

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

QWEST CORPORATION'S ANSWER
TO JOINT CLEC PETITION FOR
ADMINISTRATIVE (INTERLOCUTORY)
REVIEW OF ORDER 05

I. INTRODUCTION

- 1 Qwest Corporation ("Qwest") hereby responds to the Joint CLECs' Petition for Administrative Review ("Petition") of Order 05, Order Denying Joint CLECs' Request for Adjudication ("Order"). In that Order, the Commission denied 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 held that it lacks authority to enforce Qwest's obligations under Section 271 of the Telecommunications Act and that the Joint CLECs do not provide sufficient information to justify the Commission initiating a proceeding on its own motion.
- 2 The Order is correct on both counts, and the Petition for Review should be denied for multiple reasons. First, the Joint CLECs do not state grounds for review under WAC 480-

07-810. Second, the Commission has no obligation to commence an adjudicative proceeding, and correctly declined to do so. Third, the Petition for Review merely rehashes old arguments that the Commission has already considered and ruled on, consistently, on multiple occasions, regarding the Commission's authority to enforce Qwest's Section 271 obligations.

II. DISCUSSION

A. There Is No Basis For Interlocutory Review Under WAC 480-07-810

3 The Joint CLECs have petitioned for review of an interlocutory order of the Commission. Under WAC 480-07-810(2), interlocutory review is discretionary with the Commission. The Commission may accept review of interim or interlocutory orders in adjudicative proceedings if it finds that: (a) The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm; (b) A review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or (c) A review could save the commission and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review.

4 None of the three factors is present in this case, and the Commission should decline review at this point. Clearly, the Order does not terminate the Joint CLECs' participation in this docket under subpart (a). Nor do the Joint CLECs state that there are factors present that would justify review under subparts (b) or (c). However, if the Commission determines that it would likely exercise review over these same issues eventually, and wishes to undertake that review now instead of later, it is Qwest's position that the Commission properly denied the request for an adjudication and properly analyzed the Section 271 issues.

B. The Commission Properly Declined to Conduct an Adjudication

5 The Commission very generously considered the Joint CLECs' August 9, 2006 letter to be a petition for commencement of an adjudicative proceeding. Leaving aside whether the letter met the requirements to be considered as such, the Commission properly declined to commence an adjudicative proceeding. The intrastate private line rates that are at the heart of the Joint CLECs' request are competitively classified services. Under RCW 80.36.330(4) and the Commission's orders granting competitive classification, the Commission may investigate prices for those services only upon complaint.

6 The complaint may either be filed under RCW 80.36.110 (or other applicable provisions of the RCW), or may be initiated on the Commission's own motion. The Joint CLECs here have assiduously avoided filing their own complaint, thereby avoiding burden of proof issues that would certainly defeat any complaint. Instead, they have spent the better part of 18 months trying to convince the Commission to undertake such a complaint itself. However, the Commission is under no obligation to do so, and, having reviewed all of the Joint CLECs' submissions and arguments, has properly decided that it will not. See, Order at ¶¶ 20-25. The Joint CLECs state no basis to alter that outcome.

C. The Commission Properly Decided the Section 271 Pricing Issues

7 The Joint CLECs argue that the Commission should review Order 05 and reverse the decision with regard to the Commission's authority to set prices for Section 271 elements or services. In making this argument, the Joint CLECs do not expand the support for their position, rather they continue to rely on arguments that this Commission has already rejected. In Order 05, the Commission correctly observes that it does not have state law authority to do set prices under Section 271, and the CLECs fail to bring forward any additional information to support the assertion that that decision was incorrect. The

Commission relies on several district court decisions in support of its conclusion, and distinguishes the authority cited by Joint CLECS. Order, ¶¶ 15-19.

8 Consistent with this Commission’s prior rulings on the issue of state authority under Section 271, the Colorado Commission recently addressed this very issue, stating that the question is “whether this Commission has the jurisdiction to price network elements that must be offered by Qwest pursuant to Section 271, but not pursuant to Sections 251 or 252, of the Act.”¹ After discussing some of the differences between Section 251 obligations and section 271 obligations, the Commission observed: “Thus, the Section 271 elements in question must be unbundled by Qwest only pursuant to Section 271, and are to be priced at rates that are not unjust, unreasonable, or unreasonably discriminatory pursuant to Sections 201 and 202 of the Act . Sections 201 and 202 of the 1996 Act do not mention any state authority over pricing of network elements.”²

9 Section 271 of the Act simply does not permit state commissions to determine just and reasonable prices for elements required to be unbundled solely by Section 271. The only mention of state commissions occurs in subsection 271(d)(2), which requires that the FCC "consult" with state commissions to verify an applicant Bell' s compliance with subsection (c) of Section 271.³ Nowhere, however, is there any authority given to state commissions over pricing of Section 271 elements. Rather, there is a limited consultation role for state commissions at the time the FCC made its long distance entry decisions, and the only enforcement authority over Section 271 requirements is given not to states, but to the FCC. Although the BOCs have an ongoing 271 obligation, the authority to enforce that

¹ *Order on Commission Jurisdiction*, PUC Colorado, Docket No. 04M-111T, Dec. No. C06-1280 (September 27, 2006) at P.14 ¶44.

² *Id.* at P.15, ¶¶44, 45.

³ Subsection (c) contains the checklist of requirements to allow a Bell into the interLATA long distance market.

obligation lies solely with the FCC and not with the states.⁴

10 Since Congress chose to give rate authority to states only regarding Section 251-52 elements, state commissions are restricted, and may not seek to extend their authority to Section 271. Nor may the Commission attempt to employ Washington state law to price Section 271 elements as urged by the Joint CLECs. Indeed, although the Ninth Circuit has not addressed the point, the Seventh Circuit has confirmed that Section 271 contemplates an advisory role for state commissions, and “[r]eliance on [state] law alone cannot alter this federal regulatory scheme.”⁵

11 As such, Joint CLECs’ continued entreaties with regard to what state commissions in Georgia or Arizona have done are irrelevant, and present no basis for granting review.

III. CONCLUSION

12 For the foregoing reasons, the Commission should deny the Joint CLECs’ Petition for Review of Order 05.

DATED this 29th day of November, 2006.

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⁴ *United States Telecom Assoc. v. Federal Communications Commission*, 359 F.3d 554, 588-89 (D.C. Cir. 2004).

⁵ *Indiana Bell Tel. Co. v Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (S.D. Ind. 2003) (state commissions not authorized by Section 271 to impose binding obligations), *aff’d*, 359 F.3d 493 (7th Cir. 2004).