



The Triennial Review Order revised the FCC's unbundling rules based on a "necessary and impair analysis" pursuant to Sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996.<sup>2</sup> The FCC's order focused largely on an analysis of impairment. An impairment analysis determines whether competitive carriers would be impaired if they do not have access to a particular network element. If the finding is "no impairment", then ILECs are not required to provide the element as a UNE pursuant to Section 251(c)(3), and at UNE pricing in accordance with Section 252(d).

In the case of circuit switching, the FCC concluded that "requesting carriers are not impaired if they do not have access to unbundled local circuit switching when serving DS1 enterprise customers."<sup>3</sup> 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.

The FCC allows the states 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. Since the effective date of the Triennial Review Order is October 2, 2003, a state commission must complete an investigation and file a petition for waiver of the national finding by January 2, 2004. In cases where 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

---

<sup>2</sup> 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).)

<sup>3</sup> The FCC defined "DS1 enterprise customers" as follows: "For purposes of determining whether impairment exists according to our standard, we define DS1 enterprise customers as those customers for which it is economically feasible to a competing carrier to provide voice service with its own switch using a DS1 or above loop." See TRO footnote 1376.

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.

Petitioners contend that they will be impaired if local circuit switching is no longer provided as a UNE in markets where they serve or plan to serve. The petition lists 51 wire centers and exchanges of Qwest Corporation (Qwest) and Verizon Northwest Inc. (Verizon). The wire centers and exchanges are in suburban and rural areas across the state. According to Petitioners,

"the costs that competitors desiring to self-provision switching to service enterprise customers would face, both operational and economic, outweigh the potential revenues. It is simply not economically feasible to serve enterprise customers in these areas absent access to unbundled local switching. After reviewing relevant data, the Commission will find that economic barriers, in conjunction with operational barriers, render competitors impaired without access to unbundled switching to serve enterprise customers in these exchanges. (Petition at page 13.)

Petitioners have so far provided no factual evidence to support their claim of impairment. Absent a factual case at the outset, it will be more difficult to complete an investigation according to FCC standards and within the 90-day time limit.<sup>4</sup> Although the petition lacks the factual support staff had hoped it would contain, staff nonetheless recommends that the Commission grant the petition. Granting the petition will give Petitioners an opportunity to make their case. If indeed, the facts show that Petitioners are impaired, it would be appropriate for the Commission to petition the FCC for waiver of the national finding. In that circumstance, an FCC waiver would preserve and encourage competition in this state.

Staff has worked with the Administrative Hearings Division (AHD) to expedite the proceeding if the Commission grants Petitioners request. AHD has scheduled an immediate prehearing conference for the afternoon of September 23, 2003, following the public meeting. The conference will be held only if the Commission adopts the staff recommendation. Staff has informed Petitioners, Qwest, and Verizon that the parties will discuss at the prehearing conference the following proposed schedule:

Prehearing Conference	September 23, 2003
CLEC Testimony	October 13, 2003
ILEC Testimony	November 3, 2003

---

<sup>4</sup> A state commission may request a reasonable extension of the 90-day deadline. However, staff is not certain how receptive the FCC will be to such requests.

Hearing	November 13-14, 2003
Briefs	November 24, 2003
Commission Decision (including FCC petition if necessary)	December 29, 2003

If the Commission grants the petition, the Commission should specify staff's role in the proceeding. Staff recommends that it not participate as a party. Rather, staff believes it can contribute most effectively if the ALJ assigned to the case designates specific staff members as technical advisors to the ALJ and the Commission.<sup>5</sup> This will allow the designated staff members to assist the ALJ and the Commission as they make findings and develop conclusions pursuant to standards set forth in the Triennial Review Order.

#### **PROPOSED COMMISSION MOTION:**

The petition to open an investigation by Oregon Telecom, Inc. and United Communications, Inc. dba Unicom be granted, specific staff be designated as technical advisors to the Administrative Law Judge and the Commission, and staff not participate as a party.

Oregon Telecom UNICOM Petition

---

<sup>5</sup> 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.