

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 MOTION TO DISMISS

1 Qwest Corporation ("Qwest") hereby moves that the Washington Utilities and Transportation Commission ("Commission") enter an order dismissing this case and closing the docket. In support of this motion, Qwest states the following:

2 Section 251(d)(2) of the Telecommunications Act of 1996 (the "Act") permits the Federal Communications Commission (the "FCC") to require incumbent local exchange carriers to unbundle particular network elements only if it determines that "the failure to provide access to such network elements *would impair* the ability of the telecommunications carrier seeking access to provide the services it seeks to offer." *See* 47 U.S.C. §251(d)(2)(B).

3 On February 20, 2003, the FCC adopted its Triennial Review Order ("TRO")¹, in which it

¹ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (Released August 21, 2003).

purported to delegate to state commissions the authority to make the impairment determinations required by Section 251(d)(2) of the Act. The text of the TRO was released on August 21, 2003 and became effective on October 2, 2003. On October 10, 2003, in response to Qwest's petition, the Commission opened Docket No. UT-033044 for the purposes of making the determinations the FCC delegated to the Commission in the TRO.

4 On March 2, 2004, the United States Court of Appeals for the District of Columbia issued its decision in *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Circuit 2004) (“*USTA II*”). In *USTA II*, the D.C. Circuit held that the FCC did not have authority to delegate to state commissions its responsibility to make the impairment determinations under Section 251(d)(2) of the Act. The Court held that the FCC's delegation was unlawful and ordered as follows:

We vacate the [FCC's] subdelegation to state commissions of decision-making authority over impairment determinations, which in the context of [the TRO] applies to the subdelegation scheme established for mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber)². We also vacate and remand the [FCC's] nationwide impairment determinations with respect to these elements.³

USTA II became effective on June 16, 2004 when the D.C. Circuit issued its mandate.

5 In its order dated March 3, 2004, the Commission suspended this proceeding indefinitely pending further order of the Commission. Now that *USTA II* has become effective, the FCC's delegation of authority to this Commission to make the impairment determinations required by Section 251(d)(2) of the Act is not authorized. As the FCC stated in the TRO, “states do not have plenary authority under federal law to create, modify, or eliminate unbundling

² In its decision, the D.C. Circuit 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.

³ *USTA II*, 359 F.3d 554, 594.

obligations.” TRO, ¶ 187. Accordingly, the Commission should close this docket.

6 WHEREFORE, Qwest respectfully requests that the Commission enter an order closing this docket.

DATED this 22nd day of June, 2004.

QWEST

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