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 QWEST'S RESPONSE TO JOINT CLEC MOTION FOR AN ORDER REQUIRING QWEST TO CONTINUE TO HONOR EXISTING INTERCONNECTION AGREEMENTS

1 Qwest Corporation ('Qwest") submits the following response to the joint motion filed by Advanced TelCom, Inc. d/b/a Advanced TelCom Group and seven other CLECs (collectively, the "Joint CLECs"). In their motion, Joint CLECs request an order requiring Qwest to honor its obligations under existing Commission-approved interconnection agreements. Qwest intends to do exactly that. However, the Joint CLEC request goes far beyond that simple request, because they also ask the Commission to order Qwest to "maintain the status quo" . . . "pending resolution of judicial review of the Federal Communications Commission's ("FCC's") Triennial Review Order ("TRO") and any resulting FCC action or additional Commission actions."[1] In other words, irrespective of whether *U.S. Telecom Association v. FCC* (*"USTA II")*[2] becomes effective, the Joint CLECs are asking the Commission to ignore it until such time, potentially several years down the road, as judicial review of that decision is completed.

1 Joint CLEC Motion at 1-2.

2 *U.S. Telecom Association v. FCC*, 359 F.3d 554 (D.C.Cir. 2004).

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2 Thus, a careful reading of their motion discloses that the Joint CLECs are really seeking a premature advisory opinion from the Commission that would result in the selective enforcement of their interconnection agreements.[3] In other words, while the Joint CLECs claim that they want the interconnection agreements to be enforced, what they really want is for the Commission to ignore selective portions of those agreements. The Joint CLECs want the Commission to enforce the unbundling provisions of the agreements, but they would like the Commission to disregard the change of law provisions in the very same agreements.

3 Joint CLECs' requested relief is unlawful. Although the language of interconnection agreements varies, all the agreements contain language that requires both ILECs and CLECs to negotiate amendments to their interconnection agreements to implement changes in law. Yet the Joint CLECs' motion asks the Commission to ignore those provisions. The requested relief is also unnecessary because Qwest has reiterated many times its intention to abide by its interconnection agreements (including the change of law provisions) and because Qwest is planning commercial offerings to make available network elements that are no longer required to be unbundled. Relief is also unnecessary, or at least premature, because it is not yet clear whether or when *USTA II* will become effective.

I. BACKGROUND

4 Each of the Joint CLECs is party to a Commission-approved interconnection agreement with Qwest. These agreements set forth both rights and obligations. For example, while Joint CLECs presently have the right to purchase certain unbundled network elements that Qwest is required by law to provide, Joint CLECs have a corresponding obligation, pursuant to procedures set forth in the interconnection agreements, to amend the interconnection agreements to reflect changes in law,

[3] The law has strong policy against advisory opinions (i.e., rulings on issues that are not really at issue). The Washington Supreme Court "steadfastly adhere[s] to the 'virtually universal rule' that there must be a justiciable controversy before the jurisdiction of a court may be invoked." Advisory opinions are prohibited. *Wash. Educ. Ass'n v. Wash. State Pub. Disclosure Comm'n*, 150 Wn.2d 612, 622-623, 80 P.3d 608 (2003). The constraints on an administrative agency are equally strict. This Commission recently held that it will decline to consider disputes that are premature and not yet ripe. *In the Matter of the Petition for Arbitration of AT&T Communications of the Pacific Northwest and TCG Seattle with Qwest Corp.*, Docket No. UT-033035, Final Order Affirming Arbitrator's Report and Decision; Approving Interconnection Agreement (Feb. 6, 2004), at 6-7.

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including changes in law eliminate unbundling obligations no longer legally required.

5 The Joint CLECs' rights to purchase unbundled elements and their corresponding obligations under change of law provisions have been impacted by two recent decisions. First, on October 2, 2003, the TRO[4] became effective. The TRO narrowed ILEC unbundling obligations in significant respects and delegated certain unbundling determinations to state commissions. Second, on March 2, 2004, the *USTA II* decision narrowed ILEC unbundling obligations even further by vacating portions of the rules issued pursuant to the TRO that required the unbundling of mass market switching and high capacity transport and loops.

6 The D.C. Circuit has stayed its vacatur of specific portions of the rules issued under the *TRO* until June 15, 2004 and it is possible that the FCC, the Solicitor General and/or various CLECs will move that the vacatur be stayed pending a possible appeal to the United States Supreme Court. Thus, as matters stand now, portions of the *TRO* rules (such as the elimination of the obligation to provide line sharing) are in effect while other parts of the *TRO* rules (such as the obligation to provide DS1 and DS3 transport) will continue to exist only if *USTA II* is stayed.

7 Qwest will honor the terms of its interconnection agreements, including any terms that obligate it to continue to provide the unbundled switching, transport and loops until the change of law process is completed. However, it is reasonable for Qwest to expect CLECs to likewise honor the terms of the interconnection agreements. Accordingly, if *USTA II* becomes effective, Qwest has the right to proceed under the interconnection agreements to effectuate amendments through the change of law provisions in those agreements. Qwest may thus request that CLECs negotiate amendments to reflect the changes in law that have taken place. If negotiations fail, Qwest will then have the right to invoke applicable dispute resolution provisions in the agreements. But at this point in time, it is impossible to determine the scope of the negotiations, whether the parties will reach an impasse on some issues,

[4] *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al*., CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Order on Remand (rel. Aug. 21, 2003)

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what the precise impasses will be, which CLECs will be involved, or which interconnection agreement provisions will be at issue.

II. ARGUMENT

8 Joint CLECs have made a blanket request that the Commission require Qwest "to honor all of its obligations under existing ICAs and its SGAT, including the provisioning of unbundled local switching (including UNE-P), dark fiber, transport, and high capacity loops at Commission-prescribed rates." Their motion should be denied for three reasons. First, like Qwest, Joint CLECs are legally bound by their existing interconnection agreements, including the agreements' change of law provisions. The Commission may not lawfully disregard the change of law provisions as Joint CLECs have requested. Second, since Qwest has committed to honoring its interconnection agreements and plans to make commercial offerings available, Joint CLECs are not in jeopardy of losing access to any network elements to which they are lawfully entitled. Stated another way, CLECs have suffered no actual or threatened harm and have no basis for requesting relief. Finally, until *USTA II* is effective, it is premature to make any determinations as to the meaning or impact of that decision.

A. CLECS are Bound by their Existing Interconnection Agreements Including the Change of Law Provisions

9 It is settled law that an interconnection agreement is binding on both the ILEC and the CLEC. *CoreComm Communications, Inc. v. SBC Communications Inc.*, File No. EB-01-MD-017 (FCC Rel. May 4, 2004). The interconnection agreements between Qwest and CLECs in Washington contain change of law provisions that require the parties to negotiate amendments to reflect changes in law. Joint CLECs are legally obligated to comply with the change of law provisions.

10 The change of law provisions in Qwest interconnection agreements typically prescribe a straightforward amendment process. Initially, the parties are required to negotiate for a minimum period of time in order to arrive at mutually acceptable amendment language reflecting the particular

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change in law. The minimum negotiation period varies some from agreement to agreement but is usually between thirty and ninety days. If the parties are not able to reach agreement on an appropriate amendment during this period, they must then follow the interconnection agreement's dispute resolution provisions.

11 Both the *TRO* and *USTA II* involve changes of law that may require amendments to interconnection agreements. For example, the *TRO* eliminates Qwest's obligation to provide line sharing after a certain date and Qwest's obligation to provide enterprise switching on an unbundled basis. These changes were not challenged on appeal and will occur regardless of whether *USTA II* becomes effective. However, when it becomes effective, the *USTA II* decision will vacate portions of the TRO rules. It will not be clear until after June 15, 2004 what changes will have to be made to Qwest interconnection agreements beyond those required by the portions of the TRO that are not impacted by *USTA II*.

12 In their motion, Joint CLECs ignore the binding change of law provisions and, thus, request unlawful relief. For example, by requesting the continuation of all unbundled switching, Joint CLECs have asked the Commission to override the FCC's determination in the *TRO* that Qwest is not required to provide unbundled enterprise switching. The Commission may not lawfully enter a blanket order requiring continuation of unbundling obligations that have been eliminated in the TRO or that may be eliminated if *USTA II* becomes effective. Moreover, whether particular unbundling obligations must continue pursuant to interconnection agreements can only be determined after giving effect to the change in law provisions in each agreement. Because the *USTA II* decision is not effective yet, Qwest has not invoked the change of law provisions of the agreement. Given the fact that Qwest has not invoked the change of law provisions, there is no way of knowing whether the CLECs will comply with the change in law process prescribed in their respective interconnection agreements.

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B. CLECs are not in Jeopardy of Losing Access to Network Elements to Which They are Lawfully Entitled

13 To support their motion, Joint CLECs claim erroneously that without Commission action there is an imminent danger of a devastating impact on Qwest's Washington local exchange competitors and their local exchange customers. (Motion, ¶4). There is simply no basis for their alarmist predictions. As Qwest has made clear in its discussions with CLECs and in public statements, Qwest fully intends to honor the terms of its interconnection agreements. Moreover, Qwest has developed commercial products that will be available to CLECs where there is no longer a Section 251 unbundling obligation. Qwest is presently negotiating with CLECs commercial replacements for UNE-P and unbundled transport, loops and dark fiber.

14 There is certainly no imminent danger to CLECs or their customers. If *USTA II* becomes effective, Qwest and CLECs will have to evaluate the change of law provisions in their interconnection agreements and follow the change of law process the agreements specify. This process likely will require some time to complete, especially if there are disputes concerning whether and to what extent there have been changes in law. During this period of implementation, Qwest will continue to honor the existing terms of its interconnection agreements. Thus, there is simply no basis for Joint CLECs' claim that significant disruption will occur just as soon as the D.C. Circuit issues its mandate in *USTA II*. On the contrary, CLECs will be able to continue to offer the same local exchange services they are offering today during the time period during which they and Qwest administer the change of law process.

15 In addition, Qwest intends to offer to all CLECs commercial arrangements that include several service alternatives to UNE-P. Thus, CLECs will still be able to offer competitive service, including service that is currently provided through UNE-P. Qwest has proposed a basic framework for commercial agreements that includes various options for CLECs serving customers via UNE-P today. There are four fundamental components to Qwest's framework: (1) Qwest will continue to offer requesting

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CLECs mass market switching and shared transport combined with unbundled loops, dedicated transport, and high-capacity loops;[5] (2) Qwest will leave in place the current rates established by this Commission for these combinations of network elements until December 31, 2004 or the FCC's adoption of new, permanent unbundling rules, whichever occurs earlier; (3) beginning on January 1, 2005, Qwest will offer these combinations of network elements at market-based rates (subject to caps) that meet the just, reasonable and nondiscriminatory standard of sections 201 and 202 of the Communications Act of 1934; and (4) Qwest will enter into commercial agreements, not subject to the filing and approval requirements of section 252(e) of the Telecommunications Act of 1996, with any CLECs that desire this type of arrangement.

16 To facilitate the development of replacement products for network elements that no longer have to be unbundled, Qwest has been engaging in mediated negotiations with a group of CLECs and in one-on-one negotiations with individual CLECs. Qwest began these negotiations immediately after *USTA II* was issued. Qwest believes that these negotiations have the potential to lead to commercial agreements and very much appreciates the input it has received from the CLECs with whom it has had discussions. Qwest recently announced a commercial agreement with Covad under which Qwest will continue to provide Covad with line sharing throughout Qwest's 14-state region after the TRO's phase-out of the requirement to provide this at regulated prices.

17 To provide an increased level of certainty, Qwest has also filed a petition with the FCC requesting adoption of interim rules that would set the terms on which ILECs will continue to provide network facilities for which the D. C. Circuit vacated the FCC's impairment findings. These rules would establish a commercially reasonable framework until the FCC promulgates new, permanent unbundling rules. Among other provisions, the rules provide for access to network element

[5] The rates for replacement products for DS1 and DS3 transport and loops will be no greater than the special access rates that have already been determined by the FCC to be just and reasonable. Qwest is in the process of evaluating whether a separate product should be developed to replace unbundled dark fiber. Since dark fiber is typically used in lieu of unbundled transport or loops, it is not clear whether a separate replacement product is necessary. However, contrary to Joint CLECs' assertion, Qwest has not determined to discontinue offering dark fiber.

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combinations based on the terms outlined above. Qwest's proposed interim rules would also cap the price of high capacity transport and loops at special access rates.

18 Qwest's commitment to honor its interconnection agreements, its willingness to offer commercial replacements for network elements that no longer have to be unbundled, and its request for interim rules from the FCC provide Joint CLECs and the Commission with ample assurance that CLECs will be able to continue to serve their customers as they do today. There is simply no need for Commission action at this time.

C. Determinations as to the Meaning or Impact of *USTA II* are Premature

19 Many of the Joint CLECs' expressed concerns are based on their own unsupported views as to the positions Qwest will take when *USTA II* becomes effective. The *USTA II* decision has been stayed until June 15, 2004 and it is possible that the FCC, the Solicitor General and/or various CLECs will move that the stay be continued pending an appeal to the United States Supreme Court. While various parties have expressed their views as to whether the Supreme Court will accept an appeal and stay the *USTA II* decision, the Commission and the parties will not know whether *USTA II* will be effective until the mandate issues and any requests for a stay are denied. Thus, it is too early to make determinations as to *USTA II*'s meaning or impact.

20 Similarly, it is too early to make determinations as to whether the unbundling of certain network elements can be required under state law. While Qwest disagrees with Joint CLECs' assertions as to the permissible scope of state unbundling requirements, even Joint CLECs agree that state commissions may not impose or enforce unbundling obligations that are inconsistent with the Act's requirements. *47 U.S.C. §251(d)(3)*. The Act's requirements are set forth in its statutory language, in FCC rules and regulations, and in decisions by the courts such as *USTA II* interpreting the Act. Under section 251(d)(3)(B), state rules are valid only if they are consistent with the requirements of Section 251 as interpreted by the D. C. Circuit in *USTA II*. In addition, under basic principles of

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federal preemption, state unbundling 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."[6] The implicit argument of the Joint 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."[7] Accordingly, the only Washington unbundling requirements that are still valid are those that are consistent with *USTA II* and the FCC unbundling rules that will be unaffected by the issuance of the *USTA II* mandate.

21 Thus, under the Act, state commission authority over unbundling must be consistent with FCC rules. But, even on that issue the Joint CLEC motion jumps the gun. Until *USTA II* becomes effective, it makes no sense for the Commission or parties to attempt to address this complicated legal issue.

22 WHEREFORE, Qwest Corporation respectfully requests that the Commission deny Joint CLECs' Motion for an Order Requiring Qwest to Continue to Honor Existing Interconnection Agreements.

DATED this _____ day of May, 2004.

QWEST

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6 TRO at ¶ 187.

7 *Id.* at ¶ 192.

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