

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE ADOPTION OF)	
A RULE ENSURING THE ACCESSIBILITY)	
OF INTERCONNECTION BY COMPETITIVE)	
LOCAL EXCHANGE CARRIERS IN BOTH)	Utility Case No. 3439
URBAN AND RURAL AREAS OF NEW MEXICO)	
PURSUANT TO HOUSE BILL 400.)	
<hr/>		

FINAL ORDER ADOPTING 17.11.18 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 the accessibility of interconnection by competitive local exchange carriers in both urban and rural areas of the state.” H.B. 400, section 4(B)(4).

The NOPR issued on August 8, 2000, proposed, in accordance with H.B. 400, to adopt a new rule to facilitate the provision of local telecommunications services to the public in New Mexico by prescribing the interconnection via direct or indirect means of all providers of local telecommunications services, prescribing the unbundling of the networks of incumbent local exchange carriers (ILECs), and establishing quality of service standards for the wholesale services provided by ILECs. 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.

Comments in this case were filed on September 8, 2000 by the New Mexico Attorney General (“AG”), Leaco Rural Telephone Cooperative, Inc. (“Leaco”), the New Mexico Exchange Carriers Group (“NMECG”), Qwest Corporation (“Qwest”), the Commission’s Utility Division Staff (“Staff”), VALOR Telecommunications of New Mexico, LLC (“VALOR”), and AT&T Communications of the Mountain States, Inc., Sprint Communications Company, L.P., WorldCom, Inc., e•spire Communications, Inc., ACSI Local Switched Services, Inc. d/b/a e•spire Communications, and GST Telecom, New Mexico, Inc. (collectively, “Competitive Carriers”). The following parties filed Reply Comments by October 6, 2000: AG, Leaco, Qwest, VALOR, and Competitive Carriers. On October 13, 2000, Staff filed a Motion for an extension of time to file its Responses to Comments to October 25, 2000. The Commission granted Staff’s Motion on October 31, 2000. On November 9, 2000, the AG, Qwest, and VALOR filed responses to bench requests made by the Commission at the October 31 hearing. Qwest’s November 9, 2000 filing also included Supplemental Post-Hearing Comments addressing the proposed rule. On November 16, 2000, the Competitive Carriers filed a Motion to Strike Qwest’s Supplemental Post-Hearing Comments.

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:

Date

Location

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

DISCUSSION

The Commission commends Staff and the 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. The discussion below focuses on those areas of the rule wherein we have accepted suggested changes or made other revisions to the proposed rule in response to issues raised by the parties.

Definitions Section 7

Qwest, Leaco, and VALOR have proposed certain changes to the definitions used in the rule. As suggested by Qwest (Comments at 4), we have revised the definitions for “interconnection,” “physical collocation,” and “virtual collocation” in order to be consistent with the definitions adopted for these terms by the Federal Communications Commission (“FCC”). We have also revised our definition for “local call” to clarify that the originating and terminating endpoints for such a call are defined relative to the location of the Network Interface Device (NID) serving the end user at each end of the call. While we recognize that “a call is not terminated by connection to the NID,” as Qwest states (Comments at 4), defining the end points of a local call relative to the locations of the associated NIDs does not imply termination at the NID, but instead ensures that the determination of whether a call is local will depend upon the nature of its conveyance by telecommunications carriers between those two points.

We decline to adopt Leaco’s proposed definition for “rural LEC” (Leaco Comments at 1), as we agree with VALOR (Reply Comments at 2) and conclude that the definition of “rural LEC” for this rule needs to be consistent with the definition used in federal law bearing on interconnection, which is the definition of “rural telephone company” given in 47 U.S.C. § 153(37), rather than Section 4(C) of H.B. 400, which does not address interconnection. We also decline to adopt other revisions proposed by the parties, including Qwest’s proposal to add definitions for “Internet Related Traffic” and “Switched Access Service” (Qwest Comments at 6), finding that they are not necessary for implementation of the rule.

Section 8 – Interconnection of LECs

Qwest recommends deletion of subsection B (Quality of Interconnection), on the grounds that this provision, as well as Subsections 15, 19 and 20-22 of the proposed rule, are unnecessary and in conflict with existing federal rules (Qwest Comments at 1-2, 16, and 19). We reject Qwest’s argument, finding that the New Mexico Legislature intended that the Commission exercise authority over interconnection matters pursuant to Section 4(B)(4) of H.B. 400, and that reflecting certain federal requirements in our rule, as occurs in Section 8, accomplishes this without introducing a conflict with those federal requirements.

Section 9 – Reciprocal Compensation

The Commission considers this Section of the rule to be vital to the implementation of section 4(B)(4) of H.B. 400, because the determination of the financial arrangements governing the exchange of traffic between two interconnecting LECs is a crucial aspect of their interconnection. Parties’ comments on this Section have mainly focused on the language that “all local calls, including calls used for voice communications, data communications, and/or connection to the Internet or an Internet Services Provider, shall be subject to the reciprocal

compensation arrangements.” We are mindful of the activity, cited by Qwest, VALOR, and the Competitive Carriers, that has been occurring in the federal arena concerning the applicability of reciprocal compensation arrangements to so-called “ISP-bound traffic,” i.e. calls handed off by an ILEC to a CLEC serving an Internet Services Provider (“ISP”). In particular, we note that the U.S. Court of Appeals for the D.C. Circuit vacated and remanded the FCC’s February 25, 1999 Declaratory Ruling that ISP-bound traffic, including those calls initiated by dialing a local number, constitutes non-local, interstate communications. **Bell Atlantic Telephone Companies v. Federal Communications Commission**, 206 F.3d 1, 8 (D.C. Cir. 2000). Consequently, we find that the language at issue is consistent with the current state of federal law on this matter.

Moreover, while Qwest advances several policy arguments against the inclusion of ISP-bound traffic in reciprocal compensation arrangements (Qwest Comments at 9-10), we are not persuaded on the basis of the record in this proceeding that locally-dialed (i.e., seven-digit) calls to an ISP served by a CLEC differ from other types of local calls in any way material to the purpose of reciprocal compensation arrangements, i.e., to compensate a carrier for the costs that it incurs when terminating calls that originated on the network of another interconnected carrier. See Section 252(d)(2)(A)(i) of the Federal Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996). Finally, we note that Section 9 does not establish any specific rate levels for reciprocal compensation payments, but instead prescribes bilateral negotiations or (if such negotiations fail), the establishment by the Commission of rates based on forward-looking economic costs. Therefore, we conclude that Qwest’s concerns about “windfall profits” and reduced technical efficiency (Qwest Comments at 9-10) are premature relative to this rule. In line with the recommendation of the Attorney General (AG Reply Comments at 1), we

encourage interconnecting LECs to negotiate reciprocal compensation rates that will closely track costs and thus avoid such adverse outcomes.

We also decline to adopt other proposed changes to Section 9. For example, Leaco proposes that subsection B should be deleted in its entirety, on the grounds that it is unnecessary and unduly interferes with carriers' negotiation of bill-and-keep arrangements. Leaco Comments, at 2. However, we find that the rule as written (including subsection A) allows carriers to negotiate bill-and-keep arrangements, and also provides a remedy in those instances when a significant imbalance in the traffic exchanged by two carriers would mean that a carrier would not be fully compensated for its transport and termination of the other carrier's traffic under a bill-and-keep arrangement. Competitive Carriers Reply Comments, at 2.

Section 10 – Access Requirements

Qwest proposed to amend subsection A(1) (access to rights-of-way) to clarify that a LEC is required to provide access to only the rights-of-way and other facilities that are under its ownership or control. Qwest Comments at 12. Qwest would also delete the word “information” from subsection E(1) (interconnection of signaling networks), arguing that it is too broad and might encompass proprietary information or other information not necessary to a CLEC. *Id.* at 12. We adopt both of these changes, as they improve the clarity of the rule.

VALOR objects to the language contained in subsection B(2) (access to emergency call networks), which limits the inter-carrier charges relative to 911/E-911 emergency services to call transport and termination charges. VALOR contends that ILECs incur other types of costs associated with these services, including the costs of periodic updates to 911 databases and the provision of tandem router connections of CLECs to Public Safety Answering Point (PSAP) locations, and proposes language allowing charges to recover those costs. VALOR Comments at

3. While we are aware that carriers incur costs for their emergency call networks other than transport and termination costs, we conclude that each carrier should bear individual responsibility for recovery of those costs, so that there are incentives for carriers to meet their emergency call services obligations in an efficient, minimum-cost manner. Consequently, we refrain from expanding the scope of subsection B(2) to permit recovery of those costs from interconnected carriers.

Section 11 – Obligations of All Local Exchange Carriers

Qwest proposes to modify subsection A (dialing parity) so that the quality of service (for dialing delay) provided to competitors is relative to the ILEC's own service quality, rather than an industry standard. Qwest claims the former is the proper standard for non-discrimination under the Federal Telecommunications Act of 1996. Qwest Comments, at 13. We agree with Qwest's position and have made corresponding revisions to the language of subsection A.

Qwest also recommends that subsection E (disclosure of CPNI) should refer to existing federal requirements concerning customer proprietary network information ("CPNI"), 47 U.S.C. § 222, and contends that non-written forms of customer approval, such as oral consent, are sufficient under that rule. We have reviewed the FCC order implementing the federal requirements, 13 FCC Rcd 8061, 8077, and conclude that it does not restrict CPNI disclosure only to written consent by the customer, and moreover puts states on notice that the FCC will preempt state rules that conflict with its interpretation of 47 U.S.C. § 222. Therefore, we have deleted the word "written" from this provision in order to be consistent with federal requirements in this area.

Section 13 – White Pages Directory Listings

Qwest proposed that subsection C(1) should specify that the *telephone numbers* of end users who elect to be non-published will not be included in the directory database. This would allow the directory to include the *names* of non-published end users, so that operators could confirm their non-published status. Qwest Comments, at 14. This is a useful clarification, and we have incorporated corresponding language into the final rule.

We have also revised subsection H to specify that CLECs will be responsible for errors or omissions in the directory listings information that they supply to the designated White Pages provider in their territory. Despite the Competitive Carriers' views to the contrary (Competitive Carriers Reply Comments, at 9), we find that indemnification of the designated White Pages provider is reasonable in those circumstances because it places liability with the responsible party.

Section 14 – Costing and Pricing Standards

Leaco has suggested that we adopt separate interconnection costing and pricing standards for small rate-of-return regulated ILECs, and that we allow rural LECs to develop prices for interconnection on the basis of “rate of return embedded costs” during a transition period until such separate standards are adopted. Leaco Comments at 3-4. We reject these proposals as being neither necessary nor appropriate to encourage interconnection of LECs throughout New Mexico. Neither Leaco nor other parties have supplied evidence in this proceeding that applying a forward-looking, economic costing standard would pose particular difficulties for smaller, rural LECs as a class.¹ However, we believe that Leaco's concern is addressed by the revised version of (renumbered) subsection 21 of the rule that we are adopting. Subsection 21 allows smaller, rural LECs to seek suspension or modification of the rule's interconnection requirements,

¹ To the contrary, it can be argued that it is more difficult to estimate economic costs for the larger LECs with dozens of central offices and correspondingly more complex network architectures and operations.

including the associated costing and pricing standards requirements contained in Sections 14-16, upon good cause. Therefore, to the extent that such carriers can demonstrate the need for differential treatment with respect to the costing and pricing requirements of this rule, the Commission will have the flexibility to do so.

Section 15 – Costing Methodology

Qwest proposes to delete Section 15 in its entirety, citing it as the “primary example” of its general argument that portions of the proposed interconnection rule are redundant to existing federal rules and thus unnecessary and liable to preemption. Qwest Comments at 16. In the alternative, Qwest proposes revised language for subsection B(1) (least cost technology), arguing that “the rules should reflect the recent decision from the United States Court of Appeals for the Eighth Circuit, which ruled that forward looking costs must not be calculated on the basis of a hypothetical network, rather, the ILEC’s actual costs should govern.” *Id.* at 16 (citing **Iowa Utils. Bd. v. FCC**, 219 F.3d 744 (8th Cir. 2000)).

Given that we have already rejected Qwest’s view concerning the general necessity for the interconnection rule that we are adopting (see pp. 4-5, above), we turn to Qwest’s second argument, which is also repeated by VALOR. VALOR Reply Comments at 2. Here we agree with the Competitive Carriers, who correctly point out that the Eighth Circuit has agreed to stay its ruling pending Supreme Court view of that case, so that the ruling is no obstacle to adopting Section 15 as originally proposed. Competitive Carriers Reply Comments at 7 and 10. Nor are we persuaded that we should depart from a forward-looking, least-cost economic costing standard for unbundled network elements (“UNEs”) by the Eighth Circuit’s reasoning as proffered by the ILECs in this proceeding. We find that the costing standard that we adopt in subsection B(1) (calculation of TELRIC) is reasonable and appropriate, because if properly

implemented, it will result in UNE prices that confront CLECs with the correct economic choice between purchasing UNEs or building their own comparable telecommunications facilities, whereas that result cannot be guaranteed under the “actual cost” standard that the ILECs seek.

Section 16 – Supporting Documentation

Qwest proposed revision to subsection C so that the standard for properly-filed workpapers would be a “person with expertise in the area of analyzing forward-looking cost studies” rather than a “person” (layperson). Qwest Comments at 18. Qwest also recommended deleting the rules requirement for a cross-index. *Id.* at 18. We believe that the rule is improved by these changes, and have made corresponding revisions to this section.

Section 17 – Negotiation of Interconnection Agreements

The original version of this section set forth rules governing inter-carrier negotiations (and, where voluntary negotiations fail, compulsory arbitration) of interconnection agreements, pursuant to Section 252 of the Federal Telecommunications Act of 1996. No party opposed these rules *per se*, but Competitive Carriers recommended replacing subsections A (voluntary negotiations) and B (arbitration) with the proposed rules for arbitration and mediation of interconnection agreements that the New Mexico Corporation Commission (predecessor to this Commission) had issued in Docket No. 96-184-TC on June 17, 1996. Competitive Carriers Comments, at 2. In response to this suggestion, we have separated the former Section 17 into three sections, including Section 18, “Mediation of Interconnection Agreements,” which sets forth mediation rules based on the 1996 rules. Pursuant to Section 1.B of H.B. 400 (codified at NMSA 1978, § 8-8-12.1(B)), mediation will be undertaken by the Commission’s Telecommunications Bureau.

Section 21 – Suspension of Modification of Certain Requirements for Rural LECs

As explained earlier in this order (see the discussion in Section 14, at pp. 8-9), we have modified this section to permit smaller, rural LECs to seek suspension or modification of the rule’s costing and pricing standards requirements contained in Sections 14-16.

Section 22 – Quality of Service Standards Applicable to ILEC Interconnection Facilities and UNEs

The original version of the rule that we proposed included Sections 19-23, which prescribed a set of performance measures, minimum performance standards, and financial incentives applying to the interconnection facilities and UNEs supplied by ILECs to CLECs. In the initial round of comments, these proposed rules were attacked by both the ILECs and the CLECs, as the Competitive Carriers contended that there are “significant gaps” in the coverage of the rules, while Qwest contended that wholesale service quality rules are unnecessary and in conflict with existing federal rules, and thus should be entirely deleted. Competitive Carriers Comments at 2, Qwest Comments at 19.

By the time the parties submitted reply comments, however, substantial consensus emerged. Staff, the Competitive Carriers, and Qwest all observe that the Qwest Regional Oversight Committee (“ROC”) has been undertaking a collaborative effort to develop wholesale service quality performance measures and standards that could apply to Qwest throughout its fourteen-state operating region, and concur that the Commission should delay adoption of standards or financial incentives until the ROC’s work is concluded. Staff Comments at 1, Competitive Carriers Reply Comments at 8, Qwest Comments at 20. Moreover, we recognize the concerns of the smaller, rural ILECs that they not be subjected to wholesale service quality rules designed principally with the larger ILECs in mind. VALOR Comments at 9-12, VALOR

Reply Comments at 5. Accordingly, we will not adopt a full set of wholesale service quality measures, standards, and financial incentives at this time, and instead adopt a more limited rule that requires ILECs to meet generally accepted industry standards for UNEs and interconnection facilities. We will continue to monitor the progress of the ROC, and while we are in no manner bound by the recommendations it may make, we expect to benefit from the ROC's experience and findings during future Commission consideration of wholesale service quality requirements.

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 17.11.18 NMAC (Interconnection Facilities and Unbundled Network Elements), 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 and 63-9A-8.2.
5. Due and proper notice has been given.

IT IS THEREFORE ORDERED:

- A. 17.11.18 NMAC is hereby adopted and approved as provided by this Order. As so adopted and approved, 17.11.18 NMAC is attached to this Order as Exhibit 1.
- B. 17.11.18 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 12th day of December, 2000.

NEW MEXICO PUBLIC REGULATION COMMISSION

BILL POPE, CHAIRMAN

HERB H. HUGHES, VICE CHAIRMAN

JEROME D. BLOCK, COMMISSIONER

LYNDA M. LOVEJOY, COMMISSIONER

TONY SCHAEFER, COMMISSIONER