

**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 07
Review Remand Order on the)
Competitive Telecommunications) ORDER ACCEPTING
Environment in Washington State) INTERLOCUTORY REVIEW AND
) DENYING JOINT CLECS' PETITION
) FOR REVIEW
.....)

1 **SYNOPSIS.** *In this Order, we accept interlocutory review of Order 05, but deny the Joint CLECs' petition for review. The Joint CLECs do not provide a persuasive and compelling reason to reverse the Commission's prior decisions concerning state commission authority over Section 271 elements. Similarly, the Joint CLECs provide no compelling reason for the Commission to initiate a complaint against Qwest concerning wholesale private lines rates when the Joint CLECs have a remedy – they may file a formal complaint with the Commission.*

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,

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"].

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), 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 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 After considering responses by Qwest and Verizon, and the Joint CLECs' reply, the Commission entered Order 05 on November 9, 2006, denying the Joint CLECs' request.

² See Order 02, ¶ 6.

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

7 On November 20, 2006, the Joint CLECs filed a Petition for Administrative
Review of Order 05. Qwest and Verizon filed responses to the Joint CLECs'
petition by November 30.

MEMORANDUM

A. Standard of Review

8 This proceeding is neither an adjudicative proceeding, nor a rulemaking, but a
docket established to investigate whether to issue an interpretive statement. There
are no rules governing administrative review of orders in such proceedings.⁴ In
other orders entered in this docket, we have applied the procedural rules governing
our administrative review of adjudicative proceedings. We continue to do so here.

9 The Joint CLECs' petition is framed as a petition for review. However, it is not
clear from their petition whether they seek interlocutory or some other form of
review. As Order 05 would be considered an interlocutory order⁵ by application
of our procedural rules, we will treat the Joint CLEC's petition as a request for
interlocutory review.

10 In its response to the petition for review, Qwest argues that the Joint CLEC's
request fails to demonstrate (or even address) that review is appropriate under the
rule governing interlocutory review and should be denied.⁶ We exercise our
discretion to accept review, finding that we may save the parties and commission
substantial effort or expense in further litigating the issue by addressing the Joint
CLECs' arguments here.⁷

⁴ While there are no rules for seeking administrative review of rulemaking orders, there are specific rules governing review of adjudicative orders. *See* WAC 480-07-810, -825, -850.

⁵ The rule defines interlocutory orders as orders "entered during the course of an *adjudicative* proceeding," distinguishing them from initial or final orders. WAC 480-07-810((1) (emphasis added).

⁶ Qwest Response, ¶¶ 3-4.

⁷ Under WAC 480-07-810(2), we have discretion to consider petitions for interlocutory review, *i.e.*, accept review, and may then grant or deny the petition.

B. Section 271 Authority

- 11 In their request for adjudication and petition for review, the Joint CLECs ask us to initiate a proceeding to establish “fair, just and reasonable” rates for high-capacity loops and transport facilities. The Joint CLECs assert Qwest must provide access to these facilities, or network elements, under Section 271 of the Act⁸ regardless of the limitations on access to these elements the FCC imposed in its Triennial Review Remand Order. They argue that we erred in deciding the Commission lacked authority under the Act and state law to establish rates for Section 271 elements.
- 12 The Joint CLECs disagree with our finding in Order 05 that the Commission’s authority under RCW 80.36.610(1) does not extend to establishing just and reasonable rates for Section 271 elements.⁹ The Joint CLECs also argue that the Commission has authority under RCW 80.36.140 to establish “just and reasonable rates” for “rental or use of any telecommunications line” or “wire,” asserting that the Act preserves state authority to enforce requirements of state law to the extent they are not preempted under the Act.¹⁰ The Joint CLECs’ contentions fail to acknowledge that the statute they seek to enforce is Section 271 of the Federal Act, not provisions of state law.
- 13 In Order 05 and two prior arbitration proceedings – Dockets UT-043013 and 043045 – we found this Commission “lack[s] authority to enforce provisions of Section 271, and ... [cannot] require parties to include Section 271 elements in

⁸ Section 271 of the Act addresses the entry of Bell Operating Companies (BOCs) into the long distance, or intraLATA, telecommunications market in the region in which they provide local service. The section requires BOCs to meet certain requirements to show they have opened their local markets to competitors before the FCC will grant the BOC authority to provide in-region long distance services. *See* 47 U.S.C. §§ 271(b), (c) and (d). 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 obligations under Section 251 of the Act. *See* 47 U.S.C. §§ 271(c)(2)(B)(iv), (v), (vi) and (x). The FCC has interpreted this statutory language to mean that BOCs, such as Qwest, must provide access to these elements separately and independently from any Section 251 obligations. *TRRO*, ¶¶ 653-655.

⁹ Joint CLEC Petition, ¶ 12. RCW 80.36.610(1) authorizes the Commission to take actions permitted or contemplated for state commissions under the Act.

¹⁰ *Id.*, ¶ 13.

interconnection agreements or to address pricing.”¹¹ We also concluded that the authority extended this Commission under Section 271 was limited to a consultation mechanism with the FCC about whether BOCs met the requirements for long distance authority – finding we had no authority under Section 271 to enforce its provisions.¹² A plain reading of the Act clearly intends the FCC to be the enforcement authority of Section 271.

14 The Joint CLECs offer no compelling facts or legal basis to deviate from our prior decisions.¹³ Therefore, we continue to find this Commission has no authority to require Qwest to include Section 271 elements when arbitrating interconnection agreements or entering into commercial agreements or to establish rates for their use.

15 As a quasi-judicial body, we are mindful of precedent and the value of consistency and predictability. While we may deviate from precedent, we should change course only where the facts and law provide a compelling rationale for doing so.¹⁴ In this matter, where the Commission has clearly addressed the same issue in two prior orders, a party must demonstrate persuasively that a change of fact or law provides that compelling rationale for us to reverse or modify these decisions. The Joint CLECs have not met this burden. Thus, we deny their petition for review on this issue.

C. Wholesale Rates for Intrastate Private Line Services.

¹¹ Order 05, ¶ 14. See Order 06, Docket UT-043035, ¶¶ 39-45; Order 17, Docket UT-043013, ¶¶ 67-69. The Commission upheld this issue in its final order in Docket UT-043013, Order 18.

¹² See 47 U.S.C. § 271(d)(6), 271 (d)(2)(B)

¹³ The Joint CLECs petition was not supported by new facts or legal argument, but attached decisions by the Arizona, Georgia and Minnesota Commissions to support their position. We do not find these decisions compelling. While other states may have reached a different conclusion, the facts and legal arguments presented in these other states is the same as that presented here. See Attachments A, B and C to the Joint CLECs’ Petition. The Arizona decision is an order in an arbitration proceeding involving Qwest and Covad. The Georgia order initiates a proceeding to set just and reasonable rates under Section 271, and the Minnesota order does the same using the state’s show cause authority.

¹⁴ *Vergyle v. Employment Sec. Dep’t*, 28 Wn. App. 399, 404, 623 P.2d 736 (1981), overruled on other grounds in *Davis v. Employment Sec. Dep’t*, 108 Wn.2d 272, 276, 737 P.2d 1262 (1987).

- 16 In their initial filing, the Joint CLECs asked the Commission to either establish wholesale rates for Qwest's intrastate private line services, exercising the Commission's authority to review rates upon the Commission's own motion or complaint under RCW 80.36.140 or to initiate a complaint under the competitive classification statute, RCW 80.36.330. To support their filing, the Joint CLECs attached charts comparing Qwest's UNE and special access rates in Washington. Order 05 denied their alternative requests – finding insufficient evidence to proceed with a complaint and no compelling reason why the Commission should assume the burden of initiating an investigation the Joint CLECs might otherwise pursue.¹⁵ The Joint CLECs assert Order 05 erred in denying the requested relief. We find no error in our decision.
- 17 As stated in Order 05, the issue is not whether the Commission has the authority to initiate a proceeding, but whether we should do so. We recognize that it would be far easier for the Joint CLECs if the Commission were to initiate a complaint against Qwest under the competitive classification statutes, as Qwest would bear the burden of demonstrating effective competition.¹⁶ We remain convinced, however, that we do not have sufficient information to bring such a complaint against Qwest.¹⁷
- 18 The charts on which the Joint CLECs rely to compare Qwest's UNE and special access rates show only the difference in rates before and after the TRRO, in which the FCC removed CLEC access to the UNEs foil loops and transport. The federally mandated change from UNE rates alone is not sufficient for us to bring a complaint. Further, it is not persuasive that other state commissions have initiated action on comparable or no evidence.¹⁸ Contrary to the Joint CLECs' assertion,

¹⁵ Joint CLEC Petition, ¶¶ 16-18; *see also* Order 05, ¶ 24.

¹⁶ RCW 80.36.330(4); *see also* Joint CLEC Petition, ¶ 18.

¹⁷ In reviewing our order, we recognize that the scope of the issues in Qwest's petition for an alternate form of regulation in Docket UT-061625 may not provide an opportunity to address the issues the Joint CLECs raise in this docket. In addition, we note that the 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) have been withdrawn.

¹⁸ *See* Joint CLEC Petition, ¶ 16.

we cannot use in this or another docket information gathered about carriers in Washington from the Commission's TRRO docket, Docket UT-033044.¹⁹ Much of the information the Commission collected in that docket is confidential or highly-confidential, and is now outdated. If the Joint CLECs have the necessary data to pursue a complaint against Qwest concerning intrastate wholesale private line rates, they should file a complaint and meet the burden of proof themselves.

- 19 We also reject the Joint CLECs' claim that consumers will be harmed if we fail to assert "oversight of Qwest's wholesale services" by not filing the requested complaint.²⁰ We also recognize that the unavailability of lines to competitive providers as a result of the TRRO has led to major changes in the wholesale market for high capacity services. However, the point is that the Joint CLECs do not lack a remedy. The Joint CLECs will more effectively preserve their interests, i.e., diverse and alternative sources of telecommunications services in this state, by filing a complaint themselves, and collecting and presenting the necessary evidence to demonstrate whether Qwest's intrastate wholesale private line rates are fair, just, reasonable and sufficient.

FINDINGS OF FACT

- 20 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:
- 21 (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.

¹⁹ *Id.*, ¶ 17.

²⁰ *Id.*, ¶¶ 19-21.

- 22 (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.
- 23 (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.
- 24 (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.
- 25 (5) This proceeding is neither an adjudicative proceeding, nor a rulemaking, but a
proceeding to investigate whether to issue an interpretive statement.
- 26 (6) The Commission has issued orders in two prior arbitration proceedings –
Dockets UT-043013 and 043045 – addressing the Commission’s authority
under Section 271, and specifically, authority over Section 271 elements.

CONCLUSIONS OF LAW

27 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:

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

- 29 (2) The Commission’s procedural rules governing administrative review of orders
address only orders entered in adjudicative proceedings. It is appropriate to
apply these rules to petitions for administrative review of orders entered in
proceedings to investigate the issuance of an interpretive statement.
- 30 (3) 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.
- 31 (4) Where the Commission has clearly addressed a set of facts and law in a prior
order, a party must demonstrate persuasively that a change of fact or law
provides a compelling rationale for the reversal or modification of that order.
- 32 (5) The Commission has authority to initiate complaints on its own motion under
RCW 80.36.140 and RCW 80.36.330.
- 33 (6) The Joint CLECs’ petition provides insufficient evidence on which the
Commission can rely to initiate a complaint against Qwest under RCW
80.36.140 and RCW 80.36.330.

ORDER

THE COMMISSION ORDERS:

- 34 (1) The Joint CLECs’ petition for administrative review is accepted for review.
- 35 (2) The Joint CLECs’ petition for administrative review of Order 05 is denied.
- 36 (3) The Commission retains jurisdiction to effectuate the terms of this order.

Dated at Olympia, Washington, and effective February 8, 2006.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner