STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

GALLATIN RIVER COMMUNICATIONS L.L.C. D/B/A CENTURYLINK	)	
	)	
Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 To Establish the Rates, Terms and Conditions of Interconnection with NTS Services Corp.	)	Docket No. 11-0567

REPLY BRIEF OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION

NOW COMES the Staff ("Staff") of the Illinois Commerce Commission ("Commission"), by and through its counsel, and, pursuant to Section 761.440 of the Commission's Rules of Practice, 83 Ill. Adm. Code 761.440, submits its Reply Brief in the instant arbitration proceeding.

I. INTRODUCTION

The parties to this proceeding, Gallatin River Communications L.L.C. d/b/a CenturyLink ("CenturyLink") and NTS Services Corp. ("NTS"), disagree as to the appropriate rates for two unbundled network elements ("UNEs") – in particular, the parties dispute the rates for unbundled two wire loops and for unbundled DS1 loops. (CenturyLink Petition at 10 and 11) CenturyLink offers rates derived from a total element long run incremental ("TELRIC") cost study it has submitted in this proceeding. (CenturyLink Petition at 9) NTS argues that the CenturyLink TELRIC cost study is not accurate and that CenturyLink's offered UNE rates are unsupported. (NTS Petition Response at 3) NTS compares CenturyLink's proposed rates for the two UNEs at issue

with prior rates and with rates in other similar density locations and proposes rates based on these comparisons. (NTS Ex. 1.0 at 9 – 11)

II. ISSUE: There are only two issues before the Commission for arbitration, which are: (1) the appropriate rate for unbundled 2-Wire Loops, and (2) the appropriate rate for unbundled DS1 Loops.

Summary of Staff Position The network modeled by CenturyLink in its TELRIC study for the 2-Wire Loop Rate is inconsistent with the FCC's TELRIC requirements regarding two-wire loops and thus an inadequate basis upon which to set rates. Because the TELRIC model for the 2-Wire Loop Rate is fatally flawed, Staff recommends that the Commission set the 2-Wire Loop Rate at the proxy rate of $17.93. CenturyLink's TELRIC model, however, does not suffer from the same flaws for the DS1 Loop Rate as it does for the 2-Wire Loop Rate. Consequently, Staff recommends that the Commission adopt the CenturyLink proposed DS1 Loop Rate of $121.97.

III. Argument

A. Staff Reply to NTS

Staff supports the NTS legal conclusion that the Commission has the authority to set proxy rates in this proceeding. In all other respects, Staff stands on the positions reflected in testimony and in its Initial Brief.

B. Staff Reply to CenturyLink

1. Introduction

CenturyLink asserts that its cost model determines the "most efficient network architecture." (CenturyLink IB at 4) Staff disagrees. As Staff fully explained in its Initial Brief (Staff IB at 8-10), regarding two-wire loops, the network modeled by CenturyLink in its TELRIC study is capable of providing more services than CenturyLink's current

network is capable of providing and, therefore, is inconsistent with the FCC's TELRIC prescriptions. Staff will first address Centurylinks's legal arguments.

2. CenturyLink's Legal Positions Are Unfounded

CenturyLink justifies its adoption of a 12,000-foot CSA based upon the fact that this design was adopted in other arbitrations. CenturyLink's primary argument is that the FCC had made a determination that a 12,000-foot breakpoint is required. (CenturyLink IB at 10) The determination, however, was made by the Common Carrier Bureau of the FCC acting in the stead of the Virginia State Corporation Commission. In particular, within its determination, the Wireline Competition Bureau stated:

> In this proceeding, the Bureau, acting through authority expressly delegated by the Commission, stands in the stead of the Virginia State Corporation Commission (Virginia Commission) for the limited purpose of this arbitration.[1]

Moreover, the Seventh Circuit has addressed this very issue in deciding an analogous TELRIC methodology issue. In *MPower Communs. Corp. v. Ill. Bell Tel. Co*., 457 F.3d 625, 631 (7th Circuit 2006), the Appellate Court explained that the District Court was wrong in stating that the FCC had "taken a stand" in the Virginia Arbitration Order on the issue of whether TELRIC demanded an assumption of 100% IDLC equipment. The Seventh Circuit explained that:

> One problem with this conclusion is that 'the FCC' has not taken a stand. The Virginia dispute was arbitrated by the FCC's Wireline Competition Bureau; that Bureau's decision was not appealed to, or passed on, by the Commission. No one appointed by the President took any part in the

[1] *In the Matter of the Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration In the Matter of Petition of AT&T Communications of Virginia, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc*., 18.FCC Red 17722, 11241, ¶2, (Rel. August 29, 2003)(Virginia Arbitration Order).

> proceedings. Under the Administrative Procedures Act, federal agencies make binding decisions through rulemaking or adjudication; the Virginia arbitration was neither. Statements by agencies' bureaucracies (or their lawyers) may offer illumination helpful in understanding published rules or decisions. Here, however, there is no decision by the Commission in need of explication. All we have is action by subordinate employees.
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> *MPower Communs. Corp. v. Ill. Bell Tel. Co*., 457 F.3d 625, 631 (7th Cir. 2006)(internal citations omitted)("*MPower*")

Thus, as the Seventh Circuit noted, it may certainly be informative to learn how the Wireline Competition Bureau interprets Federal statutes to make specific arbitration determinations, such determinations themselves, CenturyLink's unsupported assertions aside, are in no way binding on the Commission. Staff agrees with CenturyLink that the Commission's arbitration decisions must meet the requirements of Section 251 and the rules prescribed by the FCC pursuant to Section 251. (CenturyLink IB at 10, fnt. 11) However, a determination made by the Wireline Competition Bureau, acting in stead of the Virginia State Corporation Commission, in an arbitration involving different carriers in a different state in different market situations and with different network configurations are not "binding on the Commission." A 12,000-foot breakpoint is neither required by Section 251 nor required by the FCC's rules implementing Section 251. The Wireline Competition Bureau, not the FCC, was addressing an issue before it in an arbitration which had unique facts. A 12,000-foot breakpoint may be appropriate and consistent with such statutes and rules under some circumstances, but certainly not in all circumstances and certainly not in the circumstances here.

Again, the Seventh Circuit directly addressed this issue in the *MPower* case. In the underlying arbitration, here at the Commission, the Commission "concluded that an efficient provider would use about 88% universal digital loop carriers (UDLCs) and 12% integrated digital loop carriers (IDLCs). Although IDLCs are less expensive per

customer, they are also more difficult to use in providing UNEs to CLECs." *MPower,* 457 F.3d at 631. The District Court, however, disagreed with the Commission's conclusion based upon the Wireline Competition Bureau's finding in the Virginia Arbitration case that used 100% IDLC. In upholding the ICC's conclusion that 100% IDLC was not always the best mix for an efficient provider, the Seventh Circuit disagreed with the District Court explaining that:

> A second problem is that, even if the Wireline Competition Bureau were speaking for the Commission, it did not establish a legal rule that 100% IDLC is the only setup that satisfies TELRIC. Both the Commission and the D.C. Circuit have stressed that there can be multiple ways to approximate that benchmark--which, since it is hypothetical and prospective, has no tried-and-true or mandatory elements. That's what we said three years ago. The Bureau used 100% IDLC in the Virginia proceeding, but to say (or demonstrate) that 'X is a lawful way to proceed' is not to establish that 'X is the only way to proceed.' Confusing sufficient with necessary conditions is a logical blunder. Nothing in the Virginia Arbitration Order implies that 100% IDLC is indispensable in all efforts to approximate a TELRIC price.
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> *Id.*, at 631-32 (internal citations omitted).

Like the percentage of IDLCs used in TELRIC modeled network, there is nothing in the Virginia Arbitration Order that determines that a 12,000-foot breakpoint is the *only* way to proceed. In other words, nothing in the Virginia Arbitration Order implies that a 12,000-foot breakpoint "is indispensible in all efforts to approximate a TELRIC price." *Id*.

CenturyLink further cites an arbitration decision made by the Commission with respect to Illinois Bell Telephone as justification for its 12,000-foot breakpoint. (CenturyLink IB at 10) Ironically, CenturyLink itself later argues that application of arbitrated rates that came from the very same AT&T arbitration are "completely unreasonable," because AT&T Illinois is not similarly situated to CenturyLink.

(CenturyLink IB at 13) CenturyLink's arguments that "AT&T's territory is primarily urban and is on average about ten times as dense as CenturyLink's service territory" underscore the fact that arbitration determinations are not one size fits all. Finally, under CenturyLink's unfounded legal theory, the Commission would have no other option than to set rates based on a TELRIC model that is fatally flawed, which inherently means that the Commission would be setting unjust and unreasonable rates.

3. CenturyLink Inappropriately Limits Its TELRIC Model

CenturyLink next argues that "[t]he only attribute of the existing network that is to be included in a TELRIC cost is the location of the incumbent LEC's existing wire centers." (CenturyLink IB at 11) Staff disagrees. The CenturyLink UNEs modeled should mirror the functionality contained in UNEs that CenturyLink is actually going to provide to any carrier that leases such UNEs. Without this constraint, the functionality included in the UNE that will be provided might bear no relationship to the UNE that is being modeled for cost purposes. Accepting CenturyLink's arguments, nothing prevents the Company from setting UNE costs based upon a network capable of providing ubiquitous broadband, video, or other services that cannot be provided using the capabilities contained in the actual UNEs being provided.

This does not, however, imply that CenturyLink must use the same technology or configuration contained in its current network. Instead, it must use the least cost technology and configuration necessary to provide the functionality that will actually be provided by CenturyLink. As the FCC has described its prescribed cost estimation methodology, "TELRIC equates the current market value of the existing network of an incumbent telecommunications provider with the cost the incumbent LEC would incur

today if it built a local network that could provide all the services its current network provides, to meet reasonably foreseeable demand, using the least-cost, most efficient technology currently available."[2]

CenturyLink also argues that adopting an 18,000-foot CSA design only marginally decreases the 2-wire loop UNE cost estimate in Band 1. (CenturyLink IB at 11-12) Putting aside the magnitude of the cost change, the fact that there is a lower cost technological configuration that allows CenturyLink to provide 2-wire loop UNEs with the functionality contained in CenturyLink's actual 2-wire loop UNE proves that CenturyLink's model is not based upon the least cost, most efficient technology currently available. Second, while moving to an 18,000-foot CSA design yields only some reductions in cost, the 18,000-foot CSA is still a design that models ubiquitous broadband functionality and therefore more functionality than is in CenturyLink's current 2-wire loops. (Staff IB at 9) While, it is unclear to Staff how much greater the impact of modeling the actual functionality of CenturyLink's would be on cost reductions, the fact that CenturyLink has sought subsidies from the FCC for deployment of such a network suggests the difference is not insignificant.[3]

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[2] Federal Communications Commission, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, and 98-147, released August 21, 2003 at paragraph 670 (emphasis added).

[3] *See* the July 29 filing by the ABC Plan Coalition in Connect America Fund, WC Docket No. 10-90; A National Broadband Plan for Our Future, GN Docket No. 09-51; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135; High-Cost Universal Service Support, WC Docket No. 05-337; Developing an Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Federal-State Joint Board on Universal Service, CC Docket No. 96-45; Lifeline and Link-Up, WC Docket No. 03-109; Universal Service Contribution Methodology, WC Docket No. 06-122; Numbering Resource Optimization, CC Docket No. 99-200; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98; Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68; IP-Enabled Services, WC Docket No. 04-36.

For all the reasons articulated above, the Commission should find that the cost information submitted by CenturyLink is not an adequate basis upon which to set rates and reject CenturyLink's arguments to the contrary.

IV. Conclusion

WHEREFORE, for all the foregoing reasons, Staff respectfully requests that the ALJ accept Staff's recommendations in their entirety as set forth herein.

Respectfully submitted,

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