

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

In the Matter of

Implementation of the Federal
Communications Commission's
Triennial Review Order.

Docket No. UT-033025

THE UNITED STATES DEPARTMENT
OF DEFENSE AND ALL OTHER
FEDERAL EXECUTIVE AGENCIES'

COMMENTS

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COMMENTS
OF

THE UNITED STATES DEPARTMENT OF DEFENSE AND
ALL OTHER FEDERAL EXECUTIVE AGENCIES

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INTRODUCTION

The Secretary of Defense, through duly authorized counsel, on behalf of the customer interests of the United States Department of Defense and all other Federal Executive Agencies (collectively referred to herein as "DoD/FEA"), hereby submits Comments in the above-captioned proceeding. For the reasons set forth herein, DoD/FEA recommends that the Washington Utilities and Transportation Commission ("the Commission") adopt the procedures set forth below to conduct the proceeding mandated by the Federal Communications Commission ("the FCC") in its *Triennial Review Order*.¹

BACKGROUND

This proceeding was initiated by the Commission's August 22, 2003 *Notice* inviting comments on procedural issues relating to matters that the Commission must

¹ Review of the Section 251 Unbundling Obligations of Local Exchange Carriers, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36 (released Aug. 21, 2003) ("*Triennial Review Order*").

address in response to the *Triennial Review Order*.² The Commission noted that the *Triennial Review Order* requires state regulatory commissions to evaluate a number of issues related to the availability of unbundled network elements ("UNEs") to competitive local exchange carriers ("LECs") and to hold proceedings within defined periods to resolve those issues. Given the short time period in which the FCC gave the state commissions to complete such proceedings, the Commission invited comments on procedural issues such as the number, scope, nature and timing of the proceedings to be held.

There are many federal offices and military installations throughout Washington, and DoD/FEA accordingly is one of the largest consumers of telecommunications services in the state. Moreover, federal legislation and sound procurement policy require that agencies procure services on a competitive basis whenever possible. Only through competition can the government be assured of obtaining the best services at the lowest possible prices. End users such as DoD/FEA do not acquire UNEs from incumbent LECs. However, the availability, prices, terms and conditions for UNEs are important to DoD/FEA because they will determine the availability, prices, terms and conditions for telecommunications services that DoD/FEA obtains from its vendors. From its unique consumer perspective, DoD/FEA is interested in participating in this proceeding to address the matters responsive to the *Triennial Review Order*.

Before addressing the procedural matters raised in the *Notice*, DoD/FEA will set forth the issues that the *Triennial Review Order* has asked the state commissions to resolve. A key element of the *Triennial Review Order* is that the FCC has deferred to

² Notice Inviting Comments Concerning Process for Implementing FCC Triennial Review Order, Docket No. UT-033025, August 22, 2003 ("the *Notice*").

state commissions the responsibility of fact finding in connection with determining what functions provided by incumbent LECs should be classified as UNEs pursuant to Section 251(c)(3) of the Communications Act of 1934, as amended ("the Act"), and the FCC's implementing orders and rules.

Loops

The FCC concluded in the *Triennial Review Order* that, on a national level, the incumbent LECs' provision of all local loops comprised of copper cable for the mass market (defined as DS0 loops) should continue to be a UNE. As to DS1, DS3 and dark fiber loops, however, the FCC found that carriers also are impaired without access on an unbundled basis, but that states may make a determination of non-impairment on a customer location-specific basis.³ The FCC adopted "triggers" for the states to use in their non-impairment reviews, and required that state commissions complete their reviews concerning UNE loops within nine months of the effective date of the *Triennial Review Order*.⁴

Circuit Switching

Of primary importance in the analysis of what functions should be available as UNEs is the resolution of whether local circuit switching for the enterprise market (which the FCC has defined as DS1 circuits and above) should be a UNE. The FCC concluded that, on a national level, local circuit switching for the enterprise market should not be a UNE. A state commission, however, may, based on a more geographically specific record, determine that local circuit switching for the enterprise market should be a UNE, because in a particular market that function meets the criteria in Section 251 of the Act,

³ *Triennial Review Order*, paras. 314, 321 and 327.

⁴ *Id.* at para. 339.

as interpreted in the *Triennial Review Order*, for classification as a UNE. A state commission that initiates such an inquiry regarding the enterprise market UNE must complete its proceeding within 90 days from the effective date of the *Triennial Review Order*, at which time the commission may "petition the Commission to waive the finding of no impairment."⁵

The FCC also invited state commissions to address whether local circuit switching for mass market customers -- *i.e.*, customers served with less than DS1 capacity -- should continue to be a UNE. The FCC concluded that such switching, viewed at a national level, should be a UNE, but a state commission may determine that in a particular market competitive LECs would not be impaired if the incumbent LEC were not required to provide the service as a UNE. The FCC instructed state commissions to complete any inquiry into the need in specific markets for a mass market local switching UNE within nine months of the effective date of the *Triennial Review Order*.⁶

Hot Cuts

In connection with its conclusion that mass market local circuit switching should be a UNE at the national level, the FCC addressed the costs and timeliness of the "hot cut process" that LECs use to switch customers from the incumbent to a competitor. The FCC instructed state commissions to approve, within nine months of the effective date of the *Triennial Review Order*, a "batch cut migration process." In the alternative, commissions may explain why such a process is not necessary in a particular market.⁷

⁵ *Id.* at para. 455.

⁶ The FCC instructed the commissions to use certain triggers and economic and operational criteria in their determinations. *Id.* at para. 494. There is no need in this pleading to address those requirements.

⁷ *Triennial Review Order*, para. 488.

Dedicated Transport

The FCC reviewed the need on a national level for incumbent LECs to continue to provide dedicated transport as a UNE. It concluded that dedicated transport for DS1, DS3 and dark fiber should remain as UNEs, but afforded state commissions nine months from the effective date of the *Triennial Review Order* to find that competitive carriers would not suffer impairment without access to transport on a particular route as a UNE.⁸

RESPONSE TO NOTICE

The above discussion shows that the Commission will have a demanding schedule in the coming nine months to the extent that parties (or the Commission) decide to challenge the FCC's national-level UNE analysis on a more specific market level.⁹ Because the proceedings for addressing enterprise market local switching must be completed within 90 days of the effective date of the *Triennial Review Order*, DoD/FEA recommends that the Commission bifurcate the subject proceeding and first address only that issue. There are two important reasons to take this approach:

- The time period is extremely short for conducting a proceeding from start to final order; and
- The issue here is the possible removal of an unbundled element that competitive carriers have relied upon heavily in providing local service in Washington. Carriers need to focus their time and resources on this critical issue now, without the distraction of other issues that can be dealt with later.

⁸ As is the case with local circuit switching, the FCC adopted triggers for the determination of no impairment.

⁹ The FCC concluded that a state commission may not define the market as encompassing the entire state in proceedings held pursuant to the *Triennial Review Order*. *Triennial Review Order*, para. 495.

The Commission can then use the remaining time to consider the extent, if any, to which the FCC's national findings that retain UNEs should be reviewed on a location-specific basis, and resolve the "hot cut" issue.

The Commission invites comments in the *Notice* on who should bear the burden of going forward with the introduction of evidence and the burden of proof in the FCC-mandated proceedings. In general, DoD/FEA recommends that a party seeking to overcome the national UNE findings set forth in the *Triennial Review Order* should bear the burden of going forward with the introduction of evidence. Given the reliance by competitive carriers on the use of UNEs to provide local service in Washington, however, DoD/FEA believes that the burden of proving that a currently available UNE should be discontinued should be on the parties seeking to remove the UNE classification. As to initiation of proceedings, DoD/FEA believes that the Commission should initiate a proceeding on the matters that are subject to its jurisdiction pursuant to the *Triennial Review Order*, rather than await a party's petition, recognizing the possibility that no party may seek to change the national findings as they relate to Washington markets.

The Commission asks how the *Triennial Review Order* affects certain other current proceedings: should the Commission consolidate proceedings, hold them in abeyance or import evidence from other proceedings into a new docket that addresses the *Triennial Review Order* issues? DoD/FEA is a party in only one other current Commission proceeding -- the Qwest Business Service Reclassification proceeding (Docket UT-030614). Accordingly, we comment on the interrelationship between these two proceedings and how to treat Docket No. UT-030614 in light of the current need to resolve UNE issues. DoD/FEA believes that parties to that proceeding should be

permitted to submit testimony and exhibits from that proceeding in the 90-day proceeding, to the extent that they are relevant, but that the dockets should not be consolidated.

Docket UT-030614 is scheduled for completion by November 6, 2003. In DoD/FEA's view, it is not possible for the Commission to arrive at a reasoned decision in that proceeding until it is known to what extent loops and local switching are retained as UNEs in Washington. Both the Staff and Qwest argue in Docket No. UT-030614 that business customers throughout the state have multiple choices for local service. Their analyses in support, however, cite competitive entry that relies extensively on UNE-based services offered by competitive LECs.¹⁰ Given the transition and disruption that would be expected to result from implementation of the *Triennial Review Order*, the Commission cannot rely on a "snapshot" of competitive market shares that predates the new competitive landscape. Thus, while DoD/FEA recognizes the existing statutory timeframe, it appears that Docket UT-030614 should be deferred until the uncertainty and "fallout" from the *Triennial Review Order* and the Commission's forthcoming implementation proceedings are clarified.

The Commission invites comments on whether the *Triennial Review Order* issues affecting Verizon and Qwest should be addressed in separate proceedings or in one generic proceeding. DoD/FEA believes that a generic proceeding that addresses the UNE obligations of both carriers is appropriate and feasible. Only two incumbent LECs would be involved, and parties with an interest in both carriers' positions would find it

¹⁰ See, e.g., Direct Testimony of Qwest witness David Teitzel at pp. 6-9; Direct Testimony of Staff witness Thomas Wilson, Jr. at pp. 17-20.

administratively easier to participate in just one generic proceeding.¹¹ This is especially true given the short time period in which the Commission must resolve the local switching UNE issue for enterprise customers. Although generic proceedings would be employed, the Commission should be prepared to make individualized determinations for different carriers or classifications of carriers in different markets and parts of the state. As DoD/FEA recommended above, the Commission should initiate the proceeding and set a schedule.

The Commission invites comments on the hearing format to be used in the proceeding responsive to the *Triennial Review Order*. For the 90-day phase of this proceeding, DoD/FEA recommends that the Commission not use evidentiary hearings. Rather, the Commission should use written pleadings, including verified statements and affidavits of experts, and full discovery rights to establish a full record. A recommended schedule for the submission of such filings is:

- Comments filed 28 days from the start of the 90-day period;
- Reply Comments filed 21 days after Comments are filed; and
- Rebuttal Comments (all parties) filed 14 days after Reply Comments are filed.

If necessary, the Commission could schedule an *en banc* hearing for the parties to address the issues in this phase. Although this is a demanding schedule, it should allow for the development of a complete record upon which the Commission can rely in making its decision.

¹¹ Although the Commission mentioned only two incumbent LECs in this regard, the proceeding should include any incumbent LEC that currently provides UNEs that may be discontinued.

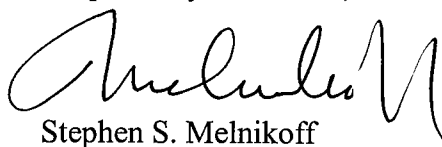
DoD/FEA believes that issues to be addressed in the nine-month period following the effective date of the *Triennial Review Order* may be resolved with limited evidentiary hearings, upon a showing by the party with the burden of introducing evidence that such a procedure is required for compilation of a complete record. Although the second phase allows longer time for a Commission decision, there are far more markets and issues to address.

Finally, the Commission invites comments on whether it should coordinate the proceedings arising from the *Triennial Review Order* with other state commissions in Qwest's region. DoD/FEA believes that, given the local market nature of the "UNE" issues that must be addressed in the proceedings, the advantages of any joint proceeding with other states as to loops, switching and transport would be outweighed, as well as unnecessarily complicated by the burdens of coordination and possible delays. Because certain parties will doubtless want to use the same witnesses in more than one state proceeding, however, DoD/FEA recommends that the state commissions collaborate to ensure that, to the extent there are evidentiary hearings for the nine-month proceeding, such hearings are not simultaneous to avoid scheduling conflicts. Coordination of proceedings to resolve the "hot cut" issue in the nine-month proceeding, however, appears to be feasible and desirable. This issue is less location-specific than the UNE loop, circuit switching and transport issues, and the incumbent LEC processes to be adopted will no doubt be similar in multiple jurisdictions.

CONCLUSION

For the reasons set forth herein, DoD/FEA recommends that the Commission adopt a schedule for the 90-day proceeding, using written submissions that deal only with the matters that need to be resolved within that period. A single proceeding should address the UNE obligations of both Qwest and Verizon, and the burdens of introducing evidence and of proof should be as stated herein.

Respectfully Submitted,



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For

The United States Department of Defense

And

All Other Federal Executive Agencies

Dated: September 3, 2003