BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of	)	
	)	Docket No. UT-033044
QWEST CORPORATION	)	
	)	
To Initiate a Mass-Market Switching and Dedicated Transport Case Pursuant to the Triennial Review Order	)	AT&T'S PREHEARING BRIEF REBUTTING LEGAL POSITIONS RAISED BY QWEST WITNESS HARRY M. SHOOSHAN

AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Seattle and TGC Oregon (collectively "AT&T") submit this prehearing brief rebutting legal argument made by Qwest's witness, Harry M. Shooshan III, Esq. in his direct testimony.

1. Introduction

Qwest Corporation ("Qwest") submitted the Direct Testimony of Mr. Shooshan on December 22, 2003. Mr. Shooshan is an attorney at law.[1] In Section 4 of his testimony entitled "FCC and Judicial Guidance Relating to the Proper Implementation of the Act," Mr. Shooshan provides legal analysis,[2] arguing that this Commission must interpret and apply the FCC's Triennial Review Order ("TRO")[3] in this case consistently with his legal interpretation of two federal court opinions. Besides the fact that his legal analysis is far more

[1] Direct Testimony of Harry M. Shooshan III on behalf of Qwest Corporation, dated December 22, 2003 [hereinafter "Shooshan Testimony"] at Exhibit HMS-A.
[2] *Id.* at 19-26. AT&T will refer to page numbers in the redacted version of Mr. Shooshan's testimony, as opposed to the confidential version of that testimony.
[3] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 271 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (*et.al.*) (rel. August 21, 2003).

appropriate for briefs (where extensive discussions of law have traditionally been presented in front of this Commission as well as the Courts), Mr. Shooshan's descriptions of those court opinions are inaccurate and incomplete. Accordingly, Mr. Shooshan's suggested application of the TRO is incorrect as a matter of law, and this Commission should reject Mr. Shooshan's legal testimony and conclusions found in Section 4 of his testimony.

2. Mr. Shooshan's incomplete and incorrect reading of *Iowa Utilities Board* and *USTA* should not impact this Commission's interpretation and application of the TRO.

Mr. Shooshan claims that because federal courts have imposed some sort of "limiting standard" on the scope of unbundled elements and "have been troubled by the seeming imbalance of the FCC's implementation of the Act,"[4] that this Commission must essentially read and apply the TRO with a jaundiced eye, limiting unbundling whenever practicable.[5] The fact is, as established below, neither of the cases that Mr. Shooshan cite show any "preference" for or against unbundling. Accordingly, as explained in greater detail below, the entire premise of Mr. Shooshan's argument is wrong; the courts have not imposed a specific "limiting standard" on the scope of unbundled elements that would alter this Commission's interpretation and application of the TRO.

a. *Iowa Utilities Board*

Mr. Shooshan's interpretation of the U.S. Supreme Court's opinion in *AT&T Corporation v. Iowa Utilities Board,* 525 U.S.366 (1998) is incomplete and taken out of context. According to Mr. Shooshan, because the Supreme

[4] Note that these are Mr. Shooshan's words with no citation to any court precedent or dicta. Shooshan Testimony at 26.
[5] *Id*.

Court ruled in *Iowa Utilities Board* that "the FCC must apply a 'limiting standard' on the scope of unbundled elements that is 'rationally related to the goals of the Act,'"[6] when there is a question about the meaning of any part of the direction the FCC gave this Commission through the TRO, that question must be resolved in favor of a "limiting standard."[7] In other words, he believes any ambiguity in the TRO must be resolved in favor of Qwest and against unbundling. He makes this legal conclusion despite the FCC's national finding of impairment without unbundled switching and transport in the TRO.[8] As established below, Mr. Shooshan's conclusion is wrong, in part because his analysis of *Iowa Utilities Board* is incomplete and unbalanced.

The question before the Court in *Iowa Utilities Board* was the legality of Rule 319, the primary unbundling rule in the FCC's First Report and Order. In Rule 319, the FCC established a baseline list of UNEs, including switching, that ILECs were required to provide to requesting carriers on an unbundled basis.[9] The FCC allowed states to add elements to the list.[10] Rule 319 contained essentially no limiting standard to the list of available UNEs. The Supreme Court found that a lack of **any** limiting standard gave requesting carriers "blanket access" to UNEs.[11] The Court did not address, let alone rule, if mass market switching and other elements on the FCC's baseline list should be unbundled. Instead, the Supreme Court vacated Rule 319, but declined to impose

[6] *Id*. at 22 (quoting *Iowa Utilities Bd.*, 525 U.S. at 389.)
[7] *Id.* at 26.
[8] TRO at ¶459.
[9] *Iowa Utilities Board*, 525 U.S. at 387.
[10] *Id*.
[11] *Id*. at 387, 390 (emphasis added).

a specific standard to analyze network-element availability. In doing so, the Court required the FCC to "apply *some* limiting standard, rationally related to the goals of the Act . . ."[12]

Mr. Shooshan suggests that the Court in requiring *some* sort of limiting standard established a preference against unbundling, and accordingly recommends that this Commission interpret the TRO with an eye towards limiting unbundling.[13]

In supporting his premise against unbundling, Mr. Shooshan also notes that Justice Breyer, in his concurring opinion in *Iowa Utilities Board*, observed that unbundling "can have significant administrative and social costs inconsistent with the Act's purposes."[14] However, Mr. Shooshan fails to mention that Justice Breyer also recognized the benefits unbundling provides to competition,[15] pitting the considerations as ones that needed to be "balanced."[16]

In sum, the *Iowa Utilities Board* Court never suggested that the FCC or this Commission place a prejudice on UNE unbundling. Accordingly, Mr. Shooshan "guiding principle" urging this Commission "to limit any requirement to unbundle local circuit switching to situations where it is clearly needed for

[12] *Id*. at 388 (emphasis in original).
[13] Shooshan Testimony at 26.
[14] Shooshan Testimony at 18 (quoting *Iowa Utilities Board*, 525 U.S. at 428 (Breyer, J., concurring)).
[15] *Iowa Utilities Board*, 525 U.S. at 427-28.
[16] *Id* at 430 (Breyer, J., concurring). *See also, United States Telcom Association v. Federal Communications Commission*, 290 F.3d 415, 427 (2002) ("Justice Breyer concluded that the fulfillment of the Act's purposes therefore called for "balance" between these competing concerns.")

efficient firms to compete and it provides an opportunity to compete" is certainly not supported by Supreme Court precedent.[17]

b. *USTA*

Mr. Shooshan also heavily relies on *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("USTA") to support his premise that Courts *favor* limiting unbundling and thus this Commission should also. Mr. Shooshan claims the "key problem" identified by the *USTA* Court was a view by the FCC that "more unbundling is better."[18] While *USTA* did mention that the FCC viewed more unbundling as better, it hardly identified the FCC's view as the "key problem" of the FCC's analysis. Instead, as explained below, the D.C. Circuit entertained an intricate analysis, determining, in sum, that because impairment analysis is the "touchstone" of the Act, the FCC must undertake a more "concrete" analysis in determining unbundling requirements.[19]

Mr. Shooshan then provides his interpretation of "key (legal) elements of the Court's decision."[20] As established below, Shooshan's interpretation is incorrect. There are four key holdings[21] of the *USTA* Court that arguably relate to this case, which in chronological order are as follows:

[17] *Id.* at 38.
[18] Shooshan Testimony at 24.
[19] *USTA*, 290 F.3d at 425.
[20] Shooshan Testimony at p.24.
[21] AT&T establishes below that the fifth holding regarding intermodal competition is not relevant to this Commission's TRO analysis.

i. The FCC's work in this area is extraordinary complex.

When reviewing the FCC's Remand Order, the USTA court kept in mind the "extraordinary complexity" of the FCC's task indicating:[22] "Congress… charged the [FCC] with identifying those network elements whose lack would impair would-be competitors' ability to enter the market, yet gave no detail as to either the kind or degree of impairment that would qualify."[23]

Accordingly, in noting the complexity of the issue, the USTA Court hardly concluded that the issue was as easy as Mr. Shooshan's suggestion of limiting unbundling whenever there is a question about the meaning of the FCC's position.[24]

ii A uniform national unbundling rule does not satisfy the requirements of the Act.

Mr. Shooshan indicates that USTA prohibited unbundling in certain markets (e.g. "where facilities competition exists or where retail rates are held above cost by regulation.")[25]

The *USTA* Court did not rule that unbundling should not occur in certain markets, it simply decided that the FCC's uniform national rule was inconsistent with the Act because it did not look at the state of competitive impairment in particular markets.[26] The Court required a more "nuanced" and comprehensive approach.[27]

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[22] *USTA*, 290 F.3d at 421.
[23] *Id*. at 422.
[24] Shooshan Testimony at p.26.
[25] *Id*. at p. 25, Subsection (2).
[26] *USTA* at 290 F.3d at 422.
[27] *Id*. at 426.

iii. The FCC's universal cost disparity concept was too broad.

The *USTA* Court determined that the FCC's reliance on universal cost disparities between CLECs and ILECs were not sufficiently granular, and thus not reasonably linked to the purposes of the Act's unbundling provisions.[28] "[C]ost comparisons of the sort made by the [FCC], largely devoid of any interest in whether the cost characteristics of an 'element' render it at all unsuitable for competitive supply, seem unlikely to either achieve the *balance* called for explicitly by Justice Breyer [concurring in *Iowa Utilities Board*] or implicitly by the Court as a whole . . . ."[29]

Mr. Shooshan transforms the D.C. Circuit's observation into a command to this Commission about how to conduct this impairment analysis. According to Mr. Shooshan, *USTA* stands for the proposition that "cost disparity can justify a finding of impairment only if the cost characteristics of a UNE 'render it . . . unsuitable for competitive supply . . ."[30] As discussed above, *USTA* does not say there can be unbundling only when there is a natural monopoly or only if the cost characteristics render it at all unsuitable for competitive supply. In fact, the *USTA* Court discouraged use of the essential facilities (natural monopoly) doctrine that Mr. Shooshan argues is mandated by the D.C. Circuit.[31]

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[28] *Id.* at 427.
[29] *Id.* at 427 (emphasis added).
[30] Shooshan Testimony at 25, Subsection (3).
[31] *USTA*, 290 F.3d at 428, n.4.

iv. In order to meet the goals of the Act, a "balance" must be drawn between competing costs.

The *USTA* Court noted Justice Breyer's balancing test from his concurring opinion in *Iowa Utilities Board*.[32] Mr. Shooshan quotes only one side of the balance in his testimony: "[U]nbundling 'imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.'"[33] The D.C. Circuit continued, however: "At the same time—the plus that the [FCC] focuses on single-mindedly—a broad mandate can facilitate competition by eliminating the need for separate construction of facilities where such construction would be wasteful."[34] Mr. Shooshan omitted half of Justice Breyer's balancing test; ironically, the same thing the D.C. Circuit recognized that the FCC did in its *UNE Remand Order* (except it was the other half).[35]

v. Broadband services are relevant to the FCC's *Line Sharing Order*.

Mr. Shooshan claims that the *USTA* opinion requires the FCC to "take into account the existence and extent of intermodal competition . . ."[36] He fails to note, however, that this portion of the *USTA* opinion concerns the FCC's *Line Sharing Order,* which concerns DSL unbundling requirements, as opposed to the *UNE Remand Order,* which addresses legacy facilities. Accordingly, the Line Sharing portion of *USTA* is inapplicable to the TRO and this Commission's impairment analysis. Contrary to Mr. Shooshan's suggestion, nothing in *USTA*

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[32] *Id*. at 427.
[33] Shooshan Testimony at 24, Subsection (1) (quoting *USTA*, 290 F.3d at 427).
[34] *USTA*, 290 F.3d at 427 (citing *Iowa Utilities Board*, 525 U.S. at 416-17).
[35] *USTA*, 290 F.3d at 427.
[36] Shooshan Testimony at 25.

makes intermodal competition relevant to this Commission's impairment analysis.

3. Conclusion

Mr. Shooshan admits he "finds flaws in the TRO," but claims the purpose of his testimony is "**not** to rehash these flaws."[37] However, his suggestion that this Commission adopt his reading of *Iowa Utilities Board* and *USTA,* and apply that reading to interpret and apply the TRO in this case, is nothing less than a request that this Commission alter the TRO's impairment analysis in favor of Qwest.[38] This case is not Qwest's appeal of the FCC's TRO. This Commission should reject Mr. Shooshan's complaints about the TRO in this case and disregard Mr. Shooshan's testimony in Section 4 of his prefiled testimony.

[37] Shooshan Testimony at 19 (emphasis in original).
[38] Indeed, Mr. Shooshan invites this Commission to question or even reject portions of the TRO: "The history of the FCC's attempts to implement the Act's unbundling requirements provides important guidance to state commissions concerning how to exercise the discretion they have been granted to make impairment determinations." Shooshan Testimony at 21.

Respectfully submitted this 2nd day of February, 2004.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., AND AT&T LOCAL SERVICES ON BEHALF OF TCG SEATTLE AND TCG OREGON

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