORDER NO. 00-316

ENTERED 6-19-00

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UT 138
UT 139

In the Matter of the Investigation into Compliance Tariffs filed by U S WEST Communications, Inc., Advice Nos. 1661, 1683, 1685, and 1690.	)	
	)	ORDER
In the Matter of the Investigation into Compliance Tariffs filed by GTE Northwest Incorporated, Advice Nos. 589, 599, and 6ll.	)	

DISPOSITION: ORDER NO. 98-444 REVISED

On November 13, 1998, the Public Utility Commission of Oregon (Commission) issued Order No. 98-444 in these dockets. The order addressed tariffs filed by U S WEST Communications, Inc. (USWC), and GTE Northwest Incorporated (GTE) to govern the manner in which building blocks (hereafter, unbundled network elements or UNEs) should be supplied to requesting competitive local exchange telecommunications carriers (CLECs). Order No. 98-444 discusses eligibility to purchase UNEs, UNE access arrangements, calculation of nonrecurring charges, the modification and construction of facilities to supply UNEs, and a variety of other issues.

On January 12, 1999, USWC, GTE, AT&T Communications of the Northwest, Inc., and TCG Oregon filed applications for reconsideration of Order No. 98-444.

On January 25, 1999, the United States Supreme Court issued its decision in *AT&T Corp. vs. Iowa Utils. Board* (*AT&T Corp*).[1] In that ruling, the Supreme Court reversed a decision by the Eighth Circuit Court of Appeals[2] which had vacated rules promulgated by the Federal Communications Commission (FCC) to implement requirements of the Telecommunications Act of 1996 (Act). Although the Supreme Court reinstated several of the FCC's rules, it invalidated the list of UNEs set forth in 47 C.F.R. §51.319 (Rule 319). In so doing, the Court directed the FCC to revise the standards under which the unbundling obligations of §251(c)(3) of the Act are determined, specifically, to give substance to the "necessary" and "impair" standards in

[1] 119 S. Ct. 721 (1999)

[2] *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997).

§251(d)(2), including consideration of the availability of alternative network elements outside the incumbents' network.

On March 8, 1999, the Commission issued Order No. 99-194 granting reconsideration of Order No. 98-444 to determine the changes necessary to implement unbundling and UNE access arrangements consistent with the Supreme Court's decision. The Commission suspended operation of Order No. 98-444 "until a more appropriate time, such as issuance of the Eighth Circuit's order on remand or issuance of revised FCC rules in accordance with the Supreme Court's decision."[3]

On June 10, 1999, the Eighth Circuit issued its *Order on Remand From the Supreme Court of the United States*,[4] formally reinstating the FCC rules affirmed in the *AT&T Corp* decision. On November 5, 1999, the FCC released its *Third Report and Order and Fourth Further Notice of Proposed Rulemaking* (*UNE Remand Order*),[5] responding to the Supreme Court's directive to reevaluate the unbundling obligations of incumbent local exchange carriers (incumbent LECs or ILECs) pursuant to §§251(c)(3) and 251(d)(2) of the Act.

In addition to the developments at the national level, the United States District Court for the district of Oregon issued a decision in *MCI Telecommunications Corp., and MCImetro Access Transmission Services Inc. v. GTE Northwest, Inc., and the Public Utility Commission of Oregon* (hereafter, *MCI v. GTE*).[6] Among other things, the Court concluded that the Commission's UNE tariffs, as presently structured, conflict with the Act.[7] According to the Court, the fundamental problem with the Commission's UNE tariffs is that they permit a CLEC to purchase UNEs "off the rack" without executing an interconnection agreement with the incumbent LEC. The Court emphasized that the Commission is not precluded from setting UNE prices for a particular ILEC and using those same prices in all interconnection agreements involving that ILEC.[8] It also observed that a "universal short form agreement might also be appropriate for some CLECs purchasing unbundled elements, so long as there is a sufficient opportunity for

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[3] Order No. 99-194 at 2.

[4] *Iowa Utilities Board v. FCC, et al*, Order on Remand from the Supreme Court of the United States, (8th Cir., June 10, 1999).

[5] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238, (rel. Nov. 5, 1999) (*UNE Remand Order*).

[6] 41 F. Supp.2d 1157 (D. Or. 1999)

[7] *Id*. at 1178.

[8] The Court also affirmed that "47 U.S.C. §251(d)(3) preserves the PUC's right to enforce state regulations or policies that establish access and interconnection obligations of local exchange carriers, are consistent with the requirements of §251, and do not substantially prevent implementation of either the requirements of §251 or the purposes of [47 U.S.C. §§251 through 261]." *Id*. at 1177-1178.

the parties to address any technical issues regarding interconnection and the PUC ensures that [the ILEC] is compensated (to the extent required by the Act) for any special costs associated with a particular interconnection agreement that are not already included in the unbundled element prices."[9]

On December 21, 1999, the Commission issued a notice reopening these dockets to examine how recent FCC and judicial rulings impact the findings in Order No. 98-444 regarding unbundling, UNE access arrangements, nonrecurring costs/charges and related issues. The Commission requested that parties file comments in response to specific questions set forth with the notice. Comments were filed on February 15, 2000, and March 15, 2000, by USWC, GTE, Sprint Corporation (Sprint), Teligent Services, Inc. (Teligent), the Western States Competitive Telecommunications Coalition (Coalition),[10] the Joint Commenters,[11] and PUC Staff (Staff).

In this order, the Commission addresses the issues presented in the December 1999 notice and the comments filed by the parties.

UNE ISSUES

Should the Commission revise its "building block" terminology to correspond with the terminology used by the FCC?

Yes. As noted in Order No. 98-444, the Commission authorized the unbundling of telecommunications services several years before the passage of the Act. As a result, there are a number of differences between the "building block" terminology used in Oregon and the terminology used elsewhere. USWC and Staff recommend that the "building block" terminology be revised to correspond with that used by the FCC.

The Commission agrees that the Oregon "building block" terminology should be revised to correspond with that used by the FCC. Uniform terminology will reduce the potential for confusion and disagreements among carriers. It will also foster efficiency because most telecommunications carriers provide services in more than one state.

[9] *Id.* at 1177.

[10] The Coalition consists of Electric Lightwave, Inc.; Integra Telecom, Inc.; GST Communications, Inc.; Covad Communications Company; and New Edge Network, Inc.; Advanced TelCom Group, Inc.; NorthPoint Communications, Inc.; and American Telephone Technologies, Inc.

[11] The Joint Commenters include AT&T Communications of the Pacific Northwest, Inc.; MCI WorldCom Inc.; Rhythms Links Inc.; and AT&T Local Services on behalf of TCG Oregon.

Must all of the UNEs listed in FCC Rule 319 be provided in Oregon?

Yes, Rule 319, as amended in the *UNE Remand Order*, establishes a minimum national list of UNEs that must be made available by incumbent LECs, including USWC and GTE.

Should the new FCC UNEs (e.g., subloop elements, linesharing elements) adopted in the *UNE Remand Order* be included on the Oregon UNE list?

Yes. All of the UNEs authorized by the FCC in the *UNE Remand Order* and incorporated in amended Rule 319 are part of the minimum national list and must be offered by incumbent LECs in Oregon. These include subloop elements and the high frequency portion of the loop. *See, e.g.*, Rule 319(a)(2) and Rule 319(h).

Some parties recommend that the Commission take additional steps to ensure that the Oregon UNE list includes the expanded definitions of the loop, network interface device, and unbundled transport adopted by the FCC in the *UNE Remand Order*. The Commission finds such action unnecessary. As emphasized above, USWC and GTE must provide all of the UNEs adopted by the FCC in the *UNE Remand Order*. This includes the expanded UNE definitions set forth in amended Rule 319.

How should the Commission reconcile its "building block" list and prices with the UNEs listed in FCC Rule 319?

Because of differences in the terminology, it is difficult to match all of the Oregon "building blocks" with the UNEs authorized in Rule 319. In its reply comments, USWC made an attempt to identify the differences, but there is no indication whether other parties agree with USWC's approach.

To resolve this problem, Staff should convene conferences or workshops to attempt to match Oregon's building blocks to the UNEs set forth in Rule 319, and to identify cross-connect facilities as prescribed in the *UNE Remand Order.*[12] This process should include identifying the appropriate prices applicable to those UNEs based on prices that the Commission approved in Order No. 97-239. It should also include identifying the Oregon building blocks that are "additional" to the UNEs listed in Rule 319. The parties should report the results of their efforts to the Commission at a public meeting within 30 days after the last conference or workshop.

Should the Commission approve the proposal by the Coalition and Joint Commenters to require incumbent LECs to provide additional UNEs currently required in Oregon but not included in FCC Rule 319?

[12] *UNE Remand Order at ¶¶178,179.*

No. The current list of Oregon "building blocks" requires USWC and GTE to unbundle certain network elements not included in Rule 319, such as directory assistance and operator services. Although §251(d)(2) of the Act permits State commissions to require incumbent LECs to provide UNEs in addition to those on the minimum national list, the states must first conduct a "necessary" and "impair" analysis for each UNE added to the national list. *See* FCC Rule 317(d). The Commission did not perform a "necessary" and "impair" analysis for any of the UNEs authorized in Order Nos. 96-188 and 96-283. Thus, until such time as the statutory standard is met, incumbent LECs shall not be required to provide UNEs in addition to those listed in Rule 319.

How should the Commission treat requests for UNEs in addition to those set forth in Rule 319?

As emphasized above, the Commission cannot require incumbent LECs to provide "additional" UNEs until it is determined that the requested elements satisfy the "necessary" and "impair" standards in §251(d)(2) of the Act. No such analysis has been conducted to date.

Requesting carriers may petition the Commission to add UNEs to those included on the national list. Upon receipt of a petition, the Commission will initiate a proceeding to determine if the requested element meets the "necessary" and "impair" standards set forth in §251(d)(2) of the Act. In the alternative, a telecommunications carrier may request that the Commission authorize additional UNEs in an arbitration proceeding.[13]

Should the Commission adopt interim prices for subloop elements and high frequency portion of the loop?

No. As noted above, the FCC's *UNE Remand Order* expands the definition of the loop to include subloop elements and the high frequency portion of the loop. The Coalition and Joint Commenters recommend that the Commission implement interim prices for these network elements by using the subloop element prices included in the AT&T/USWC contract (ARB 3/6, Order No. 97-021) and the linesharing prices set forth in a stipulation executed by USWC in the State of Minnesota.

There is no basis in the record for determining that the proposed interim prices are reasonable. Until such time as the Commission is able to develop costs and prices for subloop elements and the high frequency portion of the loop, carriers should attempt to negotiate interim prices for these UNEs in accordance with §252(a) of the Act.

[13] Because of the time constraints associated with the arbitration process, the Commission anticipates that requesting carriers will choose the petition process.

If the parties fail to agree, the Commission will establish interim prices in an arbitration proceeding.[14]

The FCC has imposed limits on the provision of certain UNEs such as circuit switching, dark fiber, shared transport, and packet switching. Should the Commission approve the proposal by the Coalition and Joint Commenters to remove those limitations in this proceeding?

No. The FCC decided to impose limits on certain UNEs after conducting the "necessary" and "impair" analysis required by §251(d)(2) of the Act. The Commission cannot remove the FCC-imposed limits without conducting a "necessary" and "impair" analysis of its own. *See* Rule 317(d).

Is the Commission preempted from unbundling network elements that the FCC has already declined to unbundle or has unbundled on a limited basis?

GTE asserts that the Commission is preempted from unbundling network elements or removing limitations on network elements where the FCC has already declined to do so. Our preliminary analysis of this question suggests that the Commission is not precluded from imposing unbundling obligations upon incumbent LECs beyond those imposed by the FCC.[15] However, it is unnecessary to resolve this issue at this time because our order only requires USWC and GTE to provide the UNEs included on the minimum national list. We will revisit the issue if and when we receive a petition to unbundle UNEs that the FCC has decided not to unbundle.

Do requesting carriers have the burden of proof if they petition the Commission to unbundle additional network elements?

GTE contends that, where a carrier requests unbundling of a UNE not included in Rule 319, it has the burden of proving that the requested UNE satisfies the "necessary" and "impair" requirements in §251(d)(2) of the Act. It is unnecessary for the Commission to address this issue until such time as we receive a request to unbundle UNEs in addition to those listed in Rule 319.

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[14] The Commission notes that USWC has recently negotiated an interim line sharing agreement with several CLECs. The stipulation establishes terms and conditions for line sharing and prices for leasing the high frequency portion of the loop. Some of the CLECs participating in this proceeding are party to the stipulation. The stipulation may provide a basis for negotiations with other requesting carriers participating in this proceeding.

[15] *See e.g., UNE Remand Order* at ¶¶153-156.

TARIFF ISSUES

May telecommunications carriers purchase UNEs without executing an interconnection agreement pursuant to the 1996 Act?

No. In *MCI v. GTE*, the District Court concluded that the Commission cannot require incumbent LECs to file tariffs allowing CLECs to purchase UNEs "off the rack" without having an interconnection agreement with the incumbent LEC. Section V.A.1. of Order No. 98-444 is inconsistent with the Court's decision and is hereby stricken.[16]

Staff points out that GTE has already revised its UNE filing to restrict the availability of UNEs to requesting telecommunications carriers that have a valid and approved interconnection agreement with GTE. USWC should make a similar filing.

Should the Commission continue to require USWC and GTE to file UNE tariffs specifying the terms and conditions of interconnection and access to unbundled elements?

In *MCI v. GTE*, the District Court made clear that the Commission may specify the UNEs and the UNE prices that an incumbent LECs may charge a requesting telecommunications carrier. However, the Court also indicated that the UNE prices established by the Commission are subject to modification if one of the parties to an arbitration proceeding demonstrates that there are "special costs" warranting a different UNE price.

Based on the Court's decision, the Commission adopts the following policy:

1. The Commission will specify the UNEs that USWC and GTE must provide to requesting carriers providing telecommunications service in Oregon. For the present, only those UNEs listed in Rule 319 must be provided. Telecommunications carriers may request the Commission to unbundle additional network elements by (a) filing a petition with the Commission in the manner described above, or (b) requesting such unbundling in an arbitration proceeding conducted pursuant to §252(b) of the Act.

2. The Commission will specify the recurring and nonrecurring prices that requesting carriers may pay to USWC and GTE for UNEs. The costs and prices will be established in accordance with methods approved by the Commission. Currently, the Commission-approved recurring UNE prices

[16] 41 F.Supp.2d at 1176-1177.

are set forth in Order No. 97-239 in docket UM 844.[17] Nonrecurring costs and prices shall be calculated based on the findings set forth in Order No. 98-444, as modified herein. See discussion below.

3. USWC and GTE shall file statements with the Commission and the parties listing recurring and nonrecurring UNE prices. The statements shall be filed after (a) the parties have conducted the workshops/conferences to reconcile the current set of Oregon "building blocks" with the UNEs listed in Rule 319; (b) revised recurring prices are calculated as a result of the building block/UNE reconciliation process,[18] and (c) the Commission has approved nonrecurring cost/prices in accordance with the terms of Order No. 98-444 and this order.[19] All parties may participate in this process.

4. In accordance with the decision in *MCI v. GTE*, the UNE prices established by the Commission shall function as "initial" or "default" prices. Those prices shall be incorporated in interconnection agreements arbitrated by the Commission under the terms of the Act, unless (a) the parties agree to different UNE prices, or (b) one of the parties to the arbitration demonstrates that there are "special costs" warranting a UNE price different from that established by the Commission.

5. Aside from specifying the UNEs that must be provided and the recurring and nonrecurring prices applicable to those UNEs, the Commission will not require USWC or GTE to file tariff language specifying terms and conditions of interconnection and access to unbundled network elements. The parties agree that it is extremely difficult to fashion tariff terms and conditions encompassing all of the technical details and complex arrangements between incumbent and competitive carriers. If carriers are unable to negotiate the terms and conditions of interconnection and access to unbundled network elements, they may seek arbitration of those issues pursuant to §252(b) of the Act.

6. Although the Commission will no longer require USWC and GTE to file tariffs specifying the terms and conditions of interconnection and access to UNEs, we still intend to adopt policies and regulations regarding those

[17] The recurring loop price is currently being reexamined in docket UT 148, in part to comply with FCC deaveraging requirements.

[18] Revisions to recurring prices shall adjust the previously approved prices in Order No. 97-239, as modified by a final order in docket UT 148 if available, and including the effect of removing the line conditioning nonrecurring cost from the recurring loop cost and price. See discussion starting at page 16 of this order.

[19] USWC and GTE shall file their nonrecurring cost studies and proposed nonrecurring prices in this proceeding. A conference will be held to identify issues and set a schedule for review and approval of nonrecurring prices.

matters where appropriate.[20] As such, the findings in Order 98-444 addressing UNE access and other "tariff-type" terms and conditions should be regarded as statements of Commission policy with respect to such issues. Absent a change in law or other compelling reason (*e.g.*, technical infeasibility), it is likely the Commission will adhere to these policies if they are presented for resolution in an arbitration proceeding.

Should the Commission adopt a "Universal Short Form Agreement?"

No. In *MCI v. GTE*, the District Court suggested that the Commission could implement a "universal short form agreement" establishing standardized terms and conditions for interconnection and access to UNEs. All parties oppose this concept, noting among other things, that the "pick and choose" provisions of the Act make such an approach unnecessary. Also, as noted above, interconnection agreements are designed to meet the unique operational requirements of the contracting carriers. It is not possible for the Commission to fashion standardized terms and conditions that can adequately accommodate the needs of the contracting parties on a going-forward basis.

UNE COMBINATIONS

FCC Rule 315(b) provides that, "[e]xcept upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." Are USWC and GTE required to comply with Rule 315(b)?

Yes, Rule 315(b) was reinstated by the United States Supreme Court in the *AT&T Corp* decision.

For purposes of Rule 315(b), the Commission interprets the term "currently combines" to mean network elements that are ordinarily combined in the incumbent LEC's network. In other words, requesting carriers should be able to order combinations of typically combined elements, even if the specific elements ordered are not physically combined by the ILEC at the time the requesting carrier places the order.[21]

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[20] For example, we have recently initiated a generic investigation to adopt collocation policies and regulations in accordance with requirements set forth in the FCC's *Advanced Services Order*. *See,* Order No. 00-292, entered June 2, 2000.

[21] Although this interpretation is consistent with that adopted by the FCC in its *First Report and Order*, we acknowledge that this issue is pending before the Eighth Circuit Court of Appeals. If it is determined by a court of final jurisdiction that the term "currently combined" has a different meaning, we will revise our decision accordingly. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC docket 96-98, First Report and Order, 11 FCC Rcd 15499, 15594 (1996) (*First Report and Order*) ¶296; *UNE Remand Order* at ¶479.

FCC Rules 315(c)-(f) require incumbent LECs to "perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination is technically feasible and would not impair the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network." Should the Commission require USWC and GTE to combine network elements in the manner set forth in Rules 315(c)-(f)?

Yes. In *US WEST v. MFS Intelenet, Inc*. [22] and *MCI v. US WEST*, [23] the Ninth Circuit Court of Appeals upheld contract provisions requiring USWC to combine network elements on behalf of the requesting carriers. The Court's decision was based upon the Supreme Court's interpretation of the Act in *AT&T Corp.* The Court found:

> Although the Supreme Court did not directly review the Eighth Circuit's invalidation of 47 C.F.R. §51.315(c)-(f), its interpretation of 47 U.S.C. §251(c)(3) demonstrates that the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the Eighth Circuit's prior invalidation of the nearly identical FCC regulation. [24]

USWC and GTE argue that the Ninth Circuit's decisions violate the Hobbs Act, [25] which gives Courts of Appeals exclusive jurisdiction to review all final orders of the FCC. Since the Eighth Circuit is the court in which the direct appeals of the FCC's Local Competition Order and related rules have been consolidated, it is charged with assessing the validity of the FCC's regulations and entering any order "enjoining, setting aside, or suspending, in whole or in part," the agency's rulings. However, the Ninth Circuit's decisions do not purport to rule on the validity of the FCC rules themselves, but simply conclude that the Supreme Court's interpretation of the Act allows State Commissions to require an incumbent LEC to combine UNEs on behalf of requesting carriers. Consistent with the Ninth Circuit's decision, the Commission requires USWC and GTE to combine UNEs on behalf of requesting telecommunications carriers in the manner prescribed in Rules 315(c)-(f).

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[22] 193 F.3d 1112 (9th Cir. 1999)

[23] 2000 WL 232273

[24] *US WEST v. MFS* at 1121.

[25] 28 U.S.C. §2342

ACCESS TO UNEs

Is it necessary for the Commission to separately adopt the collocation rules and policies in the FCC's *Advanced Services Order*?[26]

No. The rules and policies adopted by the FCC in the *Advanced Services Order*, including Rules 321 and 323, must be followed by all incumbent LECs, including USWC and GTE. The Commission does not have to take any further action to ensure compliance with the federal mandate.

The Commission notes that, on March 17, 2000, the United States Court of Appeals for the District of Columbia Circuit issued a decision remanding portions of the FCC's *Advanced Services Order*.[27] Thus, collocation requirements must comply with the Court's mandate and any amended rules promulgated by the FCC on remand.

Should the Commission initiate proceedings to implement collocation requirements imposed on State Commissions in Rules 321, 323 and the *Advanced Services Order*?

Yes. FCC rules 321, 323 and the *Advanced Services Order* contemplate that State Commissions will undertake a number of responsibilities to ensure that physical collocation is provided to requesting carriers in accordance with the Act.[28] As noted below, the Commission has initiated a generic investigation docket to adopt policies governing collocation requirements that apply to incumbent LECs generally. These requirements include matters such as collocation provisioning intervals, space exhaustion verification procedures, dispute resolution procedures, security measures, remedies for violation of collocation requirements, etc.

In addition, the Commission will initiate separate dockets to investigate collocation rates for USWC and GTE. The rate-related issues discussed in the *Advanced Services Order* include floor space charges, cage charges, extraordinary site preparation costs, costs to provide security, etc. Because the costs associated with these activities are likely to differ from carrier to carrier, it is appropriate to consider these issues in separate proceedings. As in the case of UNE prices, the collocation rates established in these dockets shall function as "default" prices, and will be incorporated in interconnection agreements established in Commission arbitration proceedings unless (a) the contracting carriers agree to different prices, or (b) one of the parties demonstrates in an arbitration proceeding that there are "special costs" warranting different rates.

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[26] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, 14 FCC Rcd 4761 (rel. March 31, 1999) (A*dvanced Services Order)*.

[27] *See GTE Service Corp. v. FCC*, No. 99-1176 (D.C.C. Mar. 17, 2000).

[28] *Id.* at ¶¶19-60.

Should the Commission eliminate the "direct access" requirement imposed by Order No. 98-444?

No. At the time Order No. 98-444 was issued, incumbent LECs were not required to combine network elements on behalf of requesting carriers pursuant to the Eighth Circuit's decision in *Iowa Utilities Board v. FCC*.[29] Because USWC and GTE declined to voluntarily combine network elements for requesting carriers, the Commission concluded that the only way to provide CLECs with access to UNEs was to require USWC and GTE to provide direct access to their main distribution frames (MDFs). We determined that such an arrangement, though not optimal, was necessary to enable the CLECs to combine the elements themselves.[30]

In *AT&T Corp*, the Supreme Court reversed the Eighth Circuit's decision and reinstated the FCC Rule 315(b). GTE now argues that the direct access requirement is unnecessary because Rule 315(b) requires incumbent LECs to provide combinations of network elements on behalf of requesting carriers.

The Joint Commenters and Coalition disagree, noting that GTE also requests the that Commission refrain from requiring incumbent LECs to provide UNE combinations until such time as retail rates are geographically deaveraged. These parties contend that direct MDF access should be allowed as long as there are any circumstances where CLECs may be forced to combine network elements themselves.

The Commission agrees that the direct access requirement should remain in effect as long as there is a possibility that CLECs may be forced to combine UNEs on their own behalf because of a refusal by the ILECs to undertake that responsibility. In reaching this decision, we note that the ILECs have taken the position before the Eighth Circuit that Rule 315(b) only requires them to provide existing combinations of elements rather than combinations "ordinarily combined" within the ILECs network. If the Court agrees with the ILECs' position, it will be necessary for CLECs to access the MDF in order to provision new UNE combinations for their customers.[31]

Should the Commission issue a clarifying statement indicating that CLECs are not required to collocate at an ILEC switch in order to purchase Enhanced Extended Links (EELs) from the ILEC to provide local exchange service to customers?

No. The EEL allows requesting carriers to serve a customer by extending a customer's loop from the end office serving that customer to a different end office in which the competitor is already collocated. The EEL therefore allows requesting carriers to aggregate loops at fewer collocation locations and increase their efficiencies by

[29] 120 F.3d at 813 (8th Cir. 1997).

[30] Order No. 98-444 at 44-46.

[31] As the Coalition points out, the FCC also contemplates that CLECs will have access to the MDF. *UNE Remand Order* at ¶206.

transporting aggregated loops over efficient-high capacity facilities to their central switching location.[32]

Teligent claims that the FCC requires incumbent LECs to provide requesting telecommunications carriers with access to EELs on an unbundled basis without requiring the CLECs to collocate at the ILEC's switch. On the other hand, Teligent acknowledges that some statements in the FCC's *UNE Remand Order* and *Supplemental Order*[33] may be interpreted to require collocation. Teligent asks the Commission to clarify the FCC's statements and order USWC and GTE to provide EELs on an unbundled basis without requiring the CLEC to collocate at the ILEC switch.

USWC responds that the FCC clearly requires requesting telecommunications carriers to collocate under the circumstances described by Teligent. Furthermore, USWC states that Commission should not attempt to explain what the FCC intended. The Commission agrees that Teligent should seek clarification of this issue from the FCC.

SWITCHED ACCESS

Should the Commission modify that portion of Order No. 98-444 which allows CLECs to purchase UNEs necessary to provide switched access service?

Yes. Order No. 98-444 allows requesting telecommunications carriers to purchase UNEs necessary to provision switched access service without restriction. USWC points out that the FCC has held that CLECs may use the unbundled switching element and the shared transport element to provide switched access only where the CLEC provides local exchange service to the end user customer.

The FCC's *Order on Reconsideration* provides that "a requesting carrier that purchases an unbundled local switching element for an end user may not use that switching element to provide interexchange service to end users for whom that requesting carrier does not also provide local exchange service."[34] The FCC's Third *Report and Order* further provides that "a requesting carrier may use the shared transport unbundled element to provide exchange access service to customers for whom the carrier provides local exchange service."[35] The Commission agrees that Order No. 98-444 should be revised so that it is consistent with the FCC's decisions.

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[32] *Id*. at ¶288.

[33] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, 1999 FCC LEXIS 5999, FCC 99-370 (rel. November 24, 1999) (*Supplemental Order*).

[34] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, FCC 96-394, ¶13 (rel. Sept. 27, 1996) (*Order on Reconsideration*).

[35] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Order on Reconsideration, CC Docket Nos. 96-98, 96-185, FCC 97-295 ¶¶38-39; ¶47, footnote 127; ¶52; ¶54 (rel. August 18, 1997) (*Third Order on Reconsideration).* Paragraph 47 further provides that "requesting

SPECIAL ACCESS

Where a CLEC purchases special access out of an ILEC's intrastate tariffs, should the Commission presume that the CLEC is providing local service over those lines?

No. In its *Supplemental Order*,[36] the FCC held:

> We conclude that, until resolution of our [Fourth Further Notice of Proposed Rulemaking], which will occur on or before June 30, 2000, interexchange carriers [IXCs] may not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provide entrance facilities (or obtain them from third parties).
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> * * * *
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> This constraint does not apply if an IXC uses combinations of unbundled network elements to provide a significant amount of local exchange service, in addition to exchange access service, to a particular customer.

The *Supplemental Order* establishes a presumption that the carrier is providing significant local exchange service if that carrier is "providing all of the end user's local exchange service." It further stated that "[w]e expect that allowing requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of unbundled loops and transport facilities will not delay their ability to convert these facilities to unbundled element pricing, and we will take swift enforcement action if we become aware that any incumbent LEC is unreasonably delaying the ability of a requesting carrier to make such conversions."[37]

On May 19, 2000, the FCC extended its temporary restraints on the use of EELs and provided additional clarification regarding the type of traffic that carriers can provide using EELs. The FCC indicated that it will issue a notice in "early 2001 to gather evidence on this issue so that we may resolve it expeditiously." It also clarified that incumbent LECs must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of UNEs, and allow incumbent LECs to subsequently conduct limited audits by an independent third party to verify the carrier's compliance with the significant local usage requirements. Specifically, a requesting carrier can use EELs if it self-certifies that it (1) is the exclusive

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carriers that purchase shared transport as a network element to provide local exchange service must also take local switching . . ."

[36] *Supplemental Order* at ¶¶4-5.

[37] *Id.* at ¶5, footnote 9.

provider of an end user's local exchange service; (2) provides local exchange and exchange access service to the end user customer's premise and handles at least one-third of the end user's local traffic; and (3) at least half of the activated channels on a circuit are "used to provide originating and terminating local dial tone service, and at least 50 percent of the traffic on each of these local dial-tone channels is voice traffic, and that the entire loop facility has at least 33 percent local voice traffic."[38]

Teligent, the Coalition and the Joint Commenters ask the Commission to obviate the self-certification process contemplated by the FCC by further presuming that, when a CLEC purchases special access out of an ILEC's intrastate tariffs, the CLEC is providing a significant amount of local service over those lines. The Commission declines to adopt this recommendation. There is no basis in the record for expanding the FCC presumption.

NONRECURRING COSTS

Should the Commission reaffirm the findings in Order No. 98-444 regarding the appropriate methods for determining nonrecurring costs and rates?

Yes. Except as otherwise noted, the findings in Sections VI –VIII of Order No. 98-444 regarding the appropriate methods for calculating nonrecurring costs and prices are affirmed.[39]

Should the Commission modify its findings in Order No. 98-444 regarding service order processing costs?

No. In Order No. 98-444 at 63-71, the Commission concluded that 98 percent of electronically submitted service orders would "flow through" without the need for human intervention. USWC and GTE ask the Commission to reexamine that conclusion in light of statements made by the FCC in evaluating Bell Atlantic's §271 application to provide in-region interLATA service.[40] The ILECs point out that the FCC noted that service orders "sometimes drop out" of the mechanized system for manual processing, that "there will always be some limited processing of competitor's orders," and that it is "unnecessary to focus on order flow-through rates to the same degree as in past orders." USWC states that the FCC's statements indicate that some manual

[38] *Supplemental Order Clarification*, Docket No. 96-98, FCC No. 00-183, (adopted May 19, 2000).

[39] The Commission contemplates that USWC and GTE will begin immediately to calculate revised nonrecurring costs in accordance with the findings in Order No. 98-444, as modified herein. After the building block/UNE mapping workshops are completed, it may be necessary for USWC and GTE to make adjustments to their nonrecurring cost estimates.

[40] A*pplication by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of New York*, CC docket No. 99-295, (December 22, 1999) (*Bell Atlantic Order*).

processing of orders is required and that flow-through rates are not as important as previously announced.

The Commission has reviewed the *Bell Atlantic Order* and concludes that it does not undermine our conclusions regarding flow-though rates for electronically submitted service orders for unbundled network elements. The FCC's statement that orders "sometimes" drop out of the mechanized system for manual processing is not inconsistent with our finding that the vast majority of those orders should be processed without error.

The Commission remains persuaded that the 98 percent flow-through rate for electronically submitted orders adopted in Order No. 98-444 is reasonable. Indeed, since our order was issued, the Minnesota Public Utilities Commission reached the same conclusion with respect to flow-through rates for UNE service orders processed by USWC.[41] Likewise, the Texas Public Utility Commission's evaluation of Southwestern Bell's recent §271 application discloses that a 98 percent electronic flow rate has been achieved by that incumbent LEC.[42]

Should the costs associated with line conditioning be collected through a single upfront nonrecurring charge?

No. In Order No. 98-444, the Commission declined to adopt the nonrecurring charges proposed by USWC and GTE for loop conditioning (or loop unloading). The Commission determined that loop conditioning costs were already included in the recurring UNE price of the loop.[43]

USWC and GTE argue that Order No. 98-444 is contrary to the *UNE Remand Order*, because the FCC contemplates that the cost of conditioning loops should be recovered as a nonrecurring cost.[44] The Coalition and Joint Commenters disagree with this interpretation. They emphasize that the FCC allows the states to determine how the ILECs should recover loop conditioning costs.

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[41] *In the Matter of a Generic Investigation of U S WEST Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements*; MPUC docket No. P-442, 5231, 3167, 466, 421/C1-96-1540; OAH Docket No. 12-2500-10956-2, Report of the Administrative Law Judge at 70-74 (November 17, 1998); Order of the Minnesota Public Utilities Commission Granting Reconsideration, Setting Prices and Ordering Compliance Filing at 13 (March 15, 2000).

[42] *In the Matter of the Application of SBC Communications, Inc, and Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. dba Southwestern Bell Long Distance For Provision of In-Region InterLATA Services in Texas,* CC Docket No. 00-4 at 40 (January 31, 2000).

[43] Order No. 98-444 at 93-95.

[44] Loop conditioning costs include the costs associated with removing "bridge taps, low-pass filters, range extenders, and similar devices." *UNE Remand Order* at ¶172.

The *UNE Remand Order* requires incumbent LECs to provide unbundled access to conditioned loops[45] and specifies that "the incumbent should be able to charge for conditioning such loops."[46] The FCC continued:

> 194. We recognize, however, that the charges incumbent LECs impose to condition loops represent sunk cost to the competitive LEC, and that these costs may constitute a barrier to offering xDSL services. We also recognize that incumbent LECs may have an incentive to inflate the charge for line conditioning by including additional common and overhead costs, as well as profits. We defer to the states to ensure that the costs incumbents impose on competitors for line conditioning are in compliance with our pricing rules for nonrecurring costs.[369]

The last sentence in paragraph 194 of the UNE Remand Order references Footnote 369, directing the reader to consult FCC Rule 507(e) and paragraphs 749-751 of the *First Report and Order*. Rule 507(e) provides that "State commissions may, where reasonable, require incumbent LECs to recover nonrecurring costs through recurring charges over a reasonable period of time." Paragraphs 749-751 restate the FCC's policy of allowing recovery of nonrecurring costs through recurring charges. For example, paragraph 749 states, in part:

> The recovery of nonrecurring costs through recurring charges is a common practice for telecommunications services. Construction of an interconnector's physical collocation cage is an example of a nonrecurring cost. We find that states may, where reasonable, require an incumbent LEC to recover construction costs for an interconnector's collocation cage as a recurring charge over a reasonable period of time in lieu of a nonrecurring charge. This arrangement would decrease the size of the entrant's initial capital outlay, thereby reducing financial barriers to entry. At the same time, any such reasonable arrangement would ensure that incumbent LECs are fully compensated for their nonrecurring costs.

Contrary to the ILECs' claims, the *UNE Remand Order* does not preclude the recovery of nonrecurring costs through recurring charges. Accordingly, our decision in Order No. 98-444 to allow nonrecurring costs associated with loop conditioning to be recovered through recurring charges was consistent with FCC's rules. As we emphasized, USWC and GTE propose nonrecurring loop conditioning charges in the amount of $597.61 per line. Nonrecurring charges of that magnitude create a financial barrier to entry and should be mitigated by allowing recovery through recurring charges assessed over a reasonable period of time as contemplated by FCC Rule 507(e).[47] As we further explained, Rule 507(e) allows

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[45] *Id*.

[46] *Id*. at ¶193.

[47] Order No. 98-444 at 115-116.

requesting carriers to pay nonrecurring loop conditioning charges via installment payments over a reasonable period of time determined by the Commission.

At page 94 of Order No. 98-444, we observed that the labor costs associated with loop conditioning are currently included in the maintenance factor used to develop the monthly recurring cost of the loop. Thus, in order to properly calculate the nonrecurring cost associated with loop conditioning activities, it will be necessary to first remove those labor expenses from the monthly recurring loop cost and price. Once the nonrecurring cost for loop conditioning has been calculated in accordance with the terms of this order, it will then be necessary to determine the length of time over which the nonrecurring loop conditioning charge should be collected. Depending on the magnitude of the charge, the Commission may find that the charge should be collected from requesting carriers over a period of several months. [48]

Should operations support systems (OSS) costs be recovered through nonrecurring charges levied upon CLECs?

No. In Order No. 98-444, the Commission concluded that the competition onset costs – including those associated with modifying operations support systems (OSS) to provide access to unbundled network elements –should not be recovered though nonrecurring charges. In arriving at this decision, the Commission emphasized that such costs are not caused by carrier decisions to enter local exchange markets, but rather are incurred to make competitive entry possible in the first place. *See* Order No. 98-444 at 55-57; concurring statement of Commissioner Joan H. Smith at 121.

USWC and GTE request that the Commission reexamine its decision regarding OSS costs in light of recent federal district court decisions in Kentucky and North Dakota, and a New Mexico PSC decision. [49] These jurisdictions appear to have concluded that CLECs should pay for OSS development costs because CLECs are solely responsible for causing those costs.

The Commission disagrees with the conclusion that the costs of modifying OSS to accommodate local exchange competition are caused by new entrants. As we emphasized in Order No. 98-444:

[48] This should not be construed to suggest that the loop conditioning charges proposed by USWC and GTE are reasonable. The parties will have an opportunity to challenge the revised nonrecurring charges calculated by USWC and GTE in accordance with the terms of Order No. 98-444 and this order.

[49] *AT&T Communications of the South Central States v. BellSouth Telecommunications Inc*., 20 F. Supp. 2d 1097, 1104 (E.D. Ky. 1998); *U S WEST Communications v. AT&T Corp*., No. A1-97-082, Slip op. at 21 (D. N.D. January 8, 1999); *In re the Consideration of the Adoption of a Rule Concerning Costing Methodologies (Phase II)*, Docket Nos. 96-310-TC, 97-334-TC, Supplemental Findings of Fact, Conclusions of Law and Order at ¶¶67, 80, 85 (Dec. 31, 1998).

> [C]ompetition onset costs . . . are not caused by new entrants but rather result from the passage of the Act and prior decisions by the Commission [opening local exchange markets to competition] . . . [T]he lack of cost causality is evident by the fact that ILECs would have to incur these costs in anticipation of competition even if no competitor entered an ILEC's service territory. . . .The social benefits of local exchange competition will inure to the public at large, not merely to customers who obtain services from new entrants. It would undermine the objectives of the Act if prospective entrants are required to bear all of the ILEC competition onset costs because it would discourage the very entry that Congress intended.
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> * * *
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> The decision not to include competition onset costs in nonrecurring charges does not mean that such costs may not be addressed elsewhere.[50]

Should the findings in Order No. 98-444 regarding Dedicated Inside Plant (DIP) be revised for purposes of calculating nonrecurring costs?

Yes. DIP refers to the connection between the loop termination location on the MDF and the ILEC's switch termination location on the MDF. By leaving this connection in place when a customer discontinues service, the ILEC is able to reduce expenses for technician time and copper wire, and can connect the next customer more quickly and easily. The greater percentage of time DIP is assumed to be available, the lower the nonrecurring charges.[51]

At the time Order No. 98-444 was entered, Rule 315(b) had been vacated by the Eighth Circuit's decision in *Iowa Utils. v. FCC*. Since USWC and GTE were not required to provide CLECs with UNE combinations and both refused to combine UNEs voluntarily, we concluded that it was unrealistic to assume that DIP would be available even where the CLEC purchased both the loop and switching elements from the ILEC. Under those circumstances, DIP would be broken when the ILEC technician disconnected the jumper wire running between the loop and the ILEC switch.

Since the Supreme Court has reinstated Rule 315(b) and the Ninth Circuit has upheld State authority to require UNE combinations in the manner required by Rules 315(c)-(f), our conclusions regarding the availability of DIP must be revised. In our view, DIP is likely to remain in place whenever the CLEC orders both the loop and switching elements from the ILEC. On the other hand, we assume that DIP will be broken whenever the loop is disconnected from the ILEC switch so that it can be reconnected to a CLEC switch.

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[50] *Id.* at 57.

[51] *Id.* at 90.

To the extent that GTE and USWC maintain data that allows them to ascertain the percentage of total CLEC circuits utilizing ILEC switching, that percentage should be used for purposes of assuming the percentage of time DIP is available. If such information is not available, GTE and USWC shall assume the DIP connection will remain in place the same amount of time it is assumed to be available in their respective retail cost studies. USWC and GTE shall develop nonrecurring costs and charges based on these assumptions.

Because local exchange competition has not yet developed to any significant extent, it is reasonable to assume that the percentage of total CLEC circuits using ILEC switching will change over time. USWC and GTE should reevaluate this data at least annually and make appropriate changes in their DIP assumptions and resulting nonrecurring costs and charges.

How does the availability of subloop elements affect the assumptions in Order No. 98-444 regarding Dedicated Outside Plant (DOP)?

Dedicated Outside Plant (DOP) is the practice of allowing outside plant cross connections to remain in place, leaving a customer's loop in a connect-through state.[52] As in the case of DIP, the greater percentage of the time DOP is available, the lower the nonrecurring charges paid by requesting carriers.

In Order 98-444, we noted:

> On the other hand, we see no reason why an ILEC should disconnect existing outside cross-connections when an ILEC customer migrates to a CLEC or a CLEC customer migrates to another CLEC. Unlike the inside plant connections between the loop and switch, the outside plant connections do not involve a combination of separate building blocks and are not encompassed are not encompassed by the Eighth Circuit's decision. In our opinion, it is reasonable to assume that DOP will remain in place the same percentage of time that it is assumed to be available in USWC's retail cost studies.[53]

Although we believe that the approach taken in Order No. 98-444 is reasonable for the time being, we recognize that the FCC's decision to unbundle the loop into subloop elements will likely impact the percentage of time that DOP connections remain in place. As USWC and GTE begin to provision subloop elements, they should obtain more accurate data regarding this matter. As in the case of DIP, GTE and USWC will be expected to review this data at least annually and make any necessary revisions to their respective nonrecurring costs and prices.

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[52] *See* Order No. 98-444 at 90-92.

[53] *Id.* at 91.

Should the Commission authorize refunds of nonrecurring charges paid by CLECs in accordance with the UNE tariffs filed by USWC and GTE?

Not at this time. Although the nonrecurring charges levied by USWC and GTE were authorized to take effect subject to refund, it is not possible to ascertain what refunds, if any, should be returned to CLECs at this time. USWC and GTE will file revised nonrecurring costs and charges in accordance with the terms of this order. Once those revised costs and charges are approved, the Commission will be able to determine whether refunds are required.

REMAND ISSUES

This order resolves three issues remanded to the Commission for further consideration by Order of the Marion County Circuit Court, dated June 5, 2000, in PUC dockets UM 351, UM 773 and UM 844.[54]

Issue No. 1: Whether the Commission can or should retain the list of "building blocks" established in PUC docket UM 351, in whole or in part or replace it with the list of network elements established in the FCC's Third Report and Order, amended Rule 319. In this order, the Commission concludes that incumbent LECs should be required to provide only those unbundled network elements listed in amended Rule 319. Telecommunications carriers may request additional UNEs in an arbitration proceeding or by filing a petition with the Commission. The Commission must perform a "necessary" and "impair" analysis in accordance with §251(d)(2) of the Act before it may require incumbent LECs to provide additional UNEs.

Issue No. 2: If the Commission orders unbundled access to network elements other than those listed in the FCC's UNE Remand Order, amended Rule 319, do those network elements meet the "necessary and impair" standard of 47 U.S.C. §251(d)(2)? As noted above, the Commission does not at this time require the ILECs to provide unbundled access to network elements other than those listed in amended Rule 319.

Issue No. 7: Whether local exchange carriers can use "building blocks" or unbundled network elements to bypass switched access and special access charges. In this order, the Commission concludes that requesting telecommunications carriers may only use UNEs to provision switched and special access in the manner permitted by the FCC.

[54] Case Nos. 97C13615; 96C14342; 97C11345; 97C12948.

ORDER

IT IS THEREFORE ORDERED that:

1. Order No. 98-444 is revised consistent with the findings set forth herein.

2. USWC and GTE shall calculate nonrecurring costs and prices consistent with the findings set forth in Order No. 98-444, as revised herein.

3. The PUC Staff shall convene conferences or workshops for the purpose of reconciling the current list of Oregon "building blocks" with the unbundled network elements listed in 47 C.F.R. §51.319.

Made, entered, and effective _____.

_____
Ron Eachus
Chairman

_____
Roger Hamilton
Commissioner

_____
Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.