Exhibit 1

ISSUED: June 11, 2004

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 Markets if Local Circuit Switching for Mass Market Customers is No Longer Available as an Unbundled Network Element.	)	RULING

DISPOSITION: MOTION DENIED

Introduction

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit or Court) entered its opinion in *United States Telecom Ass'n v. FCC* (*USTA II*). The Court vacated and remanded certain rules adopted by the Federal Communications Commission (FCC) in its Triennial Review Order (*TRO*) regarding the obligations of incumbent local exchange carriers (ILECs) to provide unbundled network elements to competitive carriers.[1] The Court twice stayed its mandate, most recently until June 15, 2004.

On May 7, 2004, Advanced TelCom Group; Eschelon Telecom of Oregon, Inc.; Global Crossing Local Services, Inc.; Integra Telecom of Oregon, Inc.; MCImetro Access Transmission Services, LLC; MCI WorldCom Communications, Inc.; Pac-West Telecomm, Inc.; Time Warner Telecom of Oregon, LLC; and XO Oregon, Inc. (collectively "Joint CLECs"), filed a motion with the Public Utility Commission of Oregon (Commission) in this docket. The Joint CLECs "request an order requiring Qwest Corporation (Qwest) to continue to honor all of its obligations under existing interconnection agreements and its Statement of Generally Available Terms (SGAT), at existing rates until final federal unbundling rules are in place or until the Commission

[1] *United States Telecom Ass'n v. FCC*, No. 00-1012, 2004 WL 374262 (D.C. Cir. March 2, 2004) (*USTA II*).

undertakes a generic proceeding to determine the impact of the *USTA II* decision on Qwest's obligations to provide unbundled network elements (UNEs)."[2]

On May 24, Qwest filed a response in opposition to the motion. Qwest's arguments are discussed below.

On May 24, Covad Communications Company (Covad) and the Northwest Competitive Communications Coalition (NWCCC)[3] filed a response in support of the Joint CLEC motion.

On June 4, 2004, the D.C. Circuit denied motions by the FCC and CLECs for an extension of stay of the Court's mandate.

On June 7, 2004, the Joint CLECs filed their reply to Qwest's response.

Joint CLEC Motion

The Joint CLECs currently obtain local switching, dark fiber, transport, and high capacity loops as UNEs under their interconnection agreements (ICAs) with Qwest. Those UNEs are used to provide service to end user customers. Although the Joint CLECs acknowledge that Qwest has represented that it will abide by its SGAT and the provisions of existing interconnection agreements, they remain concerned that:

> . . . . [T]his commitment does not preclude Qwest from seeking to amend those ICAs and its SGAT to eliminate switching, dark fiber, transport, and high capacity loop UNEs after June 15, 2004. . . . Upon expiration of the D.C. Circuit's stay, therefore, Qwest can be expected immediately to seek to revise all of its interconnection agreements to eliminate these UNEs, possibly including refusing to process any new orders for these UNEs after June 15, 2004, initiating billing for existing circuits at special access tariff rates, and requiring mass migration of customers from dark fiber facilities to special access circuits. The Commission, in turn, should expect CLECs to initiate dozens of individual Commission proceedings challenging Qwest's actions and interpretations of its existing interconnection agreements and applicable law.[4]

In addition, the Joint CLECs assert that Qwest has developed a proposed product to replace the combination of UNEs known as "UNE-P," and has commenced regional multiparty negotiations with CLECs to discuss its UNE-P replacement product. While the Joint CLECs do not object to entering into negotiations, they assert that "Qwest has not addressed how it will provide other individual network elements such

[2] Joint CLEC Motion at pp. 4, 7-8.
[3] For purposes of the response, the NWCCC members include: Axxis Communications, ATL Communications, Z-Tel, and VCI Company (Vilaire).
[4] Joint CLEC Motion at p. 3.

as dark fiber and high capacity transport circuits, in absence of a federal rule to do so as a UNE."[5] Moreover, based on informal discussions with Qwest, at least "some of the Joint CLECs understand that Qwest intends to require that high capacity transport and loop UNEs be converted to special access circuits at significantly higher costs, and furthermore that Qwest does not intend to provide any dark fiber product."[6]

The Joint CLECs acknowledge that the D.C. Circuit's decision "has created tremendous uncertainty" with respect to the availability of certain UNEs.[7] They contend that an immediate elimination of Qwest's obligation to provide local switching, dark fiber, transport, and high capacity loop UNEs at existing rates, terms, and conditions will have a "devastating impact" on competitive local exchange providers and their customers.[8]

Accordingly, the Joint CLECs urge the Commission to issue an order requiring Qwest to honor its contractual obligations under the interconnection agreements, "including provisioning unbundled local switching (including UNE-P), transport, dark fiber, and high capacity loops at §252(d) compliant rates, until final federal unbundling rules are in place or until the Commission can undertake a generic proceeding to determine the impact of the D.C. Circuit's decision on Qwest's existing obligations to provide these UNEs."[9] The generic proceeding would consider, among other things, whether the D.C. Circuit's decision represents a change in law, whether Qwest remains obligated to provide UNEs at existing rates under Section 271 of the Act, and whether Qwest should be required to provide the subject UNEs under Oregon law.

The Joint CLECs, Covad, and NWCCC also emphasize that the Commission has broad authority both under state law and the Telecommunications Act of 1996 (Act) to require Qwest to provide existing UNEs under its SGAT and current interconnection agreements.

Qwest Response

Qwest argues that the Joint CLEC motion should be denied for four reasons. First, it contends that the motion essentially asks the Commission disregard the change of law provisions in the interconnection agreements Qwest has entered into with the Joint CLECs. Qwest emphasizes that the contracting parties are legally bound by their existing interconnection agreements, including the change of law process. Thus, any change of law resulting from *USTA II* may not be implemented until the change of law process specified in the interconnection agreements has been completed. Specifically, Qwest states:

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[5] *Id.* at p. 3.
[6] *Id.*
[7] *Id.* at p. 4.
[8] *Id.*
[9] *Id.*

> Each of the Joint CLECs is a party to a Commission-approved interconnection agreement with Qwest. These agreements set forth both rights and obligations. For example, while the Joint CLECs presently have the right to purchase certain unbundled network elements that Qwest is required by law to provide, the Joint CLECs have a corresponding obligation, pursuant to procedures set forth in the interconnection agreements, to amend the interconnection agreements to reflect changes in law, including changes in law to eliminate unbundling obligations no longer legally required.
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> The Joint CLECs' rights to purchase unbundled elements and their corresponding obligations under change of law provisions have been impacted by two recent decisions. First, on October 2, 2003, the TRO became effective. The TRO narrowed ILEC unbundling obligations in significant respects, and delegated certain unbundling determinations to state commissions. Second, on March 2, 2004, the *USTA II* decision narrowed ILEC unbundling obligations even further by vacating portions of the rules issued pursuant to the TRO that required the unbundling of mass market switching and high capacity transport and loops.
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> Qwest will honor the terms of its interconnection agreements, including any terms that obligate it to continue to provide the unbundled switching, transport and loops, until the change of law process is completed. However, it is reasonable for Qwest to expect CLECs to likewise honor the terms of the interconnection agreements. Accordingly, if *USTA II* becomes effective, Qwest has the right to proceed under the interconnection agreements to effectuate amendments through the change of law provisions in those agreements. Qwest may thus request that CLECs negotiate amendments to reflect the changes in law that have taken place. If negotiations fail, Qwest will then have the right to invoke applicable dispute resolution provisions in the agreements. However, at this point, it is impossible to determine the scope of the negotiations, whether the parties will reach an impasse on some issues, what the precise impasses will be, which CLECs will be involved, or which interconnection agreement provisions will be at issue.[10]

Second, Qwest states that, "since Qwest has committed to honoring its interconnection agreements and plans to make commercial offerings available, the Joint CLECs are not in jeopardy of losing access to any network elements to which they are lawfully entitled."[11] In this context, Qwest states:

[10] Qwest Response at pp. 2-4.
[11] *Id.* at p. 4.

> If *USTA II* becomes effective, Qwest and CLECs will have to evaluate the change of law provisions in their interconnection agreements and follow the change of law process that the agreements specify. This process likely will require some time to complete, especially if there are disputes concerning whether and to what extent there have been changes in law. During this period of implementation, Qwest will continue to honor the existing terms of its interconnection agreements. Thus, there is simply no basis for the Joint CLECs' claim that significant disruption will occur just as soon as the D.C. Circuit issues its mandate in *USTA II*. To the contrary, CLECs will be able to continue to offer the same local exchange services they are offering today during the time period that they and Qwest administer the change of law process.[12]

Third, Qwest claims that the motion is based on the Joint CLECs' "unsupported views as to the positions Qwest will take when *USTA II* becomes effective."[13] Qwest emphasizes that it is uncertain whether the D.C. Circuit's stay will be continued or whether the U.S. Supreme Court will accept review of the *USTA II* decision. In any case, Qwest states that it is premature to make any determinations regarding the meaning or impact of the *USTA II* decision. Qwest also argues that "it is too early to make determinations as to whether the unbundling of certain network elements can be required under state law."[14] Qwest disagrees with "the implicit argument of the Joint CLECs that states may order broad unbundling requirements beyond the requirements of the *TRO* and *USTA II*."[15]

Fourth, Qwest states that the relief requested by the Joint CLEC motion has already been considered and denied in this proceeding.

In addition to the foregoing, Qwest states that it has filed a petition with the FCC requesting adoption of interim rules that would set the terms on which ILECs will continue to provide network facilities for which the D.C. Circuit vacated the FCC's impairment findings. These rules would establish a commercially reasonable framework until the FCC promulgates new, permanent unbundling rules.[16]

Disposition

(a) The Joint CLEC motion is denied. A status quo order is unnecessary because Qwest has affirmed that it will not attempt to modify the interconnection

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[12] Qwest Response at pp. 6-7.
[13] *Id.* at p. 8.
[14] *Id.* at p. 9.
[15] *Id.*
[16] Qwest states that the proposed interim rules provide for access to network element combinations based on the terms outlined above and would cap the price of high capacity transport and loops at special access rates.

agreements while the change of law process is being administered. Thus, CLECs and their customers are not in any imminent danger of losing access to UNEs or facing price increases in those UNEs.

Qwest emphasizes that it "will honor the terms of its interconnection agreements, including any terms that obligate it to continue to provide the unbundling switching, transport, and loops, *until the change of law process is completed*."[17] It observes that this process "will likely take some time to complete, especially if there are disputes concerning whether and to what extent there have been changes in law."[18] Qwest further affirms that "CLECs will be able to continue to offer the same local exchange services they are offering today during the time period that they and Qwest administer the change of law process."[19] We interpret these statements to mean that CLECs will not lose access to any currently provisioned UNEs or face price increases for those UNEs while the change of law process is underway. We understand this to be the case even though the D.C. Circuit has refused to stay the *USTA II* mandate beyond June 15, 2004.

In their reply comments, the Joint CLECs state that Qwest's promise to abide by the terms of its interconnection agreements "provides little comfort, particularly if the change of law provisions in their ICAs could be interpreted to automatically incorporate changes of law into the agreements or are otherwise unclear regarding the process applicable to disputed changes of law."[20] As discussed above, we do not interpret Qwest's position to be that a change of law is automatically implemented under the interconnection agreements. Instead, the agreements provide for negotiation followed by a dispute resolution in the event of disagreement concerning whether and to what extent a change in law has occurred.

(b) The CLECs emphasize that the Commission has independent authority under state law "to require Qwest to continue to provide existing UNEs under current ICAs and Qwest's SGAT."[21] As Qwest points out, however, the Commission may not lawfully enter a blanket order requiring continuation of unbundling obligations that have been eliminated by the *TRO* or *USTA II* (once the D.C. Circuit's mandate takes effect). Although the Act clearly preserves the authority of State Commissions to authorize unbundling beyond that mandated by the FCC, any such decision must be consistent with the requirements of §251(d). Thus, before a State Commission may authorize unbundling of additional network elements, it must first determine that "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."[22]

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[17] Qwest Response at p. 3. (Emphasis supplied.)
[18] I*d.*at 6.
[19] *Id.* at pp. 6-7. Note also that the *USTA II* decision may be appealed to the Supreme Court of the United States. It is possible the Supreme Court could grant certiorari and stay the *USTA II* decision pending appeal, thus postponing any change of law resulting from the D.C. Circuit's decision.
[20] Joint CLEC reply at p. 5.
[21] Joint CLEC motion at p. 5.
[22] 47 U.S.C. §251(d)(2)(B). For network elements that are proprietary in nature, §251(d)(2)(A) requires a finding that unbundling is "necessary."

The UNEs currently authorized in Oregon mirror the national list of UNEs adopted by the FCC in its UNE Remand Order.[23] The Commission did not conduct a separate impairment analysis for those UNEs, but rather relied upon the impairment findings made by the FCC. To the extent the D.C. Circuit has concluded that the impairment analysis conducted by the FCC for certain network elements is flawed, there is no legal basis for this Commission to require continued unbundling of those network elements.[24] Before the Commission could mandate such unbundling, it would first have to develop[25] and apply an impairment analysis consistent with the requirements of §251(d)(2).

(c) In their reply comments, the Joint CLECs emphasize that:

> The parties do not even agree on whether there has been a change of law that triggers the applicable provisions of the ICAs, much less on any substantive issues that might arise if the change of law process were applicable. Faced with this impasse, Qwest would likely file petitions with the Commission (or potentially a private arbitrator) for enforcement of its ICAs with virtually all CLECs in Oregon, leading to the very waste of Commission and party resources that gave rise to the Motion. Rather, the Joint CLECs request only that the Commission maintain the status quo until the Commission has determined, in a generic proceeding, in which all interested parties may participate, whether and to what extent a change of law has occurred.[26]

As discussed above, we assume that any disagreement between the parties over whether a change of law has, in fact, occurred is encompassed by the negotiation/dispute resolution process set forth in the interconnection agreements. Qwest has agreed not to make any unilateral changes to the interconnection agreements pending resolution of that process.

With respect to the Joint CLECs' proposal that the Commission convene a generic proceeding, the Commission recently observed in Order No. 04-306[27] that a generic proceeding may be an efficient method of resolving issues arising from the *TRO*

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[23] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket 96-98, FCC 99-238 (rel. Nov. 5, 1999) (*UNE Remand Order).* See also, Order Nos. 00-316 at pp. 3-6; Order No. 01-1106.

[24] The same analysis would seem to apply where the FCC has concluded that impairment no longer exists for a particular network element. See *e.g.*, *TRO* at pp. 193-195.

[25] Given that the FCC, with all of its resources, has yet to develop a legally sufficient impairment analysis after almost 8 years, it is unlikely that the Commission will be able to accomplish that task in the immediate future.

[26] Joint CLEC Reply at p. 2-3.

[27] Docket ARB 531, Order No. 04-306, entered May 27, 2004, at pp. 5-6.

and *USTA II*.[28] This approach would allow common issues to be addressed in a single forum where all interested parties can participate.

On the other hand, the Commission cannot supplant the change of law procedures in the interconnection agreements by summarily ordering the parties to participate in a generic proceeding designed to implement legal changes resulting from the *TRO* and *USTA II* decisions. The Commission has indicated that it will consider a generic docket only if the contracting parties agree upon such a proceeding.[29] If the Commission convenes a generic proceeding to consider whether and to what extent *USTA II* has resulted in a change of law, and Qwest agrees not to change existing interconnection agreements during the pendency of the change of law process, the Joint CLECs will receive the specific relief they have requested. [30]

RULING

The Joint CLEC motion filed in this docket on May 7, 2004, is denied.

Dated at Salem, Oregon, this 11th day of June, 2004.

Samuel J. Petrillo Administrative Law Judge	Allan J. Arlow Administrative Law Judge

[28] Of course, it might make even more sense for Qwest and the CLECs to agree to seek resolution of these disputes directly from the FCC or the D.C. Circuit. Past events have demonstrated that substantial time and resources could be saved by obtaining answers directly from the source.
[29] In other words, Qwest would also have to agree to such a proceeding. In the alternative, individual cases involving similar issues may be consolidated pursuant to OAR 860-014-0025.
[30] Joint CLEC Motion at pp. 4, 7-8.