

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03I-478T

REGARDING THE UNBUNDLING OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS PURSUANT TO THE TRIENNIAL REVIEW ORDER--INITIAL COMMISSION REVIEW.

**ORDER GRANTING QWEST PERMISSION TO FILE A
SUPPLEMENT TO ITS NOTICE OF SCOPE OF DOCKET**

Mailed Date: December 10, 2003

Adopted Date: December 3, 2003

I. BY THE COMMISSION

A. Statement

1. On October 31, 2003, the Commission issued Decision No. C03-1225 in this docket, addressing the Federal Communications Commission (FCC) Triennial Review Order (Triennial Review Order)¹ and its findings that incumbent local exchange carriers (ILECs) shall continue providing competing carriers with nondiscriminatory access to loops, mass market switching, and transport. In that order, we required Qwest Corporation (Qwest) to make an informational filing indicating Qwest's intent to challenge the presumptions regarding competitive impairment set forth in the Triennial Review Order as they pertain to loops, mass market switching, and transport.

2. Pursuant to Decision No. C03-1225, Qwest filed a Notice of Scope of Docket on November 6, 2003. Responses to the Notice of Scope were filed on November 20, 2003 by

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).

Allegiance Telecom of Colorado, Inc. (Allegiance);² AT&T Communications of the Mountain States, Inc., and TCG Colorado, Inc. (collectively AT&T); the Colorado Office of Consumer Counsel (OCC); and WorldCom, Inc. (MCI).

3. On November 28, 2003, the Department of Defense and All Other Federal Executive Agencies filed a Petition to Intervene.

4. In its Notice of Scope of Docket filing, Qwest states that it does not intend to challenge the FCC's finding of impairment as to loops and transport in this proceeding, but will challenge only the national finding of impairment with regard to local circuit switching. Qwest does not narrow the market for switching geographically, but states that it has every intention of moving forward vigorously with the analysis of its own information in an effort to identify specific markets where unbundled switching is not necessary. Qwest does not believe it can complete this analysis until discovery has been propounded and it has received answers from competitive local exchange carriers (CLECs).

5. Qwest does suggest that the Commission should follow the FCC's directive and take into account the following factors in defining the market:

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

² Allegiance and all other parties should be aware that, if they are to be represented in this case by out-of-state attorneys, those attorneys must comply with Commission Rule 21, Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, and Colo.R.Civ.P. 221. This means that those attorneys must file a motion for *pro hac vice* admission, following all the requirements specified in Colo.R.Civ.P. 221.

6. Qwest indicates, however, that it does not have all the facts necessary to make a determination of the appropriate markets in Colorado at this time. Qwest states that the basic geographic unit for collecting data will likely be at the wire center level, but a geographic market would, at the very least, comprise several wire centers in a Metropolitan Statistical Area, or could even be the entire service territory of Qwest in Colorado.

7. Likewise, it is Qwest's position that it is necessary to know the types and locations of switches that currently provide services to residential and small business customers and the locations of the customers served by those switches. According to Qwest, it is also crucial to know the extent and impact of intermodal competition.

8. Finally, after this data have been collected and analyzed, Qwest indicates that, the Commission will be in a position to determine the geographic markets within which it will apply the various factors required by the FCC.

9. In Allegiance's Response to Qwest's Notice of Scope, it states that although Qwest expressed a position to limit the scope of this docket to mass market switching, Qwest declined to articulate a market definition. Allegiance asserts that a market definition is a seminal issue in this docket. Allegiance states: "Qwest's Notice of Scope is disappointing and seems to have fallen short of the mark established by the Commission which directed Qwest to 'inform the Commission of . . . the particular markets for which it challenges the FCC's requirement to continue providing unbundled local switching . . .'"

10. Allegiance submits that the Commission should not have to invent new geographic market definitions for this docket, but should use the density zones (Rate Groups 1, 2, and 3) already adopted and used by the Commission today to price loops. These zones are

relevant to market definition because they were designed to promote local competition and they directly correlate to the density of potential customers.

11. AT&T in its response asserts that Qwest's document is "woefully deficient, such that it cannot be said to comply with the spirit and intent of the Commission's order . . ." AT&T alleges that this deficiency leaves the parties with a more expansive and open-ended proceeding involving Qwest's entire service territory. AT&T states that discovery should be limited and targeted as quickly as possible.

12. AT&T urges the Commission to require that Qwest supplement its November 6, 2003, Notice of Scope of Docket information so as to provide the parties with meaningful information before other providers are compelled to respond to discovery and write testimony. This supplement should include an aggregated line count by wire center or exchange of customers served by CLECs through the use of UNE-Loop, UNE-Platform, and resale. AT&T then requests that parties be allowed to respond to the supplemental filing.

13. MCI also responded to Qwest's Notice of Scope of Docket, stating that information does need to be gathered before defining a geographic market, but disagreeing with Qwest's assertion that the relevant geographic market is the entire Qwest service territory in Colorado. According to MCI, a more reasoned granular trigger investigation affords the Commission a better chance of being certain that a no-impairment finding is in the public interest, and at the same time provides ample opportunity to find no-impairment if none truly exists. Further, MCI states that it believes that the appropriate geographic market for the Commission to use is Qwest's wire centers, consistent with economic principles for defining the relevant market, the philosophies in the TRO, and the criteria of accuracy and practicality.

14. MCI states that CLECs must be able to focus on a final set of assertions from Qwest early enough in the nine-month process to allow for the development of responsive evidence, effective participation at hearings, and the filing of briefs.

15. The OCC also filed a response to Qwest's Notice of Scope of Docket. In its response, the OCC requests that the Commission order Qwest to update its Notice by December 15, 2003, identifying particular markets for which it challenges the FCC's impairment finding. Parties should then be allowed to respond to that filing within one week. The OCC notes that Qwest made a filing with the Washington Utilities and Transportation Commission that did detail, by wire center, the particular markets in which to analyze switching impairment. The OCC sees no reason why Qwest cannot provide this information in Colorado as well. Then, by January 9, 2004, the Commission could issue an order defining the scope of the docket.

16. On November 14, 2003, Staff of the Commission (Staff) and the OCC filed a Joint Motion for Clarification and/or Modification of Decision No. C03-1225 (Joint Motion).³ MCI filed a response to the Joint Motion on November 18, 2003. McLeodUSA Telecommunications Services, Inc. (McLeodUSA), and Eschelon Telecom of Colorado, Inc. (Eschelon), filed a joint response to the Joint Motion on November 19, 2003. Responses to the Joint Motion were filed on November 20, 2003, by AT&T and Qwest.

17. The Joint Motion requested clarification of Decision No. C03-1225, especially in light of Qwest's Notice of Scope of Docket. Staff and the OCC request that the Commission answer questions concerning the scope of discovery, the treatment of that discovery, and the service list proposed by Staff. Specifically, Staff and the OCC ask the Commission: Should

³ An amendment modifying the request to shorten response time was filed on November 17, 2003.

discovery in this docket be limited to mass market switching related questions, and, if so, should the loop and transport discovery be conducted in a separate docket?; and, how should the data gathered be presented to the Commission (*i.e.*, should Staff post the non-confidential discovery responses on the Commission's web site to reduce the burden of service for other parties)?

18. Also, Staff and the OCC request that the Commission order all parties to notify Staff and all parties of incorrect information found on Attachment A to its filing (the service list). Staff indicates that it will monitor the service list and update as needed, but requests that the Commission remind all parties that it is their responsibility to update their own services lists regardless of whether Staff has distributed an update list.

19. AT&T responded to Staff and OCC's Joint Motion, generally agreeing with the Joint Motion's default position that discovery not be propounded on the loops or transport issues. AT&T states that such discovery will only hinder efforts to collect the discovery that is relevant to the issues in this proceeding. AT&T also states that this information should not be collected in a separate docket at this time because the data is likely to be stale by the time the Commission actually uses it in some future proceeding.

20. As for the service list, AT&T believes it would be helpful to have companies affirmatively contact the Commission indicating whether they desire to receive service in this proceeding, and identify the correct person or entity to whom such service should be directed.

21. In McLeodUSA's and Eschelon's Joint Response to the Joint Motion, they indicate that no useful purpose would be served by the collection of data related to loops and transport in this proceeding or in a parallel proceeding. The Joint Respondents assert that the

FCC did not require a review of triggers in the absence of relevant evidence regarding those UNEs. Qwest has confirmed in its Notice that it will not offer such evidence.

22. The Joint Respondents have no particular position on the other issues raised in the Joint Motion other than to say that the service list is inaccurate and unwieldy. They suggest that the Commission could require parties truly interested in the docket to provide an e-mail address for electronic service or be excluded from the service list in the docket.

23. In its response, MCI also agrees that discovery should be limited to mass market switching. It states that it opposes discovery propounded on parties relating to loops and transport; if the Commission decides to conduct such discovery, it should be in a separate docket, using ordinary discovery deadlines without modification.

24. Qwest also agrees in its response that discovery in the instant docket should be limited to information on mass market switching, but believes that collection of data on loops and transport would be beneficial to a future impairment proceeding. Qwest suggests that this data be collected in a separate investigatory docket subject to relaxed procedural requirements. Qwest believes this docket should begin in April, 2004.

25. Qwest recommends that Staff post the non-confidential discovery responses to the Commission web site and that Staff maintain an official e-mail list for service in this docket and, periodically, or upon request, provide the “official list” to the parties.

B. Discussion

26. As noted above, Qwest’s Notice specified the services and the geographic areas for which Qwest intended to challenge the presumptive finding of impairment. At this time, Qwest will seek to reverse the presumptive finding of impairment for mass-market local circuit

switching throughout Qwest's entire service territory in Colorado. Several parties responded to the Notice and raised questions to which the Commission now responds.

27. The first question centers on the proper “definition of the market” for mass market switching. The Notice and response filings refer to geographic market definitions, that is, a geographic differentiation between portions of Qwest’s service territory that will be considered in this docket from those geographic areas that will not be considered. In that context, it is clear that the Commission cannot restrict these proceedings at this time, as requested in the responses. It is our view that Qwest is entitled to attempt to refute the FCC's presumptive finding of impairment in all areas in which it serves. However, Qwest has the burden of going forward and of persuasion; ultimately it has the burden of proving the FCC's presumptive findings to be in error. We will require Qwest to make its case for each portion of its service territory. For each geographic region, Qwest must adequately refute the FCC’s default finding by a preponderance of evidence. Qwest must do so through testimony provided in this case.

28. We are cognizant of the concerns of the parties who filed motions in response to Qwest’s Notice. We share the desire for a compact, focused, and efficient hearing. Also, we are cognizant of the possible burden this ruling places on parties. However, we see no appropriate procedural alternative. We cannot restrict Qwest’s direct case at this stage of the case, nor do we desire to do so. Procedurally, we believe a proper geographic definition of the market should emerge through prefiled testimony and during the course of the hearing, not prior to these events.

29. If Qwest is now able to narrow the geographic scope of the docket, it should file an appropriate pleading no later than close of business, Monday, December 15, 2003. Should Qwest choose to eliminate from consideration in this docket certain geographic portions of its

service territory, then those geographic areas will continue to fall under the presumptive finding of impairment until changed *in another docket*. Once a geographic region has been eliminated from consideration in this docket through a supplemental Notice of Scope of Docket or through Qwest's failure to provide evidence of non-impairment *in its direct testimony*, the Commission shall consider those geographic areas to be outside the scope of this docket. For example, no consideration of those areas will occur in this docket if the only evidence related to specific areas is presented in supplemental or rebuttal testimony, or in a post-hearing statement of position.

30. On economic and other grounds, the Commission cannot restrict the geographic scope of this docket at this time. Qwest's service territory is large and varied. Evidence presented in this proceeding may aid the Commission in its effort to define a proper market and to make findings of requisite "granularity". At this stage of the docket, however, there is no evidence in the record that would allow a reasoned, well-supported approach to geographic market definition.

31. However, in terms of focusing the inquiry in this docket, the Commission can suggest an appropriate level of informational support. For many reasons, data likely to be useful to the parties and the Commission is compiled and available on a wire-center basis. The Commission encourages Qwest and the parties to compile and present in testimony data at the wire-center level. By doing so, the Commission may consider the FCC's presumptive finding of impairment on an area less than, equal to, or greater than, a particular wire center. This flexibility will allow a more exhaustive, yet sufficiently granular test of the null hypothesis of impairment for mass market switching. We contemplate that parties can aggregate and disaggregate this data to larger or smaller regions, as they deem appropriate. The wire-center appears to be the appropriate level of data compilation and will serve as an analytical building

block that can be considered in larger, or smaller blocks, as the parties wish to present. Further, we note that larger geographic areas likely will be a composite of many wire centers. The wire-center-based informational approach poses no restriction on analysis while allowing maximum flexibility for all parties.

32. Addressing the Joint Motion of Staff and the OCC, we agree with Staff and respondents that in an effort to streamline and focus this instant docket, it would be appropriate to grant, in part, the motion clarifying and/or modifying the procedures set forth in Decision No. C03-1225, as follows.

33. Decision No. C03-1225, paragraph 5, stated that our determinations in this case as to whether competitive carriers would be impaired without access to unbundled network elements would "be based upon the evidence provided by the parties to this docket." We further stated (paragraph 5) that, as the ILEC, Qwest would have the primary responsibility to assist the Commission in conducting the investigations required by the Triennial Review Order. Qwest's Notice clarified that Qwest will not challenge the FCC's presumptive findings of impairment for loops and transport. No other party to this case has requested that we investigate impairment for those services. Therefore, we now clarify that the scope of this docket will be limited to unbundled local circuit switching in the mass market (as defined by the FCC). Given the scope of this docket, as defined by the parties, this proceeding will not further investigate impairment for loops and transport. As such, we clarify that the Commission does not desire (nor will the Commission permit) the parties to conduct discovery related to loops or transport at this time. Only discovery that is needed for conducting this docket (*i.e.*, that is related to local circuit switching) should be pursued by the parties. Staff should not expend any effort in conducting discovery regarding loops or transport in this docket. Additionally, we clarify that we will not

open separate dockets to consider loops or transport at this time. On our own motion, or acting upon a proper pleading, the Commission at some future date, by separate order in a new docket, will investigate impairment for loops and transport.

34. The initial designation of all entities having interconnection agreements with Qwest as indispensable parties in this docket has created a large service list that is proving unwieldy. Not all the entities thus designated as parties have the same level of interest in participating in this docket. While all parties must continue to fully and completely respond to discovery, the Commission will adopt the following process to limit the current service list to those parties who wish to be active participants. Only active participants will receive copies of Commission orders in this docket or pleadings from the parties to this case. Parties who have already filed a pleading in this docket shall be placed on this active participant service list without further action. Any party that has not already filed a pleading in this docket and who wishes to receive copies of pleadings and Commission orders shall file in this docket a notice of its desire to actively participate. That notice shall be filed with the Commission within ten days after the mailing date of this order. Such notification, in addition to providing the names and address of the party's representatives, shall also include e-mail addresses for those individuals. Staff is encouraged to serve as the coordinator of the electronic email list; this list will not be posted on the Commission's website. It shall continue to be the responsibility of each active participant in this docket to serve all other active participants with copies of its discovery and other filings. The Commission reminds the parties that electronic service is to be used in addition to the normal procedure.

35. The Commission does not wish to have answers to discovery posted on its website. Following normally applicable rules of Practice and Procedure, 4 *Code of Colorado*

Regulations 723-1, each party shall serve copies of its discovery questions on all active participants, including Staff and OCC. Parties wishing to ensure access to responses to another party's discovery questions may propound its own discovery to the responding party. Information that is gathered via discovery that a party in this docket wishes the Commission to consider in rendering its decision must, as per normal procedure, be placed into the record through testimony filed pursuant to the Commission's previously established procedural schedule.

II. ORDER

A. The Commission Orders That:

1. Qwest Corporation may file a supplement to its Notice of Scope of Docket by close of business on December 15, 2003. In that filing, Qwest may remove from consideration in this docket specified areas of its service territory. If Qwest chooses to remove certain areas from consideration of impairment, a request for consideration of those areas cannot be introduced in any form later in this docket.

2. The Commission encourages the parties to compile and offer into the record data on a wire-center basis. That level of data aggregation will allow the Commission maximum flexibility to consider the issue of impairment at an appropriate level of geographic detail.

3. The Joint Motion for Clarification and/or Modification of Decision No. C03-1225 by Staff of the Commission and the Office of Consumer Counsel is granted, in part, and denied, in part, consistent with the above discussion.

4. The parties are reminded that, in order to appear and to represent a party in this docket, counsel must be a member in good standing of the Colorado Bar. Failing that condition,

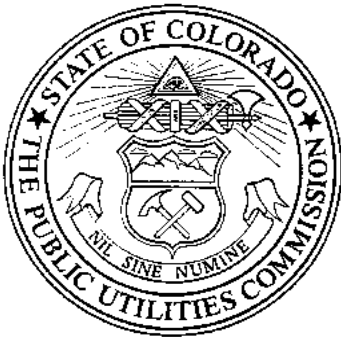
counsel must take appropriate action, including filing a motion for admission *pro hac vice* and complying with Colo.R.Civ.P. 221 and Commission Rules of Practice and Procedure.

5. The Department of Defense and All Other Federal Executive Agencies' Petition to Intervene is granted.

6. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 3, 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