

The FCC's Triennial Review Order is lengthy at 485 pages, plus appendices and separate statements by all five Commissioners. This memorandum does not attempt to summarize the entire order. The focus here is on the parts of the order where the FCC has delegated to state commissions the task of investigating impairment at a more granular level. An impairment analysis determines whether competitive carriers would be impaired if a particular network element is not available as a UNE.¹

The Triennial Review Order delegated to state commissions the following impairment analyses:

(1) Local Circuit Switching – Mass Market Customers. Local circuit switching connects lines and trunks in a local calling area, and includes various features and capabilities such as call waiting, call forwarding, and customized routing. The FCC analyzed impairment for local circuit switching by major customer class (i.e., mass market, small and medium enterprises, large enterprises). The FCC issued a national finding that "requesting carriers are impaired without access to unbundled local circuit switching when serving mass market customers."² However, the FCC went on to say, "This finding is subject to a more granular review by the states pursuant to specifically enumerated triggers and other operational and economic criteria regarding facilities-based entry in specific geographic markets." See TRO ¶419.

State commissions must complete an initial impairment analysis for mass market switching within nine months from the effective date of the Triennial Review

¹ An ILEC subject to Section 251(c)(3) is required to provide to CLECs under specified conditions "network elements on an unbundled basis." Section 251(d)(2) goes on to set the standard the FCC and the states must use to decide which network elements the ILECs must make available. Application of the Section 251(d)(2) standard for identifying UNEs is known as a "necessary and impair analysis." Section 251(d)(2) reads as follows:

(2) Access Standards. – In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether -

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. (47 U.S.C. § 251(d)(2).)

² As used by the FCC, "Mass market customers consist of residential customers and very small business customers." See TRO ¶127.

Order (October 2, 2003). Therefore, the deadline is July 2, 2004. According to the FCC:

"[S]tate commissions will conduct their initial reviews, including the triggers and factors discussed above, within nine months of the effective date of this Order. To the extent that a state commission fails to complete the granular inquiry, any aggrieved party may file a petition with this Commission demonstrating a state's failure to act pursuant to the procedures we outline today." See TRO ¶527.

Once the nine-month review is complete, the FCC expects state commissions to conduct an additional six-month investigation. Beyond that, the FCC appears to expect state commissions to conduct periodic impairment investigations on a continuing basis. According to the FCC,

We emphasize that the framework set forth here contemplates ongoing state review of unbundled switching. The operational and economic factors governing the analysis we have described are unlikely to remain constant as technology advances, customer needs change, and the competitive market for local services continues to mature. Therefore, after completion of the initial review described here, we expect states to conduct further granular reviews, pursuant to the procedures the state adopts, to reevaluate whether competitive LECs are impaired without access to unbundled local circuit switching, and whether such impairment, if found, could be cured by rolling access to such facilities....The proceeding described in this paragraph shall be completed within six months of the filing of a petition or other pleading submitted in accordance with the prescribed state procedures." See TRO ¶526.

At its July 24, 2003, public meeting, the Commission opened docket UM 1100 for the purpose of conducting a nine-month impairment analysis of local circuit switching for mass market customers for geographic markets in Oregon. The Commission opened docket UM 1100 based on the FCC's press release of February 20, 2003. The Administrative Law Judges assigned to docket UM 1100 have scheduled a procedural conference for October 1, 2003. The Commission need not address the follow-up six-month proceeding at this time.

The Triennial Review Order provided some additional specifics about state responsibilities associated with the impairment analysis for mass market switching. As part of this impairment analysis, states must approve and

implement a "batch cut process" for "hot cuts."³ The FCC concluded that an efficient and less costly batch cut process will mitigate, although not necessarily eliminate, impairment if unbundled switching is no longer available to service mass market customers. The FCC requires the states to complete their investigation of the "batch cut process" in nine months, as follows:

"[S]tate commissions must, within nine months from the effective date of this Order, approve and implement a batch cut process that will render the hot cut process more efficient and reduce per-line hot cut costs. In the alternative, if appropriate for any particular geographic market, state commissions must issue detailed findings supporting a conclusion that current hot cut processes do not give rise to impairment in a market and that a batch cut process is therefore unnecessary." See TRO ¶460.

In addition, state commissions must address the concept of "rolling" access, as follows:

"If, after applying the triggers and examining evidence of switch deployment and other factors, a state commission has made a finding of impairment in any particular market, it must consider whether this impairment could be addressed by a narrower rule making unbundled switching temporarily available for a minimum of 90 days for customer acquisition purposes, rather than making unbundled switching available for an indefinite period of time." See TRO ¶424.

Staff procedural recommendation regarding mass market switching. The Commission has already opened docket UM 1100 for the purpose of conducting a granular impairment analysis for mass market switching. The Commission need do nothing further, except to clarify that, pursuant to FCC Order No. 03-36, the Commission will include in docket UM 1100 an investigation of the "batch cut process" and "rolling" access.

The Commission also should specify staff's role in docket UM 1100. Staff recommends that it not participate as a party. Rather, staff believes it can contribute most effectively if the ALJs assigned to the case designate specific

³ As used by the FCC, "a hot cut refers to a process requiring incumbent LEC technicians to disconnect manually the customer's loop, which was hardwired to the incumbent LEC switch, and physically re-wire it to the competitive LEC switch, while simultaneously reassigning (i.e., porting) the customer's original telephone number from the incumbent LEC switch to the competitive LEC switch." See TRO footnote 1294.

staff members as technical advisors to the ALJs and the Commission.⁴ This will allow the designated staff members to work directly with the ALJ to develop information requests to the industry, and assist the ALJ and the Commission as they make findings and develop conclusions pursuant to standards set forth in the Triennial Review Order. Staff will recommend an appropriate staff role as needed for other dockets that could flow from the FCC's Triennial Review Order.

(2) Local Circuit Switching – Enterprise Customers. The FCC issued a national finding that "requesting carriers are not impaired without access to unbundled local circuit switching when serving DS1 enterprise customers." However, the FCC went on to say, "The states may rebut this finding by petitioning this Commission based on a granular review of specifically enumerated operational and economic criteria regarding facilities-based entry in specific markets." See TRO ¶419.

States have 90 days from the effective date of the Triennial Review order to complete their investigation and file a petition with the FCC rebutting the national finding. If a state commission does not rebut the national finding for DS1 enterprise customer switching, the FCC established the following transition plan:

"Competing carriers must transfer their embedded base of DS1 enterprise customers to an alternative service arrangement within 90 days from the end of the 90-day state commission reconsideration period, unless a longer period is necessary to comply with a 'change of law' provision in an applicable interconnection agreement." See TRO ¶532.

Staff procedural recommendation regarding enterprise switching. At the Commission's July 24, 2003, public meeting, staff recommended the Commission take a wait-and-see approach to this aspect of the FCC decision by waiting for carriers to petition the Commission for an investigation. Now that the FCC has released its Triennial Review Order, staff continues to recommend this approach. Indeed, two carriers (Oregon Telecom, Inc. and United Communications, Inc. dba Unicom) filed such a petition on September 11, 2003. The Commission will consider the latter petition separately. If the Commission grants a petition for a 90-day review, staff recommends that the 90-day proceeding be separate from docket UM 1100.

⁴ Staff contemplates a role similar to the one staff played in docket UM 823, which investigated Qwest's petition to provide interLATA toll services pursuant to Sections 271 and 272 of the Telecommunications Act of 1996. In docket UM 823, designated staff members worked along side the ALJ throughout the proceeding. The designated staff members were subject to the same ex parte restrictions as the ALJ and Commission. See Order Nos. 00-243 and 00-385.

(3) High Capacity Loops. Loops are the transmission facilities between an ILEC central office and the customer's premises. The FCC analyzed impairment for various types of loops, and considered how different types of loops are used to provide services to major customer classes (i.e., mass market, small and medium enterprises, large enterprises). In most cases the FCC issued national findings that do not require an additional impairment analysis by state commissions. However, for high capacity (i.e., dark fiber, DS3, and DS1) loops the FCC delegated to state commissions the task of further analyzing impairment on a "customer-by-customer location basis" using FCC designated "triggers." See TRO ¶328.

The FCC requires the states to complete their "initial" review of customer-by-customer locations within nine months from the effective date of its Triennial Review Order. Therefore, the deadline is July 2, 2004. According to the FCC:

We expect states to complete their initial reviews applying the triggers and other analyses discussed above within nine months from the effective date of this Order. Unbundled DS1, DS3, and dark fiber loops will remain available to all customer locations until the state commission determines that unbundled loops at particular capacities serving specific customer locations for which there is evidence in the proceeding that the customer location satisfies one of the triggers or the potential deployment analysis specified in this Part. To the extent that a state commission does not complete its proceeding in this nine month period, aggrieved parties may file a petition with this Commission demonstrating a state's failure to act pursuant to the procedures we outline today. We expect the states will require an appropriate period for competitive LECs to transition from any unbundled loops that the state finds should no longer be unbundled. See TRO ¶339.

In addition to the nine-month investigation, the FCC expects state commissions to conduct an additional six-month investigation, and possibly continuing reviews beyond that. According to the FCC,

After completion of their initial reviews, we expect state commissions to conduct further granular reviews, pursuant to the procedures the state commissions adopt, to identify additional customer locations that satisfy the triggers. Such proceedings shall be completed within six months of the filing of a petition or other

pleading submitted in accordance with the prescribed state commission procedures. See TRO ¶¶340.

Staff procedural recommendation regarding high capacity loops. The Commission should inform carriers that it will not open a docket unless it receives a petition. The Commission should also instruct carriers that, in order to speed up the investigation, such a petition must be accompanied by a specific list of customer-by customer locations, together with a justification for including each location on the list based on the FCC "triggers" and other FCC criteria for finding no impairment. The advantage of waiting for a petition is that each ILEC will have to decide whether pursuing an investigation is worth its while. The Commission does not have information to make this decision, nor could the required information be gathered easily. The disadvantage is that there may be a short procedural delay in opening a docket if and when a petition is filed. This will make it somewhat more difficult to meet the FCC's nine-month deadline. With this in mind, the Commission should advise carriers to file petitions promptly. If the Commission grants a petition, staff recommends that the resulting proceeding be separate from docket UM 1100.

(4) Dedicated Transport. Dedicated transport provides a competing carrier with transmission facilities between an ILEC's central offices that are dedicated to that particular carrier. The FCC considered various types of dedicated transport in conducting its impairment analysis, and considered how different types of transport are used to provide services to major customer classes (i.e., mass market, small and medium enterprises, large enterprises). In the case of dark fiber, DS3, and DS1 transport, the FCC found on a national level that requesting carriers are impaired without access to these types of dedicated transport. However, the FCC delegated to state commissions the task of further analyzing impairment on an interoffice route basis using FCC designated "triggers." See TRO ¶¶359, 360.

The FCC requires the states to complete their "initial" review of specific interoffice routes within nine months from the effective date of its Triennial Review Order. Therefore, the deadline is July 2, 2004. According to the FCC:

States that conduct this review need only address routes for which there is relevant evidence in the proceeding that the route satisfies one of the triggers or the potential deployment analysis specified in this Part. To the extent that a state commission does not complete its proceedings in this nine month period, aggrieved parties may file a petition with this Commission demonstrating a state's failure to

act pursuant to the procedures we outline today. We expect that states will require an appropriate period for competitive LECs to transition from any unbundled transport that state finds should no longer be unbundled. See TRO ¶417.

In addition to the nine-month investigation, the FCC expects state commissions to conduct an additional six-month investigation. According to the FCC,

After completion of their initial reviews, we expect state commissions to conduct further granular reviews, pursuant to the procedures the state commissions adopt, to identify additional routes that satisfy the triggers. Such proceedings shall be completed within six months of the filing of a petition or other pleading submitted in accordance with the prescribed state commission procedures. See TRO ¶418.

Staff procedural recommendation regarding dedicated transport. As with high capacity loops, the Commission should inform carriers that it will not open a docket unless it receives a petition. The Commission should instruct carriers that, in order to speed up the investigation, such a petition must be accompanied by a specific list of interoffice routes, together with a justification for including each route on the list based on the FCC "triggers" and other FCC criteria for finding no impairment. The advantage of waiting for a petition is that each ILEC will have to decide pursuing an investigation is worth its while. The Commission does not have information to make this decision, nor could the required information be gathered easily. The disadvantage is that there may be a short procedural delay in opening a docket if and when a petition is filed. This will make it somewhat more difficult to meet the FCC's nine-month deadline. With this in mind, the Commission should advise carriers to file petitions promptly. If the Commission grants a petition, staff recommends that the resulting proceeding be separate from docket UM 1100.

PROPOSED COMMISSION MOTION:

Pursuant to FCC Order No. 03-36, the Commission confirms that it will investigate in docket UM 1100 whether competitive carriers are impaired if local circuit switching for mass market customers is no longer available as an unbundled network element (UNE). The Commission clarifies that it will also investigate in docket UM 1100 the "batch cut process", and the FCC's concept of "rolling" access to unbundled circuit switching. The Commission concludes that the ALJs assigned to docket UM 1100 should designate specific staff as

technical advisors to the ALJs and the Commission, and that staff should not participate as a party. Regarding impairment associated with local circuit switching for enterprise customers, high capacity loops, and dedicated transport, the Commission informs carriers by its action at this public meeting that it will not open a docket unless it receives a petition. Any petitions must be accompanied by specific supporting information as described in the staff memorandum.