

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

**IN THE MATTER OF U S WEST)
COMMUNICATIONS, INC.'S MOTION FOR) CASE NO. USW-T-00-3
AN ALTERNATIVE PROCEDURE TO)
MANAGE ITS SECTION 271) COMMISSION FINAL DECISION
APPLICATION.) ON QWEST CORPORATION'S
) COMPLIANCE WITH SECTION 271
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This case commenced more than two years ago when U S WEST Communications, Inc., which became Qwest Corporation through a merger, filed a Notice of Intention to File a Section 271 Application and a Motion for Alternative Procedure to Manage the Section 271 Process. The Commission in response to Qwest's motion determined to join a multi-state collaborative process to establish a record on Qwest's efforts to satisfy the legal requirements for its entry into the interLATA market. Since then the Commission has issued a number of procedural orders and three decisions on the substantive issues, which collectively track the procedural history of the case, not restated here. The three substantive decisions required Qwest to respond by making changes to key components of its case, which Qwest provided in a filing on May 24, 2002, entitled Notice of Updated Statement of Generally Available Terms and Conditions [SGAT] and Request for Commission Acknowledgment that Rates are Effective on June 7, 2002.

Qwest also filed on May 31, 2002 an Affidavit of Jeffrey D. Owens essentially identifying the particular changes to its SGAT and averring that the changes were made to comply with the Commission's earlier decisions. Mr. Owens is a Senior Director in the Policy and Law Organization of Qwest Corporation, with responsibilities for managing aspects of Qwest's 271 efforts, including the filing of Qwest's SGAT in each of the fourteen states in which it provides local service. In his Affidavit, Mr. Owens states that the changes Qwest made to the Idaho SGAT fall within three categories:

- 1) Changes that were recommended or required by the Multi-State Facilitator or by this Commission;
- 2) Changes that resulted from consensus or other agreements or changes made at the request of CLECs in Idaho or other states, as well as compliance language dictated by an order from the Federal Communications Commission or compliance language from other states that Qwest agreed to carry-forward to Idaho; and

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- 3) Changes that resulted from the correction of typographical, grammatical, name change, capitalization, or other non-substantive matters, such as the deletion of redundant language or updates to web site addresses or technical standards.

Affidavit of Jeffrey D. Owens, p. 2 ¶ 4. The affidavit includes an extensive list of revisions that have been made to the SGAT to comply with Commission decisions.

BACKGROUND

Section 271 of the Telecommunications Act of 1996 (47 U.S.C. § 271) establishes the means for a Bell Operating Company (BOC), which includes Qwest, to begin providing in-region interLATA and interstate telecommunication services. The determination to authorize Qwest's entry into the interLATA market is made by the Federal Communications Commission (FCC), not this or any other state commission. 47 U.S.C. § 271(b). The three decisions already issued by the Commission address different parts of the Section 271 requirements: (1) Qwest's compliance with the 14-item checklist in Section 271 (the Checklist Decision) issued November 21, 2001; (2) Qwest's Performance Assurance Plan issued March 7, 2002 (the QPAP Decision); and (3) a decision on public interest, Track A, and Section 272 issued April 19, 2002 (the Public Interest Decision). Each decision identified issues that remained open and conditioned Commission approval on satisfactory resolution of those issues.

DISCUSSION

The Checklist Decision.

Section 271 contains a checklist of 14 items relating to access and interconnection a BOC must meet in each state where it provides local service. 47 U.S.C. § 271(c)(2)(B). The checklist identifies broadly stated requirements or categories for access and interconnection Qwest must provide to competitors desiring interconnection with its facilities. The Commission in the Checklist Decision stated it "is prepared, when consulted by the FCC, to report that Qwest satisfies the access and interconnection requirements of the competitive checklist in 47 U.S.C. § 271(c)(2)(B), so long as Qwest revises its SGAT as set forth in this decision and as may be necessary as this case proceeds to its conclusion." Checklist Decision p. 10. Qwest asserts in its May 24, 2002 filing that it has responded to the issues identified by the Commission, including revisions to SGAT terms resulting from other state commission decisions.

The revised SGAT filed by Qwest on May 24 contains the revisions required by the Commission in its Checklist Decision. Included in the changes made by Qwest are those

approved by the Commission in its Public Interest Decision, specifically to Section 5.12.2 of the SGAT relating to general terms and conditions of the SGAT. Because Qwest made the changes directed by the Commission, and the SGAT provides comprehensive terms for access and interconnection consistent with the checklist requirements, the Commission is prepared, when consulted by the FCC, to report the record establishes that Qwest satisfies the access and interconnection requirements of 47 U.S.C. § 271(c)(2)(B).

The QPAP Decision.

Part of the FCC's review of a Section 271 application is to determine that granting interLATA authority to the BOC "is consistent with the public interest, convenience and necessity." 47 U.S.C. § 271 (d)(3)(C). To insure the applicant will continue to meet the access and interconnection requirements after approval is granted, the FCC has determined the public interest standard may require a BOC to have a performance assurance plan (Plan or QPAP) in place. The QPAP provides specific standards for Qwest's delivery of services to competitor telecommunications companies (CLECs) and automatic penalties if the standards are not met.

In its QPAP Decision, the Commission expressed support for Qwest's Plan but was "not yet prepared to recommend approval of the QPAP, however, because changes must still be made." The QPAP Decision directed some specific changes. In addition, the Commission expected that completion of Qwest's operation support system (OSS) testing might result in changes to QPAP measurements, and the Commission anticipated that changes might be prudent based on changes made by other state commissions. QPAP Decision pp. 9-10. Qwest in its May 24 filing asserts that it has made the changes directed or anticipated by the Commission and that its filing complies with Commission instructions.

Staff reviewed the revised QPAP and believes it is consistent with the Commission's directives in its QPAP Decision. One change to the QPAP Staff believed might be appropriate in the interest of uniformity with other state commission decisions relates to the triggering of Tier 2 penalty payments. The relevant terms approved by the Commission were those recommended by the Facilitator in his QPAP Report. Qwest's original QPAP called for payment of Tier 2 penalties only if three consecutive months of performance measures are missed by Qwest. The Facilitator recommended changes that provide for Tier 2 payments if Qwest misses the performance measures in two out of three consecutive months and subsequently misses the measures again in the calendar year. In monitoring the decisions of other state commissions, Staff noted that some

commissions appeared to be requiring Tier 2 payments for each month that the performance measures are missed. According to Staff, Qwest asserts that it has not made that change to its QPAP in any other state, but has committed to providing the change to the Idaho QPAP “in the event that Qwest agrees to remove the phase-in of Tier 2 payments for the QPAP in any state that participated in the ROC multi-state QPAP process.”

Another change to the QPAP worth noting results from the Commission’s instructions for Section 16.1 of the QPAP describing the 6-month review and future changes to the QPAP. In its QPAP Decision, the Commission stated “that the QPAP should leave open the possibility that the Commission may broaden the review if necessary to respond to circumstances arising from actual experience with the QPAP.” QPAP Decision p. 8. The Commission also noted that Section 16.1 stated that changes could not be made to the QPAP without Qwest’s agreement. The Commission required that the language be modified “to state that Qwest will make changes if the Commission so directs, whether Qwest agrees or not with the changes.” QPAP Decision pp. 8-9.

In response to the Commission’s instructions, the revised QPAP provides that Qwest, a CLEC, or the Commission every six months “may initiate a review of the performance measurements to determine whether measurements should be added, deleted, or modified; whether the applicable benchmark standards should be modified or replaced by parity standards; and whether to move a classification of a measurement to high, medium, or low, Tier 1 or Tier 2.” The QPAP also now limits Qwest’s potential liability for changes to the QPAP it does not agree with “to 10% of the monthly payments that Qwest would have made absent the effect of such changes as a whole.” That 10% payment collar is in effect for 12 months following the change. For changes to performance measures that have not been submitted to the ROC PID administration process, however, a CLEC may request that the 10% collar be lifted after only six months of payments where the CLEC has received 80% or less of what the total payments would have been without the collar.

The Commission stated in its QPAP Decision that “the QPAP is well on its way to meeting the FCC’s zone of reasonableness standard,” the review standard used by the Commission in the QPAP Decision. Qwest responded to the Commission’s instructions to make changes to the QPAP, as identified in the revised QPAP filed on May 24. The Commission believes the QPAP now adequately satisfies the FCC’s zone of reasonableness standard of review.

The Public Interest Decision.

Although the QPAP is properly part of the FCC's public interest inquiry, the Commission issued a separate Public Interest Decision, in addition to the QPAP Decision, to better address the variety of issues comprising the public interest standard. The Public Interest Decision contains several reservations to Commission approval. In that decision the Commission stated it (1) would review the change management process Qwest was to provide with the OSS test results, (2) would reserve its final decision on the Section 272 separate affiliate requirements until Staff filed supplemental comments, and (3) could not find Qwest in compliance with public interest standards until unbundled network elements (UNE) prices that satisfy the FCC's TELRIC standards are established.

1. OSS Testing Results and Change Management Process.

The Commission acknowledges receipt of the final report of KPMG Consulting and HP Consulting covering the third-party test of Qwest's Operational Support System (OSS), including the change management process. Staff reported it believes the testing process was comprehensive, thorough and fair. The testing identified numerous concerns and issues resulting in a number of improvements to Qwest's systems. The final report concludes that Qwest's systems provide a competitor with the basic tools and services it needs to function and that these are provided in a manner that affords competitors a reasonable chance to compete.

The final report also indicates that a number of issues remained unresolved at the conclusion of the test. The Commission expects that Qwest will continue its efforts to address these issues. Should the FCC approve Qwest's application for interLATA authority, the Commission will continue monitoring and observing Qwest's actual wholesale service performance. The Commission finds that the draft and final reports show that Qwest is providing CLECs with non-discriminatory access to OSS and that it is likely to serve CLECs in a manner consistent with the requirements of Section 271.

2. Section 272 Separate Affiliate Requirements.

Once a BOC receives authorization to provide interLATA services, Section 272 of the Telecommunications Act requires that those services be provided through affiliate entities separate from the BOC. In its Public Interest Decision, the Commission stated regarding Qwest's compliance with the Section 272 requirements that "the Commission conditionally finds that Qwest has put in place a separate affiliate to comply with the requirements of Section 272, but will

reserve a final decision until Staff has filed its supplemental comments.” Public Interest Decision p. 10. Staff did not file supplemental comments, and its concerns about Section 272 compliance relate to continued monitoring of Qwest’s separate affiliation transactions. Staff recommended the Commission accept the record on the Section 272 requirements, but review Qwest’s continued compliance in future audits, including one to occur six months after Qwest receives FCC approval for interLATA service.

The only condition the Commission placed on its conclusion that “Qwest has put in place a separate affiliate to comply with the requirements of Section 272” was the filing of supplemental comments by Staff. That condition has been removed by Staff’s recommendation that the Commission continue to monitor Qwest’s separate affiliation transactions, which the Commission will do through already planned audits.

3. UNE Prices and TELRIC Standards.

In its Public Interest Decision, the Commission stated “the Commission cannot find Qwest in compliance with public interest standards until UNE prices that satisfy the FCC’s TELRIC standards are established.” Public Interest Decision p. 12. In its May 24 filing Qwest asked the Commission to approve revised UNE prices contained in the filing effective June 7, 2002, pending resolution of the UNE cost docket. According to Qwest’s filing, the Company “intends that these new, lower rates remain in effect for its CLEC customers until one of the following occurs: the Idaho Public Utilities Commission establishes a different rate in a cost docket; a mutually acceptable different rate is negotiated between Qwest and its customers; or a change to applicable law takes place triggering a rate change pursuant to any ‘change in law’ provision of an applicable interconnection agreement.” Qwest Notice of Updated SGAT p. 7. Qwest asserts that its updated SGAT “provides substantial reductions in key UNE prices that would not otherwise be reduced until completion of the cost docket.”

AT&T in a letter sent to the Commission complained about Qwest’s revised UNE prices, claiming Qwest’s representation that the new rates will not increase rates to CLEC customers is incorrect. AT&T acknowledges Qwest made voluntary reductions to a “limited” number of rate elements, but believes some of the new rates could actually increase costs, and thus AT&T “objects to any attempt by Qwest to unilaterally increase rates currently set forth in the interconnection agreements between AT&T and Qwest.” AT&T also agrees the “reductions offered by Qwest adjust the rates closer to being TELRIC compliant.”

There are several responses to the concerns raised by AT&T. First, in a letter AT&T received from Qwest, which was included in AT&T's letter to the Commission, Qwest states it will charge CLECs the lowest rates, whether in the revised filing or in existing interconnection agreements. That commitment, which the Commission expects Qwest to honor, should ensure no CLEC's costs increase as a result of the revised UNE rates. Second, AT&T is a party in the Commission's on-going UNE price case and should raise its concerns in that docket. Appropriate UNE rates will be established by the Commission after considering the evidence offered by all parties, including AT&T. Finally, the revised UNE rates are part of Qwest's SGAT, which is "a statement of the terms and conditions that [a BOC] generally offers within that State to comply with the [interconnection] requirements of section 251 and the regulations thereunder." 47 U.S.C. § 252(f)(1). When such statements are filed with a state commission, the commission may permit the statement to take effect, which "shall not preclude the State commission from continuing to review" the statement. 47 U.S.C. § 252(f)(3) and (4). The Commission will review the appropriateness of the UNE prices in the UNE cost case, and will require the rates approved in that case to be included in Qwest's SGAT.

In short, the Commission believes the revised UNE prices are reasonable, pending resolution of the cost case, and the Commission will permit them to be effective as of June 10, 2002. The prices contained in the compliance filing provide reductions in key UNE prices that would not otherwise occur until completion of the cost docket. Revised prices for two important elements—unbundled loops and local switching—are based on TELRIC prices established by the Colorado Commission. For the local loop price, Qwest represents that it adjusted the price established in the Colorado case to reflect Idaho specific data, as determined by the FCC's Cost Synthesis Cost Model. In the words of AT&T, the resulting price adjustments "are closer to being TELRIC compliant."

Motion Filed by Touch America, Inc.

The Commission also received on June 4, 2002, a motion filed by Touch America, Inc., asking for an order "staying these proceedings pending resolution of Touch America's complaints before the FCC that raise critical questions concerning Qwest's current and potential future compliance with [Section 271] requirements." As an alternative, Touch America "requests that the Commission condition its recommendation regarding Qwest's 271 application on the FCC's determination regarding the Touch America complaints." Touch America has filed

