



STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 99-03- APPLICATION OF VERIZON NEW YORK, INC. -
21RE01 PROPOSED TARIFF FOR UNBUNDLED NETWORK
ELEMENT, REBUNDLED SERVICE - TRO

August 25, 2004

By the following Commissioners:

Jack R. Goldberg
John W. Betkoski, III
Linda J. Kelly

DECISION

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DECISION

I. INTRODUCTION

A. SUMMARY

In this Decision, the Department of Public Utility Control (Department) determines that the General Statutes of Connecticut §§16-247a and 16-247b provide it with the requisite authority to unbundle Verizon New York, Inc. (Verizon or Company) telecommunications network. Accordingly, the Department directs Verizon to continue to provision mass market switching, DS-1 and DS-3 loops for individual customers, DS-1 and DS-3 dedicated inter-office transport and dark fiber transport at their current rates until such time as Federal Communications Commission (FCC) rules and regulations have been finalized and are available for use or until such time as an interconnection agreement has been filed and approved by the Department or a binding commercial agreement has been negotiated between Verizon and respective competitive local exchange carriers (CLEC).

B. BACKGROUND OF THE PROCEEDING

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit (DC Circuit Court) issued its opinion in United States Telecom Ass'n v FCC, Nos. 00-1012 (consol.), 2004 WL 374262 (DC Cir., March 2, 2004) (USTA II). In that opinion, the court vacated the FCC recently-promulgated rules and regulations by which the FCC delegated a portion of its decision-making authority to state commissions. Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003); Errata, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338 et al., FCC 03-227, 18 FCC Rcd 19020 (Sep. 17, 2003) (Triennial Review Order or TRO). Subsequent to that ruling, the DC Circuit Court extended until June 15, 2004, the date by which its March 2, 2004 opinion would become effective. These rules and regulations serve as the authority for many of the Department Decisions issued in order to promote competition relative to the obligations of incumbent local exchange carriers to provide access to certain elements of their local network.

In the absence of clear rules and regulations, the FCC has recommended that interested parties engage in commercial negotiation to reconstitute their business relationships without reliance upon the rules and regulations vacated by the DC Circuit Court. It is unclear to the Department whether such agreements will be negotiated in the limited time period remaining before the court's order takes effect on June 15, 2004. The consequences of not reaching a commercial agreement between the various parties are unknown but are of general concern to the Department and the public. Accordingly, the Department must take the necessary action to ensure the interests of the public are not adversely affected by any irreconcilable difference that may ensue from these negotiations.

Therefore, pursuant to §§4-181a and 16-9 of the General Statutes of Connecticut, the Department reopened the instant docket on June 2, 2004, for the limited purpose of determining whether the Department has sufficient authority to require the continued provisioning of the specific network elements at the same terms and conditions as those required by the May 17, 2000 Decision in the above noted docket. Pending the issuance of this Decision, Verizon was directed in the June 2, 2004 Decision, to continue provisioning the network elements at their currently total service long run incremental cost-based prices until it is otherwise directed by the Department.

In the June 2, 2004 Decision reopening this proceeding, the Department sought Written Comments from interested parties concerning the continued offering of specific network elements by Verizon at their current rates and charges as previously adopted by the Department. The Department received Comments and Reply Comments from AT&T Communications of New England, Inc. (AT&T); MCI, Inc. (MCI); and Verizon.

II. POSITIONS OF PARTIES

A. AT&T

AT&T states that Verizon attempts to convince the Department that USTA II has rendered it powerless to act to protect consumers and competition in Connecticut. AT&T maintains that the Department has full authority to continue its existing standstill orders to maintain the status quo in Connecticut pending resolution as to the extent to which Verizon should be required to continue providing all existing UNEs as a matter of either federal or Connecticut law and policy, or as a contractual obligation under existing interconnection agreements. AT&T claims that in the TRO, the FCC made a nationwide finding that CLEC market entry would be impaired without access to certain unbundled network elements (UNE), created rules for determining localized unbundling obligations, and asked state commissions to apply those rules in conducting localized inquiries to diagnose the health of competition in local telecommunications markets within each state. According to AT&T, USTA II invalidated certain FCC unbundling rules, and remanded the matter to the FCC for further action. It did not make any finding that CLECs are not impaired without access to unbundled mass market switching, dedicated transport, or any other UNE or UNE combination. AT&T also claims that in reaching its decision, the DC Circuit Court did not make a determination as to what elements should be unbundled as a matter of federal law and policy. AT&T further claims that USTA II did not place any limitation on the additional authority of state commissions to regulate intrastate competition as a matter of state law and policy.

In the opinion of AT&T, Verizon misses the mark in terms of what USTA II holds and what role states are permitted to play under the 1996 Telecommunications Act (Telcom Act). AT&T claims that Verizon is wrong relative to the grant of authority that the Connecticut legislature gave to the Department, which was confirmed by the Connecticut Supreme Court. Therefore, AT&T suggests that the Department not be persuaded that it cannot act to promote competition and protect consumers, and should continue its order requiring the provisioning of current UNEs at current rates until the Department or the FCC orders otherwise. AT&T asserts that Verizon will not be harmed

by such an order, but without it, consumers and competition in Connecticut will suffer greatly.¹

AT&T notes that state commissions have exercised their authority to preserve the status quo by issuing standstill orders requiring Verizon and other incumbent local exchange rates (ILEC) to continue to provide UNEs and UNE combinations at current total element long run incremental cost (TELRIC) rates. Since then several additional standstill orders have been issued by other state commissions. They include the states of Indiana, Washington and the District of Columbia. AT&T claims that these orders provide further tangible confirmation that the Department has full authority to continue its existing standstill orders.²

Additionally, AT&T argues that the Department may impose unbundling requirements under Connecticut law in addition to any unbundling requirements that exist under federal law. AT&T notes that the Supreme Court of Connecticut has confirmed that the Department's exercise of its broad authority under Connecticut law to impose unbundling obligations in addition to those already imposed by federal law is consistent with and not preempted by federal law. AT&T cites to that court's order In Southern New England Telephone Company v. Department of Public Utility Control (SNET Order),³ wherein the Southern New England Telephone Company (Telco) challenged a Department Decision requiring forward-looking rates for enhanced provisioning services that the Telco contended did not qualify as UNEs under the Telecom Act. In light of the SNET Order, AT&T maintains that the Department has broad authority under Connecticut law to require Verizon to continue to provide existing UNEs and UNE combinations.

Furthermore, AT&T argues that Connecticut General Statutes (Conn. Gen. Stat.) § 16-247a explicitly provides the Department with the power to specify and require the local incumbent to provide to its competitors, on an unbundled basis, specific network functionalities. Second, Conn. Gen. Stat. § 16-247b requires the Department to implement the unbundling of Verizon's "network, services and functions that are used to provide telecommunications services" when such unbundling is in the public interest, provided such unbundling is consistent with federal law and is technically feasible. Third, under that statute, the Department is authorized and required to set the rates for such unbundled network elements "based on their respective forward looking long-run incremental costs . . . consistent with the provisions of 47 USC 252(d)," (i.e., consistent with the pricing standard for UNEs established by the FCC under federal law). Therefore, AT&T concludes that it is clear that the Connecticut Legislature has authorized the Department to require Verizon to provide unbundled network elements at forward-looking, TELRIC rates.

AT&T disagrees with the Verizon assertion that the Department may only use its state law authority to reaffirm the federal unbundling regime, rather than to build upon it. According to AT&T, the Connecticut Supreme Court has already rejected that argument

¹ AT&T Reply Comments, pp. 1 and 2.

² Id., pp. 3 and 4.

³ Southern New England Telephone Company v. Department of Public Utility Control, 261 Conn. 1, 803 A.2d 879 (2002).

because Congress did not intend to preempt the field, and carved out a specific role for states to play in regulating local telecommunications under federal law. The Connecticut Supreme Court specifically held that the Department may act under its state law authority to require an ILEC to offer an unbundled element at prices based on forward-looking economic cost, even where the ILEC is not required to do so by the FCC's rules. It also found that the Department's exercise of such jurisdiction and authority pursuant to state law was consistent with the federal scheme. AT&T concludes that Department retains full authority under Connecticut law to keep the existing standstill orders in effect.⁴

AT&T also disagrees with the Verizon argument that the Department's standstill order impairs the Company's rights under existing interconnection agreements to stop providing certain UNEs. Verizon's assertion of such rights is hotly disputed. Pending resolution of that dispute, AT&T suggests that the Department has full authority to maintain its existing standstill order in order to preserve the status quo.⁵

Moreover, AT&T disagrees with Verizon in that its UNE obligations imposed by its previous merger agreement are no longer valid. According to AT&T, the Department can require Verizon to adhere to the UNE commitments provided for in those agreements. AT&T states that the TRO could not, as a matter of law, have amended Verizon's obligations. AT&T states that the TRO does not apply, nor does it even reference, merger conditions agreed to by Verizon, which are obligations distinct from and independent of the FCC's UNE rules (and contract change of law requirements). AT&T suggests that, at the very least, an attempt to eliminate such obligations would require some explicit statement in the TRO. The TRO makes no reference to independent merger conditions, and thus cannot be read to do away with them.

AT&T further argues that the TRO has not disturbed or displaced Verizon's unbundling obligations nor has USTA II. AT&T further disagrees with the Verizon argument that the Bell Atlantic/GTE Merger Agreement has sunset because there has been a final and non-appealable order of the UNE remand and line sharing proceedings. AT&T claims that the problem with that argument is that Verizon ignores the fact that the Company is required to provide UNEs or some combinations of those elements. In the opinion of AT&T, Verizon has not shown that its merger obligations to provision UNEs have terminated. Therefore, AT&T concludes that the Department should require Verizon to adhere to its merger commitment UNE obligations.⁶

Lastly, AT&T argues that the Department's practice of permitting Verizon to mirror its New York UNE rates provides no basis for allowing the Company to disrupt the market by refusing unilaterally to continue offering certain UNEs at TELRIC rates. AT&T contends that the Department's past decisions to permit Verizon to mirror its New York UNE rates in no way deprive the Department of jurisdiction to prevent market disruption by keeping in place the same standstill order for Verizon as it has for the Telco. AT&T also contends that Department's prior reliance on findings relevant to Verizon's offerings in New York mean that the Company is entitled to expect as a given

⁴ AT&T Reply Comments, pp. 4-9.

⁵ *Id.*, p. 9.

⁶ *Id.*, pp. 10-15.

that its terms and rates of service approved in New York will always be accepted as appropriate for the particular needs of Connecticut's telecommunications market. Therefore, AT&T urges the Department to continue its existing standstill orders requiring Verizon to continue to provide all existing UNEs and UNE combinations at current prices.⁷

B. MCI

MCI contends that the Department may require unbundling beyond what is required as long as those unbundling requirements are consistent with Telcom Act or the FCC's rules.⁸ Specifically, MCI contends that the Department possesses the authority to order the continuing provisioning of mass market switching, dedicated transport, and high-capacity loops by making a determination that CLECs would be impaired without unbundled access to the elements.⁹ MCI also argues that Verizon may not unilaterally discontinue UNE provisioning; rather, the Company must abide by the change of law provisions included in its ICAs.

Similar to AT&T, MCI asserts that USTA II is limited to the FCC's rules and findings of impairment regarding mass market switching, dedicated transport, and high capacity loops. MCI also asserts that USTA II does not decide the issue of whether impairment actually exists in certain areas without access to the UNEs. Additionally, MCI claims that USTA II does not support the proposition that ILECs are now relieved of their duty to offer the UNEs.

MCI further states that Telcom Act remains valid statutory law, as USTA II did not find fault with the statute itself. Consequently, MCI concludes that § 251(d)(3) of Telcom Act, preserves state regulation, remains intact and in force.¹⁰ Accordingly, MCI requests that the Department order Verizon to provide UNEs consistent with Telcom Act.¹¹

C. VERIZON

Verizon maintains that the Department's attempts to re-impose unbundling requirements are unnecessary, contrary to law, and inconsistent with sound public policy. Verizon recommends that the Department should withdraw its June 2, 2004 Decision and decline to enter any further standstill order at the conclusion of this proceeding. According to Verizon, there is no need for the Department to consider the imposition of a standstill requirement because the Company mirrors in Connecticut the availability, terms, and prices of its network element offerings in New York. The rationale supporting the mirroring rule is as cogent now as it was in 2000, and nothing about the current situation warrants any change in the Department's commitment to the rule. The New York Public Service Commission (NYPSC) is actively investigating the very issues raised by the Department in this docket. If Verizon is required by the

⁷ *Id.*, pp. 15 and 16.

⁸ MCI Comments, p. 2.

⁹ *Id.*

¹⁰ MCI Reply Comments, p. 3.

¹¹ MCI Comments, p. 4.

NYPSC, in accordance with law to maintain its current unbundled offerings, it commits to do so in Connecticut. Nevertheless, if the NYPSC permits Verizon to withdraw or modify certain offerings THE Company requests that the Department permit Verizon to do so as well.

Verizon maintains that there is no emergency that would justify the pre-emptive action that the Department contemplates in the June 2, 2004 Decision. Verizon commits to not disconnect any services to CLEC end-users when the USTA II mandate issues, but will continue providing service either pursuant to commercially-negotiated agreements or, in the absence of an agreement, move CLEC service to resale rates (or for high capacity transport and loops, to special access rates) after an ample notice period. Specifically, Verizon plans to give CLECs 90 days' notice after issuance of the mandate, which is longer than many of its interconnection agreements require.¹² During that 90-day notice period, Verizon commits to continuing to provide the de-certified UNEs at TELRIC rates and to accept new orders for those UNEs. Verizon also commits to continue offering its Wholesale Advantage commercial offering and will continue to negotiate terms with CLECs during this period, and thereafter.

Additionally, Verizon argues that the requirements that the Department seeks to re-impose in this proceeding have either been found to be contrary to federal law and policy by the FCC itself, or have been found unlawful by the federal courts. The Department does not have legal authority to require the continued provision of network elements on an unbundled basis at TELRIC prices, where such requirements have been explicitly eliminated under federal law. According to Verizon, the Department exceeded its authority in purporting to impose such requirements on an interim basis, before any legal or factual analysis had been conducted in this proceeding. Verizon also states that the various arguments that CLECs have raised in an attempt to find some viable source of state-commission authority for a so-called "standstill" order, are uniformly without merit. Moreover, such an order would abrogate Verizon's rights under most if not all of its interconnection agreements to discontinue the provision of certain network elements on an unbundled basis either immediately or upon specified notice where a court or agency declares that unbundling is not required by applicable law.

Verizon asserts that sound public policy points in precisely the opposite direction from the course now being considered by the Department. Thus, even if the Department had legal authority to re-impose the unbundling requirements that have been eliminated by the FCC or vacated by the DC Circuit Court, it should decline to do so as a matter of regulatory discretion.

In the opinion of Verizon, the CLECs' claims that the continued availability of UNEs at TELRIC rates is necessary to sustain competition are wholly untrue. There is no crisis to be averted, and thus no need for a standstill order. Verizon contends that it has already offered reasonable end-to-end wholesale services as alternatives to the unbundled offerings that will be eliminated by the USTA II mandate, and has actively participated in negotiations looking towards post-USTA II commercial agreements. Moreover, CLECs can earn substantial margins by buying at TELRIC and selling at

¹² If any CLEC believes that its interconnection agreement requires more, Verizon's notice will ask the CLEC to notify Verizon in a timely manner.

retail, and modest increases in the rates that Verizon charges for the use of its network will not put them out of business. The Company therefore concludes that what the issue here is whether Verizon will be unlawfully required to continue subsidizing its CLEC competitors by providing certain network elements at unrealistically low TELRIC-based rates. Verizon also concludes that the unbundling regime that the Department seeks to lock into place is unsatisfactory. Verizon recommends that the Department embrace the FCC and federal court initiatives that minimize the number of current unbundling regulations.¹³

Relative to the Company's offering of UNE-P, Verizon notes that the Department approved UNE and UNE combination tariffs that were based on Verizon's New York tariffs, and directed Verizon to "mirror" any subsequent changes in its New York network element offerings. The mirroring rule has a number of benefits for Verizon, the CLECs, and the Department. It avoids unnecessary work for Verizon and the Department while ensuring that any changes in Verizon's offerings will receive the thorough review characteristic of the New York Commission. It promotes efficiency by enabling Verizon to operate its Connecticut and New York networks and Operations Support Systems in an efficient and consistent manner. Further, the competitors that use Verizon's UNEs are familiar with and have long operated under its New York tariff, and that tariff has supported the development of extensive local exchange competition in New York.

The Company claims that its New York UNE tariff has been in effect for two and a half years and has undergone extensive regulatory scrutiny by the NYPSC and the CLECs in New York. The Company also claims that the application of the mirroring rule is sensible since the NYPSC is now actively reviewing the very issues raised by this Docket. In the New York proceeding, Verizon agreed to provide certain forms of UNE-P for a four-year period in the two "major cities" density zones in New York State, and for a six-year period in the remainder of the state. Moreover, a complete end-to-end element platform would continue to be available for an additional two-year transitional period, at rates that would ramp up from their current TELRIC-based levels to levels based on resale rates. Also pending before the New York Commission are two arbitrations concerning proposed interconnection-agreement amendments that would implement the provisions of the TRO and provide a framework for implementing future declarations of law by the FCC and the federal courts (e.g., Case 04-C-0314). Therefore, since the NYPSC is already reviewing these issues, Verizon concludes that the Department's concerns will be fully addressed if it adheres to its practice of allowing the NYPSC's decisions on UNE availability and pricing to be implemented in Connecticut as well. No further action by the Department is required at this time.¹⁴

Verizon argues that even if the Department believes that it is necessary to address the issues raised by this docket independently, rather than relying on the mirroring rule, there is no need to enter a standstill order, whether interim or long-term for the purposes of preserving CLECs' access to Verizon's network. Verizon is prepared to offer CLECs alternatives to "de-certified" UNEs and to provide ample notice periods and otherwise to facilitate the CLECs' transition to those wholesale service alternatives. According to Verizon, these commitments are intended to ensure a

¹³ Verizon Comments, pp. 2-6.

¹⁴ *Id.*, pp. 9-12.

smooth transition to post-USTA-II serving arrangements, provided that CLECs act in good faith. CLECs will be provided with ample notice, will not need to disconnect and re-connect their circuits, and will be able to negotiate successor arrangements on a commercially reasonable basis. All existing contractual rights will be scrupulously respected.¹⁵

Nevertheless, Verizon maintains that the Department has no legal authority to put in place “standstill” requirements that would negate explicit rulings of the FCC and the federal Court of Appeals. The Company asserts that this applies with particular force to the interim component of the Department’s Decision, which put in place an immediately-effective standstill that will remain in effect at least until the Department issues a final Decision in this docket. That interim order was put in place without any opportunity for the submission of evidence, legal arguments, or comments by the parties. According to Verizon, the fact that the parties are now being given an opportunity to submit comments cannot save the validity of the interim order, nor can it override the clear substantive law that would prevent the Department from issuing a further standstill order in its final Decision.¹⁶

Additionally, Verizon argues that the Telcom Act expressly delegates final unbundling determinations to the FCC alone. Therefore, §251(d)(1) of the Telcom Act requires the Commission to establish regulations to implement the requirements of this section, including the unbundling requirements of §251(c)(3). Section 251(d)(2) sets forth the impairment and necessity standards that the Commission shall consider in determining what network elements should be made available under § 251(c)(3). Verizon states that in adopting the Telcom Act, Congress created a federal regime for unbundling, to be guided by federal-agency regulations, and took the regulation of local telecommunications away from the states. USTA II also sharpens this point because while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities, absent affirmative evidence of authority to do so. Therefore, for this reason, the DC Circuit Court found the FCC’s subdelegation of its unbundling authority to state commissions to be unlawful. Consequently, Verizon concludes that only the FCC may make unbundling determinations under §§ 251(c)(3) and 251(d)(2) of the Telcom Act. Verizon notes that CLECs have relied in other states on various provisions of the Telcom Act, such as 47 U.S.C. §§ 251(d)(3) and 261(b) and (c), that supposedly preserve state commission authority to impose independent state unbundling requirements that go beyond those imposed under federal law. Their reliance on these provisions is misplaced, because each is qualified by the clear limitation that state action cannot impair the federal regulatory scheme. Thus, § 251(d)(3) precludes states from taking action that would “substantially prevent implementation of this section and the purposes of this part,” § 261(b) precludes regulations that are inconsistent with the provisions of this part, and § 261(c) precludes state requirements that are inconsistent with this part or the FCC’s regulations to implement this part. Verizon maintains that the FCC interpreted this language, in the context of unbundling requirements, in the TRO, and made it clear that the residual

¹⁵ *Id.*, pp. 13-15.

¹⁶ *Id.*, p. 16.

state power cannot be applied in a way that would require unbundling where it has been determined that unbundling should not be required under federal law.

Verizon asserts that a decision by the FCC not to require an ILEC to unbundle a particular element essentially reflects a balance struck by the agency between the costs and the benefits of unbundling that element. Any state rule that struck a different balance would conflict with federal law, thereby warranting preemption. Verizon also asserts that, the FCC has made clear that the limitations on federal unbundling obligations embody pre-emptive federal law and policy just as the obligations themselves do. According to the Company, the FCC recognized that too much unbundling could be as destructive of federal policies as too little unbundling, if not even more destructive.

Therefore, Verizon concludes that the FCC's interpretation of the Telcom Act precludes the imposition of state unbundling requirements in areas such as packet switching, Enterprise switching, line sharing, and OCn transport, where the FCC has rejected broad unbundling claims based on countervailing federal policies. The same conclusion also follows for unbundling obligations that have been eliminated by USTA II rather than by the FCC. Verizon claims that CLECs have argued that the FCC's discussion of pre-emption issues in the TRO is inapplicable to such obligations, on the ground that the DC Circuit Court's vacatur would leave a "vacuum," so that there would be no declared federal unbundling mandate with which a state requirement could conflict. Thus, Verizon recommends that should be rejected by the Department.

The reality is that the FCC imposed a limited set of unbundling requirements in the TRO. State action to undo those limitations would clearly have been precluded under the TRO. Subsequently, USTA II vacated many of the FCC requirements on the grounds that the FCC had gone too far, and had developed an unbundling scheme that was contrary to federal law and policy. Thus, it expanded the limitations on the FCC-imposed unbundling requirements. The Company also states that it would be incorrect to treat USTA II as a mere procedural ruling that eliminated some FCC regulations and did nothing else. In the opinion of Verizon, both the USTA I and USTA II decisions clearly articulate specific federal policies that militate against an overextension of the § 251(c)(3) unbundling obligation. Thus, the decisions should be regarded as adding to, not subtracting from, the unbundling limitations imposed by the FCC itself. Lastly, Verizon notes that one of the DC Circuit Court's rationales for vacating the switching and transport provisions of the TRO was the improper delegation of authority to state commissions.¹⁷

Nevertheless, Verizon contends that even if the above limitations on state authority did not apply, the Department cannot impose standstill orders or other orders that conflict with federal declarations that unbundling of certain network elements may no longer be required, in the absence of any impairment findings. Both the Supreme Court and the DC Circuit Court have made it clear that a valid finding of impairment by the FCC under § 251(d)(2) is an absolute prerequisite to any mandatory unbundling requirement. In the opinion of Verizon, in striking down the FCC's second set of unbundling rules there must be a valid finding of impairment under § 251(d)(2) before

¹⁷ *Id.*, pp. 17-21.

an incumbent LEC may be ordered to provide access to a network element at UNE rates. Moreover, that finding must be made by the FCC.¹⁸

Verizon commits to complying with all of the requirements of its interconnection agreements with CLECs. Those agreements include a wide variety of provisions for implementing regulatory or judicial decisions such as the TRO or USTA II. Verizon claims that most, if not all, of those agreements specifically give the Company the right to discontinue the provision of particular network elements where a court or agency declares that the provision of such elements on an unbundled basis is not required by applicable law. According to Verizon, the Department has no authority to modify the terms of interconnection agreements that it has already approved. Under §252(a) of the Telcom Act, an interconnection agreement, once approved, is “binding.” The Department thus has no authority to override the terms of any interconnection agreement by requiring Verizon to continue to provide unbundled access to network elements in circumstances where the parties’ interconnection agreements authorize Verizon to stop providing such access.¹⁹

Verizon contends that CLECs have argued in a number of states that a commitment made by the Company’s predecessors in 2000, in connection with their proposed merger,²⁰ requires Verizon to continue offering FCC-defined UNEs at TELRIC rates notwithstanding the USTA II decision. Verizon disagrees because any merger-related obligation to continue providing UNEs at TELRIC rates sunset with the denial of certiorari in the USTA I case, which took place on March 24, 2003, or, at the latest, three years after the merger closing date (i.e., on June 30, 2003). Verizon states that to the extent that there is any ambiguity about those merger conditions the interpretational question is in any event a federal one, and not an issue for the Department to resolve. Enforcement of the merger conditions is the responsibility of the FCC, not the Department. If the FCC believes that Verizon’s merger conditions preclude the Company from discontinuing or modifying its unbundled offerings, it has had ample ability to assert and enforce that position.²¹

Moreover, Verizon contends that the CLECs have argued that state commissions can in effect, reverse the USTA II actions concerning mass-market local switching and high-capacity dedicated transport and loops by setting TELRIC-based prices for network elements that the Company is required to provide under §271 of the Telcom Act. This approach, in the opinion of Verizon is unavailing for at least three independent reasons. For example, the FCC has made it clear that TELRIC pricing requirements do not apply to §271 services. The Company claims that the CLECs have argued that nothing in federal law precludes the price from being set at TELRIC, under some just and reasonable authority. However, in the opinion of Verizon, this ignores the fact that it would be an impermissible evasion of the federal unbundling limitations for a state commission to use §271 to create a §251 unbundled offering. Additionally, Verizon

¹⁸ *Id.*, pp. 21-23.

¹⁹ *Id.*, pp. 23 and 24.

²⁰ The merger of Bell Atlantic and GTE was approved by the FCC in Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control, Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000), and closed on June 30, 2000.

²¹ Verizon Comments, pp. 24-32.

claims that there are a number of unresolved issues as to the terms and conditions governing § 271 offerings. There is no basis for the CLECs' contentions that such offerings will be identical to the corresponding UNEs with respect to such issues as the scope of the offerings or combination requirements.

Further, the terms of §271 offerings, including the pricing and other issues are governed by federal law. Nothing in the Telcom Act gives the Department any power to interpret or enforce §271 requirements; only the FCC may issue regulations on these matters. Thus, in ¶664 of the TRO, the FCC stated that whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the FCC will undertake in the context of a Bell Operating Company's (BOC) application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). Accordingly, to the extent that Verizon is required to offer certain services pursuant to § 271 that it is not required to offer pursuant to § 251(c)(3), it will do so through federal tariffs or through commercial agreements.²²

Verizon argues that even if the Department had the authority to require the Company to continue offering certain network elements on an unbundled basis, it would also have the discretion not to impose such requirements, and indeed should refrain from doing so on public policy grounds for a number of reasons. First, in purporting to give the CLECs, for whatever period of time, unbundling rights that are not only not required by law, but that are directly contrary to law, the Department would also be pre-empting negotiations between Verizon and the CLECs that are aimed at hammering out terms and conditions for the continued use of the Company's network, by CLECs that desire to use it, at commercially reasonable rates.

Verizon asserts that the Department's requirement to continue extending current unbundling requirements would destroy competition in telecommunications because it is clear that the harm it is causing now far outweighs its purported benefits. UNE-P was never intended to be permanent; yet the CLECs are doing everything in their power to make it so. Verizon states that reform is desperately needed to eliminate an unjust subsidy and the unfair competition that results; to create the means and the incentive for further network investment by the Company; and to promote network investment by the CLECs. According to the Company, the Department, like other state commissions, faces a continuing stream of foreground CLEC muttering about the supposed defects of ILEC UNE offerings.

Verizon concludes that prolonging the availability of TELRIC-priced UNE-P may help individual CLECs, since it will enable them to continue building their business plans on a risk-free subsidy that does not require, does not incent, and hinders, investment in competitive network facilities. However, a subsidy of any sort can hardly be said to advance true competition. TELRIC-priced UNE-P imposes a triple whammy on consumers: it impoverishes Verizon, depriving it of the ability to make new network investments; it punishes rather than encourages such new investments; and it deprives CLECs of the incentive to make new network investments of their own. These impacts,

²² *Id.*, pp. 32 and 33.

in an era of rapidly evolving technology and the wholesale movement of consumers to intermodal alternatives, will eliminate, not preserve, the benefits of true competition.²³

IV. DEPARTMENT ANALYSIS

A. INTRODUCTION

Verizon argues that it no longer has any obligation whatsoever to provision UNEs or to use the change of law provisions in its ICAs to discontinue said provisioning.²⁴ Despite these statements, Verizon has pledged to continue offering UNE service until November 11, 2004, and to give 90 days notice prior to any changes in price or service after that time.²⁵

The Department has reviewed the Comments and Reply Comments and believes that there are at least two available means by which it may lawfully order Verizon to continue providing UNEs at their current rates.²⁶ The first option, proposed by Verizon, offers for a limited time period, a voluntary agreement with the Department. The second, not universally accepted by the parties, is afforded by Connecticut statute provides the Department with certain authority notwithstanding the actions of USTA II.

While Verizon has indicated that it will not revise its UNE rates through November 11, 2004, the Department is not confident that accepting that offer will adequately protect consumer rights or preserve the responsibilities that have been previously placed upon all service providers by the Department. Consequently, it is necessary to fully explore both options before adopting a specific course of action in this matter.²⁷

B. THE OFFERING OF UNEs THROUGH NOVEMBER 11, 2004

Verizon will offer mass market UNE-P, DS-1 and DS-3 loops for individual customers, and DS-1 and DS-3 dedicated transport between Company central offices, and to not raise the prices for these UNEs through November 11, 2004. Verizon will also adhere to its existing ICAs including any applicable change-of-law provisions.²⁸ Consequently, it is not unreasonable for the Department to assume that Verizon would accept a “standstill” order from the Department as long as that order expires on November 11, 2004. The Department however, lacks confidence that a new regulatory framework can be implemented by the FCC before the six-month window provided by Verizon’s offer expires; and past experience with FCC rulemaking efforts tends to

²³ *Id.*, pp. 33-35.

²⁴ Verizon Reply Comments at 2.

²⁵ Attachment to Verizon Reply Comments.

²⁶ The Department will not address the other means including merger agreements by which it has the continuing authority to issue a standstill order. The decision not to address these means is in no way a waiver of their validity or an acknowledgment of their lack thereof in this proceeding, but would be redundant to this discussion.

²⁷ The Department has also issued this Decision in Docket 99-03-21RE01, Application of Verizon New York Inc. – Proposed Tariff for Unbundled Network Elements – Rebundled Service, TRQ, detailing Verizon New York Inc.’s (Verizon) responsibilities under federal and state law.

²⁸ Telco Reply Comments, p. 2.

support the Department's concern in this area. It is for these reasons that the Department cannot accept Verizon's proposal without amending that proposition. In so doing, the Department will exercise its rights provided for pursuant to Connecticut Statute and offers the following discussion for the benefit of the parties.

C. DEPARTMENT AUTHORITY TO ORDER UNBUNDLING

Verizon argues that the Department is prohibited from instituting its own unbundling restrictions because they are preempted by federal law. The Department disagrees with that argument. At the root of this issue is the difference between an affirmative finding of non-impairment and the absence of any finding. The situation the Department faces in the aftermath of USTA II is that there is no longer any finding regarding impairment which the Department must apply, or with any rules it may promulgate from which they could conflict. That requirement has been vacated by USTA II. Additionally, it is illogical that the only way two regulatory schemes may not conflict is if they are identical, which suggests that they must be identical so as to not conflict. In this matter the lack of an approved regulatory standard cannot be presented as a basis to argue that a proposed standard presents a conflict. Therefore, the Department rejects this assertion as specious and unfounded.

1. State Authority

By Public Act 94-83,²⁹ the Connecticut General Assembly conveyed broad powers to the Department in Conn. Gen. Stat. §§ 16-247a and 16-247b to provide greater access to Verizon's telecommunications network. It is significant that the Legislature directed the Department to pursue that goal two years before implementation of the Telcom Act. In pursuit of that goal, the Department undertook unbundling initiatives prior to any federal initiative and subsequently sought to make certain its requirements were consistent with those later prescribed by the FCC. Therefore, the Department's requirement that Verizon's network be unbundled has been made pursuant to the provisions set forth in Public Act 94-83. The actions of the DC Circuit Court to vacate the federal rules does not diminish the authority of the Legislature or the requirements it has imposed on telecommunications service providers by state statute.

While Conn. Gen. Stat. § 16-247a outlines the general goals the Legislature sought to achieve in its efforts to realign the state's telecommunications markets, Conn. Gen. Stat. § 16-247b expressly empowers the Department to unbundle telephone company network, services and functions which the Department has determined are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations.³⁰ While the existence of this provision is beyond question, the effect of it in light of the Telcom Act, the TRO, and USTA II has been disputed amongst the parties to this proceeding and is addressed below.

²⁹ An Act Implementing the Recommendations of the Telecommunications Task Force.

³⁰ Conn. Gen. Stat. § 16-247b.

2. Preservation of State Access Regulations

Verizon argues that the Department possesses no authority to order additional unbundling to that prescribed by the Telcom Act. The Department disagrees and is of the opinion that Verizon has misconstrued the intent of this proceeding. First, the Department is not seeking to use the Telcom Act as an enabling statute for its actions in this proceeding. Rather, the Department is exercising its authority provided by the General Assembly prior to enactment of the federal statute as the legal foundation for its actions. Because this authority preceded the Telcom Act, the Department is not dependent upon any federal directive that might be affected by USTA II.

Additionally, the Department's authority is consistent with the Telcom Act's requirement that its actions not conflict with any current federal requirements. 47 U.S.C. § 251(d)(3) specifically states that in prescribing and enforcing its regulations to implement § 251, the FCC shall not preclude the enforcement of any regulation, order, or policy of a state commission that:

- (A) establishes access and interconnection obligations of local exchange carriers;
- (B) is consistent with the requirements of this section; and
- (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.³¹

Therefore, the Department concludes that the actions it takes in this proceeding are consistent with those provisions.

3. Triennial Review Order

The TRO does not conflict with the general views of the Department. Specifically, the Department does not seek in this proceeding to unbundle any element for which the FCC has "found no impairment," nor has it "otherwise declined to require [its] unbundling on a national basis."³²

Therefore, the Department concludes that any assertion made by Verizon that the Department cannot impose unbundling requirements on the Company lacks relevance and is hereby rejected. In the opinion of the Department, Verizon's proposed options are predicated upon an affirmative finding or some other action on the part of the FCC. In each instance, the option requires some showing by the FCC that it has considered unbundling these network elements and has expressly elected not to do so for federal policy reasons. If such a finding were to be made, any state regulation that conflicts with the FCC's finding would certainly fail. However, because the FCC must make a finding of impairment to unbundle certain elements, the fact that there has been no discussion or decision regarding a network element does not equate to a nationwide finding of non-impairment for purposes of § 251(d)(3), just as it does not equate to a

³¹ 47 U.S.C. § 251(d)(3).

³² TRO, ¶ 195.

nationwide finding of impairment. Rather, by virtue of § 251(d)(3), the status of any network element is left undecided and left to the states if they are authorized under state law to determine the element's status.

It is precisely that scenario which is presented to the Department in this proceeding. To date, the FCC lacks an affirmative conclusion that competitive carriers are not impaired in the marketplace without unbundled access to those network elements at issue in the TRO. Similarly, a general finding by the FCC that carriers are impaired without unbundled access has been vacated by the DC Circuit Court,³³ which has not been replaced or supplemented as of this date.

In the opinion of the Department, any interpretation other than one which requires an affirmative finding of impairment or non-impairment in regard to the provisioning of each element would render § 251(d)(3) meaningless. If the FCC's lack of determination equated to a finding of non-impairment for the purposes of preemption, then state commissions can produce no independent regulations which would be "consistent with" and "not substantially prevent the implementation of" the Telcom Act.³⁴ Instead, for the purposes of preemption, the provisioning of every network element would have a finding of non-impairment attached to it until the FCC determined otherwise. In that context, a state regulatory body would be unable to promulgate regulations regarding that network element because it would not be consistent with the Telcom Act.³⁵

Additionally, when employing Verizon's reasoning, the state would be left solely to regulate network elements that the FCC has previously determined meet an impairment standard. Furthermore, any state regulations would have to replicate federal regulations regarding the same elements and not provide for any requirement beyond that contained in the federal regulations. Finally, any state regulations that might be interpreted as more lenient would present a direct conflict with the more stringent federal regulations. In that environment, state regulations could only exist if they mirrored federal regulations. If such a regulatory framework were the intent of Congress, it would have provided for that requirement in § 251(d)(3). The Department further believes that if this were Congress' intention, it would not have created the state authority "carve-out" exception in that section.

It is a well-settled principle that a statute's provisions may not be read so as to render superfluous any other provision in the same enactment.³⁶ Reading § 251(d)(3) in the manner Verizon suggests would result in preemption which the FCC specifically denied in the TRO, stating "[w]e do not agree . . . that the states are preempted from regulating in this area as a matter of law."³⁷ Instead, a balance must be struck whereby

³³ USTA II, p. 569.

³⁴ 47 U.S.C. 251(d)(3).

³⁵ This rationale does not conflict with the Supreme Court's determination in AT&T Corp. v. Iowa Utils. Bd., because it does not impact the FCC's determinations of impairment under the Telcom Act or the baseline presumptions. Rather, this rationale merely addresses whether such an affirmative determination has been made for the purposes of preemption.

³⁶ Stewart v. Tunxis Service Center, 237 Conn. 71, 79 (1996).

³⁷ TRO, ¶ 192.

the states possess the authority to regulate the field in a manner which respects the federal role and its supremacy. Consequently, § 251(d)(3) allows for the unbundling of mass market switching, DS-1 and DS-3 loops for individual customers, and DS-1 and DS-3 dedicated transport. Furthermore, based on USTA II, the TRO does not stand in the way of the Department's endeavor.

4. USTA II

Verizon asserts that USTA II relieves the Company of its obligations to offer UNEs prescribed by the TRO. Verizon also argues that USTA II preempts the Department from ordering the continued provisioning of those UNEs because the DC Circuit Court determined that the Telcom Act grants the FCC, not the state commissions, the authority to determine which network elements an ILEC must unbundle. Again, USTA II found the FCC's delegation of authority to the states to be unlawful.³⁸ Once the joint implementation process proposed by the FCC was eliminated, the DC Circuit Court had no choice but to find the resulting nationwide finding of impairment to be too broad to survive.³⁹ Each of these factors and their effects are discussed in detail below.

First, USTA II turned on the FCC's delegation of authority to the states.⁴⁰ The DC Circuit Court vacated the FCC's rules because the FCC unlawfully delegated its decision-making authority under the § 251(d)(2) to the states.⁴¹ That is, the FCC delegated its decision-making authority to an outside agency rather than to a subordinate. Because the Telcom Act did not contemplate the delegation of authority provided for by the FCC in the TRO, it is clear from USTA II that any responsibility to make determinations of impairment under § 251(d)(2) remains with the FCC and cannot be assigned to the states without additional legislative actions.

Verizon argues that this is proof of the DC Circuit Court's interpretation that the Telcom Act should be implemented by the FCC and not the states. While the Department is in agreement with Verizon with this aspect, it must be pointed out that it has never been, nor is it now, the intention of the Department to implement the requirements contained in the Telcom Act as a self-appointed FCC twin. Rather, the Department will protect the interests of Connecticut's consumers by using all of the authority properly delegated to it by the Legislature. Such authority is specifically recognized and protected in § 251(d)(3). The Department will exercise that authority in a manner consistent with federal law. Therefore, because the Department is not attempting to use the authority vacated by the DC Circuit Court, that portion of USTA II has no bearing on the Department's efforts in this proceeding.

³⁸ USTA II, p. 568.

³⁹ *Id.*

⁴⁰ *Id.*, stating the general conferral of regulatory authority does not empower an agency to subdelegate to outside parties.

⁴¹ *Id.*, stating "[w]e therefore vacate, as an unlawful subdelegation of the Commission's § 251(d)(2) responsibilities, those portions of the Order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements."

Additionally, because there is no expressed authority from Congress for states to implement the finding of impairment on a localized basis, the court in USTA II vacated the FCC's national finding of impairment.⁴² It is important to note that this was not a determination by the court regarding the actual state of requesting carrier impairment. Rather, it was a rebuke by the judiciary of the broad impact of the FCC's determination that it did not properly consider the "more nuanced concept of impairment."⁴³

USTA II does not supplant the FCC's right to make a determination of impairment where evidence clearly supports such a conclusion. Rather, that decision simply states that the FCC has not adequately made such a determination itself. The consequence of that situation is that the FCC lacks any finding upon which to predicate its instructions and/or its requirements. The absence of any explicit finding on the part of the FCC leaves the area open to state regulation.

Second, the DC Circuit Court specifically declined to address the issue of preemption as presented by paragraph 195 of the TRO relative to state unbundling regulations because such a claim of unlawful preemption was not ripe.⁴⁴ Therefore, this issue was not addressed and § 251(d)(3) was left intact and in force.

Third, USTA II only denied state commissions authority that it concluded was unlawfully delegated to them by the FCC. The court rendered no comment on the role of state commissions in the implementation of the Telcom Act that might be construed to further restrict the rights and responsibilities of state commissions such as the Department.

Fourth, USTA II did not suggest that evidence available to the FCC showed that impairment in the local exchange market was not problematic and unbundled network access was not necessary. Had USTA II made such a finding, the Department would have been required to refrain from any further regulatory action. The lack of such a declaration reinforces the Department's belief that an impairment finding remains to be determined and that the Department must take the necessary actions to protect the interests of the public during the interim.

Therefore, in light of the above, the Department finds that USTA II does not present a barrier to its efforts to foster competition and protect Connecticut consumers. Accordingly, the Department concludes that its actions in this proceeding do not conflict with any prescribed federal requirements.

⁴² *Id.*, p. 569.

⁴³ *Id.*, p. 569, quoting United States Telecom. Ass'n v. Fed. Communications Comm'n, 290 F.3d 415, 426 (D.C. Cir. 2002).

⁴⁴ *Id.*, p. 594.

5. SNET Order

The SNET Order specifically detailed the Department's authority to require unbundled access to networks, services, and functions beyond that which is required under federal law, as long as the Department unbundling Decisions comport with Conn. Gen. Stat. §16-247b by demonstrating that such UNEs are in the public interest, consistent with federal law, and technically feasible of being tariffed and offered separately or in combinations.⁴⁵

In the opinion of the Department, the SNET Order remains valid law and further supports the Department's position that it has been empowered by Conn. Gen. Stat. §16-247(b) to impose unbundling restrictions so long as both state and federal law are observed. All requirements imposed on the Department by both Congress and the Connecticut General Assembly have been fully satisfied.

Therefore, in light of the above, the Department hereby determines that Conn. Gen. Stat. §§16-247a and 16-247b provide it with the requisite authority to require the unbundling of the Telco's telecommunications network. Accordingly, the Telco should continue provisioning mass market switching, DS-1 and DS-3 loops for individual customers, DS-1 and DS-3 dedicated inter-office transport and dark fiber transport at their current rates. The Company should continue provisioning these UNEs until such time as the FCC's rules and regulations have been finalized and are available for use or until such time as an interconnection agreement has been filed and approved by the Department or a binding commercial agreement has been negotiated between the Telco and respective CLEC.

V. FINDINGS OF FACT

1. Verizon will offer mass market UNE-P, DS-1 and DS-3 loops for individual customers, and DS-1 and DS-3 dedicated transport between Company central offices, and will not raise the prices for these UNEs through the end of calendar year 2004.
2. Verizon will adhere to its existing ICAs including any applicable change-of-law provisions.
3. The Connecticut Legislature directed the Department to unbundled Verizon's telecommunications network two years before implementation of the Telcom Act.
4. The Department undertook unbundling initiatives prior to any federal initiative and subsequently sought to make certain its requirements were consistent with those later prescribed by the FCC.
5. The Department's requirement that Verizon's network be unbundled has been made pursuant to the provisions set forth in Conn. Gen. Stat. §16-247b.

⁴⁵ SNET Order, p.36.

6. Conn. Gen. Stat. § 16-247b empowers the Department to unbundle telephone company network, services and functions which the Department has determined are in the public interest, are consistent with federal law and are technically feasible of being tariffed and offered separately or in combinations.
7. The Department is exercising its authority provided by the Legislature prior to enactment of the federal statute as the legal foundation for its actions.
8. The Department is not requiring in this proceeding the unbundling of any element for which the FCC has found no impairment or declined to require its unbundling on a national basis.
9. By virtue of § 251(d)(3) of the Telcom Act, the status of any network element is left undecided and left to the states if they are authorized under state law to determine the element's status.
10. USTA II turned on the FCC's delegation of authority to the states.
11. The DC Circuit Court vacated the FCC's rules because the FCC unlawfully delegated to the states its decision-making authority under the § 251(d)(2).
12. The Department will protect the interests of Connecticut's consumers by using all of the authority properly delegated to it by the Legislature. Such authority is specifically recognized and protected in § 251(d)(3).
13. The Department will exercise its authority in a manner which is consistent with federal law.
14. The DC Circuit Court declined to address the issue of preemption as presented the TRO relative to state unbundling regulations because such a claim of unlawful preemption was not ripe and § 251(d)(3) was left intact and in force.
15. USTA II only denied state commissions authority that it concluded was unlawfully delegated to them by the FCC.
16. USTA II did not suggest that evidence available to the FCC showed that impairment in the local exchange market was not problematic and unbundled network access was not necessary.
17. USTA II does not present a barrier to its efforts to foster competition and protect Connecticut consumers.
18. The SNET Order specifically detailed the Department's authority to require unbundled access to networks, services, and functions beyond that which is required under federal law, as long as the Department unbundling Decisions comport with Conn. Gen. Stat. §16-247b by demonstrating that such UNEs are in the public interest, consistent with federal law, and technically feasible of being tariffed and offered separately or in combinations.

19. The SNET Order remains valid law and further supports the Department's position that it has been empowered by Conn. Gen. Stat. §16-247(b) to impose unbundling restrictions so long as both state and federal law are observed.

VI. CONCLUSION AND ORDERS

A. CONCLUSION

Conn. Gen. Stat. §§16-247a and 16-247b provide the Department with the authority to require the unbundling of Verizon's telecommunications network. That authority was granted two years prior to the implementation of the Telcom Act. Therefore, the Department is not dependent upon any federal directive that might be affected by USTA II. This authority is also consistent with the Telcom Act. Accordingly the claim made by Verizon that the Department cannot impose unbundling requirements on the Company lacks relevance and is hereby rejected. Consequently, the Department concludes that its actions in this proceeding do not conflict with any prescribed federal requirements.

B. ORDERS

1. Verizon shall continue to provision mass market switching, DS-1 and DS-3 loops for individual customers, DS-1 and DS-3 dedicated inter-office transport and dark fiber transport at their current rates.
2. Verizon shall not discontinue or alter these services or their respective rates and charges until such time as FCC rules and regulations have been finalized and are available for use or until such time as an ICA has been filed and approved by the Department or binding commercial agreement has been negotiated between Verizon and a CLEC and the Department has been notified as such.
3. Verizon shall also continue to abide by its existing ICAs until such time as the Department orders otherwise.

**DOCKET NO. 99-03- APPLICATION OF VERIZON NEW YORK, INC. -
21RE01 PROPOSED TARIFF FOR UNBUNDLED NETWORK
ELEMENT, REBUNDLED SERVICE - TRO**

This Decision is adopted by the following Commissioners:

Jack R. Goldberg

John W. Betkoski, III

Linda J. Kelly

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

August 26, 2004

Date