

Federal Communications Commission

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Application by Qwest Communications)
International, Inc. for Authorization To)
Provide In-Region, InterLATA Services in the) WC Docket No. 02 - 314
States of Colorado, Idaho, Iowa, Montana,)
Nebraska, North Dakota, Utah, Washington)
and Wyoming)
)

MEMORANDUM OPINION AND ORDER

Adopted: December 20, 2002

Released: December 23, 2002

By the Commission: Commissioner Copps issuing a statement; Commissioner Adelstein not participating.

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rebalancing should involve all LECs in Montana to address the alleged price squeeze.¹⁵⁹³ The Montana Consumer Counsel asserts that the Montana Commission is empowered by state law to regulate toll rates and access charge rates, and that commission should do so independent of a section 271 application review.¹⁵⁹⁴

439. We find that the price squeeze allegation raised by the Montana Commission does not relate to the openness of the local telecommunications market to competition within the scope of section 271 of the Act. Therefore, we do not deny Qwest's section 271 application for failure to comply with the public interest on this basis. While we encourage states to establish cost-based intrastate access rates, we agree with Qwest and the Montana Consumer Counsel that their establishment is not a precondition to section 271 approval.¹⁵⁹⁵ We do not have jurisdiction to set intrastate intraLATA access charges or intrastate long distance toll rates, and our review of these rates in a section 271 application is limited to their role in any potential wholesale UNE rate/retail rate price squeeze.¹⁵⁹⁶ Jurisdiction to set intraLATA, intrastate toll rates and access charge rates rests solely with the Montana Commission. The price squeeze alleged by the Montana Commission is in the intrastate intraLATA toll market, where Qwest already is authorized to provide service. Denying Qwest's section 271 application would not address the alleged price squeeze in the intrastate intraLATA toll market. Accordingly, this alleged price squeeze, and any potential violation of state regulations by Qwest's failure to file a revenue requirements and rate design case, are within the Montana Commission's authority and ability to address, and are more appropriately addressed by that commission.

B. Assurance of Future Compliance

440. As set forth below, we find that the performance assurance plans (PAP) that will be in place in the nine states provide assurance that the local market will remain open after Qwest receives section 271 authorization in the nine application states. We find that these plans fall within a zone of reasonableness and are likely to provide incentives that are sufficient to foster post-entry checklist compliance. In prior orders, the Commission has explained that one factor it may consider as part of its public interest analysis is whether a BOC would have adequate incentives to continue to satisfy the requirements of section 271 after entering the long distance market.¹⁵⁹⁷ Although it is not a requirement for section 271 authority that a BOC be subject to such performance assurance mechanisms, the Commission previously has stated that the existence of a satisfactory performance monitoring and enforcement mechanism would be

¹⁵⁹³ Qwest III Thompson/Freeberg Reply Decl. at paras. 19-20 (citing Commissioner Rowe's dissenting statement in the Montana Commission Qwest III Comments).

¹⁵⁹⁴ Montana Consumer Counsel Qwest III Reply at 2; Montana Consumer Counsel Qwest II Reply at 2-4.

¹⁵⁹⁵ See Qwest II Application at 191-92; Qwest Aug. 15 Pricing *Ex Parte* Letter at 18. See also Montana Consumer Counsel Qwest II Reply at 2-3.

¹⁵⁹⁶ See para. 436, *supra* (discussing our review of intrastate toll rates and access charges in the local market price squeeze analysis).

¹⁵⁹⁷ See, e.g., *Verizon Pennsylvania Order*, 16 FCC Rcd at 17487-88, para. 127.

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probative evidence that the BOC will continue to meet its section 271 obligations after a grant of such authority.¹⁵⁹⁸ The nine state PAPs, in combination with the respective commission's active oversight of its PAP, and these commissions' stated intent to undertake comprehensive reviews to determine whether modifications are necessary, provide additional assurance the local market in the five application states will remain open.¹⁵⁹⁹

441. In prior section 271 orders, the Commission has generally reviewed plans modeled after either the New York or the Texas plans.¹⁶⁰⁰ However, the Commission has also approved plans that are not modeled on either of those two plans.¹⁶⁰¹ In this case, the Colorado PAP was designed principally by a Special Master for the Colorado Commission with input from Qwest and other parties.¹⁶⁰² The Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming PAPs, on the other hand, were developed in a multi-state review

¹⁵⁹⁸ *Ameritech Michigan Order*, 12 FCC Rcd at 20748-50, paras. 393-398. We note that in all of the previous applications that the Commission has granted to date, the applicant was subject to an enforcement plan administered by the relevant state commission to protect against backsliding after BOC entry into the long-distance market. These mechanisms are generally administered by state commissions and derive from authority the states have under state law or under the federal Act. As such, these mechanisms can serve as critical complements to the Commission's authority to preserve checklist compliance pursuant to section 271(d)(6).

¹⁵⁹⁹ The Wyoming Commission did not endorse the Wyoming PAP because of what it deemed to be several shortcomings in the PAP. As discussed later in this section, we find that the shortcomings identified by the Wyoming Commission do not diminish the assurances provided by the Wyoming PAP. Qwest II Application, App. E, Qwest Performance Assurance Plans, Tab 1, Montana Performance Assurance Plan at 22-25 (Montana PAP), Qwest II Application, App. E, Tab 2, Utah Performance Assurance Plan at 19-20 (Utah PAP), Qwest II Application, App. E, Tab 3, Washington Performance Assurance Plan at 19-20 (Washington PAP); Qwest II Application, App. E, Tab 4, Wyoming Performance Assurance Plan at 19-20 (Wyoming PAP); Qwest I Application, Appendix E, Qwest Performance Assurance Plans, Tab 1, Colorado Performance Assurance Plan at 22-25 (Colorado PAP); Qwest I Application, App. E, Qwest Performance Assurance Plans, Tab 2, Idaho Performance Assurance Plan at 14, 19-20 (Idaho PAP); Qwest I Application, App. E, Qwest Performance Assurance Plans, Tab 3, Iowa Performance Assurance Plan at 14, 19-20 (Iowa PAP); Qwest I Application, App. E, Qwest Performance Assurance Plans, Tab 4, Nebraska Performance Assurance Plan at 14, 19-20 (Nebraska PAP); Qwest I Application, App., Qwest Performance Assurance Plans, Vol 1 Tab 5, North Dakota Performance Assurance Plan at 15, 21-22 (North Dakota PAP); Colorado Commission Qwest I Comments at 59; Colorado Commission Qwest I Reply at 48; Idaho Commission Qwest I Comments at 13-14; Iowa Board Qwest I Comments at 70; Montana Commission Qwest II Comments at 52-53; Nebraska Commission Qwest I Comments at 5 (citing Nebraska Commission QPAP Decision (<http://www.nol.org/home/NPSC/C-1830APAP04-23-02.PDF>) at 15-16); North Dakota Commission Qwest I Comments, Appendix at 236-39; Washington Commission Qwest II Comments at 29-31; Wyoming Commission Qwest II Comments at 17.

¹⁶⁰⁰ See, e.g., *Verizon Connecticut Order*, 16 FCC Rcd at 14181, para. 76; *Verizon Massachusetts Order*, 16 FCC Rcd at 9120, para. 238; *SWBT Texas Order*, 15 FCC Rcd at 18560, para. 421; *Bell Atlantic New York Order*, 15 FCC Rcd at 4166-67, para. 433.

¹⁶⁰¹ See *Verizon Pennsylvania Order*, 16 FCC Rcd at 17488-89, paras. 128-129.

¹⁶⁰² Qwest I Application App. A, Tab 35, Declaration of Mark S. Reynolds-Colorado (Qwest I Reynolds-Colorado Decl.) at paras. 2-4.

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diminish the effectiveness of the plan, and we note that the other PAPs filed in these applications have identical or similar provisions.¹⁶⁵⁰

451. We recognize that states may create plans that ultimately vary in their strengths and weaknesses for tools for post-section 271 authority monitoring and enforcement; thus we defer to the Wyoming Commission to determine the form of the provisions necessary in Wyoming. We conclude that the Wyoming Commission has requested modifications to the Wyoming PAP, and that these modifications can be sought within the Wyoming PAP's review provision. With the guidance provided in this order, we expect the Wyoming Commission will adopt a PAP. We recommend that the Wyoming Commission take action to adopt a PAP as soon as possible.

452. Finally, we disagree with AT&T's contention that the PAPs will be ineffective at deterring poor performance. AT&T contends that the PAPs will be ineffective at deterring poor performance because Qwest's data are inaccurate and unreliable.¹⁶⁵¹ The PAPs filed in this application have provisions for late, inaccurate, or incomplete performance reports.¹⁶⁵² Moreover, we take further comfort in the proposals by the ROC to support an ongoing multi-state collaborative to address post-section 271-related issues (including an audit program).¹⁶⁵³ We find that, at least for purposes of this application, Qwest's performance data are generally reliable and reflective of Qwest's wholesale performance.¹⁶⁵⁴

C. Unfiled Interconnection Agreements

453. Notwithstanding our concern about discrimination in interconnection agreements and potential violations of the Act as a result, we find that Qwest's previous failure to file certain interconnection agreements with the application states does not warrant a denial of this application. As discussed below, we conclude that concerns about any potential ongoing checklist violation (or discrimination) are met by Qwest's submission of agreements to the commissions of the application states pursuant to section 252 and by each state acting on

¹⁶⁵⁰ We agree with Qwest that the de-escalation structure in the Qwest PAP provides a greater incentive for the RBOC to provide compliant performance than other plans that have been submitted in section 271 applications that have been approved by this Commission. Qwest II Reynolds-PAP Decl. at paras. 39-46.

¹⁶⁵¹ AT&T Qwest II Comments at 157; AT&T Qwest I Comments at 114; AT&T Qwest II Finnegan Decl. at paras. 201-03; AT&T Qwest I Finnegan Decl. at paras. 220-02.

¹⁶⁵² Qwest II Reynolds-PAP Decl. at paras. 59-60; Qwest I Reply at 116-17; Colorado PAP Sections 13-14; Idaho PAP Sections 14-15; Iowa PAP Sections 14-15; Montana PAP sections 14-15; Nebraska PAP Sections 14-15; North Dakota PAP Sections 14-15; Utah PAP sections 14-15; Washington PAP sections 14-15; Wyoming PAP sections 14-15.

¹⁶⁵³ Qwest I Reply at 28-29; Letter from Melissa Newman, Vice President Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-189, Attach. (dated July 18, 2002) at 2-3 (Qwest July 18b *Ex Parte* Letter); Iowa Board Qwest I Reply at 8-9.

¹⁶⁵⁴ Iowa Board Qwest I Reply at 33-34. *See supra*, Section II.A for further discussion.

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Qwest's submission of those agreements. Although this record does not demonstrate ongoing discrimination, parties remain free to present other evidence of ongoing discrimination, for example, through state commission enforcement processes or to this Commission in the context of a section 208 complaint proceeding. Further, to the extent any past discrimination existed, we anticipate that any violations of the statute or our rules will be addressed expeditiously through federal and state complaint and investigation proceedings. To this end, we note that a number of state commissions have already begun investigations of these agreements.

1. Background

454. *Regulatory Proceedings and Qwest Responses.* This issue first arose when the Minnesota Department of Commerce filed with the Minnesota Public Utilities Commission (Minnesota Commission) a complaint against Qwest on February 14, 2002, citing eleven agreements that it argues should have been filed with the Minnesota Commission for approval.¹⁶⁵⁵ The Minnesota Commission docketed this complaint and assigned it to an administrative law judge.¹⁶⁵⁶

455. In response to the investigation in Minnesota, Qwest filed letters with the state commissions of eight of the nine application states explaining that, while it did not consider the eleven agreements at issue in Minnesota to be interconnection agreements that must be filed under section 252, it was submitting copies of those agreements involving competitive LECs operating in that particular state.¹⁶⁵⁷ Qwest provided the same information to the Wyoming Commission in a motion to deny an AT&T request for investigation.¹⁶⁵⁸ In addition, in seven of

¹⁶⁵⁵ AT&T Qwest I Comments at 18, Attach. 2 (*Second Amended Verified Complaint, In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Minnesota Public Utilities Commission, Docket No. P-421/C-02-197 (June 2002)*). According to the second amended complaint, the Minnesota Department's investigation began on June 21, 2001, when it sent an information request to Qwest asking that it provide all unfiled agreements with competitive LECs entered into by Qwest over the last five years. *See id.* at 5.

¹⁶⁵⁶ On September 20, 2002, the administrative law judge released a recommended order finding twenty five violations in twelve agreements. On November 1, 2002, the Minnesota Commission adopted the recommended order. *See In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies, Minnesota Public Utilities Commission, Docket No. P-421/C-02-197 (November 1, 2002)*. The Minnesota Commission held hearings on penalties on November 19, 2002.

¹⁶⁵⁷ *See* Letter from Peter Rohrbach, Counsel, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-314 (filed November 15, 2002) (Qwest Nov. 15e *Ex Parte* Letter) (attaching letters to the commissions of Montana, Utah and Washington; attaching a motion to deny an AT&T request for investigation in which Qwest provided the same information to the Wyoming Commission); Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-148 (dated Aug. 26, 2002) (Qwest Aug. 26a *Ex Parte* Letter) (attaching letters, minus attachments, to the commissions of the five Qwest I application states).

¹⁶⁵⁸ *See* Qwest Nov. 15e *Ex Parte* Letter (attaching a motion to deny an AT&T request for investigation in which Qwest provided the same information to the Wyoming Commission).