

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**IN THE MATTER OF THE ADOPTION OF )  
A RULE GOVERNING INVESTMENT IN )  
TELECOMMUNICATIONS INFRASTRUCTURE )  
AND PROMOTING DEPLOYMENT OF HIGH- )  
SPEED DATA SERVICES IN URBAN AND RURAL )  
AREAS OF NEW MEXICO PURSUANT TO )  
HOUSE BILL 400. )**

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**Utility Case No. 3438**

**FINAL ORDER ADOPTING 17.11.17 NMAC**

**THIS MATTER** comes before the New Mexico Public Regulation Commission (“Commission” or “NMPRC”) upon the Notice of Proposed Rulemaking (“NOPR”) issued on August 8, 2000, and upon the record developed in this case.

**STATEMENT OF THE CASE**

On March 7, 2000, House Bill 400 (being 2000 N.M. Laws, Ch. 102; codified as NMSA 1978, § 63-9A-8.2) was signed into law. Among other things, House Bill 400 (H.B. 400) requires the Commission to adopt, by no later than January 1, 2001, a rule that will “ensure adequate investment in the telecommunications infrastructure of the state” and “promote the availability and deployment of high-speed data services.” H.B. 400, sections 4(B)(2) and (3).

In accordance with H.B. 400, the NOPR proposed to adopt a new rule in order to ensure adequate investment in the telecommunications infrastructure in both urban and rural areas of the state, enable the timely delivery of local exchange service, and promote the availability and deployment of high-speed data services. The rule was proposed under the authority granted the Commission by the Public Regulation Commission Act, NMSA 1978, Sections 8-8-4 and 8-8-15, and the New Mexico Telecommunications Act, NMSA 1978, Section 63-9A-8.2.

The NOPR established deadlines for the filing of written comments and the filing of reply comments. Public comment hearings were scheduled at various places around the state.

Written comments were filed on September 8, 2000 by the Commission's Utility Division Staff ("Staff"), the New Mexico Attorney General ("AG"), the Office of Science and Technology, New Mexico Economic Development Department ("OST"), the New Mexico Information Technology Management Office ("NMITMO"), the New Mexico Exchange Carriers Group ("NMECG"), Qwest Corporation ("Qwest"), VALOR Telecommunications of New Mexico, LLC ("VALOR"), and e•spire Communications, Inc., and ACSI Local Switched Services, Inc., d/b/a e•spire Communications, GST Telecom, Inc., AT&T Communications of the Mountain States, Inc., WORLDCOM, Inc., and Sprint Communications Company L.P. (collectively, the "Competitive Carriers"). Reply comments were filed on October 13~~6~~, 2000 by Qwest, VALOR, Staff, the AG, and Competitive Carriers.

Affidavits attesting to the timely publication of notice in newspapers of general circulation were filed by the Albuquerque Journal on August 23, 2000, by the Farmington Daily Times on August 24, 2000, and by the Las Cruces Sun-News on October 11 and 24, 2000.

Public comment hearings were held by the Commission on the following dates and locations:

<u>Date</u>	<u>Location</u>
September 13, 2000	Santa Fe, New Mexico
September 14, 2000	Farmington, New Mexico
September 16, 2000	Albuquerque, New Mexico
September 20, 2000	Farmington, New Mexico
October 5, 2000	Silver City, New Mexico
October 6, 2000	Las Cruces, New Mexico
October 31, 2000	Santa Fe, New Mexico

On October 31, 2000 the Commission issued an order requesting comment on several specific issues relating to Case No. 3438, and extended until November 9, 2000 the filing deadline for additional comments relating to a series of Bench Requests issued by the Commission.

Responses to Bench Requests were filed by Staff, the AG, NMECG, VALOR, Qwest, and Competitive Carriers on November 9, 2000. On November 16, 2000, the Competitive [Carriers](#) filed a Motion to Strike Supplemental Post-Hearing Comments of the NMECG. On November 21, 2000, Qwest filed its Objection to Consideration of Newly Proposed Rules.

### **DISCUSSION**

The Commission commends Staff and the many participants in this case for their comments and suggestions about these rules. We have considered all of the written comments and oral comments of the parties. Our decisions regarding changes to the proposed rules are set forth below.

#### **Section 2 – Scope**

Much discussion has surrounded the scope of these proposed rules. The Commission has heard arguments from large incumbent carriers like VALOR, who claim exemption from these rules since it now operates under an Alternative Form of Regulation plan (“AFOR”) that includes commitments to infrastructure investment and deployment of high-speed data services. NMECG has argued that the rule cannot apply to incumbent local exchange carriers (“ILECs”) with fewer than 50,000 access lines, since nothing in H.B. 400 “purports to amend or supersede the specific language of Sections 63-9H-4 and 63-9H-5A of the Rural Telecommunications Act that limit the jurisdiction of the PRC over Rural LECs.” NMECG Comments, at 6. Meanwhile, Qwest has

represented that, from a public policy standpoint, these rules should apply equally to ILECs and competitive local exchange carriers (“CLECs”).

~~\*\*INSERTED TAB~~ The Commission declines to apply these rules to CLECs. At a time in which competitive entry into telecommunications markets should be generally encouraged, requiring CLEC compliance with these rules would provide a disincentive for CLECs to operate in New Mexico. We also decline to omit small ILECs from the coverage of these rules. Nothing in the H.B. 400 rulemakings provision explicitly excludes small ILECs. Moreover, the provisions in H.B. 400 that require this and the companion rules expressly reflect the Legislature’s concerns with upgrading telephone service in rural areas. Without the ability to apply these rules to small rural ILECs, the Commission would not be able to carry out the mandates to address the telecommunications needs of rural customers. Thus, as a matter of law we decline to limit the scope of this Rule to only a subset of New Mexico’s telecommunications carriers.

As parties will note, the final rules adopted below have been scaled back considerably in terms of specific carrier requirements for infrastructure investment and the deployment of high-speed data services. Thus, compliance with these rules by rural ILECs should not be overly onerous, and should also meet the requirements set forth by the Legislature in H.B. 400.

The question of whether an incumbent LEC’s AFOR plan should take precedence over these rules has been seriously considered. VALOR requested and received an approved AFOR plan in Utility Case No. 3358 on June 27, 2000, prior to the adoption of these rules. VALOR’s AFOR plan set forth commitments that were designed to comply with Sections 4(B)(2) and (3) of H.B. 400: in doing so, other parties (such as Qwest) have claimed that the standard for compliance with H.B. 400 for all carriers has effectively been set. Qwest Comments, at 5-6.

The Commission disagrees, in part. The AFOR plan adopted by this Commission for VALOR included infrastructure investments and a plan for deploying high-speed data services that is specific to VALOR's network and service territory. The recently proposed AFOR plan for Qwest contains provisions that are in many respects similar, but not altogether identical, to those in VALOR's AFOR plan. Thus, it is clearly evident that not *all* types of investment and/or schedules for deploying high-speed data services are necessary or feasible for carriers of different sizes and operating in different parts of the state of New Mexico. ~~Notwithstanding~~ Nevertheless, these rules do reflect many of the standards for investment and deployment of high-speed data services that the Commission adopted in the VALOR AFOR plan because they are reasonable standards that can and should apply to all carriers, irrespective of size.

The Commission therefore concludes that all incumbent local exchange carriers, regardless of size, should be required to abide by these rules. When a carrier is operating under an AFOR plan, any commitments for specific infrastructure investments and deployment of high-speed data services set forth in that AFOR plan will take precedence over the commitments contained in this rule. If a section or subsection of these rules is not discussed or addressed in the carrier's AFOR plan, then the rules included in that section or subsection will apply.

### Section 3 – Statutory Authority

The Commission accepts Staff's recommendation to include NMSA 1978 Section 63-7-1.1 within this section.

### Section 7 – Definitions

Commenting parties have made minor recommendations as to the applicability and accuracy of a few definitions. The Commission has removed the word "capable" from the

definition of “high-speed data services” in order to address the AG’s concern that the definition was too weak and ambiguous. The Commission also has employed the definition of “basic local exchange service” in lieu of “POTS,” in order to provide consistency between this rule and the other H.B. 400 rules. All definitions for terms that no longer appear in these rules have been deleted.

#### Section 8 – Capital Investments

The Commission is persuaded to amend this rule from its initial position that capital investment be linked to historic levels of investment. The Commission’s original goal was to discourage a *decrease* in investment levels. However, as many parties have noted, requiring future investment consistent with past investment levels serves to punish those carriers that have invested heavily in the past, while absolving those carriers that have not. Rather than require a specific amount of investment, we adopt language in this rule that requires capital investment sufficient to meet both the requirements set forth in other sections of this rule, as well as to meet the service quality and consumer protection standards adopted in Utility Case No. 3437.

#### Section 9 – Distribution Plant

Section 9 of the proposed rules addressed ILEC Held Orders. The rule relating to ILEC Held Orders has been deleted in its entirety, as per numerous parties’ comments that since held orders are addressed in Utility Case No. 3437, there is no need for them to be addressed in this rule as well. Section 9 now contains rules relating to Distribution Plant.

The section of the rule relating to Distribution Plant has been shortened considerably due in large part to the establishment of a separate section relating to deployment of high-speed data services. Consistent with the overall objective of these rules, the Distribution Plant section continues to require ILECs to develop and implement a plan to upgrade distribution plant in

order to relieve network congestion, enhance the quality of basic local exchange service, and facilitate the introduction of high-speed data services. Language has been added that requires investment in distribution plant to meet any service quality rules adopted by the Commission.

#### Section 10 – Interoffice Transmission Facilities

The Commission agrees with Qwest, VALOR and the AG that it is inappropriate to designate a specific technology for interoffice transmission facility deployment. As such, the language set forth in the proposed rule that required carriers to deploy fiber optic interoffice facilities throughout their network has been removed. Rather than mandating a change in deployed technologies (say, from copper to fiber facilities) where it might not be warranted or necessary, Section 10 as adopted requires deployment of and/or upgrades to interoffice facilities in order to meet the overall objective of these rules and to be consistent with the standards for deploying and upgrading distribution plant. These standards include meeting demand for POTS, facilitating the deployment of high-speed data services, and meeting any service quality rules adopted by the Commission.

#### Section 11 – Switching Plant

The substance of Section 11 remains largely unchanged. The Commission concurs with Staff's recommendation that, because there are likely very few analog switches currently deployed in New Mexico, there is no need to require a monthly upgrading timetable (i.e., 8% of analog switches upgraded to digital each month through January 1, 2002). Incumbent carriers thus have until January 1, 2002 to make these upgrades.

Further, as recommended by Qwest, the rule is clarified to identify specific CLASS services that are to be made available through upgrades to digital switches, recognizing the fact

that not all CLASS services are feasibly deployed to all customers, regardless of the [type of switch that serves those customers deployed](#).

## Section 12 – Deployment of High-Speed Data Services

As referenced above, rules relating to the deployment of high-speed data services were previously lodged in the section relating to Distribution Plant. These rules now occupy their own Section.

In deference to the concerns of the commenting parties, the final rules do not prescribe deployment of a specific technology or service. The Commission agrees that there is no “one size fits all” technology for the very diverse carriers and areas in New Mexico. Accordingly, all references and mandates relating to the deployment of specific services, namely digital subscriber line (“DSL”) service, have been removed.

By adopting more generic requirements for the types of high-speed data services that are to be deployed, it became necessary to change or eliminate many of the individual requirements found in the proposed rules. For example, since the rule no longer specifically requires deployment of DSL services, it would be nonsensical to have a mandated loop-conditioning program. Further, requiring upgrades to digital loop carrier equipment in order to provide DSL service is no longer required. The Commission believes that if a carrier seeks to provide DSL service in order to comply with the rules set forth in Section 12, then the carrier will necessarily condition its loops and make any necessary upgrades to its digital loop carrier plant.

The final rules also adopt a less prescriptive roll-out of high-speed data services. The Commission has been persuaded that it is not realistic to *require* incumbent carriers, large and small alike, to invest in the deployment of high-speed data services across *all* lines without considering recovery of the costs associated with this investment from customers that might seek

to purchase such services. As such, the Commission has adopted rules for deploying high-speed data services in urban and rural areas that emulate the standards that were adopted in the VALOR AFOR Plan. Specifically, incumbent carriers are required to deploy high-speed data services in exchanges serving more than 5,000 access lines by January 1, 2003.

Deployment of high-speed data services to exchanges serving fewer than 5,000 access lines is to be undertaken by an incumbent carrier within 18 months of demonstration of demand for such services by either 10% of the total access lines in the exchange or 75 access lines, whichever is less. The 10% threshold has been instituted in order to provide a realistic threshold of demand for customers in smaller exchanges, since requiring demand by 75 access lines for high-speed data services may constitute a much more significant percentage of the population in a rural exchange as compared to a more urban area.

Staff has suggested that demand for high-speed data services in rural areas is often biased by the *presence*, or lack thereof, of high-speed data services in those exchanges, i.e., where no such services are provided, demand will languish. The Commission does not dispute this point of view; however, no commenting party has proffered a tenable solution to this situation. ~~As such~~ Consequently, we see no alternative at this point to a demonstration of actual demand in requiring deployment of high-speed data services in rural exchanges by incumbent carriers.

The Commission believes that, with these changes, the rules governing the deployment of high-speed data services are fairly applied to all incumbent local exchange carriers. VALOR already has committed to similar requirements in its AFOR plan, and Qwest's proposed AFOR plan contains comparable provisions. Given the past history of the NMECG members' level of service quality and investment, the Commission feels that these rules are also fair to carriers serving rural regions of New Mexico.

### Section 13 – Line Sharing

The majority of the commenting parties did not object to this rule as proposed. Accordingly, this rule is adopted, but with Staff's suggestion to remove specific reference to Federal Communication Commission ("FCC") rules and orders, as future regulatory decisions have the potential to ~~impact~~affect these rules, or possibly render them moot. The rule now states that all incumbent carriers shall provide competitive carriers with access to UNEs and interconnection arrangements required for the provision of line sharing in compliance with all NMPRC and FCC rules and orders.

### Section 14 – Reporting Requirements

The proposed rules contained separate sections for Initial Reports and Recurring Reports. The rules as adopted contain a single section on Reporting Requirements, with subsections for Initial Reports and Annual Reports.

The Initial Reports are requested in large part so that the Commission has some baseline information to which future reports can be compared, in order to determine whether ~~or not~~ these rules have succeeded in achieving the statutory goals of H.B. 400. That being said, the initial reporting requirements have been reduced substantially, due in large part to the removal of various rules requiring specific technological deployments on the part of the incumbent LEC, as discussed above.

The Commission agrees to reduce the recurring reporting requirements from a quarterly to an annual basis, which will be filed with the Commission no later than March 31 of each year. Annual reports will sufficiently address the progress made by incumbent LECs in meeting the requirements of these rules, and will not be burdensome to smaller carriers.

As referenced in Section 17.11.17.2 – Scope, all incumbent local exchange carriers, including those operating under an AFOR Plan, are required to submit Initial Reports and Annual Reports to the Commission. This requirement is vitally important in order for the Commission to assess the impact of the proposed commitments contained within the AFOR plans adopted by certain large incumbent carriers as compared to the requirements set forth in these rules.

#### Section 15 – Exemption or Variance

Though the Commission has crafted these rules with the expectation that all ILECs will have the ability to comply with all of the adopted sections, we have added a new section (17.11.17.15) to these rules that permits an ILEC to file an application for an exemption or a variance from any requirements of this rule. An application for an exemption or variance must identify the section of this rule for which the exemption or variance is requested; describe the situation which necessitates the exemption or variance; describe the effect of complying with this rule on the ILEC and its customers, and on its competitive affiliates and their customers, if the exemption or variance is not granted; describe the result the request will have if granted; state how the exemption or variance will achieve the purposes of this rule and the New Mexico Telecommunications Act; state why the proposed alternative is in the public interest and is a better alternative than that provided by this rule; and state why the exemption or variance would have no anticompetitive effect. The Commission may, at its discretion, require an informal conference or formal evidentiary hearing prior to making its determination.

#### Other Issues

*Enhanced Extended Links (“EELs”)*: Competitive Carriers have proposed that the rule include a section on Enhanced Extended Links. According to Competitive Carriers:

The EEL is a dedicated transmission path connecting the end user with the CLEC's voice or data switch at a CLEC point of presence. The EEL provides CLECs with the functionality of loop, central office aggregating and routing equipment, and interoffice transport. The EEL promotes the availability and deployment of high-speed data services by, among other reasons, eliminating the need for CLECs to collocate in every ILEC central office, thus reducing the effective cost of interconnection and conserving central office space. CLECs could use the EEL to expand data services at more competitive prices in New Mexico. Competitive Carriers Comments, at 2.

There is some argument between Competitive Carriers and Qwest as to the applicability of mandating access to EELs. The Commission is unconvinced that enough information exists in the record to make a determination on the requirement of providing EELs to CLECs, and resolves to address it in a subsequent proceeding.

**THE COMMISSION FINDS AND CONCLUDES:**

1. The foregoing statements and discussion are hereby adopted as Findings and Conclusions of the Commission.
2. The Commission has jurisdiction over the parties and subject matter of this case.
3. It is in the public interest for 17.11.17 NMAC (Infrastructure and High Speed Data Services), to be adopted as provided by this Order and as set out in Exhibit 1 to this Order.
4. The Commission has the jurisdiction and authority to adopt and issue this rule pursuant to NMSA 1978, Sections 8-8-4, 8-8-15, 63-7-1.1 and 63-9A-8.2.
5. Due and proper notice has been given.

**IT IS THEREFORE ORDERED:**

- A. 17.11.17 NMAC is hereby adopted and approved as provided by this Order. As so adopted and approved, 17.11.17 NMAC is attached to this Order as Exhibit 1.
- B. 17.11.17 NMAC shall be published on or before December 29, 2000 in the New Mexico Register and shall be effective January 1, 2001.

C. This Order is effective immediately.

D. Copies of this Order shall be served on all persons on the attached Certificate of Service.

E. This Docket is closed.

**ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 12<sup>th</sup> day of December, 2000.**

**NEW MEXICO PUBLIC REGULATION COMMISSION**

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**BILL POPE, CHAIRMAN**

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**HERB H. HUGHES, VICE CHAIRMAN**

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**JEROME D. BLOCK, COMMISSIONER**

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**LYNDA M. LOVEJOY, COMMISSIONER**

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**TONY SCHAEFER, COMMISSIONER**