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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

PETITION OF QWEST CORPORATION TO
INITIATE A NINE-MONTH CASE UNDER
THE TRIENNIAL REVIEW ORDER

I. INTRODUCTION

Qwest Corporation (“Qwest”) files this Petition in response to the “Notice of Deadline to File Petitions Concerning Impairment Without Unbundled Access to DS1, DS3, and Dark Fiber Loops, Transport, and Mass Market Switching” (“Notice”) issued on September 30, 2003 by Judge Rendahl on behalf of the Washington Utilities and Transportation Commission (“Commission”) in the Triennial Review Order (“Order”)¹ docket. Qwest hereby informs the Commission and all interested parties that it hereby requests that the Commission initiate a mass-market switching and dedicated transport docket pursuant to the Order.

The Notice requires that “any person requesting that the Commission review the FCC’s national findings of impairment for DS1, DS3, and dark fiber loops and dedicated transport or mass-market switching must file a petition with the Commission”² The Notice clarified

¹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advance Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147 (August 21, 2003) (“Order”).

² Notice at 2.

1 what a petitioning party must present to initiate a case:

2 The Commission does not require that the petitioner present a prima
3 facie case of no impairment for unbundled access to loops, transport
4 and mass-market switching, or require a petitioner to file pre-filed
5 testimony and supporting evidence. However, any petition filed
6 with the Commission must identify the specific customer locations,
7 routes, or markets in which the petitioner asserts that competitors
8 would not be impaired without unbundled access to loops, transport
9 or mass-market switching. The petition should also address the
10 issue of how the Commission should define the market for mass-
11 market switching, following the guidelines set forth in paragraph
12 495 of the Triennial Review Order. For each market, the petition
13 should identify the number of “competing providers not affiliated
14 with each other or the incumbent LEC” serving mass-market
15 customers in the market or “offering wholesale local circuit
16 switching service to customers serving DS0 capacity loops in that
17 market using their own switches.” See 47 C.F.R. §
18 51.319(d)(2)(iii)(A)(1) and (2).³

19 Qwest has decided not to pursue unbundling relief at this time for high-capacity loops, but may
20 address that issue in a future proceeding.⁴ Qwest is hereby requesting unbundling relief for (1)
21 dedicated transport on certain routes and (2) switching related to loops for mass market customers.

22 Qwest is unable at this time, however, to define the “routes” and “markets” at the level of
23 specificity contemplated in the Notice. Qwest has commenced, but has not completed, its analysis
24 of the data available to it on both issues. More importantly, however, Qwest has not yet had an
25 opportunity to review CLEC responses to Commission discovery or engage in its own discovery.⁵
26 Qwest believes this discovery will disclose the granular facts that will allow Qwest to complete its
analysis of the evidence and thereby allow it to specifically define routes and markets in this case.⁶

For both dedicated transport and mass market switching, much of the information upon which the

³ *Id.*

⁴ See 47 C.F.R. 51.319(a)(7)(ii). A state commission will have six months from the filing of the petition to conduct a review.

⁵ Furthermore, Commission-propounded discovery is consistent with recent Commission practice and the comments in this case by Staff. In Qwest's pending business competitive classification docket, the Commission, recognizing that CLEC-controlled information was needed in order to evaluate and implement the statute governing the proceeding, ordered all CLECs in the state serving business customers to provide specific information regarding the services they provide. *Docket No. UT-030614, Order No. 6, at 3, 5.* In its comments in this proceeding, Staff acknowledged that the Commission, pursuant to RCW 80.04.170, possesses authority to order non-party local exchange carriers to provide information that the Commission deems necessary to the proceeding in the same manner it has done in Qwest's recent competitive classification proceedings. *Staff's Comments, at 4.*

⁶ In its October 3, 2003 Comments, Qwest outlined the critical importance of discovery in this case.

1 Commission's findings must be made is in the exclusive control of other providers (including
2 CLECs, CAPs, IXCs, cable providers, wholesale providers, wireless providers, and VoIP
3 providers) and is not available to Qwest. Until it can gain access to that information, Qwest must
4 rely on a subset of (1) data that is in its possession and (2) data that is publicly available. Qwest
5 can make certain inferences from this data, but needs access to data held by other providers in
6 order to fully assess the "market" and the "routes" for which impairment does not exist according
7 to FCC standards. Full and complete discovery responses from other providers are critical to the
8 Commission's duty to determine whether impairment exists or not—it is equally critical to
9 Qwest's ability to precisely define the markets and routes where a finding of non-impairment is
10 appropriate.

11 At the same time, Qwest is mindful of the desire of the Commission and other parties to
12 learn the precise scope of the nine-month case. Qwest has every intention of moving forward
13 vigorously with the analysis of its own information and to obtain, through appropriate discovery,
14 the information necessary to allow it more discretely identify the specific routes and markets in
15 which unbundling relief is appropriate. In the meantime, Qwest is able to provide only a high
16 level preliminary description of these routes and markets in this pleading.

17 To assist the Commission in fully understanding Qwest's position on these issues, Qwest
18 will first provide general comments on the issues set forth in the Notice and will then state its
19 formal Petition in this case.

20 II. COMMENTS

21 A. The Order Contemplates Discovery and Factual Analysis by the Parties Prior to 22 Identification of Specific Routes and Markets

23 The Order made a national finding that CLECs are impaired without access to dedicated
24 transport⁷ and mass market switching. However, the FCC did so with the clear reservation that it
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26 _____
⁷ With the exception of OCn level transport, for which the FCC found no impairment. Order ¶ 359.

1 lacked the specific facts necessary for a more granular analysis of specific routes and markets.⁸
2 The Order thus repeatedly states that a state commission’s task in a Triennial Review case is to
3 examine multiple factors to determine whether the national finding of impairment for dedicated
4 transport and mass market switching is valid on specific routes or within specific markets. The
5 FCC made it clear that, in order to fulfill its mandate on both issues, the Commission must not
6 only examine information in the possession of Qwest, but must also examine information in the
7 possession of CLECs and other providers: “State commissions possess the requisite expertise to
8 apply [FCC]-prescribed standards, and they routinely utilize processes and procedures – including
9 discovery, sworn testimony, and cross-examination on the record – that are essential to reasoned
10 fact finding.”⁹ Likewise, in order for Qwest to definitively identify the unbundling relief it is
11 requesting, it must also be able to obtain and review the same information—that can only occur
12 following discovery.

13 **1. Dedicated Transport**

14 The Order defines dedicated transport impairment as a route-specific concept. Instead of
15 taking a broader market power or market analysis approach, the FCC concluded that for dedicated
16 transport “a route-specific bright-line standard is more manageable for the parties and
17 administratively more practical.”¹⁰ Noting that the “the record is insufficiently detailed to make
18 more precise findings regarding impairment,” the FCC delegated to the states “a fact-finding role
19 to determine on a route-specific basis where alternatives to the incumbent LECs’ networks exist
20 such that competing carriers are no longer impaired.”¹¹ The FCC thus adopted two triggers: the
21 first focusing on whether three non-affiliated CLECs have self-provisioned transport on a specific
22

23 ⁸ With regard to dedicated transport, the FCC stated: “[E]vidence suggests that requesting carriers likely are not
24 impaired without access to unbundled transport in some particular instances, but evidence in the record is not
25 sufficiently detailed to identify these specific routes.” *Id.* ¶ 394. The FCC said this about switching for mass market
26 customers: “We also recognize that a more granular analysis may reveal that a particular market is not subject to
impairment in the absence of unbundled local circuit switching.” *Id.* ¶ 461.

⁹ *Id.* ¶ 488.

¹⁰ *Id.* ¶ 396.

¹¹ *Id.* ¶ 398.

1 route (Self-Provisioning Trigger), the second addressing whether two wholesale providers of
2 transport have deployed facilities on a specific route (Competitive Wholesale Facilities Trigger).¹²

3 The FCC conceded that the Self-Provisioning Trigger analysis is “very granular” and that
4 it requires specific analysis of the routes employed by competitors of the ILEC.¹³ The Order
5 contemplates that the state commission will conduct comprehensive discovery and/or allow parties
6 to engage in specific, extensive discovery: “[W]e delegate to states authority to determine where
7 three or more unaffiliated competing carriers each have deployed transport facilities on a route.”¹⁴
8 But even that information does not end the inquiry. Even if a CLEC has facilities on a specific
9 route, the facility “must be operationally ready to provide transport into or out of an incumbent
10 LEC central office” and “must terminate in a collocation arrangement which may be arranged
11 either pursuant to contract, tariff or, where appropriate, section 251(c)(6).”¹⁵ Among other things,
12 the factual inquiry must address the capacity level of each facility and whether the carrier obtained
13 the facility pursuant to a long-term IRU.¹⁶ A similar analysis of every CLEC facility that
14 potentially meets the trigger on a specific route must be conducted. The Commission’s analysis
15 of the Competitive Wholesale Facilities Trigger is equally granular and is likewise dependent
16 upon similar information in the possession of wholesale providers in the marketplace.¹⁷

17 Qwest has complete information about its own network and has some information relating
18 to whether CLECs have facilities that terminate in certain central offices. Based only on Qwest’s
19 own information, indications are that numerous routes—particularly in rural and suburban service
20 territories—would not meet the triggers. But in more densely populated urban areas, the
21 information in Qwest’s possession suggests there may be no impairment. For example, once a
22 CLEC facility leaves a Qwest central office, Qwest can only engage in informed speculation about

23 ¹² *Id.* ¶ 400.

24 ¹³ *Id.* ¶ 401.

25 ¹⁴ *Id.* ¶ 405.

26 ¹⁵ *Id.* ¶ 406.

¹⁶ *Id.* ¶ 408.

¹⁷ *Id.* ¶¶ 412-16.

1 where or even whether it terminates in other Qwest central offices. Without the highly granular
2 discovery from CLECs that is clearly mandated by scope of the inquiry required by the FCC, it is
3 extremely difficult for Qwest to make a definitive conclusion of the routes where it will seek
4 unbundling relief.

5 Thus, in the Petition section, Qwest's definition of the routes for which it is seeking relief
6 in Washington is necessarily stated in general terms. As it obtains more specific information
7 through analysis of its own information and through discovery, Qwest is committed to refining its
8 request for unbundling relief for dedicated transport. In the meantime, the routes set forth in
9 Exhibit to the Petition section represent Qwest's best information at this time.

10 **2. Mass Market Switching**

11 It is equally difficult for Qwest to provide definitive descriptions of the markets in which it
12 will seek relief from its current obligation to unbundle switching for mass-market customers. As
13 with dedicated transport, the Order mandates that state commissions engage in a granular, fact-
14 specific analysis, not only to analyze whether impairment exists within relevant geographic
15 markets, but to define the relevant geographic markets: "State commissions must first define the
16 market in which they will evaluate impairment."¹⁸ The Commission must analyze a vast amount
17 of information generally within the possession of CLECs and other providers. Indeed, in many
18 cases the same data necessary to define the market will also determine if impairment exists in that
19 market.

20 **a. Defining a geographic market under the order**

21 In contrast to the route-specific approach to dedicated transport, the approach for switching
22 is premised on the state commission's definition of a geographic market. Market definition is
23 critical for both analytical paths defined by the Order to analyze switching impairment. The first
24 path (herein referred to as "Track 1") focuses on whether either of two triggers (Self-Provisioning
25 and Competitive Wholesale Facilities Deployment) has been met. The second path ("Track 2")

26 ¹⁸ *Id.* ¶ 495.

1 comes into play if neither trigger has been met—it focuses on whether, even if the triggers are not
2 met, a particular market is “suitable for ‘multiple, competitive supply.’”¹⁹

3 The FCC explained the analytical process the Commission should follow in defining a
4 market. The state commission must use the same market definition for both tracks.²⁰ While the
5 Commission has discretion to “determine the contours of each market,” the FCC prohibited state
6 commissions from defining a market “as encompassing the entire state.”²¹ Likewise, the FCC
7 cautioned that state commissions should not “define the market so narrowly that a competitor
8 serving the market alone would not be able to take advantage of the scale and scope economies
9 from serving a wider market.”²² Instead, the state commissions should define markets on a
10 granular level, taking into account several discrete factors:

- 11 1. The locations of customers actually being served by competitors.
- 12 2. The variation in factors that affect the ability of competitors to serve each group of
13 customers.
- 14 3. The ability of competitors to target and serve specific markets economically and
efficiently with currently available technologies.²³

15 Each factor focuses on what competitors are actually doing or what they have the ability to do
16 within certain geographic areas. Many of these facts must be ascertained by discovering facts
17 from other providers.

18 In defining a market, it is critical to know where competitors have switches, whether they
19 are serving mass market customers with them (and where the customers are located), whether the
20 switches can be used to serve mass market customers if they are not currently serving them, the
21 geographical scope of each switch, and a host of other issues related to evidence of actual

22 ¹⁹ *Id.* ¶ 506. Under Track 2, the state commission is required to analyze evidence relating to actual competitive
23 deployment, operational barriers, and economic issues (including a business case analysis of an efficient entrant). *Id.*
¶¶ 506-20.

24 ²⁰ *Id.* ¶ 495.

25 ²¹ *Id.*

26 ²² *Id.*

²³ *Id.* See also ¶ 496 (state commission may consider “how UNE loop rates vary across the state, how retail rates
vary geographically, how the number of high-revenue customers varies geographically, and how the cost [and] how
the cost of serving customers varies according to the size of the wire center and the location of the wire center.”)

1 deployment.²⁴ Even if the level of actual deployment is insufficient to meet the Track 1 switching
2 triggers, actual deployment remains a relevant factor in a Track 2 analysis, where the state
3 commissions must weigh evidence of actual deployment, operational factors, and a business case
4 modeling process to determine if an efficient CLEC could economically serve mass-market
5 customers.²⁵

6 The definition of a market in a switching impairment inquiry cannot be determined in a
7 vacuum. It requires an analysis of granular state-specific data, much of which is not readily
8 available to Qwest.

9 While the Order states that the state commission must first define the relevant market,²⁶
10 nothing in the Order suggests that the FCC meant that the market must be defined before
11 discovery proceeds. In so stating, the FCC was describing the analytical process a state
12 commission should follow at the end of the case in considering the evidence placed before it by
13 the parties. Thus, at the end of the case, the Commission must first define the market based on the
14 evidence before it before determining whether impairment exists within that market. When
15 considered in context, it is clear the FCC had no intention of mandating that a party or the
16 Commission define the market at the beginning of the case.

17 Even parties that will adamantly oppose Qwest's efforts to obtain unbundling relief for
18 mass-market switching recognize that it is impossible to define a market at this point in the case.
19 In comments filed less than a month ago in Utah, MCI stated:

20 [T]he Commission needs to examine evidence submitted by the
21 parties on each of the areas identified in [paragraph 495 of the
22 Order], and there should be hearings on this before the Commission
23 makes its determination. While the FCC states that the "State
24 commissions must first define the markets in which they will
25 evaluate impairment," in context this appears to only state the
26 obvious—that before any state commission can determine whether

²⁴ *Id.* ¶¶ 495, 498-501, 504-05, 508-10.

²⁵ Qwest is developing a business case model to be used in this case. However, before all inputs to the model can be finalized, it is important that Qwest have an opportunity to review CLEC responses to Commission and Qwest discovery regarding actual practices of CLECs.

²⁶ Order ¶ 495.

1 there is impairment in a market, the state commission must define
2 what the market is. But, given that the market definition must be the
3 same in the trigger analysis as it is in the economic analysis, and
4 **given the extensive factual record that the FCC has required**
5 **that the states analyze before defining the market, it is clear that**
6 **the Commission's determination as to the definition of the**
7 **market should only be made after it has received and reviewed**
8 **all evidence and argument in the matter. The ruling on the**
9 **appropriate definition should only be made at the end of the**
10 **case when the Commission also rules on impairment.**²⁷

11 AT&T made a similar argument:

12 [A]t the outset of the case, all parties should be given an opportunity
13 to file preliminary "guidance comments" on market definition.
14 Under ideal circumstances, it would be desirable to determine the
15 geographic market(s) at the outset, so that all parties could prepare
16 their showings knowing in advance the basis on which the
17 Commission will reach its determinations.

18 As a practical matter, however, the circumstances under which the
19 parties and the Commission are laboring are not ideal. **First of all,**
20 **the nine-month schedule dictated by the FCC is extraordinarily**
21 **tight, and resolving these issues "up front" necessarily would**
22 **consume several weeks of valuable time. More importantly, the**
23 **considerations that the FCC has identified (and those that the**
24 **parties will no doubt advance) in deciding on geographic**
25 **markets are highly fact-specific and best resolved on the basis of**
26 **the evidence that will be collected.**

Accordingly, it may well be advisable for this Commission to
address geographic market issues as part of its determinations on the
merits, and the parties would make their presentations on geographic
market as part of their cases in chief. It is essential, in all events,
that the parties have the opportunity to propose and support their
recommendations on market definition, and to respond fully to the
recommendations of others.²⁸

These comments from two of the largest CLECs in Washington indicate agreement with Qwest
that the Commission's market definition decision cannot and should not be made at this point

²⁷ Comments of WorldCom Inc. (MCI), *In the Matter of a Proceeding to Address Actions Necessary to Respond to the Federal Communications Commission Triennial Review Order Released August 21, 2003*, Docket No. 03-999-04 (Utah PSC) (September 17, 2003) (emphasis added).

²⁸ Comments of AT&T Communications of the Mountain States, Inc. and TCG Utah ("AT&T") Regarding Commission Proceedings Arising From the FCC's Triennial Review Order, *In the Matter of a Proceeding to Address Actions Necessary to Respond to the Federal Communications Commission Triennial Review Order Released August 21, 2003*, Docket No. 03-999-04 (Utah PSC) (September 19, 2003) (emphasis added).

1 because more facts are necessary to do so. For the same reason the Commission cannot make the
2 market definition decision now (i.e., it lacks sufficient evidence), Qwest should not be required to
3 state its proposed market definitions with any degree of granularity.

4 Moreover, fundamental pleading principles support Qwest’s position that identifying
5 routes and markets with particularity should be required only after an opportunity for it to review
6 responses to discovery. The first principle states that a party has no obligation to plead facts with
7 specificity where the facts are within the knowledge and control of other parties.²⁹ The second
8 corollary principle relates to notice pleading under the rules of civil procedure. A notice pleading
9 under Washington law contemplates “that discovery will provide parties with the opportunity to
10 learn more detailed information about the nature of a complaint.”³⁰

11 These cases stand for the general proposition that it is unfair to require a party to plead
12 facts that are not in its possession and which can only become known through discovery. The
13 same principle of fairness applies here, where Qwest does not have in its possession all of the facts
14 that would allow it to define routes and markets at the level of specificity contemplated by the
15 Notice.

16 **B. The Appropriate Method to Define a Market**

17 The Notice asks Qwest to comment on “how the Commission should define the market for
18 mass market switching, following the guidelines set forth in paragraph 495 of the Triennial
19 Review Order.”³¹ As noted above, the FCC has delegated considerable authority to the

20 ²⁹ *Boeseke v. Boeseke*, 255 Cal.App. 2d 848, 852 n. 2, 63 Cal.Rptr. 651, 655 n. 2 (Cal. App. 1968) (“facts
21 peculiarly within the knowledge of an adversary may be pleaded on information or belief or omitted on the strength of
22 such an allegation”); *Credit Managers Ass’n v. Superior Court*, 51 Cal. App.3d 352, 361, 124 Cal.Rptr. 242, 248 (Cal.
23 App. 1975) (“plaintiff need not plead facts with specificity where the facts are within the knowledge and control of the
24 defendant and are unknown to plaintiff.”); *Lozman v. Putnam*, 328 Ill.App.3d 761, 769-70, 767 N.E.2d 805, 812-13
25 (Ill. App. 2002). Even Federal Rule 9(b)—the rule that requires fraud claims be pleaded with particularity—is relaxed
26 “as to matters peculiarly within the opposing party’s knowledge.” *Wool v. Tandem Computers*, 818 F.3d 1433, 1439
(9th Cir. 1987) quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure*, § 1298, at 416 & n. 95 (1969).
Thus, even the demanding rule 9(b) pleading requirements that apply to insider-trading cases are not so stringent that
they preclude a party the opportunity for discovery. *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993) (“But
surely we can not expect a private plaintiff . . . to plead the specificity Rule 9(b) requires without allowing some
limited opportunity for discovery”). In this case, there is no similar stringent pleading requirement. Indeed, the FCC
has specifically declined to impose a burden of proof on any particular party. Order ¶ 92.

³⁰ *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099, 1106 (1992).

³¹ Notice at 2.

1 Commission to define markets for purposes of a mass-market switching impairment case. The
2 FCC cautioned about defining too broad a market (i.e., it cannot be “the entire state”), but likewise
3 cautioned against cutting too narrowly (“states should not define the market so narrowly that a
4 competitor serving the market alone would not be able to take advantage of available scale and
5 scope economies from serving a wider market”³²). Within those parameters, state commissions
6 must consider the factors set forth in paragraph 495, as well as a variety of other factors that the
7 FCC has defined as relevant to a switching impairment analysis.

8 In the end, the market definition decision is driven by the specific activity of competitors,
9 including, in a Track 2 case, the ability of potential competitors to economically operate in the
10 market. Thus, in the absence of specific facts and discovery from competitors about their service
11 territory and business plans, it is difficult to recommend an appropriate definition of the market.
12 Depending on those facts (e.g., location of CLEC switches, the capability of those switches,
13 whether there are specific operational or economic barriers in the area, and so on), the macro view
14 of the market could be as large as Qwest’s service territory in the state of Washington.

15 Although the Commission does not yet have all the facts necessary to make a
16 determination of the appropriate markets in Washington, Qwest will outline some general
17 observations on the process it will follow in determining the geographical markets in which it will
18 seek unbundling relief. Qwest suggests the Commission follow the same process in making the
19 ultimate market definition decisions.

20 **1. The Three-Step Process**

21 In the Order, the FCC made a national finding that the development of competition among
22 firms providing switched local services to residential and small business customers (the mass
23 market) is impaired without access to unbundled switching. This is a rebuttable finding. The FCC
24 recognized “that a more geographically specific record may identify particular markets where
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26 _____
³² Order ¶ 495.

1 there is no impairment.”³³ Because switching impairment is a market-specific concept, it is
2 necessary to identify geographic markets—geographic areas within which firms do or can offer
3 services in competition with ILEC services to residential and small business customers over non-
4 ILEC switches—where there is sufficient evidence to rebut the national finding.

5 Qwest intends to follow a three-step process for identifying the geographic markets in
6 which it will claim there is no impairment. These steps include: (1) assembling the facts, (2)
7 performing a fact-based analysis of actual and/or potential competition, and (3) making a decision
8 based upon the fact-based analysis.

9 **a. Assembling the facts**

10 Assembling the facts is an absolute prerequisite for Qwest’s ability to precisely identify
11 geographic markets where it believes there is no impairment. Discovery, of course, is an essential
12 element of assembling the necessary facts. As noted above, many of the facts critical to the
13 analysis exist only solely within the CLECs’ possession. For example, the Order states that
14 commissions “must take into consideration the locations of customers actually being served (if
15 any) by competitors.”³⁴ This is information that is primarily in the possession of CLECs and other
16 providers. Geographic areas for collecting data can be subsets of the areas comprised by
17 geographic markets. For example, the basic geographic unit for collecting data will likely be at
18 the wire center level, but a geographic market would, at the very least, comprise several wire
19 centers in an MSA or LATA or could be the entire service territory of Qwest in a state.

20 **b. Performing a fact-based analysis**

21 The next step in the process is the performance of a fact-based analysis of actual and
22 potential CLEC local service competition over non-ILEC switches. It must begin with an accurate
23 assessment of the locations of all non-ILEC switches used by CLECs to provide local services.

24 This should include local switches that are currently providing services to any customers,
25

26 ³³ *Id.* ¶ 7 (Executive Summary at 12).

³⁴ *Id.* ¶ 495.

1 including switches currently used to provide services only to enterprise customers.³⁵

2 To determine actual competition from non-ILEC owned switches, it is necessary to know
3 the types and locations of switches that currently provide services to residential and small business
4 customers, and the locations of the “mass market” customers served by those switches. It is
5 likewise critical to develop a clear understanding of the nature and impact of intermodal
6 competition in the area being analyzed—thus, data from intermodal competitors is a critical part of
7 the discovery process.³⁶

8 To determine potential competition, it is necessary to know the locations and capabilities
9 of all switches, collocation arrangements, DLCs, OSS, and transport used to provide local
10 services, because “the evidence on the record shows that the cost of providing mass market service
11 is significantly reduced if the necessary facilities are already in place and used to provide other
12 higher revenue services.”³⁷ The extent that CLECs have already made sunk investments and
13 established operations related to a geographic market to serve enterprise customers can have a
14 significant bearing on the analysis of impairment related to residential and small business
15 customers.

16 The business case modeling process performed in a Track 2 analysis likewise relies on a
17 realistic assessment of the granular facts (e.g., density, location, and proximity of wire centers, as
18 well as a host of other factors).

19 **c. Decision**

20 On the basis of the totality of these facts and after applying rational economic factors, the
21 state commission will be in a position to determine the geographic markets within which it will
22 apply the various factors required by the FCC. It is critical to keep in mind that it is not possible
23 to get to the final step if the relevant facts are not developed and made available for the parties to
24 analyze.

25 ³⁵ *Id.* ¶ 508.

26 ³⁶ *See, e.g.*, 47 C.F.R. 51.319(d)(iii)(A)(1).

³⁷ *Id.*

1 **III. PETITION**

2 In response to the Commission’s September 30, 2003 Notice, Qwest hereby notifies and
3 petitions the Commission as follows:

4 **A. DS1, DS3 and Dark Fiber Loops**

5 There are numerous locations and routes in Washington in which CLECs are not impaired
6 in the absence of unbundled DS1, DS3 and Dark Fiber loops. For example, in many high-density
7 business areas and elsewhere, multiple CLECs routinely self-provision such loops. Nevertheless,
8 given the heavy demands on Qwest to fully address issues related to dedicated transport and mass
9 market switching, Qwest hereby notifies the Commission that it has decided not to request relief
10 from its unbundling obligations for such loops in Washington at this time. Qwest may request that
11 the Commission, pursuant to the ongoing authority of the Commission under the Order, to
12 consider these issues at a later time.³⁸

13 **B. Dedicated Transport**

14 In its Comments, Qwest explained that it is extremely difficult to definitively describe the
15 specific routes in Washington in which CLECs and other providers are not impaired in the absence
16 of unbundled dedicated transport. Nevertheless, Qwest hereby petitions the Commission to
17 determine, based on the granular analysis required by the Order and on the basis of the facts that
18 will be presented by Qwest after it has had an opportunity to review CLEC responses to
19 Commission and Qwest discovery, that CLECs are not impaired in the absence of unbundled
20 dedicated transport on 114 routes in Washington. The A (beginning) location and Z (ending)
21 location of each route is set forth on Exhibit A. Qwest selected these routes on the basis of
22 collocations in each of the wire centers designated as either an A or Z location. This request is
23 based on a preliminary analysis of Qwest’s own data. At such time as Qwest is able to complete a
24 discrete analysis of each of these routes on the basis of full and complete facts under the standards
25 in the Order, Qwest will amend this request to the extent its request for unbundling relief deviates

26 ³⁸ See 47 C.F.R. 51.319(a)(7)(2) (state commissions must complete subsequent reviews within six months).

1 from the routes described above. In order to complete this analysis, it is essential that Qwest be
2 able to obtain specific information from other providers or third parties.

3 **C. Mass-Market Switching**

4 **1. Qwest's Preliminary Scoping of Markets for Purposes of this Petition**

5 In its Comments, Qwest explained that it is extremely difficult to definitively describe the
6 geographic markets in Washington in which CLECs and other providers are not impaired in the
7 absence of unbundled switching for mass-market customers. Qwest outlined in general terms the
8 process it will follow to identify on a more specific basis the precise contours of the geographical
9 areas in Washington that constitute the correct markets for purposes of the Track 1 or Track 2
10 analyses. Because it is necessary for Qwest to obtain access to a variety of factual information
11 that is not its possession at this time, Qwest cannot be very specific.

12 Nevertheless, Qwest hereby petitions the Commission to determine, based on the granular
13 analysis required by the Order and on the basis of the facts that will be presented by Qwest
14 following an opportunity to review CLEC responses to Commission and Qwest discovery, that
15 CLECs are not impaired in the absence of unbundled switching for mass-market customers
16 anywhere in Qwest's service territory within the state of Washington.

17 Qwest bases its preliminary conclusion on data it possesses regarding the location of
18 CLEC switches, the use of DS0 level loops serving CLEC customers, the existence of
19 collocations, and the existence of customers currently being served via UNE-P. The information
20 currently in Qwest's possession creates inferences as to actual and potential competition that can
21 only be validated by information in the possession of other providers. Qwest recognizes that a
22 more discrete analysis of the facts will allow it to define the market or markets for mass-market
23 switching in the state of Washington with greater particularity.

24 **2. Response to Commission Request**

25 The Commission's Notice requested, for each market identified, that Qwest "identify the
26 number of 'competing providers not affiliated with each other or the incumbent LEC' serving

1 mass market customers in the market or ‘offering wholesale local circuit switching service to
2 customers serving DS0 capacity loops in the market using their own switches.’”³⁹

3 With regard to the question relating to the number of competing providers offering
4 wholesale switching, Qwest is unaware of any in Washington. However, to the extent carriers are
5 providing wholesale switching services, that is not an activity that a wholesale provider would
6 have an obligation to inform Qwest is taking place. The discovery that Qwest has proposed is
7 designed to determine if any carriers are providing such wholesale services.

8 Likewise, for the same reasons, Qwest is unable to provide a definitive response to the
9 question about the number competing providers providing self-provisioned switching to serve
10 mass market customers. However, in an effort to provide the Commission with some relevant
11 information, Qwest is attaching an exhibit (Exhibit B) that provides information identifying wire
12 centers where CLECs represent in the LERG they are serving customers with their own switches,
13 and further stratifying that information with information showing where CLECs are purchasing
14 unbundled loops (i.e., UNE-L), where CLECs are purchasing UNE-P, and where CLECs are
15 collocated.

16 CLECs own and operate switches in Washington and are purchasing DS-0 level unbundled
17 loops (i.e., UNE-L) in numerous wire centers in Washington. Although the ordering of DS0 loops
18 from Qwest is a strong indication that they are serving the mass-market, competitors are not
19 required to inform Qwest if they are using these switches to serve mass-market customers. Also,
20 the CLECs have not informed Qwest of the geographical scope of the switches they have thus far
21 deployed. The information in Exhibit B is no substitute for actual information from CLECs
22 related to actual switch deployment. Nothing on Exhibit B provides information, for example,
23 related to switches deployed by providers utilizing cable technology to serve mass market
24 customers.

25 Qwest has proposed discovery questions for the Commission to propound that, if answered
26

³⁹ Notice at 2.

1 fully and completely, will provide the information necessary to allow Qwest to fully respond to
2 questions propounded by the Commission. Until those questions are answered, Qwest cannot
3 make more definitive responses.

4 **IV. CONCLUSION**

5 Qwest therefore petitions the Commission to open a mass market switching case pursuant
6 to the Order throughout Qwest's entire service territory in the state of Washington. In addition,
7 Qwest petitions the Commission to open a dedicated transport case for the transport routes
8 described in Exhibit A to this Petition.

9 RESPECTFULLY SUBMITTED this 10th day of October, 2003.

10 QWEST

11
12 /s/ Lisa A. Anderl

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