

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Implementation of the
Federal Communications Commission's
Triennial Review Order

Docket No. UT-033044

COMMENTS OF QWEST
CORPORATION

I. INTRODUCTION

1 Qwest Corporation ("Qwest") files these Comments in response to the Notice of Opportunity To Submit Comments ("Notice") issued on May 6, 2004 by Judge Rendahl on behalf of the Washington Utilities and Transportation Commission ("Commission") in the Triennial Review Order ("TRO")¹ docket.

2 In the Notice, Judge Rendahl summarized recent activity related to the TRO. For example, she noted that in Order No. 14, the Commission suspended proceedings indefinitely in this docket in light of the decision of the United States Circuit Court for the D. C. Circuit in *United States Telecom Association v. FCC*,² ("USTA II"). In Order No. 14, the Commission noted that it would schedule a status conference at a later date, most likely after the 60-day stay of the D.C. Circuit's

¹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advance Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147 (August 21, 2003).

² 359 F.3d 554 (D.C. Cir. 2004).

decision had elapsed, for the purpose of determining whether to proceed in this docket.³ Judge Rendahl also noted that the FCC had encouraged commercial negotiations and that the original 60-day stay had been extended by the D.C. Circuit to June 15, 2004 at the request of the FCC.

3 In light of these events, the Commission asked interested parties in this docket to provide:

- Comments on whether a status conference is necessary at this point.⁴
- Comments concerning the Commission’s “options and obligations under *USTA II*, similar to the comments filed recently with the Colorado Commission.” On this issue, the Commission restated the questions that has been addressed in Colorado, noted that several parties had filed comments in Colorado, and asked that parties that had previously filed in Colorado “supplement” those filings as opposed to repeating them.⁵

4 The purpose of these Comments, therefore, is to address the questions set for in the Notice by supplementing Qwest comments filed in Colorado on April 16, 2004.⁶ With the exception of an Errata filing discussed hereafter and with the updates provided herein, Qwest’s Colorado comments correctly reflect Qwest’s position on the issues discussed therein. Qwest will not repeat those positions here, except insofar as it is necessary to clarify and supplement them as requested in the Notice.

II. THE COMMISSION SHOULD NOT SCHEDULE A STATUS CONFERENCE

5 The Notice asked the parties to comment on whether a status conference is necessary at this point. Qwest does not believe a conference is necessary now and recommends that the Commission defer scheduling one.

6 As the Notice acknowledges, the FCC recently requested and the D. C. Circuit granted an extension

³ Notice at 1.

⁴ *Id.*

⁵ *Id.* at 2.

⁶ Qwest Corporation’s Comments in Response to Commission’s Order Granting Motion to Stay Proceedings and Requesting Comment, Docket Nos. 03I-478T and 03I-485T (April 16, 2004).

of the stay of the *USTA II* decision until June 15, 2004 to enable the industry to engage in commercial negotiations. As described in more detail in section III, Qwest has, along with MCI, taken the lead in putting together an ongoing mediated process in which Qwest and 40-50 CLECs are participating. Whether the negotiations will result in agreement among the interested parties is unclear at this point, though the discussions are proceeding in good faith and there is reason to believe that progress is being made.

7 Whether or not those negotiations result in comprehensive agreements, other issues will also need to develop before the Commission should hold a status conference. For example, whether or not agreements can be reached in the commercial negotiations process, it is still unclear what the status of the *USTA II* decision will be after June 15, 2004. The majority of the FCC has stated that it will seek an appeal through the United States Solicitor General and shall likewise seek a stay of the *USTA II* decision pending an appeal to the United States Supreme Court.

8 On May 18, 2004, the Solicitor General filed a request with the United States Supreme Court asking for a 30-day extension (from May 31, 2004 to June 30, 2004) in which to file a petition for a writ of certiorari. In the Application, the Solicitor General noted that the time was necessary “in light of the ongoing negotiations and to consider the full practical and legal ramifications of the decision of the court of appeals”⁷ The Supreme Court granted the extension on May 19, 2004. While Qwest opposes an appeal of the *USTA II decision* and believes that a request for a further stay is unlikely to be successful, it is certainly not clear at this point how these events will develop. Thus, since no one knows what the status of the *USTA II* decision will be after June 15, 2004 and given the many different directions this matter could take, Qwest does not believe that scheduling a status conference is necessary at this time. If one is held, it is likely to result only in speculation by the parties.

⁷ Application for an Extension of the Time Within Which to File a Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia, *Federal Communications Commission and United States of America, Applicants v. United States Telecom Association* (May 18, 2004) ¶ 6.

III. UPDATE OF COLORADO COMMENTS

A. Colorado Errata Filing

9 In the Notice, the Commission asked parties that had filed comments in Colorado to supplement the Colorado comments, instead of repeating them. The first order of business is to provide the Commission with the Errata filing that Qwest made in Colorado on May 13, 2004. In the original April 16, 2004 Comments in Colorado, Qwest provided a redlined attachment (Attachment C), a copy of the FCC's TRO rules, showing the specific rules (1) that were vacated by the *USTA II* decision, (2) that were remanded but not vacated by *USTA II* and (3) that were unaffected by the decision.

10 Due to an oversight, the rules related to high capacity loops, which the court vacated,⁸ were not shown in strikeout format on Attachment C to the original Colorado comments. On May 13, 2004, Qwest filed an Errata filing (including a revised version of Attachment C) correcting that oversight. A copy of the Colorado Errata (including the revised Attachment C) is attached hereto as Attachment 1.

B. Current Status of Commercial Negotiations

11 In the original Colorado comments, Qwest reported on its commercial agreement with Covad by which Qwest will continue to provide Covad with access to line sharing throughout the 14-state Qwest region. Qwest has had and is currently engaging in direct negotiations with individual CLECs on a variety of issues, including discussions related to a new service that has the functionality of UNE-P as well as commercial arrangements for CLECs to obtain access to high capacity transport, loops, and dark fiber.

12 In the month since the Colorado comments were filed, a significant amount of other, more broadly focused, commercial negotiation activity has taken place. The most significant of that activity is the

⁸ Qwest is aware that some or all of the CLECs disagree with Qwest's interpretation of *USTA II* with regard to high capacity loops.

mediated negotiation process that resulted from Qwest's consultations with MCI in order to identify and retain a neutral and qualified mediator to conduct a series of multi-party commercial negotiation sessions. Qwest and MCI agreed on the retention of Cheryl Perrino, the former Chairwoman of the Wisconsin Public Service Commission, to mediate the group negotiations with CLECs purchasing UNE-P in Qwest's 14-state territory. To date, two mediated commercial sessions under the direction of Ms. Perrino have taken place in Denver.

- 13 The first session was held on April 28, 2004 and was attended by representatives of Qwest and of more than 50 CLECs. During that session, the primary focus of discussion was Qwest's Qwest Platform Plus ("QPP") product proposal. CLECs had an opportunity to ask questions to clarify the QPP offering, air their concerns, and to suggest alternatives. At the conclusion of the first mediated session, the group determined that an expanded discussion involving not only QPP, but loop issues as well, would be beneficial. The CLECs attending the first negotiations session then met independently of Qwest on May 5, 2004 to discuss issues for the second session.
- 14 The second mediated group session was held on May 13, 2004. That session was attended by the representatives of over 40 CLECs. The subject of this session was expanded to a discussion of both section 251 services and other non-section 251 services with CLECs participating in the session. At the conclusion of this negotiation session, Qwest presented a new proposal to the CLECs for their consideration.
- 15 The CLECs involved in these negotiations sessions met again on Wednesday, May 19, 2004 to discuss the new Qwest proposal and to determine if they believed a third mediated group negotiation session would be beneficial in assisting the parties to reach agreement on a UNE-P replacement product. That decision is still pending.
- 16 Each of these sessions provided the parties with opportunities to clarify their understanding of each other's positions and to identify areas where opportunity for agreement exists—further demonstrating

that, if allowed to continue, these negotiations have the potential of facilitating a smooth transition when the mandate in *USTA II* is issued.

C. Status of Qwest's Statement of Generally Available Terms and Conditions, Washington Unbundling Rules, and Washington Tariffs

- 17 In the Colorado comments, Qwest provided an update on the status of the statement of generally available terms ("SGAT") and on other issues related to state tariffs and state unbundling rules. Because the Notice appears to seek the same information for Washington, it is provided hereafter.
- 18 On February 26, 2004, Qwest filed with the Commission its Ninth Revised section 252(f) statement of generally available terms ("Ninth Revised SGAT") that implemented the FCC's rulings in the TRO. Following the D. C. Circuit's issuance of *USTA II*, on March 11, 2004, Qwest filed a Notice of Withdrawal of the Ninth Revised SGAT; Qwest is in the process of updating its SGAT to reflect the *USTA II* rulings. Qwest will file an updated SGAT after the court issues its mandate in *USTA II*. Qwest will also modify its interconnection tariff, WN U-43. While section 251(d)(3) preserves state authority to establish "access and interconnection obligations of local exchange carriers," section 251(d)(3)(B) requires that all such requirements be "consistent with the requirements of" section 251. The "requirements" of section 251 will be modified with the issuance of the mandate in *USTA II* and, as required by section 252(d)(3)(B), Qwest will modify its tariff to make it consistent with the D.C. Circuit's rulings.
- 19 A similar analysis would also apply to any effort to impose unbundling rules pursuant to state unbundling authority. Under section 251(d)(3)(B), state unbundling rules are valid only if they are consistent with the requirements of section 251 as interpreted by the courts, including the U.S. Supreme Court in *Iowa Utilities Board* and the D. C. Circuit in *USTA I* and *USTA II*. There is a threshold question whether the state commissions can do anything in this area, since the D.C. Circuit directed the FCC (rather than the states) to adopt new unbundling rules that comply with *USTA II*. In addition, even if the states possess authority to adopt state unbundling rules, under basic principles

of federal preemption, such rules must be consistent with the FCC unbundling rules that *USTA II* did not invalidate. As the FCC stated in the TRO, “states do not have plenary authority under federal law to create, modify, or eliminate unbundling obligations.”⁹ The argument of some CLECs that states may order broad unbundling requirements beyond the requirements of the TRO and *USTA II*, in the words of the FCC, ignore “long-standing federal preemption principles that establish a federal agency’s authority to preclude state action if the agency, in adopting its federal policy, determines that state actions would thwart that policy.”¹⁰ Accordingly, the only Washington unbundling requirements that would be valid are those that are consistent with relevant court decisions, including *USTA II*, and the FCC unbundling rules that will be unaffected by the issuance of the *USTA II* mandate.

IV. CONCLUSION

20 Given the continuing high level of uncertainty regarding the ultimate status the *USTA II* decision will have after June 15, 2004 and given ongoing good faith commercial negotiation efforts, it would be both fruitless and speculative to hold a status conference at this time. Furthermore, as Qwest pointed out in its Colorado comments, it intends to honor its interconnection agreements, thus assuring that no disruptions will occur to CLECs and customers if the mandate is issued by the D.C. Circuit on June 15, 2004. Any changes thereafter will occur in an orderly fashion under the change of law provisions of those agreements. Finally, Qwest and many CLECs in the 14-state region are involved in a productive, good faith process to resolve issues on a business-to-business basis. That process should be allowed to continue.

RESPECTFULLY SUBMITTED this 21st day of May, 2004.

QWEST

⁹ TRO at ¶ 187.

¹⁰ *Id.* at ¶ 192.

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