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	)	AT&T'S REPLY TO QWEST'S AND STAFF'S RESPONSE TO JOINT CLEC MOTION
	)	
Pursuant to the Triennial Review	)	
	)	
	)	

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 reply to Qwest Corporation's ("Qwest's") and Commission Staff's ("Staff's") Response to the Joint CLEC Motion for an Order Requiring Qwest to Maintain Status Quo Pending Resolution of Legal Issues ("Joint CLEC Motion").

SUMMARY

1. In the Triennial Review Order ("*TRO*"), the Federal Communications Commission ("FCC"): (1) determined that there were rebuttable presumptions as to whether or not competitive local exchange carriers ("CLECs") would be impaired in specific market segments if incumbent local exchange companies ("ILECs") were not required to make unbundled network elements ("UNEs") available to the CLECs in those market segments, and (2) established processes to rebut those presumptions. The *USTA II* decision *did not* invalidate the Federal 1996 Telecommunications Act requirement that

Qwest make UNEs available,[1] nor does *USTA II* affect the requirement that Qwest's rates for UNEs be based upon total element long-run incremental cost ("TELRIC").

2. Nevertheless, Qwest's conduct has left no doubt that it is actively pursuing actions to deny, restrict, and administratively hamper CLEC access to UNEs—in particular mass market switching. Through the use of industry letters, Qwest notified CLECs that it intends to withdraw the availability of certain UNEs either completely or within specific consumer market segments and substitute its newly developed products and pricing for that of those UNEs previously offered under TELRIC pricing.[2] Qwest's conduct speaks far louder than its words—or rather, its Response's assertions that it is allegedly honoring its change in law provisions and not acting upon the *USTA II* decision in advance of its becoming effective.[3] This holds true as well for Staff's assumptions that Qwest is operating within the confines of Qwest's contract change of law provisions.

3. In light of Qwest's conduct, there appears to be three questions the Commission must resolve in determining whether to grant a request to maintain the "*status quo*." First, the Commission should determine what is and is not affected by the

[1] The D.C. Circuit temporarily stayed its vacatur "until no later than the later of (1) the denial of any petition for rehearing or rehearing en banc or (2) 60 days from [March 2, 2004]." 359 F.3d, at 595. On April 14, 2004, at the request of the FCC, the Court extended the stay for an additional 45 days, or until June 15, 2004. Now, the stay may be extended. The FCC (and the CLECs independently) recently asked the Court for a further stay of its mandate pending the filing of timely petitions for certiorari. *USTA v. FCC*, CADC No. 00-1012, Motion of the Federal Communications Commission to Stay the Mandate Pending the Filing of Petitions For a Writ of Certiorari (May 24, 2004)("FCC Motion for Stay of Mandate"). The FCC's rationale for a further stay mirrors, in substance, the reasons why the Commission should act in a timely manner to preserve the *status quo* until the Commission can determine the rights and obligations of Qwest and its CLEC customers. As the FCC argues, absent a stay of the D.C. Circuit's mandate, ILECs "have indicated that once the mandate issues, they will immediately stop providing certain network elements at TELRIC rates . . ." which will create "disruption [that] could cripple CLECs" ability to retain existing customers and attract new ones." FCC Motion at 11. If the Court refuses to stay its mandate, it will be up to the Commission to maintain stability in the Washington telecommunications marketplace.

[2] *See*, Qwest March 12, 2004 Letter to AT&T threatening to withdraw mass market switching in 60 days and transition CLECs to "other service options;" *see also,* Qwest's Response to Joint CLEC Motion at ¶ 15.

[3] *See e.g.,* Qwest Response to Joint CLEC Motion at ¶¶ 1 & 8 ("until *USTA II* is effective, it is premature to make any determinations as to the meaning or impact of that decision").

USTA II decision. Second, the Commission should determine what constitutes a "change of law" under the general change provisions in the interconnection agreements. And third, the Commission should determine its own authority to require unbundling obligations based upon state and federal law.

ARGUMENT

I. THE USTA II DECISION ONLY SET ASIDE THE FCC'S RULES FOR DETERMINING WHEN CERTAIN CURRENTLY AVAILABLE UNES WOULD NO LONGER BE AVAILABLE; QWEST'S OBLIGATIONS UNDER THE 1996 ACT AND ITS INTERCONNECTION AGREEMENTS REMAIN IN TACT.

4. As a threshold matter, it is important to differentiate what is and is not affected by the *USTA II* decision. Under § 251(c)(3) of the Act, ILECs must provide access to UNEs. Essentially, the Act requires Qwest to share its network and services with competitors seeking entry into the local exchange marketplace.[4] Under 47 U.S.C. § 251(c), a CLEC can obtain access to Qwest's network in one of three ways. A CLEC may: (1) purchase local telephone services at wholesale rates from Qwest for resale to end users, (2) lease elements of the Qwest network "on an unbundled basis," or (3) interconnect its own facilities with Qwest's network.[5] The Act also requires that Qwest offer non-discriminatory access[6] to UNEs at wholesale prices.[7] With respect to wholesale prices, the United States Supreme Court has definitively supported the FCC's TELRIC

[4] *MCI Telecomm. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 328 (7th Cir. 2000), *cert. denied*, 31 U.S. 1132, 121 S.Ct. 896, 148 L.Ed.2d 802 (2001).
[5] *AT&T Communications of California, Inc., et al., v. Pacific Bell Telephone Company,* 228 F.Supp.2d 1086 (2002); *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, at 371-373, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).
[6] 47 U.S.C. § 251(c)(3)(A)(ii).
[7] Communications Act of 1934 at §§ 3(43, 46), 251(c)(4) and as amended, 47 U.S.C.A. § § 153(43, 46), 251(c)(4), and 252(c)(4)(A).

methodology for determining an ILEC's cost to produce UNEs.[8] Thus, the requirement that Qwest provide non-discriminatory access to UNEs at wholesale prices based on the FCC's TELRIC methodology remains in effect, even if the *USTA II* mandate results in the vacatur of certain FCC unbundling rules.

5. In the *TRO,* the FCC: (1) established nationwide rebuttable presumptions that CLECs would be impaired without access at TELRIC rates to mass market switching and high-capacity dedicated transport; (2) prescribed procedures for rebutting the FCC's presumptions and, going forward, for determining whether or not currently available UNEs may be discontinued; and (3) delegated to the states practical authority to define relevant markets and assess whether CLECs would be impaired if ILECs were allowed to discontinue providing certain services. The Court in *USTA II* held that the FCC's conclusions in the *TRO* did not clearly support a nationwide impairment determination with respect to mass-market switching,[9] and that the FCC's order "suggests that the Commission doubts a national impairment finding" for high capacity dedicated transport.[10] The Court also held that such a substantial delegation of authority to the states by the FCC was not lawful.[11]

6. The Court did not substitute impairment findings of its own or adopt an alternative plan. Rather, it vacated the rules associated with the FCC's nationwide impairment findings and delegation of authority regarding mass-market switching and high-capacity dedicated transport (DS1, DS3, and dark fiber facilities) UNEs. These

[8] *Verizon Communications, Inc. v. FCC,* 535 U.S. 467, 122 S. Ct. 1646 (2002).
[9] 359 F. 3d at 569-571.
[10] 359 F. 3d at 574.
[11] 359 F.3d at 564, 565 & 568.

matters were remanded to the FCC for the FCC to implement a new scheme.[12] Thus, a mandate in *USTA II* would—if and when it becomes effective—do nothing more than require the FCC to adopt rules effectuating the CLECs' federal right to UNEs established by § 251(c)(3) of the Act in a manner that comports with *USTA II*.

7. Post *USTA II*, the unbundling obligations of ILECs under 47 U.S.C. §251(c)(3) remain intact. Indeed, the *USTA II* Court rejected the ILECs' assertions that the FCC's impairment test was too open ended.[13] The Court did *not* alter the FCC's basic definition of impairment, nor did it find that any specific network element is not subject to an unbundling requirement. While faulting the FCC's rationale for requiring certain elements to be unbundled, the Court supported the FCC's unbundling requirements as to others.[14] *USTA II* did not (or could not) countermand the determination of the Supreme Court upholding TELRIC as the appropriate cost basis for pricing UNEs. Consequently, in the event that a mandate in *USTA II* becomes effective, the federal statutory obligations of Qwest to provide as UNEs, such as mass-market switching, high-capacity transport, and other transport facilities, under the Act would remain in full effect. The real question is whether, during the period between *USTA II* becoming effective and the FCC adopting new rules, the Commission can and should maintain the status quo to fill the void during the absence of effective FCC unbundling regulations.

8. Until *USTA II* takes effect it is not legally binding. But even if it were to take effect, nothing in *USTA II* would "materially affect any material term" of the

[12] 359 F.3d at 571 & 574.
[13] 359 F. 3d at 571-572.
[14] The *USTA II* decision supported the FCC's conclusion that certain section 271 checklist items, i.e., loop, transport, switching and signaling/databases, are required to be unbundled. 359 F. 3d at 588. In addition, at least one ILEC, Verizon, expressly asked the D.C. Circuit to rule that it could stop providing certain UNEs by a date certain, which the Court refused to do.

interconnection agreements, 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, dedicated transport and all other UNEs at TELRIC rates. In particular, *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 any UNEs or any UNE combination. *USTA II* thus draws no conclusions as to what obligations the ILECs have to provide UNEs and UNE combinations.

II. EXISTING INTERCONNECTION AGREEMENTS BETWEEN QWEST AND CLECS OBLIGATE QWEST TO CONTINUE PROVIDING UNEs AT TELRIC RATES ON A NON-DISCRIMINATORY BASIS.

9. Regardless of how it interprets *USTA II,* that decision does not permit Qwest to modify or discontinue AT&T's or other CLECs access to unbundled mass market switching, dedicated transport or any other UNE without following its interconnection agreements' unambiguous process for negotiating or adjudicating the parties' respective claims regarding the effect of asserted changes in law. And while Qwest suggests in its Response to the Motion that it is following the change in law provisions, in fact, it is assuming a material change in law and actively seeking to renegotiate UNE availability with CLECs.

10. AT&T and TCG's interconnection agreements with Qwest contain processes for modification, if there is a material change to applicable law. An agreement cannot be changed until the parties have negotiated or arbitrated mutually acceptable language to implement the purported change in applicable law. For example, Section 2.2 of the AT&T agreement provides, in pertinent part:

> To the extent that the Existing Rules are vacated, dismissed, stayed or *materially changed* or modified, then this Agreement shall be amended to

> reflect such legally binding modification or change of the Existing Rules. Where the Parties fail to agree upon such an amendment within sixty (60) Days after notification from a Party seeking amendment due to a modification or change of the Existing Rules or if any time during such sixty (60) Day period the Parties shall have ceased to negotiate such new terms for a continuous period of fifteen (15) Days, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement. It is expressly understood that this Agreement will be corrected, or if requested by CLEC, amended as set forth in this section 2.2, to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement. Any amendment shall be deemed effective on the effective date of the legally binding change or modification of the Existing Rules for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered. *During the pendency of any negotiation for an amendment pursuant to this Section 2.2, the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement.* For purposes of this section, "legally binding" means that the legal ruling has not been stayed, *no request for a stay is pending, and any deadline for requesting a stay designated by statute or regulation, has passed*.[15]

This Section 2.2 comes directly out of Qwest's SGAT and would, therefore, likely reflect what is contained within many interconnection agreements with other CLECs.

11. By sending out its March 12, 2004 letter to CLECs and filing its March 22, 2004 letter to the Commission, Qwest has clearly and erroneously taken the position that *USTA II* requires a modification of the agreement's material terms, and has just as clearly conceded that the change of law provision quoted above would apply—but no change, as yet, has taken place at least with respect to *USTA II*. Nevertheless, Qwest is actively seeking to amend interconnection agreements to alter mass market switching UNEs and pricing. As noted above, until *USTA II* takes effect it is not legally binding; even if it were to take effect, nothing in *USTA II* would "materially affect any material term" of the agreement, because nothing in *USTA II* constitutes a finding that Qwest has

[15] Emphasis added.

no obligation under the law to provide unbundled mass market switching, dedicated transport and all other UNEs at TELRIC rates.

III. THE ACT RECOGNIZES THE COMMISSION'S STATE AUTHORITY UNDER WASHINGTON LAW TO ADOPT AND ENFORCE UNBUNDLING REGULATIONS.

12. The Commission has federal and state law authority to establish rules for determining whether particular UNEs should continue to be offered. Since telecommunications is part of interstate commerce, primary jurisdiction rests with the Federal government. However, in §152(b) of the Communications Act of 1934 (which was not changed by the 1996 Telecommunications Act), Congress reserved to the states authority over "charges, classifications, practices, services, facilities or regulations for or in connection with intrastate communication services."[16] Yet, when a rate or service necessarily involves both jurisdictions, state authority may be exercised unless state authority is expressly pre-empted by Congress or state authority is exercised in a manner that is an obstacle to accomplishment of the purposes of Congress. As the United States Supreme Court noted:

> While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines*, 312 U.S. at 67, 61 S.Ct., at 404, it is also true that a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority. This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency.[17]

[16] 47 U.S.C. §152(b)(1).
[17] *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890, 1901, 90 L.Ed.2d 369, 374 (1986).

Significantly, §251(d)(3) of the Act recognizes state authority to enforce a State's unbundling rules. Thus, while the Act expressly relies on the Commission to implement the federal standards, under this provision, the Commission's right to establish and enforce additional requirements under State law is unaffected so long as the State regulations are not inconsistent with § 251. In this regard, it is noteworthy that the text of § 251 is preceded by a header that reads, "PART II – DEVELOPMENT OF COMPETITIVE MARKETS." Thus, state regulations that promote and preserve the ability of CLECs to provide consumers competitive alternatives are fully consistent with the federal Act. Indeed, in the absence of FCC regulations regarding mass-market switching and high capacity dedicated transport UNEs, state unbundling regulations or requirements to maintain the *status quo* are essential to fulfill Congressional objectives.

13. Under the circumstances, and particularly in view of the fact that the Act preserved state authority, if the *USTA II* decision becomes effective, it is appropriate and consistent with the Federal Constitution, the Act and state law for the Commission to exercise its authority to ensure the continued availability of UNEs.

14. As with federal authority, the Commission also has ample state authority to require unbundling. It is the traditional role of state governments to act as a decisive

counter-force to firms that occupy "bottlenecks" in commerce.[18] Typically, such bottlenecks occur when one interest or group controls a location or facility that cannot be economically replicated by competitors. An entity controlling such an "essential facility" may attempt to defeat competition by either refusing to allow competitors access to it or permitting access under terms, conditions, or prices that are discriminatory relative to the provision of the same facility to the entity's own or affiliated retail operations. Accordingly, it is well established under common, statutory, and case law that government may compel the provision of such bottleneck facilities to non-related entities on terms that are equal, in every respect, with the terms under which they are provided to affiliated operations.[19]

15. Precisely because utilities' facilities often cannot be economically replicated by competitors, legislatures have traditionally conferred upon state regulatory agencies broad powers to prevent utilities from unjustly and unduly discriminating in the provision of services and products, including discriminations that are competitive. In Washington, this is seen in RCW 80.36.300 and RCW 80.36.140. Without repeating, but

[18] *Munn v. Illinois*, 94 U.S. 113, 24 L.Ed. 77 (1877) ("This brings us to inquire as to the principles upon which this power of [State] regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." 94 U.S. at 125-126).

[19] *See United States v. Terminal Railway Association of St. Louis,* 224 U.S. 383, 411, 32 S. Ct. 507, 516, 56 L. Ed. 810 (1912) (use of a critical railroad bridge owned by a group of railroad companies must be made available to unaffiliated competing railroad companies "upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.")

rather by reference, AT&T points back to its discussion in its Response to the Joint CLEC Motion on page 10, beginning in paragraph 9, wherein it discusses, at length, this Commission's state-created authority. Contrary to Qwest's assertions in its Response, the CLECs are not asking this Commission to act in a fashion that is contrary to the federal unbundling requirements. Rather, the CLECs are asking this Commission to act in concert with the federal law, as it currently exists.

CONCLUSION

16. Qwest's actions speak louder than its words; it is not abiding by its interconnection agreements and awaiting a real, material change in law before it proceeds to alter its obligations. It is, as evidenced by its letters to CLECs and this Commission, actively engaged in efforts to materially alter the terms and conditions under which it offers certain UNEs, including mass market switching and others. Therefore, for the foregoing reasons, AT&T respectfully requests that the Washington Commission grant the Joint CLEC's Motion to maintain the *status quo*.

Respectfully submitted this 4th day of June, 2004.

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

By:_____

Rebecca B. DeCook
Mary B. Tribby
AT&T Law Department
1875 Lawrence Street, Suite 1575
Denver, CO 80202
(303) 298-6357 (Tel)
(303) 298-6301 (Fax)
decook@att.com

James K. Tarpey
Thomas R. O'Donnell
Holland & Hart, LLP
8390 East Crescent Parkway, Suite 400
Greenwood Village, CO 80111
(303) 290-1634
jtarpey@hollandhart.com