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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1100

In The Matter Of The Investigation To)
Determine, Pursuant To Order Of The)
Federal Communications Commission,)
Whether Impairment Exists In Particular) **ORDER**
Markets If Local Circuit Switching For)
Mass Market Customers Is No Longer)
Available As An Unbundled Network)
Element.)

DISPOSITION: INVESTIGATION DOCKET OPENED

At a special public meeting convened on July 24, 2003, the Public Utility Commission of Oregon (Commission) approved a request by its Staff to open an investigation for the purpose of conducting a review to determine, pursuant to order of the Federal Communications Commission (FCC), whether impairment exists in a particular market if local circuit switching for mass market customers is no longer available as an unbundled network element. A copy of the Staff report is attached as Appendix A to this order and is incorporated herein by reference.

On February 20, 2003, the FCC entered its decision in CC Docket 01-388, also known as the Triennial Review docket. In that decision, the FCC revised its rules concerning the obligations of incumbent local exchange carriers to make unbundled network elements available to competitive local exchange carriers. Although the FCC has not yet published its order in the Triennial Review docket, it has indicated that the States will be required to conduct the impairment analysis discussed above within a nine month period. That being the case, the Commission finds that it is prudent to open this investigation now, so that proceedings may commence shortly after the FCC issues its order.

In addition to investigating local circuit switching used to serve mass market customers, the FCC also concluded that local circuit switching used “for business customers served by high capacity loops such as DS-1 will no longer be unbundled based on a presumptive finding of no impairment. Under this framework, States will have 90 days to rebut the national finding.” The Commission adopted Staff’s recommendation not to open an investigation at this time to determine if there is a sufficient basis for rebutting the FCC’s presumption of no impairment. The Commission will wait for a

petition requesting a 90-day investigation before deciding whether to go forward with such an undertaking.

IT IS THEREFORE ORDERED that this docket is opened to investigate, pursuant to order of the Federal Communications Commission, whether impairment exists in a particular market if local circuit switching for mass market customers is no longer available as an unbundled network element.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

ITEM NO. 1

**PUBLIC UTILITY COMMISSION OF OREGON
STAFF REPORT
PUBLIC MEETING DATE: July 24, 2003**

REGULAR X CONSENT _____ EFFECTIVE DATE _____ NA

DATE: July 17, 2003

TO: John Savage through Phil Nyegaard

FROM: Dave Booth

SUBJECT: FCC "TRIENNIAL REVIEW" INVESTIGATION: Requests the Commission open an investigation to determine, pursuant to FCC order, whether impairment exists in a particular market if local circuit switching for mass market customers is no longer available as an unbundled network element.

STAFF RECOMMENDATION:

Staff recommends the Commission open an investigation for the purpose of conducting a nine-month review to determine, pursuant to order of the Federal Communications Commission (FCC), whether impairment exists in a particular market if local circuit switching for mass market customers is no longer available as an unbundled network element.

DISCUSSION:

On February 20, 2003, the FCC made its decision in CC Docket No. 01-388, also known as the Triennial Review. In its Triennial Review decision, the FCC revised its rules concerning the obligations of incumbent local exchange carriers (ILECs) to make unbundled network elements (UNEs) available to competitive local exchange carriers (CLECs). To date, the FCC has not published an actual Triennial Review order. The order will set forth the precise text of revised UNE rules and the details of its decisions. However, the FCC did issue on February 20, 2003, a two-page press release with a four-page attachment. A copy of the FCC's press release and attachment are appended to this memorandum.

On several occasions, the FCC has adopted rules to implement the unbundling requirement in Section 251 of the Telecommunications Act of 1996 (the Act). According to Section 251(c)(3), an ILEC subject to Section 251 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. 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. (See 47 U.S.C. § 251(d)(2).)

Application of the Section 251(d)(2) standard for identifying UNEs is known as a "necessary and impair analysis." Prior to the Triennial Review, the FCC conducted a necessary and impair analysis in CC Docket Nos. 96-98 and 98-147. The FCC orders in these dockets established an FCC UNE list as set forth in 41 C.F.R. § 51.319. In Order Nos. 01-1106 and 02-164, the Oregon Commission adopted a list of UNEs that is consistent with the FCC's then-current UNE list.

The FCC's Triennial Review decision of February 20, 2003, changes the UNE list in 41 C.F.R. § 51.319. For example, the pre-Triennial Review version of 41 C.F.R. § 51.319 includes a UNE called "high frequency portion of the loop." This UNE allows an arrangement known as "line sharing," where a CLEC can provide high-speed internet services using the high frequency portion of the loop, while the ILEC is using the lower frequency portion of the same loop to provide standard voice services. According to the FCC's Triennial Review press release, the FCC has decided to end "line sharing," determining that the "high frequency portion of the loop" should no longer be a UNE. The FCC concluded that that "access to the entire stand-alone copper loop is sufficient to overcome impairment." See FCC Press Release, Attachment, Page 2.

Another UNE included in the pre-Triennial Review version of 41 C.F.R. § 51.319 is "local circuit switching." The FCC's Triennial Review press release gives state commissions a role in determining whether local circuit switching will remain a UNE in particular markets. The local circuit switching UNE is a key component of the combination of UNEs that reproduces local telephone service. This combination of UNEs (i.e., circuit switching, switching features, transport, and loop) is known as the

"UNE-Platform," or "UNE-P" for short. Eliminating local circuit switching as a UNE effectively eliminates UNE-P as a way for CLECs to provide local telephone services.

According to the press release, the FCC has decided to limit CLEC access to local circuit switching in two ways. First, the FCC has concluded that local circuit switching "for business customers served by high-capacity loops such as DS-1 will no longer be unbundled based on a presumptive finding of no impairment. Under this framework, states will have 90 days to rebut the national finding." See FCC Press Release, Attachment, Page 1. Second, in the case of local circuit switching used to serve "mass market customers," the FCC has concluded that state commissions should conduct state-specific impairment analyses "within 9 months." The FCC press release states:

For mass market customers, the Commission sets out specific criteria that states shall apply to determine, on a granular basis, whether economic and operational impairment exists in a particular market. State Commissions must complete such proceedings (including the approval of an incumbent LEC batch hot cut process) within 9 months. Upon a state finding of no impairment, the Commission sets forth a 3 year period for carriers to transition off of UNE-P. See FCC Press Release, Attachment, Page 1.

Local circuit switching for business customers served by high-capacity loops.

With regard to the FCC's first limitation on local circuit switching, the Commission has three options: (1) The Commission can now open an investigation to conduct the 90-day review. (2) The Commission can wait and see if carriers petition the Commission to open an investigation for this purpose and after hearing the arguments decide at that time whether to open such an investigation. (3) The Commission can now decide that it will not conduct a 90-day review.

If the Commission does not conduct a 90-day review and successfully rebut the FCC's national finding of no impairment, staff understands that local circuit switching would no longer be available throughout Oregon as a UNE when used for service to business customers over high-capacity loops 90 days after the FCC rules take effect.

Staff recommends option 2, the wait-and-see approach, for two reasons. First, the FCC has framed the 90-day review in a way that places the burden on a state commission to develop facts that are sufficient to overcome the FCC's national finding of no impairment. This will be difficult. Second, staff is concerned about the Commission's ability to complete such a difficult task in so short a time, while simultaneously completing a nine-month review of local circuit switching for mass market customers as discussed below. The Commission should wait to consider whether to open a 90-day

investigation until it receives a petition. The Commission should expect any petition to describe in as much detail as possible a proposed procedure for satisfying the FCC's 90-day requirement.

Local circuit switching for mass market customers.

With regard to the FCC's decision on local circuit switching for mass market customers, the Commission has three options: (1) The Commission can now open an investigation to conduct the nine-month review. (2) The Commission can wait and see if carriers petition the Commission to open an investigation for this purpose and after hearing the arguments decide at that time whether to open such an investigation. (3) The Commission can now decide that it will not conduct a nine-month review.

It is not entirely clear what happens if the Commission does not conduct a nine-month review. One possibility is that local circuit switching would no longer be available throughout Oregon as a UNE when used for service to mass market customers at a point three years and nine months after the FCC rules take effect. This time period allows a nine-month period during which the Commission could have conducted its review, followed by three years during which the FCC says carriers will transition off of UNE-P. However, the FCC's press release indicates that the three-year transition off of UNE-P commences upon "a state finding of no impairment." It is unclear whether a state's decision not to conduct a nine-month review would constitute a state finding of no impairment. Where a state does not conduct a nine-month review, it is possible the FCC itself would take on the task of doing an impairment analysis. In that case, the impairment analysis could expand beyond nine months. Also, it is possible that the FCC review would determine that there is impairment in at least some Oregon markets, and that the UNE should remain available in those markets. For the sake of this discussion, Staff is assuming that if the Commission chooses not to conduct a nine-month review, the local switching UNE for mass market customers would end in three years and nine months.

Staff recommends option 1. The Commission should take up the FCC's offer to conduct a nine-month review. By doing so, the Oregon Commission would be in charge of making a determination whether eliminating the local circuit switching UNE for mass market customers is appropriate. The FCC's nine-month deadline is tight, but staff believes it is feasible to complete such an investigation if the schedule is firmly controlled and the discovery process is handled efficiently. In order to facilitate discovery, staff will propose in the docket that it assume a major role in gathering information. Staff is in a unique position to conduct a survey of the intrastate telecommunications industry to obtain information that addresses the "specific criteria" that the FCC has promised to provide in its order.

Moreover, option 1 expedites the start of the investigation once the FCC issues an order. Staff had been waiting for the FCC to publish its order before recommending Commission action, believing that the order may contain helpful details. However, staff now believes the Commission should proceed to open an investigation based on the FCC's press release. While greater detail is desirable, it is more important to ensure that the investigation can get underway promptly once the FCC publishes its order.

PROPOSED COMMISSION MOTION:

That the Commission open an investigation for the purpose of conducting a nine-month review to determine, pursuant to FCC order, whether impairment exists in a particular market if local circuit switching for mass market customers is no longer available as an unbundled network element.