

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of QWEST)
CORPORATION, fka US WEST)
Communications, Inc., for Approval of)
Compliance with 47 U.S.C. § 271(d)(2)(B))

DOCKET NO. 00-049-08
REPORT ON TRACK A

ISSUED: March 12, 2002

By The Commission:

INTRODUCTION

This Order concerns the "Track A requirement" that as a precondition to providing in-region interLATA service in Utah, Qwest must demonstrate its compliance with the four elements of 47 U.S.C. § 271(c)(1)(A) (known as the "Track A requirement"). Sessions 7 and 8 of Technical Workshop 3 held on June 6, 7, and 28, 2001 (of the Multi-State Collaborative) addressed Qwest's satisfaction of the four prongs of Track A. In these proceedings, Qwest and interested parties from the seven participating states presented briefs, offered testimony, and cross-examined witnesses. With respect to Utah, Qwest submitted the direct and rebuttal testimonies of David L. Teitzel, as well as opening and reply briefs. Among the other parties participating in this proceeding, only AT&T and Sprint directly addressed Qwest's compliance with Track A in Utah. ⁽¹⁾ AT&T addressed Track A in the affidavit of Mary Jane Rasher and in its opening and reply briefs; Sprint included Track A arguments only in its opening brief.

Part V of the Staff's September 21, 2001 Report on Group 5 Issues addressed Track A requirements. On October 5, 2001, AT&T filed comments and exceptions to the Track A portion of the Staff's Report. Qwest filed comments asking this Commission to accept the Utah-specific Track A Staff report, and that it find Qwest in compliance with the Track A requirement in Utah.

The Commission has reviewed the record of the Track A portion of the workshops, including the testimony, evidence, briefs, and comments submitted by all parties, the Staff's Report on Track A, and the comments of the parties in response to the Staff's Report, and now makes the following specific findings of fact and conclusions of law.

FINDINGS OF FACT

Under the Telecommunications Act of 1996 (the "Act"), a Bell Operating Company ("BOC") generally may not provide in-region interLATA service until it receives approval to do so from the Federal Communications Commission ("FCC"). 47 U.S.C. § 271. Qwest has the burden of demonstrating that it complies with the requirements of 47 U.S.C. § 271(c)(1)(A), the Track A requirement. This section of the Act requires Qwest to demonstrate that it has signed binding interconnection agreements with one or more facilities-based competitors, which are collectively providing telephone exchange service to business and residential customers in the state.

In accordance with the FCC's interpretation of 47 U.S.C. § 271(c)(1)(A), Qwest must specifically demonstrate four things: (a) that Qwest has one or more binding agreements with CLECs that have been approved under section 252 of the Act; (b) that Qwest provides access and interconnection to unaffiliated competing providers of telephone exchange service; (c) that these unaffiliated competitors collectively provide telephone exchange service to residential and business subscribers; and (d) that these competing providers offer telephone exchange service either exclusively or predominantly over their own facilities in combination with resale. ⁽²⁾

Based on our review of the record and briefing in this proceeding, we find that Qwest has met its burden of proof on all four elements of the Track A requirement with respect to business services. Qwest also meets the Track A requirements

for residential service even though that service is limited in the state. We explain the basis for our findings below.

A. Has Qwest Entered into One or More Binding Agreements That Have Been Approved Under Section 252?

As an applicant for section 271 authority, Qwest is required to demonstrate by a preponderance of the evidence that it has "entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities."⁽³⁾ Section 252 of the Act in turn lays out the procedures and standards by which state commissions arbitrate and approve BOC-CLEC interconnection agreements.

The FCC has affirmed that agreements approved by a state commission pursuant to section 252 are "binding" within the meaning of Track A in that they define the obligations of each party -- specifically, the "rates, terms, and conditions under which [the BOC] will provide access and interconnection to its network facilities."⁽⁴⁾

Qwest has provided concrete evidence that it has entered into one or more binding agreements in Utah approved under section 252, which no party has contested. The Commission finds that Qwest has demonstrated its compliance with this element of Track A. The Commission finds that Qwest is in compliance with the first prong of 47 U.S.C. § 271(c)(1) (A).

B. Does Qwest Provide Access and Interconnection to Unaffiliated Competing Providers of Telephone Exchange Service?

The FCC has held that a CLEC qualifies as a "competing provider" so long as it provides service "somewhere in the state," and it is not necessary that the CLEC provide service throughout the state (or the BOC's service territory) as a whole.⁽⁵⁾ Notably, the Act does not condition BOC entry into long distance upon CLECs having achieved a ubiquitous presence throughout a state.⁽⁶⁾ The FCC has declared that it "do[es] not read section 271(c)(1)(A) to require any specified level of geographic penetration by a competing provider."⁽⁷⁾

Nor must a CLEC gain a specific minimum market share before it qualifies as a competing provider.⁽⁸⁾ Thus, as long as CLECs are "serving more than a *de minimis* number of end-users for a fee in their respective service areas," they are an "actual commercial alternative to the BOC" sufficient for this portion of the Track A requirement.⁽⁹⁾

During the workshop, Qwest presented a comprehensive list of the unaffiliated CLECs that are active in Utah, together with information regarding the types of facilities and services that each CLEC is purchasing from Qwest.⁽¹⁰⁾ In the prepared testimony of its witnesses and in CLEC data request responses and other exhibits filed during the workshop, Qwest has provided compelling evidence that it is providing access and interconnection to unaffiliated competing providers in Utah, including AT&T, WorldCom (through its affiliate Brooks Fiber), Electric Lightwave, Inc. ("ELI"), and XO Utah.⁽¹¹⁾

This evidence demonstrates that Qwest currently provides access and interconnection to unaffiliated competing providers of telephone exchange service. The Commission therefore finds Qwest in compliance with this element of Track A.

C. Are Unaffiliated Competitors Collectively Providing Telephone Exchange Service to Both Residential and Business Subscribers?

Section 271(c)(1)(A) specifically requires that competitors in Utah provide "telephone exchange service . . . to residential and business subscribers."⁽¹²⁾

The FCC has decided that the issue is whether the CLECs in this state are *collectively* serving both residential and business customers, not whether any single carrier is serving both groups.⁽¹³⁾ The FCC has held that a section 271 applicant needs to demonstrate that CLECs are collectively providing service to more than a *de minimis* number of
⁽¹⁴⁾

residential and business customers. Qwest has demonstrated that multiple CLECs are providing telephone exchange service to businesses subscribers in much of Qwest's Utah service territory. Qwest has shown that at least one CLEC is offering residential service to residential customers residing in specific limited geographic pockets of the State.⁽¹⁵⁾

To demonstrate its compliance with this prong of Track A, Qwest submitted actual counts of unbundled loops and resale lines provisioned to CLECs in Utah. Qwest demonstrated in the workshop that, as of April 30, 2001, Qwest had provisioned exactly 27,080 unbundled loops to 20 CLECs in Utah;⁽¹⁶⁾ at the same time, CLECs were providing a total of 537 access lines to business customers and 1,444 access lines to residential customers by means of resale.⁽¹⁷⁾

Qwest supplemented its actual counts of unbundled loops, resale access lines, and other tracked elements with estimates of the business and residential bypass lines in service in Utah. The first estimate, calculated using Qwest's ported number methodology, indicates that, as of April 30, 2001, CLECs may have provided as many as 55,339 business and 2,913 residential full-facilities bypass lines in the state, for a total of 58,252 CLEC access lines that bypass Qwest's network altogether.⁽¹⁸⁾ If these estimates are accepted and added to the actual counts of leased UNE loops and resold lines, then the CLEC market share in Utah would be 7.4 percent.

Although AT&T alleged that Qwest had failed to establish a substantial link between ported telephone numbers and the number of CLEC bypass access lines, the Commission agrees with Staff's determination that Qwest's explanation of the relationship was logical.⁽¹⁹⁾ Regardless of whether Qwest's estimates are valid, the Commission's own recent Fourth Annual Report to the Governor, Legislature, the Public Utilities and Technology Interim Committee, and the Information Technology Commission (the Commission's Report) concluded that CLECs served approximately 32 percent of the business market, and 6 percent of the residential market in Qwest's service territory. Together these numbers represent promising market activity. However, the Commission's Report and the price list information filed with the Commission show that the residential customers served by CLECs are in a limited number of geographic areas so that a majority of Utah residential customers still have no choice with respect to their local exchange provider.

In addition to its actual counts and estimates of CLECs' competitive deployments, Qwest submitted qualitative evidence in the workshop describing CLECs' specific competitive activities in Utah's business and residential markets. Qwest provided a list of CLECs actively providing facilities-based service to end users in Utah, including information on the type of interconnection facilities or services that each CLEC was purchasing from Qwest as of December 31, 2000.

During the workshop, Qwest updated this list to show that as of May 2001, 28 CLECs were purchasing facilities and services from Qwest in Utah.⁽²⁰⁾ The Commission's Report however, shows that by fall of 2001 the number had fallen to only 14 CLECs, with only a fraction of those providing basic exchange service.

Based on the evidence surveyed above, the Commission finds that Qwest has demonstrated its compliance with this element of Track A for business customers. For residential customers, it appears that Qwest satisfies this element as well based on the FCC's application of the statute.

D. Are Competitors Providing Telephone Exchange Service Either Exclusively over Their Own Telephone Exchange Service Facilities or Predominantly over Their Own Telephone Exchange Service Facilities in Combination with Resale?

The last element of the Track A requires that section 271 applicants demonstrate that a CLEC is providing service either exclusively over its own facilities or predominately over its own facilities in combination with resale.⁽²¹⁾ The FCC has determined that a CLEC's own facilities include UNEs that it leases from the incumbent provider.⁽²²⁾ Further, the FCC concluded that if a CLEC is providing service to business *or* residential customers exclusively or predominantly over its own facilities, the section 271 applicant may rely on evidence of CLECs' provision of resale services to the other type of customer.⁽²³⁾ The FCC has held that the fourth element of Track A can be satisfied if an applicant demonstrates that CLECs are collectively serving business customers via facilities-based competition and residential customers by means of resale (or the reverse).⁽²⁴⁾

Qwest has demonstrated that CLECs in Utah have leased unbundled loops from Qwest, which are deemed the CLECs' own facilities under the FCC's rules. Additionally, data request responses from CLECs establish that they are collectively providing facilities-based service to both residential and business customers in Utah. ⁽²⁵⁾

Based on these showings, the Commission finds that Qwest is in compliance with the fourth element of 47 U.S.C. § 271(c)(1)(A).

CONCLUSION OF LAW

We conclude that Qwest has met all four prongs of the Track A requirement, 47 U.S.C. § 271(c)(1)(A) with respect to business services. We conclude that with respect to residential service Qwest meets all four aspects of the Track A requirements even though that service is limited in the state.

DATED at Salt Lake City, Utah this 12th day of March, 2002.

/s/ Stephen F. Mecham, Chairman

/s/ Constance B. White, Commissioner

/s/ Richard M. Campbell, Commissioner

Attest:

/s/ Julie Orchard,
Commission Secretary

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¹ See General Terms and Conditions, Section 272 & Track A Report (Sept. 21, 2001) ("Staff's Report") at 72.

² See Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd 20543 ¶¶ 62-104 (1997) ("*Ameritech Michigan Order*").

³ 47 U.S.C. § 271(c)(1)(A).

⁴ *Ameritech Michigan Order* at ¶ 72.

⁵ *Ameritech Michigan Order* at ¶ 76 (quoting H.R. Rep. No. 104-204, at 77 (1995)).

⁶ *Id.* at ¶ 77 & n.170.

⁷ *Id.* at ¶ 76.

⁸ *Id.* at ¶ 77 (explaining that Congress considered and rejected language that would have imposed a "market share" requirement in section 271(c)(1)(A)). See also Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237 ¶ 268 (2001) ("*SBC Kansas/Oklahoma Order*").

⁹ *Ameritech Michigan Order* at ¶ 78. To be clear, no particular amount of competition is required to comply with Track A. *Bell Atlantic New York Order* at ¶ 427.

¹⁰ See Confidential S8 QWE DLT-10 (reporting what UNEs, LIS trunks, resale, and other interconnection services and facilities each CLEC was purchasing from Qwest).

¹¹ See Qwest's Brief in Support of Its Compliance With the Track A Entry Requirements of 47 U.S.C. § 271(c)(1)(A) and the Public Interest Test of

47 U.S.C. § 271(d)(3)(C), *In the Matter of the Investigation into Qwest Corporation's Compliance with § 271 of the Telecommunications Act of 1996* (July 25, 2001) at 22-24 ("Qwest Br.").

¹² 47 U.S.C. § 271(c)(1)(A).

¹³ See *Ameritech Michigan Order* at ¶ 82; Memorandum Opinion and Order, *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, FCC 01-269 (rel. Sep. 19, 2001) ¶ 122.

¹⁴ See *Ameritech Michigan Order* at ¶ 78.

¹⁵ See, e.g., Confidential S8 DLT-10 at 7 (summarizing the services being offered by CLECs in Utah); Qwest Br. at 22-24.

¹⁶ See Confidential S8 QWE DLT-8; Confidential S8 QWE DLT-15; Qwest Br. at 39.

¹⁷ See Confidential S8 QWE DLT-8.

¹⁸ See Confidential S8 QWE DLT-8.

¹⁹ Staff's Report at 79.

²⁰ See Confidential S8 QWE DLT-10 at 7.

²¹ The FCC has determined that this element of Track A can be satisfied even if only one CLEC in Utah is offering service exclusively or predominantly over its own facilities; it need not be the case that other CLECs (or all CLECs) use their own facilities as well. See *Ameritech Michigan Order* at ¶ 104 (determining that because one CLEC was offering service exclusively over its own facilities, the BOCs' interconnection agreement with that CLEC satisfied the statutory requirement and made it unnecessary to examine whether additional interconnection agreements with other CLECs also satisfied the requirement).

²² *Ameritech Michigan Order* at ¶ 99.

²³ See Memorandum Opinion and Order, *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599 ¶ 48 (1998) ("We note . . . that reading the statutory language to require that there must be facilities-based service to both classes of subscribers to meet Track A could produce anomalous results, and there appear to be overriding policy considerations that lead to a contrary construction of the statutory language.") The FCC has stated unequivocally that "if all other requirements of section 271 have been satisfied, it does not appear to be consistent with congressional intent to exclude a BOC from the in-region, interLATA market solely because the competitors' service to residential customers is wholly through resale." *Id.*

²⁴ *Id.*

²⁵ See Confidential S8 QWE DLT-19; Confidential S8 QWE DLT-20. See also Confidential S8 QWE DLT-27F (compilation of data request responses regarding the number of CLEC residential facilities-based access lines and customers in Utah); Confidential S8 QWE DLT-28F (compilation of data request responses regarding the number of CLEC business facilities-based access lines and customers in Utah).