

**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

RESPONSE OF COVAD
COMMUNICATIONS COMPANY AND
NORTHWEST COMPETITIVE
COMMUNICATIONS COALITION IN
SUPPORT OF STATUS QUO MOTION

INTRODUCTION

1 Covad Communications Company (“Covad”) and the Northwest Competitive Communications Coalition (“NWCCC”)¹ respond in support of the motion to maintain the status quo filed by Joint CLECs on May 10, 2004 (“Motion”). It is fundamental that Qwest’s obligation to provide UNEs continues unabated – regardless of the outcome of the Triennial Review Order and related appeals. A fundamental component of this obligation is, of course, the requirement that UNEs continue to be priced at TELRIC.² Quite simply, Qwest may not withhold access to UNEs without violating applicable law –

¹ For purposes of this response, the NWCCC members are: Axxis Communications, ATL Communications, Z-Tel, and VCI Company (“Vilaire”).

² Even if the Commission were to conclude that Qwest is required to provide access to network elements on something other than a “Unbundled Network Element” or “UNE” basis, as discussed below, it must still require access utilizing a similar cost-based methodology (which may vary depending on the source of authority relied upon). The term “UNE,” as used in this response, will denote 251(c)(3) elements, while non-UNEs will simply be referred to as network elements.

including sections 251 and 271 of the Act, Washington Law, and the parties' interconnection agreements. The Act preserves and protects Washington's independent authority to ensure continued access to unbundled elements in furtherance of competition.³ Furthermore, Washington law provides that this Commission can order unbundling at rates based on total service long run incremental costs. The Commission should exercise that authority to require that Qwest continue to make available all networks elements, and mandate that the *status quo* shall be maintained while the Commission exercises its authority.

DISCUSSION

2 The Communications Act remains applicable, with or without implementing federal rules (as we have now witnessed several times). The Telecommunications Act of 1996 requires ILECs to interconnect with and make unbundled network elements available to competitive carriers. The Act stated – and still requires – that access to elements is mandated wherever necessary and where carriers would be impaired without such access.⁴ Only Congress may amend the Act, and it has not done so. Thus, the Act still governs, and it requires access to network elements on an unbundled basis.

3 The fact that the FCC's rules were, in substantial part, vacated and remanded in *USTA II* is of little or no consequence in terms of the ILEC obligation to provide access to network elements. Since the Act itself contains the requirement that ILECs provide “nondiscriminatory access to network elements,” any lack of implementing rules does not mean that the ILEC can deny access to the UNEs.

³ See, e.g., 47 U.S.C. §§251(d) and 261(b) and (c).

⁴ 47 U.S.C. § 252

4 It is beyond dispute that the Commission's independent state law authority is not preempted by the Federal Telecommunications Act. Section 252(e)(3) of the Act, entitled "Preservation of authority" explicitly states that:

*[N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.*⁵

Thus, in terms of filling the void that may be created by vacatur of the federal rules, the states have authority to act. Congress, in fact, envisioned that both the FCC and state commissions would take action to implement the access obligations. Section 251(d)(3) of the Act, entitled "Preservation of State access regulations" provides as follows:

In prescribing and enforcing regulations to implement the requirements of this section, the [Federal Communications] Commission 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.*⁶

5 Accordingly, the Act protects state action that promotes the unbundling objectives of the statute, and prohibits the FCC from interfering with such action. In this instance, further FCC rulemakings could not preclude the enforcement of action by this Commission to **establish** unbundling obligations provided such action is consistent with the unbundling requirements in section 251 and would not prevent implementation of its pro-competitive requirements.

6 It is likewise beyond dispute that the authority granted under independent state law was not preempted by the FCC's *Triennial Review Order*, nor could it have been.

⁵ 47 U.S.C. § 252(e)(3).

⁶ 47 U.S.C. § 251(d)(3).

While the FCC has the authority to interpret the Act, it does not have the authority to re-write it. The Act defines this Commission's authority, and, as set forth above, the Act does not evince any general Congressional intent to preempt state law unbundling orders. Rather, the Act expressly preserves such state law authority.

7 Even the FCC recognized that the aforementioned provisions of the Act expressly indicate Congress' intent not to preempt state regulation, and forbid the FCC from engaging in such preemption:

Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.⁷

Moreover, in its *Triennial Review Order*, the FCC did not preempt **any existing** state law unbundling requirements, nor did it act to preclude the adoption of **any future** state law unbundling requirements.

8 Apart from the authority under Section 251 of the Act, this Commission also has broad authority and jurisdiction under Washington law to order Qwest to provide UNEs or their state-law equivalent. Indeed, before the passage of the Federal Telecommunications Act, the Washington Commission brushed aside U S West's and GTE's arguments that it lacked the authority to order unbundling of their services beyond that voluntarily offered by ILECs:

The Commission has carefully and thoroughly considered the incumbent LECs' arguments that we lack authority to order any interconnection terms or conditions other than those they are offering. We believe that the incumbent LECs' interpretation of the Commission's authority, and USWC's interpretation in particular, are unreasonably restrictive. The Commission has broad authority to regulate the rates, services, facilities, and practices of

⁷ See *Triennial Review Order*, at ¶ 191.

telecommunications companies in the public interest. See, POWER v. Utilities & Transp. Comm'n, 104 Wn.2d 798, 808, 711 P.2d 319 (1985); State ex rel. American Telechronometer Co. v. Baker, 164 Wash. 483, 491-96, 2 P.2d 1099 (1931); State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co., 85 Wash. 29, 36, 147 P. 885 (1915).

...

The first paragraph of RCW 80.36.140 (quoted in the Commission Jurisdiction section of this order) gives the Commission broad authority over rates. The second paragraph, quoted above, gives the Commission broad authority over practices and services as well. The way in which services are offered, on a bundled or unbundled basis, certainly falls within the scope of the second paragraph. See, e.g., State ex rel. American Telechronometer Co. v. Baker, 164 Wash. 483, 491-96, 2 P.2d 1099 (1931) (citing earlier version of above quoted provision); State ex rel. Public Service Commission v. Skagit River Telephone & Telegraph Co., 85 Wash. 29, 36, 147 P. 885 (1915) (describing Commission's power to regulate public utilities as "plenary").

Fourth Supplemental Order Rejecting Tariff Filing and Ordering Refilings; Granting Complaints, In Part ("Interconnection Order"), WUTC v. U S West Communications, Inc., WUTC Docket No. UT-94164, et al. at 15 and 51 ("Interconnection Case") (Oct. 30, 1995).

9 The Commission decided its Interconnection Case under state law the year before the Federal Act was passed. It based its decision in large part on RCW 80.36.140, which provides, in relevant part:

Whenever the commission shall find, after such hearing that the rules, regulations or practices of any telecommunications company are unjust or unreasonable, or that the equipment, facilities or service of any telecommunications company is inadequate, inefficient, improper or insufficient, the commission shall determine the just, reasonable, proper, adequate and efficient rules, regulations, practices, equipment, facilities and service to be thereafter installed, observed and used, and fix the same by order or rule as provided in this title.

10 As the Joint CLECs note in their motion, the unilateral withdrawal of UNEs (or price increases) until new Federal or state unbundling rules are in place would be extremely disruptive both to CLECs and to their customers. In the context of

Washington's policy declarations promoting "efficiency, availability, diversity, universal service and reasonable charges,"⁸ there is no way that withdrawal of UNEs by Qwest can be found to be "just, reasonable, proper, adequate and efficient" "rules, regulations, practices" under RCW 80.36.140.

11 RCW 80.36.140 is just the tip of the state law iceberg. There are a number of other provisions that the Commission can rely on to require Qwest to offer, or to prohibit Qwest from withdrawing, UNEs. For example, RCW 80.36.200 states:

Every telecommunications company operating in this state shall receive, transmit and deliver, without discrimination or delay, the messages of any other telecommunications company.

Another statute to which the Commission might look is RCW 80.36.260, which provides:

Whenever the commission shall find, after a hearing had on its own motion or upon complaint, that repairs or improvements to, or changes in, any telecommunications line ought reasonably be made, or that any additions or extensions should reasonably be made thereto in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for telecommunications communications, the commission shall make and serve an order directing that such repairs, improvements, changes, additions or extensions be made in the manner to be specified therein.

The Commission can order "repairs, improvements, and changes" to promote the "convenience of the public." The provision of UNEs has been proven to be a huge "convenience" to the public.

12 Likewise, another provision in Washington law requires that:

All rates, tolls, contracts and charges, rules and regulations of telecommunications companies, for messages, conversations, services rendered and equipment and facilities supplied, whether such message, conversation or service to be performed be over one company or line or over or by two or more companies or lines, shall be fair, just, reasonable and sufficient, and the service so to be rendered any person, firm or corporation by any telecommunications company shall be rendered and performed in a prompt, expeditious and efficient manner and the facilities, instrumentalities and equipment furnished by it shall be safe, kept in good condition and

⁸ See RCW 80.36.300.

repair, and its appliances, instrumentalities and service shall be modern, adequate, sufficient and efficient.

RCW 80.36.080. Services provided by Qwest must be “modern, adequate, sufficient, and efficient.” It would not be “adequate,” “sufficient” or “efficient” for Qwest to withdraw any UNEs until Federal and state proceedings are concluded, since many or all of the very same UNEs could be reinstated by this Commission under state law, by the Supreme Court, or by the FCC on remand from the D.C. Circuit.

13 In reviewing some of the same issues as are implicated in Joint CLECs’ motion, a Maine PUC Hearing Examiner appropriately concluded, following a thorough and well-reasoned legal analysis, that State Commissions may order additional unbundling without running afoul of the Act.⁹ A State Commission mandate, “which requires an ILEC to unbundle portions of its network not required by the FCC, should be considered consistent with the federal regime in that it imposes additional, not contradictory, requirements on the ILEC.”¹⁰ A state would therefore be completely justified in adding to the federally-mandated list of elements. “Indeed, there is nothing about requiring Qwest to provide access to the UNE requested . . . that would preclude Qwest from meeting its federal unbundling requirements nor would it require Qwest to take action that would be considered illegal by the FCC.”¹¹

⁹ *Public Utilities Commission Investigation of Skowhegan OnLine Inc.’s Proposal for UNE Loops*, Docket No. 2002-704, Addendum to Examiner’s Report, dated February 17, 2004. (*Maine Decision*) On April 1, 2004, the Maine PUC issued Part I of its Order in that docket, stating in part that “we find that Verizon must provide CLECs with access to the SOI subloop. Verizon may file prices, terms and conditions for the SOI subloop that are consistent with the pricing rule established in our June 30, 2003 Order in Docket No. 2002-578. Pending approval of those prices and schedules, Verizon must provide the SOI subloop at the current TELRIC rate for loops. Verizon must make the new subloop available to SOI and other CLECs no later than April 30, 2004.” Part II of that Order has now been issued as well.

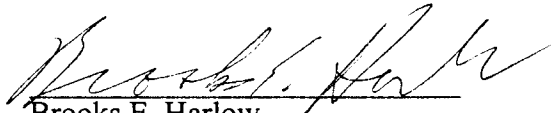
¹⁰ *Id.* at page 13.

¹¹ *Id.*

CONCLUSION

14 The Act clearly preserves and protects Washington's independent authority to ensure continued access to unbundled elements in furtherance of competition. This Commission has authority to do so directly under the Act, as well as under state law. To preserve its ability to exercise that authority and prevent undue disruption and harm to the public interest until it does so, the Commission should preserve the *status quo* for all network elements by granting Joint CLECs' motion.

Respectfully submitted this 25th day of May, 2004.



Brooks E. Harlow
WSB No. 11843
Fax: (206) 622-7485
brooks.harlow@millemnash.com

Attorneys for Covad
Communications Company and
Northwest Competitive
Communications Coalition