

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of

Implementation of the Federal
Communication Commission's
Triennial Review Order

DOCKET NO. UT-033025

PUBLIC COUNSEL COMMENTS

Public Counsel files these comments regarding the FCC's Triennial Review Order (TRO) in response to the Commission's notice of August 22, 2003.

Due to the length and complexity of the order, these comments are necessarily of a general nature. Public Counsel may supplement these comments an appropriate time later in the docket.

1. Burden of Going Forward

As a general matter, a party wishing to rebut a presumption or finding contained in the TRO should have the burden of initiating the proceeding, and the burden of proof.

2. Effect on Pending Commission Proceedings

UT 030614. It would be premature to grant competitive classification for Qwest's business services given the findings of the TRO, the policy and analytic framework laid out by the FCC, and the uncertain impact of the TRO on Washington's markets. Public Counsel would recommend that the docket be held in abeyance, but for the statutory timeline imposed on the Commission, which appears to preclude that option. As an alternative, Public Counsel will urge the Commission to deny the petition both because Qwest has not carried its burden and established the statutory elements, and because of the impact of the TRO on the issues in the case.

Neither Qwest nor Staff adequately analyzed the status of local competition in the mass market. The petition does not acknowledge any distinction between the mass and enterprise markets in Washington, but seeks statewide competitive classification for all services used by

any type of customer in any part of the state. In dramatic contrast with this approach to analyzing the telecommunications market, the FCC discusses the prospects for mass market local competition in great detail, See, e.g., TRO ¶¶ 459-532. The FCC specifically forecloses the states from using a statewide market in analyzing impairment, TRO ¶ 495, and discusses in detail the different customer groups that constitute different market segments, see e.g., ¶¶ 124, 127, 128.

The FCC, furthermore, identifies various significant barriers to mass market entry that Qwest and Staff overlook. The FCC finds that the ILECs' existing hot cut process impairs CLECs in offering service to the mass market. Until a viable hot cut process is implemented, effective local competition cannot occur in the mass market. See TRO ¶¶ 473-475. The FCC's Order provides further evidence, separate from the "hot cut" issue, that operational and economic barriers prevent CLECs from competing with ILECs in the mass market. TRO ¶ 476. The FCC directs states to examine this evidence further and notes that all the studies in the record, including the BOC studies "suggest that it would be uneconomic for a competing carrier to serve customers in smaller wire centers." TRO ¶¶ 477-485.

In view of these and other findings, and the specific direction of the FCC regarding the appropriate means of defining markets and analyzing competitive activity, the Commission should reject any invitation by Qwest or Staff to take a "head in the sand" approach and disregard the integral relationship between the TRO and the issues in this proceeding. Once the Commission has completed the analysis required by TRO it will have a much more complete basis upon which to reach a conclusion about the level of competition in Washington's business market. Evaluating competition on the basis of the broad brush and cursory analysis in Qwest's petition runs the very substantial risk of reaching factual conclusions which will ultimately be found to be inaccurate and unsubstantiated.

Public Counsel has no comment at this time on the impact on other docketed proceedings.

3. Verizon and Qwest

Public Counsel recommends that related Verizon and Qwest dockets be consolidated. For example, if both companies challenge the FCC impairment finding as to mass market local switching, it would be more practical to consider them together.

4. Hearing Format

Public Counsel recommends that any proceeding to determine impairment be conducted as adjudication with an evidentiary hearing process. Proceedings to address the “batch cut” issue may be more amenable to a multi-state approach through the Regional Oversight Committee or other vehicle.

5. Coordination with States

The Commission should make an effort to coordinate schedules with other states, recognizing that some parties will be active in multiple forums. However, impairment proceedings, and others that involve very specific factual determinations about local markets cannot be conducted jointly with other states.

6. Confidential Information

Public Counsel urges the Commission to make provision for access for Public Counsel and other non-competitor parties to all the relevant data produced in impairment proceedings on the same basis as the Commission staff. Limiting access to Staff alone not only makes it virtually impossible for others to fully participate in the case, but deprives the Commission of the analysis of other parties without a particular competitive self-interest.

Respectfully submitted, this 11th day of September, 2003.

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