

SUPREME COURT OF FLORIDA

VERIZON FLORIDA, INC.,)
)
 Appellant & Cross Appellee,) CASE NO. SC02-2647
)
 v.)
)
 LILA A. JABER, ET AL.,)
)
 Appellees & Cross Appellees,)
)
 and)
)
 AT&T COMMUNICATIONS OF THE)
 SOUTHERN STATES, LLC,)
)
 Cross Appellant,)
)
 v.)
)
 LILA A. JABER, ET AL.,)
)
 Appellees & Cross Appellees.)
 _____)

**CROSS-ANSWER BRIEF OF THE FLORIDA PUBLIC SERVICE
COMMISSION**

—
DAVID E. SMITH
Attorney Supervisor
Florida Bar No. 309011

FLORIDA PUBLIC SERVICE COMMISSION

2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0862
(850) 413-6084

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FCC DECISIONS

*In the Matter of Application 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, 15 FCC Rcd 3953 (1999) . . . PASSIM*

SYMBOLS AND DESIGNATION OF THE PARTIES

Cross-Appellee, the Florida Public Service Commission, is referred to in this Cross-Answer Brief as the “Commission.” Cross-Appellant, AT&T Communications of the Southern States, LLC, is referred to as “AT&T.” References to AT&T’s Brief on Cross-Appeal are designated “Brief at ___.”

References to the Record on Appeal are designated R. [Vol.: P.], e. g., R. 16: 2802; the Transcripts of the April 29-30, 2002, administrative hearing in the case are designated TR.: [Vol.: P.], e. g., TR. 3: 375. The Transcript of the Special Agenda Conference held October 14, 2002 is designated TRA.: [P.], e. g., TRA.: 34. Exhibits entered into the record at hearing are designated Ex.: [No.: P.], e. g., Ex. 5:43.

Unbundled Network Elements as that term is used in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Codified at various sections of 47 U. S. C. §152 et seq.), 47 U. S. C. §§251-252, are referred to as “UNEs.” The Federal Communications Commission is referred to as the “FCC”, and that agency’s UNE pricing methodology, the so-called “Total Element Long Run Incremental Cost” methodology is referred to as “TELRIC.” The Commission’s final order in this proceeding, Order No. PSC-02-1574-FOF-TP, issued November 15, 2002, in Docket No. 990649B, *In re: Investigation into pricing of unbundled network elements (Sprint/Verizon track)*, is referred to as the “UNE Order.” The Commission’s order

in the BellSouth Telecommunications, Inc. phase of the UNE proceedings, Docket No. 990649A, Order No. PSC-01-1181-FOF-TP, is referred to as the “BellSouth Order.”

Incumbent local exchange companies like Verizon are referred to as “ILECs”; competitor companies like MCI and AT&T are referred to as alternative local exchange companies or “ALECs”.

Verizon’s computer model used to generate TELRIC rates, the Integrated Cost Model-Florida, is referred to as the “ICM-FL.”

STATEMENT OF THE CASE AND THE FACTS

The Statement of the Case and the Facts are as set forth in the Commission's Answer Brief filed in response to Verizon's Initial Brief.

SUMMARY OF THE ARGUMENT

AT&T attempts to elevate the FCC's TELRIC methodology to an immutable formula. It is not. It is a set of methodological principles that afford a state commission flexibility to consider the circumstances of the company whose UNE rates are being set. Determining TELRIC compliance is a factual determination made by weighing the evidence presented, as the Commission did in this case.

The record showed that the use of the GTD-5 switch was a forward-looking technology for Verizon's system compliant with TELRIC principles. The fact that Verizon had one ATM switch deployed on an experimental basis does not render that technology a necessary component of the company's switching model.

While the Commission had some concerns about Verizon's deployment of DLC in its model, those concerns did not rise to the level of a finding that the resultant cost studies should be rejected as non-TELRIC compliant. Based on its weighing of the evidence and consideration of alternatives, the Commission correctly concluded that Verizon's ICM-FL based cost studies met TELRIC standards. That finding was founded on both consideration of individual components and on the overall results which reflected a network that was not simply based on the existing network. In the end, the object of the exercise was to set reasonable UNE rates for Verizon.

AT&T has not shown that the Commission's UNE Order was not supported by competent substantial evidence, that it abused the discretion it is afforded in determining TELRIC compliance or that it otherwise erred as a matter of law.

The UNE Order should be affirmed.

STANDARD OF REVIEW

As this Court has said many times, orders of the Commission come to this court "clothed with the statutory presumption that they have been made within the commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made." *Gulf Coast Electric Cooperative v. Johnson*, 727 So. 2d 259, 262 (Fla. 1999)(citations omitted). The Commission's interpretations of its statutes are entitled to great weight and a party challenging an order bears the burden of overcoming the presumption of validity by showing a departure from the essential requirements of law. *Id.* [citing *AmeriSteel Corp. v. Clark*, 691 So. 2d 473 (Fla. 1997)]. The Commission's findings will be upheld if they are based on competent substantial evidence and are not clearly erroneous. *Id.* The deference afforded the Commission's orders is appropriate given the agency's special expertise in the area of utility regulation. *Id.* [citing *Gulf Oil v. Bevis*, 322 So. 2d 30, 32 (Fla. 1975); *Public Service Commission v. Fuller*, 551 So. 2d 1210, 1212 (Fla. 1989)].

ARGUMENT

I. THE COMMISSION CORRECTLY CONCLUDED ON THE BASIS OF THE EVIDENCE BEFORE IT THAT VERIZON'S COST STUDY WAS TELRIC COMPLIANT AND PROVIDED AN ADEQUATE BASIS ON WHICH TO SET UNE RATES.

In its Brief, AT&T seeks to leverage its attack on the Commission's UNE Order by casting the issue before the Court as purely a "matter of law" not involving the competent substantial evidence standard. Thus, it would have the Court find that "the study relied upon by Verizon is deficient as a matter of law and any rates developed using this deficient study are erroneous" Brief at 9. By this characterization, AT&T asks the Court disregard the volumes of competing expert testimony the Commission had to weigh in deciding whether to accept or reject Verizon's TELRIC cost studies as a basis to set UNE rates. AT&T's approach is forced, and its conclusions unsupported by the record or the law.

As a preliminary matter, the Court should note that neither the FCC nor the Courts consider TELRIC an immutable formula which can be applied with mathematical precision. As the D.C. Circuit Court of Appeals noted in *AT&T Corp. v. FCC*, 220 F.3d 607, 615 (D. C. Cir. 2000),

TELRIC is not a specific formula, but a framework of principles that govern pricing determinations. "While TELRIC consists of 'methodological principles' for setting prices, states retain flexibility to consider local technological, environmental, regulatory, and economic

conditions.” *Bell Atlantic*, 15 FCC Rcd at 4084 P244 (quoting local competition *First Report and Order*, 11 FCC Rcd at 15812). In other words, while state commissions use TELRIC to establish rates, application of TELRIC principles may result in different rates in different states.

The FCC itself recognizes that states’ determinations of TELRIC compliance must be viewed under a liberal standard. In reference to its approval of Section 271¹ applications, where it relies on the findings of state commissions for TELRIC compliance, the FCC noted that

. . . we will reject the [271] application only if basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce.

In the Matter of Application 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, 15 FCC Rcd 3953, 4084 (1999) cited in *AT&T Corp.* 220 F.3d 615-616.

The determination of TELRIC compliance is not a legal conclusion but a “factual determination made by weighing the evidence.” *Illinois Bell Telephone v. Wright*, 245 F. Supp. 2d 900, 908 (N.D. Ill. 2003). Implementation of the TELRIC

¹47 U. S. C. §271 is a special provision of the 96 Telecom Act that defines the process by which former Bell Operating Companies (“BOC”) may qualify to enter the long distance market. One of the conditions is that they offer TELRIC-based UNE rates. The FCC relies on the findings of state commissions for this determination and others on the so-called “checklist” of conditions that the BOCs must meet.

standard has indeed “proved complex, involving detailed fact-finding over years of litigation in state agencies.” *WorldCom, Inc. v. FCC*, 308 F.3d 1, 5 (D.C. Cir. 2002).

Seen from the perspective of reviewing courts and the FCC itself and recognizing the deferential standard this Court applies to Commission’s orders, each of AT&T’s challenges to the Commission’s determinations of TELRIC compliance in its UNE Order must fail.

A. The Commission correctly determined that Verizon’s inputs and assumptions for switching costs were TELRIC compliant.

One of the “deficiencies with the ICM” cited by AT&T in its Brief is Verizon’s inclusion of GTD-5 switches and the exclusion of ATM² switching from its switching cost model. AT&T argues that because the GTD-5 switch is currently deployed in Verizon’s network and is not the least cost and most efficient switch on the market, it cannot be accepted as forward looking technology compliant with TELRIC standards. AT&T misinterprets TELRIC’s standards and overlooks the Commission’s mandate to set UNE rates recognizing the specific characteristics of the individual company.

²ATM refers not to the familiar automated teller machine but “Asynchronous Transfer Mode” which is a very high speed transmission technology.

The Commission heard extensive testimony from Verizon witness Tucek supporting the company's contention that recognition of its GTD-5 switches complied with the "efficient network configuration" standard of the FCC's Rule 47 C.F.R. §51.505(b)(1). That testimony is summarized in considerable detail in the Commission's UNE Order at pages 134-143. R. Vol. 16:2908-2917. The Commission likewise heard extensive testimony from the ALEC coalition's witness Akum as to why the GTD-5 switch was not "forward looking" and should be excluded from switching costs calculations. *Id.*

Based on its consideration of the evidence, and its interpretation of the FCC's TELRIC rules, the Commission concluded that the GTD-5 should be included as a forward looking technology in Verizon's switching cost model. At page 143 of the UNE Order, the Commission concluded:

Verizon's assumptions and inputs as they relate to the GTD-5 and other switches included in its switching model appear to be reasonable, and are indicative of a forward-looking, TELRIC compliant cost study. Although the GTD-5 may not be a forward-looking technology for other LECs, based on the record here we believe that the GTD-5 appears to be a forward-looking, economically efficient technology for Verizon-Florida. Verizon has indicated throughout the record that it intends to purchase additional GTD-5 switches, albeit as remote, and has no plans to discontinue the use of the GTD-5 in its network. The ALEC Coalition admits the same, but adds that Verizon is only doing so to ensure host switch compatibility. As such, we believe the inclusion of the GTD-5 switch in the determination of switch costs does not appear to violate TELRIC.

R. Vol. 16:2917.

The Commission's interpretation of the evidence before it and the requirements of TELRIC are consistent with the FCC's own pronouncements and those of reviewing courts cited above. The Commission is not required to disregard the characteristics of the company whose rates are being set and may take those characteristics into account when setting UNE rates. *AT&T Corp., Bell Atlantic Order, supra.*

As to AT&T's argument that Verizon's switching cost study is deficient because it did not include ATM technology, AT&T ignores the content of the testimony that it elicited on cross examination. In response to AT&T's inquiry, Verizon's witness Tucek indicated that there was only one such switch in Florida, that it was the first one in the entire Verizon network and that it was deployed on a trial basis to provide relief to an existing tandem switch. TR. 6:877-878. With regard to deployment of ATM as a forward-looking technology, Mr. Tucek stated that "it would be incorrect to do so until you knew that you were going to deploy the technology in that fashion on a widespread basis." TR. 6:877.

Mr. Tucek's testimony makes clear that the Commission would have had no basis to consider ATM a necessary component of Verizon's forward-looking switching technology. Just because the technology exists and a single switch is being

used on a trial basis does not elevate it to an essential component of the company's network. The Commission did not err in finding Verizon's switching cost model TELRIC compliant. *AT&T, supra*.

B. The Commission did not err in its treatment of DLC in setting Verizon's UNE rates.

AT&T again invokes its formulaic interpretation of TELRIC in claiming that Verizon's placement of digital loop carrier (DLC)³ equipment impermissibly approximates the company's embedded network. Thus, based on snippets of testimony from Verizon witness Tucek's deposition, it concludes that "Verizon has replicated existing network and the model does not yield costs based on the most efficient technology currently available and the lowest cost network configuration. . . ." Brief at 13.

The very provisions of witness Tucek's testimony cited by AT&T indicate that the witness had a different understanding of what TELRIC required and the company's rationale for using the DLC locations that it did. When asked if the selection of DLC locations violated the FCC's TELRIC methodology, he stated:

³Digital Loop Carrier refers to electronic equipment that basically enhances the efficiency of the network by allowing multiple signals to be carried over a single channel.

Because what we do in ICM-Florida is try to move the modeled network closer to the real network, which means that the costs produced by the model are more reflected, reflective of the costs we expect to incur. Ex. 25: 59.

Mr. Tucek conceded that the company's placement of DLC equipment did not strictly meet the FCC's scorched node methodology that holds only the location of wire centers constant. However, he reiterated his view that the standard the FCC has set for TELRIC should produce costs reflective of those the ILEC expects to incur. Ex. 25: 60.

To be sure, the Commission recognized that the DLC placement issue raised concerns about whether Verizon's ICM-FL model reflected the most efficient technology and lowest cost network configuration consistent with the FCC's Rule §51.505(b)(1). UNE Order at 67; R. Vol. 16:2841. Yet, on balance the Commission concluded that it should accept the model as the basis for setting rates. The Commission explained its reasoning as follows:

Prior to the Supreme Court's decision witness Tucek's view was supported by the Eighth Circuit's decision; we believe this is no longer the case, and question whether on balance it can be concluded that ICM-FL yields costs based on "the most efficient telecommunications technology currently available and the lowest concerns cost network configuration, ..." (§51.505(b)(1)) Although we have concerns as to the extent to which it approximates its current network in some respects, we believe that ICM-FL should nevertheless be accepted as the basis for setting UNE rates for Verizon in this proceeding, for the following reasons. First, there is no viable alternative basis upon which rates can

be set. To completely reject Verizon's model would require Verizon to refile studies at a future time, using a modified model; however, there is little meaningful record support for what specific refinements should be made. Second, we take some comfort that ICM-FL does not fully replicate Verizon's existing network, in that it models fewer sheath feet of cable than currently exist. Third, due to the various modifications to Verizon's model inputs approved in other sections of this Order, we believe that the rates yielded by ICM-FL on balance are reasonable. Accordingly, we find that the network design reflected in ICM-FL shall be accepted for purposes of establishing recurring UNE rates in this proceeding, subject to our adjustments in other sections of this Order.

UNE Order at 67-68; R. Vol. 16; 2841-2842.

In its argument, AT&T elevates the Commission's expression of "concerns" to a finding that "the model was flawed" and an irrefutable finding that "the ICM fails to comply with the requirements of §51.505(b)(1). Brief at 16. Besides being an overstatement of what the Commission actually said in its Order cited above, AT&T adheres to its unsupportable view that any imperfection in the application of the TELRIC formula, as it sees it, must be a reversible error. That position overlooks the essential finding of the Commission that utilization of Verizon's ICM-FL model resulted in *reasonable rates* for UNEs in Florida. AT&T would have the Court take it on faith that any flaw in the TELRIC methodology is fatal notwithstanding the complexity of the process of determining rates and the effect of the adjustments made by the Commission. It disregards the ultimate goal of setting rates and concludes that nothing the Commission did by way of adjustments in the process "can possibly

remedy this flaw.” Brief at 17. That does not reflect the standard for the application of the TELRIC methodology and determination of UNE rates expressed by the FCC and reviewing Courts. *AT&T Corp., WorldCom, Illinois Bell, Bell Atlantic Order, supra.*

AT&T attempts to brush aside the Commission’s expression of confidence in the ICM-FL model based on the number of sheath feet of cable produced by the model. As expressed in the Order quoted above, the ICM-FL model produced fewer feet of cable than actually exist on the network indicating that the model did not replicate Verizon’s existing network. Yet precisely that finding was approved by the Ninth Circuit Court of Appeals as supporting compliance with the TELRIC methodology. In *US West Communications, Inc. v. Jennings*, 304 F.3d 950, 959 (9th Cir. 2002), the Court made the following analysis:

A. Cable Sheath Mileage

CLEC e-Spire contends that the ACC’s [Arizona Corporation Commission] determination of cable sheath mileage conflicts with TELRIC rate-setting rules and is unsupported by substantial evidence. The choice of which TELRIC pricing model produces the most reliable results falls within the agency’s expertise. In its final decision, the ACC set the mileage at 26,092, based on projections from the Hatfield Model 3.1. The fact that the figure is well below the approximately 43,000 cable sheath miles in the existing US West network is consistent with the ACC’s position that it properly followed the TELRIC methodology, as required by 47 U.S.C. §252(d)(1) and 47 C.F.R. §51.505. Substantial evidence supports the 26,092 mileage figure because it falls within the

range of estimates generated during the ACC hearings. We therefore affirm the ACC's cable sheath mileage determination.

It is clear that the 9th Circuit agrees with the Arizona Corporation Commission that the number of sheath feet (or miles) of cable modeled is indicative of TELRIC compliance when compared to the actual number of feet in the existing system. The Commission was correct in reaching the same conclusion in Verizon's case.

AT&T's final claim that the Commission erred in finding that it had no viable alternative to setting UNE rates based on the ICM-FL model is of little more than academic interest. In the first place, the quoted rule, 47 C.F.R. §51.513(a), indicates that the rule is permissive and requires a finding by the Commission of a "reasonable basis for its selection of a particular rate." Brief at 17. Presumably, if it considered the matter at all, the Commission did not believe that the use of proxy rates was reasonable in the face of the evidence it had before it. In any case, there is no indication that AT&T ever advocated the use of the FCC's proxy rates as a substitute for rates set based on the evidence.⁴ AT&T's arguments about what might have occurred under other circumstances is no basis for this Court to overturn the Commission's well considered order.

⁴The ALEC Coalition, of which AT&T was a member, sponsored Greg Darnell as a witness. Mr. Darnell advocated the use of UNE rates set in the BellSouth proceedings in the docket, not FCC proxy rates. TR. 3:505.

CONCLUSION

The Commission's orders come to this Court with a presumption of validity, and a challenger has a heavy burden to overcome that presumption on appeal. *Pan American World Airways, Inc. v. Florida Public Service Commission*, 427 So. 2d 716 (Fla. 1983); *Florida Interexchange Carriers Association v. Clark*, 678 So. 2d 1267 (Fla. 1996). AT&T has not met its burden to show that the Commission committed reversible error in this case. The Commission's UNE Order was made consistent with the agency's expertise and discretion and fails neither from a lack of record support nor other procedural irregularity. The Commission's Order setting UNE rates for Verizon should be affirmed in all respects.

Respectfully submitted,

DAVID E. SMITH
Attorney Supervisor
Florida Bar No. 309011

COMMISSION

FLORIDA PUBLIC SERVICE

2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0862
(850) 413-6084

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 19th day of August 2003 to the following:

Marvin E. Barkin/Marie Tomassi
Trenam, Kemker, Scharf, Barkin,
Frye, O'Neill & Mullis, P.A.
200 Central Avenue, Suite 1230
St. Petersburg, FL 33701

Kimberly Caswell, Esquire
P. O. Box 110, FLTC0007
Tampa, FL 33601-0110

Messer Law Firm
Floyd Self/Norman Horton
Suite 710
215 South Monroe Street
Tallahassee, FL 32302

Donna C. McNulty
WorldCom, Inc.
1203 Governors Square Blvd.
Suite 201
Tallahassee, FL 32301-2960

BellSouth Telecommunications,
Inc. - Nancy B. White
c/o Nancy H. Sims
150 So. Monroe Street
Suite 400
Tallahassee, FL 32301-1556

Richard D. Melson
Hopping Green & Sams
P. O. Box 6526
Tallahassee, FL 32314

Virginia Tate
AT&T Communications of the
Southern States, LLC
1200 Peachtree Street
Suite 8068
Atlanta, GA 30309

Matthew J. Feil
Florida Digital Network Inc.
390 No. Orange Avenue
Suite 2000
Orlando, FL 32801

Ausley Law Firm
Jeffrey Wahlen/John Fons
P. O. Box 391
Tallahassee, FL 32302

KMC Telecom, Inc.
John D. McLaughlin, Jr.
1755 North Brown Road
Lawrenceville, GA 30034-8119

Katz, Kutter Law Firm
Patrick Wiggins
Charles Pellegrini
12th Floor-106 E. College Ave.
Tallahassee, FL 32301

Florida Cable Telecommunications
Assoc., Inc. - Michael A. Gross
246 E. 6th Avenue, Suite 100
Tallahassee, FL 32303

Florida Competitive Carriers
Assoc. - c/o McWhirter Law Firm
Joseph McGlothlin/Vicki Kaufman
117 South Gadsden Street
Tallahassee, FL 32301

MCI WorldCom, Inc.
Brian Sulmonetti
Concourse Corporate Center Six
Six Concourse Parkway
Suite 3200
Atlanta, GA 30328

Pennington Law Firm
Marc W. Dunbar
P. O. Box 10095
Tallahassee, FL 32302

Bruce May
Holland Law Firm
P. O. Drawer 810
Tallahassee, FL 32302

Robert Waldschmidt
Howell & Fisher
Court Square Building
300 James Robertson Parkway
Nashville, TN 37201-1107

Kelley Law Firm
Genevieve Morelli
1200 19th Street, N.W.
Suite 500
Washington, D.C. 20036

Stephen T. Refsell
Bette Willis
ALLTEL Comm. Services, Inc.
One Allied Drive
Little Rock, AR 72203-2177

Network Access Solutions Corp.
Don Sussman
Three Dulles Tech Center
13650 Dulles Technology Drive
Herndon, VA 20171-4602

Supra Telecommunications and
Information Systems, Inc.
Mark E. Buechele
Koger Center-Ellis Bldg.
1311 Executive Center Drive
Suite 200
Tallahassee, FL 32301-5027

Swidler Berlin Friedman, LLP
Michael Sloan
3000 K Street, N.W. - #300
Washington, D.C. 20007-5116

Shook, Hardy & Bacon LLP
Rodney L. Joyce
600 14th Street, N.W.
Suite 800
Washington, D.C. 20005-2004

Sprint-Florida, Inc.
Charles J. Rehwinkel
1313 Blairstone Road
Tallahassee, FL 32301-3021

Nanette Edwards
Director-Regulatory, Sr. Atty.
ITC DeltaCom
4092 S. Memorial Parkway
Huntsville, AL 35802

David Tobin
Tobin & Reyes
7251 W. Palmetto Park Rd.
#205
Boca Raton, FL 33433-3487

Rhonda P. Merritt
MediaOne Florida Telecomm.
101 N. Monroe Street
Suite 700
Tallahassee, FL 32301

Time Warner Telecom of Florida,
L.P. - Carolyn Marek
233 Bramerton Court
Franklin, TN 37069

Z-Tel Communications, Inc.
George S. Ford
601 S. Harbour Island Blvd.
Tampa, FL 33602-5706

Charles E. Watkins
Covad Communications Company
19th Floor, Promenade II
1230 Peachtree Street, N.E.
Atlanta, GA 30309

Rick Heatter
Mpower Comm. Corp.
175 Sully's Trail
Suite 300
Pittsford, N.Y. 14534-4558

Lisa Riley
TCG South Florida
1200 Peachtree Street, N.E.
Suite 8066
Atlanta, GA 30309-3523

DAVID E. SMITH

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the font type used in this brief is Times New Roman
14 point.

DAVID E. SMITH