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February 20, 2004

Via E-Mail and
Overnight Mail

Ms. Carole J. Washburn, Executive Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
P.O. Box 47250
Olympia, WA 98504-7250

Re: Docket No. UT-033044 - Triennial Review
Qwest's Response to AT&T's Prehearing Brief

Dear Ms. Washburn:

Enclosed for filing are the original and 6 copies of Qwest's Response to AT&T's Prehearing Brief. The electronic copy is being provided by e-mail.

Sincerely,

Lisa A. Anderl

LAA/llw
Enclosures
cc: Service List (via e-mail and U.S. Mail)

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of Qwest Corporation to Initiate a Mass-Market Switching and Dedicated Transport Case Pursuant to the Triennial Review Order	Docket No. UT-033044 QWEST'S RESPONSE TO AT&T'S PREHEARING BRIEF

I. INTRODUCTION

1 Qwest Corporation ("Qwest") hereby submits this response to the pre-hearing brief submitted by AT&T on February 2, 2004. The procedural order that governs this docket does not provide for the parties to submit pre-hearing briefs, and AT&T's submission is therefore unauthorized. Instead of burdening the Commission with a motion to strike AT&T's brief, however, Qwest respectfully requests that the Commission grant it leave to submit this response.

2 AT&T submitted its unauthorized pre-hearing brief under the guise that it is necessary because Qwest improperly included discussion of legal issues in the direct testimony of its witness, Harry Shooshan. The disingenuous nature of this claim is evident from a review of AT&T's own testimony, which is replete with detailed legal interpretations and discussions of legal issues. For example, the 149-page direct testimony of AT&T witness John Finnegan includes a 15-page section devoted to Mr. Finnegan's legal interpretations of the FCC's *Triennial Review Order* ("*TRO*"), a discussion of Mr. Finnegan's views on the meaning and alleged applicability of antitrust law, and multiple citations to judicial opinions and FCC

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orders.[1]

3 As AT&T's own testimony shows, a discussion of the legal framework that governs the Commission's impairment determinations is an essential part of this proceeding and is hardly improper. Consistent with the procedures that govern this proceeding, AT&T should have expressed any disagreements it has with the legal framework articulated by Mr. Shooshan in its response testimony instead of through a pre-hearing brief. Moreover, on the merits, AT&T's legal discussion in its brief is incomplete and inaccurate and based on mischaracterization of Mr. Shooshan's direct testimony. In the brief discussion that follows, Qwest corrects these inaccuracies.

II. DISCUSSION

A. Mr. Shooshan correctly recognizes the judicial rulings that require application of a limiting standard in determining the network elements that ILECs must unbundle.

4 As Mr. Shooshan describes in his testimony, the FCC has attempted on three separate occasions to define the network elements that ILECs must unbundle. Thus far, courts have ruled that the FCC erred twice by defining those elements in a manner inconsistent with the Telecommunications Act of 1996 ("the Act").[2] The FCC's third attempt is currently under review by the United States Court of Appeals for the District of Columbia Circuit, where the case has been briefed and argued.[3] In the portion of his testimony that AT&T addresses in its pre-hearing brief, Mr. Shooshan summarizes the rulings of the United States Supreme Court and the D.C. Circuit that have invalidated the FCC's previous unbundling rules. His discussion of these rulings provides critical context for the unbundling determinations the

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1 *See, e.g.*, Direct Testimony of John Finnegan at 3-18, 63-65, 74-75. Virtually all of Mr. Finnegan's response testimony is premised on his legal interpretation of the *TRO*. Likewise, the direct testimony of Dr. Cabe, MCI's witness, is replete with legal analysis. *See, e.g.*, Direct Testimony of Richard Cabe at 5, 8-11, 17-25, 30-32, 57-64.

2 *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 388 (1999) ("*Iowa Utilities Board*"); *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*").

3 *United States Telecom Association v. FCC*, Nos. 00-1012 (D.C. Cir.) (argued January 28, 2004).

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Commission must reach in this proceeding, since the Supreme Court's ruling in *Iowa Utilities Board* and the D.C. Circuit's ruling in *USTA* set forth several basic principles upon which unbundling decisions must be based. As Mr. Shooshan discusses, while the Commission's unbundling determinations should be based on the *TRO*, the multiple ambiguities in the FCC's 485-page order create some uncertainty concerning how the order should be applied. Mr. Shooshan sensibly proposes that in attempting to resolve this uncertainty, the Commission should look to the basic principles established in the governing legal opinions, *Iowa Utilities Board* and *USTA*.

5 Thus, Mr. Shooshan observes that one of the key principles established by *Iowa Utilities Board* is that there must be a meaningful limitation on an ILEC's unbundling obligations. In that case, the Supreme Court struck down the FCC's unbundling rule (Rule 319) that required ILECs to unbundle network elements if "the failure . . . to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer . . . ."[4] Under that standard, the Court reasoned, "it is hard to imagine when the incumbent's failure to give access to the element would not constitute an 'impairment' . . . ."[5] Because a requesting carrier would almost always be able to point to some increase in cost or diminution in quality, the Court ruled that the FCC's rule did not impose a meaningful limiting standard and therefore violated the Act: "[W]e agree with the incumbents that the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do."[6] Significantly, the Court emphasized that in defining "impairment" under the Act, the FCC "cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network."[7] "That failing

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4 First Report and Order, *In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185 (August 8, 1996) ("First Report and Order") ¶ 285.

5 *Iowa Utilities Board*, 525 U.S. at 389.

6 *Id.* at 388.

7 *Id.* at 389.

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alone," the Court ruled, "would require the Commission's rule to be set aside."[8]

6 AT&T's claim that Mr. Shooshan's summary of these rulings by the Supreme Court has no relevance to this proceeding is belied by its own testimony. For example, a recurring theme of AT&T's testimony is that the Commission should continue to require Qwest to provide unbundled switching because UNE-P is more economic for CLECs than UNE-L.[9] However, that comparison is precisely the type of meaningless unbundling limitation found to be unlawful in *Iowa Utilities Board.* In many markets, if unbundling determinations hinged on comparisons of UNE-P and UNE-L costs, ILECs' unbundling obligations would be unbounded in precisely the manner that the Supreme Court has held is impermissible. Mr. Shooshan's summary of *Iowa Utilities Board* bears directly on this unlawful standard suggested by AT&T.

7 Similarly, AT&T and other CLECs argue in their testimony that the Commission should exclude intermodal competitors and facilities from the impairment analysis.[10] As Mr. Shooshan points out, the *TRO* is not a model of clarity on this issue, as it contains ambiguous and sometimes self-contradictory statements relating to the relevance of intermodal competition.[11] In resolving this issue, it is essential for the Commission to consider the Supreme Court's admonition in *Iowa Utilities Board* that an evaluation of impairment must take into consideration the availability of elements outside the ILEC's network. The Supreme Court has plainly required that competitive alternatives to the ILEC be considered in determining impairment. This issue, therefore, is a primary example of why the Commission's evaluation of impairment under the *TRO* should be guided by *Iowa Utilities Board.*

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8 *Id.*

9 *See, e.g.*, Direct Testimony of John Finnegan at 18-23.

10 Direct Testimony of John Finnegan at 131-37; Response Testimony of John Finnegan at 7-9; Response Testimony of William Lehr/Lee Selwyn at 20-22; Direct Testimony of Richard Cabe at 62-64.

11 Direct Testimony of Harry Shooshan at 34-35, 59, 68-80.

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8 Based in part on *Iowa Utilities Board*, Mr. Shooshan states in his testimony that (1) courts have been troubled by the FCC's implementation of the Act in favor of unbundling, (2) the Commission should keep in mind the admonition to apply a limiting standard, and (3) where the *TRO* is unclear, the Commission should interpret the order consistent with both *Iowa Utilities Board* and *USTA* and apply a limiting standard to Qwest's unbundling obligations.[12] Each of these points is fully supported by *Iowa Utilities Board* and *USTA*. AT&T's claim that Mr. Shooshan has distorted the meaning of these rulings is baseless and is itself based on a distortion of Mr. Shooshan's testimony.

9 For example, AT&T represents that Mr. Shooshan "believes any ambiguity in the TRO must be resolved in favor of Qwest and against unbundling."[13] Mr. Shooshan makes no such claim in his testimony. Instead, he recommends only that where the *TRO* is ambiguous or contradictory, the Commission should interpret the Order consistent with the relevant judicial pronouncements, including the Supreme Court's holding that a "meaningful limiting standard" must apply to ILECs' unbundling obligations.[14] This testimony is firmly rooted in the Supreme Court's unambiguous holding in *Iowa Utilities Board.*

10 Similarly, AT&T inaccurately asserts that Mr. Shooshan has testified that the Supreme Court established "a preference against unbundling."[15] Again, nowhere in his testimony does Mr. Shooshan state the Supreme Court established such a preference. Instead, quoting *USTA*, Mr. Shooshan states only that there is a prohibition against requiring unbundling in markets "'where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have [been] the object of Congress's concern.'"[16] As Mr.

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12 *Id.* at 20-23, 26.

13 AT&T Br. at 3.

14 Shooshan Direct at 26.

15 AT&T Br. at 4.

16 Shooshan Direct at 24 (quoting *USTA*, 290 F.3d at 422).

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Shooshan explains, this ruling establishes that state commissions should not require unbundling where sufficient facilities-based competition already exists or where retail rates have been set below cost.[17] In the former case, unbundling is unnecessary because competition already exists and, in the latter case, unbundling serves no useful purpose because CLECs will not choose to compete for customers who are paying below-cost retail rates.

11 In sum, contrary to AT&T's claims, Mr. Shooshan has accurately described the Supreme Court's ruling that a meaningful limiting standard must apply to ILEC unbundling obligations. That ruling is plainly relevant to the impairment issues the Commission must decide in this proceeding.

B. Mr. Shooshan accurately summarizes the ruling in *USTA* that requires limiting ILEC unbundling obligations only to situations where unbundling will address the type of impairment Congress intended to eliminate.

12 In striking down the FCC's second attempt at defining ILECs' unbundling obligations, the *USTA* court's primary concern was that the FCC had defined those obligations so broadly as to require unbundling in markets where CLECs are unimpaired. As the court stated, under the FCC's approach, "UNEs [would have been] available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have been the object of Congress's concern."[18] To demonstrate the over-inclusiveness of the FCC's unbundling requirements, the court cited markets in which ILECs are required to charge retail rates that are below cost. In those markets, the court observed, it is unlikely that competitive carriers will choose to compete even if UNEs are available: "The Commission never explicitly addresses by what criteria want of unbundling can be said to impair competition in such markets, where, given the ILECs' regulatory hobbling, any competition would be wholly artificial."[19]

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17 *Id.* at 24-25. (Mr. Shooshan's testimony inadvertently refers to "above cost" instead of "below cost.")

18 *USTA v. FCC*, 290 F.3d at 422.

19 *Id.*

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13 The court also demonstrated the over-breadth of the FCC's unbundling requirements by pointing out that unbundling would be required even in markets where elements have been significantly, but not ubiquitously, deployed on a competitive basis. As the court stated, the FCC "never explains why the record supports a finding of material impairment where the element in question – though not literally ubiquitous – is significantly deployed on a competitive basis in those markets where there is no reason to suppose that rates are artificially low . . . ."[20]

14 Relying on these rulings and statements by the D.C. Circuit, Mr. Shooshan accurately states in his testimony that in applying the *TRO*, commissions should not require unbundling in markets where there is no impairment to be eliminated. As examples, he cites the same scenarios the D.C. Circuit discussed – markets where the ILEC's retail rates are below cost and markets where the network element at issue is already significantly deployed on a competitive basis.[21] In challenging Mr. Shooshan's discussion of *USTA*, AT&T asserts that contrary to his testimony, the D.C. Circuit "did not rule that unbundling should not occur in certain markets."[22] However, a fair reading of Mr. Shooshan's testimony shows that he has simply and accurately restated what *USTA* supports -- that unbundling should not be required in markets where there is no impairment, such as markets where rates are below cost or where elements are competitively deployed. There is no merit to AT&T's claim that Mr. Shooshan has misstated this central ruling in *USTA*.

15 Nor is there merit to AT&T's assertions that Mr. Shooshan has inaccurately summarized the rulings and statements in *USTA* relating to the limited relevance of cost disparities between CLECs and ILECs. Mr. Shooshan correctly observes that the *USTA* court largely rejected the

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20 *Id.* (citations omitted).

21 Shooshan Direct at 25.

22 AT&T Br. at 6.

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FCC's reliance on CLEC/ILEC cost disparities as a basis for assessing impairment.[23] Indeed, the court could not have been clearer: "To rely on cost disparities that are universal as between new entrants and incumbents in *any* industry is to invoke a concept too broad, even in support of an *initial* mandate, to be reasonably linked to the purpose of the Act's unbundling provisions."[24] The court explained further that a cost disparity approach is appropriate only if it focuses on whether "the cost characteristics of an 'element' render it at all unsuitable for competitive supply . . . ."[25] Again, Mr. Shooshan's testimony accurately quotes this statement by the court, which has particular relevance in this case given AT&T's improper attempt in its testimony to equate purported CLEC/ILEC cost differences as a basis for the Commission to require Qwest to continue to provide unbundled switching.[26] *USTA* establishes that the types of cost differences that AT&T alleges exist cannot justify the imposition of an unbundling requirement.

16 Finally, based on a clearly strained interpretation of *USTA*, AT&T asserts that Mr. Shooshan has testified incorrectly that intermodal competition is relevant to the analysis of impairment.[27] In *USTA*, the D.C. Circuit held that the FCC erred in determining that ILECs must unbundle the high frequency portion of the loop ("line sharing") because it failed to consider the relevance of competition for DSL services coming from cable and satellite providers.[28] The court explained:

> In sum, nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs noted by Justice Breyer [in *Iowa Utilities Board*] under conditions where it had no reason to think doing so would bring on a significant enhancement of competition. The Commission's naked disregard of the competitive context risks exactly

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23 Shooshan Direct at 25; *see also id.* at 28-30.

24 *USTA v. FCC*, 290 F.3d at 427.

25 *Id.*

26 The entire premise of the Direct Testimony of Douglas Denney/Arlene Starr is that impairment persists as the result of cost disparities.

27 AT&T Br. at 8-9.

28 *USTA v. FCC*, 290 F.3d at 428-29.

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that result.[29]

17 In challenging Mr. Shooshan's discussion of this ruling, AT&T argues that the holding is limited to line sharing only, implying that intermodal competition is not relevant to the impairment issues before the Commission in this case.[30] However, a reading of the plain language quoted above shows that the D.C. Circuit's holding is not so limited and applies with equal force to impairment assessments relating to other network elements. Indeed, that is precisely why the FCC's rules implementing the *TRO* recognize that intermodal providers that provide service "comparable in quality" must be included in the *TRO's* self-provisioning trigger.[31] It is AT&T, not Mr. Shooshan, that has misstated this ruling.

III. CONCLUSION

18 For the reasons stated, the Commission should reject AT&T's challenges to the testimony of Mr. Shooshan. Further, as stated in that testimony, the Commission should base its impairment determinations on the *TRO* and should rely on *Iowa Utilities Board* and *USTA* for guidance in applying the *TRO*.

DATED this 20th day of February, 2004.

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29 *Id.* at 429.

30 AT&T Br. at 8.

31 47 C.F.R. § 51.319(d)(3)(A)(1).

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