

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
COMMISSION STAFF ON
PROCESS FOR
IMPLEMENTING FCC
TRIENNIAL REVIEW ORDER

By Notice served on August 22, 2003, the Washington Utilities and Transportation Commission (Commission) invited comments from interested persons on how the Commission should implement the FCC's Triennial Review Order (FCC Order). In soliciting comments, the Commission set forth a series of specific questions on which it seeks comments. By Notice dated September 3, 2003, the date for filing of comments was extended to September 11, 2003.

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?

STAFF RESPONSE: Who should initiate the proceeding and who bears the burden of proof depends on the issue identified in the FCC Order that is being addressed. Several examples are detailed below.

a. The FCC Order includes a presumption that competitive carriers are impaired without access to unbundled DS1, DS3, and dark fiber loops, and thus must remain available to competitive carriers on an unbundled basis until the state commission makes a determination that such access "at particular capacities serving specific customer locations" ¹ is not required. If the Commission makes a determination of non-impairment, it must do so within 9 months of the effective date of the Order. Staff

¹ FCC Order, ¶339.

believes that if an ILEC believes that competitive carriers are not impaired without access to UNEs at a particular location, the ILEC should institute a proceeding before this Commission and bear the burden of proof on that issue.

b. The FCC Order, at ¶453, creates a presumption that competitive carriers are not impaired without having access to local circuit switching to serve business customers on an unbundled basis. The FCC Order does give state commissions the opportunity to rebut this presumption by analyzing the local market on a more granular level “and determine whether DS1 enterprise customers should be granted access to unbundled incumbent LEC circuit switching.”² If the Commission wishes to exercise this opportunity, the Commission must petition FCC for waiver of the finding of no impairment within 90 days of effective date of the Order. It would appear that any CLEC that wishes to have the Commission perform the analysis described in ¶455 should petition the Commission on this issue and present evidence necessary to allow the Commission to make such a determination, rather than the Commission instituting a proceeding on its own motion. If several CLECs petition the Commission for this type of determination, those petitions could, and in Staff’s view, should, be consolidated for hearing or other proceedings.

c. ¶488 of the FCC Order requires state commissions to approve a batch cut migration process within nine months of the effective date of the Order. For this requirement, it would make sense for the Commission to require the ILECs and the CLECs to agree on a process/procedure and bring it to the Commission for approval. A workshop format for this element may make sense, to provide a framework and timelines within which the carriers must work. For Qwest, the Change Management Process (CMP) that was created during the 271 process may be an appropriate forum to use to develop a batch cut process. For Verizon, most, if not all, of the CLECs interested in interconnecting with Verizon are involved in the existing Verizon Terms and Conditions case, Docket UT-011219. That docket, rather than creating a new docket, may provide a convenient forum for the companies to agree on a batch cut migration process, to be presented to the Commission for approval.

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?

² FCC Order, ¶455.

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

STAFF RESPONSE:

Docket UT-003022/003040 (Qwest SGAT and Section 271 Proceeding)

These cases are essentially complete. While Qwest will need to update certain items in its SGAT to comply with the Order, Staff does not believe that the dockets need to be formally opened or formal proceedings conducted, except to review compliance filings. TRO-related revisions to the SGAT should be considered in the same manner as other SGAT revisions, which the Commission addressed in its 46th Supplemental Order in these dockets, entered on August 21, 2003.

The ongoing Qwest PAP (QPAP) includes provisions for changes. To the extent the Triennial Review Order justifies a change in the QPAP, the change should be proposed and disposed as provided in the QPAP.

Docket UT-023003 (New Generic, Recurring Costs):

For UT-023003, the recurring cost docket of the new generic cost proceeding, Staff has identified two issues in the Order that would appear to have an impact on Docket No. UT-023003. Those issues are cost-of-capital and depreciation rates.

- a. Cost of Capital. ¶ 683 of the Order makes it clear that a TELRIC-based cost of capital should reflect any unique risks associated with new services, and that “the use of UNE-specific costs of capital is an acceptable method of reflecting in UNE prices any risk associated with new facilities that employ new technology and offer new services.” As the FCC acknowledges in ¶684, proceedings in many states, including Washington, to date have not considered the use of different costs of capital for different elements. The Order leaves open the possibility that parties may choose to propose (and states have the option to adopt) a single cost of capital for all UNEs that appropriately reflects the risks associated with competitive markets for the services provided over incumbent LEC networks. The Commission may choose to set a single cost of capital for all UNEs offered by a LEC, but the Commission must consider whether it wishes to allow the LECs the opportunity to present evidence on different costs of capital for different unbundled network elements. In Docket UT-023003, only Verizon filed direct

testimony and evidence regarding an overall competitive cost of capital for use in TELRIC studies.

- b. Depreciation Rates. ¶¶685—686 of the Order address changes in depreciation to reflect the risks associated with new facilities and new services. The Order states that commissions may consider using some form of accelerated depreciation in determining UNE rates. In Docket UT-023003, both Qwest and Verizon advocate using financial depreciation rates in the calculation of TELRIC, as opposed to regulatory depreciation rates. Neither the Qwest or Verizon testimony address whether or the extent to which their proposals to use financial depreciation are a form of accelerated depreciation. Neither ILEC has addressed why an accelerated form of depreciation would be appropriate to use in Washington.

Staff believes the Commission has two options for this proceeding: Either bifurcate the proceeding and go forward with the case schedule as currently set, and set a separate schedule to determine whether cost of capital and depreciation rate changes are appropriate, or delay the current schedule and give parties an opportunity to file supplemental testimony regarding changes emanating from the Order. Staff prefers the latter approach.

Docket UT-011219 (Verizon Terms and Conditions for Interconnection)

The Verizon Terms and Conditions proceeding in Docket UT-011219 is scheduled for hearings in April 2004. It is anticipated this Commission's process will be complete or at least well under way prior to those dates, thus impact to the Verizon case may be assessed prior to formal hearings. Staff is aware that the parties to that case have discussed preparing a stipulation for a continuance of the schedule in that case, but none has been filed as of the date these comments are being prepared. As noted above, the Commission may wish to use this docket to require the parties to agree on a batch cut migration process and present it to the Commission for review and approval.

Docket UT-030614 (Qwest's Petition for Competitive Classification of Basic Exchange Business Services)

This proceeding is subject to a statutory deadline that will require a decision before any proceeding before this Commission to implement the FCC Order can be completed. The Commission will undoubtedly be presented with arguments and evidence in the Qwest case to the effect it should deny the competitive classification because of

uncertainty about the availability of UNE-P. The Commission should consider those on their merits in the competitive classification case. The Commission's decision likewise will probably be offered in any proceeding for consideration in any impairment analysis, and the Commission should consider those arguments on their merits. If the Commission's ultimate decision in a proceeding to implement the FCC Order creates a conflict with the Commission's ultimate decision in the Qwest competitive classification case, the Commission will have the ability under RCW 80.36.330(7) to reconcile those differences.

Docket UT-033034 (New Generic, Non-Recurring Costs)

As with Docket UT-011219, the proceedings in this case are set far enough in the future that they should not be held in abeyance, and evidence will not be filed soon enough to consider importing any evidence into any proceedings under Docket UT-033025.

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

Staff does not favor importing evidence from any of the proceedings listed above to a new docket. Evidence presented to address the various issues identified in the FCC Order should be forward-looking, and the most current evidence available, and evidence available from the other dockets is likely to use inconsistent test periods, making effective comparison difficult. Also, if evidence is imported from other dockets, the possibility exists that a party to the proceedings in this case may not have been or may not be a party to the case from which the evidence is imported, thus raising due process concerns. However, if a particular party or company recommends that evidence be imported from another proceeding before this commission, the evidence, and the parties to the other proceeding can be examined for due process concerns at that time.

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

Subject to the comments above about the individual issues raised by the FCC Order, Staff proposes that the Commission address the issues affecting Verizon and Qwest in one generic proceeding rather than a series of separate dockets. Staff does agree with the September 3, 2003 comments filed by the DoD/FEA that a bifurcation of

proceedings, to address the issues covered by the 90-day timeline be addressed separately from those with the 9 month timeline.

- 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?**

STAFF RESPONSE:

Staff recommends that unless the Commission has evidence, or a concern about the presumptions in the FCC Order and wishes to consider changes to those presumptions, the Commission should wait for a party to file a petition.

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?**

STAFF RESPONSE:

The impairment analysis should be done in an adjudicated hearing. Other actions, such as developing the mass migration procedure, should be done by the industry under the WUTC's supervision.

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

STAFF RESPONSE:

Staff believes that it is in the best interests of the Commission and the parties, in terms of most effective use of resources, to coordinate the scheduling of any proceedings arising from the FCC's Order with other states in Qwest's region. The Commission is currently participating in a regional effort to coordinate scheduling and data requests and the question of whether hearings could be consolidated could be addressed in that forum. Due to differences in the procedural rules and process approaches of the various Qwest states, as well as possible differences in the parties to the proceedings in the various states, it may not be realistic to coordinate to the extent of accepting testimony or documents filed in other states as evidence in Washington, without opportunity for objection and cross-examination.

The Staff suggests the Commission also consider coordinating potential resources available in states outside the Qwest region, in particular, with other Verizon West states. Verizon West appears to have a distinct OSS from Qwest or from Verizon East,

due to the differences in the former GTE and Bell Atlantic networks that were merged to form Verizon.

DATED this ____ day of _____, 2003.

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