Decision 03-08-074 August 21, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish A Framework for Network Architecture Development of Dominant Carrier Networks.	Rulemaking 93-04-003 (Filed April 7, 1993)
Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks.	Investigation 93-04-002 (Filed April 7, 1993) (Verizon UNE Phase)

ORDER DENYING REHEARING OF DECISION 03-03-033

In this order, we deny the application for rehearing of Decision (D.) 03-03-033 filed by Verizon California Inc. ("Verizon"). In D.03-03-033 (hereinafter, the "Interim UNE Decision"), we adopted interim rates for certain unbundled network elements ("UNEs") that Verizon sells to competitive local exchange carriers ("CLECs").

I. BACKGROUND

In 1994, the California Legislature enacted Public Utilities Code section 709.5 (Stats. 1994, Ch. 1260, Sec. 3.), which opened all telecommunications markets under the Commission's jurisdiction to competition. The Commission was ordered to ensure that "whatever additional rules and regulations that may be necessary to achieve fair local exchange competition shall be in place no later than January 1, 1997." (Pub. Util. Code, § 709.5, subd. (c).)

This included establishing rates for the basic network functions ("BNFs")[1] of Verizon and Pacific Bell Telephone Company ("Pacific").

In D.95-12-016, the Commission adopted the Total Service Long Run Incremental Cost ("TSLRIC") cost methodology for setting BNF rates.**2** (See, Re *Open Access to Bottleneck Services and a Framework for Network Architecture Development of Dominant Carrier Networks* [D.95-12-016] (1995) 62 Cal.P.U.C.2d 575.) Pursuant to that decision, Verizon submitted cost studies using this methodology in December 1995 and January 1996. In D.96-08-021, the Commission found that Verizon's studies did not adequately conform to the TSLRIC principles adopted in D.95-12-016 and could "not reasonably be used to set prices for BNFs and services on [Verizon's] system." (*Re Open Access to Bottleneck Services and a Framework for Network Architecture Development of Dominant Carrier Networks* [D.96-08-021] (1996) 67 Cal.P.U.C.2d 221, 229.) However, in order to meet the requirement to have unbundled BNF rates in place by January 1, 1997, the Commission modified Verizon's cost studies, using certain aspects of Pacific's cost studies, to approximate conformance with the requirements of D.95-12-016. (*Id*. at pp. 258-263.) Verizon was ordered to file updated cost studies within one year. (*Id.* at p. 269.) In January 1997, the Commission issued D.97-01-022, which approved an interconnection agreement between AT&T and Verizon. The prices adopted in that decision reflected modifications to Verizon's cost studies as ordered in D.96-08-021 and would be in effect until new cost studies were submitted and permanent prices were set. The prices adopted in D.97-01-022 are referred to in this order as the "temporary rates."

In August 1996, the Federal Communications Commission ("FCC") issued rules implementing the local competition provisions of the 1996

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[1] BNFs are now more commonly known as UNEs.

[2] TSLRIC is a forward-looking cost methodology which calculates cost based on the services supported.

Telecommunications Act ("1996 Act"). As part of those rules, states were directed to use the Total Element Long Run Incremental Cost ("TELRIC") methodology to determine the costs for UNEs.[3] (See, 47 C.F.R. § 51.505.) In September 1997, Verizon filed a new cost study, based on the TELRIC methodology, to comply with D.96-08-021. However, due to a legal challenge of the TELRIC methodology and competing telecommunications priorities at the Commission, establishment of permanent UNE rates for Verizon was put on hold. Consequently, the temporary rates adopted in D.97-01-022 have not been updated and continue to serve as Verizon's rates for providing UNEs to CLECs.

On May 31, 2002, in response to a motion filed by Tri-M Communications Inc., the Assigned Commissioner and ALJ issued a ruling to resume the proceeding to set permanent UNE rates for Verizon. The ruling also noted that relief in the form of interim UNE prices was warranted, given the lengthy delay in the proceeding. (See *Assigned Commissioner's and ALJ's Ruling Granting Motion of Tri-M Communications Inc. (TMC) to Intervene, Granting Motion of TMC in Part, and Scheduling Prehearing Conference*, May 31, 2002, at pp. 4-5.) Three proposals were submitted. Verizon proposed that the interim rates be based on the temporary rates, adjusted by a trend analysis conducted by Verizon in Florida. (See *Comments of Verizon California Inc. in Support of Interim Pricing Proposals*, July 30, 2000.) AT&T Communications of California and WorldCom Inc. ("ATT/WorldCom") proposed that the interim rates be based on Pacific's interim rates set in D.02-05-042, adjusted by the FCC's Synthesis Model to reflect cost differences between the two companies. (See *Proposal of AT&T Communications of California Inc. and WorldCom, Inc for Interim Unbundled Network Element Rates*, July 30, 2002.) ATT/WorldCom and TURN (collectively, "Joint Commenters") subsequently submitted another proposal in

[3] Like TSLRIC, TELRIC is a forward-looking cost methodology. However, it calculates costs based on the network elements they derive from.

response to an ALJ Ruling soliciting further comments. This proposal proposed interim rates based on UNE rates set for Verizon in New Jersey, adjusted by the FCC's Synthesis Model to reflect cost differences between New Jersey and California. (See *Response of AT&T Communications of California Inc, WorldCom, Inc and The Utility Reform Network to Assigned Commissioner and Administrative Law Judge's Ruling Reversing Limitation on Interim Pricing Proposals and Soliciting Further Comments*, September 9, 2002.)

On March 13, 2003, the Commission issued the Interim UNE Decision. The Interim UNE Decision adopted the Joint Commenters' proposal for setting interim rates for a subset of Verizon's UNEs.[4] These interim rates would be subject to adjustment at the time permanent UNE rates were established. (D.03-03-033, at p. 72, OP 1.)

On April 16, 2003, Verizon filed a timely application for rehearing of the Interim UNE Decision and raises the following challenges: (1) the Commission's decision to base Verizon's interim UNE rates on New Jersey UNE rates is not supported by the evidentiary record and is arbitrary and capricious; (2) the Interim UNE Decision violates Verizon's due process rights; and (3) the rates established in the Interim UNE Decision are below Verizon's costs in California and confiscatory.[5]

AT&T Communications of California, MCI, the Office of Ratepayer Advocates and The Utility Reform Network, collectively, filed a timely response opposing Verizon's rehearing application. Covad Communications Company ("Covad") filed its response opposing the rehearing application one day late. Covad filed a motion to accept its late-filed response. This decision grants Covad's motion.

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[4] The UNEs covered in the decision are: 2-wire loops, 4-wire loops, 2-wire port, Centrex Port, DS-1 port, end office switching per minute of use, tandem switching per minute of use and switch features.

[5] On June 17, 2003, Verizon filed a federal complaint of this decision against the Commissioners in their official capacities. The Commission filed its answer on August 4, 2003.

II. DISCUSSION

A. Interim Rates

The local competition provisions of the 1996 Act require incumbent local exchange carriers ("ILECs") to provide UNEs to CLECs "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." (47 U.S.C.S. § 251(c)(3).) State commissions are directed to determine these "just and reasonable" rates. (47 U.S.C.S. § 252(d).) The FCC's regulations implementing the 1996 Act specify that these rates shall be based on the UNE's "forward-looking economic cost" using the TELRIC methodology. (47 C.F.R. § 51.505(b) (2003).) Under TELRIC, the state commission is to consider the "existing location of the incumbent LEC's wire centers." (*Id.*)

Verizon maintains that, pursuant to section 252(d)(1) of the 1996 Act and the FCC's regulations, interim UNE rates must reflect its costs in California. (Verizon App., at p. 3.) Thus, it believes that the Interim UNE Decision errs by adopting interim rates based on New Jersey's UNE rates. (Verizon App., at p. 3.) Verizon is mistaken. While Section 252(d)(1) and the FCC regulations specify the requirements for determining the "just and reasonable" rates for UNEs, they do not state that these requirements must be used to establish interim rates pending the determination of just and reasonable rates. Indeed, a state commission could

> . . . impos[e] requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

(47 U.S.C.S. § 261(c).) The setting of UNE prices are primarily intrastate in nature. Thus, to promote local competition, we could reasonably adopt interim

UNE rates in a manner that is consistent with the 1996 Act and the FCC's regulations.

In this instance, the Interim UNE Decision is consistent with the 1996 Act and the FCC's regulations. The rates that serve as the basis for the interim rates are TELRIC-based, as required under the 1996 Act and the FCC's regulations. (See 47 U.S.C.S. § 252(d)(1); 47 C.F.R. § 51.505(b)(2).) To establish the interim rates, the Commission used Verizon's New Jersey UNE rates. The Commission increased these rates using the FCC's Synthesis Model, to account for "regional and network differences between New Jersey and California." (D.03-03-033, at p. 31.) Thus, the Commission considered Verizon's costs in California. (See 47 C.F.R. § 51.505(b)(1).) A 22% markup was then added to these adjusted rates. This would clearly be considered a "reasonable profit" under 47 U.S.C.S. § 252(d)(1)(B). We further note that while the depreciation and cost of capital rates used by the New Jersey Board of Public Utilities differ from those previously used by the Commission, we did not believe these differences were of concern, since the depreciation and cost of capital rates will be reconsidered and may be adjusted when permanent UNE rates are established. (D.03-03-033, at p. 38.) Thus, we considered these factors, as required under 47 C.F.R. §§ 51.505(b)(2) and (3). Accordingly, adoption of interim rates, based on a methodology that uses forward-looking rates and is adjusted to approximate Verizon's costs in California, is consistent with the 1996 Act and the FCC's regulations and lawful.

Verizon also asserts that the same standards must apply to setting interim and permanent rates because it "would not be made whole by any true-up mechanism." (Verizon App. at p. 7.) Verizon's grounds for this assertion are unsubstantiated and speculative. For example, it argues that it will lose customers to CLECs as a result of "artificially low UNE rates." (Verizon App., at p. 7.) However, Verizon has failed to submit any persuasive evidence that the interim

UNE rates are "artificially low." Indeed, the interim rates adopted in the Interim UNE Decision fall within the range of rates adopted for other Verizon jurisdictions. The mere fact that they are lower than the rates proposed by Verizon does not mean they are "artificially low."[6] Moreover, as noted in the Interim UNE Decision, where the Synthesis Model would have resulted in an adjusted California rate that was lower than the New Jersey rate, the higher New Jersey rate was used. (D.03-03-033, at p. 36.) Thus, the Interim UNE Decision was "conservative" in setting the interim UNE rates. (D.03-03-033, at p. 36.) Lacking any persuasie evidence, we reject Verizon's assertion that the rates are "artificially low" as unfounded.

Verizon's concerns regarding the time involved in developing permanent rates and Verizon's ability to collect any true-up amounts from the CLECs do not identify legal error. (Verizon App., at pp. 7-8.) These concerns would apply any time interim rates are established. Both the federal courts and the California Supreme Court have upheld the use of interim rates subject to true-up. (See, e.g., *GTE South, Inc. v. Morrison* (4th Cir. 1999) 199 F.3d 733, 748; *TURN v. CPUC* (1988) 44 Cal.3d 870, 878-879.) As discussed above, our adoption of Joint Commenters' proposal satisfies the requirements of both the 1996 Act and the FCC's regulations. Verizon provides no persuasive reason why the same methodology must be used to set both interim and permanent rates. Accordingly, we find no error in using Joint Commenters' proposal to set the interim UNE rates.

Verizon further argues that there was no need to set interim rates at all, as "it is perfectly appropriate under TELRIC to have a lag time between the setting of rates and the updating of those rates." (Verizon App., at pp. 4-5.) Verizon's argument appears to suggest that the temporary rates set under D.97-01-022 are TELRIC rates. However, as has been clearly shown in the record and

[6] Moreover, as noted in the Interim UNE Decision, "it is difficult to understand how any interim rates set herein could be 'below TELRIC' when the Commission has never actually completed a forward-looking (i.e., TELRIC) analysis of Verizon's costs." (D.03-03-033, at p. 43.)

discussed extensively in the Interim UNE Decision, those rates were based on TSLRIC and found by the Commission to be insufficiently forward-looking. Thus, even if a time lag is appropriate under TELRIC, it is not necessarily appropriate in this instance. Moreover, we have not yet established Verizon's TELRIC rates in California, so we are not "updating" those rates in this proceeding. Consequently, Verizon's argument is without merit.

B. Evidentiary Support

Verizon asserts that the Interim UNE Decision is not supported by the evidentiary record because the cost studies used to establish the New Jersey UNE rates are not part of the administrative record of this proceeding and there is no determination that the New Jersey UNE rates are TELRIC-compliant. (Verizon App., at p. 4.) Accordingly, it maintains that the Commission acted in an arbitrary and capricious manner in adopting Joint Commenters' proposal for setting interim UNE rates. Verizon's claims of legal error lack merit.

As an initial matter, it is important to note that, contrary to Verizon's assertions, we did not "adopt" the New Jersey UNE rates as the interim UNE rates for Verizon in California. Rather, we considered three proposals for setting interim UNE rates and adopted the proposal that we believed would best serve as a proxy for Verizon's UNE rates in California. Thus, the issue is not whether the New Jersey UNE rates are supported by the evidentiary record, but rather whether the *proposal* we adopted is supported by the evidentiary record.

A review shows that the evidentiary record supports the adoption of Joint Commenters' proposal. Joint Commenters proposed basing the interim UNE rates on the New Jersey UNE rates in its September 9 filing to the Commission. (See *Response of AT&T Communications of California, Inc., WorldCom, Inc. and the Utility Reform Network to Assigned Commissioner and Administrative Law Judge's Ruling Reversing Limitation on Interim Pricing Proposals and Soliciting Further Comments ("Joint Commenters Sept. 9 Filing")*, September 9, 2002.)

That filing explains the rationale for using the New Jersey UNE rates. (Joint Commenters September 9 Filing, at pp. 3-5; see also Murray Decl., Sept. 9, 2002.) Evidence in the record also explains why Joint Commenters believed that the New Jersey rates should be adjusted using the FCC's Synthesis Model. (Murray Decl., Sept. 9, 2002, ¶¶ 4-8; see also, Murray Decl., July 30, 2002, ¶¶ 9-14 (discussion of Synthesis Model).) The Interim UNE Decision extensively discusses the proposals submitted by the parties, comments on the proposals, and the Commission's consideration of the evidence. (D.03-03-033, at pp. 12-33.) The decision also explains why we declined to adopt Verizon's proposal (D.03-03-033, at p. 30) and chose to adopt Joint Commenters' proposal (D.03-03-033, at pp. 30-33). Thus, our decision to adopt Joint Commenters' proposal is supported by the evidentiary record and we did not act in an arbitrary and capricious manner.

Verizon also faults the Commission for using the UNE rates adopted by the New Jersey Board of Public Utilities without confirming that they are TELRIC-compliant for California and without addressing the "clear TELRIC errors" identified by Verizon. (Verizon App., at pp. 4, 8.) This argument is without merit. First, the issue is not whether the New Jersey UNE rates are TELRIC-compliant for California, but rather whether the *proposal*, which uses these rates as a starting basis, results in rates that would serve as reasonable proxies for Verizon's UNE rates in California on an interim basis. As discussed above, we evaluated each of the proposals. Evaluation of the proposals necessarily included an examination of the underlying rates. Thus, we did examine the New Jersey rates to determine whether they would be a reasonable basis for setting Verizon's interim UNE rates in California.

Second, the alleged "errors" identified by Verizon were raised in its comments to the draft decision, after the evidentiary record had been closed. In the Interim UNE Decision, we concluded that this was "new information" and thus

precluded under Rule 77.3 of the Commission's Rules of Practice and Procedure.[7] (See, D.03-03-033, at p. 42.) Verizon disputes this conclusion. It maintains that it had noted in the record that "the New Jersey rates reflected numerous TELRIC errors" and that its comments to the draft decision "simply pointed out these legal errors in more detail." (Verizon App., at p. 11, fn. 23.) This assertion is not supported by the record. Verizon's comments simply note that it would be "inappropriate" for the Commission to use New Jersey's UNE rates and cite as an example the different depreciation rates used by the New Jersey Board of Public Utilities and the Commission. (*Response of Verizon California Inc to the CLEC's August 20, 2002 and September 9, 2002 Comments*, September 20, 2002, at pp. 20-21.) Only after the evidentiary record had been closed did Verizon raise its list of alleged "legal errors" which included cost of capital, IDLC assumptions, fill factors and switching inputs. (O*pening Comments of Verizon California Inc on the November 14, 2002 Draft Decision of ALJ Duda Establishing Interim Rates and Adopting Nonrecurring Prices*, December 4, 2002, at pp. 7-11.) Verizon improperly characterized this material as a "more detailed" discussion of its previous comments regarding inconsistent depreciation rates, when in fact it was raising new information. Verizon had an opportunity to include its arguments regarding the New Jersey UNE rates in the evidentiary record, but failed to do so. In accordance with our rules, we correctly declined to address Verizon's new arguments in the Interim UNE Decision.[8]

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[7] Pursuant to Rule 77.3 of the Commission's Rules of Practice and Procedure:

> Comments shall focus on factual, legal or technical errors in the proposed decision and in citing such errors shall make specific references to the record. . . New factual information, untested by cross-examination, shall not be included in comments and shall not be relied on as the basis for assertions made in post publication comments.

[8] Moreover, we will not "second-guess the work of another state commission and essentially 'rehear' how New Jersey set UNE rates. . . . Verizon can always seek remedy by appealing the order of the New Jersey board if it believes that errors were made there." (D.03-03-033, at p. 43.)

Verizon further argues that the Commission is precluded from adopting a methodology which deviates from its prior rulings on cost of capital and depreciation inputs. (Verizon App., at p. 13, citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.* (1983) 463 U.S. 29, 43.) We disagree. *Motor Vehicle Mfrs.* concerned an agency's change in its interpretation of an existing statute. In this instance, we are establishing UNE rates in accordance with the 1996 Act, something we have not yet done. Thus, we are not acting contrary to our prior rulings. Accordingly, *Motor Vehicle Mfrs.* is not applicable.[9] Furthermore, we specifically note that as part of setting permanent UNE rates, certain inputs, such as depreciation, will be reconsidered. (D.03-03-033, at p. 38, fn. 38.) Thus, any reliance by Verizon on the cost of capital or depreciation rates adopted in other rulings in this instance is misplaced. For these reasons, we were not precluded from adopting Joint Commenters' proposal.

C. Due Process

Verizon contends that the Interim UNE Decision violates its due process rights by holding Verizon to "an evidentiary standard that was impossible to meet in this expedited proceeding." (Verizon App., at p. 4.) To the contrary, Verizon was held to the same evidentiary standard as other parties in this proceeding

Verizon first alleges that the Commission essentially required it to start from "scratch" rather than use the temporary rates as a basis for its proposal. (Verizon App., at p. 6.) It maintains that the Commission cannot reject its proposal without specifically find that the temporary rates are inconsistent with TELRIC. (Verizon App., at p. 6.) However, we rejected Verizon's proposal because the proposal was based on prices using the TSLRIC methodology and that

[9] The US. Supreme Court also considered the applicability of *Motor Vehicle Mfrs.* to the FCC's actions under the 1996 Act. (See *Verizon Communications Inc. v. FCC* (2002) 535 U.S. 467.) In that decision, the Court noted that while that case concerned "an agency's 'changing its course' as to the interpretation of a statute, . . . [the cases in *Verizon Communications*] involve the FCC's first interpretation of a new statute. . ." (*Id*. at 503.) Thus, the Court held that *Motor Vehicle Mfrs.* was inapplicable.

had been found to not "reasonably reflect forward-looking economic principles." (D.03-03-033, at p. 22.) Findings of Fact 1 and 2 specifically address this issue. (See D.03-03-033, at p. 65.) Verizon had an opportunity to explain why it considered its rates to be sufficiently forward-looking. However, the Commission did not agree with Verizon's explanation. (See D.03-03-033, at p. 23.) The fact that we were not persuaded by Verizon's arguments does not mean that we held Verizon to a different evidentiary standard.

Verizon next argues that the Commission rejected its argument that the switching costs for Florida and California were similar because there was "no data showing these similarities actually exist." (Verizon App., at p. 6.) A proper reading of that section, however, shows that we were simply noting the difference between SBC/Ameritech's cost studies in Illinois, which were used by the Commission to set interim rates for Pacific, and Verizon's proposals in this proceeding. As the Interim UNE Decision points out, the record in Pacific's UNE proceeding revealed similarities between California and Illinois with regard to switching characteristics, whereas the record in Verizon's UNE proceeding did not show similarities between California and Florida. (D.03-03-033, at p. 27.) Verizon has disregarded this discussion and instead concluded that it was held to a different evidentiary standard than other parties in this proceeding.

Verizon's final argument that it was held to a higher evidentiary standard than the other parties concerns our rejection of Verizon's loop proposal. Verizon appears to believe its proposal was rejected because there was insufficient analysis. (Verizon App., at p. 6.) However, the Interim UNE Decision clearly notes: "On the whole, we find Verizon's loop discount proposal unreasonable and contradictory because it proposes one methodology for its switching rates and an entirely differently methodology for loop rates." (D.03-03-033, at p. 28.) Moreover, the Commission's statement cited in Verizon's rehearing application addressed Verizon's assertion that its loop rates should actually *increase*, even

though Verizon had proposed that the rate be *decreased*. Thus, we properly criticized this assertion and noted that Verizon "will need to provide further support for its analysis in the permanent phase of this proceeding" if it intends to continue to assert that loop rates should be *increased*. (D.03-03-033, at p. 29.) Again, simply because we did not find Verizon's proposal persuasive does not mean that we applied a different standard to Verizon.

In sum, Verizon was held to the same evidentiary standard as all parties in this interim phase. Therefore, there was no denial of Verizon's due process rights in this regard.

Additionally, Verizon was provided adequate notice and a meaningful opportunity to be heard before the interim UNE prices were adopted. There were four rounds of comments, and Verizon participated in each round. Furthermore, upon Verizon's motion, we also took official notice of the UNE rates adopted by the Florida PSC. (See D.03-03-033, at p. 26.) Thus, Verizon was afforded sufficient due process.

Finally, Verizon contends that the Commission may not use a generic proceeding to establish interim UNE rates. (Verizon App., at p. 8.) Verizon cites as authority the Ninth Circuit's recent decision in *Pacific Bell v. Pac-West Telecom, Inc.* (9th Cir. 2003) 325 F.3d 1114. *Pacific Bell* concerned the Commission's determination that the reciprocal compensation provisions in interconnection agreements also applied to calls made to Internet service providers ("ISPs"). The Commission issued this generic order, which applied to all existing applicable interconnection agreements, pursuant to its "legislative authority." (*Id.* at p. 1121.) The FCC, however, had determined that ISP traffic was interstate for jurisdictional purposes. As the Ninth Circuit determined that the 1996 Telecommunications Act "did not grant state regulatory commissions additional general rule-making authority over interstate traffic", it held that the Commission could not use "its general rule-making authority under California law to issue a

generic order applicable to all interconnection agreements between telecommunications companies in California." (*Id*. at p. 1127.)

Our action in this instance, however, is distinguishable. The Interim UNE Decision concerns setting UNE prices, which are primarily intrastate in nature. Therefore, unlike ISP traffic, we are not issuing a rule regarding interstate traffic. Additionally, the 1996 Act specifically authorizes state commissions to set UNE prices. (See, 47. U.S.C.S. § 252(c); *AT&T Corp. v. Iowa Utilities Bd.* (1999) 525 U.S. 366, 384.) As such, we are not relying on our "general rule-making authority under California law" but a specific grant of authority under the 1996 Act to establish the interim UNE rates. Finally, *Pacific Bell* concerned generic orders as part of a general rulemaking proceeding. However, nothing in the decision can be read as precluding us from using a generic rulemaking proceeding to issue a specific ratemaking application. In this instance, parties specifically recognize that this was the "Verizon UNE Phase" of the proceeding. Thus, unlike the circumstances in *Pacific Bell*, we have issued a decision concerning a specific ratemaking application, not a generic order. Consequently, *Pacific Bell* is not applicable and we may use the OANAD Proceeding to establish Verizon's interim rates.

D. "Just and Reasonable" Rates

Finally, Verizon asserts that the interim rates adopted in the Interim UNE Decision are confiscatory. (Verizon App., at p. 16.) Verizon bases its claim on its belief that the UNE rates adopted by the New Jersey Board of Public Utilities constituted an unconstitutional taking of its property. Verizon's assertion fails for a number of reasons. First, Verizon has merely alleged that using the New Jersey UNE rates as the basis for setting the interim UNE rates results in confiscatory rates. This is insufficient to invoke the constitutional protection against an unlawful taking or confiscation. "It is a well-established rule that an allegation merely asserting in general language that rates are confiscatory is not

sufficient and that, in order to invoke constitutional protections, the facts relied on must be specifically set forth and from them it must clearly appear that the rates would necessarily deny to plaintiff just compensation and deprive it of its property. (Citation.)" (*Public Serv. Com. of Montana v. Great Northern Util. Co.* (1933) 289 U.S. 130, 136-137.) Indeed, the U.S. Supreme Court has specifically noted that it "has never considered a taking challenge on a ratesetting methodology without being presented with specific rate orders alleged to be confiscatory." (*Verizon Communications Inc. v. FCC, supra*, 535 U.S. at 524.) In this instance, the mere fact that Verizon has alleged that the New Jersey UNE rates result in a taking is insufficient to conclude that the UNE rates adopted in the Interim UNE Decision are confiscatory. Accordingly, Verizon has failed to demonstrate with evidence that the interim UNE rates are confiscatory and its allegation is without merit.

Second, Verizon's assertion is not ripe. Section 252(d)(1) refers to a "determination" of the "just and reasonable rates" for UNEs. "Determination" of a "just and reasonable" rate suggests a rate that is not subject to true-up (i.e., "permanent"). The interim UNE rates in this case, however, are "adopted on an interim basis and made subject to adjustment, either up or down, from today's date until final prices are adopted." (D.03-03-033, at p. 72, OP 1.) Thus, we have not made a final determination of Verizon's "just and reasonable" UNE rates. Consequently, Verizon prematurely argues that the Commission has set confiscatory UNE rates.[10]

Finally, an unlawful taking or confiscation occurs if a regulation or rate is unjust and unreasonable. (*Duquesne Light Co. v. Barasch* (1988) 488 U.S. 299.) Whether a regulation or rate is just and reasonable depends on a balancing

[10] In fact, the cost models and studies for setting Verizon's permanent UNE rates are to be filed with the Commission on October 20, 2003. Thus, Verizon will have an opportunity to participate in the proceedings to establish its "just and reasonable" rates as well as provide input on how its interim rates should be trued-up.

of the interests of the regulated entity providing the services and the interests of the consumers of such services. (*Federal Power Com. v. Hope Nat. Gas Co.* (1943) 320 U.S. 591, 603.) In this instance, we balanced the interests of providing greater local competition to California consumers with Verizon's right to be compensated by the CLECs to access Verizon's UNEs under the TELRIC methodology. Our decision to adopt these interim UNE rates is entirely consistent with Congress's intention "that competition under the Telecommunications Act take root 'as quickly as possible.' (Citation.) " (*GTE South, Inc. v. Morrison* (4th Cir. 1999) 199 F.3d 733, 744.) Thus, in balancing the interests involved, we properly exercised our discretion in adopting interim rates for UNEs, which would be subject to true-up at the time permanent UNE rates were determined. Verizon's claim that the interim rates are confiscatory lacks merit.

E. Covad's Motion

Covad's response to Verizon's rehearing application was filed with the Commission on May 2, 2003, one day after the 15 day deadline for responses. (See Cal. Code Regs., tit. 20, § 86.2.) Pursuant to Rule 45 of the Commission's Rules of Practice and Procedure, Covad filed a Motion to Accept Late-Filed Response. Covad's Motion stated that it was unable to file its response in a timely manner due to technical difficulties.

We shall grant Covad's motion. Covad has actively participated in this proceeding and has provided a reasonable explanation why its response is one day past the 15-day deadline. Moreover, replies to these responses are not permitted under the Commission's Rules, so Verizon is not harmed by this late-filed response.

III. CONCLUSION

Verizon's application for rehearing fails to demonstrate legal error in Commission Decision (D.) 03-03-033.

THEREFORE, IT IS ORDERED:

1. Rehearing of D.03-03-033 is denied.
2. Covad's Motion to Accept Late-Filed Response is granted.

This order is effective today.

Dated August 21, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners