BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of:	)	
	)	Docket No. UT-033044
QWEST CORPORATION	)	
	)	JOINT CLEC RESPONSE IN
To Initiate a Mass-Market Switching and	)	SUPPORT OF MOTION FOR AN
Dedicated Transport Case Pursuant to the	)	ORDER REQUIRING QWEST TO
Triennial Review Order	)	MAINTAIN STATUS QUO
	)	

Advanced TelCom, Inc., d/b/a Advanced TelCom Group, Eschelon Telecom of Washington, Inc., Global Crossing Local Services, Inc., Integra Telecom of Washington, Inc., Pac-West Telecomm, Inc., Time Warner Telecom of Washington, LLC, and XO Washington, Inc. (collectively "Joint CLECs"), provide the following response to the opposition of Qwest Corporation ("Qwest") and Commission Staff ("Staff") to the Joint CLEC's Motion for an order requiring Qwest to continue to maintain the status quo of its obligations under existing Commission-approved interconnection agreements ("ICAs") with any competing local exchange carrier ("CLEC") or Qwest's Statement of Generally Available Terms ("SGAT") pending resolution of judicial review of the Federal Communications Commission's ("FCC's) Triennial Review Order ("TRO")[1] and any resulting FCC action or additional Commission action, including but not limited to resolution of the issues raised in the Commission's May 6, 2004, Notice of Opportunity to Submit Comments ("Notice").

[1] *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).

DISCUSSION

1. Qwest and Staff oppose the Joint CLECs' Motion on very different grounds. Qwest maintains that the Motion lacks substance and any demonstration of necessity, based largely on Qwest's claims to have provided adequate assurances of the continued availability of unbundled network elements ("UNEs") or equivalent services through Qwest's public statements, offers to negotiate commercial agreements, and proposal to the FCC to adopt interim unbundling rules. Staff, on the other hand, bases its opposition on procedural grounds, contending that this proceeding is not the proper forum to address the Joint CLECs' concerns. Neither Qwest nor Staff raises sufficient justification to deny the Motion.

2. Qwest first contends that CLECs are bound by their existing interconnection agreements, including the change of law provisions. The Joint CLECs do not dispute that contention, but it misses the point. The Joint CLECs take the position that the D.C. Circuit's decision in *USTA II*,[2] if and when it becomes effective, does not represent a change of law that requires amendment to the existing ICAs.[3] The Court vacated some of the rules that the FCC established in the TRO, but that decision has no impact whatsoever on the requirements of the Telecommunications Act of 1996 ("Act"), including Sections 251 and 271, or on Qwest's obligations under Washington law. The Joint CLECs continue to believe that the provisions of their existing ICAs, as well as Qwest's SGAT,

[2] *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[3] Qwest erroneously claims that the Joint CLECs have requested that the Commission override FCC rules that are currently in effect and would not be affected by *USTA II*. The Joint CLECs' motion does not include such rules. To the contrary, at least some of the Joint CLECs have already executed amendments to their ICAs to incorporate the provisions of the TRO. *See, e.g.*, Docket No. UT-960356, Order Approving Fourteenth Amendment to ICA Between XO and Qwest (approval of

properly reflect those legal requirements, even in the absence of the FCC rules that the D.C. Circuit has vacated.

3. The Joint CLECs' position thus is fundamentally different than Qwest's stated position. The parties do not even agree on whether there has been a change of law that triggers the applicable provisions of the ICAs, much less on any substantive issues that might arise if the change of law process were applicable. Faced with this immediate impasse, Qwest would likely file petitions with the Commission (or potentially a private arbitrator) for enforcement of its ICAs with virtually all CLECs in Washington, leading to the very waste of Commission and party resources that gave rise to the motion. The Joint CLECs do not request that the Commission abrogate any party's contractual rights. Rather, the Joint CLECs request only that the Commission maintain the status quo until the Commission has determined, in a generic proceeding in which all interested parties may participate, whether and to what extent a change of law has occurred.

4. Qwest also claims that the relief that the Joint CLECs have requested is unnecessary because CLECs are not in jeopardy of losing access to UNEs to which they are "lawfully" entitled. The Joint CLECs find little solace in Qwest's representations, particularly if the change of law provisions in their ICAs could be interpreted to automatically incorporate changes of law into the agreements or are otherwise indefinite on the process and procedures applicable to changes of law. Again, the Joint CLECs have no guarantee that Qwest will not take unilateral action or establish an arbitrary date by which it will consider the "administration" of "the change of law process" to be complete based on Qwest's interpretation of the ICAs.

TRO amendment).

5. Qwest's offer to negotiate commercial arrangements for UNEs for which no FCC rule will apply similarly does not assuage the Joint CLECs' concerns. The "market-based rates" that Qwest is offering are Qwest's special access tariff rates,[4] which are substantially higher than the UNE prices that the Commission has established.[5] The enormous price increases this represents will be just as disruptive to CLECs' ability to serve customers as Qwest's immediate discontinuance of those UNEs would be. Qwest's condition on this offer that the commercial agreement not be filed with, or subject to approval by, the Commission raises its own issues, not the least of which are the likelihood of discrimination and the unavailability of any such agreements to other carriers under Section 252(i).

6. Qwest's petition to the FCC for interim rule-making only heightens the Joint CLECs' concerns. Qwest's proposed rules expand the scope of the *USTA II* decision by including high capacity loops and preempting state commissions from enforcing any state law requirement that Qwest be required to offer the UNEs that are the subject of the vacated rules. Adoption of such rules would ensure that CLECs have no option for obtaining such UNEs other than as special access circuits or as Qwest-created services at "market-based" rates that are dictated by Qwest without any Commission involvement or review. Far from providing any assurances of the continued availability of UNEs, Qwest's petition for rulemaking seeks to virtually guarantee that UNEs (as opposed to Qwest tariffed services) will *not* be available.

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[4] Qwest Response at 7, n.5.

[5] For example, Qwest's special access rate for DS1 channel terminations in zone 1 (wire centers where a significant number of CLECs have collocation and Qwest has pricing flexibility from the FCC) is $132.25, Qwest Tariff F.C.C. No. 1, pp. 17-91, almost double the UNE rates the Commission established for comparable DS1 loops of approximately $69.00.

7. Finally, Qwest argues that determinations as to the meaning of *USTA II* and Qwest's obligations under state law are premature. Of course, Qwest then ignores its own argument by taking the position that "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."[6] The Joint CLECs have not sought a ruling from the Commission on either of these issues. Rather, the Joint CLECs' discussion of Washington law was addressed to the Commission's authority to order the relief that the Joint CLECs' requested, *i.e*., to require all parties to ICAs to maintain the status quo until the Commission (or the FCC or the courts) has clarified Qwest's unbundling obligations under the Act or Washington law. Qwest's arguments, therefore, should be made as part of its comments on the Commission's Notice or in response to a newly opened docket to examine these issues, not in the context of the Joint CLECs' Motion for interim relief.

8. Staff, unlike Qwest, opposes the motion on procedural grounds. Staff states, "If the request is that the Commission use its role as arbitrator of interconnection agreements to interpret whether the Act might still require unbundling of the switching and transport elements at TELRIC prices, that question should be presented through the arbitration process."[7] As discussed above, however, the Joint CLECs are not asking the Commission to make that determination in granting the Motion. Rather, the Joint CLECs ask only that the Commission require all parties to maintain the status quo while the Commission undertakes such an inquiry on a generic basis. The Commission, through the Notice, has already recognized the necessity, and indicated a willingness, to examine such

[6] *Id*. at 9, ¶ 20.

[7] Staff Response at 3, ¶ 6.

issues in this proceeding. Whether in this or some newly opened generic docket, however, the Commission should not be trying to address these issues simultaneously with multiple petitions for Commission action from Qwest or CLECs resulting from Qwest's efforts to implement its interpretation of *USTA II*, and Qwest's ICAs.

9. Staff also states, "If the request is for an order under state law requiring, at least temporarily, exactly what the *USTA II* court held the FCC could not require under the Section 251 impair standard, Staff submits that such an order, even a temporary one, is very likely preempted as inconsistent with Section 251 of the Act."[8] Staff misconstrues *USTA II*. The D.C. Circuit vacated and remanded the FCC's determinations that CLECs would be impaired without access to unbundled mass market switching, high capacity transport, and dark fiber. The Court did not find that no impairment existed, or that these elements could not be considered UNEs as a matter of law. The Court merely required the FCC to undertake an impairment analysis under different standards. The Act, on the other hand, expressly preserves state unbundling requirements that are consistent with, and do not substantially prevent implementation of, the requirements of Section 251 of the Act.[9] The vacatur and remand of FCC rules on these UNEs does not even arguably create an inconsistency with Section 251 or substantially prevent implementation of its requirements if the Commission were to order that these UNEs continue to be available while the Commission determines Qwest's unbundling

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[8] *Id.*, ¶ 7.

[9] 47 U.S.C. § 251(d)(3).

obligations under Washington law. The Commission thus has more than ample authority under both federal and state law to grant the relief that the Joint CLECs have requested.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Motion and the responses of other parties in support of the Motion, the Commission should issue an order requiring Qwest to continue to maintain the status quo of its obligations under existing Commission-approved ICAs with any CLEC or under Qwest's SGAT pending resolution of judicial review of the TRO and any resulting FCC action or additional Commission action, including but not limited to resolution of the issues raised in the Commission's Notice.

DATED this 4th day of June, 2004.

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By _____
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