

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

In the Matter of a Commission Investigation
into ILEC Unbundling Obligations as a Result
of the FCC Triennial Review Order

ISSUE DATE: October 3, 2003

DOCKET NO. P-999/CI-03-961

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.

In the Order the FCC refined its definition of the “impair” standard, the touchstone in determining which network elements must be unbundled, and explained the significance of other policy factors in reaching unbundling determinations. For some network elements, such as the high-frequency portion of the loop and “greenfield” fiber loops, the agency made binding nation-wide findings and set nation-wide rules on incumbent local exchange carriers’ unbundling obligations.

For other network elements, the agency adopted a rebuttable presumption for or against unbundling, and delegated to state commissions the authority to make final determinations, applying federal standards. And for other network elements, the agency articulated the principles

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.*

to be applied in making unbundling determinations, found that these determinations required fact-intensive, local evidentiary inquiries, and delegated the responsibility for those inquiries to the state commissions. The FCC required that these state proceedings be completed within nine months of the effective date of the Triennial Review Order.³

On July 10, 2003, anticipating the release of the FCC Order, this Commission issued a notice seeking procedural comments on the nine-month proceeding it would shortly begin. Among other things, the notice sought comments on the appropriate procedural framework for the proceeding, likely issues, probable parties, and evidentiary requirements.

The following persons filed comments:

- Minnesota Department of Commerce
- Qwest Corporation
- MCImetro Access Transmission Services LLC; MCI WorldCom Communications, Inc.; and Brooks Fiber Communications of Minnesota, Inc., filing jointly as “MCI”
- Citizens Telecommunications Company of Minnesota, Inc. and Frontier Communications of Minnesota, Inc., filing jointly
- Eschelon Telecom of Minnesota, Inc.
- Allegiance Telecom, Inc.
- Sprint Minnesota, Inc.
- AT&T Communications of the Midwest, Inc. and AT&T Local Services on behalf of TCG Minnesota, Inc., filing jointly as AT&T
- McLeod USA Telecommunications, Inc. and the CLEC Coalition⁴

All commenting parties agreed that the issues in this case would be those raised by applying the FCC’s impairment criteria to three sets of network elements – mass market local circuit switching, high-capacity loops, and dedicated transport. The FCC reached a general conclusion that competitive local exchange carriers are impaired in their ability to provide service without unbundled access to these elements. The agency also concluded, however, that there were probably market-specific, route-specific, and customer-location-specific cases in which there was no impairment, and it delegated to the states the authority to make those determinations.

³ The FCC also set a 90-day deadline for state petitions to rebut, as to specific local markets, the agency’s presumptive, nation-wide finding that competitive local exchange carriers are not impaired in serving enterprise customers without unbundled access to local circuit switching. This Commission has opened a separate proceeding to investigate the claims of two carriers that there are specific markets in Minnesota where impairment should be found. Docket No. P-999/CI-03-960.

⁴ The CLEC Coalition is made up of Otter Tail Telecom, LLC; US Link, Inc. and VAL-ED Joint Venture, LLP d/b/a 702 Communications.

The following commenting parties stated their intention to participate in the proceeding: Qwest Corporation, MCI, the Department of Commerce, Allegiance Telecom, Inc., AT&T, and Sprint Minnesota, Inc.

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 over the application of the federal impairment standard to mass market switching, high-capacity loops, and dedicated transport, as well as jurisdiction over related issues.

The Commission finds that these issues turn 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 ultimate issue in this case is to identify any specific geographic markets, customer locations, or transmission routes for which competitive local exchange carriers would not be impaired by the absence of unbundled access to mass market switching, high-capacity loops, or dedicated transport. That determination turns on myriad intermediate facts.

III. Additional Filings Required

The scope of this proceeding is necessarily broad at this point. Clearly, however, neither the Commission nor the Administrative Law Judge can conduct an impairment analysis of every geographic market, every customer location, and every transmission route in the state. To help focus and expedite this investigation, therefore, the Commission will require the parties to respond to the questions listed below within two months of the date of this Order. Upon reviewing the answers filed by the parties, the Commission may narrow or redefine the scope of this proceeding.

Specific Customer Locations and High Capacity Loops

- A. Does any person claim that there is no impairment for high capacity loops at certain specific customer locations because either (1) the location is currently being served by two or more unaffiliated CLECS with their own loop transmission facilities or (2) two or more unaffiliated competitive providers have deployed transmission facilities to the location and are offering alternative loop facilities to CLECS on a wholesale basis at the same capacity level? If you are making this claim, please provide the following information:

1. the identity and location of all customers for whom no impairment is claimed;
 2. a description of the evidence you intend to offer establishing the existence of either or both of the conditions required for a finding of no impairment as described above.
- B. Does any person claim that, even though the two conditions specified in A above are not met, there are specific customer locations where requesting carriers are not impaired because there are no material economic or operational barriers at a customer location precluding the requesting carrier from economically deploying loop transmission facilities to the customer location? If you are making this claim, please provide the following information:
1. the identity and location of all customers for whom no impairment is claimed;
 2. a description of the evidence you intend to offer regarding the application of the following factors:
 - (a) evidence of alternative loop deployment at that location;
 - (b) local engineering costs of building and utilizing transmission facilities;
 - (c) the cost of underground or aerial laying of fiber or copper;
 - (d) the cost of equipment needed for transmission;
 - (e) installation and other necessary costs involved in setting up service;
 - (f) local topography such as hills and river;
 - (g) availability of reasonable access to rights-of-way;
 - (h) building access restrictions/costs;
 - (i) availability/feasibility of similar quality/reliability alternative transmission technologies at that particular location.
 3. Any other factors or conditions you deem relevant.

Dedicated Transport

- A. Does any person claim that there are dedicated transport loops where requesting carriers are not impaired by the absence of unbundled transport because requesting carriers have the ability to self-deploy or have access to third party alternatives? If so, for each route for which you are making this claim, please provide the following information:
1. If you are claiming requesting carriers have the ability to self-deploy, please provide evidence that three or more competing carriers, not affiliated with each other or the incumbent local exchange carrier, each have deployed non-incumbent LEC transport facilities along a specific route;
 2. If you are claiming requesting carriers have access to third party alternatives, please provide evidence that competing carriers have available two or more alternative transport providers, not affiliated with each other or the incumbent LEC, immediately capable and willing to provide transport at a specific capacity along a given route between incumbent LEC switches or wire centers.

- B. Does any person claim that a requesting carrier is not impaired on a particular route because that route is suitable for multiple, competitive supply even if the conditions specified in A above are not met? If so, for each route for which you are making this claim, please provide the following information:
1. the identity and location of each specific route for which you are making this claim;
 2. a description of the evidence you intend to offer regarding the application of the following factors:
 - (a) local engineering costs of building and utilizing transmission facilities;
 - (b) the cost of underground or aerial laying of fiber;
 - (c) the cost of equipment needed for transmission;
 - (d) installation and other necessary costs involved in setting up service;
 - (e) local topography such as hills and rivers;
 - (f) availability of reasonable access to rights of way;
 - (g) the availability or feasibility of alternative transmission technologies with similar quality and reliability;
 - (h) customer density or addressable market;
 - (i) existing facilities based competition;
 - (j) any other factors you deem relevant for consideration.

Mass Market Switches

- A. What should the Commission use as the relevant market when analyzing impairment issues for mass market switching? Should the relevant market be a wire center? A central office? A LATA? An exchange? Something else? Does the commission need to define the relevant market prior to undertaking any of the impairment analysis, or should the parties define the relevant market as part of their advocacy in the substantive impairment proceedings before the administrative law judge? As part of your comments on these issues, please also address the following factors:
1. the locations of customers actually being served (if any) by competitors;
 2. the variation in factors affecting competitors' ability to serve each group of customers;
 3. a competitor's ability to target and serve specific markets economically and efficiently using currently available technologies;
 4. how a competitor's ability to use self-provisioned switches or switches provided by a third party wholesaler to serve various groups of customers varies geographically and;
 5. distinguish among markets where different findings of impairment are likely.

- B. Does any person claim that the FCC finding of national impairment for mass market switches should be over-turned in any respect? If you are making this claim, please provide the following information:
1. Any market specific evidence establishing the existence of any markets where there are three or more carriers, unaffiliated with either each other or the incumbent LEC, that are serving mass market customers using self-provisioned switches;
 2. Any market specific evidence establishing that there are two or more competitive wholesale suppliers of local circuit switching, unaffiliated with each other or the incumbent LEC, in any defined market
- C. What is the appropriate cut off for multi-line DS0 customers?
- D. Does any person claim that a given, defined market allows self-provisioning of switching even in the absence of three actual independent self-provisioning carriers or two wholesale suppliers of switching? If you are making this claim, please provide the following information:
1. whether competitors are using their own switches to serve enterprise or mass market customers in the market at issue;
 2. the role of potential operational barriers, specifically examining whether incumbent LEC performance in provisioning loops, difficulties in obtaining collocation space due to lack of space or delays in provisioning, and difficulties in obtaining cross-connects in an incumbent's wire center, are making entry uneconomic for competitive carriers;
 3. the role of potential economic barriers associated with the use of competitive switching;
 4. any other factors or issues the person making the claim deems relevant.
- E. Does any person claim that impairment to requesting carriers in mass market switching can be eliminated through the use of "rolling" access to unbundled switching for a period of 90 days or more, as described by the FCC in its Triennial Review Order? If so, please provide the following information:
1. describe the type of "rolling" access that you believe will eliminate any impairment;
 2. describe the feasibility of the "rolling" access you claim will eliminate any impairment;
 3. if some type of access other than "rolling" access will eliminate the impairment, please describe.

Low Cost, Batch Hot Cut Process

Please comment on a low cost, batch hot-cut process that could be used in Minnesota by Qwest for switching customers from Qwest switches to requesting carrier switches. Also, please comment on whether this process should be developed as a regional OSS process, with certification and implementation by individual states, rather than on a state by state basis.

Other Issues

Are there any other issues the Commission needs to consider in the nine-month proceedings? If so, please identify and describe.

IV. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Steve M. Mihalchick. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 349-2544.

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*

Much of the discovery conducted in this case will be equally necessary and relevant for all parties. To avoid burdening the parties with preparing and answering duplicative discovery requests, the Department of Commerce has agreed to coordinate the common discovery.

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.

The parties shall work together to facilitate the Administrative Law Judge's issuance of a protective order

- *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 Qwest Corporation, MCI, the Department of Commerce, Allegiance Telecom, Inc., AT&T, and Sprint Minnesota, Inc. 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 13, at 9:00 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, the Commission is required to complete its consideration of this case within nine months of the effective date of the Triennial Review Order. The Commission asks the Office of Administrative Hearings to conduct contested case proceedings in light of these time constraints and requests that the Administrative Law Judge submit his final report in time to allow the Commission adequate opportunity for thorough consideration of the case.

V. 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.

VI. 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 there are within this state specific geographic markets, customer locations, or transmission routes for which competitive local exchange carriers would not be impaired by the absence of unbundled access to mass market switching, high-capacity loops, or dedicated transport.
2. The parties shall file answers to the questions set forth in section II within two months of the date of this Order.
3. 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).

ATTACHMENT A

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 into ILEC Unbundling Obligations as a Result of the FCC Triennial Review Order MPUC Docket No. P-999/CI-03-961
OAH Docket No.

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Steve M. Mihalchick, Office of Administrative Hearings, Suite 1700, 100 Washington Square,
Minneapolis, Minnesota 55401; (612) 349-2544

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: _____