

BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of:)	
)	Docket No. UT-033044
QWEST CORPORATION)	
)	JOINT CLEC MOTION FOR AN
To Initiate a Mass-Market Switching and)	ORDER REQUIRING QWEST TO
Dedicated Transport Case Pursuant to the)	MAINTAIN STATUS QUO
Triennial Review Order)	PENDING RESOLUTION OF
_____)	LEGAL ISSUES

Advanced TelCom, Inc., d/b/a Advanced TelCom Group, Eschelon Telecom of Washington, Inc., Global Crossing Local Services, Inc., Integra Telecom of Washington, Inc., MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc., Pac-West Telecomm, Inc., Time Warner Telecom of Washington, LLC, and XO Washington, Inc. (collectively “Joint CLECs”), bring the following motion for an order requiring Qwest Corporation (“Qwest”) to continue to maintain the status quo of its obligations under existing Commission-approved interconnection agreements (“ICAs”) with any competing local exchange carrier (“CLEC”) or Qwest’s Statement of Generally Available Terms (“SGAT”) pending resolution of judicial review of the Federal Communications Commission’s (“FCC’s) Triennial Review Order (“TRO”)¹ and any resulting FCC action or additional Commission action, including but not limited to resolution of the issues raised in the Commission’s May 6, 2004, Notice of Opportunity to Submit Comments (“Notice”).

¹ *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Order on Remand (rel. Aug. 21, 2003).

MOTION

1. On March 2, 2004, the D.C. Circuit Court of Appeals vacated portions of the TRO in which the FCC established unbundling requirements for local switching, transport, and other unbundled network elements (“UNEs”).² The Court temporarily stayed its vacatur for 60 days, or until May 2, 2004. The D.C. Circuit recently granted the FCC’s unopposed motion to extend the stay until June 15, 2004. If there are no further extensions and the stay expires, no FCC rules governing the unbundling requirements under Section 251 of the Telecommunications Act of 1996 (“Act”) will exist for local switching and transport. In addition, Qwest and other incumbent local exchange carriers (“ILECs”) contend that if the stay expires, no such FCC rules will exist for high capacity loops as well.³

2. Qwest has informed some CLECs with which it has ICAs that Qwest is developing a product to replace the combination of UNEs known as “UNE-P” and has engaged in regional, multi-party negotiations to replace UNE-P with this new product. While the Joint CLECs are willing to engage in negotiations with Qwest, Qwest has yet to address how or whether it will provide individual

² *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

³ Although the D.C. Circuit’s opinion addresses only unbundled local switching and transport, Qwest and other ILECs have sought to expand the ruling by taking the position that the court’s decision also vacates the FCC’s unbundling rules for high capacity loops. *See, e.g., In re Qwest Communications Int’l Petition for Rulemaking to Adopt Interim Unbundling Rules Following Remand of the Triennial Review Order* at i (filed March 29, 2004) (“As of May 1, 2004, or shortly thereafter, when the D.C. Circuit’s mandate will issue, the Commission’s impairment findings regarding mass market switching, shared and dedicated transport, and high-capacity loops will be vacated.”) (emphasis added). Without in any way conceding that the D.C. Circuit’s decision has any such impact, the Joint CLECs include high capacity loops among the UNEs at issue to ensure that the requested order applies to all UNEs the ILECs claim are affected by the D.C. Circuit’s decision.

network elements other than UNE-P, such as dark fiber and high capacity transport circuits, in the absence of a federal rule to do so as a UNE. As a result of informal discussions with Qwest, 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. Most ominously, Qwest does not intend to provide *any* dark fiber product, which would require the physical migration of hundreds of customers currently served using Qwest dark fiber to Qwest special access facilities at enormous cost and potential for CLEC customer service disruption.

3. Qwest, moreover, has not represented that it will continue to honor its obligations under its existing ICAs and SGAT in Washington, nor has Qwest represented that it will not seek to amend those ICAs and its SGAT to eliminate switching, dark fiber, transport, and high capacity loop UNEs after June 15, 2004. Qwest obviously has little or no incentive to make any such representations or to reach any agreement to continue to provide CLECs with UNEs other than UNE-P. 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 after June 15, 2004, for these UNEs, 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 interconnection agreements and applicable law.

4. The D.C. Circuit's decision has created tremendous uncertainty with respect to the availability of UNE local switching, dark fiber, transport, and, in light of recent ILEC contentions, high

capacity loops. The Joint CLECs currently obtain local switching, dark fiber, transport or high capacity loops as UNEs under their ICAs with Qwest and use those UNEs to provide service to end user customers. Indeed, the availability of UNE-P, dark fiber, unbundled transport, and high capacity loops was a critical element in the Commission's decisions to classify all of Qwest's business services as competitive telecommunications services. An immediate elimination of those UNEs at Commission-prescribed rates developed using Section 252(d) pricing standards would have a devastating impact on Qwest's Washington local exchange competitors and more importantly, on end user customers, particularly those customers who obtain service from providers other than Qwest.

5. Accordingly, the Joint CLECs urge the Commission to issue an order requiring Qwest to maintain the status quo and continue to honor all of its obligations under existing ICAs and its SGAT, including the provisioning of unbundled local switching (including UNE-P), transport, dark fiber, and high capacity loops at Section 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. Indeed, the Commission has recognized the need to make such a determination in its Notice seeking comment on many of the issues raised by the D.C. Circuit's decision. Maintaining the status quo while the Commission undertakes the appropriate generic proceeding to examine these issues would ensure continuity as well as most efficiently make use of Commission and affected party resources to determine issues of general applicability, including but not necessarily limited to the following:

- (a) Whether the D.C. Circuit's *USTA II* decision represents a "change in law."

The Telecommunications Act of 1996 ("Act") establishes Qwest's obligation to provide

UNEs, and even in the absence of FCC rules, existing ICAs and Qwest's SGAT provisions requiring Qwest to provide UNEs are fully consistent with, and required by, the Act.

(b) Whether Qwest remains obligated to provide the subject UNEs under Section 271 of the Act under the rates, terms, and conditions the Commission has established. Qwest obtained authority to provide interLATA services in Washington in reliance on compliance with the competitive checklist, and having now received the benefit of its bargain, Qwest should not be permitted to deprive competitors and consumers of the benefit of their bargain.

(c) Whether, as a matter of Washington law, Qwest should be required to provide the subject UNEs at Section 252(d) or comparable Commission-prescribed rates. Section 252(d)(3) of the Act expressly preserves the authority of state commissions to enforce their own requirements with respect to access to, and interconnection with, incumbent local exchange company facilities.

6. The Joint CLECs do not seek to preclude parties from voluntarily negotiating amendments to their interconnection agreements to incorporate all or part of the TRO or to prevent any commercial negotiations in the wake of the D.C. Circuit's decision. Rather, the objective is to ensure that Qwest will not unnecessarily expend party and Commission resources after June 15, 2004, by seeking to require CLECs to amend their existing interconnection agreements (or act unilaterally) to eliminate provisioning of existing UNEs at Section 252(d) rates until critical issues have been resolved at both the federal and state levels.

7. The Commission has ample authority to require Qwest to continue to comply with its obligations under existing ICAs and its SGAT. The Commission has reviewed and approved – and in

many cases arbitrated – each effective ICA in Washington, and the Commission spent several years establishing the rates, terms, and conditions in Qwest’s SGAT. The Commission has long asserted jurisdiction to enforce those agreements. *See, e.g.*, WAC 480-07-540. Issues concerning the extent to which Qwest must comply with its obligations under those agreements fall squarely within the Commission’s jurisdiction and authority to interpret applicable federal legal requirements and prescribe appropriate rates, terms, and conditions for unbundled access to Qwest’s network in Washington.

8. The Commission also has independent authority under state law to require Qwest to continue to provide existing UNEs under current ICAs and Qwest’s SGAT. Prior to passage of the Act, the Commission concluded that it “has authority to order unbundling pursuant to RCW 80.36.140.” *WUTC v. U S WEST, et al.*, Docket Nos. UT-941464, *et al.*, Fourth Supp. Order at 51 (Oct. 31, 1995) (“*Interconnection Order*”); accord *In re Development of Universal Terms and Conditions for Interconnection and Network Elements to be Provided by Verizon Northwest, Inc.*, Docket No. UT-011219, First Supp. Order ¶ 19 (March 2002). The Commission explained that the statute “gives the Commission broad authority over practices and services,” and “[t]he way in which services are offered, on a bundled or unbundled basis, certainly falls within the scope” of that authority. *Interconnection Order* at 51. The Commission further concluded that the rates for unbundled services must be based on total service long run incremental costs (“TSLRIC”), which is comparable to the total element long run incremental cost (“TELRIC”) methodology adopted by the FCC. *See id.* at 52.

9. The Commission’s conclusions are no less applicable today. Indeed, the concerns with creation of “new” services raised by the incumbent local exchange companies in the

Interconnection Order no longer exist now that Qwest maintains an SGAT and files interconnection agreements with the Commission, all of which establish rates, terms, and conditions for Qwest's provisioning of UNEs, including local switching, dark fiber, transport, and high capacity loops. Having already unbundled its network, the issue is whether Qwest can discontinue providing certain UNEs in the absence of federal rules requiring Qwest to continue providing them. Such an issue indisputably falls within the Commission's authority to determine whether the "practices of any telecommunications company are unjust or unreasonable" and whether "the facilities or service of any telecommunications company is inadequate, inefficient, improper or insufficient." RCW 80.36.140.

10. The Commission has, and should exercise, authority to require Qwest to continue to provide unbundled local switching, dark fiber, transport, and high capacity loops at existing rates, terms, and conditions. The Commission should not permit the potential chaos created by the FCC and the D.C. Circuit to affect the ability of Washington consumers to have an effective choice of local service providers. Accordingly, the Commission should require Qwest to maintain the status quo until the federal dispute over local switching, dark fiber, transport, and high capacity UNEs has been resolved or until the Commission can conduct the appropriate proceedings to determine whether, in the absence of federal rules, Qwest should be required to provide these UNEs on some other basis.

REQUEST FOR RELIEF

WHEREFORE, the Joint CLECs request the following relief:

A. An order from the Commission requiring Qwest to continue to maintain the status quo and honor all of its obligations under existing ICAs and its SGAT, including the provisioning of unbundled local switching (including UNE-P), dark fiber, transport, and high capacity loops at

Commission-prescribed rates established under Section 252(d) standards, 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; and

B. Such other or further relief as the Commission finds fair, just, reasonable, and sufficient.

DATED this 10th day of May, 2004.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Advanced TelCom, Inc., d/b/a Advanced
TelCom Group, Eschelon Telecom of Washington, Inc.,
Global Crossing Local Services, Inc., Integra Telecom of
Washington, Inc., Pac-West Telecomm, Inc., Time Warner
Telecom of Washington, LLC, and XO Washington, Inc.

By _____
Gregory J. Kopta

MCImetro ACCESS TRANSMISSION SERVICES, LLC,
and MCI WORLDCOM COMMUNICATIONS, INC.

By _____
Michel Singer Nelson
MCI Regulatory Attorney
707 17th Street, Suite 4200
Denver, CO 80202
Phone: (303) 390 6106
fax : (303) 390 6333
michel.singer_nelson@mci.com