



DEPARTMENT OF THE ARMY  
UNITED STATES ARMY LEGAL SERVICES AGENCY  
901 NORTH STUART STREET  
ARLINGTON VA 22203-1837



REPLY TO  
ATTENTION OF  
Regulatory Law Office  
U 4113

May 21, 2004

**VIA ELECTRONIC FILING & OVERNIGHT MAIL**

Commission Secretary  
Washington Utilities & Transportation Commission  
P.O. Box 47250  
1300 S. Evergreen Park Drive, S.W.  
Olympia, WA 98504-7250

Subject: **DoD/FEA's Comments**

In Re: **Docket No. UT-033044** – 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.

To The Honorable Commission Secretary:

Enclosed for filing in the above-captioned proceeding is the original Comments by the United States Department of Defense and All Other Federal Executive Agencies (collectively referred to herein as "DoD/FEA").

In accordance with the Commission's Rules, Certificates of Service (for Docket Nos. UT-033044 and UT-030614) are appended. In addition, nineteen (19) copies of this letter with enclosures are attached. Copies of this filing are being sent to all parties of record in accord with the Certificates of Service. An electronic (by email) copy of this filing will be made on May 21, 2004.

Inquiries to this office regarding this proceeding should be directed to the undersigned at (703) 696-1643.

Thank you for your cooperation and assistance in this matter.

Sincerely,

Stephen S. Melnikoff  
General Attorney  
Regulatory Law Office  
U.S. Army Litigation Center  
901 N. Stuart Street, Suite 700  
Arlington, Virginia 22203-1837  
Telephone: (703) 696 - 1643  
stephen.melnikoff@hqda.army.mil

Enclosures

Attached: Nineteen (19) Copies

CF: See Certificates of Service (electronic service & first class mail)

Honorable Ann E. Rendahl (Email on 5/21/04)

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

THE UNITED STATES DEPARTMENT  
OF DEFENSE AND ALL OTHER  
FEDERAL EXECUTIVE AGENCIES'

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

I certify that I have caused a copy of the foregoing document, together with this Certificate of Service, in Docket No. UT-033044 to be sent this day by electronic service (email) and postage prepaid, properly addressed, first class U.S. Mail (or private courier) to the counsel and parties named below, as indicated:

**JONATHAN THOMPSON**  
Assistant Attorney General  
1400 S. Evergreen Park Drive SW  
PO Box 40128  
Olympia, WA 98504-0128

**SIMON J. FFITCH**  
Assistant Attorney General  
Public Counsel Office  
900 4<sup>th</sup> Avenue  
Suite 2000  
Seattle, WA 98164-1012

**LISA A. ANDERL**  
Qwest Corporation  
1600 7<sup>th</sup> Avenue  
Room 3206  
Seattle, WA 98191

**GREGORY J. KOPTA**  
Davis Wright Tremaine, LLP  
2600 Century Square  
1501 Fourth Avenue  
Seattle, WA 98101-1688

**JEFFREY J. BINDER**  
Allegiance Telecom, Inc.  
1919 M Street – Suite 420  
Washington, DC 20036

**REBECCA DECOOK**  
AT&T Law Department  
1875 Lawrence Street  
Suite 1575  
Denver, CO 80202

**BROOKS E. HARLOW**  
Miller Nash LLP  
440 Two Union Square  
601 Union Street  
Seattle, WA 98101

**KAREN S. FRAME**  
Senior Counsel  
Covad Communications  
Company  
7901 Lowry Blvd.  
Denver, CO 80230

**WILLIAM E. HENDRICKS III**  
Attorney – Sprint Corp.  
902 Wasco Street  
Hood River, OR 97031

**ARTHUR A. BUTLER**  
Ater Wynne LLP  
Two Union Square  
601 Union Street  
Suite 5450  
Seattle, WA 98101-2327

**JAMES I. HARLAN**  
Allegiance Telecom  
9201 Central Expressway  
Dallas, TX 75231

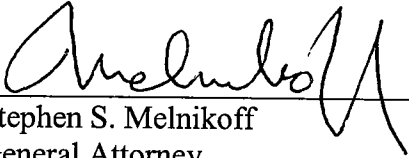
**MICHEL SINGER NELSON**  
MCI Inc.  
707 17th Street  
Suite 4200  
Denver, CO 80202

**LISA RACKNER**  
Ater Wynne LLP  
222 SW Columbia  
Suite 1800  
Portland, OR 97201

**TIMOTHY J. O'CONNELL**  
Stoel Rives LLP  
600 University Street – Suite 3600  
Seattle, WA 98101

**ANDREW O. ISAR**  
Miller Isar, Inc.  
7901 Skansie Avenue  
Suite 240  
Gig Harbor, WA 98335

Dated this 21st day of May 2004,  
at Arlington County, Virginia.

  
Stephen S. Melnikoff  
General Attorney  
Regulatory Law Office  
U.S. Army Legal Services Agency  
Department of the Army  
901 N. Stuart Street, Suite  
Arlington, VA 22203-1837  
(703) 696 - 1643

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION  
COMMISSION

In the Matter of the Petition of

QWEST CORPORATION

For Competitive Classification of  
Basic Business Exchange  
Telecommunications Services.

Docket No. UT-030614

THE UNITED STATES DEPARTMENT  
OF DEFENSE AND ALL OTHER  
FEDERAL EXECUTIVE AGENCIES'

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

I certify that I have caused a copy of the foregoing document, together with this Certificate of Service, in Docket No. UT-030614 to be sent this day by electronic service (email) and postage prepaid, properly addressed, first class U.S. Mail (or private courier) to the counsel and parties named below, as indicated:

Jonathan C. Thompson  
Assistant Attorney General  
1400 S. Evergreen Park Dr. S.W.  
P.O. Box 40128  
Olympia, WA 98504-0128

Lisa A. Anderl  
Corporate Counsel  
Qwest  
1600 7<sup>th</sup> Avenue, Room 3206  
Seattle, WA 98191

Simon J. ffitich  
Assistant Attorney General  
Chief, Public Counsel Division  
Office of the Attorney General  
900 Fourth Avenue, Suite 2000  
Seattle, WA 98164-1012

Adam L. Sherr  
Attorney  
Qwest  
1600 7<sup>th</sup> Avenue, Room 3206  
Seattle, WA 98191

Letty S. D. Friesen  
AT&T  
1875 Lawrence Street, Floor 15  
Denver, CO 80202


Karen J. Johnson  
Integra Telecom  
19545 NW Von Neumann Dr.  
Suite 200  
Beaverton, OR 97006

Richard H. Levin  
Counsel for Advanced TeleCom, Inc.  
3554 Round Barn Boulevard  
Suite 303  
Santa Rosa, California 95403

Michel Singer Nelson  
WorldCom  
707-17<sup>th</sup> Street  
Suite 4200  
Denver, CO 80202

Arthur A. Butler  
Ater Wynne LLP  
Counsel for WeBTEC  
601 Union Street, Suite 5450  
Seattle, WA 98101

Dated this 21st day of May 2004,  
at Arlington County, Virginia.



Stephen S. Melnikoff  
General Attorney  
Regulatory Law Office  
U.S. Army Legal Services Agency  
Department of the Army  
901 N. Stuart Street, Suite  
Arlington, VA 22203-1837  
(703) 696 - 1643

(10/15/03)

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

THE UNITED STATES DEPARTMENT  
OF DEFENSE AND ALL OTHER  
FEDERAL EXECUTIVE AGENCIES'

COMMENTS

**COMMENTS**

by

**THE UNITED STATES DEPARTMENT OF DEFENSE AND  
ALL OTHER FEDERAL EXECUTIVE AGENCIES**

Robert N. Kittel  
Chief

Stephen S. Melnikoff  
General Attorney

Regulatory Law Office  
Office of the Judge Advocate General  
U. S. Army Litigation Center  
901 N. Stuart Street, Suite 700  
Arlington, Virginia 22203-1837

May 21, 2004

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

THE UNITED STATES DEPARTMENT  
OF DEFENSE AND ALL OTHER  
FEDERAL EXECUTIVE AGENCIES'

COMMENTS

**COMMENTS**

The Secretary of Defense, through duly authorized counsel, on behalf of the customer interests of the United States Department of Defense and all other Federal Executive Agencies (collectively referred to herein as "DoD/FEA"), hereby responds to the "Notice of Opportunity to Submit Comments" (the "*Notice*") issued on May 6, 2004 by the Presiding Administrative Law Judge. In the *Notice*, the Washington Utilities and Transportation Commission ("the Commission") invites parties to file responses to eight questions that arise from the decision of the United States Court of Appeals for the District of Columbia in the *USTA II* decision.<sup>1</sup>

In *USTA II*, the Court of Appeals vacated in part the *Triennial Review Order* issued by the Federal Communications Commission ("FCC") in August 2003.<sup>2</sup> The Commission thereupon suspended the subject proceeding indefinitely. The *Notice* noted

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<sup>1</sup> *United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

<sup>2</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*").

that following suspension of this proceeding, the FCC has encouraged the parties to enter into commercial negotiations for the provision of telecommunications service, and that the effective date of *USTA II* has been extended until June 15, 2004. The *Notice* invites parties to state whether they believe that a status conference is necessary, and also invites parties to respond to the same questions that the Colorado Public Utilities Commission asked in connection with its consideration of the effect of *USTA II*.

DoD/FEA commends the Commission for taking the opportunity to obtain parties' views about the impact that would occur should *USTA II* become effective. Initially, we state our belief that a status conference in this proceeding is not necessary at this time. DoD/FEA understands from public documents and statements that the incumbent Local Exchange Carriers ("LECs") and the competitive LECs are in many cases engaged in discussions concerning whether to enter into commercial agreements for the provision of the telecommunications service that the competitive LECs require. Convening a conference in this proceeding now, especially if parties are expected to state what action the Commission should take at this point, may divert parties' attention from those negotiations. Should the carrier parties desire to convene a status conference, however, DoD/FEA will participate by telephone.

With respect to the Commission's eight questions, DoD/FEA responds to **Questions (1), (2) and (3)** with the observation that in pertinent part *USTA II* vacated (but stayed the effective date of that vacatur) only the FCC's delegation of authority and the FCC's rules, and only those rules that were based on the FCC's conclusion that competitive LECs were impaired on a nationwide basis without unbundled access to mass-market switching and certain dedicated transport elements (DS1, DS3 and dark



fiber).<sup>3</sup> All other FCC unbundling rules remain in effect, and on remand, of course, the FCC may and could reinstate the unbundling requirements as originally specified. Moreover, Section 271 of the Communications Act requires a carrier subject thereto, including Qwest, to offer to competitive LECs “local switching unbundled from transport, local loop transmission, or other services” (47 USC § 271(c)(2)(B)(vi)) and “local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services” (47 USC § 271(c)(2)(B)(v)). The Court did not address the requirements imposed on incumbent LECs by Section 251 of the Communications Act -- only the FCC's determination under Section 251 as to what functions qualify as UNEs -- and accordingly all Section 251 obligations remain in effect. Likewise, *USTA II* did not address the FCC's requirement that UNEs must be priced at rates developed through a TELRIC analysis. Qwest and the Commission remain under the obligation to develop prices for UNEs required under the federal statute using the TELRIC approach. The Court did not address the manner in which states price unbundled network elements under state statutes. Thus, the decision does not affect the Commission's authority to use TELRIC -- or some other method -- as the approach in instances where it sets prices under state authority for functions that are not mandated as UNEs in the FCC's rules.

**Questions (4), (5) and (6)** inquire as to the effect of *USTA II* on Qwest's Statement of Generally Available Terms and Conditions (SGAT), state unbundling rules and state tariffs. DoD/FEA's review of *USTA II* confirms that the decision has no immediate practical impact on Qwest's obligations under the SGAT and its interconnection agreements, and no impact whatsoever on state unbundling rules or

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<sup>3</sup> The court also vacated the FCC's conclusion that wireless carriers are impaired without unbundled access to incumbent LEC dedicated transport.

tariffs. The reason why *USTA II* may have an eventual practical effect on the SGAT and the parties' interconnection agreements is that those documents, as DoD/FEA understands, have provisions that allow for reopening provisions if there is a "change of law." Should *USTA II* become effective and a party thereupon believes that the decision qualifies as a "change of law", that party could presumably initiate the process for reformulation of the SGAT or agreement. DoD/FEA is not presently in a position to comment on how the Commission should interpret the term "change of law" or on the process that must take place (or on the governing "rules" to be utilized) before new terms required by such a change become effective. But until such a process has been completed, Qwest remains bound by the terms of those documents.

In Question (7), the Commission asks what it should do to facilitate negotiations between parties as to the functions that *USTA II* addressed. DoD/FEA believes that the carrier parties hereto are best suited to respond to that question and the Commission's implicit offer of assistance. Finally, as to Question (8), DoD/FEA does not see an immediate need for the Commission to establish a procedural schedule or hear oral argument on these issues in this proceeding, given the uncertainty as to whether *USTA II* will become effective and whether the parties will reach commercial arrangements. We note in this regard that Qwest has filed comments with the Arizona Corporation Commission in response to that agency's invitation for comments on the effect of *USTA II*.<sup>4</sup> Qwest represented therein that the change of law provisions ensure that "the status

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<sup>4</sup> Qwest Corporation's Brief Addressing Issues Relating to the Triennial Review Order and the Effect of *USTA v. FCC*, Arizona Corporation Commission Docket No. T-00000A-03-0369 (filed April 27, 2004).

quo will continue for some period of time after the effective date of the *USTA II* mandate.”<sup>5</sup>

Although DoD/FEA does not believe that Commission action is required prior to issuance of the *USTA II* mandate, we do support efforts for the Commission to act quickly if that occurs. In this regard, we again note that *USTA II* did not address in any way this Commission's jurisdiction to act under state law to require unbundling of network elements and to set the prices for those offerings. Thus, the Court did not substantively address Section 251(d)(3) of the Communications Act, which provides:

PRESERVATION OF STATE ACCESS REGULATIONS. -- In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that --

- (A) establishes access and interconnection obligations of local exchange carriers;
- (B) is consistent with the requirements of this section; and
- (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.<sup>6</sup>

Rather than address the role of the states in implementing local competition (other than by FCC delegation), the *USTA II* Court simply noted that the FCC had included language in the *Triennial Review Order* as to preemption, but found that the parties' concerns in this regard were not ripe for adjudication.<sup>7</sup>

This proceeding, however, may not be the best forum for the Commission to consider adopting unbundled network elements under state statutes to replace those that may be vacated at the federal level. Accordingly, DoD/FEA recommends that the Commission initiate a new proceeding immediately upon effectiveness of *USTA II* to

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<sup>5</sup> *Id.*, p. 5.

<sup>6</sup> 47 USC § 251(d)(3).

<sup>7</sup> *USTA II*, Slip Opinion, pp. 60-61.

address the format and issues necessary to be resolved.<sup>8</sup> That could be accomplished by inviting comments on the need to adopt UNEs that replace those that no longer exist at the federal level, to the extent needed to ensure strong and fair competition for local service in the mass market.

DoD/FEA must point out another matter related to the *USTA II* decision. In last year's *Reclassification Order*, in which the Commission reclassified all Qwest business services as competitive, the Commission found that all Qwest's local business services were subject to "effective competition" throughout its service area, and that because of the "pro-competitive market structure" in Washington, such competition would discipline the market.<sup>9</sup> The Commission emphasized that an "important feature of this structure is the availability to competitors of UNE-P, which is the entire platform (loop, transport and switch included) used by Qwest to serve a customer."<sup>10</sup> The Commission acknowledged parties' concerns that proceedings in the dockets implementing the *Triennial Review Order* threaten the existence of UNE-P, but the Commission declined to defer that proceeding or to combine the proceedings.<sup>11</sup> The continued existence of UNE-P or UNEs for serving the mass market, as it was made available at the federal level, is now in doubt. DoD/FEA believes that, should *USTA II* become effective and Qwest and its competitive LECs fail to enter into commercial agreements that assure the availability of wholesale

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<sup>8</sup> As a customer of telecommunications services provided by both incumbent and competitive LECs, DoD/FEA observes that it is critical for customer planning and certainty as well as for continuity of both the marketplace and service that a gap in regulation not exist between the effectiveness of *USTA II* and any replacement for the vacated UNEs. We note that certain competitive LECs in this proceeding have filed a motion asking the Commission to require Qwest to maintain the *status quo* in its local service obligations to competitive providers in order to assure this outcome. DoD/FEA will respond to that motion.

<sup>9</sup> In the Matter of the Petition of Qwest Corporation for Competitive Classification of Basic Business Exchange Telecommunications Services, Docket No. UT-030614, *Order No. 17 Granting Competitive Classification* (Served December 22, 2003) ("*Reclassification Order*"), p. 39.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*, p. 34.

services similar (in structure and pricing) to UNE-P and UNEs, the Commission must revisit its conclusions in the *Reclassification Order* in addition to conducting state proceedings to consider replacing the former UNE-P and UNEs with a service that ensures competition. Thus, it is essential that the Commission be prepared to initiate state proceedings to “fill the void” caused by the *USTA II* vacatur, in order to ensure the continuation of the “pro-competitive market structure”, and thereby assure customers of having competitive options for local service.

Respectfully Submitted,



Stephen S. Melnikoff  
General Attorney

Regulatory Law Office  
Office of the Judge Advocate General  
U. S. Army Litigation Center  
901 N. Stuart Street, Suite 700  
Arlington, VA 22203-1837  
(703) 696-1643

For

The United States Department of Defense

And

All Other Federal Executive Agencies

Dated: May 21, 2004