

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

COMMISSION STAFF'S
RESPONSE TO JOINT CLECS'
MOTION TO MAINTAIN THE
STATUS QUO

1 Commission Staff submits this response to the Joint CLECs' Motion for an Order Requiring Qwest to Maintain the Status Quo. Staff opposes the CLECs' motion on procedural grounds.

2 As stated in Staff's comments filed in this docket on May 21, 2004, it is Staff's view that, if the *USTA II*¹ court's decision becomes effective, ILECs no longer will be required by federal rules to provide their competitors with switching and dedicated transport at TELRIC rates. Existing interconnection agreements still require unbundling of those elements at TELRIC, however, at least for some period. Additionally, Qwest is still required to provide unbundled switching and transport

¹ *United States Telecom Ass'n v. FCC (USTA II)*, 359 F.3d 554 (D.C. Cir. 2004).

under Section 271 of the Act, although not at TELRIC rates and not subject to rules requiring combination of elements.

3 To the extent that the CLECs are asking the Commission to order Qwest to do what the company's interconnection agreements require it to do (i.e., to provide UNEs consistent with those agreements, at existing rates, until change of law, dispute resolution, and arbitration processes produce new agreements), the Joint CLECs' motion seems to have little point. The interconnection agreements require what they require, and if there is any dispute as to what they require, parties may file petitions for enforcement of the agreements pursuant to WAC 480-07-650.

4 Although Judge Rendahl imposed a "status quo" requirement as a condition of Verizon's request for a continuance in UT-043013, that is different than the Commission ordering it, outright, in this case. That docket specifically concerns Verizon's petition to arbitrate changes to its interconnection agreements to reflect the changes of law resulting from the TRO, and subsequently from the *USTA II* decision. Although Verizon sought a stay in that proceeding until June 15 and asked the Commission to toll the time for completion of the arbitration process that would apply under 47 U.S.C. § 252(b)(4)(C), it evidently had refused to stipulate that it would not alter the availability of UNEs during the pendency of the stay.

Unlike Verizon, Qwest has no filing or petition pending to amend its interconnection agreements.

5 To the extent that the Joint CLECs are asking the Commission to order Qwest to do something more than comply with its interconnection agreements, the legality of such an order is questionable, at best, and in any case, the question is not properly presented through a motion in this docket.

6 If the request is that the Commission use its role as arbitrator of interconnection agreements to interpret whether the Act might still require unbundling of the switching and transport elements at TELRIC prices, that question should be presented through the arbitration process.

7 If the request is for an order under state law requiring, at least temporarily, exactly what the *USTA II* court held the FCC could not require under the Section 251 impair standard, Staff submits that such an order, even a temporary one, is very likely preempted as inconsistent with Section 251 of the Act. *See* 47 U.S.C. § 251(d)(3). If this commission is to require unbundling of network elements, it must articulate a state law basis and develop its own record and its own reasoning (including assuring itself that any unbundling it orders is not inconsistent with Section 251 as interpreted by *USTA I* and *II*). It would not be legally sustainable for this Commission to adopt the FCC's provisional national impairment findings for

mass market switching and dedicated transport because those were discredited by the court as inconsistent with Section 251.²

8 This docket was opened to implement the TRO—not to adopt state unbundling requirements. If the Joint CLECs wish to establish an independent state law requirement for unbundled access to switching and dedicated transport at TELRIC rates, or some other pricing standard, they should bring a complaint seeking that relief and articulating a basis for this commission to impose such a requirement in a manner that is not inconsistent with Section 251 of the Act.

DATED this 25th day of May, 2004.

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² “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.” *USTA II* at 571. “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 574.