

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayner	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of AT&T and WorldCom's
Request for a Commission Investigation of
Qwest's Pricing of Certain Unbundled
Network Elements

ISSUE DATE: February 13, 2002

DOCKET NO. P-442,421,3012/M-01-1916

NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On March 15, 2000, the Commission issued its ORDER GRANTING RECONSIDERATION, SETTING PRICES AND ORDERING COMPLIANCE FILING.¹ In that Order the Commission established prices for Qwest Corporation's (Qwest) unbundled network elements (UNEs). The rates produced from that proceeding were based on HAI version 5.0a, and generally reflected cost conditions which existed in the mid-to-late 1990's.

On December 21, 2001, AT&T and WorldCom² jointly submitted a request that the Commission commence an investigation of the pricing of certain UNEs offered by Qwest to competitive local exchange carriers (CLECs). Specifically, AT&T and WorldCom requested that the Commission investigate the prices of UNEs making up the UNE Platform (UNE-P) - the local loop, switching and transport - to determine whether the prices that have been established are appropriately cost based. In addition they requested that the Commission review the prices set for unbundled "high capacity" loops (i.e. DS1, HDSL, ADSL).

Further, AT&T and WorldCom requested that this matter be referred to the Office of Administrative Hearings (OAH) for a contested case proceeding. They requested that a schedule

¹ In the Matter of a Generic Investigation of US West Communications, Inc.'s Cost of Providing Interconnection and Unbundled Network Elements, Docket No. P-442, 5321, 3167, 466, 421/CI-96-1540.

² AT&T Communications of the Midwest, Inc. and TCG Minnesota, Inc. (collectively AT&T) and WorldCom, Inc. (WorldCom).

be established that will enable a final resolution of all issues within the same general timetable that has been established for the currently pending 271 proceedings.³

On January 15, 2002, Qwest filed reply comments requesting that the Commission deny AT&T and WorldCom's request.

On January 24, 2002, certain Competitive Local Exchange Carriers⁴ (CLEC Coalition or Coalition)) filed a Petition to Intervene.

This matter came before the Commission on January 29, 2002.

FINDINGS AND CONCLUSIONS

I. AT&T and WorldCom's Request

AT&T and WorldCom requested that the Commission investigate the prices of UNEs making up the UNE P Platform, that is the local loop, switching and transport as well as the prices set for the unbundled, high capacity loops, that is DS1, HDSL, and ADSL loops.

Further they requested this be referred to the OAH for a contested case proceeding, with direction that the OAH establish a schedule for determination of the issues that parallels the schedule established in the Qwest section 271 proceeding.

AT&T and WorldCom also asked the Commission to replace the current deaveraging scheme with a plan that more closely reflects Qwest's loop costs. They advocated a deaveraging plan that groups wire centers with similar costs into cost based zones and set forth a three zone deaveraging proposal setting deaveraged prices.

³ Proceedings pending with the OAH to review Qwest's compliance with Section 271(c) of the Telecommunications Act of 1996 (*Pub L. No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code*).

⁴ Ace Telephone Association; Encore Communications; Hutchinson Telecommunications, Inc.; Mainstreet Communications, LLC; NorthStar Access LLC; Otter Tail Telecom, LLC; Tekstar Communications, Inc.; Unitel Communications, U.S.Link, Inc.; and ValEd Joint Venture, LLP.

II. Jurisdiction

The Commission has jurisdiction over this proceeding pursuant to § § 237.011 and 237.081, subd. 2(c).

III. Comments of the Parties

A. AT&T and WorldCom

AT&T and WorldCom argued that the establishment of cost-based prices for UNE-P elements is critical to the development of competition and that the prices established in the US WEST generic cost proceeding are no longer an accurate reflection of Qwest's costs of providing those elements. To support their position, they cited changed market conditions since the completion of the US WEST generic cost proceeding and improvements in the HAI Model (now HAI 5.2a) that allow total element long-run incremental cost (TELRIC) to be estimated with greater accuracy.

Further, they put forth a three zone deaveraging proposal to replace the current deaveraging plan adopted by the Commission in its October 5, 2000 ORDER ON RECONSIDERATION⁵ arguing that their proposal more closely reflects Qwest's loop costs.

AT&T and WorldCom argued that there were several reasons that this investigation into UNE-P pricing should be considered roughly concurrently with the Commission's consideration of Qwest's Section 271 petition. First, they argued that if Qwest gets FCC approval of its 271 petition before the UNE-P prices are set on a cost-based basis, Qwest will have a "first to market" advantage which will make it more difficult for companies like WorldCom and AT&T to compete once the UNE-P rates are finally set. Second, they argued that since the UNE-P prices will not be considered in the pending Section 271 proceedings, it is possible that there will be a later dispute on the scope of any decision the Commission makes in the pending Section 271 proceedings. By addressing the UNE-P issue now such potential dispute would be avoided.

B. CLEC Coalition

The CLEC Coalition agrees with AT&T and WorldCom in believing that the existing rates for the loop and switching unbundled network elements are significantly higher than the actual cost of those networks.

⁵ In the Matter of Implementing the Geographic Deaveraging Requirements of 47 C.F.R. § 51.507(f), Docket No. P-999/CI-99-465.

However, the Coalition argued that under the geographical deaveraging proposal of AT&T and WorldCom all of the benefit of the lowered rates would flow to the most urban areas, leaving the existing unreasonably high rates in effect for the less urban exchanges. It argued that the rates proposed by AT&T and WorldCom for the less urban exchanges (Zone 3 under the AT&T and WorldCom proposal) would be too high to support competition. The Coalition, therefore, supports the existing Commission approved rate design.

C. Qwest

Qwest argued that the rates that AT&T and WorldCom seek to review were set less than two years ago and there is no need to review them at this time. These rates were set over objections that are similar to the objections being made now. Further, the Commission entered its geographic deaveraging order, over the objections of AT&T and WorldCom even more recently, and this should not be subject to review now.

D. Department of Commerce (DOC) and The Minnesota Office of the Attorney General Residential and Small Business Division (OAG-RUD)

At the meeting before the Commission the DOC and OAG-RUD each indicated that it supported a contested case proceeding on the UNE-P pricing issue but not on the geographical deaveraging matter.

IV. Commission Action

The Commission recognizes that the ability of new entrants to obtain combinations of elements in a non-discriminatory manner and at cost based rates is critical for the development of competition in the local market. The Commission is persuaded that there is reason to believe that previously set prices for the UNE-P elements may not reflect recent market changes and model improvements and recognizes the need to resolve this issue. Due to the significant unresolved factual issues, the Commission will refer this matter to the OAH for a contested case proceeding.

For these reasons, the Commission will grant the request of AT&T and WorldCom and refer the entire matter, except geographical deaveraging, to the OAH for a contested case proceeding. Specifically, the proceeding will be for the purpose of investigating the prices of UNEs making up the UNE Platform (UNE-P) - the local loop, switching and transport - to examine whether the prices that have been established for those elements are appropriately cost-based. In addition, the prices set for unbundled "high capacity" loops (i.e DS1, HDSL and ADSL loops) will be reviewed.

Further, the Commission is persuaded that this matter is sufficiently related to Section 271 issues so that it is important to have this matter resolved when the Commission will be

considering those issues. For this reason the Commission will ask the ALJ to resolve all of the issues within the same general timetable that has been established for the currently pending 271 proceedings.

The issue of geographical deaveraging will not be sent to the OAH for resolution. Geographical deaveraging involves determinations of policy, which should and will remain within the Commission's purview. Any arguments that the parties may want to make regarding the zones determined by the Commission in its previous Order on geographical deaveraging can be made before the Commission.

V. Administrative Matters

Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Kathleen Sheehy. Her address and telephone number are as follows: 5726 Bryant Avenue South, Minneapolis, Minnesota 55419; (612) 866-4086.

B. Hearing Procedure

Controlling Statutes and Rules

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 117 University Avenue, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

Right to Counsel and to Present Evidence

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-

examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

Discovery and Informal Disposition

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Marc Fournier, Telecommunications Analyst, Minnesota Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651)296-3793; or Karen Hammel, Assistant Attorney General, 700 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 297-1852.

Protecting Not-Public Data

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

Accommodations for Disabilities; Interpreter Services

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

Scheduling Issues

The times, dates, and places of public and evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

Notice of Appearance

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

Sanctions for Non-compliance

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are Qwest, Minnesota Department of Commerce, the Minnesota Office of the Attorney General's Residential and Small Business Utilities Division, AT&T Communications of the Midwest, Inc. and TCG Minnesota (collectively AT&T), WorldCom, the CLEC Coalition (Ace Telephone Association; Encore Communications; Hutchinson Telecommunications, Inc.; Mainstreet Communications, LLC; NorthStar Access LLC; Otter Tail Telecom, LLC; Tekstar Communications, Inc.; Unitel Communications, U.S.Link, Inc.; and ValEd Joint Venture, LLP).

Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference will be held in this case on Thursday, February 28, 2002 at 1:30 p.m. in the Small Hearing Room of the Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101. Persons participating in the prehearing conference should be prepared to discuss time frames, scheduling, discovery procedures, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

VI. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., may apply to this case. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

VII. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The Commission grants the request of AT&T and WorldCom and refers this entire matter, except geographical deaveraging, to the Office of Administrative Hearings for contested case proceedings, as set forth above.
2. The Commission requests that the Administrative Law Judge resolve all of the issues within the same general timetable that has been established for the currently pending 271 proceedings.
3. A prehearing conference shall be held on Thursday, February 28, 2002 , at 1:30 p.m. in the Small Hearing Room, Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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ATTACHMENT A

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of AT&T and WorldCom's MPUC Docket No. P442, 421, 3012/M-01-1916
Request for a Commission Investigation of
Qwest's Pricing of Certain Unbundled Network OAH Docket No.
Elements

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Kathleen Sheehy; 5726 Bryant Avenue South, Minneapolis, Minnesota 55419; (612) 866-4086.

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: _____

DATE: _____