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EX PARTE

VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

RE: *In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338*

Dear Ms. Dortch:

The 1996 Telecommunications Act (the “Act”) is founded to a large extent on the Congressional hope that voluntary negotiations between carriers will ultimately supplant the current system of regulatory mandates. Indeed, one of the most fundamental premises of the Act is that competition will function far better than regulation in bringing the benefits of modern telecommunications to the American people, and the hallmark of any competitive marketplace is the ability of the various parties to contract freely among themselves free of government interference. Recent attempts by state commissions to assert regulatory authority over commercial agreements that are clearly outside the scope of their jurisdiction under Section 252 of the Act threaten to subvert Congress’ intent in this area. It is critical that the Federal Communications Commission (“Commission”) clarify in the upcoming remand order that states have no authority over commercial agreements between carriers for elements that do not meet the impairment test in the Act.

In clear recognition of the Act’s strong preference for commercial agreements, after the Commission’s most recent court reversal in the *USTA II* case,¹ the five members of the Commission issued a press release calling for negotiations among competitive local exchange carriers (“CLECs”) and incumbent local exchange carriers (“ILECs”), finding that “[a]fter years of litigation and uncertainty, such agreements are needed now more than ever.”² In response to the obvious need for commercially reasonable agreements instead of regulatory dictates and

¹ *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), cert. denied sub. nom. *NARUC v. USTA*, 125 S.Ct. 313 (2004).

² Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein on Triennial Review Next Steps, March 31, 2004.

encouraged by the consensus of the Commission itself, Qwest undertook to negotiate commercial agreements with CLECs concerning two network elements that did not pass the statutory “impairment test” – unbundled switching and line sharing. Qwest was able to negotiate a number of successful agreements in both areas, demonstrating that market forces really could function in the extant telecommunications marketplace.³

Despite the market success of these agreements, state regulators are acting in a manner that could undermine the entire concept of free market negotiations envisioned by the Act. In Qwest’s region, nine state regulatory bodies have already moved to assert jurisdiction over Qwest’s commercial agreements, and one regulator has already rejected one of the agreements for failure to comply with the state’s view of proper regulatory policy. It is Qwest’s opinion that these state actions are totally unsupportable under the Act, and has moved to litigate to vindicate this position where appropriate and necessary. But it should not be necessary to litigate the issue of state jurisdiction in the multiple federal district courts where Qwest has either currently initiated or plans to initiate litigation challenging state jurisdiction over these agreements. Such litigation is burdensome and inefficient, and carries with it the attendant risk of multiple inconsistent judgments. The Commission has the power to clear up the jurisdictional issue immediately, and should simply declare that states do not have the authority to regulate in any fashion contracts between carriers for interconnection facilities, functions or services that are not covered by Sections 251(b) or 251(c) of the Act.

The issue of state regulatory interference with federal statutory mandates under the Act, including commercial agreements such as Qwest has entered into, is of critical importance today because implementation of the Act has moved away from those areas wherein the Statute empowers state action. In matters involving implementation and enforcement of the Act, states have only so much authority as has been delegated to them by the Act itself, and cannot rely on any residual authority over intrastate services to oust the Commission from its primary jurisdiction to implement and enforce the Act. The Supreme Court has made it quite clear that implementation and enforcement of the Act is a matter entrusted exclusively to the Commission except in those areas where state jurisdiction is expressly conferred.⁴

In this context, the law is also clear that states do not have jurisdiction over interconnection agreements which are not covered by Sections 251(b) or (c) of the Act, including agreements for the provision of network elements to carriers pursuant to commercial contracts when those elements have been removed from the list of elements that pass the “impairment test” established in Section 251(d)(2)(B) of the Act. This is especially true for those elements that are unbundled by federal directive pursuant to the terms of Section 271(c)(2)(B) of the Act – unbundling required as a prerequisite to Regional Bell Operating Company (“RBOC”) entry into in-region interLATA markets. As has been pointed out in Qwest’s initial comments in this

³ It is important to realize that ILECs, such as Qwest, have a significant economic incentive to enter into such commercial agreements because CLECs are finding more and more attractive alternatives to ILECs’ services. Because the rates prescribed for unbundled network elements regulated by the Commission and by the states are generally confiscatory, or close to confiscatory, ILECs have no economic incentive to enter into these regulated arrangements.

⁴ See *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378, n.6 (1999).

docket,⁵ state jurisdiction over network elements as defined in the Act⁶ is limited to those instances where jurisdiction is specified in either Section 251(b) or (c) or Section 252 of the Act. No such jurisdiction exists over a network element that does not meet the “impairment test,” especially where the finding of non-impairment has been made by this Commission.⁷

One of the most significant implications of this fact is that states do not have the authority to review and approve or disapprove agreements between carriers for network elements that do not meet the impairment test. This approval authority, derived from Sections 252(a)(1) and 252(e)(1) of the Act, is limited to agreements for services and facilities covered by Sections 251(b) and 251(c) of the Act,⁸ and is clearly non-existent once a network element has been removed from the list of unbundled network elements pursuant to application of the “impairment test” and does not otherwise need to be provided pursuant to Sections 251(b) or (c). Contracts for such network elements are solely within the federal jurisdiction and are subject to the requirements of Section 211(a) of the Communications Act of 1934, as amended.

This is an extremely important issue for Qwest, because Qwest has entered into commercial contracts with CLECs in two critical areas. First, Qwest has entered into sixty-nine contracts for what is called the “Qwest Platform Plus” (“QPP”) with fifteen separate CLECs, including MCI. QPP is a market-based switching product⁹ that enables CLECs who desire to compete in the local exchange market with a platform-type service to do so on terms that are fair and economically reasonable to both parties. Second, Qwest has entered into forty-six contracts with twenty-one CLECs granting line sharing opportunities to these CLECs. As is the case with QPP, these line sharing arrangements are made in a commercial and market setting, rather than pursuant to regulatory compulsion, and the price is such as to make these agreements advantageous to both parties.

Both of these agreements could not have been implemented in a stringent regulatory environment marked by regulatory compulsion to make the network elements that make up these products available at TELRIC prices. Because sales at TELRIC result in significant losses to Qwest, these commercial products would have been destroyed by the continued application of the Commission’s mandatory unbundling rules. Failure of the Commission to take the necessary steps to protect these agreements from state regulation would be in derogation of its affirmative obligation to encourage ILECs and CLECs to negotiate and enter into commercial contracts

⁵ Comments of Qwest Communications International Inc., filed Oct. 4, 2004 at 92-97 (“Qwest Initial Comments”).

⁶ 47 U.S.C. § 153(29).

⁷ Of course, full federal jurisdiction also exists over other commercial agreements for network elements not covered by Section 271(c)(2)(B) of the Act – e.g., line sharing agreements. States are given jurisdiction over a limited and specified set of agreements under the Act – those covered by Sections 251(b) and (c), and no others. See Qwest Initial Comments at 94-95.

⁸ See *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, 19340-41 ¶ 8 (2002).

⁹ The QPP product permits the CLEC to combine switching, which is not an unbundled network element (and hence is not subject to state jurisdiction) with unbundled loops purchased under an interconnection agreement that has been filed pursuant to Sections 252(a)(1) and 252(e)(1).

whenever the market is such that commercial contracts are a feasible substitute for a regulatory mandate.

However, recent assertions of state regulatory power over these agreements threaten their continued viability, and dictate that the Commission, in its upcoming order in this proceeding, take action to firmly establish that state regulators do not have jurisdiction over market agreements for network elements that are not covered by Section 251(d)(2)(B)'s impairment test. Without such a ruling, it is likely that state regulators will continue to attempt to assert jurisdiction over these agreements, and even attempt to modify or invalidate agreements or portions of agreements, developments which could greatly reduce the incentive and ability of Qwest and CLECs to negotiate such agreements in the future. Because the existence of free market agreements such as Qwest's contracts for QPP and line sharing are the hallmark of a free and competitive market, it is incumbent on the Commission to take rapid and decisive action to protect them from unwarranted and unjustified intrusion by state regulators.

Nine states have currently ruled, either in final written form or orally at an open meeting, that the QPP agreement is subject to the state filing requirements of Section 252(a)(1) and 252(e)(1) of the Act. Of these states, three (Utah,¹⁰ Colorado¹¹ and Montana¹²) have ruled that Section 252 requires the filing with the states of all wholesale service contracts, whether covered by Sections 251(b) or (c) or not, and two other states (Iowa¹³ and Wyoming¹⁴) have ruled that Section 252 applies to the QPP but have not yet stated a rationale. Two states (Washington and South Dakota) have ruled that the QPP agreement was really part of an agreement for other services covered by Section 251(c), and two states (Minnesota and Oregon) have ruled that the QPP agreement is made subject to Section 252 by the Commission's Interim Order¹⁵ in this docket. The Oregon PUC has rejected the QPP agreement on the basis that it objects to some of its terms (as inconsistent with Section 252).¹⁶ The Minnesota Department of Commerce has filed

¹⁰ In the Matter of the Interconnection Agreement Between Qwest Corporation and MCIMetro Access Transmission Services, LLC for Approval of an Amendment for Elimination of UNE-P and Implementation of Batch Hot Cut Process and QPP Master Service Agreement; Docket No. 04-2245-01; Order Denying Motion to Dismiss; issued Sept. 30, 2004.

¹¹ The Application for Approval of Interconnection Agreement Between U S WEST Communications, Inc. and MCIMetro Access Transmission Services, LLC., Docket No. 96A-366T; issued Nov. 16, 2004.

¹² The Montana Commission announced in open meetings that it would apply the same analysis as it did regarding the Covad Commercial Line Sharing Agreement, which is to apply section 252 to non-section 251 services.

¹³ In re: U S WEST Communications, Inc., n/k/a Qwest Corporation, and MCIMetro Access Transmission Services, LLC; Docket No. NIA-99-35; Order Denying Motion to Dismiss Application for Review of Negotiated Commercial Agreement and Approving Interconnection Agreement; issued Oct. 29, 2004.

¹⁴ In the Matter of the Contract Filings of MCIMetro Access Transmission Services, LLC for Approval of an Amendment to its Interconnection Agreement and Approval of the Qwest Master Service Agreement Entered Into with Qwest Corporation; Docket No. 70027-TK-04-38, Docket No. 70000-TK-04-1020; Order; issued Nov. 1, 2004.

¹⁵ *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16783 (2004).

¹⁶ In the Matter of MCIMetro Access Transmission Services, LLC, and Qwest Corporation for Approval of a Negotiated Agreement Under the Telecommunications Act of 1996; ARB 6(14) & (15); Disposition: Motion to Dismiss Denied; Amendment and Agreement Rejected; entered Nov. 9, 2004.

comments with the Minnesota PUC arguing that the QPP should be rejected because it does not contain proper Section 252 language, but the Minnesota PUC has not yet issued a final written ruling.

Montana has also ruled that the Qwest line sharing agreement is subject to state authority under Section 252. There is a prospect of similar rulings in other states.¹⁷

It is also important to note that state regulators are applying a variety of standards in both interpreting the scope of their jurisdiction over these commercial agreements, and in determining how to apply their own public interest standards to these agreements. In the case of agreements subject to Sections 251(b) or (c), there is at least some measure of uniformity imposed by the Commission's rules, even though states have significant latitude within the scope of those rules. Under the interpretation of the Act being adopted by the state regulators in dealing with non-251(b) or (c) agreements, which agreements are not subject to state jurisdiction at all, the uniformity established by the Commission's Section 251(b) and (c) implementing rules is absent, creating the additional potential for state action that is not only disruptive of federal policy in this area, but disruptive in multiple and different manners.

The upshot of the foregoing is obvious. All of these state regulators are claiming regulatory authority over these commercial contracts – and one state regulatory agency has already rejected the QPP contract. Yet these commercial agreements are for network elements for which no impairment finding can lawfully be made to support making them available as unbundled network elements under Section 251(c)(3) of the Act. States have no jurisdiction over these elements under the Act (or, as is pointed out in Qwest's comments in this docket, under any residual state authority) to regulate these agreements at all, far less to reject them. These state decisions will result in multiple lawsuits in a variety of courts, with the concomitant risk of diverse court findings and judgments. It is imperative that the Commission itself act quickly to confirm the federal status of these agreements and preempt all state regulatory jurisdiction over network elements which have not been made available as unbundled network elements under Section 251(c)(3) of the Act.¹⁸

Sincerely,

/s/ Robert L. Connelly, Jr.

¹⁷ Qwest has appealed the Montana ruling in United States Federal District Court for the District of Montana.

¹⁸ It should be remembered that this ruling does not automatically exempt these contracts from regulation. These agreements have been duly filed under Section 211(a) of the Communications Act of 1934, as amended, and are subject to the Commission's jurisdiction in the same manner as all other intercarrier contracts filed under that section of the Act.

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