

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 CLOSING DOCKET

Mailed Date: December 5, 2003
Adopted Date: November 26, 2003

I. BY THE COMMISSION

A. Statement

1. On August 21, 2003, the Federal Communications Commission (FCC) issued its Triennial Review Order¹ which, in part, made the presumptive determination that incumbent local exchange carriers need not provide to competitive carriers unbundled local circuit switching for the enterprise market (*i.e.*, for DS1 capacity loops and higher). *See* Rule 51.319(d)(3).² The FCC concluded that unbundled switching in the enterprise market was no longer necessary for competitive carriers because, in its view, competition in this market would not be impaired without unbundled local switching. However, Rule 51.319(d)(3) permits a state commission to petition the FCC to rebut its presumptive finding that competitive carriers are not impaired without access to unbundled local circuit switching in the enterprise market in particular geographic markets. Rule 51.319(d)(5) provides that a state commission wishing to

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).

² All FCC rules referenced in this order are contained in 47 C.F.R.

rebut the FCC's finding of non-impairment for local circuit switching in the enterprise market must file its petition within 90 days of the effective date of the Triennial Review Order.

2. By Decision No. C03-1114 (released September 30, 2003), we opened this docket to consider whether the Commission would file such a petition with the FCC pursuant to Rule 51.319(d)(5). That Decision directed that competitive carriers could request that we file a petition with the FCC by following the procedures specified there. Decision No. C03-1114 directed any interested competitive carrier to file with us a petition accompanied by information making a *prima facie* showing that such carrier would be impaired without access to unbundled switching in the enterprise market. The Decision further stated that, if a competitive carrier made a *prima facie* showing of impairment in specific geographic markets, we would conduct a proceeding to investigate whether to file a petition with the FCC challenging its presumptive finding of non-impairment.

3. iLoka, Inc., d/b/a Microtech-Tel (Microtech) filed its petition on October 9, 2003 in accordance with Decision No. C03-1114. In Decision No. C03-1231 (released October 31, 2003), we addressed Microtech's petition. We noted that the petition expressed Microtech's interest in maintaining DS1 UNE-P circuits in Colorado. We further noted that the petition appeared to be concerned primarily with the process of transitioning Microtech's customers from DS1 UNE-P to its own facilities-based switching.³ Observing that Microtech's interconnection agreement with Qwest Corporation (the incumbent local exchange carrier in Colorado) contained

³ At paragraph number 8 in our initial decision opening this docket, the Commission directed any petitioner seeking to have this Commission file for a waiver with the FCC on the national presumption of non-impairment to file all evidence available or in the possession of the CLEC in the form of prefiled written question-and-answer testimony. The Microtech petition dated October 9, 2003, contained the testimony of only one witness, Kenneth L. Wilson. Mr. Wilson's testimony addresses only impairment as it relates to the transition process. No further evidentiary showing was made by Microtech.

a change-of-law provision that might address transitioning Microtech's customers from UNE-P to Microtech's own switching facilities, we requested that Microtech and Qwest negotiate on a transition plan. In addition, we directed Microtech and Qwest to file a report regarding the status of those negotiations by November 21, 2003. We deferred ruling on whether Microtech had made a *prima facie* showing of impairment pending the negotiations with Qwest.

4. On November 12, 2003, Qwest Corporation filed its Report Regarding Negotiation (Report). Qwest stated that it interprets both the relevant interconnection contract provisions between Qwest and Microtech and the Colorado Commission Rule to allow for a period of 240 days for the transition of Microtech customers from Qwest's switch to its own local switch.

5. On November 21, 2003, Microtech filed its Progress Report Regarding Negotiations (Progress Report). Microtech reported its version of the contacts between Qwest and Microtech. Microtech agreed with Qwest that further negotiations would be unlikely to yield any results and requested that the Commission decide whether to proceed or to delay further action pending a ruling by the D.C. Circuit Court of Appeals on the appeals of the Triennial Review Order. Microtech failed in its Progress Report to address the issue of whether 240 days was inadequate for it to finish the installation of its own switch and to transition its customers to its own facilities.

6. Therefore, we now address whether the Commission will conduct a proceeding to decide whether to file a petition with the FCC challenging its finding of non-impairment for enterprise market switching as it relates to Microtech. For the limited purposes of this docket, the Commission will agree that Microtech may invoke the transition period under the change-of-law provisions of its interconnection agreement with Qwest. Based upon the filings before it, the

Commission finds that as to the narrow issue of the time afforded to Microtech to transition its customers, the operation of its interconnection agreement provides for an adequate period. Typical interconnection agreements specify processes that are to be followed in dealing with any potential operational issues that might arise during a transition of customers. Microtech must exhaust its contractual administrative remedies regarding its expressed concerns in this area. Finally, to eliminate operational barriers to the transition process, the Commission has initiated Docket No. 03I-485T addressing the certification of Qwest's batch hot cut process.

7. The testimony and evidence attached to Microtech's petition failed to address any further issue.

8. Now being duly advised, we determine that we will not conduct any further proceedings in this matter, and that we will not file any petition with the FCC challenging its finding of non-impairment for local switching in the enterprise market. Microtech may file its own petition with the FCC challenging the finding of non-impairment for local switching under any FCC rules and procedures permitting such a filing. Since no further action is contemplated in this proceeding, this docket will be closed.

II. ORDER

A. The Commission Orders That:

1. This docket is closed.
2. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
November 26, 2003.**

(S E A L)



ATTEST: A TRUE COPY

**Bruce N. Smith
Director**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners