BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Investigation Concerning the Status of Competition and Impact of the FCC's Triennial Review Remand Order on the Competitive Telecommunications Environment in Washington State.	)	DOCKET NO. UT-053025 JOINT CLEC PETITION FOR ADMINISTRATIVE REVIEW OF ORDER 05

1. Covad Communications Company, Integra Telecom of Washington, Inc., Time Warner Telecom of Washington, LLC, and XO Communications Services, Inc. (collectively "Joint CLECs") petition the Commission for administrative review of Order 05, Order Denying Joint CLECs' Request for Adjudication ("Order 05").

INTRODUCTION

2. The Commission established this docket in response to concerns expressed by the Joint CLECs in opposition to Qwest's last petition for competitive classification of business services. Specifically, the Joint CLECs contended that Qwest could not legitimately demonstrate the existence of effective competition under RCW 80.36.330 by relying on competitors' access to unbundled network elements ("UNEs") when the Federal Communications Commission ("FCC") had authorized Qwest to no longer offer many of those UNEs. The Commission chose to grant Qwest's petition based on the availability of UNEs at that time but initiated this proceeding, as the caption states, to investigate "the status of competition and impact of the FCC's Triennial Review Remand Order on the competitive telecommunications environment in Washington state."

3. Eighteen months later, the Commission has yet to initiate any such investigation. The Commission has addressed only disputed issues concerning which UNEs should no longer be available in which wire centers. But the Commission has not considered how the unavailability of those UNEs will impact local exchange competition in general, or more specifically whether effective competition exists to justify continued competitive classification of Qwest's retail and wholesale business services. Consistent with their understanding of the purpose of this docket, the Joint CLECs proposed that the Commission address those issues in an adjudicative phase of this docket and, as the Joint CLECs believe is necessary, establish just and reasonable rates for wholesale services that competitors need to offer viable alternatives to Qwest's retail services. The Joint CLECs envisioned procedures similar to those used in Docket No. UT-033044 (the Triennial Review Order docket), in which the parties negotiated, and the Commission issued, bench requests to all local exchange carriers operating within Qwest's service territory, followed by prefiled testimony and hearings.

4. Order 05, however, rejects that proposal. The Order makes no reference to any alternative procedures for undertaking the investigation for which this docket was created. To the contrary, Order 05 seems to indicate that the Commission lacks the resources and workload capacity to conduct any such investigation. Meanwhile, Qwest continues to maintain prices for high capacity circuits that far exceed their costs, which further hampers CLECs' ability to offer effectively competitive alternative services, particularly in areas where UNEs are no longer available, to the ultimate detriment of Washington consumers.

5. If the Commission truly believes that "fostering the development of local exchange competition in Washington is an important goal and state policy,"[1] the Joint CLECs urge the Commission to review Order 05 and to initiate the investigation that this docket was opened to undertake.

DISCUSSION

A. The Commission Has State Law Authority to Establish Appropriate Rates for Section 271 Elements.

6. Order 05 concludes that neither the Telecommunications Act of 1996 ("Act") nor Washington law authorize the Commission to establish rates for loop and transport facilities that Qwest is required to provide under Section 271. The order is incorrect on both counts.

7. Order 05 first contends, "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 enforcement of Section 271."[2] Such a contention ignores the language and intent in the Act. Section 271 obligations are expressly linked to state commission approval authority over interconnection agreements ("ICAs") under section 252 of the Act. Specifically, section 271(c)(2)(A) establishes that Qwest and other Bell Operating Companies ("BOCs") must meet the "specific interconnection requirements" of that section – *i.e.*, the "competitive checklist" in subsection (c)(2)(B) – through an ICA or a statement of generally available terms ("SGAT"), each of which is subject to state commission review and approval. Section 271(c)(2) provides in relevant part (with emphasis added):

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[1] Order 05 ¶ 25.

[2] Order 05 ¶ 16.

Specific Interconnection Requirements

(A) Agreement Required

A Bell operating company meets the requirements of this paragraph if, within the State for which authorization is sought –

(i)(I) ***such company is providing access and interconnection pursuant to one or more agreements*** described in paragraph (1)(A) [interconnection agreement], or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [SGAT], ***and***

(ii) ***such access and interconnection meets the requirements of subparagraph (B)*** of this paragraph [the competitive checklist].

8. The competitive checklist in Section 271(c)(2)(B) includes the mandate to provide high capacity loops and transport independent of section 251. Section 271(c)(2)(A) defines these facilities and other items on the competitive checklist as "access and interconnection" that must be provided "pursuant to one or more agreements described in paragraph (1)(A). Such agreements, according to Section 271(c)(1)(A), must "have been approved under section 252." Such approval authority rests first and foremost with this and other state commissions pursuant to section 252.

9. Section 252(e) is consistent with incorporation of Section 271 elements into ICAs within state commission jurisdiction. That section provides that all ICAs, whether adopted by negotiation or arbitration, shall be submitted to the state commission for approval. Section 252(e) does not restrict such agreements to those incorporating only Section 251 elements. Indeed, this Commission has been expansive in its interpretation of agreements that must be filed with the Commission under Section 252, requiring the filing of settlement agreements, commercial agreements, and any other agreements that

bear on any aspect of Qwest's interconnection obligations, regardless of whether the agreements were negotiated or arbitrated under Section 252(a) or (b). The Commission cannot logically contend that it lacks jurisdiction to enforce the Section 271 competitive checklist when Congress requires such elements to be included in agreements approved – and enforced – by the Commission and the Commission itself requires that any agreements related to interconnection be filed for its approval.[3]

10. The Arizona Commission concluded that its authority to review and approve ICAs under Section 252 includes authority over the prices Qwest charges for network elements mandated by section 271.[4] That commission emphasized (1) its authority under section 252(e) to review "any" ICA; (2) the inclusion of the competitive checklist under the statutory provision entitled, "Specific Interconnection Requirements"; and (3) the requirement in section 271(c)(1)(A) that a BOC enter into an agreement approved under section 252 that specifies the terms and conditions under which the BOC is providing access and interconnection to its network facilities.[5] The Arizona Commission also observed that the FCC order approving Qwest's long distance entry expressly recognized an ongoing role for state commissions:

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[3] *See, e.g., MCI Telecom. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 338 (7th Cir. 2000) ("A state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by the commission."); *WUTC v. Advanced Telcom Group, et al.*, Docket No. UT-033011, Order 05 ¶ 54 (Feb. 12, 2004) (recognizing that "federal courts have recognized state commission authority to enforce the provisions of interconnection agreements" and that "[i]mplicit in the FCC's analysis [of Section 252(e)] is state commission authority to enforce the failure to file interconnection agreements as required by section 252").

[4] *In re Petition of Covad for Arbitration of an Interconnection Agreement with Qwest*, Docket Nos. T-03632A-04-0425 and T-01051B-04-0425, Opinion and Order (Jan. 2006) (a copy of which is attached to this Petition for the Commission's reference).

[5] *Id*. at 18-20.

> Working in concert with the Arizona Commission, we intend to closely monitor Qwest's post-approval compliance for Arizona . . . .
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> * * *
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> We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Qwest's entry into Arizona.[6]

The FCC order approving Qwest's long distance entry in Washington contains the same language cited by the Arizona Commission as an express recognition that the FCC expected state commissions to have an ongoing enforcement role under section 271.[7]

11. The Georgia Commission took a slightly different approach in reaching the same conclusion. That commission, like the Arizona Commission, found that "Section 252 agreements are the vehicles through which a BOC demonstrates compliance with Section 271. As such, it is logical to conclude that obligations under Section 271 must be included in a Section 252 interconnection agreement."[8] In contrast to the Arizona Commission, however, the Georgia Commission emphasized that "[b]y setting rates, the Commission is not enforcing Section 271."[9] Rather, that commission concluded, it was reasonably exercising concurrent jurisdiction with the FCC to establish just and reasonable rates, which is within the express contemplation of the FCC:

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[6] *Id*. at 20 (quoting *In re Application of Qwest for Authorization to Provide In-Region InterLATA Services in Arizona*, FCC 03-309, WC Docket No. 03-194, Memorandum Opinion and Order ¶¶ 59-60 (Dec. 3, 2003)).

[7] *In re Application of Qwest for Authorization to Provide In-Region InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, FCC 02-332, WC Docket No. 02-314, Memorandum Opinion and Order ¶¶ 498-99 (rel. Dec. 23, 2002).

[8] *In re Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations to Provide Unbundled Network Elements*, Ga. PSC Docket No. 19341-U, Order Initiating Hearings to Set Just and Reasonable Rate Under Section 271 at 3 (Jan. 17, 2006) ("Georgia Order").

[9] *Id*.

> There are elements that a BOC must provide under Section 271 that the FCC has found no longer meet the Section 251 impairment standard. While a BOC is no longer obligated to offer such an element at TELRIC prices, the element still must be priced at the just and reasonable standard set forth in Section 271. In discussing the just and reasonable standard the FCC states as follows:
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> > Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied *under most federal and state statutes*, including (for interstate services) the Communications Act.
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> Far from claiming the exclusive right to set the rates pursuant to this standard, the FCC expressly recognized the application of such a standard at both the state and federal level.[10]

12. The Act (as written and as interpreted by the FCC) thus authorizes the Commission to establish just and reasonable rates for section 271 elements. Washington statutes, in turn, expressly authorize the Commission to "take actions, conduct proceedings, and enter orders as permitted or contemplated for a state commission under the federal telecommunications act of 1996."[11] Order 05 is simply incorrect when it states that such state law authority does not apply to establishing just and reasonable rates for section 271 elements.

13. Washington law also provides that the Commission has the authority to establish "just and reasonable rates" for "rental or use of any telecommunications line" or "wire,"[12]

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[10] *Id*. (footnote and citations omitted) (quoting TRO ¶ 663) (emphasis added by quoting commission).

[11] RCW 80.36.610(1).

[12] RCW 80.36.140.

which indisputably includes loops and transport. Order 05 does not address this statutory provision but observes merely that "the Commission's state law authority to order access to unbundled telecommunications elements is limited by the Act and subsequent federal law."[13] While true, that limitation is inapplicable. The Act specifically preserves state authority to enforce the requirements of state law to the extent that those requirements are not preempted by the Act.[14] Even if Section 271 did not authorize the Commission to establish rates for checklist items – which it does – nothing in the Act or any FCC decision preempts the Commission from establishing such rates under authority granted by the Washington legislature.[15]

14. The Commission, therefore, has – and should exercise – authority to establish just and reasonable rates for loops and transport that Qwest is required to provide under Section 271's competitive checklist.

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[13] Order 05 ¶ 5, n.15.

[14] *E.g.*, Section 252 (e)(3).

[15] *In re a Potential Proceeding to Investigate the Wholesale Rates Charged by Qwest*, Minn. PUC Docket No. P-421/CI-05-1996, Notice and Order for Hearing at 3-5 (May 4, 2006) (a copy of which is attached to this Petition for the Commission's reference) ("Minnesota Order"); *accord Verizon New England v. Maine Pub. Utils. Comm'n*, 441 F. Supp. 2d 147 (D. Me. 2006); *Verizon New England v. Maine Pub. Utils. Comm'n*, 403 F. Supp. 2d 96 (D. Me. 2005). Order 05 cites contrary decisions from district courts in Florida and Missouri. The Florida decision includes little, if any, analysis, and the Missouri court found persuasive the argument that the ICA requirements could be satisfied by a single negotiated agreement and thus there was no implicit authority under Section 271 for anything other than state commission approval of ICAs. Such a theoretical possibility is irrelevant, particularly in Washington where the Commission conducted extensive proceedings to develop an SGAT and arbitrate interconnection agreements that comply with the Act and state law. Carriers could fully negotiate agreements under Section 252 as well, but that possibility does not undermine Commission authority to arbitrate other agreements or to enforce all agreements – including fully negotiated agreements and agreements that include section 271 elements.

B. The Commission Should Exercise Its Authority to Ensure that Qwest's Intrastate Private Line Rates Are Fair, Just, Reasonable, and Sufficient.

15. Order 05 correctly observes that "there is no question of the Commission's authority to address rates through an investigation or adjudication for intrastate private lines."[16] The Order nevertheless declines to initiate such a proceeding, stating, "The Joint CLECs do not present sufficient evidence or compelling reason for the Commission to assume the burden of an investigation and complaint that the Joint CLECs might otherwise carry."[17] This conclusion is problematic on several grounds.

16. The Joint CLECs presented the Commission with evidence that, while they are facilities-based carriers, they rely on Qwest's "last mile" and transport facilities to serve their customers; that Qwest's intrastate and interstate private line rates vastly exceed the forward-looking costs of those facilities; and that the percentage of CLEC access lines in Washington as reported to the FCC are very small, particularly when compared to the percentages in other populous states in the Qwest region. The Minnesota Commission found comparable evidence more than sufficient to open its own adjudicative investigation into Qwest's wholesale rates,[18] and the Georgia Commission opened a similar docket without any evidence at all.[19] If the evidence the Joint CLECs provided is insufficient for the Commission even to initiate an adjudication – especially when the ostensible purpose of this docket is to investigate the status of local competition – the Joint CLECs do not know what evidence would be sufficient.

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[16] Order 05 ¶ 22.

[17] *Id.* ¶ 24.

[18] Minnesota Order.

[19] Georgia Order.

17. Order 05 also states, "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."[20] The Commission, however, actually has more comprehensive information in this area than the Joint CLECs based on its prior investigation pursuant to the FCC's Triennial Review Order ("TRO") in Docket No. UT-033044. The Commission issued subpoenas in that proceeding to all local exchange companies operating in Qwest's local service territory and obtained highly confidential information about the location of facilities and the availability of high capacity services to competitors. The Joint CLECs do not have access to this data (other than their own) and could not use it outside the context of that docket even if they had access. Publicly available testimony based on an analysis of this data, however, supports the Joint CLECs' market experience that Qwest is the predominant, if not sole, source of wholesale high capacity facilities in its service territory in Washington.[21] The Commission thus has as much, if not more, information than the Joint CLECs on the extent to which alternatives to Qwest's high capacity private line services are available to competitors.

18. Order 05 further provides, "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."[22] Neither the Commission nor the Joint CLECs should bear

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[20] *Id.*

[21] *In re Petition of Qwest to Initiate a Mass-Market Switching and Dedicated Transport Case Pursuant to the TRO*, Docket No. UT-033044, prefiled Response Testimony of Dean R. Fassett (Feb. 2, 2004) (a copy of which is attached to this Petition for ease of reference). Mr. Fassett's prefiled testimony addresses only transport because Qwest did not even allege the existence of sufficient alternative providers of loop facilities.

[22] Order 05 ¶ 24.

the burden to prove that Qwest's private line services (at least as provided to competitors) are not subject to effective competition – Qwest should bear the burden to demonstrate the existence of effective competition. Indeed, the Commission previously determined that Qwest bears the burden of proof in a proceeding to reclassify competitively classified services in the context of Qwest's Centrex services, and the legislature expressly provided that "[i]n any complaint proceeding initiated by the commission, *the telecommunications company providing the service shall bear the burden of proving that the prices charged cover cost, and are fair, just, and reasonable*."[23]

19. Consumers of telecommunications services, not just the Joint CLECs, are negatively impacted by lack of full Commission oversight of Qwest services in markets that are not effectively competitive. The Commission's competitive classification of Qwest's high capacity private line services was based in large part, if not primarily, on the availability of UNEs to competitive providers. The unavailability of such UNEs in multiple Qwest wire centers represents a fundamental change in the factual basis of the Commission's prior determination. Qwest – not the Commission or the Joint CLECs – should be required to prove that effective competition exists for these services under these circumstances and that Qwest's prices are fair, just, and reasonable.

20. Finally, Order 05 states that "there are other dockets before the Commission in which the Joint CLECs may address these issues."[24] That statement is simply incorrect. Qwest's pricing of private line or other high capacity services used by competitors is not specifically at issue in any of the dockets listed in the Order – or in any other docket, for

[23] RCW 80.36.330(4) (emphasis added).

[24] Order 05 ¶ 25.

that matter. Qwest already enjoys competitive classification for its high capacity services and thus has not sought any relief in its alternative form of regulation ("AFOR") (Docket No. UT-061625) or its latest petition for competitive classification of services (Docket No. UT-061634) specific to such services. Unless the Commission is willing to expand the issues in these dockets beyond those raised in Qwest's petitions to include pricing of high capacity private line services, that issue will not be addressed at all if the Commission does not consider it in this docket.

CONCLUSION

21. The Commission opened this docket to investigate the impact of the unavailability of UNEs in multiple wire centers on local competition in Washington. The Joint CLECs proposed a procedural vehicle by which the Commission could and should undertake that investigation and ensure that the TRRO does not negatively impact consumers' access to alternative sources of telecommunications services. Order 05 rejects that proposal based on an incorrect interpretation of Commission authority and of Qwest's obligations under applicable law. The Commission should review that order and initiate the proceeding the Joint CLECs have proposed, consistent with the intent of this docket and the public interest.

DATED this 17th day of November, 2006.

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