

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03M-417T

RE: IN THE MATTER OF THE IMPLEMENTATION OF THE FEDERAL
COMMUNICATIONS COMMISSION'S TRIENNIAL REVIEW ORDER
ADOPTING NEW RULES FOR NETWORK UNBUNDLING OBLIGATIONS.

**ORDER REGARDING 90-DAY
REVIEW HEARING PETITIONS**

Mailed Date: October 31, 2003
Adopted Date: October 16, 2003

I. BY THE COMMISSION

A. Statement

1. On September 30, 2003, the Commission issued Decision No. C03-1114 in this docket, addressing the Federal Communications Commission (FCC) Triennial Review Order¹ and its finding that local circuit switching for business customers served by high-capacity loops (DS1 capacity and above (*i.e.* enterprise market)) will no longer be required to be made available as an unbundled network element (UNE). The FCC also provided that a state commission would have 90 days from the effective date of its order to file a petition with the FCC to challenge the national finding of “no impairment” to competition based upon the characteristics of enterprise markets in any individual state.

2. At the Commission’s September 24, 2003 Weekly Meeting, we discussed the rationale and arguments contained in the FCC’s Triennial Review Order. Making a preliminary

¹ *Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provision of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunication Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003).

finding that the FCC's arguments and rationale regarding non-impairment in the enterprise market were applicable to the characteristics of enterprise markets in Colorado, we decided not to file a petition with the FCC on our own motion to seek a waiver of Rule 51.319(d)(3).

3. However, we invited any Competitive Local Exchange Carrier (CLEC) to file a petition with the Commission seeking a proceeding to address the FCC's non-impairment finding, and if the petitioner made a *prima facie* showing that the CLEC would likely be competitively impaired without access to the local switching UNE in the enterprise market, we would conduct a proceeding.

4. As part of its petition, we required CLECs to provide all evidence available or in the possession of the CLEC, filed in the form of pre-filed, written question-and-answer testimony and exhibits, including sworn affidavits by the witnesses. We further required that the petitions should contain a clear definition of the particular geographic market as defined in Rule 51.319(d)(2)(I), and suggested a possible procedural schedule for any Commission investigation to be conducted in this matter. However, we deferred adopting a procedural schedule pending a Commission decision on whether the CLEC petition had made an adequate showing to justify conducting a 90-day proceeding.

5. In response to that Order, three CLECs made filings with the Commission: NC Telecom, Inc. (NCT), LTE Communication Services, Inc. (LTE), and Microtech-Tel, Inc. (Microtech). We reviewed each filing to determine whether the CLEC met its burden to show that a 90-day proceeding was warranted.

6. LTE captioned its filing as "Comments." Basically, LTE offers comments on what it perceives as mistakes committed by the FCC in its Triennial Review Order regarding

UNE-P as necessary for small customers on a DSO basis. LTE also asserts that unbundled transport in all forms should continue to exist for DSO, DS1, and DS3. We acknowledge LTE's "comments" and thank LTE for taking the time to offer comment on this matter. However, it would appear that LTE did not intend for this filing to constitute a petition for a review hearing and we decline to construe the pleading as such. We therefore find that LTE's comments are not a complete petition for a 90-day proceeding, and as such we will take no further action on its filing.

7. NCT filed its petition along with accompanying testimony and affidavits. NCT indicates in its petition that it has an interest in the FCC's Triennial Review Order and submits testimony in support of the petition. Testimony is provided by Mr. Dennie Mecham of NCT. Mr. Mecham states that NCT is interested in ensuring that the Commission has a record showing impairment in the market if it were to adopt the FCC's national finding of no impairment regarding local switching UNE for enterprise markets. However, Mr. Mecham further indicates that NCT is "specifically concerned about the loss of line sharing and the extremely higher cost of line splitting."²

8. We also acknowledge NCT's filing and thank NCT for its interest and time in providing comments in this matter. However, we find that NCT's stated interest in this proceeding is inconsistent with the subject matter of the 90-day review hearing. Mr. Mecham states that NCT's specific concern is with line sharing and line splitting, while the subject matter of the 90-day review hearing has to do with enterprise market switching. As such, we find NCT's filing incomplete and will take no further action on its petition.

² *Testimony of Dennie Mecham of NC Telecom, Inc.*, page 4, answer to Question #9: "What is NCT's interest in this proceeding?"

9. Microtech filed its petition and testimony on October 9, 2003. Microtech through its witness Mr. Kenneth L. Wilson offers testimony regarding Microtech's interest in maintaining DS1 UNE-P circuits in Colorado. According to Mr. Wilson's testimony, the FCC failed to take cognizance of the transition process from UNE-P to facilities-based service and the impact of such a transition on CLECs and their customers.³ He asserts that the Triennial Review Order does not adequately address the process by which transition from DS1 UNE-P to facilities-based switching should take place. As such, he argues, significant operational and economic barriers and lack of a supervised transition process impair Microtech's ability to effectively transition its existing enterprise customers to facilities-based service, despite Microtech's steps to deploy switching facilities in Colorado.

10. Microtech advocates that the Commission should allow CLECs to keep customers who are currently being serviced by DS1 UNE-P on that service until the CLEC is able, in time, to put the customers on its own switch. Alternatively, Microtech asks the Commission to impose a transition period long enough to ensure an orderly and fair transition, and enter an order detailed enough to ensure the maintenance of service quality and public safety.

11. We understand Microtech's petition and attached testimony to be a request for a transition plan for Microtech to move from UNE-P switching to its own switch. For the reasons stated below, however, we need not decide today whether the petition satisfies the parameters we articulated in Decision No. C03-1114, *i.e.*, whether Microtech has made a *prima facie* showing of impairment.⁴

³ *Pre-filed Testimony of Kenneth L. Wilson on Behalf of Microtech-Tel, Inc., on Issues Regarding Enterprise Switching*, pages 2-3, answer to Question: "What is the Purpose of Your Testimony?".

⁴ We do deem Microtech's position complete.

12. We note that the Interconnection Agreements entered into between Qwest Corporation (Qwest) and Microtech contain specific “change of law” provisions that address change of law contingencies such as the FCC’s Triennial Review Order. Therefore, we find it prudent to recommend that Qwest and Microtech enter into good-faith negotiations regarding a transition plan for Microtech’s shift to its own switch.⁵ We request that the parties report back to the Commission no later than three weeks from the effective date of this Order on the parties’ progress of arriving at an agreed upon plan. Should we find that the parties have resolved the transition issue, the possibility that the Commission would conduct further 90-day proceedings or to file a petition with the FCC regarding this matter, would be obviated. If the matter is not resolved, we will then address whether Microtech’s filing makes a *prima facie* showing to justify further proceedings in this docket.

II. ORDER

A. The Commission Orders That:

1. The Comments filed by LTE Communication Services, Inc., are acknowledged. However, because the Comments do not comport to the requirements of Decision No. C03-1114, the Commission will take no further action on the Comments.

2. The Petition of NC Telecom, Inc., is acknowledged. However, we find the petition to be incomplete and the subject matter irrelevant to the proceedings at hand. Therefore, the Commission will take no further action on the Petition.

3. The Petition of Microtech-Tel, Inc., is deemed complete.

⁵ We note that we take no position regarding how the transition issue might be resolved, *e.g.*, pricing of elements during the transition period.

4. Microtech-Tel, Inc., and Qwest Corporation are encouraged to enter into good-faith negotiations regarding a transition plan to move Microtech-Tel, Inc., to its own switch, taking into specific consideration the “change of law” provisions contained in the parties’ Interconnection Agreement.

5. Microtech-Tel, Inc., and Qwest Corporation shall file a progress report with the Commission within three weeks of the effective date of this Order to update the Commission on the progress of the parties in the transition process.

6. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Mailed Date of this Order.

7. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING
October 16, 2003.**

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith

**Bruce N. Smith
Director**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

JIM DYER

Commissioners