

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of a Proceeding to)
Address Actions Necessary to Respond)
to the Federal Communications)
Commission Triennial Review Order)
Released August 21, 2003)

DOCKET NO. 03-999-04

ORDER DENYING JOINT CLEC MOTION

ISSUED: June 14, 2004

By The Commission:

On May 12, 2004, Eschelon Telecom of Utah, Inc, Integra Telecom of Utah, Inc., XO Utah, Inc., and DIECA Communications, Inc., DBA Covad Communications Company (Joint CLECs) filed a Motion for an Order Requiring Qwest to Maintain Status Quo Pending Resolution of Legal Issues (Joint CLEC Motion). Through their Joint CLEC Motion, the Joint CLECs request that the Commission require Qwest to maintain the status quo and continue to honor all of Qwest's obligations under existing interconnection agreements and Qwest's Statement of Generally Available Terms and Conditions (SGAT), including the provisioning of unbundled local switching (including UNE-P), dark fiber, transport, and high capacity loops at Commission prescribed rates established under Section 252(d) standards, until final federal unbundling rules are in place or until the Commission can undertake a generic proceeding to determine the impact of a D.C. Court of Appeals' decision, *United States Telecom Association vs. Federal Communications Commission*, 359 F.3d 554 (D.C. Cir. 2004)(*USTA II*).

In *USTA II*, the Federal Court of Appeals determined that the Federal Communications Commission (FCC) had used an incorrect standard by which to determine

which UNEs should be made available to competing telecommunications carriers under Section 251 and the terms and conditions for such availability. The Court vacated the FCC's order which had identified UNEs to be provided and the process by which they were to be made available, but stayed the vacatur through June 15, 2004. The Joint CLECs anticipate that Qwest will withdraw the specified UNEs after the stay expires; they effectively seek to preclude any change in interconnection conditions and seek continued access to the UNEs until the questions of what UNEs need to be made available are finally resolved.

Through the filing of Responses to the Joint CLEC Motion and Replies to these Responses, various parties either support or oppose the Joint CLEC Motion. AT&T argues in support of the Joint CLEC Motion. MCI initially argued in support, but, after entering into an agreement with Qwest setting terms and conditions for access to Qwest's network, took no position for or against the motion at oral argument. Qwest opposes the Joint CLEC Motion. Qwest argues that granting the motion effective ignores the change of law provisions of Qwest existing interconnection agreements. Qwest argues that *USTA II* can be viewed (and Qwest does) as a change in law and that parties to existing interconnection agreements must comply with those agreements' terms dealing with changes in law. Qwest contends that the Joint CLECs and those supporting their motion are attempting to avoid the change of law provisions of the interconnection agreements. Qwest further represents that it will continue to honor existing interconnection agreements, continuing to make the identified UNEs available under the current terms, through December 31, 2004. Thereafter, Qwest represents that it will make equivalent services and network elements available under market terms and conditions for any

telecommunications carrier which desires to obtain such services and elements under the terms to be offered by Qwest. Hence, other telecommunications carriers will not lose access to Qwest's needed services or elements and may continue to provide service to their customers without disruption; contrary to the claims made in the Joint CLEC Motion. Qwest also argues that the Joint CLEC Motion is premature. Further stay may be granted, either by the Circuit Court or the U.S. Supreme Court. Qwest counters that the Joint CLECs and supporters base their arguments on claims of what Qwest will do and that no such conduct has occurred and, based on Qwest's representations of what it will do, will not occur. Qwest argues that granting the motion implies the exercise of claimed authority beyond Section 251 provisions and resolution of issues associated with the purported exercise of such authority requires further examination and deliberation.

The Division of Public Utilities (DPU) recommends that Qwest respond to a number of questions (which would provide some illumination on Qwest's future conduct), that the Commission conduct further proceedings to determine the impact of *USTA II*, require that Qwest provide notice to the Commission and CLECs of changes that Qwest proposes in interconnection agreements and the SGAT as a result of *USTA II*, and that the Commission use Utah Code Ann. §§ 54-8b-16 and 17 to promptly resolve interconnection disputes between Qwest and CLECS. The DPU argues that the multiply party and broad relief entailed by the Joint CLEC Motion is unwarranted. The DPU believes that more discrete action is appropriate, particularly in light of Qwest's assurances and lack of specific conduct which is impinging upon a CLEC's operations.

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This matter was heard by the Commission on June 10, 2004. Counsel for the Joint CLECs, AT&T, MCI, the DPU and Qwest appeared either in person or participated through telephone conference call. Subsequent additional authorities were submitted by the Joint CLECs on June 11, 2004 and by Qwest on June 14, 2004.

Base on the Commission's consideration of the above noted filings and the arguments made at the June 10, 2004, hearing, the Commission DENIES the Joint CLEC Motion.

DATED at Salt Lake City, Utah, this 14th day of June, 2004.

/s/ Ric Campbell, Chairman

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
GW#38827