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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Implementation of the
Federal Communications Commission's
Triennial Review Order

Docket No. UT-033025
**INITIAL COMMENTS OF
QWEST CORPORATION**

Qwest Corporation ("Qwest") hereby submits these initial comments in response to the Notice Inviting Comments Concerning Process for Implementing FCC Triennial Review Order (Notice) issued August 22, 2003. In the Notice, the Commission seeks comment on procedural issues relating to the Federal Communications Commission's ("FCC") Triennial Review Order ("Order"). In the Notice, the Commission posed several questions relating to the issues it may need to address as a result of the Order.

GENERAL COMMENTS

As a preliminary matter, Qwest notes that it is still in the process of reviewing and analyzing the FCC's 576 page Order. Therefore, Qwest's responses to the questions raised by the Commission represent its best effort to interpret the Order given the limited time it has had to review the Order.

The Order has already been the subject of legal challenges by a variety of parties, including Qwest. On August 28, 2003, Qwest joined Southwestern Bell, BellSouth and the United States Telephone Association in filing a Writ of Mandamus before the U.S. Circuit Court

1 of Appeals in Washington D.C., asking the court to, among other things, vacate the FCC's rules
2 governing the unbundling of mass market switching and high-capacity facilities and to order the
3 FCC to issue a lawful order within 45 days. In providing its responses and in suggesting possible
4 procedures for state proceedings that result from the order, Qwest is not waiving its right to
5 appeal any issue in the Order, including issues related to the state proceedings required by the
6 Order.

7 RESPONSES TO SPECIFIC QUESTIONS

8 Following are Qwest's responses to the specific questions raised by the Commission in its
9 Notice.

- 10 1. **Who bears the burden of going forward and the burden of proof regarding**
11 **the various issues identified in the FCC's order, i.e., should the Commission**
12 **initiate the proceedings or is it more appropriate for an ILEC or CLEC to**
initiate the proceeding?

13 Qwest's Response:

14 **Burden of Proof**: In its analysis of the evidence submitted to it, the FCC declined to
15 adopt a "burden of proof" for any particular party. (Order at paragraph 92). With regard to all
16 state proceedings resulting from the Order, the FCC likewise did not impose, and specifically
17 rejected, a burden of proof on any party, instead describing the factors that the state Commission
18 should consider in those proceedings.

19 With regard to unbundled switching for enterprise customers (the 90-day proceeding), the
20 FCC made a national finding of "no impairment," subject to further state review. The FCC
21 required the state Commissions to file a waiver petition with the FCC within 90 days of the
22 effective date of the Order if the state made an "affirmative finding" of impairment in a particular
23 market. Because it is unclear whether any CLEC in Washington will ask the Commission to file
24 such a petition, CLECs should, at the very least, notify the Commission by October 3, 2003, if
25 they intend to present evidence that could form the basis for the findings the Commission must
26 make prior to petitioning for a waiver. Only upon receipt of a notice, should the Commission

1 open a generic 90-day proceeding. If no CLEC comes forward, the Commission need take no
2 action.

3 With regard to the nine-month proceeding (mass market switching, transport, high
4 capacity loops, etc.) the Commission should open a proceeding immediately. Qwest intends to
5 present evidence to the Commission demonstrating "no impairment." Likewise, Qwest expects
6 that several CLECs will present evidence arguing for continued unbundling. Thus, a reasonable
7 approach would be to have all parties make simultaneous filings of testimony, other evidence,
8 and briefs in the nine-month case.

9 **Discovery:** Qwest recommends the Commission use this docket to begin compiling the
10 data that may be used for either or both of the 90-day and 9-month proceedings, pursuant to the
11 federal authority delegated to the states in the Triennial Review Order, paragraphs 179 to 196.
12 Qwest recommends that the Commission issue standardized data requests to all providers of
13 telecommunications services in Washington. Qwest is in the process of preparing a set of
14 standardized data requests that Qwest will propose the Commission use for this purpose. Qwest
15 will provide those data requests to the Commission no later than September 11, 2003, which is
16 the deadline for filing comments.

17 **Protective Order:** The Commission should also issue a standard protective order to
18 ensure that competitively sensitive information of the parties and non-parties produced in
19 response to the Commission's data requests is made available to the parties and to the
20 Commission, but is not disclosed or used improperly.

- 21 **2. How does the Commission's review of the FCC's Order affect ongoing**
22 **proceedings before the Commission, e.g., issues pending in Dockets UT-**
23 **003022/003040, UT-023003, UT-011219, UT-030614?**
- 24 **a. Should the Commission consolidate proceedings, or hold certain**
proceedings in abeyance pending resolution of issues arising from the
FCC's Order?
- 25 **b. Should the Commission import evidence from these or other**
26 **proceedings to a new docket addressing the various issues identified in**
the FCC's order?

1 **Qwest's Response:**

2 a. In UT-023003, the Commission is engaged in a TELRIC analysis of UNE prices
3 for loops and switching. As noted in Qwest's response to Question 1, switching will clearly be
4 contested in the nine-month proceeding. Given the demands that will be placed on the
5 Commission's and the parties' time as a result of the Order, and given that the cost docket is not
6 on a statutory or other mandated deadline, Qwest would not oppose continuing that case until the
7 nine-month proceeding is completed. Docket UT-030614 is Qwest's competitive classification
8 docket relating to Qwest's retail analog business services. Hearings are scheduled in less than
9 two weeks, and the docket will be concluded with a final order by the first week in November.
10 That proceeding should not be delayed or consolidated with any proceeding resulting from the
11 FCC's Order, as the issues are ripe for decision now, and there is no outcome from the FCC's
12 Order that changes either the relevant facts or law with regard to that case.

13 Qwest strongly opposes the consolidation of either the 90-day or the nine-month case
14 with any other dockets. It will be extremely demanding to address the issues identified by the
15 FCC. Consolidation with other dockets will needlessly complicate matters.

16 b. Qwest opposes the wholesale importation of evidence from other proceedings as
17 being burdensome to the parties and not likely to be sufficiently targeted to Washington issues to
18 be useful. Qwest does not oppose more targeted importation, so long as:

- 19 (1) notice and an opportunity to object are offered to all parties;
20 (2) the evidence is relevant; and
21 (3) the evidence is subject to further discovery and cross-examination, as well
22 as other procedural safeguards to ensure due process;
23 (4) the opportunity to provide any additional rebuttal/responsive evidence to
24 any imported testimony.

25 **3. Should the Commission address issues affecting Verizon and Qwest in**
26 **separate proceedings or in one generic proceeding addressing all companies?**

1 a. **If no party files a petition concerning a particular ILEC should the**
2 **Commission initiate a proceeding or wait for a party to file a petition?**

3 **Qwest's Response:** Qwest believes generic proceedings are appropriate. As noted in
4 Qwest's response to Question 1, all CLECs should be given until October 3, 2003, to notify the
5 Commission if they intend to present evidence on switching for enterprise customers. Only upon
6 receipt of such notice should the Commission open a generic 90-day proceeding.

7 **4. What hearing format should the Commission adopt for the various issues**
8 **identified in the FCC's Order, i.e., a paper process, workshop, or hearing**
9 **process?**

10 **Qwest's Response:** An adjudicative hearing process is the most appropriate format for
11 the Commission to obtain the information necessary to make the findings required by the Order.
12 Thus, a reasonable approach would be to have all parties make simultaneous filings of testimony,
13 other evidence, and briefs in the nine-month case.

14 **5. Should the Commission coordinate any of the proceedings arising from the**
15 **FCC's Order with other states in Qwest's region?**

16 **Qwest's Response:** Qwest recommends that the state Commissions in the 14-state
17 former U S WEST region develop a procedure to cooperate in coordinating procedural schedules
18 for the proceedings, as well as template discovery. Because many parties will be participating in
19 cases before multiple Commissions and because witnesses and legal counsel will need to be
20 involved in several states, coordination among Commissions is essential.

21 However, Qwest opposes a multi-state process as a means of addressing the state-specific
22 substantive issues that will need to be addressed in both the 90-day and 9-month proceedings for
23 the following reasons:

24 (1) If a CLEC in a particular state challenges the national presumption of no
25 impairment for switching in the enterprise market, the Order requires the state Commission in
26 that state to decide the impairment issue based on specific facts in that state (and perhaps on the
basis of specific facts relating to smaller market areas within that state). A coordinated, multi-

1 state investigation is not well-suited to undertake the inquiry required by the Order. In deed, the
2 basis for the FCC's decision to delegate this task to the states was to make factual inquiries of
3 sufficient granularity in recognition of the requirements of the D.C. Circuit Court USTA
4 decision.

5 (2) Multi-state proceedings are useful only when examining a common base of
6 evidence, a situation that does not exist in this case. While the multi-state Section 271
7 workshops were useful in Qwest's region, that model is not comparable to the issues in the
8 Triennial Review and simply will not work as a means of implementing the order. In the multi-
9 state Section 271 proceedings, virtually all the issues addressed were common issues that existed
10 across the states. In this case, however, the issues are specific to each state.

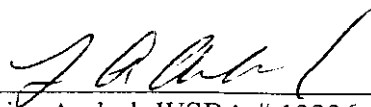
11 (3) Even if a multi-state proceeding were held, it would not eliminate the need for
12 separate state proceedings. By definition, a multi-state process lacks the jurisdictional authority
13 to issue a final order in any particular state. Thus, at the very least, assuming an individual CLEC
14 were to challenge the presumptive finding of no impairment in the 90-day proceeding, each state
15 would be required to hold a separate evidentiary hearing in order to issue a ruling. The issues in
16 the 9-month proceeding are also highly state and market specific.

17 (4) In the Section 271 process, the state Commissions were making a
18 recommendation to the FCC as opposed to making the ultimate determination. In the 90-day
19 proceeding, the state Commission must make an "affirmative finding" of impairment in a
20 particular market before filing its waiver petition with the FCC. In the nine-month proceeding,
21 the state Commission is the ultimate decision-maker. In neither case is the state Commission in
22 the consultative role they were in during the 271 process. Thus, the state Commissions will be
23 required to meet all legal requirements for a valid order in each state, such as open meeting law
24 requirements, state Administrative Procedure Act requirements, and evidentiary standards.
25 Because the requirements for a valid and enforceable order are not identical in each state, it
26 would be impossible for a multi-state process to provide any meaningful assistance. Indeed, the

1 existence of a multi-state process will have the effect of adding new levels of complexity to a
2 process that must be completed in a short period of time. The multi-state Section 271 process
3 lasted about two years (in some states, even longer). Thus, even if a multi-state process made
4 sense (which it does not), the deadlines imposed in the order simply do not provide enough time
5 for such a process to work.

6 RESPECTFULLY SUBMITTED this 5th day of September, 2003.

7 QWEST

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