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 REPLY TO RESPONSE OF AT&T, COVAD AND NWCCC TO JOINT CLEC MOTION FOR AN ORDER REQUIRING QWEST TO CONTINUE TO HONOR EXISTING INTERCONNECTION AGREEMENTS

1 Qwest Corporation ("Qwest") submits the following reply to the responses filed by (1) Covad Communications Company and the Northwest Competitive Communications Coalition ("NWCCC") and (2) AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively, "AT&T") to the Joint CLECs' motion for an order requiring Qwest to honor existing interconnection agreements. As Qwest stated in its May 25, 2004 response, the Joint CLECs are actually requesting that the Commission disregard the interconnection agreements' change of law provisions and ignore the effects of the FCC's Triennial Review Order (the "*TRO*")[1] and the D.C. Circuit Court of Appeals' decision in *United States Telecom Association v. Federal Communications Commission* ("*USTA II* ").[2]

[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 (FCC rel. August 21, 2003).

[2] 59 F.3d 554 (D.C. Cir. March 2, 2004).

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2 None of the arguments made by Covad, NWCCC and AT&T overcomes Qwest's objections to the relief requested in the Joint CLECs' motion. As Qwest stated in its response, Joint CLECs are legally bound by their existing interconnection agreements, including the agreements' change of law process. The Commission may not lawfully disregard the change of law process as Joint CLECs have requested. It is noteworthy that in its response, AT&T agrees that the change in law process must be followed but then supports the Joint CLEC motion even though the relief requested – a blanket order requiring only that unbundling obligations under existing interconnection agreements continue to be enforced – would violate the very change of law process AT&T espouses.

3 Since Qwest has committed to honoring its interconnection agreements (including the change of law provisions) and plans to make commercial offerings available, the CLECs are not in jeopardy of losing access to any network elements to which they are lawfully entitled. This is particularly true for Covad now that it and Qwest have entered into a commercial agreement to replace the line sharing obligations eliminated in the *TRO*. If the CLECs contend that particular network elements must still be unbundled after *USTA II*, they will have the ability to argue their point through the change of law process under their respective interconnection agreements. As matters stand now, the parties do not even know when or whether *USTA II* will become effective.

Covad's and NWCCC's Response

4 In their response, Covad and NWCCC make a number of new arguments. Qwest addresses each in turn.

5 First, Covad and NWCCC erroneously assert that, even in the absence of FCC rules laying out the boundaries of the ILECs' unbundling obligations, section 251(c)(3) of the Telecommunications Act of 1996 (the "Act") standing alone imposes a self-executing, blanket unbundling duty on the ILECs. This argument misreads the Act and ignores the courts' authoritative (and binding) construction of the statute. Section 251(c)(3) does not stand by itself and, as the Supreme Court made very clear, does

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not authorize "blanket access to incumbents' networks."[3] Rather, section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]," 47 U.S.C. § 251(c)(3) — that is, only if the FCC determines that the "necessary" and "impair" tests of section 251(d)(2) are satisfied. As the Supreme Court and D.C. Circuit have held, the section 251(d)(2) requirements reflect Congress's decision to place a real upper bound on the level of unbundling regulators may order.[4]

6 Congress explicitly assigned the task of applying the section 251(d)(2) impairment test and "determining what network elements should be made available for purposes of subsection [251](c)(3)" to the *FCC*. 47 U.S.C. § 251(d)(2). The Supreme Court confirmed that as a precondition to unbundling, section 251(d)(2) "requires the [Federal Communications] Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[5] And the D.C. Circuit just confirmed rather dramatically that Congress did not allow the FCC to have state commissions perform this work on its behalf.[6] Covad's and NWCCC's suggestion that the Act establishes self-executing and blanket unbundling obligations that this Commission may enforce in the absence of FCC rules is thus exactly backwards; instead, the Act imposes significant substantive limits on unbundling and assigns the job of determining the location of those boundaries to the FCC.

7 Second, Covad and NWCCC next suggest that the Commission has plenary authority under state law to order whatever unbundling it chooses, and to support this argument, they cite the various state-law savings clauses contained in the Act. What Covad and NWCCC ignore is that these

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3 *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 390 (1998) ("*Iowa Utilities Board*").

4 *See Iowa Utilities Board*, 525 U.S. at 390 ("We cannot avoid the conclusion that if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included § 251(d)(2) in the statute at all."); *USTA v. FCC*, 290 F.3d 415, 418, 427-28 (quoting *Iowa Utilities Board's* findings regarding congressional intent and section 251(d)(2) requirements, and holding that unbundling rules must be limited given their costs in terms of discouraging investment and innovation).

5 *Iowa Utilities Board*, 525 U.S. at 391-92.

6 *See USTA II*, 359 F.3d at 568.

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savings clauses preserve independent state authority *only to the extent it is consistent with the Act*, including section 251(d)(2)'s substantive limitations on the level of unbundling that may be authorized. Section 251(d)(3), for example, protects only those state enactments that are "consistent with the requirements of this section" — which a state-law unbundling order ignoring the Act's limits would clearly not be. 47 U.S.C. § 251(d)(3). Likewise, sections 261(b) and (c), which Covad and NWCCC cite, both protect only those state regulations that "are not inconsistent with the provisions of this part" of the Act, which includes section 251(d)(2). 47 U.S.C. §§ 261(b), (c). Nor does section 252(e)(3) help Covad or NWCCC; that simply says that "nothing in *this section*" — that is, section *252* — prohibits a state from enforcing its own law, 47 U.S.C. § 252(e)(3) (emphasis added), but the relevant limitations on the scope of permissible unbundling that are at issue are found in section *251*. See 47 U.S.C. § 251(d)(2).

8 Covad's and NWCCC's lengthy recitation about the various potential sources of Washington law that might support state-law unbundling obligations is thus very much beside the point. The relevant question is not whether sweeping unbundling obligations can be cobbled together out of state law, but rather whether any such obligations would be consistent with *Congress's* substantive limitations on the permissible level of unbundling, as authoritatively construed by the Supreme Court and the D.C. Circuit. Given the courts' unambiguous holdings that the FCC's various iterations of blanket unbundling rules violated *the Act itself*, an attempt to reimpose or maintain those same obligations on state-law grounds would similarly violate the Act and be unlawful.[7]

9 Third, Covad and NWCCC also cite paragraph 191 of the *TRO* out of context. Paragraph 191 is the first paragraph in the *TRO* that discusses limits on state bundling authority and it merely notes that states may under certain circumstances order unbundling and that some states in the past had added

[7] Covad's and NWCCC's reliance on the Commission's Interconnection Order (Fourth Supplemental Order Rejecting Tariff Filing and Ordering Refilings: Granting Complaints, In Part, *WUTC v. U.S. West Communications, Inc*., WUTC Docket No. UT-941464, et al. (October 30, 1995)), is also misplaced because that order was issued well before any of the provisions of Act at issue here had been authoritatively construed by the courts. In fact, it was issued before the Act became law. The order does not reflect the legal understanding of the Act that exists today.

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network elements to the national list. The paragraphs that follow paragraph 191 make it clear that the law has changed and now severely limits the permissible scope of state law unbundling authority. In Paragraph 193, for example, the FCC states: "Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 and do not "substantially prevent" the implementation of the federal regulatory regime." In paragraph 195 of the *TRO*, the FCC concludes as follows:

> If a decision pursuant to state law were to require unbundling of a network element for which the Commission has either found no impairment—and thus has found that unbundling that element would conflict with the limits of section 251(d)(2))—or otherwise declined to require unbundling on a national basis, we believe it unlikely that such a decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(c).

10 The final authority that Covad and NWCCC rely upon is a recommended decision dated February 17, 2004, issued by a Maine Public Utility Commission Hearing Examiner purporting to permit that state's commission to order the unbundling of elements that the FCC has *expressly held* should not be unbundled. This decision is simply out of step with the authoritative constructions of the Act given by the federal courts. It cannot be squared with the Seventh Circuit's decision in *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004), where the court stated that it "cannot now imagine" an unbundling requirement that would comply with the Act when the FCC has found that the requirement does not meet the impairment standard. It also conflicts with FCC's own pronouncement in paragraph 195 of the *TRO* (quoted above) that state commissions may not re-unbundle network elements that the FCC determines do not pass the section 251(d)(2) impairment test. If the aberrant recommended decision from Maine is challenged in court or at the FCC, it will almost certainly be invalidated or preempted.

AT&T's Response

11 In addition to the arguments made by Covad and NWCCC, AT&T makes two other arguments.

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First, AT&T asserts that *USTA II* did not change either the requirements of the Act or the requirements of Qwest's interconnection agreements. This assertion is true only in the narrowest and most meaningless sense. Obviously, the D.C. Circuit did not change the Act in *USTA II;* it interpreted the Act's requirements. One of those requirements is that the FCC determine which elements must be unbundled under the Act by considering whether the failure to provide access to particular network elements "would impair the ability of the telecommunications carrier seeking access to provide the services it seeks to offer."[8] In *USTA II*, the D. C. Circuit concluded that the FCC's impairment findings for mass market switching and dedicated transport[9] did not comply with the Act and it vacated the impairment findings because they were unlawful. The D.C. Circuit's decision to vacate the FCC's impairment findings is significant and far from routine. D.C. Circuit case law establishes that the court vacates a rule only when it perceives no basis on which the agency's decision could be sustained on remand.[10]

12 In addition, while *USTA II* does not by its terms order that interconnection agreements be changed, *USTA II* will constitute a change of law when it becomes effective under most, if not all, Qwest interconnection agreements. The change of law provisions in Qwest's interconnection agreements are typically triggered when existing FCC rules are "vacated," "materially changed," or "modified."[11] In this case, if and when it becomes effective, *USTA II* will "vacate" existing FCC rules. When that happens, Qwest may request that its interconnection agreements be amended to reflect the change of law that will have taken place.

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8 47 U.S.C. §251(d)(2)(B).

9 The Court grouped high capacity dedicated transport and loops together, defined them as "transmission facilities dedicated to a single customer or carrier" and referred to them collectively as "dedicated transport elements." *USTA II*, 359 F.3d 554, 573.

10 *Radio-Television News Directors' Ass'n v. FCC*, 184 F.3d 872, 888 (D.C. Cir. 1999); see also *Allied Signal Inc. v. United States Nuclear Regulatory Comm'n*, 988 F.2d 146, 151 (D. C. Cir. 1993)(vacatur "depends on the 'seriousness of the order's deficiencies," and remand is appropriate when there "is at least a serious possibility that the [agency] will be able to substantiate its decision on remand") (quoting *UMW v. FMSHA*, 920 F.2d 960, 966-67(D.C. Cir. 1990)).

11 See Interconnection Agreement between Qwest and AT&T Communications of the Pacific Northwest, Docket No. UT-033035, Section 2.2 (change of law is triggered when FCC regulations are "vacated, dismissed, stayed or materially changed or modified.")

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13 Second, AT&T asserts that the Commission has authority to determine whether Qwest has continuing unbundling obligations under the Act. This argument runs afoul of *USTA II's* clear holding that the FCC, not state commissions, must make the impairment determination called for by Section 251(d)(3)(B) of the Act. As the United States Supreme Court held in *AT&T*,[12] "the Federal Government has taken the regulation of local telephone competition away from the states," and it is clear that the FCC must "draw the lines to which [the states] must hew," lest the industry fall into the "surpassing strange" incoherence of "a federal program administered by 50 independent state agencies" without adequate federal oversight. State commissions may not short-circuit this process by reimposing, on the basis of their own interpretation of the Act or state law, the very unbundling obligations that were vacated in *USTA II*.

14 Qwest therefore 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 June, 2004.

QWEST

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[12] *AT&T v. Iowa Utilities Board*, 525, 366, 378 n. 6 (1999).

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