ORDER NO. 00-798

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UT 148
UM 963

In the Matter of the Revised Tariff Sheets Filed by QWEST CORPORATION, formerly known as U S WEST COMMUNICATIONS, INC.[1], for Telecommunications Service.	))))	ORDER

DISPOSITION: RECONSIDERATION DENIED

Background. On August 30, 2000, the Commission issued Order No. 00-481 (Order) in this docket. In that Order, we established the geographic boundaries for the deaveraging of UNE prices into three price tiers and, deaveraging then-current rates, established a default/initial price structure for Qwest Corporation (Qwest) and, on an interim basis, for Verizon Northwest, Inc. (Verizon). Qwest timely filed an Application for Reconsideration on October 25, 2000. AT&T Communications of the Pacific Northwest, Inc., AT&T Local Services on behalf of TCG Oregon and WorldCom, Inc. (ATT/WCOM) jointly filed a timely Petition for Reconsideration on October 30, 2000. Responses to Qwest's Application were filed by ATT/WCOM, Western States Competitive Telecommunications Coalition[2] (WSCTC) and Commission staff (Staff). Qwest filed a Reply to those Comments on November 22, 2000. Responses to ATT/WCOM's Petition were filed by Qwest, Staff and Verizon.

This proceeding originally concerned two, interrelated issues: first, the determination of the prices that incumbent local exchange carriers (ILECs) charge competitive local exchange carriers (CLECs) that wish to purchase the unbundled network elements (UNEs) designated as loops; and, second, the determination of the geographic areas for which the ILECs' UNE cost-based prices were to be calculated for the purpose of deaveraging rates that had previously been calculated on a statewide average basis.

The opinion of the United States Court of Appeals for the 8th Circuit in Iowa Utilities Board, et al., v. Federal Communications Commission and United States of

[1]This name change officially occurred at the close of business on June 30, 2000. Except where the former name is part of an official citation, "Qwest" shall be used throughout this order.

[2] WSCTC's membership consists of Electric Lightwave, Inc., Advanced TelCom Group, Inc., Northpoint Communications, Inc., McLeodUSA Telecommunications Services, Inc., and XO Oregon Inc. (formerly known as NEXTLINK Oregon, Inc.).

America, Case No. 96-3321, decided July 18, 2000 (8th Circuit decision), had caused us to issue an order that only partially resolved the matters we intended to conclude in these dockets. Our Order set forth, in detail, our reasons for excluding the development of new costs for the repricing of the loop UNE, (Issues 1 through 9), from our consideration. We did, however, proceed with geographically deaveraging our existing statewide average loop prices in accordance with previous findings by the Commission in other dockets relating to LEC costs. On September 22, 2000, three weeks after we issued our Order, the 8th Circuit stayed the effectiveness of its order invalidating the rule on which we had relied in declining to consider Issues 1-9.

As noted above, Qwest and ATT/WCOM both sought reconsideration of the Commission's Order, but each with respect to different findings and conclusions. Each submission is discussed in turn.

I. THE QWEST APPLICATION

Positions of the Parties. Qwest asks the Commission to reconsider the decision not to address Issues 1 through 9. Qwest further asks that, after we have done so, we revise our decision with respect to Issue 13, accordingly. In support of its application, Qwest states that the Order contains three critical errors: first, that it ignores the mandate from the U.S. District Court to reevaluate the loop price; second, that because the Commission found that Qwest's evidence used methods rejected by the 8th Circuit Court of Appeals, it could not still be in compliance with the 8th Circuit's ruling; and third, that, by unbundling the UM 844 price, the Order was internally inconsistent because we utilized the very methods that we claimed were no longer available due to the 8th Circuit decision. To correct these alleged errors, Qwest asks the Commission to decide the issues and set new Qwest loop UNE prices in accordance with the evidence and recommendations it offered at hearing and in its briefs and to deaverage that price rather than the UM 844 derived price.

In its reply comments, WSCTC contends that Qwest's Application is flawed in several respects. First, Qwest fails to meet any of the four requisite criteria for reconsideration set forth in OAR 860-014-0095(3)(a)-(d), because Qwest's reliance upon a claim of a change in law ignores the fact that the 8th Circuit stayed the effectiveness of its order changing the law. If the law is unchanged, there are no grounds for reconsideration and, therefore, "Qwest cannot have it both ways." (WSCTC Comments, p. 2). Second, WSCTC states that Qwest's LoopMod cost methodology does not comply with the FCC's reinstated 51.505(b)(1), (a fact which Qwest disputes in its Reply) and recommends that the Commission not adopt any loop prices based on the LoopMod model.

The ATT/WCOM Response also notes the inconsistency of Qwest's position that the law has changed but that Qwest's LoopMod methodology comports with the requirements of the law whether or not the FCC's rules are in effect. For its part, the

ATT/WCOM Response argues that, since 51.505(b)(1) is back in effect, any loop prices which the Commission sets (and it should set such prices) must comport with the rule, which, ATT/WCOM contends, LoopMod does not.

Commission Staff, like WSCTC, argues that since the law is status quo ante, Issues 1 through 9 and Issue 13 should be decided by applying the FCC's pricing rules to the evidentiary record made in this proceeding.

In its Reply, Qwest seeks to clarify its initial position: it does not claim that there has been a change in the law; it only claims that there are errors of law made by the Commission that materially affect the decision (Reply, p. 2). With respect to the scope of the reconsideration, Qwest states, "The Commission has already decided that it will consider only Qwest's model in this docket. Thus, if the Commission is to render a decision on the record, as all parties seem to advocate, it must use Qwest's model to do so." (Reply, p. 2-3).

Discussion. Qwest contends that the Commission has erred by unreasonably delaying the implementation of the remand of the U. S. District Court.[3] We disagree with Qwest's contention.

The Court had ordered the Commission to "resolve these issues by applying its expertise and the principles delineated in the Act," and we were allowed, but not required, to reopen the record to accept additional evidence on the issue. The applicable section of the Act, Sec. 252 (d)(1), which sets forth the pricing standards for interconnection and network element charges, is extremely general. It states, in part, as follows:

> Determinations by a State commission of…the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—
>
> "(A) shall be—
>
> "(i) based on the cost (determined without reference to rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
>
> "(ii) nondiscriminatory, and
>
> "(B) may include a reasonable profit.

The Act, furthermore, through Section 256, charges the Federal Communications Commission (FCC) to establish procedures for Commission oversight

[3] *U S WEST Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc.,* 31 F.Supp.2d 839 (D. Or. 1998), *U S WEST Communications, Inc. v. TCG Oregon,* 31 F.Supp.2d 828 (D. Or. 1998), and *U S WEST Communications, Inc. v. WorldCom Technologies, Inc.*, 31 F.Supp.2d 819 (D. Or. (1998). The District Court Opinions were issued simultaneously and contain identical language with respect to the subject matter of this proceeding.

and to use its powers to promote public telecommunications network interconnectivity. In AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999), the U.S. Supreme Court affirmed the FCC's authority to establish national rules and standards for competition in the provision of local telecommunications services pursuant to the Act.

The language of the mandate from the District Court reflects the linkage between our expertise and the principles delineated in the Telecommunications Act of 1996. We concluded that the Commission "expertise" to which the Court referred was not a single body of knowledge, policies and opinions developed by the Commission in isolation from national rules. Rather, the Court was referring to our familiarity in implementing those rules promulgated by the FCC and integrating them into our statewide public interest mandate. The Court gave no cause to believe that the Commission was expected to ignore the pending dispute regarding the validity of the federal rules in determining the costs of unbundled loops. With the 8th Circuit's vacatur of 51.505(b)(1), there was sufficient uncertainty to warrant our decision to delay action on the development of new costs until such time as the dust of litigation had settled. Given our interpretation of the Court's mandate, and the constellation of circumstances at the time we were obliged to issue our Order in this proceeding, we reject Qwest's contention that we committed legal error in failing to decide Issues 1-9 on its desired timetable.

Qwest's second allegation of error is somewhat harder to understand. "Second, the Commission was incorrect when it found that Qwest's evidence used methods rejected by the Eighth Circuit" (Application, p. 2). Qwest claims, in its Reply Comments, that the evidence it submitted was in compliance with the methods that the FCC had set forth in their orders adopting rule 51.505(b)(1) (Reply, p. 1). The 8th Circuit rejected the rule. Since the rule has now been reinstated, we consider the Qwest allegation to have no practical significance or meaning. It is rejected.

Finally, Qwest contends that we erred in utilizing UM 844 prices in lieu of deciding Issues 1-9, because they were derived using methods required by the same, rejected rule. We disagree. Our clear and absolute mandate from the FCC to geographically deaverage unbundled network elements by August 30, 2000, justified the use of available data, pending the adoption of federal rules which would provide us with generally accepted cost models. Furthermore, the 8th Circuit's reinstatement of 51.505(b)(1) renders Qwest's argument on this issue moot.

The question that now arises is the following: Given the 8th Circuit's reinstatement of 51.505(b)(1) and the substantial period of time that will likely pass until new FCC rules are promulgated, should the Commission permissively revisit its Order and decide Issues 1-9 and revise the conclusions in Issue 13 based upon the evidentiary record? For the reasons set forth below, we conclude that such actions would be ill-advised and would fail to further the public interest.

In a series of procedural rulings, the presiding administrative law judge (ALJ) structured the presentation of evidence in this case in such a way as to comport with the then-existing FCC interpretation of the Act. However, the scope of the Commission's inquiry was largely dictated by the factor of time and the Commission was prevented from conducting the type of inquiry that it might have preferred. The ALJ's March 10, 2000 procedural ruling described our dilemma in detail:

> Two events deprive us of the ability, for lack of adequate time, to adopt Joint Intervenors'[4] request to add the issue of the appropriate cost model: (1) the absence of U S WEST's consent to a further suspension of the tariff, and (2) the Commission's strictly time-limited request for a waiver of C.F.R. 51.507(f) from the FCC. Indeed, even without the requested addition, the parties will be hard-pressed to participate on the many issues listed in Appendix A and noted above. To choose a new methodology, and, within that time frame, have U S WEST develop cost studies which capture the selected model's data requirements, and provide that data to all parties in a manner to allow everyone to prepare for the hearing in May, would be a daunting task.

In anticipation of this Ruling, the Joint Intervenors had proposed to "narrow the field" of cost model candidates as a means to accelerate the process. This stratagem was also rejected:

> Furthermore, the Commission is not in a position to choose a new model arbitrarily; it must examine the strengths and weaknesses of each model on its merits and weigh those against the public interest standard the Commission is required to uphold. Such a model would have to be used, not only in this proceeding, but in other pending and future dockets as well, in order to prevent "model arbitraging" of costs and prices between dockets. In addition to the time constraints previously noted, such an exploration is clearly beyond the scope of this case, and raises questions regarding our authority to explore this issue without further notice to the public. While it may, indeed, be reasonable for the Commission to consider the question of the proper cost model, UT 148 is not the appropriate proceeding in which to undertake that task.

[4] The "Joint Intervenors" referred to in that Ruling were WorldCom and WSCTC.

In our Order, we noted that the use of LoopMod was dictated by particular circumstances. We also acknowledge that one of the time constraints that compelled us to limit the record at the time the hearing was held no longer existed when the Order was issued: our Order No. 00-316 in UT 138/UT 139, issued June 19, 2000, set forth new policies at p. 7-8 which eliminated the need for tariffs and therefore the tariff suspension time limit. The other time constraint, the FCC's 51.507(f) compliance order, was met through our use of UM 844 prices on an interim basis. Several parties to this proceeding have already indicated their belief that LoopMod fails to comply with 51.505(b)(1) and that our use of LoopMod in setting default prices would be in error.[5] Consequently, there is a substantial likelihood of an appeal of such a Commission order. In the event of a remand, we would likely be required to examine all of the cost models, as the Joint Intervenors had originally requested.

Yet, even as such an examination of LoopMod's or any other current model's compliance with the stayed 51.505(b)(1) was underway in Oregon, the FCC would be required to respond to whatever judicial result eventually occurs; its response would be the development of a new methodology, or a more thoroughgoing explanation of a current methodology, with respect to the calculation of ILEC costs. Unless we are sufficiently prescient to divine exactly what the outcome of the FCC's actions will be, the development of the new Oregon-specific cost model would suffer the same infirmities as intervenors now maintain LoopMod does. Therefore, the Commission can and will re-examine Issues 1-9, and the requested cost model issue once a new FCC cost methodology is delineated or existing methodologies are given reinvigorated validity.

II. THE ATT/WCOM PETITION

The ATT/WCOM Petition contends that our Order contains two errors: first, that the Commission's Order failed to fulfill the objectives of FCC Rule 51.507(f)(2); and, second, that by providing Verizon with a 12.84% price differential above the prices set for Qwest, the Commission violated its own administrative rules for giving the required notice to the parties and therefore deprived ATT/WCOM of due process, particularly in light of earlier procedural rulings. We respond to and reject each allegation, in turn, for the reasons set forth below.

A. Rule 51.507(f)(2) Noncompliance

Positions of the Parties. The Petition notes that while the Commission established three deaveraged zones--the minimum requirement under 51.507(f)(2)--our

[5] "[T]he Commission must either modify LoopMod in a manner consistent with the evidence presented by WorldCom and AT&T at the hearing, or reject LoopMod outright and, consistent with the petition of [WSCTC], open a new generic cost docket to consider alternative cost models" (ATT/WCOM Response, p. 2-3). An appellant might argue, among other things, that we had foreclosed consideration of relevant issues for reasons which no longer exist.

placement of 92% of Qwest's access lines and 86% of Verizon's access lines into one zone effectively failed to fulfill the objectives of the rule (Petition, p. 5-6). It then offers suggestions for dividing Qwest and Verizon wire centers into either 4 or 5 zones. Qwest responds to this issue by noting that the Petition fails to address, let alone satisfy the grounds for reconsideration set forth in OAR 860-014-0095(3) and merely restates arguments made previously at pages 14-25 of Petitioners' Opening Brief. Staff and Verizon reply in a similar manner, noting that ATT/WCOM failed to show any legal or factual error in our Order as required by the aforementioned rule.

Discussion. In our Order, (p. 9-10), we set forth the reasoning for our decision as to the number of zones and the groupings of wire centers within each zone:

> We establish three rate zones because we find that they will adequately account for the cost differences between wire centers, yet be less complex than the 5-zone WorldCom/AT&T proposal. We find that it will therefore be easier both for use by customers and administration by telecommunications carriers' sales staffs.
>
> . . . . . We find from our review of the evidence presented that, in the case of both Qwest and Verizon, large incremental jumps in per-line average costs occur between major groupings of wire centers at approximately one and one-half and at three times each company's calculated statewide average cost. We further find that it is reasonable to establish cost breakpoints between zones near these common multiples of the statewide average per-line cost where large incremental jumps between groupings exist.

The Petition contends that the FCC's objectives require that less than a majority of lines be placed within a single zone[6], but provides no basis for that assertion. It merely opines that the petitioners would have preferred greater granularity so that the wire centers of the very highest density would have been able to provide CLECs with lower than the average loop UNE costs for the wire centers in the Zone 1 group as a whole. We affirm our reasoning in the Order and deny reconsideration on this issue.

[6] "…it is clear that the Commission has averaged the majority of costs for the majority of Qwest's and Verizon's lines into Zone 1, thereby, negating the benefit of any deaveraging in the high density areas of Oregon." (Petition, p. 5).

B. Verizon Pricing and Due Process

Positions of the Parties. The second part of our Order to which ATT/WCOM objects, is as follows:

> In docket UM 731, Order No. 00-312, June 16, 2000, we found that Verizon's statewide average per-line costs exceeded those of Qwest by 12.84 percent. In order to avoid Verizon being prejudiced in its interconnection agreement negotiations, we find that it is reasonable to increase the UM 773 wire center costs by 12.84 percent in setting Verizon's default loop UNE prices. (Order, page 10).

Without citing any particular rule to support its allegation, ATT/WCOM claims a violation of Commission rules because the Commission based its conclusion on a determination made in Docket UM 731, Order No. 00-312. It also claims that the procedural rulings and Stipulation placed the issue of Verizon's costs out-of-bounds; Verizon's costs were to be based on Qwest's costs, which made our use of UM 731 improper. The due process complaint is based on Petitioners' contention that they were not given notice and opportunity to comment on the Verizon proposal. It was first offered by Verizon in rebuttal prehearing testimony and, "Since this proposal was filed in the rebuttal round, no party had the opportunity to directly address this matter in testimony and the proposal was not addressed during the hearing"(Petition, p.8). The Petition thus concludes that the Commission's conclusion is "beyond the scope of this proceeding" because Verizon's costs were not at issue in this proceeding and no party other than Qwest was permitted to offer evidence as to costs (Petition, p. 9).

In its Reply, Verizon rebuts the ATT/WCOM assertion with particularity: "…the CLECs had every opportunity to perform discovery, analyze and cross-examine Verizon's proposal before and during the hearings. They had full notice of Verizon's position and were afforded a clear and adequate opportunity to challenge it during the hearings. The CLECs did not contest Verizon's showing when it was presented, attempted no discovery, asked no questions and offered no formal objection to its presentation by Verizon as outside the scope of the proceeding. The CLECs have no basis for asserting that their due process rights were abridged" (Reply, p. 7). Verizon also noted (Reply, p. 10), that having its costs "based" on Qwest's costs until further information on Verizon's costs is known, does not mean that their costs must, for the purposes of this docket, be identical.

Discussion. In UM 731, Order No. 00-312, we determined that there was a 12.84 percent cost differential between Qwest's and Verizon's costs. AT&T and WorldCom both participated in the UM 731 proceeding. We then took official notice of the UM 731 Order's findings when we adopted that portion of our UT 148 Order. Our

action in such circumstances is proper.[7] Furthermore, Verizon's position did not take anyone by surprise at the hearing, and at no time during the proceedings did AT&T or Worldcom contend that Verizon's testimony exceeded the latitude afforded by the Stipulation. Indeed, in its Opening Brief, pages 14-16, Verizon describes in detail its contention that a Qwest-Verizon cost differential adjustment should be adopted and discusses the procedural history, including the Procedural Stipulation, in its argument that such a determination is proper. In their Reply Brief, AT&T and WorldCom addressed not one of the points made in Verizon's Opening Brief. No parties' procedural due process rights have been violated in this docket. The Petition is denied.

ORDER

IT IS ORDERED that Qwest's Application For Reconsideration and the Petition for Reconsideration of AT&T and WorldCom are each denied in their entirety.

Made, entered, and effective _____.

_____
Ron Eachus
Chairman

_____
Roger Hamilton
Commissioner

_____
Joan H. Smith
Commissioner

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

[7] *See, MCI Telecommunications Corp. v. GTE Northwest,* 41 F. Supp 2d 1157, 1167 (D. Or. 1999).