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**

COMMENTS OF VERIZON NORTHWEST INC. ON TRIENNIAL REVIEW PROCEDURE

September 11, 2003

On August 22, 2003, the Washington State Utilities and Transportation Commission ("Commission") invited interested persons to comment on a number of questions regarding the Commission's procedural approach to its Triennial Review proceedings. Listed below are the responses of Verizon Northwest Inc. ("Verizon").

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

Verizon believes that an ILEC or CLEC, and not the Commission, should initiate a proceeding. Given the Commission's limited resources, the scope of the potential review, and the short deadlines that the FCC has imposed for completing the proceedings, the Commission should first determine whether the 90 day proceeding and the nine month proceeding are necessary. The Commission can best do this by publicly notifying all certificated carriers in that state that it will conduct these proceedings only if a carrier requests a proceeding.

In its impairment analysis, the FCC did "not adopt a 'burden of proof' approach that places the onus on either incumbent LECs or competitors to prove or disprove the need for unbundling." *Triennial Review Order* ¶ 92. However, in light of the FCC's impairment conclusions, it has, at least as a practical matter, established a "burden of going forward" for both the 90 day case and nine month case.

For the 90 day case (unbundled switching for enterprise customers served by DS1 or higher loops), the FCC has "established a national finding that competitors are not impaired with respect" to these enterprise customers. *Triennial Review Order* ¶ 451. This finding cannot be overturned by this Commission; instead, the Commission can only petition the FCC to waive its finding of no impairment. *Id.* ¶ 455. For this reason, the FCC's no impairment finding is

effectively self-executing. If a state commission does not act, the FCC's impairment finding stands.

Verizon does not believe there is any need for a 90 day proceeding. The facts in favor of no impairment are overwhelming. In Verizon's entire national footprint, for example, it has provided *hundreds of thousands* of "high capacity" loops to CLECs, and of this number, *significantly less than one percent* are being provided in conjunction with a Verizon switch. This minute percentage actually overstates the extent to which CLECs are using Verizon switches in conjunction with high capacity loops, since it does not include any of the high capacity loops that CLECs provide themselves. There simply cannot be impairment in a situation where CLECs are affirmatively declining unbundled switching for virtually all of the high capacity loops that they are ordering from Verizon.

There is a simple explanation for why CLECs are declining ILEC unbundled switching – they are using their own switches. The FCC concluded there is "significant nationwide deployment of switches by competitive providers to serve the enterprise market . . ." *Id.* ¶ 435. The FCC based this conclusion on the fact that CLECs "have deployed as much as 1,300 local circuit switches and are primarily utilizing these switches to serve enterprise customers." *Id.* ¶ 421 n. 1395.

These facts, together with the FCC's national finding of no impairment, prove that there is not a legitimate factual basis to challenge to the FCC's impairment finding for enterprise customers. The Commission should therefore first determine whether any carrier intends to challenge the FCC's finding. If a CLEC indicates that it intends to challenge this finding, the Commission should, in light of the FCC's national finding of impairment, require a legally and factually sufficient showing by that carrier *before* the Commission undertakes further

proceedings. The Commission should adopt a schedule that allows for such a process to take place.

For the nine month proceeding (all other network elements at issue), the Commission should undertake the same general approach, although the posture of this nine month proceeding is likely to be very different from the Commission's 90 day case. Most notably, for the nine month case, while the FCC has made certain presumptive findings, it has not made any conclusive impairment determinations that it alone can overturn, as it has done in the 90 day case. Rather, for the nine month proceeding, the FCC has provided state commissions with criteria and procedures that they must apply, but has left all of the ultimate impairment decisions to the state commissions themselves.

It is likely that the impairment presumptions in the nine month case will be challenged. The Commission should nevertheless first determine whether a nine month case is needed for all markets in the state. If an ILEC indicates that it intends to challenge the impairment presumption for one of the network elements covered in the nine month case, then the Commission must move forward and follow the steps laid out by the FCC for determining, on a granular level, whether the FCC's presumption as to that network element is correct. If an ILEC indicates that it does not intend to challenge the FCC's finding of impairment for a particular network element, then the Commission does not need at this time to undertake the specific actions assigned to it by the FCC for that particular ILEC's territory. The specific impairment steps set forth by the FCC are as a general rule intended to "alleviate impairment in markets over which they [state commissions] exercise jurisdiction." *Triennial Review Order* ¶ 460. If an ILEC declines to challenge the FCC's tentative impairment determination for a particular

network element or market area, then that network element must still be unbundled, and this continued availability alleviates whatever impairment the FCC believed exists.

2. How does the Commission's review of the FCC's Order affect ongoing proceedings before the Commission, e.g., issues pending in Dockets UT-003022/003040, UT-023003, UT-011219, UT-030614?

a. Should the Commission consolidate proceedings, or hold certain proceedings in abeyance pending resolution of issues arising from the FCC's Order?

b. Should the Commission import evidence from these or other proceedings to a new docket addressing the various issues identified in the FCC's Order?

Verizon offers no opinion on the Qwest dockets.

In Docket UT-023003, the Commission will consider costs and prices for many of Verizon's UNEs, and in Docket UT-011219 the Commission will consider the terms and conditions under which Verizon will offer UNEs. Both dockets are in their early stages.

Verizon does not object to these dockets being suspended. Today, CLECs purchase UNEs from Verizon under Commission-approved prices, terms and conditions, and when the Triennial Review Order takes effect, the parties can negotiate appropriate changes to their existing agreements to reflect that order (e.g., they can change the current "UNE conversion" provisions). Given this, the Commission can abate UT-023003 and UT-011219 and devote its attention and resources to the 90 day case (assuming one is needed) and to any nine month case an ILEC files.

Finally, the evidence from these dockets should not be "imported" automatically into any Triennial Review proceeding. If any party wants to import such evidence it may seek to do so subject to other parties' objections and rights of cross-examination.

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

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

The Commission should address all issues affecting Verizon and Qwest in two proceedings: one nine month proceeding for both Verizon and Qwest, assuming both ILECs request a nine month proceeding, and, if necessary, one 90 day proceeding for both Verizon and Qwest, assuming CLECs file credible 90 day cases against both. The short deadlines imposed by the FCC do not provide enough time for separate proceedings for each ILEC if both are engaged in either type of case. Moreover, a separate simultaneous proceeding for each ILEC would likely be duplicative in many respects, resulting in a waste of resources and a loss of efficiencies.

The Commission should set a firm deadline by which parties must indicate whether they intend to challenge the FCC's finding or presumption regarding a particular ILEC's serving area. If no party files a timely petition, the Commission can then conclude that the FCC's finding or presumption for that particular network element in that territory will not be factually rebutted and therefore no proceeding is necessary at this time.[1]

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

While the short deadlines for completing these proceedings did not change with the release of the FCC's actual Triennial Review Order, the number of potential tasks that this Commission may have to complete was increased by the actual Order. For example, just for mass market switching, the FCC has (among other things) adopted "triggers as a principal mechanism for use by states in evaluating whether requesting carriers are in fact not impaired in

[1] The Order allows for the initiation of additional cases after completion of the initial nine month period. *See, e.g., Triennial Review Order* ¶ 526 ("We emphasize that the framework set forth here contemplates ongoing state review of the status of unbundled switching.")

a particular market," and, in those markets in which a state commission is evaluating impairment, has required the state commission to: analyze "whether competitors are already using their own switches to serve voice customers in the relevant market;" examine economic and operational issues; determine the proper geographic market for its impairment analysis; explore whether "rolling" access to unbundled local switching "could adequately address certain barriers to entry," and monitor the operational aspects of any transition of embedded customer bases affected by its unbundling determinations. *See generally FCC Triennial Order* ¶¶ 493-526.

The broad scope of this work, together with deadlines as short as 90 days and no longer than nine months, effectively eliminates the possibility of workshops or extensive hearings with multiple rounds of briefing. Instead, Verizon believes that if there is a 90 day case – and, as Verizon stated above, it seems unlikely that there is any such need – this 90 day case should be done "on the papers." The nine month case, on the other hand, will likely require some hearings, since it is more complicated in both scope and process. However, these proceedings should be limited in length and designed solely to gather the record that the Commission itself will use in making its determinations.

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

No. The FCC has assigned to state commissions "some fact finding responsibilities" in large part because they are "well situated to conduct the granular inquiry we delegate to them," and because state commissions can provide the "more targeted, granular unbundling analysis" that the FCC concluded was needed. *FCC Triennial Review Order*, ¶¶ 188-189 & 186. Diluting this state-specific focus through multi-state proceedings would be inconsistent with both the FCC's stated justifications and its expectations, and for this reason it would be inappropriate for

the Commission to combine its proceedings with similar investigations conducted by other state commissions – to do so would negate the very reason state commissions were assigned these tasks in the first place. [2]

Moreover, as a practical matter, it seems unlikely that the interested parties in Washington will be identical to those in other states, so it would not be practical or efficient for the Commission to combine its factual investigation with other state commissions – even if the Commission's charge were less granular than the one the FCC assigned to it.

[2] While Verizon believes that formal, multi-state proceedings would be inconsistent with the FCC's justification for assigning these proceedings to state commissions and therefore improper, Verizon would not object to informal open meetings between state commissions and carriers in the region, provided these meetings were strictly limited to a discussion of scheduling and other procedural issues of common interest.