BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of	)	
	)	Docket No. UT-033044
QWEST CORPORATION	)	
	)	
To Initiate a Mass-Market Switching and Dedicated Transport Case Pursuant to the Triennial Review	)	AT&T'S RESPONSE TO JOINT CLEC MOTION

AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle and TGC Oregon (collectively "AT&T") hereby respond to the Joint CLEC Motion for an Order Requiring Qwest to Maintain Status Quo Pending Resolution of Legal Issues ("Joint CLEC Motion").

I. INTRODUCTION

1. AT&T supports the Joint CLEC Motion requesting that Qwest be required to maintain the status quo. By granting the Joint CLEC Motion the Commission will provide certainty to competitive local exchange carriers and will ensure that consumers are able to retain the telecommunications carriers of their choice until the issues surrounding the Federal Communications Commission's ("FCC") *Triennial Review Order* ("*TRO"*) are resolved. Uncertainty only benefits Qwest Corporation ("Qwest") and seriously disadvantages the competitive carriers. Maintaining the status quo until the *TRO* is resolved generally treats all the telecommunications carriers fairly. The CLECs' customers are not disrupted and Qwest continues to receive Commission–approved, cost-based rates.

2. The availability of UNEs at TELRIC prices constitutes the critical bridge from the monopoly past to facilities-based competition. If the bridge is weakened, closed, or rendered unaffordable, Washington consumers will face an abrupt lessening of competition, which means fewer choices and higher prices in the short term. In addition, Washington may never realize the potential investments that facilities-based CLECs are prepared to make, and it certainly will not realize the security and reliability benefits of a diverse "network of networks."

3. In the event the D.C. Circuit's *USTA II* order were to take effect, there are tools available to the Commission to preserve UNE-P and retail competition in Washington. The Commission has ample authority to maintain the status quo, for example, by requiring Qwest to continue to provide network elements and UNE-P at current unbundled network elements ("UNE") rates under state law.

4. Furthermore, the "change of law" provision in AT&T's current Interconnection Agreements ("ICAs") prohibits Qwest from discontinuing its provisioning of UNE-P or dedicated transport without following the requisite process. That process includes the right to invoke the dispute resolution procedure to determine the scope of Qwest's obligations under both federal and Washington law to continue to provide UNE-P and dedicated transport, among other services, at TELRIC-compliant rates. Thus, even were the Commission to determine that a "change of law" has occurred under federal law, it would be required to consider what consequences, if any, flow from that event, including determining whether Qwest is obliged under either federal or Washington state law to continue to provide access to unbundled switching and transport at TELRIC-compliant rates. During the resolution of those issues, Qwest would be

obligated by contract to provide the same services and elements it does today. In short, Qwest is obligated to continue to comply with its existing contractual obligations to provide UNE-P and unbundled transport at current rates, unless and until there is an affirmative finding by the Commission that it is permitted to alter those existing contractual duties.

II. ARGUMENTS

A. The Commission Can and Should Require Qwest to Continue Providing Unbundled Switching and Transport at TELRIC-Compliant Rates, At Least Until There Is a Final Resolution of Qwest's Obligations To Do So Under Federal Law.

5. The Joint CLECs have expressed legitimate concern that Qwest may, relying on the vacatur of *USTA II*, take unilateral action to deny CLECs access to certain UNEs or to raise the prices for those UNEs. AT&T agrees that, absent some action by state commissions, CLECs and customers may be exposed to attempts by the Bell operating companies ("BOCs") to engage in such unilateral, even though AT&T does not agree there is any legal basis for the BOCs' action. Nothing in *USTA II* overturns or modifies the unbundling provisions of the Telecommunications Act. Nothing in *USTA II* modifies any of the contractual provisions that currently obligate Qwest to provide UNEs at TELRIC rates. And nothing in *USTA II* modifies the Commission's independent authority to ensure that Qwest does not abuse its control of bottleneck facilities to impede competition. Therefore, at a minimum, the Commission should ensure that Qwest take no actions under color of the *USTA II* decision (or otherwise) that would restrict CLECs' access to UNEs under existing ICAs, or make such access more difficult or costly, unless and until Qwest complies with the change of law provisions in its existing ICAs and obtains authority from the Commission to implement the changes.

6. The CLECs' right to order and use unbundled network elements at TELRIC prices stems from the Telecommunications Act of 1996. The *USTA II* decision – even if it were to become effective -- would not and cannot repeal the 1996 Act. Rather, it would only vacate some of the FCC's current unbundling rules and remand the *TRO* to the FCC for further proceedings. Notably, *USTA II* did *not* alter the FCC's basic definition of impairment, nor did it (or could it) find that any specific network element may not be subject to an unbundling requirement. Further, the *USTA II* decision would not affect in any way the lawfulness of TELRIC pricing, which was conclusively resolved by the Supreme Court in *Verizon Communications, Inc. v. FCC,* 535 U.S. 467, 122 S. Ct. 1646 (2002). And critically, the *USTA II* court recognized that its decision would not invalidate existing interconnection agreements.

7. In fact, in their arguments to the D.C. Circuit, the BOCs, represented to the Court that an order vacating portions of the *Triennial Review Order* would not, by itself, terminate the incumbent local exchange carriers' ("ILECs") obligation to provide unbundled switching and dedicated transport.

8. In its Petition for Writ of Mandamus, the BOCs asked for much broader relief than was ultimately granted by the Court. In addition to asking the Court to vacate the FCC's unbundling rules, the BOCs also sought an order directing the FCC to adopt and apply a new impairment standard within 45 days, and providing for a "transition plan" that would do away with UNE-P if the FCC "fail[ed] to develop lawful rules" within that period.[1] But despite the BOCs' request for a court order that it could stop

[1] *USTA v. FCC*, D.C. Circuit Nos. 00-1012, 00-1015, Verizon's "Petition For Writ of Mandamus To Enforce the Mandate of This Court," filed August 28, 2003, at 30.

providing unbundled switching if the FCC rules were vacated and not replaced with new unbundling rules, the Court declined to grant such relief.

9. At oral argument before the D.C. Circuit, the BOCs' counsel conceded that if the only relief it obtained was the vacatur of some FCC unbundling rules, then the BOCs would be required to continue to provide all UNEs under their existing interconnection agreements, at least until there was a subsequent finding by the FCC or the Court that CLECs were not impaired without access to particular elements. This admission was made during the following exchange:[2]

> Judge Edwards: … Now, assume you're right on all of that and the conclusion is that [the FCC] cannot delegate [to the states]. Whatever else they can do – what's the remedy? …
>
> Mr. Kellogg [counsel for the BOCs]: The remedy is to remand to the FCC to vacate the decision or the parts of the decision that we challenge that allow such delegation and to direct the Commission to do what Congress and the courts told them to do, which is to make an impairment determination.
>
> Judge Edwards: ***Where does that leave your clients***, in your view, with respect to the precise matters that are at issue? … [D]o they remain in limbo? That is, do they remain as they are now? Do you assume impairment, no impairment, what? What are you imagining?
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> Mr. Kellogg: Well, it's a difficult question, Your Honor, because –
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> Judge Edwards: That's why I'm raising it.
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> Mr. Kellogg: -- we are subject, ***we are subject to a number of agreements in the states, and the states will continue to require us to provide elements pursuant to those agreements***.
>
> Judge Edwards: ***Right***.
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> * * *
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> Mr. Kellogg: Until there is a law, the remedy is a lawful unbundling regime that–

[2] *USTA v. FCC*, D.C. Circuit Nos. 00-1012, 00-1015, Transcript of Oral Argument, January 28, 2004, at 7-11 (emphasis added).

> Judge Williams: Yes, but ***we don't have the authority to do that, only the FCC can do that***, so that question is, the question Judge Edwards is driving at and I'm interested in is if we agree with you on the delegation, do we say that the whole, that all the rules that are covered by the delegation are vacated effective 60 days after our decision or something like that[,] or what do we do?
>
> Mr. Kellogg: Well, your honor, … we would urge the Court to provide a much more specific remedy. … We would ask the Court to impose strict guidelines on the Commission to reach a new and lawful unbundling decision. We would ask the Court to provide specific guidance, even more specific than provided in *USTA*, on the relevant factors going into that decision…. [A]nd we would ask the Court to direct the Commission to the extent that they cannot make a lawful impairment [finding], which we do not believe they can do in most markets for switching and transport, then they have to develop a prompt transition mechanism away from the artificial competition of the UNE-P to the sort of facilities-based competition that Congress envisioned.

10. Four points are noteworthy here. First, counsel admitted that on a remand to the FCC on the delegation issue, the FCC would have to make further impairment determinations. Second, counsel for the BOCs explicitly recognized that a vacatur would not, by itself, relieve them of their current obligations to provision UNEs. Third, Judges Edwards and Williams concurred in that evaluation. Fourth, while the Court's order would (if it ever takes effect) vacate portions of the *Triennial Review Order*, the Court did not grant the BOCs the remainder of the relief they sought. The BOCs expressly asked the D.C. Circuit to rule that by a date certain they could stop providing unbundled mass market switching and dedicated transport, but the Court's decision provides no such relief.

11. In short, as both the Court and the BOCs' counsel recognized, if *USTA II* as issued were to take effect, it would not, by itself, change the law in a fashion that would relieve the BOCs of their obligations to continue to provision UNEs.

12. The Commission can and should enter an order requiring Qwest to continue to provide existing UNEs and combinations at TELRIC rates until such time as all issues regarding Qwest's obligations to do so under federal law and Washington law have been resolved. Doing so would be entirely consistent with the *USTA II* decision.

B. Any Claim by Qwest that *USTA II* Alters Its Obligations to Provide Unbundled Switching and Transport Would Have to Be Resolved Under Its Contractual "Change of Law" Provisions.

13. Qwest is obligated under the current ICAs to provide AT&T with unbundled loops, switching, dedicated transport, other UNEs, and combinations thereof, in accordance with applicable law of all governmental authorities. Thus, so long as Qwest has any obligation under federal law or Washington law to provide UNE-P at TELRIC rates, that obligation is incorporated into Qwest's contracts with AT&T.

14. If *USTA II* were to take effect, therefore, Qwest would not be entitled unilaterally to modify its contractual obligations based on its interpretation of *USTA II*. In other words, if it interprets *USTA II* to permit it to discontinue CLEC access to unbundled mass market switching and dedicated transport (which would be a radically incorrect reading of the case), Qwest must adhere to the ICAs' processes for negotiating or adjudicating claims regarding the effect of asserted changes in law before it could obtain the right to reform its contracts.

15. Since *USTA II* has not yet taken effect, it is not a judicial decision or change of law under the terms of the ICA. But even if it were to take effect, nothing in *USTA II* would affect any term of the ICA, because nothing in *USTA II* constitutes a finding that Qwest has no obligation under either federal law or Washington law to provide unbundled mass market switching and dedicated transport at TELRIC rates. *USTA II* does not address or provide an answer to the question of whether CLECs remain

impaired in any particular area in the absence of access to UNEs and UNE combinations. It makes no finding on impairment and it draws no conclusions as to what obligations the ILECs have to provide UNEs and UNE combinations.

16. Moreover, while the parties are negotiating, and if necessary resolving disputes as to whether *USTA II* operates to invalidate applicable law, Qwest must continue to provide the same services and elements called for in its ICAs. Thus, the change in law procedures guarantee that changes of law will not result in any party making precipitous and potentially disruptive modifications to local phone service based on their self-serving interpretation of new law. Instead, the parties must work together to amend their contracts to reflect any new law. If the parties are unable to agree upon the scope or implementation of a change of law, the Commission is required to resolve the dispute.

C. If *USTA II* Took Effect, Leaving Us Without FCC Guidance, the Commission Would Have Authority to Determine Whether Qwest Has a Continuing Obligation Under Federal Law to Provide UNE-P.

17. Section 252 of the Telecom Act explicitly authorizes state commissions to implement the unbundling requirement contained in 47 U.S.C. § 251(c)(3). It charges state commissions with "ensur[ing]" that arbitrated agreements "meet the requirements of section 251 … including the regulations prescribed by the [FCC] pursuant to section 251…."; and it authorizes state commissions to reject any arbitrated agreement found not to "meet the requirements of section 251 …, including the regulations prescribed by the [FCC] pursuant to section 251."[3] State commissions thus have authority to implement not just FCC regulations issued pursuant to Section 251, but also have authority to enforce Section 251 itself, including the unbundling requirement in 47 U.S.C.

[3] 47 U.S.C. § 252(c)(1), (e)(2)(B).

§ 251(c)(3). This authority extends beyond the formation stage of interconnection agreements.

18. The Telecommunications Act empowers state commissions to interpret and enforce unbundling obligations in arbitration agreements that they have approved.[4] Furthermore, state commissions are authorized to make unbundling determinations on issues that the FCC has not settled. The Act explicitly makes state commissions responsible for arbitrating all "open issues," 47 U.S.C. §252(c), which necessarily includes issues that are open because the FCC has not issued regulations which resolve them.

D. The Commission Also Has Authority to Determine Whether Qwest Must Continue to Provide UNE-P Under Washington Law.

1. Qwest Must Provide Access to Unbundled Network Elements Under Washington Law.

19. Even before the Act was passed, the Washington Commission determined that it had authority under state law to require unbundling. In fact, as early as 1985, the Washington legislature enacted sweeping telecommunications reform and declared it the policy of the State to "[p]romote diversity in the supply of telecommunications services and products in telecommunications markets throughout the state." RCW 80.36.300(5). The Supreme Court of Washington subsequently held that this and other state-law enactments precluded the conferral of monopoly status on any local exchange carrier,[5] and shortly thereafter the Washington commission approved the registration of the State's first alternative local telephone company. In 1995, the Washington Commission then

[4] *Southwestern Bell Tel. Co. v. Public Utility Comm'n of Texas*, 208 F.3d 475, 479-80 (5th Cir. 2000) ("the Act's grant to the state commissions of plenary authority to approve or disapprove … interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved"); *See also Michigan Bell Tel. Co. v. MCIMetro*, 323 F.3d 248, 356-57 (6th Cir. 2003); *BellSouth Telecom. Inc. v. MCIMetro*, 317 F.3d 1270, 1276 (11th Cir. 2003) (en banc).

[5] *See In re Electric Lightwave, Inc.*, 123 Wash.2d 530, 869 P.2d 1045 (1994)

issued an order requiring U S WEST to interconnect with requesting competing telephone companies.[6] In addition, prior to passage of the Act, the Washington Commission concluded that it had "authority to order unbundling pursuant to RCW 80.36.140."[7] The Commission explained that the statute "gives the Commission broad authority over practices and services," and "[t]he way in which services are offered, on a bundled or unbundled basis, certainly falls within the scope" of that authority.[8] The Commission further concluded that the rates for unbundled services must be based on total service long run incremental costs ("TSLRIC"), which is comparable to the total element long run incremental cost ("TELRIC") methodology adopted by the FCC.[9] The 1996 Act's subsequent pre-emption of state-law barriers to entry in Section 253 thus occurred when the State of Washington had already eliminated exclusive franchises on its own and had begun imposing market-opening requirements on its incumbent carriers.

20. After the Act was passed, the Washington Commission has continued to order additional unbundling pursuant to its state law authority. In the proceeding concerning the first interconnection agreement between GTE and AT&T,[10] the Washington Commission addressed its authority to decide the combination issue under state law. It held:

> State commissions, unlike the FCC, also have authority under the Act to implement state policies to the extent the policies are consistent with the Act. This commission has an obligation to implement Washington statutes

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[6] *See Washington Util. & Transp. Comm'n v. US WEST Communications, Inc., et al.,* Docket Nos. UT-941464, -941465, -950146, -950265, Fourth Supp. Order, (Wash. Util & Transp. Comm'n, Oct. 31, 1995) ("*Interconnection Order*").
[7] *Id*. at 51; *accord In re Development of Universal Terms and Conditions for Interconnection and Network Elements to be Provided by Verizon Northwest, Inc.*, Docket No. UT-011219, First Supp. Order ¶ 19 (March 2002).
[8] *Interconnection Order* at 51.
[9] *Id*. at 52.
[10] *See In re AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest Inc.*, Dkt. No. UT-960307, Commission Order Partially Granting Reconsideration, (March 16, 1998) ("GTE Order").

> governing quality of service and incumbent discrimination against new entrants. To the extent those statutes create a need for incumbents to offer element combinations, the Commission must require them to offer combinations to the extent the Commission is able to do so.[11]

21. The Washington Commission then found that GTE's disconnection of network elements would violate Washington's telecommunications law in two respects. First, it held that such disconnections would be anticompetitive and would violate RCW 80.36.186, Washington's anti-discrimination statute.[12] That provision, which had been enacted in 1989, prohibits any "telecommunications company providing noncompetitive services" from "mak[ing] or grant[ing] any undue or unreasonable preference or advantage to itself or to any other person providing telecommunications service," or "subject[ing] any telecommunications company to any undue or unreasonable prejudice or competitive disadvantage." RCW 80.36.186. RCW 80.36.186 further provides that "[t]he commission shall have primary jurisdiction to determine whether any rate, regulation, or practice of a telecommunications company violates this section."

22. Second, the Commission held that, in myriad respects, such disconnections would violate the State's service quality policies, codified in RCW 80.36.300, and service quality standards. It found that disconnection would increase "potential service failure points," "increase costs," "make competitive telecommunications service less efficient" and "less available," "produce unnecessarily high prices for Washington consumers," and "make it more difficult for the Commission to promote diversity" in the telecommunications markets.[13] It would thus violate the service quality policies set forth

[11] *GTE Order* at 6.
[12] *GTE Order* at 7.
[13] *GTE Order* at 6, 8.

in RCW 80.36.300, and was also "particularly likely" to violate the service quality standard of WAC 480-120-500(1):

> The facilities of telecommunications companies shall be designed, constructed, maintained, and operated to ensure reasonable continuity of service, uniformity in the quality of service furnished, and the safety of persons and property.[14]

23. Similarly, in the first U S WEST – AT&T arbitration, the Commission ordered the unbundling of dark fiber, even though the FCC had not included dark fiber in the list of unbundled network elements at the time.[15] On appeal of this issue, the federal district court affirmed, citing to Paragraph 244 of the Local Competition Order, where the FCC states that states may impose additional unbundling requirements so long as such requirements are consistent with the Act and FCC regulations.[16]

24. Accordingly, even if it were determined that Qwest were no longer obligated to provide unbundled mass market switching and dedicated transport under federal law (which is not the state of the law today), state law clearly requires Qwest to provide such unbundling as a matter of Washington law and policy. Since that policy would not be "inconsistent" with the requirements of Section 251, the Washington

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[14] *GTE Order* at 8. For similar reasons, the Commission's Order also required GTE, upon request, to combine for competing carriers network elements that are not ordinarily combined within U S WEST's network. *GTE Order* at 6-10. U S WEST had already initiated an action in federal district court to review a similar requirement in the U S WEST-AT&T agreement. The District Court ruled in U S WEST's favor, based upon the intervening ruling of the 8th Circuit, but the 9th Circuit ultimately affirmed the Commission's ruling on other grounds. *U S WEST Communications v. AT&T Communications*, No. C97-1320R, Order Granting in Part and Denying In Part Cross-Motions for Summary Judgment, Slip Op. at 7 (D. Wash. July 21, 1998) ("District Court Opinion"), *aff'd. MCI v. U S West*, 204 F3d 1262 (9th Cir. 2002).

[15] *In the Matter of the Petition for Arbitration of an Interconnection Agreement between AT&T Communications of the Pacific Northwest, Inc. and U S WEST Communications, Inc. Pursuant to 47 USC Section 252*, Docket No. UT-960309, Commission Order Modifying Arbitrator's Decision and Arbitrator's Recommendations, and Approving Interconnection Agreement With Modifications, pp. 11-12 (November 27, 1996). *See also, In re AT&T Communications of the Pacific Northwest, Inc. and GTE Northwest Inc.*, Dkt. No. UT-960307, Commission Order Approving Interconnection Agreement, p. 20 (August 25, 1997), citing *In the Matter of the Application of Electric Lightwave, Inc. for an Order Authorizing Registration of Applicant as a Telecommunications Company*, Docket No. UT-901029,

[16] *See MCI v. U S West*, 204 F3d at 1268 (9th Cir. 2002)(the 9th Circuit affirmed, although by this time the FCC had added dark fiber to the UNE list.

Commission should apply its state law requirements to require the continued provisioning of loop/switching combinations and dedicated transport at nondiscriminatory rates established by the Commission.[17]

2. The Commission's Power to Require Unbundled UNEs at TELRIC Rates Under Washington Law Has Not Been Preempted.

25. The Telecommunications Act expressly permits states to adopt and enforce pro-competitive measures that go beyond the requirements of federal law. Thus, even if Qwest's obligation to provide unbundled mass market switching or dedicated transport at TELRIC rates under federal law was in procedural hiatus, the Commission could ensure the continued vibrancy of retail competition in Washington by ordering Qwest to continue providing such access to UNEs and UNE-P at rates reflecting forward-looking economic costs as a matter of state law and policy. If *USTA II* were to take effect and the FCC's rules were to be vacated, there would not even be a basis for Qwest to claim that such a state order would be inconsistent with FCC rules, because there would be no FCC rules.

26. The Telecommunications Act specifically preserves the ability of states to impose state-law requirements when reviewing interconnection agreements.[18] Congress preserved this state autonomy with only one qualification: a state commission may

[17] In essence, there is no change of law in the mandate issues because applicable state law will continue to require Qwest to provide mass market switching and dedicated transport.

[18] The Act provides that "nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement." 47 U.S.C. § 252(e)(3). Section 252(e)(3) thus represents "an explicit acknowledgment that there is room in the statutory scheme for autonomous state commission action." *Puerto Rico Tel. Co. v. Telecom. Reg. Bd. of Puerto Rico*, 189 F.189 F.3d 1, 14 (1st Cir. 1999); *see also Southwestern Bell Tel.*, 208 F.3d at 481 (§ 252(e)(3) "obviously allows a state commission to consider requirements of state law when approving or rejecting interconnection agreements"); *AT&T Comms. of NJ v. Bell Atlantic-NJ, Inc.*, No. Civ. 97-CV-5762(KSH), 2000 WL 33951473, at *14 (D.N.J. June 6, 2000) ("§ 252(e)(3) gives states the authority to impose unbundling requirements beyond those mandated by FCC regulations.").

enforce or establish state law requirements "subject to Section 253 of this title," Section 252(e)(3), which prohibits states from imposing legal requirements that create barriers to competitive entry. Thus, so long as it does not invoke state law to create barriers to entry in violation of Section 253 of the Act, a state may exercise its inherent sovereign power to regulate the terms of competitive access to local telephone networks.

27. Two other savings clauses further demonstrate that the Telecommunications Act envisions an active role for states to impose additional unbundling requirements that go beyond the minimum set of requirements, or floor, set by federal law. First, 47 U.S.C. § 261(c) provides that "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part." Second, Section 601(c) of the Telecommunications Act of 1996 establishes a special rule of construction for interpreting the Act. Congress specified that the Act "shall not be construed to modify, impair, or supersede . . . Federal, State, or local law unless expressly so provided."[19]

28. In sum, the Telecommunications Act authorizes this Commission, like every other state commission, to impose unbundling requirements under state law that go beyond what FCC regulations require. A number of states have done so. *See,* for example, *Petition of Verizon New England, Inc.*, 173 Vt. 327, 795 A.2d 1196, 1200 (2002) (holding that Public Service Board's power under Vermont law to order Verizon to combine unbundled network elements was not preempted even if FCC had declined to order such combinations under federal law).

[19] P.L. 104-104 § 601(c)(1), 110 Stat. 56, 143 (1996).

29. In *Southwestern Bell Tel. Co. v. Waller Creek Comms., Inc*., 221 F.3d 812 (5th Cir. 2000), the Fifth Circuit confronted a challenge by Southwestern Bell to a Texas Public Utility Commission decision ordering it to combine UNEs for a competitor. Southwestern Bell had argued that the decision was illegal because it had been based on an FCC regulation specifying when ILECs had to combine elements, which regulation had been vacated by the Eighth Circuit. The Fifth Circuit squarely rejected the argument: "Nothing in the Telecommunications Act forbids such combinations. Even if the Eighth Circuit's decision on this issue is correct – which we do not decide today – it does not hold that such arrangements are prohibited; rather, it only holds that they are not required by law." *Id.* at 821.

30. "[W]here Congress has not expressed an intent to supersede all State or local regulation in a field, a State or local law will be preempted if it is impossible to comply with both the local and Federal law, or the State or local law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[20] Thus where, as here, Congress has specified that federal law constitutes a set of minimum requirements to which the states may add, States may "erect a regulatory framework that expands upon the federal foundation."[21]

31. As the BOCs and the D.C. Circuit recognized, if *USTA II* were to take effect, it would *not* constitute a finding that CLECs are no longer impaired without access to unbundled mass market switching or unbundled dedicated transport, and thus it would *not* constitute a finding that Qwest may stop providing such UNEs at TELRIC rates without violating federal law. Nor would *USTA II* constitute any finding that Qwest

[20] *City of New York v. Job-Lot Pushcart*, 88 N.Y.2d 163, 170, 666 N.E.2d 537, 541, 643 N.Y.S.2d 944, 948 (1996) (citations omitted).
[21] *Id.*, 88 N.Y.2d at 171, 666 N.E.2d at 541, 643 N.Y.S. 2d at 948.

should not be, and is not, required to do so as a matter of Washington law or policy. Unless and until all such issues are conclusively and finally resolved, it is appropriate for the Commission to exercise its broad powers and to maintain the status quo by ordering Qwest to continue to provide all UNEs at TELRIC rates.

E. Public Pronouncements Made by Qwest Require an Order Maintaining Status Quo

32. In the Arizona state *TRO* proceeding, Qwest has made a number of statements that indicate that Qwest will abide by the change of law provisions in its ICAs with the CLECs: "Qwest cannot unilaterally remove a UNE or change the price of a UNE. We agree with the parties who state that Qwest must follow the change of law processes in the interconnection agreement."[22] However, other statements made by Qwest are more troubling.

1. Unbundled switching and dedicated transport will not be Section 251 UNEs once the mandate issues. *Id.,* Tr. at 16.
2. There is a change of law when the mandate issues under Qwest's SGAT provisions. *Id.,* Tr. at 37.[23]
3. The changes in the ICA and the SGAT that must be approved by the Commission will be limited to Section 251 UNEs. *Id.,* Tr. At 15-16.

Stated simply, although Qwest claims it will abide by the ICA change of law process, CLECs have no assurances, absent Commission order, that Qwest will do so. Nor do CLECs have any assurances that Qwest will follow the change in law process, including the dispute resolution process, for all TRO-related UNEs. Since Qwest believes that, at the time the mandate issues, it no longer has to provide mass market switching and dedicated transport (and possibly loops), it has stated that it will only negotiate for these

[22] *In the Matter of ILEC Unbundling Obligations as a Result of the Federal Triennial Review Order,* Docket No. T-0000A-03-0369, Procedural Conference Ariz. Com. Comm. (May 10, 2004), at 15. *See* also *id.,* at 37.

[23] AT&T has no reason to believe Qwest will take a different position regarding its ICAs with CLECs.

elements outside of the scope of Section 252. In addition, it claims that state Commission's have no jurisdiction over these UNEs – a position AT&T vigorously disputes. Even if Qwest follows the change of law process, by invoking the change of law process after the mandate issues, Qwest may fundamentally alter the relationship of the CLECs, Qwest and this Commission, especially if Qwest refuses to recognize its state law obligations. By maintaining the status quo the Commission will affirm Qwest's state law obligations.

33. In addition to this Commission acknowledgement, in granting an interim stand-still request by CLECs in the context of granting Verizon's request for an abeyance of its arbitration proceeding until June 15, 2004, that "Verizon's motion … is granted, subject to the condition that Verizon maintains the status quo under the existing interconnection agreements in Washington State by continuing to offer UNEs consistent with the Agreements at existing rates pending completion of the arbitration,"[24] a number of other state commissions have already acted to provide that the BOCs may not upset the *status quo* pending their resolution of the parties' rights and obligations under the *TRO* and *USTA II*.

34. The Rhode Island Public Utilities Commission recently ordered Verizon's Rhode Island affiliate to continue providing UNE-P and all other existing UNEs, at TELRIC rates, until such time as that Commission is convinced that the ILEC no longer has any legal obligation to do so.[25]

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[24] *In the Matter of the Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc. with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Washington Pursuant to 47 U.S.C. Section 252(b), and the Triennial Review Order*, Docket No, UT-043013, Order No. 04 (May 21, 2004), at 6.

[25] *In re Implementation of the FCC's Triennial Review Order and Review of Verizon Rhode Island's TELRIC Filings,* Rhode Island Public Utilities Commission Docket Nos. 3550 and 2681, Order No. 17990, issued March 26, 2004, at 7-8.

35. The Connecticut Department of Public Utility Control ("DPUC") has issued a stand-still order to SBC Connecticut, pending a decision on its authority to require the continued provisioning of UNEs at previously-determined rates, terms and conditions.[26]

36. The arbitrators in the Texas Verizon arbitration proceeding stopped Verizon from discontinuing any UNE listed in Verizon's October 3, 2003 industry letter, required Verizon to file a 30-day notice of discontinuation if it wanted to exercise its asserted rights to discontinue, and invited CLECs to pursue expedited dispute resolution and seek interim relief under the Texas PUC's rules.[27]

III. CONCLUSION

37. The Commission should grant the Joint CLEC Motion and confirm Qwest's obligation to provide UNEs and essential facilities under state law at TELRIC or cost-based rates. *USTA II* did not relieve Qwest of its current obligations to provide UNEs. As explained herein, *USTA II* does not give Qwest a license to take unilateral action to restrict access to existing UNEs, or to change the prices paid for existing UNEs, unless and until this Commission has reviewed and approved Qwest's proposed changes. Put more simply, this Commission should make crystal clear that *USTA II* does *not* give Qwest free rein to raise UNE rates or to restrict access to UNEs, but that such changes may only be made *after* Qwest properly invokes the change of law provisions of its existing ICAs, *after* it adheres to the processes required to negotiate and, as necessary,

[26] *DPUC Investigation Into the Southern New England Telephone Company Unbundled Loops, Ports and Associated Interconnection Arrangements and Universal Service Fund In Light Of the Telecommunications Act of 1996 – Reopener*, *et al*., Dockets Nos. 96-09-22, 99-03-13, 00-05-06 and 00-12-15, Decision (May 20, 2004).

[27] *Petition of Verizon Southwest for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Texas Pursuant to 47 U.S.C. Section 252 of the Communications Act of 1934, as amended, and the Triennial Review Order*, PUC Docket No. 29451, Order No. 8 (May 20, 2004), at 8-9.

arbitrate any outstanding issues, and, most importantly, *after* it obtains approval from this Commission to implement any changes.

38. Make no mistake – underlying Qwest's advocacy, whether explicitly or implicitly, is Qwest's desire to reduce, if not eliminate, competition. On the other hand, underlying all of the legal issues is one fundamental policy issue – the development of competition. Washington law is, and the Commission's policy to date has been, designed to preserve and promote the development of competition in Washington. The Commission should thus maintain the status quo to preserve competition and ensure that Washington consumers continue to benefit from such competition.

39. The Commission is not preempted from enforcing state law, if required to maintain the status quo. The Telecommunications Act of 1996 clearly articulates the states' right to enforce state law and regulations. Washington law, regulations and prior Commission orders clearly articulate Qwest's obligation to provide UNEs, including mass market switching and dedicated transport, and UNE-P.

40. AT&T respectfully urges that the Joint CLEC Motion be granted.

Respectfully submitted this 25th day of May, 2004.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC., AND AT&T LOCAL SERVICES ON BEHALF OF TCG SEATTLE AND TCG OREGON

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