

Decision No. C04-0333

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03I-478T

REGARDING THE UNBUNDLING OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS PURSUANT TO THE TRIENNIAL REVIEW ORDER--INITIAL COMMISSION REVIEW.

DOCKET NO. 03I-485T

REGARDING ADOPTION OF A BATCH HOT CUT PROCESS
PURSUANT TO 47 C.F.R. § 51.319(D)(2)(II).

**ORDER GRANTING MOTION TO STAY PROCEEDINGS
AND REQUESTING COMMENT**

Mailed Date: March 31, 2004

Adopted Date: March 31, 2004

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of the Motion to Temporarily Stay Discovery in the Captioned Dockets and Extend Procedural Dates filed by the Colorado Office of Consumer Counsel (OCC). Qwest Corporation filed its response and supplemental response to the OCC's motion. Qwest, in its initial responses, did not oppose the motion for stay, and in later response actively supported the motion. Qwest's final response included a representation that, if a stay is granted, it would not seek action at the Federal Communications Commission based upon our "failure to act" (paragraph 527 of FCC's

Triennial Review Order¹). Commission Staff also filed its response to the motion. While Staff did not oppose a stay, it requested that parties be required to answer all pending discovery requests. Finally, Qwest submitted its reply and supplemental reply to Staff's response.²

2. At a prior Commissioners' Deliberations Meeting, we orally granted the OCC's motion to stay these proceedings pending a decision by the D.C. Circuit Court of Appeals. Since that time, the court issued its decision in *United States Telecom Association v. Federal Communications Commission*, No. 00-1012 (D.C. Cir. March 2, 2004) (*USTA*). That decision reversed and vacated certain rules adopted by the FCC. These proceedings before the Commission were predicated upon those rules. Now being duly advised in the premises, we affirm our prior oral ruling staying these proceedings. The stay of state proceedings to determine the extent of Qwest's unbundling obligations pursuant to the Triennial Review Order will remain in effect indefinitely, subject to further order of the Commission. In addition, in light of the *USTA* decision, we request that the parties submit comment on those questions discussed below.

B. Stay of Proceedings

3. The Commission initiated these dockets to implement directives issued by the Federal Communications Commission in its Triennial Review Order. Notably, in the rules adopted in the Triennial Review Order, the FCC delegated to the state commissions the responsibility to conduct a number of proceedings regarding the unbundling obligations of incumbent local exchange carriers such as Qwest.

¹ *Review of the Section 251 Unbundling obligation of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provision of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunication Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003).

² We grant Qwest's Motion for Leave to File a Reply to the Staff of the Commission's Response to Motion of the Colorado Office of Consumer Counsel to Temporarily Stay Discovery and Extend All Procedural Dates.

4. The OCC's motion requested that we stay discovery and extend the procedural schedule for approximately 60 days. The motion pointed out that the rules adopted in the Triennial Review Order and particularly the rules delegating certain functions to the state commissions were on appeal to the District of Columbia Court of Appeals. In fact, as noted above, the court has now held that it was unlawful for the FCC to delegate authority to conduct proceedings such as these to the state commissions.

5. In light of the *USTA* decision, we now stay these proceedings in their entirety pending further order of the Commission. A ruling on Staff's request to require responses to pending discovery is also stayed for the same reason.

C. Request for Comment

6. The *USTA* decision creates uncertainty regarding Qwest's obligation to provide unbundled mass market switching and unbundled dedicated transport (for DS1, DS3, and dark fiber). Specifically, the court vacated (potentially effective as early as 60 days after the decision) the FCC's rules that required incumbent local exchange carriers, such as Qwest, to continue providing these services to competitive local exchange carriers (CLEC) subject to certain determinations by state commissions. Some questions regarding the effects of the court's decision may be considered in other proceedings (*e.g.*, *USTA*'s preemptive effect, if any, on state statutes and rules on unbundling; the appropriate pricing of network elements). At this time, the Commission seeks comment as to the effect of *USTA* on the telecommunications services for CLEC customers. Generally, we wish to receive legal argument, procedural options, and other comments regarding Commission options and obligations, all in the context of the *USTA* ruling.

7. The scope of the court's ruling is unclear as it pertains to state commission authority and obligations. Likewise, it is unclear regarding the rights and responsibilities of

telecommunications providers upon issuance of the mandate (60 days following the decision or, by our calculation, May 3, 2004). Thus, the Commission seeks comment from the parties on the questions listed below and related matters. In general, the Commission seeks comment on its authority to ensure that telecommunications services to CLEC customers are not unduly disrupted in the event the *USTA* decision becomes effective, and what actions the Commission can and should take to transition to a post-*USTA* world. Specific questions include:

- a) What FCC unbundling rules will be in effect in light of the *USTA* decision?
- b) What unbundling obligations, if any, will remain in effect for Qwest Corporation for mass market switching and high-capacity (DS1, DS3, and dark fiber) transport, either under §§ 251 or 271 of the Telecommunications Act, when the *USTA* decision becomes effective?
- c) In the event *USTA* becomes effective, will Qwest have any legal obligation to provide network elements and services at prices based on Total Element Long Run Incremental Cost (TELRIC)?
- d) Will Qwest's current Statement of Generally Available Terms and Conditions (SGAT) as it relates to unbundled switching and dedicated transport remain in full force and effect in the event *USTA* becomes effective?
- e) What state unbundling rules remain in effect after *USTA* becomes effective?
- f) Which state tariffs remain in effect after *USTA* becomes effective?
- g) What should the Commission do to facilitate negotiations between parties on prices, terms, and conditions of unbundled network elements affected by *USTA*?

h) Should the Commission set a procedural schedule and/or hear oral argument on these issues?

8. The Commission joins Chairman Powell of the FCC in calling upon the telecommunications industry to conduct good-faith negotiations to agree upon wholesale terms and rates for those unbundled network elements affected by the *USTA* decision. In our view, the industry has an obligation to have a plan for transition to a post-*USTA* world in the event the judicial stay is lifted, so that end-use customers enjoying competitive services will not be unduly disrupted by chaotic uncertainty. Therefore, as noted above, we seek comment on how the active participants in this docket plan to remove that uncertainty.

II. ORDER

A. The Commission Orders That:

1. Qwest Corporation's Motion for Leave to File a Reply to the Staff of the Commission's Response to Motion of the Colorado Office of Consumer Counsel to Temporarily Stay Discovery and Extend All Procedural Dates is granted.

2. The Motion to Temporarily Stay Discovery in the Captioned Dockets and Extend Procedural Dates filed by the Colorado Office of Consumer Counsel is granted consistent with the above discussion. All procedural requirements in these dockets are stayed pending further orders by the Commission.

3. Interested parties shall file comments consistent with the above discussion by April 16, 2004.

4. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 31, 2004.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners