

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of a Commission Investigation
into the FCC Triennial Review Order's
National Presumptive Finding of No
Impairment for Local Switching on High
Capacity Loops Available to Business
Customers

ISSUE DATE: September 30, 2003

DOCKET NO. P-999/CI-03-960

ORDER OPENING INVESTIGATION AND
NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On February 20, 2003, the Federal Communications Commission (FCC) adopted its Triennial Review Order,¹ which revised the federal rules governing the obligations of incumbent local exchange carriers to unbundle certain elements of their networks and make them available to competitive carriers at cost-based rates.² On August 21, 2003, the FCC released the text of that Order. The effective date of the Order and the new rules is October 2, 2003.

One of the major revisions the Order made to the federal unbundling rules was to eliminate the across-the-board requirement to unbundle local circuit switching. Instead, the Order adopted separate unbundling requirements for mass market customers (residential and very small business customers) and enterprise customers (medium and large business customers served by loops of DS1 capacity or higher), based on the degree to which lack of access to unbundled switching would impair the ability of competitive carriers to serve these customer classes.

The FCC found significant impairment in the case of mass market customers and no impairment in the case of enterprise customers. The agency therefore continued to require unbundled switching when competitive carriers served mass market customers and discontinued requiring it when competitive carriers served enterprise customers.

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*, CC Docket No. 01-338, Released August 21, 2003.

² 47 U.S.C. §§ 251(c)(3), 252(d)(1); 47 CFR 51.307 *et seq.*

The FCC recognized, however, that impairment in serving enterprise customers might still exist in specific geographic markets. The FCC therefore provided states an opportunity to rebut the no-impairment finding as to specific geographic markets by filing a petition with the agency within 90 days of the effective date of the Order.

This Commission issued two notices seeking comment on the need for a proceeding to examine the federal presumption of no impairment. The first notice, dated July 10, 2003, requested procedural comments on a hypothetical 90-day proceeding. The second notice, dated September 16, 2003, asked persons who recommended holding such a proceeding and persons who intended to participate in such a proceeding if held, to declare their intention to participate and to provide a summary of the issues they intended to raise.

Two competitive local exchange carriers – US Link, Inc. and Desktop Media d/b/a DM Broadband – filed comments recommending a 90-day proceeding and declaring their intention to participate. Qwest Corporation filed comments stating its intention to participate if the Commission conducted a proceeding. Sprint Minnesota, Inc. reserved its right to participate in any proceeding, especially in the portion of the proceeding dealing with market definition. The Minnesota Department of Commerce stated its intention to participate if the Commission conducted a proceeding.

On September 25, 2003, the matter came before the Commission.

FINDINGS AND CONCLUSIONS

I. Jurisdiction and Referral for Contested Case Proceedings

The Commission has general jurisdiction over Minnesota telephone companies and telecommunications carriers under the Minnesota Telecommunications Act, Minnesota Statutes Chapter 237, particularly sections 237.02, 237.035, 237.081, and 237.16. The Commission has specific jurisdiction under 47 CFR § 51.319(d)(3) over the issue of whether there are specific markets in Minnesota where the federal presumption against mandatory unbundling of local circuit switching for enterprise customers does not hold.

The Commission finds that the issue of whether this state should seek to rebut that federal presumption as to specific markets turns on facts that are best developed through formal evidentiary proceedings. The Commission will therefore refer the matter to the Office of Administrative Hearings for contested case proceedings.

II. Issues to be Addressed

The issue in this case is whether, in specific markets within this state as alleged by US Link, Inc. and Desktop Media, competitive local exchange carriers are impaired in their ability to serve

enterprise customers without access to local circuit switching as an unbundled network element. Making this determination will require the Commission to consider at least the issues set forth below, which the parties shall address in this proceeding.

- A. The identity and location of each enterprise customer that is claimed to be served by an unbundled loop of DS1 capacity or higher.
- B. For each identified customer and loop, actual, market-specific evidence of impairment, including but not limited to the following information:
 - 1. Any scale economies favoring the incumbent local exchange carrier;
 - 2. The cost differences caused by scale economies and whether these cost differences are sufficiently large and persistent, alone or in combination with other factors, to be likely to make entry uneconomic;
 - 3. The existence of sunk costs, meaning costs that are unrecoverable upon exit from the market;
 - 4. Evidence that the incumbent local exchange carrier has incurred sunk costs, making it likely that entry by another carrier will cause the incumbent to drop prices below average cost, presenting a barrier to the entering carrier;
 - 5. Any first mover advantages maintained by the incumbent local exchange carrier;
 - 6. Any offsetting advantages the competitive local exchange carrier looking to enter the market has, including, but not limited to, the ability to design new, more efficient networks with new equipment and technology;
 - 7. Any absolute cost advantages held by the incumbent local exchange carrier;
 - 8. Any other barriers within the control of the incumbent local exchange carrier that support a finding of impairment;
 - 9. Any other factors suggesting that the sum of the existing barriers is likely to make entry uneconomic;
 - 10. The nature, amount, and effects of any revenues the incumbent

local exchange carrier receives from implicit supports.

The parties may also raise and address other issues relevant to the question of whether, in the specific Minnesota markets under consideration, the federal presumption against mandatory unbundling of local circuit switching for enterprise customers does not hold and should be rebutted.

III. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Kathleen A. Sheehy. Her address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 341-7602.

B. Hearing Procedure

- *Controlling Statutes and Rules*

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 117 University Avenue, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

- *Right to Counsel and to Present Evidence*

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

- *Discovery and Informal Disposition*

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to John Lindell, Public Utilities Financial Analyst, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 297-1398; Marc Fournier, Public Utilities Rates Analyst, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 296-3793; or Steve Alpert, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 296-3258.

- *Protecting Not-Public Data*

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

- *Accommodations for Disabilities; Interpreter Services*

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

- *Scheduling Issues*

The times, dates, and places of hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

- *Notice of Appearance*

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

- *Sanctions for Non-compliance*

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are US Link, Inc., Desktop Media d/b/a DM Broadband, Qwest Corporation, and the Minnesota Department of Commerce. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve

copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference in this case will be held on Monday, October 6, 2003, at 9:30 a.m. in the Large Hearing Room in the offices of the Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101-2147.

Parties and persons intending to intervene in the matter should attend the prehearing conference, prepared to discuss time frames and scheduling. Other matters which may be discussed include the locations and dates of hearings, discovery procedures, protective orders, settlement prospects, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

E. Time Constraints

Under 47 CFR § 51.319(d)(3), the Commission is required to file any petition seeking to unbundle local circuit switching for enterprise customers in specific markets on or before December 31, 2003.

The Commission asks the Office of Administrative Hearings to conduct contested case proceedings in light of these time constraints and respectfully requests that the Administrative Law Judge submit her final report by December 15, 2003. The Commission also asks the Administrative Law Judge to immediately certify to the Commission any decision she makes on any motion for summary disposition and to continue the evidentiary proceeding pending Commission action on the certified motion.

IV. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 *et seq.*, may apply to this case. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

V. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The Commission hereby refers for contested case proceedings, as set forth above, the issue of whether, in specific markets within this state as alleged by US Link, Inc. and Desktop Media, competitive local exchange carriers are impaired in their ability to serve enterprise customers without access to local circuit switching as an unbundled network element.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East, Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of a Commission Investigation MPUC Docket No. P-999/CI-03-960
into the FCC Triennial Review Order's National
Presumptive Finding of No Impairment for OAH Docket No.
Local Switching on High Capacity Loops
Available to Business Customers

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Kathleen A. Sheehy, Office of Administrative Hearings, Suite, 1700, 100 Washington Square,
Minneapolis, Minnesota 55401; (612) 341-7602

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: _____

DATE: _____