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**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UT 138

UT 139

In the Matter of the Investigation into )  
Compliance Tariffs filed by U S WEST )  
Communications, Inc., Advice Nos. 1661, )  
1683, 1685, and 1690. )

ORDER

In the Matter of the Investigation into )  
Compliance Tariffs filed by GTE Northwest )  
Incorporated, Advice Nos. 589, 599, and 611. )

DISPOSITION: RECONSIDERATION GRANTED;  
ORDER NO. 00-316 AFFIRMED

**Procedural History**

On June 19, 2000, the Public Utility Commission of Oregon (Commission) entered Order No. 00-316 in these dockets. The order modified portions of Order No. 98-444, entered November 13, 1998, and addresses a variety of issues relating to unbundled network elements (UNEs).

On August 18, 2000, Qwest Corporation (Qwest) (formerly, U S WEST Communications, Inc.), and Verizon Northwest, Inc. (Verizon) (formerly GTE Northwest Incorporated) filed applications for reconsideration and/or rehearing. Qwest and Verizon request the Commission to reconsider and modify Order No. 00-316 to the extent that it requires (a) incumbent local exchange carriers (ILECs) to combine UNEs on behalf of requesting competitive local exchange carriers (CLECs), regardless of whether such elements are currently combined; and (b) to assume a 98 percent flow-through of electronically submitted service orders for purposes of calculating nonrecurring costs for processing and implementing such orders. In addition, Verizon challenges (c) the requirement that ILECs provide direct access to the ILEC main distribution frames and (d) the long-run incremental cost methodology adopted by the Commission for purposes of calculating UNE prices generally.

On September 5, 2000, Worldcom, Inc. (Worldcom) (formerly MCIWorldcom, Inc.), AT&T Communications of the Pacific Northwest, Inc. (AT&T), and AT&T Local Services (AT&T) on behalf of TCG Oregon, filed a joint response opposing the applications for reconsideration.

### **Cost Methodology**

Order Nos. 98-444 and 00-316 require Qwest and Verizon to calculate nonrecurring costs based on the assumption that 98 percent of electronically submitted CLEC service orders will flow through without the need for human intervention. Qwest and Verizon challenge this requirement, alleging that it is contrary to the July 18, 2000 decision of the Eighth Circuit Court of Appeals in *Iowa Utilities Bd. v. Federal Communications Commission and United States of America*, 219 F.3d 744 (8<sup>th</sup> Cir. 2000). That decision vacated and remanded Federal Communications Commission (FCC) rule 51.505(b)(1), which requires that UNE rates be based on the total element long-run incremental cost (TELRIC) of the element using the most efficient telecommunications technology currently available and the lowest cost network configuration, given the the existing location of the incumbent LEC's wire centers. Qwest and Verizon claim that the 98 percent flow-through assumption is a hypothetical network assumption prohibited by the Eighth Circuit's decision. Verizon further alleges that all of the UNE costs and prices established by the Commission suffer from this defect, and recommends that UNE prices be declared interim, subject to true-up, pending review of the Eighth Circuit's decision by the Supreme Court.

On September 22, 2000, the Eighth Circuit stayed that portion of its July 18, 2000 decision vacating FCC rule 51.505(b)(1) "pending the filing and ultimate disposition of a petition for certiorari with the Supreme Court." In view of the Court's decision, the Commission finds that the parties should continue to develop nonrecurring costs and prices based upon Commission-approved cost principles as required in Order No. 00-316. The request to modify the 98 percent flow-through assumption is therefore denied.

In the event that nonrecurring charges are developed and approved before a Supreme Court decision on the merits of TELRIC, and the Commission determines that those charges should be incorporated in an interconnection agreement,<sup>1</sup> the charges should be implemented subject to true-up. Implementing nonrecurring charges subject to true-up will prevent carriers from suffering irreparable harm while the Supreme Court deliberates on the TELRIC issue.

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<sup>1</sup> As indicated in Order No. 00-316 at 8, Commission-approved nonrecurring prices will function as "default" prices. Those prices will be incorporated in interconnection agreements arbitrated by the Commission pursuant to the Act unless (a) the parties agree to different prices or; (b) one of the parties to the arbitration demonstrates that there are "special costs" warranting a price different from that established by the Commission.

## **UNE Combinations**

Consistent with recent decisions of the Ninth Circuit Court of Appeals in *US WEST v. MFS Intelenet, Inc.*, 193 F.3d 1112 (9<sup>th</sup> Cir. 1999) and *MCI Telecommunications Corp. v. US WEST Communications*, 204 F.3d 1262, 1268 (9<sup>th</sup> Cir. 2000), Order No. 00-316 at 10 requires Qwest and Verizon to combine UNEs on behalf of requesting carriers even if the UNEs are not ordinarily combined in the ILEC's network (hereafter, "new combinations"). In reaching this decision, the Commission acknowledged that the Eighth Circuit and the Ninth Circuit disagree on the issue.

In its July 18, 2000 decision, the Eighth Circuit reaffirmed its position that ILECs are not obligated to provide new UNE combinations, and concluded that the Ninth Circuit misinterpreted prior Eighth Circuit decisions on that issue. *Iowa Utils. Bd.* at 758-759. Qwest and Verizon contend that the Eighth Circuit's decision regarding new combinations is controlling because that Circuit has exclusive jurisdiction over FCC Rules. Accordingly, they argue that the Commission must alter Order No. 00-316 to reflect the Eighth Circuit's decision.

AT&T and Worldcom disagree with these claims and assert that the Commission continues to be bound by the Ninth Circuit's interpretation of the Act. In support of their argument, AT&T and Worldcom point out that the Supreme Court denied Qwest's petition for certiorari on this issue in *US WEST v. MFS Intelenet, Inc.*<sup>2</sup>

After reviewing the arguments, the Commission concludes that Order No. 00-316 should remain unchanged.<sup>3</sup>

## **Direct Access**

In Order No. 00-316 at 12, the Commission reaffirmed that CLECs should continue to have direct access to ILEC main frames as long as there remains the possibility that CLECs will be required to combine UNEs themselves. In its application, Verizon repeats its prior request that the Commission eliminate the direct access requirement. We agree with AT&T and Worldcom that there is nothing in Verizon's application to dispel our concern that the ILECs may attempt to require CLECs to combine elements themselves. Verizon's request is therefore denied.

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<sup>2</sup> See *US WEST Communications, Inc. v. MFS Intelenet, Inc.*, 120 S. Ct. 2741 (2000).

<sup>3</sup> On September 13, 2000, the Ninth Circuit issued a decision involving consolidated appeals of arbitrated interconnection agreements. *US WEST Communications, et al. v. Hamilton et al.*, docket nos. 99-35586, 99-35462, 99-35587, \_\_\_ F.3d \_\_\_, 2000 WL 133548 (9<sup>th</sup> Cir. September 13, 2000). The Court's decision appears to acknowledge the approach taken in Order No. 00-316 with respect to new combinations. To confirm that fact, the Commission has filed a motion for clarification with the Court. Because Order No. 00-316 mirrors the Court's position on this issue, we anticipate that the Court will grant the motion.

**ORDER**

IT IS SO ORDERED.

Made, entered, and effective \_\_\_\_\_.

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**Ron Eachus**  
Chairman

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**Roger Hamilton**  
Commissioner

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**Joan H. Smith**  
Commissioner

A party may appeal this order to a court pursuant to ORS 756.580.