

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Unbundled Access to Network Elements

**Review of the Section 251 Unbundling
Obligations of Incumbent Local Exchange
Carriers**

)
)
)
)
)
)
)

WC Docket No. 04-313

CC Docket No. 01-338

October 8, 2004

**EX PARTE COMMENTS OF THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

Marilyn Showalter,
Chairwoman

Richard Hemstad,
Commissioner

Patrick J. Oshie,
Commissioner

Washington Utilities and
Transportation Commission
P.O. Box 7250
1300 S. Evergreen Park Dr., SW
Olympia, WA 98504-7250
(360) 664-1160

I. EXECUTIVE SUMMARY

The Washington Utilities and Transportation Commission (WUTC) provides these comments in response to the Federal Communications Commission's (FCC) request in this rulemaking proceeding¹ for summaries of state proceedings arising from the Triennial Review Order.² Because the WUTC did not complete its scheduled hearings, nor deliberate on the issues and reach a decision, our comments are limited to a summary of the procedural history of the WUTC's Triennial Review proceedings. We also provide a brief summary of the record evidence, and a discussion of our findings in a pertinent state law proceeding involving Qwest Corporation (Qwest).

The WUTC began extensive proceedings in 2003 and 2004 to address Qwest's petition for WUTC review of the FCC's national findings in the Triennial Review Order concerning mass-market switching and dedicated transport. The proceedings involved 21 parties, extensive discovery by the WUTC and other parties, as well as the submission of over 500 proposed exhibits, including prefiled testimony, attached exhibits, proposed cross-examination exhibits and responses to WUTC-issued bench requests. Despite the extensive efforts by parties and the WUTC in preparing for hearings, the WUTC suspended the hearings and eventually closed the

¹ *In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, ¶ 15, released August 20, 2004 (*Interim Order*).

² *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 Advance Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (*Triennial Review Order*), corrected by Errata, 18 FCC Rcd 19020 (2003), vacated and remanded in part, affirmed in part *United States Telecom Ass'n v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004) (*USTA II*)

docket after the U.S. Court of Appeals for the District of Columbia Circuit entered its decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

The record before the WUTC includes testimony and exhibits from Qwest's first witness and confidential and highly confidential responses to bench requests and orders requesting information from 68 entities, including competitive local exchange companies (CLECs), 37 of which indicate operations or facilities in Washington State. The information provided in response to bench requests and orders indicates that, as of late 2003, the highest concentration of self-deployed switching and transport has occurred in the Seattle area, with smaller concentrations of self-deployed switching occurring in Spokane and Vancouver, Washington, and smaller concentrations of self-deployed transport occurring in Spokane, Bellevue, and Tacoma, Washington.

Finally, the WUTC attaches to these comments as Attachment 1 the WUTC's December 2003 Competitive Classification Order in which the WUTC found that competition in the local analog business telecommunications market in Qwest's service area in Washington State relies heavily upon the availability and presence of UNE-P.

II. PROCEDURAL HISTORY BEFORE WUTC

The WUTC is an agency of the State of Washington, composed of three member commissioners appointed by the governor. The WUTC has statutory authority to regulate the rates and conditions of service of telecommunications companies operating within the state.

Following the release of the Triennial Review Order on August 21, 2003, the WUTC opened Docket No. UT-033025 to determine the appropriate process for implementing provisions of the FCC's Order. The WUTC requested comments from interested parties and

scheduled a prehearing conference for September 26, 2003, to identify parties to the proceeding, identify issues, and establish a procedural schedule. Specifically, the WUTC noted that the Triennial Review Order imposed certain requirements on state commissions to conduct granular, fact-specific analyses to determine whether competitive local exchange carriers (CLECs) are impaired under 47 U.S.C. § 252(d)(2)(B) without unbundled access to DS1, DS3, and dark fiber loops, dedicated local transport, and mass-market switching network elements.

Noting that the Triennial Review Order also allowed states to petition the FCC within 90 days of the Order to rebut a national finding of no impairment to CLECs without unbundled access to enterprise market loops, the WUTC scheduled a hearing for November 10-13, 2003, to address the issue of enterprise market switching.

Following the September 26, 2003, prehearing conference, the WUTC set a deadline of October 3, 2003, for any person to file a petition with the WUTC to rebut the national presumption of no impairment for enterprise market switching. No person or corporation filed such a petition by October 3, 2003, challenging the FCC's findings regarding enterprise market switching. As a result, the WUTC notified all parties that there would be no 90-day proceeding to address impairment for enterprise market switching and canceled the November hearings scheduled to address the issue.

The WUTC also set a deadline of October 10, 2003, for persons to file petitions with the WUTC requesting WUTC review of the FCC's national findings of impairment for DS1, DS3, and dark fiber loops, dedicated transport, or mass market switching. On October 10, 2003, Qwest Corporation, an incumbent local exchange carrier (ILEC) serving portions of Washington State, filed a petition in Docket No. UT-033044, requesting WUTC review of the FCC's national findings concerning mass-market switching and dedicated transport, but did not request review

of the FCC's findings concerning DS1, DS3 and dark fiber loops. Verizon Northwest Inc., a non-rural ILEC also providing local service to portions of Washington State, did not request WUTC review of any of the FCC's findings in the Triennial Review Order.

The WUTC assigned an administrative law judge to preside over the proceedings and convened a prehearing conference in Docket No. UT-033044 to identify parties, identify and narrow issues, discuss discovery options and the need for a protective order and to establish a procedural schedule. The following entities intervened or participated as parties in Docket No. UT-033044: Advanced TelCom of Washington, Inc., Allegiance Telecom of Washington, Inc., AT&T Communications of the Pacific Northwest, Inc. and AT&T Local Services (TCG Seattle and TCG Oregon) (AT&T), Covad Communications Company (Covad), the Department of Defense and all other Federal Executive Agencies, Eschelon Telecom of Washington, Inc. (Eschelon), Global Crossing Local Services, Inc. (Global Crossing), Integra TelCom, Inc. (Integra), McLeodUSA Telecommunications, Inc. (McLeod), WorldCom, Inc., d/b/a MCI Inc. (MCI), the Northwest Competitive Communications Coalition (ATL Communications, Axxis Communications, Gorge Networks, Inc., Focal Communications Corporation of Washington, Fox Communications Corporation, Eschelon, Oregon Telecom, Sentito Networks, World Communications, Inc., and Z-Tel Communications, Inc.), Pac-West Telecomm, Inc. (Pac-West), Qwest, Sprint Corporation, Time Warner Telecom of Washington, Inc., Verizon Northwest Inc., the Washington Electronic Business and Telecommunications Coalition (WeBTEC), XO Communications, Inc. (XO), the Office of Public Counsel for the Office of the Attorney General of Washington, and WUTC Staff.

During the conference, the WUTC scheduled hearings on Qwest's petition for March 1-5, 2004 and March 15-19, 2004. To allow the parties to more efficiently and expeditiously gather

the data necessary to develop testimony and evidence to present to the WUTC, the WUTC agreed to develop bench requests requesting information relating to mass-market switching, dedicated transport, and batch hot cut issues, and to enter a protective order in the proceeding.

The WUTC scheduled a workshop for November 12-14, 2003, to address batch hot cut issues, requesting comments on batch hot cut processes and response to bench requests relating to batch hot cut processes prior to the workshop. On October 21, 2003, the WUTC issued Bench Request Nos. 1-31 to Qwest and Bench Request Nos. 32-38 to other parties requesting responses by November 3, 2003. On November 3, 2003, the WUTC endorsed a regional batch hot cut forum proposed by Qwest, MCI, and AT&T, as well as a schedule and procedural requirements, which would allow parties to file testimony on batch hot cut issues in time to be addressed in WUTC hearings. The WUTC canceled its workshop scheduled for November 12-14, 2003.³

Also on October 21, 2003, the WUTC issued Order No. 02 in Docket No. UT-033044, a protective order, governing the disclosure of proprietary, confidential and highly confidential information. On October 22, 2003, the WUTC issued Bench Request Nos. 39 –62 to parties other than Qwest requesting information concerning the nature of ownership and usage of switches and transport in Washington State, and Bench Request Nos. 63-70 to Qwest requesting information about local lines used, switching activity and collocation activity. The WUTC also entered Order Nos. 03 and 04, requiring non-party CLECs to disclose to the WUTC the same

³ Following comments filed by a number of parties, the WUTC determined that Verizon need not develop a batch hot cut process unless the ILEC filed a petition with the WUTC contesting the FCC's findings for impairment of mass-market switching. The WUTC also closed Docket No. UT-033025. *In the Matter of the Implementation of the Federal Communications Commission's Triennial Review Order*, Washington Utilities and Transportation Commission Docket No. UT-033025, Order No. 03, Order Declining to Initial Proceedings to Address ILEC Batch Cut Processes; Closing Docket (Nov. 19, 2003).

information requested in Bench Request Nos. 32-62. The nature of the responses to the WUTC bench requests and Order Nos. 03 and 04 is addressed below in Section III.

Qwest, MCI, AT&T, and Commission Staff filed written testimony and exhibits addressing the issues of the appropriate geographic market for mass-market switching, whether the FCC's self-deployment trigger had been met in any market, and whether the FCC's potential deployment standard had been met in any market to show a lack of impairment without access to mass-market switching. Covad filed written testimony on the issue of transition from UNE-P to UNE-L. Qwest proposed use of the Metropolitan Statistical Area, or MSA, as the appropriate geographic market, while AT&T proposed the use of the LATA, MCI proposed use of the wire center, and Commission Staff proposed a modified MSA as a geographic market and dividing the market into a residential and business market.

Qwest, AT&T, Integra, and the Joint CLECs (Eschelon, Global Crossing, Integra, McLeod, Pac-West, and XO), filed written testimony and exhibits addressing the issue of Qwest's dedicated transport petition and whether the FCC's self-deployment triggers were met along any route in Washington State.

At the time the hearings were suspended, the parties had not yet completed filing testimony and exhibits addressing Qwest's proposed batch hot cut process, although Qwest, AT&T, MCI, Covad, McLeod, and Commission Staff had filed initial and responsive written testimony and exhibits on the issue.

At the time the WUTC commenced hearings in Docket No. UT-033044, the WUTC had marked for identification in an exhibit list over 500 exhibits, including prefiled written testimony, attached exhibits, proposed cross-examination exhibits and responses to the bench

requests and Orders Nos. 03 and 04. The prefiled written testimony and exhibits addressing Qwest's batch hot cut process were not included in this list of premarked exhibits.

The WUTC commenced its hearings in Docket No. UT-033044 on March 1, 2004. On the morning of March 2, 2004, after the WUTC had heard the testimony and cross-examination of Qwest's first witness Mr. Harry M. Shooshan, the D.C. Circuit entered its decision in *USTA II*. Following an extended break, the WUTC admitted the testimony and exhibits relating to Mr. Shooshan and granted Qwest's motion to suspend the proceedings. In Order No. 14, entered on March 3, 2004, the WUTC suspended indefinitely the proceedings in Docket No. UT-033044 due to the uncertainty prompted by the *USTA II* decision, and canceled the hearings scheduled for March 3-5, 2004, March 15-19, 2004, and April 27-30, 2004.

On August 2, 2004, after it was clear that the *USTA II* mandate was effective, the WUTC entered Order No. 16 in Docket No. UT-033044, closing the docket and admitting as exhibits the responses to Bench Request Nos. 1-70 and Orders No. 03 and 04.

II. RECORD EVIDENCE FROM WUTC PROCEEDING

The record evidence in Docket No. UT-033044 consists of Exhibits 1-T through 8, 10-11, 15, 18, and 22, relating to Qwest's witness Mr. Shooshan, as well as Exhibits 501 through 546-HC,⁴ Exhibits 550 through 600, and Exhibits 605-HC through 628-HC, which represent responses to Bench Request Nos. 1-70, CLEC responses to Order Nos. 03 and 04, and highly

⁴ The designation "HC" refers to an exhibit that contains highly confidential information as defined in the protective order, Order No. 02 in Docket No. UT-033044. Likewise, the designation "C" refers to an exhibit that contains confidential information as defined in the protective order.

confidential and masked responses⁵ to the bench requests and Order Nos. 03 and 04, respectively. Unlike the exhibits relating to Mr. Shooshan's testimony and cross-examination, the responses to bench requests and Order Nos. 03 and 04 have not been tested under cross-examination.

On August 27, 2004, the WUTC requested comments from parties to Docket No. UT-033044 concerning the scope of comments to be filed in this proceeding with the FCC, the form of presenting information to the FCC, and the treatment of confidential and highly confidential information. Only Qwest, MCI, and AT&T responded to the WUTC's request.

Qwest asserts that the WUTC file only a summary of the procedural history of Triennial Review proceedings before the WUTC. MCI requests that the Commission provide not only a summary of the WUTC's procedural history in Docket No. UT-033044, but also provide the actual responses to bench requests and Order Nos. 03 and 04, without summarizing the data. MCI also requests that the WUTC expand the scope of the protective order entered in Docket No. UT-033044 to allow parties to use proprietary material produced in the proceeding before the FCC. AT&T suggests that the WUTC provide a summary of the procedural history of the proceeding in Docket No. UT-033044 and identify testimony filed by the parties and the issues addressed by the testimony. AT&T also asserts that the WUTC should provide a summary of the bench request responses, and provide the FCC with all relevant CLEC testimony and exhibits.

Based upon the FCC's request to provide "summaries of state proceedings, especially highlighting factual information that would be relevant under the guidance of *USTA II*,"⁶ and

⁵ In response to a motion for anonymous disclosure, the WUTC allowed parties and non-party CLECs to submit responses to the bench requests and Order Nos. 03 and 04 by masking the identities of the responding entity using an alpha-numeric code developed and assigned by the WUTC.

⁶ *Interim Order*, ¶ 15.

given the fact that much of the data submitted in response to the bench requests is designated as confidential or highly confidential, the WUTC will provide a bare bones summary of the responses to the bench requests relating to mass-market switching and dedicated transport.

Out of 68 entities responding to bench requests and Order Nos. 03 and 04, including parties to the proceeding, 17 carriers provided responses to Bench Request Nos. 39 and 40 indicating that they have self-deployed 43 switches serving Washington State. Of these 17 carriers:

- eleven carriers own a total of 15 switches located in Seattle, Washington;
- five carriers own a total of six switches located in Portland, Oregon that are used to provide service in Washington State;
- four carriers own a total of seven switches in Spokane, Washington;
- four carriers each own switches in Tukwila, Washington;
- two carriers own a total of three switches in Tacoma, Washington;
- one carrier owns two switches in Beaverton, Oregon, used to provide service in Washington State.

In addition, carriers own single switches in Eatonville, Everett, Kent, Redmond, Wenatchee, and Yakima, Washington.

Out of 68 entities responding to both bench requests and Order Nos. 03 and 04, including parties to the proceeding, 21 carriers provided responses to Bench Request Nos. 50 and 54 indicating that they own and/or lease transport facilities between two Qwest central offices or between a Qwest central office and another location. Fourteen carriers indicate that they own or control fiber rings in Washington State.

Eleven of the 21 carriers responded that they lease transport facilities from a carrier other than Qwest. The carriers did not respond in a way that would allow the WUTC to identify specific transport routes, but the responses indicate non-Qwest leased transport facilities along 63 routes originating from, terminating in, or wholly in Seattle, as well as seven routes for Bellevue, six for Renton, three each for Tacoma and Spokane, two each for Kent and Yakima, and one each for Redmond, Ephrata, and Moses Lake, Washington.⁷

Fourteen of the 21 carriers responded that they own transport facilities between two Qwest central offices or between a Qwest central office and another location. Similar to the responses concerning leased facilities, the responses indicate a concentration of facilities along transport routes originating from, terminating in, or wholly in Seattle – at least 57 routes identified by individual carriers. The responses also indicate individual routes based in Spokane (10), Bellevue (6), Tacoma (5), Kent (2), Puyallup (2), Lacey/Olympia (2), Tukwila (2), Redmond (1), Everett (1), Kirkland (1), and Centralia (1).

Finally, fourteen carriers responded that they own or control at least 17 fiber rings in Seattle, 10 in Spokane, three in Tacoma, two in Wenatchee and one each in Bellevue, Kent, Tukwila, Everett, Yakima, and Vancouver, Washington.

III. OTHER PERTINENT PROCEEDINGS.

In an order entered in December 2003, the WUTC found, based upon the ubiquitous availability of business analog services provided by CLECs (including through UNE-P facilities), that there is effective competition for local analog business telecommunications

⁷ Individual carriers may use routes parallel to those used by other carriers. No attempt was made to determine duplication of routes identified by carriers, *i.e.*, the number of carriers identifying the same route.

services in Qwest's territory in the state of Washington.⁸ Based in part on this finding, the WUTC granted Qwest's request to loosen WUTC controls on how Qwest sets local rates for analog business telephone service in the state of Washington. A copy of the WUTC's Competitive Classification Order is attached as Attachment 1 to these comments.

The WUTC found in its Competitive Classification Order that:

- "The Qwest exchanges where CLECs own or lease analog business lines (whether through resale, UNE-P, UNE-L, or CLEC-owned facilities) cover 99.8% of Qwest's analog business lines";⁹
- "Of CLEC analog business lines in Qwest exchanges, 20% are provided through CLEC-owned facilities, 27% through UNE-P, 43% through UNE-L, and 10% through resale";¹⁰ and
- "CLECs provide UNE-P service in all wire centers except Castle Rock, Easton, Elk, Green Bluff, Pateros, Liberty Lake and Northport. These named wire centers account for .27% of analog business lines in Qwest wire centers."¹¹

While the WUTC's Competitive Classification Order focuses on competition in the local business telecommunications services market in Washington State rather than on the state of competition in the mass-market switching market in the state, the WUTC's findings and conclusions are relevant to the FCC's request for information from states in this rulemaking proceeding, and are appropriate for the FCC to consider.

⁸ *In the Matter of the Petition of Qwest Corporation for Competitive Classification of Basic Business Exchange Telecommunications Services*, Washington Utilities and Transportation Commission Docket No. UT-031614, Order No. 17, Order Granting Competitive Classification (Dec. 22, 2003), ¶¶ 140-143 [*Competitive Classification Order*].

⁹ *Id.*, ¶ 26.

¹⁰ *Id.*

¹¹ *Id.*

IV. CONCLUSION

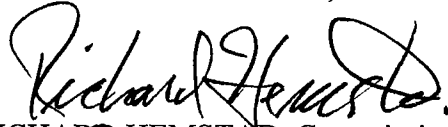
The WUTC did not conclude its fact-finding proceedings conducted in response to the Triennial Review Order, but did gather data, admitted as evidence in the proceeding, that the FCC should consider in this rulemaking proceeding. These data describe, at a minimum, the level and concentrations of self-deployed switching and transport by CLECs in the state of Washington. The WUTC also provides, for the FCC's review and consideration, its findings in a pertinent proceeding that competition in the local analog business telecommunications market in Qwest's service area in Washington State relies heavily upon the availability and presence of UNE-P.

DATED at Olympia, Washington and effective this 8th day of October, 2004.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



MARILYN SHOWALTER, Chairwoman



RICHARD HEMSTAD, Commissioner



PATRICK J. OSHIE, Commissioner