

States 'unified' against FCC eliminating UNE-P, backs state role

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The National Association of Regulatory Utility Commissioners yesterday sent a letter to the FCC insisting on the need for state flexibility to maintain the availability of the unbundled network element platform (UNE-P) and to add to any national list of UNEs. The letter was signed by 80 commissioners, said new NARUC President David Svanda, and many more likely will be signing on.

NARUC plans to step up its advocacy on the issue at the FCC, with meetings between state staff and FCC staff and between state and FCC Commissioners. "You can expect to see a lot of activity around the initiative," Mr. Svanda said at a press briefing during a Phoenix Center conference in Washington. Charlie Acquard, executive director of the National Association of State Utility Consumer Advocates, endorsed NARUC's effort and said his group would "work very closely with NARUC, the FCC, and Congress" to ensure the continued availability of UNE-P.

The letter said the FCC's order in its UNE "triennial review" proceeding, now expected to be released in late January or early February, should do the following: (1) not preempt the states; (2) set a "presumptive national list" of UNEs that includes all existing elements; (3) allow states to "check off" before an item is removed from the UNE list; (4) retain challenged UNEs on the list until a state commission makes a contrary filing; (5) provide for a "caucus" between federal and state regulators before promulgating the "necessary and impair" standard used to evaluate if a UNE should be available; and (6) confirm the authority of state regulators to add to the national list of UNEs.

"State commissions remain focused on the difficult tasks of promoting facilities-based competition as envisioned by the 1996 Telecommunications Act and assuring customers receive better services and more choices at lower prices," the state commissioners wrote. "We emphasize that we cannot accomplish that important economic policy goal without the availability of effective competitive entry strategies such as UNE-P."

"The states have never been more unified on an issue than this one," Robert B. Nelson, Michigan Public Service Commissioner, said during a panel discussion at the Phoenix Center conference. State regulators "have the ability to deal with these issues" and can "do the granular analysis that the 'USTA' case requires," he said, referring to the "U.S. Telecom Association v. FCC" decision by the U.S. Court of Appeals in Washington. In that decision, the court overturned the FCC's previous unbundled network element rules, finding that the Commission hadn't failed to do an adequately granular analysis of competitive conditions.

Marilyn Showalter, chairwoman of the Washington Utilities and Transportation Commission, said policy-makers should be wary of "policy-backsliding." As regulators clear Bell companies to offer in-region interLATA (local access and transport area) services, competition using UNE-P is one of the factors they've examined in evaluating whether the Bells have opened their local exchange service markets, she noted. "Saying it is OK to remove of those fairly important elements gives me real pause," Ms. Showalter said.

Ms. Showalter added that the price of UNE-P "should be part of the debate." The incumbents are seeking to eliminate the availability of UNE-P, although their problem seems primarily to be the price at which they have to offer it, she said. "If the problem is price, why isn't the solution to change the price?" Ms. Showalter asked. "It's important to get to the bottom of what the real problem is."

During a panel discussion later in the day, former FCC General Counsel Christopher Wright, a partner at the Washington law firm of Harris, Wiltshire, and Grannis, said the FCC has little choice but to leave significant responsibility in the hands of state commissions. Under the appeals court decisions on the FCC's UNE rules, it is clear that the "required level of granularity is not possible at the FCC," Mr. Wright said.

The FCC apparently is considering "preemptively preempting" the states through terms of its UNE order, Mr. Wright added. Such a move would almost surely be overturned, he said. He added that court challenges to the FCC's order likely will be heard at some court other

than the U.S. Court of Appeals in Washington, where most FCC cases are considered. The court that hears the UNE case will be determined by a lottery involving every circuit in which a challenge is lodged, he said.

Thomas Tauke, senior vice president-public policy and external affairs at Verizon Communications, Inc., agreed that the state commissions should play a significant role in unbundling decisions, but he said the FCC still should make some determinations that would apply nationwide. "I believe switching is a national market," Mr. Tauke said. "Most [decisions on] UNEs will have to have state involvement, but I believe switching won't need" state input. Similarly, the FCC has already made "determinations about the competitiveness of the market" for high-capacity loops and transport, he said. "I believe the FCC will make some calls on the federal side."