

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of Qwest Corporation for Arbitration with Eschelon Telecom, Inc., Pursuant to 47 U.S.C. Section 252 of the Federal Telecommunications Act of 1996

Docket No. UT-063061

QWEST CORPORATION'S NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF PETITION FOR RECONSIDERATION

- 1 Qwest Corporation, ("Qwest"), through counsel, respectfully submits this notice of supplemental authority in support of its Petition for Reconsideration, filed October 27, 2008.
- 2 Qwest's petition is for the limited purpose of requesting that the Commission reconsider three rulings relating to two issues addressed in the Final Order: (1) the ruling that Qwest must retain the same circuit identification number when it converts Eschelon's service from an unbundled network element ("UNE") provided under Section 251 of the Telecommunications Act of 1996 (the "Act") to a non-UNE service provided in most cases through an interstate, FCC tariff ("UNE conversion"); (2) the Commission's determination that the \$25 conversion charge negotiated and adopted in the "Wire Center Proceeding" will permit Qwest to recover the significant costs imposed by the UNE conversion requirements adopted in the Final Order; and (3) the ruling relating to the bills that Qwest's systems generate for point-to-point commingled

EELs that would require Qwest to include in the separate bills for the UNE and the tariffed component of these EELs information that cross-references the other component. In support of its petition, Qwest relies on statutory language and multiple decisions from federal courts establishing that the arbitration authority of state commissions under Section 252 of the Telecommunications Act of 1996 ("the Act") is limited to resolving open issues relating to the duties established by Sections 251(b) and (c).¹ These decisions from the federal courts establish unanimously that state commissions do not have the authority to impose any terms and conditions for the network elements and services that Qwest provides under Section 271. This principle is directly relevant to Qwest's petition, since each of the three issues addressed in the petition involves an attempt by this Commission to impose a term or a price in connection with a network element or service that Qwest provides under Section 271, not under Section 251.

3 Through this notice, Qwest brings to the Commission's attention a newly issued decision from the United States Court of Appeals for the Seventh Circuit holding that state commissions are prohibited from regulating in any way the network elements and services that Bell Operating Companies provide under Section 271 (attached hereto). In *Illinois Bell Tel. Co. v. Box*, Nos. 08-1489, 08-1494 (7th Cir. Nov. 26, 2008), the Seventh Circuit ruled that the Illinois Commission exceeded its authority under the Act by setting rates for network elements the FCC has removed from Section 251 and that Illinois Bell now provides under Section 271. In finding that the Illinois Commission is without regulatory authority over Section 271 elements, the court emphasized that "the state has only a consultative role in proceedings under section 271."² The court rejected the Illinois Commission's argument that it has a substantive decision-making role under Section 271, stating that the argument "makes no sense" because

¹ See Petition for Reconsideration at ¶¶ 11-18.

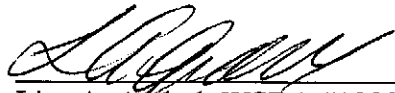
² Slip op. at 10.

there is no mention of such a role in the statute and "also because the consultative role to which section 271 confines the state commissions would be read out of the Telecommunications Act if the defendants were correct. . . ."³

4 In reaching this result, the Seventh Circuit joins the First Circuit and the Eighth Circuit, along with more than 10 federal district courts around the country. There is not a single decision from a federal court that goes the other way. These decisions establish that the Commission does not have the authority to regulate the Section 271 services that Qwest provides with UNE conversions and point-to-point commingled EELs and that, therefore, the three rulings challenged in Qwest's petition for reconsideration are unlawful.

DATED this 23rd day of December, 2008.

QWEST



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³ *Id.* at 11.