

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of)	DOCKET NO. UT-033044
)	
QWEST CORPORATION)	ORDER NO. 16
)	
To Initiate a Mass-Market)	ORDER ADMITTING RESPONSES
Switching and Dedicated Transport)	TO BENCH REQUESTS AND ORDER
Case Pursuant to the Triennial)	NOS. 03 AND 04 AS EXHIBITS;
Review Order)	GRANTING QWEST’S MOTION TO
)	DISMISS THE PETITION AND
)	CLOSE THE DOCKET
.....)	

1 **SYNOPSIS.** *In this Order, the Commission admits as evidence in the proceeding the responses to Bench Request Nos. 1-70 and Orders No. 03 and 04. Having admitted the responses to Bench Requests, the Commission closes the docket in this proceeding. If further process is needed in connection with future FCC orders, a new docket may be opened.*

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 Order¹ concerning impairment to competitors without unbundled access to mass-market switching and dedicated transport.

3 **PROCEDURAL HISTORY.** On October 10, 2003, Qwest filed a petition with the Washington Utilities and Transportation Commission (Commission) in Docket

¹ *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”].*

No. UT-033044 to initiate a review of the FCC's findings in the Triennial Review Order concerning mass-market switching and dedicated transport.²

4 On March 2, 2004, one day after the Commission began formal hearings in this proceeding, 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 (D.C. Circuit 2004) (*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. In Order No. 14 in this docket, the Commission canceled the hearings and suspended the proceedings indefinitely due to the uncertainty prompted by the D.C. Circuit's decision.

5 On April 13, 2004, the D.C. Circuit granted the FCC's motion to extend the stay of mandate in *USTA II* through June 15, 2004. On June 14, 2004, Supreme Court Justice Rehnquist denied various petitions for stay of the *USTA II* mandate, allowing the mandate to become effective on June 16, 2004.

6 On June 15, 2004, the administrative law judge entered Order No. 15, an Order granting the Joint CLECs' Motion for a status quo order, requiring Qwest to maintain the status quo under its interconnection agreements and scheduling a status conference for June 23, 2004. On June 23, 2004, Qwest filed with the Commission a motion to dismiss its petition and close the docket.

7 Qwest, 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 (Covad), the Joint CLECs, WorldCom, Inc, d/b/a MCI, Inc. (MCI), the Washington Electronic Business and Telecommunications Coalition

² A summary of earlier procedural history in this docket is set forth in Order Nos. 05 and 06 in this proceeding and will not be repeated in this Order.

(WeBTEC), the Northwest Communications Coalition (NWCC), Commission Staff and Public Counsel attended the June 23, 2004, status conference. The parties made oral responses to Qwest's motion, choosing to forego the opportunity to provide written responses.

8 **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 the Department of Defense and all other Federal Executive Agencies (DOD/FEA). Gregory J. Kopta, Davis Wright Tremaine, LLP, Seattle, Washington, represents Advanced TelCom, Inc., Eschelon Telecom of Washington, Inc., Global Crossing Local Services, Inc., Integra Telecom of Washington, Inc., McLeodUSA Telecommunications, Inc., Pac-West Telecomm, Inc., Time Warner Telecom of Washington, LLP, and XO Washington, Inc. These parties are referred to as the Joint CLECs. Michel Singer Nelson, attorney, Denver, Colorado, and Lisa Rackner, Ater Wynne, LLP, Portland Oregon, represent MCI. Arthur A. Butler, Ater Wynne, LLP, Seattle, Washington, represents WeBTEC. Jonathan Thompson, Assistant Attorney General, Olympia, Washington, represents Commission Staff. Simon ffitch, Assistant Attorney General, represents Public Counsel Section of the Attorney General's Office.

9 **QWEST MOTION TO DISMISS.** Qwest requests that the Commission enter an order dismissing its petition and closing the docket. Qwest argues that the *USTA II* decision vacated the sub delegation in the Triennial Review Order "to state commissions for decision-making authority over impairment determinations." *Qwest Motion at 2, quoting USTA II, 359 F.3d at 594.* Now that the *USTA II* mandate is effective, Qwest argues that state commissions have no authority to

make the impairment determinations Qwest sought in its petition initiating this proceeding.

- 10 During the conference, parties were asked to comment on the status of the proceeding, how the Commission should address Qwest's motion and how the Commission should handle the prefiled exhibits and testimony not yet entered in the official record.
- 11 Qwest argued that the Commission should reopen the docket or open a new docket to obtain information should the FCC request data from the states. Qwest asserts that the official record in the proceeding is limited, given that only a few prefiled exhibits were admitted as exhibits. Qwest objects to the Commission sending to the FCC any prefiled materials that were not subject to cross-examination or admitted as an exhibit.
- 12 AT&T opposed Qwest's motion as premature. AT&T argued that there might still be a role for the states under the interim rules the FCC is likely to issue. AT&T also argued that petitions for certiorari seeking review of the *USTA II* decision may still be filed with the U.S. Supreme Court until June 30, and may be accepted. AT&T argued that until such time, the Commission should hold the docket open but not continue with the docket, noting decisions by the Texas and California Commissions. Covad, the Joint CLECs, WeBTEC, Staff and Public Counsel concurred in AT&T's arguments.
- 13 The Joint CLECs concurred with AT&T's arguments and argued that it is less burdensome to keep the docket open than to reopen a closed docket or open a new docket. The Joint CLECs note that the Commission sought comments from parties on the effect of the *USTA II* decision and that closing the docket may forestall Commission action on those issues. The Joint CLECs also raise concerns about the ability of the Commission to enforce or modify Order No. 15 entered in

this proceeding if the docket were closed. Staff, Public Counsel and WeBTEC concurred in the Joint CLECs' comments.

14 MCI and the NWCC did not state a position on any issues during the conference.

15 In response, Qwest refuted AT&T's and the Joint CLECs' arguments. Qwest argued that it is speculative to wait for FCC action on an interim order as it is unclear whether the FCC will ask for state participation, and if so, in what form. Qwest asserted that petitions for certiorari would have no effect on the *USTA II* mandate, and that the Commission has authority to enforce its orders even if the docket in which the order was entered is now closed.

16 **Discussion and Decision.** Having considered the motion and all parties' arguments, we have determined that the most appropriate action, given the history of this proceeding, is to admit on our own motion the responses to Bench Request Nos. 1 through 70 as Exhibits 501 through 628-HC and then close the docket.

17 On October 21 and 22, 2004, the Commission issued Bench Request Nos. 1 through 70, requesting responses from Qwest and party CLECs. These bench requests sought information relating to Qwest's existing hot cut process, its proposed batch hot cut process, and the nature of Qwest's and party CLECs ownership and use of switching and transport facilities in Washington state. The Commission also sought responses to Bench Request Nos. 32 through 62 from non-party CLECs registered in Washington State through Order Nos. 03 and 04 entered on October 23, 2004, and November 13, 2004, respectively. The Commission received a number of responses to the Bench Requests and Order Nos. 03 and 04, some of them as highly confidential responses. In preparation for the March hearings, these responses were marked for identification as Exhibits 501 through 628-HC, but only the response marked as Exhibit 548-HC was ever admitted as an exhibit.

- 18 The Commission will not consider or treat as evidence any response to a bench request until it is entered into the record as an exhibit. *WAC 480-07-405(9)*. Although the responses to the Bench Requests and Order Nos. 03 and 04 were never subject to cross-examination, the Commission believes it appropriate to enter the responses into evidence as Exhibits 501 through 628-HC, as representative of the parties' and non-party CLECs' responses to the Commission's bench requests.
- 19 It appears likely that the FCC will request information from state commissions in considering final rules on remand from the *USTA II* decision. The bench request responses and responses to Order Nos. 03 and 04 may prove useful in submitting information to the FCC. The Commission may consider further process in a separate proceeding to address any recommendations or comments to be filed with the FCC.
- 20 Qwest's request to dismiss the underlying petition in this proceeding and to close the docket is reasonable given that the *USTA II* mandate is now effective and the delegation provisions of the Triennial Review Order have been vacated. We grant Qwest's motion to dismiss the petition and close the docket, finding that no party has provided a persuasive argument to keep the docket open.
- 21 We reject AT&T' request to hold the docket open until after the U.S. Supreme Court considers petitions for writ of certiorari. Although AT&T, the National Association of Regulatory Utility Commissions, and others have filed petitions for writ of certiorari with the U.S. Supreme Court appealing the *USTA II* decision, a decision by the Supreme Court on whether to accept the petitions or if accepted, on the merits of the petition, will take months if not years. If the Supreme Court upholds the FCC's decision in the Triennial Review Order and the delegation of authority to state commissions, the Commission would most likely need to open a new proceeding as the current testimony and evidence would be stale.

22 The Commission has authority to enforce its orders even after a docket has closed. *See RCW 80.04.410.* Order No. 15 in this docket, the order requiring Qwest to maintain the status quo under its interconnection agreements, will remain in effect even after this docket is closed.

O R D E R

The Commission Orders:

- 23 (1) The responses by Qwest Corporation and other parties to Bench Request Nos. 1 through 70, and the responses by non-parties to Order Nos. 03 and 04 in this proceeding are admitted as Exhibits 501 through 628-HC.
- 24 (2) Qwest Corporation's motion to dismiss its petition and close Docket No. UT-033044 is granted.

DATED at Olympia, Washington, and effective this 30th day of July, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-07-870.