

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

In the Matter of the Investigation) DOCKET UT-053025
Concerning the Status of Competition)
and Impact of the FCC's Triennial) ORDER 05
Review Remand Order on the)
Competitive Telecommunications) ORDER DENYING JOINT CLECS'
Environment in Washington State) REQUEST FOR ADJUDICATION
)
.....)

1 **SYNOPSIS.** *In this Order, we deny the Joint CLECs' request that the Commission initiate an adjudicative proceeding to establish cost-based rates for high capacity loop and transport elements. The Commission lacks authority to enforce Qwest's obligations under Section 271 of the Telecommunications Act. In addition, the Joint CLECs do not provide sufficient information to justify the Commission initiating a proceeding on its own motion.*

SUMMARY

2 **PROCEEDING.** In Docket UT-053025, the Washington Utilities and Transportation Commission (Commission) considers the level of competition in the telecommunications industry and challenges facing telecommunications carriers following the Federal Communication Commission's (FCC) Triennial Review Remand Order (TRRO)¹ including whether to issue an interpretive statement or policy statement addressing these issues.

3 **INTERESTED PARTIES.** Lisa A. Anderl, Associate General Counsel, and Adam L. Sherr, Corporate Counsel, Seattle, Washington, represent Qwest. Timothy J. O'Connell and John H. Ridge, Stoel Rives LLP, Seattle, Washington, represent Verizon. Gregory J. Kopta and Sarah Wallace, Davis Wright Tremaine LLP, Seattle, Washington, represent Covad Communications Company (Covad), Eschelon Telecom of Washington, Inc. (Eschelon), Integra Telecom of Washington, Inc. (Integra),

¹ *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, Order on Remand, FCC 04-290 (rel. Feb. 4, 2005) [Hereinafter "Triennial Review Remand Order" or "TRRO"].

McLeodUSA Telecommunications Services, Inc., and XO Communications Services, Inc. (collectively Joint CLECs). Gregory Diamond, Denver, Colorado, represents Covad. Dennis Robins, Vancouver, Washington, represents Electric Lightwave, Inc. Karen Clausen, Minneapolis, Minnesota, represents Eschelon. Karen Johnson, Beaverton, Oregon, represents Integra. David Mittle, Santa Fe, New Mexico, represents Tel West Communications, LLC. Peter Healy, Olympia, Washington, represents TSS Digital Services, Inc. (TDS). Arthur A. Butler, Ater Wynne LLP, Seattle, Washington, represents the Washington Electronic Business and Telecommunications Coalition (WeBTEC). Simon J. ffitch and Judith Krebs, Assistant Attorneys General, Seattle, Washington, represent the Public Counsel Section of the Washington Office of the Attorney General (Public Counsel).

- 4 **PROCEDURAL HISTORY.** The Commission opened this docket as a staff investigation in April 2005. After holding a workshop in this proceeding on February 1, 2006, the Commission redefined the nature of the proceeding, stating that it would consider whether to issue an interpretive statement or policy statement in this proceeding.²
- 5 On August 9, 2006, the Joint CLECs filed a letter requesting the Commission initiate a proceeding to determine whether to require cost-based access to high capacity loops and transport under Section 271 of the Telecommunications Act of 1996 (the Act)³ or to classify the services as intrastate private line services under state law.
- 6 Qwest and Verizon filed responses opposing the Joint CLECs' request, and the Joint CLECs filed a reply on September 11, 2006.
- 7 On September 21, 2006, Qwest submitted supplemental authority to support their response to the Joint CLECs' request.

² See Order 02, ¶ 6.

³ Pub. L. No. 104-104, 110 Stat. 56 (1996).

MEMORANDUM

8 The Joint CLECs’ August 9, 2006, letter requests that “the Commission initiate an adjudicated phase of this docket to establish just and reasonable rates for high capacity loop and transport facilities that are no longer available as UNEs [unbundled network elements] in the wake of the TRRO – either as Section 271 UNEs or as wholesale intrastate private line circuits.”⁴ The Joint CLECs assert that implementing the terms of the FCC’s Triennial Review Remand Order will severely limit CLEC access to high capacity facilities in wire centers designated as non-impaired. The Joint CLECs assert that the prices for special access services, the only available alternative to high-capacity UNEs, greatly exceed the cost-based UNE rates. The Joint CLECs claim that without access to these facilities at just and reasonable rates, their ability to offer competitive services will be severely limited.

9 We interpret the Joint CLECs’ letter as a petition for an adjudicative proceeding.⁵ Under our rules, the Commission must either begin an adjudicative proceeding or decide not to conduct such a proceeding within 90 days after a petition or responses are filed, whichever is later.⁶ For the reasons discussed below, we decide not to initiate an adjudicative proceeding as the Joint CLECs request.

A. Section 271 Authority

10 The Joint CLECs propose that the Commission exercise its authority to establish rates for high-capacity transport and loop UNEs which the Joint CLECs assert Qwest must provide under Section 271 of the Act.

11 Section 271 addresses the entry of Bell Operating Companies (BOCs) into the long distance or interLATA telecommunications market in the region in which they provide local service. The section requires BOCs to meet certain requirements, to

⁴ Joint CLECs’ August 9, 2006, letter at 2, 6.

⁵ See WAC 480-07-305(3)(b), WAC 480-07-370(1)(b)(i).

⁶ WAC 480-07-305(5).

show they have opened their local markets to competitors before the FCC will grant a BOC authority to provide in-region long distance services.⁷

- 12 The competitive checklist in Section 271(c)(2)(B) identifies the elements or services to which a BOC must provide access or interconnection to competitive carriers. Four of these checklist items - loops, transport, switching and signaling - require access to elements without reference to incumbent local exchange carrier (ILEC) obligations under Section 251(c)(3) of the Act to provide unbundled access to elements or services to competitive carriers.⁸ The FCC has interpreted Section 271 to require BOCs to provide access to these four specific elements under Section 271 separately and independently from any obligations under Section 251(c)(3).⁹ These elements are referred to as Section 271 elements.
- 13 Both the Joint CLECs and Qwest agree that Section 271 imposes an obligation separate from Section 251(c)(3) to provide unbundled access to loops, transport, switching and signaling. However, the Joint CLECs and Qwest disagree about state commission authority to enforce this obligation. Specifically, the Joint CLECs have requested the Commission to provide access to Section 271 elements through an interconnection or other agreement and, further, to establish cost-based rates for those elements. For reasons discussed below, we reject the Joint CLECs' proposal.
- 14 In two prior proceedings – the Covad Arbitration proceeding, Docket UT-043045, and Verizon Arbitration proceeding, Docket UT-043013 – the Commission determined that we lack authority to enforce the provisions of Section 271, and could not require parties to include Section 271 elements in interconnection agreements and to address pricing.¹⁰ The Joint CLECs' petition provides no factual or legal basis to diverge from the conclusions reached in our earlier decisions.

⁷ See 47 U.S.C. §§ 271(b), (c), (d).

⁸ See Section 271(c)(2)(B)(iv), (v), (vi) and (x). See also 47 U.S.C. § 251(c)(3). The Triennial Review Remand Order is the last in a series of FCC orders addressing ILEC obligations to provide unbundled access to elements and services under Section 251(c)(3).

⁹ *Triennial Review Remand Order*, ¶¶ 653-655.

¹⁰ See Docket UT-043035, Order 06, ¶¶ 39-45; Docket UT-043013, Order 17, ¶¶ 67-69. The Commission upheld this issue in its final order, Order 18, in Docket UT-043013.

- 15 As in the previous arbitrations, the Joint CLECs assert we may require BOCs, such as Qwest, to provide access to Section 271 elements at cost-based rates by incorporating the obligation to provide such elements into interconnection agreements. The petitioners support their argument by referring only to language in Section 271(c)(2)(A) providing that a BOC meets the requirements for Section 271 authority if it provides access and interconnection through an interconnection agreement or statement of generally available terms (SGAT), and the access and interconnection comply with the competitive checklist. The FCC has already decided that Qwest has met the requirements for Section 271 authority. The petitioners ask us to expand the authority expressly vested in the FCC under Section 271 to include state authority to order access to Section 271 elements. We decline to do so.
- 16 Section 271 gives state commissions authority to consult with the FCC about whether BOCs have met the requirements for long distance authority, but affords state commissions no role in the enforcement of Section 271.¹¹ State commissions may only arbitrate agreements requiring compliance with Section 251 and state law. Two recent district court decisions in Missouri and Florida support our conclusion.¹²
- 17 Furthermore, we are not persuaded by the recent district court decision on which the Joint CLECs rely. That decision focuses on whether states are preempted from setting rates under Section 271, not whether states have authority to require inclusion of Section 271 elements in interconnection agreements.¹³ The facts - and state law - underlying this decision are quite different from those in Washington. In Maine, Verizon agreed during the state's Section 271 review process to file with the Maine Public Utilities Commission a state wholesale tariff including Section 271 elements.¹⁴

¹¹ See Section 271(d)(6).

¹² *DIECA Communications, Inc., et al. v. Florida Pub. Serv. Comm'n.*, 447 F. Supp. 2d 1281, 1286 (N.D. Fla 2006); *Southwestern Bell Tel., L.P. d/b/a SBC Missouri v. The Missouri Public Service Commission, et al.*, Docket No. 4:05-CV-1264 CAS, Declaratory Judgment and Permanent Injunction, Memorandum Opinion and Order at 17-20 (E.D. Mo, E. Div., Sept. 14, 2006).

¹³ See *Verizon New England v. Maine Pub. Utils. Comm'n.*, 441 F. Supp 2d 147 (D. Me. 2006); see also *Verizon New England v. Maine Pub. Utils. Comm'n.*, 403 F. Supp. 2d 96 (D. Me. 2005).

¹⁴ *Verizon New England*, 441 F. Supp. 2d at 150; see also *Verizon New England*, 403 F. Supp. 2d at 99-100.

There was no agreement during the Section 271 review process in Washington to include Section 271 elements in wholesale tariffs or interconnection agreements. Thus, there is no basis under Washington State law for this Commission to require Qwest to include Section 271 elements in its interconnection agreements.¹⁵

18 After the FCC entered the TRRO, the Maine Public Utilities Commission required Verizon to continue to provide access to Section 271 elements at TELRIC rates.¹⁶ Verizon sought to enjoin the state's order. The court found that Verizon did not show that the Maine commission lacked authority under state law authority to include Section 271 elements in interconnection agreements.¹⁷ The court also held that Verizon failed to show that Section 271 preempts states from setting rates for Section 271 elements.¹⁸ While states may not be preempted from setting rates for Section 271 elements, they must demonstrate authority under state law to enforce obligations under Section 271. As we discuss above, we do not find state authority in Washington to enforce Qwest's obligations under Section 271.

19 In conclusion, state commissions may set rates for Section 271 elements, but possess no authority to enforce Section 271 obligations – unless such authority is grounded in state law. As we discuss above, we do not find state authority in Washington to enforce Qwest's obligations under Section 271.

¹⁵ The Commission 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 Telecommunications Act of 1996. Enforcement of Section 271 obligations is not an action permitted under the Act. In addition, the Commission's state law authority to order access to unbundled telecommunications elements is limited by the Act and subsequent federal law. See RCW 80.36.140; *WUTC v. U S West Communications, Inc.*, Fourth Supplemental Order Rejecting Tariff Filing and Ordering Refiling; Granting Complaints, In Part, WUTC Docket UT-941614 (Oct. 30, 1995); see also *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 378 n.6 (1999).

¹⁶ 441 F. Supp. 2d at 150-51; TELRIC stands for Total Element Long-Run Incremental Cost, and is the methodology the FCC established for pricing for unbundled network elements. See First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, 15,884, ¶ 672 (1996).

¹⁷ 441 F. Supp. 2d at 152.

¹⁸ *Id.*

B. Wholesale Rates for Intrastate Private Line Services.

- 20 The Joint CLECs also request that the Commission initiate a proceeding to establish wholesale rates for Qwest's intrastate private line services. The Joint CLECs assert the Commission has jurisdiction to review rates upon the Commission's own motion or complaint under RCW 80.36.140, or revisit the competitive classification of Qwest's high capacity private line services under RCW 80.36.330. To support this request, the Joint CLECs attach charts comparing Qwest's UNE and special access rates in Washington. The Joint CLECs assert the requested proceeding would be in keeping with the purpose of this docket – "to determine the status of competition and assess the impact of the TRRO."¹⁹
- 21 Qwest opposes the Joint CLECs' proposal, asserting among other concerns that the Commission may lack jurisdiction over pricing for private line services as carriers mix their intrastate and interstate traffic on the same circuits that require the circuits to be priced under the interstate tariff.²⁰
- 22 Unlike the issue of Section 271 authority above, there is no question of the Commission's authority to address rates through an investigation or adjudication for intrastate private lines. The Joint CLECs and Qwest agree that the Commission may on its own motion or upon a complaint, determine whether a telecommunications carrier's rates "are unjust, unreasonable, unjustly discriminatory or unduly preferential."²¹ Contrary to Qwest's assertion, the Commission may also investigate prices for competitively classified services either upon the Commission's own motion or upon complaint.²²

¹⁹ Joint CLECs' August 9, 2006, letter at 6.

²⁰ Qwest Response at 4-5.

²¹ RCW 80.36.140.

²² RCW 80.36.330(4). "The commission may investigate prices for competitive telecommunications services upon complaint. *In any complaint proceeding initiated by the Commission* the telecommunications company providing service shall bear the burden of proving that the prices charges cover costs, and are fair just, and reasonable." *Id.* (emphasis added).

- 23 The relevant question is whether the Commission *should* initiate such a proceeding. At this time the question requires consideration of whether the Commission has sufficient evidence to proceed now, as well as the Commission's resources and workload.
- 24 We deny the Joint CLECs' request that the Commission initiate a complaint proceeding under RCW 80.36.140 or RCW 80.36.330. After reviewing the Joint CLECs' request and attached charts comparing UNE and access charges, the Commission lacks sufficient evidence to proceed with a complaint on its own motion or to reclassify Qwest's competitively classified services. The Joint CLECs do not present sufficient evidence or a compelling reason for the Commission to assume the burden of an investigation and complaint that the Joint CLECs might otherwise carry. It is apparent from the Joint CLECs' request and reply that they have better information than the Commission about how CLECs obtain and use services from Qwest, and what alternatives are available. If the Joint CLECs believe they have sufficient evidence to file a complaint with the Commission, the Joint CLECs should do so and carry the burden of proof.
- 25 We agree with the Joint CLECs that fostering the development of local exchange competition in Washington is an important goal and state policy.²³ This has been the case for over two decades, and is increasingly important in the current phase or increasing consolidation in the telecommunications industry. However, there are other dockets before the Commission in which the Joint CLECs may address these issues. These open dockets include Qwest's petition for an alternate form of regulation in Docket UT-061625, and petitions for competitive classification filed by United Telephone Company of the Northwest d/b/a Embarq (Docket UT-061622), CenturyTel of Washington, Inc. (Docket UT-061629) and Qwest (Docket UT-061634). These open dockets may provide a better use of the Commission's resources and a more focused forum for discussing the Joint CLECs' concerns over Qwest's pricing of high capacity network elements than this proceeding or a Commission initiated complaint.

²³ RCW 80.36.300.

FINDINGS OF FACT

26 Having discussed above in detail the evidence received in this proceeding concerning
all material matters, and having stated findings and conclusions upon issues in dispute
among the parties and the reasons therefore, the Commission now makes and enters
the following summary findings of fact, incorporating by reference pertinent portions
of the preceding detailed findings:

27 (1) The Washington Utilities and Transportation Commission is an agency of the
state of Washington vested by statute with the authority to regulate the rates
and conditions of service of telecommunications companies within the state,
and to take actions, conduct proceedings, and enter orders as permitted or
contemplated for a state commission under the Telecommunications Act of
1996.

28 (2) Verizon Northwest Inc. and Qwest Corporation are incumbent Local Exchange
Companies, or ILECs, providing local exchange telecommunications service to
the public for compensation within the state of Washington.

29 (3) Qwest Corporation is a Bell Operating Company (BOC) within the definition
of 47 U.S.C. § 153(4), providing local exchange telecommunications service to
the public for compensation within the state of Washington.

30 (4) Covad Communications Company, Electric Lightwave, Inc., Eschelon
Telecom of Washington, Inc., Integra Telecom of Washington, Inc.,
McLeodUSA Telecommunications Services, Inc., Tel West Communications,
LLC, TSS Digital Services, Inc., and XO Communications Services, Inc., are
local exchange carriers within the definition of 47 U.S.C. § 153(26), providing
local exchange telecommunications service to the public for compensation
within the state of Washington, or are classified as competitive
telecommunications companies under RCW 80.36.310 - .330.

31 (5) The Joint CLECs' support their petition solely through an attachment
identifying Qwest's rates for UNEs and special access services.

CONCLUSIONS OF LAW

32 Having discussed above all matters material to this decision, and having stated
detailed findings, conclusions, and the reasons therefore, the Commission now makes
the following summary conclusions of law incorporating by reference pertinent
portions of the preceding detailed conclusions:

33 (1) The Washington Utilities and Transportation Commission has jurisdiction over
the subject matter of, and parties to, these proceedings.

34 (2) Section 271 of the Telecommunications Act of 1996 provides state
commissions authority to consult with the FCC about whether Bell operating
companies have met the statutory standards for the FCC to grant authority to
provide long-distance telecommunications services, but provides no authority
for state commissions to enforce Bell operating company obligations under the
statute.

35 (3) The Commission has authority to initiate complaints on its own motion under
RCW 80.36.140 and RCW 80.36.330.

36 (4) The Joint CLECs' petition provides insufficient evidence on which the
Commission can justify initiating a complaint under RCW 80.36.140 and
RCW 80.36.330.

37 (5) Section 271 gives state commissions authority to consult with the FCC about
whether BOCs have met the requirements for long distance authority, but
affords state commissions no role in the enforcement of Section 271. State
commission may only arbitrate agreements requiring compliance with Section
251 and state law.

ORDER

THE COMMISSION ORDERS:

38 (1) The Joint CLECs' petition for an adjudicative proceeding is denied.

39 (2) The Commission retains jurisdiction to effectuate the terms of this order.

Dated at Olympia, Washington, and effective November 9, 2006.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

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.