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 COMMENTS OF COMMISSION STAFF

1 Commission Staff files these comments in response to the Commission's Notice of Opportunity to Submit Comments of May 6, 2004.

1) What FCC unbundling rules will be in effect in light of the *USTA* decision?

2 The *USTA II* court apparently intended for the vacated rules requiring unbundling of mass market (DS0) switching[1] and dedicated transport (DS1, DS3 and dark fiber)[2] to be severed from the other rules that the FCC adopted in the TRO. The court vacated and remanded (subject to the stay) not only those portions of the

[1] 47 C.F.R. § 51.319(d)(Local circuit switching); "We therefore vacate, as an unlawful subdelegation of the Commission's § 251(d)(2) responsibilities, those portions of the Order that delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements, and in particular we vacate the Commission's scheme for subdelegating mass market switching determinations." USTA II at 18. "We therefore vacate the FCC's determination that ILECs must make mass market switches available to CLECs as UNEs, subject to the stay discussed in part VI below, and remand to the Commission for a re-examination of the issue." Id. at 22.

[2] 47 C.F.R. § 51.319(e)(Dedicated transport); "We therefore vacate the national impairment findings with respect to DS1, DS3, and dark fiber and remand to the Commission to implement a lawful scheme." Id. at 28.

FCC's rules that delegated to the states the granular fact-finding role for mass market switching and dedicated transport, but also the provisional rules requiring ILECs to make those elements available to CLECs as UNEs. Thus, the other rules adopted in the TRO (as well as those not addressed by the TRO) still stand (with the exception of those portions that were remanded to the FCC, but not vacated).

2) What unbundling obligations, if any, will remain in effect for Qwest Corporation for mass market switching and high-capacity (DS1, DS3, and dark fiber) transport, either under §§ 251 or 271 of the Telecommunications Act, when the *USTA* decision becomes effective?

3 Despite the vacatur of the rules requiring unbundling of DS0 switching and dedicated transport, 47 U.S.C. § 271(c)(2)(B)(v) and (vi) require Bell Operating Companies to provide, as a condition of entry into interLATA long distance markets, "[l]ocal transport from the trunk side of a wireline local exchange switch unbundled from switching or other services," and "[l]ocal switching unbundled from transport, local loop transmission, and other services." In the TRO, the FCC found that these requirements of Section 271 were different from those of Section 251 in that TELRIC pricing does not apply to the elements that must be provided on an unbundled basis under 271, nor does the duty to combine elements (and thus, apparently, to provide the unbundled network element platform). TRO at §§ 656-64. The *USTA II* court expressly upheld this FCC finding. *USTA II* at 52-54.

4 Qwest also has an ongoing obligation to provide unbundled access to switching and dedicated transport under existing interconnection agreements, subject to change of law and dispute resolution provisions that apparently provide for some transition period in which new agreements can be negotiated in light of the changes in unbundling rules. In the event of an impasse, amendments to those agreements can, and should, be brought to the Commission for arbitration.

5 Qwest will also have to honor its interconnection tariffs and its SGAT (for new interconnection agreements) until such time as it amends those documents. The SGAT contains its own change of law and dispute resolution provision that appears to mirror those in the individual interconnection agreements. Washington SGAT at 2.2.[3]

3) In the event *USTA* becomes effective, will Qwest have any legal obligation to provide network elements and services at prices based on Total Element Long Run Incremental Cost (TELRIC)?

6 First, Qwest will have to do so as long as its existing interconnection agreements require it, or until an amended interconnection agreement is in place that provides otherwise.

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[3]"To the extent that the Existing Rules are vacated, dismissed, stayed or materially changed or modified, then this Agreement shall be amended to reflect such legally binding modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) Days after notification from a Party seeking amendment due to a modification or change of the Existing Rules or if any time during such sixty (60) Day period the Parties shall have ceased to negotiate such new terms for a continuous period of fifteen (15) Days, it s shall be resolved in accordance with the Dispute Resolution provision of this Agreement."

7 Second, any new interconnection agreements the company enters into will have to provide access to those elements that are required by the non-vacated federal unbundling rules (e.g., unbundled loops and, at least until it is phased out under the terms of the TRO, the high-frequency portion of the loop). Arguably, this commission could, using its authority under state law, require Qwest to provide some access to mass market switching and dedicated transport elements to the extent that it is consistent with Section 252.[4] The Commission might consider pricing standards other than TELRIC in imposing unbundling obligations under state law. Under Section 251(d)(3), states are permitted to enforce their own orders establishing access and interconnection obligations of local exchange carriers that are not inconsistent with Section 252 and do not substantially prevent the implementation of Section 252. Staff believes any settlements Qwest reaches with CLECs (for example, pursuant to the FCC's call to the industry to begin good-faith negotiations consistent with the Act) will be "interconnection agreements" subject to Sections 251 and 252 of the Act, and the requirement of filing with state commissions under Section 252(i).

[4] The FCC did make findings in the TRO that CLECs *are impaired* in some markets without unbundled access to DS0 switching and on some routes without access to dedicated transport, although its state delegation scheme to determine those markets and routes where such impairment might be lacking was found unlawful. This is different than its findings concerning the high-frequency portion of the loop where it found that continued unbundling would be inconsistent with the goals of the Act.

8 Third, Qwest will have an obligation to provide those unbundled elements set out in its SGAT and interconnection tariffs until it amends those documents through the applicable processes. Again, in the amendment processes, this commission could, under state law, require Qwest to provide some access to mass market switching and dedicated transport elements at TELRIC prices to the extent it is consistent with Section 252.

4) Will Qwest's current Statement of Generally Available Terms and Conditions (SGAT) as it relates to unbundled switching and dedicated transport remain in full force and effect in the event *USTA* becomes effective?

9 Yes, unless it is amended pursuant to Section 252(f). See footnote 3, *supra.*

5) What state unbundling rules remain in effect after *USTA* becomes effective?

10 This Commission has not adopted any unbundling rules.

6) Which state tariffs remain in effect after *USTA* becomes effective?

11 Qwest's interconnection services tariffs remain in effect. *See* http://tariffs.uswest.com:8000/docs/TARIFFS/Washington/WAIT/.

7) What should the Commission do to facilitate negotiations between parties on prices, terms, and conditions of unbundled network elements affected by *USTA*?

12 The Commission could, by a complaint on its own motion or upon a formal complaint by one LEC against another LEC, establish obligations under state law for

companies to provide unbundled access to each other's networks and the pricing structure that would apply when one company uses another company's network.

8) Should the Commission set a procedural schedule and/or hear oral argument on these issues?

13 There really is nothing for the Commission to do in this docket (which was opened for the purpose of implementing the TRO) unless the Supreme Court grants a further stay of the *USTA II* court's vacatur of those portions of the TRO that delegated a role to the states. If the Supreme Court does grant certiorari and a stay of the D.C. Circuit's ruling, Qwest can at that time assess whether it wants to proceed with its petition in this docket (and seek the market-by-market relief from unbundling of mass market switching and dedicated transport that the TRO provides for) and the Commission can assess whether it wishes to devote its resources despite the possibility that the Supreme Court could still uphold the D.C. Circuit and moot the Commission's efforts. If the Supreme Court does not grant a stay of the D.C. Circuit's vacatur, then there will be no delegated authority on which this Commission may act to provide the granular findings delegated to the States by the TRO.

14 The vehicle for these issues to come before the Commission might be: (1) an interconnection arbitration, (2) a proceeding to amend the SGAT, (3) a filing to

amend Qwest's interconnection tariffs, or (4) a proceeding on the Commission's own motion or upon a complaint to consider unbundling obligations under state law.

DATED this 21st day of May, 2004.

CHRISTINE O. GREGOIRE
Attorney General

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JONATHAN C. THOMPSON
Assistant Attorney General
Washington Utilities and
Transportation Commission
(360) 664-1225