

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of) DOCKET NO. UT-033044
)
QWEST CORPORATION) ORDER NO. 10
)
To Initiate a Mass-Market) PREHEARING CONFERENCE
Switching and Dedicated Transport) ORDER; ORDER GRANTING
Case Pursuant to the Triennial) QWEST'S MOTIONS TO MODIFY
Review Order) ORDER NO. 08 AND STRIKE
) PORTIONS OF TESTIMONY;
) DENYING QWEST'S REQUEST FOR
) A DELAY IN THE PROCEDURAL
) SCHEDULE
)
.....)

1 SYNOPSIS. In this Order, the Commission grants Qwest's motion to allow up to six
(6) in-house experts to review highly confidential information, and amends paragraph 15
of Order No. 02, the protective order in this proceeding. The Commission grants
Qwest's motion to strike portions of AT&T witness Mr. Falcone's Direct Testimony
addressing electronic loop provisioning, or ELP. The Commission denies Qwest's
request for a 60-day delay in the procedural schedule in this proceeding.

2 NATURE OF THE PROCEEDING. This proceeding addresses a petition filed
by Qwest Corporation (Qwest) seeking review of the findings of the Federal
Communications Commission (FCC) in its Triennial Review Order¹ concerning
impairment to competitors without unbundled access to mass-market switching
and dedicated transport.

3 PROCEDURAL HISTORY. On October 10, 2003, Qwest filed a petition with the
Washington Utilities and Transportation Commission (Commission) in Docket

¹ In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange
Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,
Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos.
01-338, 96098, 98-147, Report and Order and Order on Remand and Further Notice of Proposed
Rulemaking, FCC 03-36 (Rel. August 21, 2003) [Hereinafter "Triennial Review Order"].

No. UT-033044 to initiate a review of the FCC's findings in the Triennial Review Order concerning mass-market switching and dedicated transport.²

- 4 On February 5, 2004, Qwest filed a Motion for Modification of Order No. 08, requesting expedited resolution of the motion. By notice issued on February 6, 2004, the Commission provided an opportunity for written responses to Qwest's motion to be filed with the Commission on Monday, February 9, 2004, and scheduled a prehearing conference for Tuesday, February 10, 2004, to hear arguments on Qwest's motion. No party filed a written response to Qwest's motion.
- 5 On Friday, February 6, 2004, Qwest filed a Motion to Strike AT&T Testimony regarding electronic loop provisioning. By notice issued on Monday, February 9, 2004, the Commission requested oral responses to Qwest's motion to strike during the prehearing conference scheduled for Tuesday, February 10, 2004. On Wednesday, February 11, 2004, AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (AT&T) filed a written response to Qwest's motion to strike.
- 6 During the conference held on February 10, 2004, Qwest made an oral motion requesting a 60-day delay in the procedural schedule in this proceeding. At the request of the administrative law judge, Qwest filed a letter with the Commission on February 10, 2004, formally requesting a 60-day delay in the schedule. Parties were given an opportunity to respond to Qwest's request during the conference.
- 7 **APPEARANCES.** Lisa A. Anderl, Associate General Counsel, Seattle, Washington, and Charles Steese, Steese & Evans, Denver Colorado, represent Qwest. Rebecca DeCook and Richard Wolters, AT&T Law Department, Denver,

² A summary of earlier procedural history in this docket is set forth in Order Nos. 05 and 06 in this proceeding and will not be repeated in this Order.

Colorado, and Walter Eggers, Holland & Hart, Cheyenne, Wyoming, represent AT&T. Karen S. Frame, Senior Counsel, Denver, Colorado, represents Covad Communications (Covad). Stephen S. Melnikoff, Regulatory Law Department, US Army Litigation Center, Arlington, Virginia, represents the Department of Defense and all other Federal Executive Agencies (DOD/FEA). Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents Advanced TelCom Group, Inc. (ATG), Eschelon Telecom, Inc (Eschelon), Global Crossing Local Services, Inc. (Global Crossing), Integra TelCom, Inc. (Integra), McLeod Local Services, Inc. (McLeod), Pac-West Telecomm, Inc. (Pac-West), Time Warner Telecom of Washington, LLP (Time Warner), and XO Communications, Inc. (XO). Together with Eschelon, these parties are referred to as the Joint CLECs. Michel Singer Nelson, attorney, Denver, Colorado, represents WorldCom, Inc, d/b/a MCI, Inc. (MCI). Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, represents WeBTEC. Jonathan Thompson and Gregory Trautman, Assistant Attorneys General, Olympia, Washington, represent Commission Staff.

8 **QWEST'S MOTION TO MODIFY ORDER NO. 08.** In Order No. 02, the protective order in this proceeding, the Commission limited access to highly confidential information to a reasonable number of in-house attorneys, two in-house experts, and a reasonable number of outside counsel and experts. *Order No. 02, ¶ 15.* In Order No. 08, the Commission granted, in part, Qwest's motion to modify Order No. 02 by allowing access to highly confidential information to five in-house experts. Qwest had requested that eight in-house experts have access to highly confidential information.

9 Qwest now requests that the Commission modify Order No. 08 to allow up to six (6) in-house experts access to highly-confidential information. Qwest asserts that it has already assigned five in-house experts to respond to data requests and bench requests and to prepare testimony. Qwest now asserts that an additional in-house expert, Robert Jeff Hubbard, must have access to highly confidential information to respond to the highly confidential portions of the testimony of

MCI witness Mr. Stacey that address collocation and other operational issues. During the conference, Qwest asserted that there is no outside expert who is qualified to address these issues.

10 No party filed a response to Qwest's motion. During the conference, no party objected to Qwest's motion. The Joint CLECs stated that Qwest had demonstrated the need for an additional in-house expert to have access to highly confidential data. Although the Joint CLECs are concerned about further expansion of the number of in-house experts with access to highly confidential information in this proceeding, they do not object to Qwest's motion.

11 **Discussion and Decision.** Qwest has demonstrated good cause to allow an additional in-house expert to have access to highly confidential information. Qwest's motion to modify the Order No. 08 is granted, with the proviso that Qwest's motion requires the modification of Order No. 02, the protective order in this proceeding, not Order No. 08. Paragraph 15 of Order No. 02, the protective order, is amended as follows:

Parties seeking disclosure of Highly Confidential Information shall designate no more than (1) a reasonable number of in-house attorneys who have direct responsibility for matters relating to Highly Confidential Information; (2) ~~five~~ six in-house experts; and (3) a reasonable number of outside counsel and outside experts to review materials marked as "Highly Confidential." Highly Confidential Information may not be disclosed to persons engaged in the development, planning, marketing, or selling of retail or wholesale services for the purposes of any entity competing with or against any other entity, or for strategic or business decision making, non-regulatory strategic or business planning, or procurement on behalf of the receiving entity.

- 12 **QWEST'S MOTION TO STRIKE PORTIONS OF TESTIMONY REGARDING ELECTRONIC LOOP PROVISIONING.** On January 23, 2004, Robert V. Falcone filed direct testimony with the Commission on behalf of AT&T addressing hot cut and batch migration processes. *See Exhibit RVF-14T*. In addition to analyzing Qwest's batch hot cut proposal and stating AT&T's objections to the proposal, Mr. Falcone describes a technology AT&T refers to as electronic loop provisioning, or ELP, and requests that the Commission "evaluate and adopt AT&T's ELP proposal as a solution to removing CLEC impairment." *Falcone Direct at 59, lines 18-19*. AT&T recommends use of an electronic, software driven process for changing telephone service providers, rather than a manual, labor intensive, and error-prone process such as the hot cut process.
- 13 Qwest moves to strike the portion of Mr. Falcone's testimony that describes and recommends adoption of an ELP process. *Qwest Motion at 1, n.1*. Qwest asserts that the FCC specifically rejected AT&T's ELP proposal in the Triennial Review Order, and that AT&T's attempt to reintroduce the issue in this proceeding is improper. *Id.* Qwest notes that Mr. Falcone concedes in his testimony that the FCC rejected AT&T's ELP proposal. *Id. at 2*. Further, Qwest contests Mr. Falcone's assertion that state commissions should "consider all sources of 'impairment' to CLECs' competitive entry and take measures to mitigate or eliminate them, consistent with the Order's rulings." *Id. at 6, citing Falcone Direct at 58, n.53*. Mr. Falcone relies on paragraph 486 of the Triennial Review Order, which Qwest asserts does not provide state commissions the authority to adopt whatever mitigating measures they see fit to address.
- 14 During the prehearing conference, AT&T stated that it does not expect the Commission to order ELP in this proceeding, but requested that the Commission not strike the testimony, and allow it for the purpose of providing a benchmark of what would cure impairment in providing mass-market switching.

- 15 In response, Qwest asserted that there is no need to retain the testimony if AT&T is not requesting adoption of the ELP proposal, as the testimony requests adoption of the ELP proposal. Qwest also objects to AT&T's proposal as a request that the Commission find inadequate, as a matter of law, the FCC's requirement that states adopt a batch hot cut process.
- 16 In AT&T's written response to Qwest's motion, AT&T asserts that Mr. Falcone's ELP testimony is relevant to the proceeding as AT&T's ELP proposal provides a benchmark against which Qwest's bench hot cut process can be measured. AT&T also asserts that the FCC gave state commission wide discretion to develop solutions to the hot cut impairment problem. AT&T argues that although the FCC rejected AT&T's ELP proposal, the FCC did not prohibit state commissions from considering or comparing the proposal with an ILEC's batch hot cut proposal. AT&T argues that the FCC identified in the Triennial Review Order problems with existing ILEC hot cut processes, and requires states to develop batch cut processes that are as efficient as the ILEC's own process.
- 17 AT&T requests the Commission deny Qwest's motion to strike. AT&T also requests that the Commission open a separate proceeding to investigate whether Washington State should require ELP as a long-term solution for transferring large volumes of mass-market customers.
- 18 **Discussion and Decision.** The Commission grants Qwest's motion to strike portions of Mr. Falcone's testimony regarding ELP. If the Commission allows Mr. Falcone's ELP testimony, other parties, including Qwest, will undoubtedly believe it necessary to file responsive testimony on the issue. All parties and the Commission will be required to spend the time reviewing that testimony, preparing for cross-examination, and taking time in hearing and in briefs to address the issue. Although the Commission has set aside two weeks for hearing in this proceeding, given the number of issues the parties have presented in their prefiled testimony, there is no time to spend on issues that the FCC has not

directed states to investigate or address. As all parties agree, the FCC rejected AT&T's ELP proposal and directed the states to develop a batch hot cut process. *Triennial Review Order*, ¶¶ 486-91.

- 19 AT&T may disagree that a batch hot cut process is the appropriate process for transferring large volumes of mass-market customers. However, the Commission is charged with determining an appropriate batch hot cut process in this proceeding, not the best, most efficient method for transferring large volumes of mass-market customers. AT&T may present its arguments about the merits of Qwest's batch hot cut proposal and make the comparison to ELP in this proceeding based upon the information presented and the discussion in the *Triennial Review Order*. There is no need for the Commission to consider testimony in this proceeding concerning a proposal AT&T does not expect the Commission to adopt.
- 20 The Commission denies AT&T's request to open a separate proceeding to investigate whether to require ELP as a long-term solution to impairment created by the batch hot cut process. Under the Commission's procedural rules in chapter 480-07 WAC, AT&T may file a formal petition requesting such an investigation.
- 21 **QWEST REQUEST TO DELAY PROCEEDINGS.** Qwest requests that the Commission delay the proceedings in this docket for 60 days and temporarily suspend all discovery and requirements to file testimony. Qwest seeks to suspend or delay the proceedings because of concerns expressed during oral argument concerning the *Triennial Review Order* before the D.C. Circuit Court of Appeals that the FCC lacks authority to delegate impairment determinations to state commissions. Qwest asserts that the Court's decision, which is expected in the near future, is likely to have a significant impact on this proceeding, requiring the proceeding to be abandoned, altered or restarted.

22 Qwest argues that all parties could save extensive resources by delaying the docket for 60 days. Qwest proposes that hearings be rescheduled for the weeks of June 7-11, 2004, and June 28-July 2, 2004, with discovery resuming in mid-April and the last rounds of testimony on batch hot cut and other issues due on May 7, 2004. Qwest notes that similar suspension requests are pending in Colorado, Nebraska, and New Mexico. Qwest also noted during the prehearing conference that the hearings scheduled before the Washington Commission would be the first to be held in Qwest's region concerning its petitions on mass-market switching issues.

23 Qwest claims that no party would be prejudiced by the delay, that no party is opposed, and that Qwest will not claim a "failure to act" under paragraph 527 of the Triennial Review Order due to the requested suspension in the schedule.

24 During the prehearing conference, AT&T and Covad stated that they would not oppose the request, but would not join in the request. AT&T sought written assurances from Qwest that it would not use the suspension to claim a state's failure to act under the Triennial Review Order. Covad and Mr. Melnikoff, counsel for the Department of Defense and other Federal Executive Agencies, expressed concern about the nine-month time frame established by the FCC for these proceedings. These parties specifically expressed concern about what the Commission would do if the D.C. Circuit upheld the FCC's decision, given the FCC's denial of Oregon's request for an extension of the 90-day proceeding. Staff noted that the Triennial Review Order required a state petition to the FCC within 90 days of the effective date of the Order, and that the requirements for the nine-month proceeding are different.

25 **DISCUSSION AND DECISION.** The Commission denies Qwest's request for a 60-day delay in the procedural schedule. It is premature to determine whether to delay or suspend the procedural schedule in this proceeding. Although the D.C. Circuit Court of Appeals held oral argument and the assigned judges asked

certain pointed questions about the FCC's authority to delegate impairment decision making to state commissions, the court has not yet entered a decision. The Commission should not delay or suspend the procedural schedule before the D.C. Circuit has decided the questions raised about the Triennial Review Order. Even if the D.C. Circuit does reverse or remand the FCC's decision in the Triennial Review Order, there remains the possibility of an appeal to the U.S. Supreme Court. Whether there would be a stay of the Triennial Review Order pending appeal is yet another question.

26 Without a decision by the D.C. Circuit on the Triennial Review Order, it makes considerable sense to continue in this proceeding. All parties have already invested considerable resources in this proceeding: The first two rounds of testimony have been filed with the Commission, and the final round is due in one week. The Commission requires that parties file their final round of testimony with the Commission as required in Orders No. 01 and 06, and in notices dated November 3, 2003, December 17, 2003, and January 16, 2004. The hearings scheduled for the weeks of March 1 and March 15, 2004, will go forward as scheduled.

27 **OTHER PROCEDURAL ISSUES.** During the conference, Qwest notified the Commission that it may need to exceed the 20-page limit for rebuttal testimony established in Order No. 06. The administrative law judge clarified that the limit does not apply to exhibits, only to the actual written testimony. The administrative law judge advised Qwest to file a written request to file over-length rebuttal testimony if the testimony will exceed the limit by more than 5 pages.

28 The Joint CLECs advised all parties that they may need to file supplemental direct testimony and exhibits at the same time as they file supplemental responsive testimony to Ms. Torrence's testimony, due to the recent receipt of responses to data requests. The administrative law judge advised counsel for the

Joint CLECs and Qwest to discuss the matter and to raise it with the Commission if they cannot reach agreement on the issue.

29 **NOTICE TO PARTIES: Any objection to the provisions of this Order must be filed within ten (10) days after the date of this Order, pursuant to WAC 480-07-430 and WAC 480-07-810. Absent such objection, this Order will control further proceedings in this matter, subject to Commission review.**

DATED at Olympia, Washington, and effective this 13th day of February, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL
Administrative Law Judge