

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition of	)	DOCKET NO. UT-033044
	)	
QWEST CORPORATION	)	ORDER NO. 15
	)	
To Initiate a Mass-Market	)	ORDER GRANTING JOINT CLEC
Switching and Dedicated Transport	)	MOTION; REQUIRING QWEST TO
Case Pursuant to the Triennial	)	MAINTAIN STATUS QUO;
Review Order	)	SCHEDULING STATUS
	)	CONFERENCE
	)	<b>(Set for June 23, 2004, at 1:30 p.m.)</b>
.....	)	

1 **SYNOPSIS.** *This Order grants the Joint CLECs’ motion for a status quo order, and requires Qwest to continue to provide products and services under interconnection agreements with CLECs at the prices set forth in the agreements until the Commission approves amendments to these agreements or the FCC otherwise resolves the legal uncertainties presented by the effect of the mandate in USTA II. The Commission may modify or revoke this order if the present circumstances change.*

2 **NATURE OF THE PROCEEDING.** This proceeding addresses a petition filed by Qwest Corporation (Qwest) seeking review of the findings of the Federal Communications Commission (FCC) in its Triennial Review Order<sup>1</sup> concerning impairment to competitors without unbundled access to mass-market switching and dedicated transport.

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<sup>1</sup> *In the matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96098, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (Rel. August 21, 2003) [Hereinafter “Triennial Review Order”].*

3 **PROCEDURAL HISTORY.** On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit entered a decision in *United States Telecom Association v. Federal Communications Commission*, 359 F.3d 554 (2004) (*hereinafter USTA II*), the appeal by numerous parties of the FCC's Triennial Review Order. In its decision, the D.C. Circuit vacated and remanded significant portions of the FCC's Triennial Review Order, but stayed the effect of its decisions for 60 days.

4 On March 3, 2004, the Commission entered Order No. 14 in this proceeding, granting Qwest's motion to suspend the proceedings indefinitely. In that Order, the Commission the Commission advised the parties that it would schedule a status conference after the 60-day stay of the court's mandate had elapsed.

5 On March 31, 2004, the FCC urged carriers to begin negotiations to "arrive at commercially acceptable arrangements for the availability of unbundled network elements." *Press Release of FCC Chairman Michael K. Powell, March 31, 2004*. Based on the agreement of carriers to enter such negotiations, the FCC sought an extension of the stay of the mandate. On April 13, 2004, the D.C. Circuit granted the FCC's motion to extend the stay of the mandate in *USTA II* through June 15, 2004.

6 The Solicitor General requested, and Supreme Court Justice Rehnquist granted, an extension of the deadline for the FCC to file petitions for writ of certiorari with the United States Supreme Court until June 30.<sup>2</sup> The D.C. Circuit, however, refused the FCC's and other party's requests for a further extension of the stay of the mandate. On June 9, 2004, the Solicitor General and the FCC announced that they would not file a petition for writ of certiorari with the Supreme Court. Although other parties filed petitions for stay with the Supreme Court on June

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<sup>2</sup> Other parties, including NARUC and AT&T, requested and were granted similar extensions of the time to file petitions for writ of certiorari.

10, 2004, Justice Rehnquist denied the stay petitions on June 14, allowing the mandate in *USTA II* to become effective on June 15, 2004.

- 7 On May 6, 2004, the Commission requested comment concerning the necessity of a status conference, as well as comments concerning the Commission's options and obligations following the *USTA II* decision. Commission Staff, Public Counsel, AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services on behalf of TCG Seattle and TCG Oregon (AT&T), Covad Communications Company (Covad), WorldCom, Inc, d/b/a MCI, Inc. (MCI), Advanced TelCom, Inc., d/b/a Advanced TelCom Group (ATG), Eschelon Telecom of Washington, Inc. (Eschelon), Global Crossing Local Services, Inc. (Global Crossing), Integra Telecom of Washington, Inc.(Integra), Pac-West Telecomm, Inc. (Pac-West), Time Warner Telecom of Washington, LLP (Time Warner), and XO Washington, Inc. (XO), the Department of Defense and all other Federal Executive Agencies (DoD/FEA), and Qwest filed comments. The Commission will consider these comments in the context of the Joint CLECs' motion.
- 8 On May 10, 2004, ATG, Eschelon, Global Crossing, Integra, MCI, Pac-West, Time Warner, and XO (collectively the Joint CLECs) filed with the Commission a Motion for an Order Requiring Qwest to Maintain Status Quo Pending Resolution of Legal Issues. Covad, AT&T, DoD/FEA, Qwest, and Commission Staff filed responses to the motion. The Joint CLECs, AT&T, and Qwest filed replies to the responses.
- 9 On June 11, 2004, the Joint CLECs filed with the Commission supplemental authority in support of the motion for status quo. On June 14, 2004, Qwest filed supplemental authority in opposition to the Joint CLECs' motion.

- 10 **APPEARANCES.** Lisa A. Anderl, Associate General Counsel, and Adam Sherr, Senior Attorney, Qwest Corporation, Seattle, Washington, and Ted Smith, Stoel Rives, LLP, Salt Lake City, Utah, represent Qwest. Rebecca DeCook and Steven Weigler, AT&T Law Department, Denver, Colorado, represent AT&T. Karen S. Frame, Senior Counsel, Denver, Colorado, represents Covad. Stephen S. Melnikoff, Regulatory Law Department, US Army Litigation Center, Arlington, Virginia, represents DoD/FEA. Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents ATG, Eschelon, Global Crossing, Integra, McLeodUSA Telecommunications, Inc., Pac-West, Time Warner, and XO. Michel Singer Nelson, Senior Attorney, Denver, Colorado, and Lisa Rackner, Ater Wynne, LLP, Portland, Oregon, represent (MCI). Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, represents the Washington Electronic Business and Telecommunications Coalition (WeBTEC). Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents Commission Staff. Simon ffitich, Assistant Attorney General, represents the Public Counsel Section of the Attorney General's Office.
- 11 **STATUS CONFERENCE.** The parties recommend the Commission not convene a status conference in this proceeding until after the *USTA II* mandate becomes effective. As the mandate became effective on June 15, the Commission schedules a status conference in this proceeding for **Wednesday, June 23, 2004, at 1:30 p.m. in the Commission's Main Hearing Room, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington.** Persons who cannot attend the conference in person may participate via the Commission's teleconference bridge line 360-664-3846. Persons desiring to participate via the bridge line must make advance reservations by calling Kippi Walker at 360-664-1139, no later than noon on Tuesday, June 22, 2004.

12 **JOINT CLEC MOTION FOR STATUS QUO ORDER.** In their comments, Public Counsel, AT&T, MCI, the Joint CLECs, and DoD/FEA request that the Commission act to forestall or minimize any disruption in the telecommunications market in Washington State caused by price increases, disruption of ILEC/CLEC business plans, and deterrence of competitive entry, as a result of the effect of the *USTA II* decision. Specifically, AT&T, MCI and the Joint CLECs request that the Commission take steps to ensure that Qwest does not unilaterally increase prices or limit or discontinue the availability of UNEs, including UNE-P, if the *USTA II* mandate takes effect.

13 To ensure that the Commission addresses the issue, the Joint CLECs filed a motion requesting that the Commission require Qwest to

[C]ontinue 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 and Conditions (“SGAT”) 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 action, including but not limited to resolution of the issues raised in the Commission’s May 6, 2004 Notice of Opportunity to Submit Comments.

*Motion at 1.* The Joint CLECs assert that Qwest is likely to unilaterally limit or deny CLEC access to UNE-P and dedicated transport, dark fiber and high-capacity transport and loops, and increase prices upon the *USTA II* mandate becoming effective, despite the existence of interconnection agreements that preclude such action. *Id. at 3.*

14 The Joint CLECs assert that Qwest will seek to revise all of its interconnection agreements to eliminate these UNEs as soon as the *USTA II* mandate becomes effective, and that CLECs will file multiple petitions to challenge Qwest’s actions. *Id. at 3.* The Joint CLECs request that the Commission address this threat of

immediate elimination of certain UNEs by ordering Qwest to maintain the status quo and honor its interconnection agreements. *Id. at 4*. The Joint CLECs assert that the Commission has authority under state and federal law to require Qwest to comply with the terms of its interconnection agreements. *Id. at 6*.

15 Covad, AT&T and DoD/FEA filed responses in support of the motion, while Staff and Qwest oppose the motion.

16 Qwest asserts in its response that the relief requested in the Joint CLECs' motion is unnecessary and unlawful. *Qwest Response at 2*. Qwest states that it intends to honor its interconnection agreements and that the motion is an attempt to change the terms of interconnection agreements by modifying the change in law provisions. *Id.* Qwest argues that the Commission may not enter a "blanket order requiring continuation of unbundling obligations that have been eliminated in the TRO," or may be eliminated by *USTA II*. *Id. at 5-6*. Qwest further argues that it has developed commercial products that will be available to CLECs where there is no longer a Section 251 unbundling obligation, and that there is "no immediate danger of a devastating impact on Qwest's Washington local exchange competitors and their local exchange customers." *Id. at 6*.

17 Staff opposes the motion asserting that the requested relief is unnecessary, as it requires Qwest to comply with the terms of its interconnection agreements. Staff asserts that if Qwest violates the terms of the agreements, that CLECs may file petitions for enforcement of the agreements under WAC 480-07-650. *Staff Response at 1-2*. Staff further argues that such a motion is not proper in this proceeding, and should more appropriately be brought in an arbitration or other proceeding relating directly to the affected interconnection agreements. *Id. at 3*. To the extent the Joint CLEC motion asks the Commission to require unbundling obligations that *USTA II* has stated that the FCC cannot require, Staff asserts that such action would be preempted as inconsistent with Section 251 of the Act. *Id.*

18 Qwest's comments and pleadings, and those filed in response indicate that there is a very deep disagreement among the parties as to the effect of the *USTA II* decision. Qwest asserts that once the *USTA II* mandate becomes effective, Qwest will not be required under Section 251 to provide unbundled access to mass-market switching, high-capacity transport, shared transport, or high-capacity loops. *Qwest Comments at 6; Qwest's Colorado Comments at 6-7; see also Qwest Reply at 7.* While Qwest agrees that interconnection agreements and its SGAT will remain in effect subject to change in law provisions in those agreements, Qwest plans to file a revised SGAT upon the effective date of *USTA II*, indicating that Qwest believes the change in law provisions are triggered when *USTA II* becomes effective. *Qwest Comments at 6, 7-8.; Qwest's Colorado Comments at 4, 7, 9.* Finally, Qwest questions whether states have authority to address the UNEs at issue under Section 251(d)(3), as any state unbundling rules must be consistent with Section 251, and consistent with, and not broader than existing FCC rules, which rules have been, or will soon be, vacated. *Qwest Comments at 6-7; see also Qwest Reply at 3-4.* The Joint CLECs, other responding CLECs, DoD/FEA, and Public Counsel disagree with Qwest's position on these issues.

19 **Discussion and Decision.** The parties' comments on the effect of *USTA II* on ILEC unbundling obligations, whether a change in law occurs when the *USTA II* mandate becomes effective, and state authority to interpret and impose unbundling obligations underscore the urgency behind the Joint CLECs' motion. The momentous confusion in the state of the law under Section 251 of the Telecommunications Act since the D.C. Circuit entered its decision in *USTA II* likewise creates equally momentous confusion in the competitive markets in Washington State and across the country until the FCC, or the states, in the absence of FCC action, act to resolve the issues.

20 The Commission has authority under Section 252 to approve negotiated or arbitrated interconnection agreements. The Act does not preclude state commission enforcement of any regulation, order or policy establishing access

and interconnection obligations of local exchange carriers, as long as the state commission action is consistent with Section 251 and does not prevent implementation of the requirements of the section. *49 U.S.C. § 251(d)(3)*. The FCC has recognized the authority of state commissions to address fact-intensive determinations relating to interconnection agreements, including enforcement of those agreements.<sup>3</sup>

21 The Commission also has authority under RCW 80.36.610(1) to “take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission” under the Act. The Commission has authority under state law to resolve complaints between two or more public service companies and to determine whether any practice of a telecommunications company is unreasonable. *See RCW 80.04.110 and RCW 80.36.170*. As Commission Staff notes, the Commission has adopted rules governing the enforcement of interconnection agreements. *See WAC 480-07-650*. Finally, The Commission’s governing statutes require the Commission to regulate in the public interest the rates, services, facilities and practices of telecommunications companies in this State. *RCW 80.01.040(3)*. Considered together, the Commission has authority to address the Joint CLECs’ motion as well as the issues raised by the motion, although, as noted below, these issues are more appropriately addressed in another proceeding.

22 The Joint CLECs request an order to maintain the status quo “pending judicial review of the FCC’s TRO and any resulting FCC action or additional Commission action.” The overriding public interest in maintaining stability in

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<sup>3</sup> *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Agreements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276, 17 FCC Rcd. 19.337, ¶ 7 (October 4, 2002) [Hereinafter “*FCC Declaratory Ruling*”].



the local telecommunications marketplace in Washington State until these matters are resolved requires that the Commission grant the Joint CLECs' motion.

- 23 Qwest must continue to provide all of the products and services under existing interconnection agreements with CLECs, at the prices set forth in the agreements, until the Commission approves amendments to these agreements or the FCC otherwise resolves the legal uncertainties presented by the effect of the mandate in *USTA II*. Maintaining the status quo among parties to interconnection agreements will allow negotiation or arbitration of amendments to such agreements to proceed without the threat of sudden or unplanned discontinuation of services and products offered under the agreements. This Order is consistent with Section 251. It does not establish unbundling requirements, it merely requires Qwest to comply with the terms of its existing interconnection agreements until the FCC establishes interim rules governing Section 251 obligations that permit change, or until this Commission approves appropriate amendments to those agreements.
- 24 In granting this motion, the Commission does not decide the issues the parties raise, *i.e.*, whether there is a change in law, the extent of ILEC unbundling requirements under Section 251, and the extent of state authority to establish separate unbundling requirements. These issues should, and likely will, be addressed in a separate proceeding involving Qwest and all affected CLECs, presumably to modify the SGAT or arbitrate a common amendment to interconnection agreements.
- 25 For example, all parties agree that the change in law provisions of interconnection agreements and the SGAT apply, but disagree as to whether the effect of *USTA II* is a change in law. Most change in law provisions in interconnection agreements and the SGAT include a dispute resolution process, such as arbitration by the Commission as to whether a change in law exists. This

proceeding is not the appropriate one in which to reach the decision as to whether a change in law has occurred. By entering this status quo order, the Commission does not disregard the change in law process, but requires Qwest and all parties to follow the processes set forth in their agreements to allow the Commission to interpret the provisions of interconnection agreements that this Commission has approved.

26 The Commission may modify or revoke this Order at any time if the circumstances that gave rise to this Order change. For example, should the FCC enter interim rules that address the legal uncertainties raised by the parties, this status quo order may no longer be necessary.

27 **NOTICE TO PARTIES: This is an Interlocutory Order of the Commission. Administrative review may be available through a petition for review, filed within 10 days of the service of this Order pursuant to WAC 480-07-810(3).**

DATED at Olympia, Washington, and effective this 15th day of June, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

ANN E. RENDAHL  
Administrative Law Judge