

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Edward A. Garvey
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Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Further Commission
Investigation of Avoided Cost Discount of
US WEST Communications (now Qwest)

ISSUE DATE: May 2, 2002

DOCKET NO. P-999/CI-99-776

ORDER CLOSING DOCKET AND
OPENING A NEW INVESTIGATION

PROCEDURAL HISTORY

On December 2, 1996 the Commission issued its ORDER RESOLVING ARBITRATION ISSUES AND INITIATING A US WEST COST PROCEEDING arising from a consolidated arbitration proceeding¹ under the Federal Telecommunication Act of 1996(The Act).² In that Order, the Commission resolved numerous disputed issues including the wholesale discount at which USWest Communications, Inc. (USWC) must offer telecommunications services for resale to its competitors. The Commission established a 21.5% avoided cost discount applicable to retail services resold by USWC.

On April 15,1997, USWC filed a complaint in United States District Court, District of Minnesota alleging, inter alia, that the 21.5% wholesale discount rate adopted by the Commission was in error and inconsistent with Section 252(d) of the Telecommunications Act.

On March 31, 1999 United States District Judge Ann Montgomery remanded to the Commission the issue of the calculation of avoided costs. The Court directed the Commission to use retail rates as the basis for the wholesale resale discount offered by USWC to Competitive Local Exchange Companies(CLECs) pursuant to the Act and FCC requirements.

¹In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc. and MFS Communications Company for Arbitration with US WEST Communications, Inc. Pursuant to Section 252 (b) of the Federal Telecommunications Act of 1996. Docket No. P-442, 421/M-96-855; P-5321, 421/M-96-909; P-3167, 421/M-96-729 Consolidated.

² 47 U.S.C. § 252(b)

The Commission opened Docket number P-999/CI-99-776, In the Matter of a Further Commission Investigation of Avoided Cost Discount of USWC, to investigate further the calculation of USWC's avoided cost discount.

On December 11, 2001, the Commission issued an Order accepting and adopting a proposal submitted jointly by Qwest and affected CLECs, under which the wholesale discount was set at 17.66% as of February 8, 2000 for all CLECs other than those subject to the Qwest/MFS interconnection agreement.³

On December 11, 2001, the Commission issued a Notice/Request for Comment on the necessity of further proceedings to investigate the possible revision of the wholesale discount rate, and whether any parties were willing to sponsor an avoided cost study.

The only party to file comments in response to the notice was the Department of Commerce (DOC), which recommended that the Commission proceed with an investigation to review and, if necessary, revise the level and structure of the current wholesale discount rate applied to Qwest retail services.

US Link filed a reply to the DOC's comments indicating concern with the DOC's suggestion that the wholesale discount should be separately determined for different services. It recommended caution before making changes to the current wholesale rate design.

On March 12, 2002, New Access Communications, LLC (New Access) filed a request for clarification of the Commission's December 11, 2001 Order. Specifically, New Access requested clarification of how the discount applied to Qwest's "win-back" tariff, under which Qwest waives non-recurring charges and provides up to two months' free service to residential customers who return to Qwest after receiving service from a CLEC.

On March 28, 2002, ASCENT⁴ filed comments in support of New Access' request for clarification.

On April 11, 2002, Qwest filed its Response to the New Access request for clarification.

Both matters came before the Commission on April 18, 2002.

³ CLECs subject to that agreement (having opted into that agreement on or before February 8, 2000) would continue to receive the 21.5% discount until its expiration, based upon a judicial determination that Qwest had agreed to the 21.5% discount in that agreement.

⁴ The Association of Communications Enterprises (ASCENT) is an international industry organization representing the interests of advanced communications firms.

FINDINGS AND CONCLUSIONS

This Order will address two separate issues: (1) whether the Commission should open a new investigation to look into Qwest's avoided cost or wholesale discount; and (2) how to proceed with New Access' request for clarification of the Commission's December 11, 2001 Order.

I. The Avoided Cost or Wholesale Discount

A. Background

The Commission has, by its Order of December 11, 2001, adopted a 17.66% discount for the period beginning February 8, 2000 for all Qwest Interconnection Agreements in Minnesota, other than the MFS Interconnection Agreement and parties that have opted into that Agreement on or before February 8, 2000.

The Commission, by notice of December 11, 2001, solicited comments from parties on the necessity of further proceedings to investigate the possible revision of the wholesale discount for Qwest and whether any parties were willing to sponsor an avoided cost study.

B. Positions of the Parties

1. DOC

The DOC argued that the Commission should proceed with an investigation to review and possibly revise the level and structure of the current wholesale discount rate applied to Qwest retail services. It argued that Qwest, and any other interested party, should provide a proposed avoided cost study with an averaged discount rate and a proposal with a discount rate calculated for at least five categories of services. Other parties could then examine the studies and either propose modifications to the study and/or propose a different study.

At hearing, the DOC indicated that it may consider conducting an investigation into the accuracy and design of the wholesale discount and depending on its findings would then determine whether to return to the Commission with this issue.

2. US Link

US Link, Inc. (US Link) stated its concern with the DOC's suggestion that the wholesale discount should be separately determined for different services. It stated that changing the wholesale rate design could be more harmful than beneficial to US Link. It indicated that the Commission should proceed cautiously before making changes to the current wholesale rate design.

US Link further indicated it would not support further investigation of Qwest's avoided cost discount. It argued that it did not have the resources to do an avoided cost study.

3. RUD-OAG⁵

The RUD-OAG indicated at hearing that if there were to be further reexamination of the issue, it was concerned that only Qwest would be able to offer an avoided cost study because CLECs did not have the resources to do so. The RUD-OAG argued that it was important that CLECs participate in any review. The Agency also expressed concern about its own ability to participate due to resource constraints.

4. Eschelon

Eschelon suggested that the docket go forward but with limits on what it was attempting to accomplish. Eschelon indicated that its participation would be limited due to resource constraints. Eschelon also questioned whether after such an investigation there would be a significant difference from the current situation.

5. New Access

New Access stated it did not have the resources to prepare a cost study. However, it indicated its belief that the discount rate is too low and proposed an interim rate of 25%.

6. Qwest

Qwest argued that no party came forward in the past and no party has come forward now showing that the 17.66% wholesale discount is incorrect. It argued that this is not the time to do a further investigation on this issue.

C. Commission Action

The Commission recognizes that the wholesale discount rate may not reflect avoided costs with as much precision as when it was set, due to the time that has elapsed since it was first determined. However, the Commission also recognizes that the parties affected by the wholesale discount rate have either not responded or have clearly indicated the lack of resources to pursue this matter at this time. Without having the interest or support of the affected parties, the Commission will not investigate this further and will close this docket.

The Commission recognizes that the DOC, under its own investigative authority, may proceed with its own investigation and may return to the Commission at a later date to reopen this issue. The Commission is open to the DOC, or any other interested party, coming forward with an avoided cost study and a request to open a further investigation.

⁵ Residential and Small Business Utilities Division of the Office of the Attorney General.

II. New Access's Petition for Clarification

A. Positions of the Parties

1. New Access

New Access' Petition⁶ asks the Commission to clarify how the 17.66% wholesale discount rate should be applied in light of a "win back" tariff Qwest makes available to customers of New Access. Under the win back tariff, a CLEC customer who leaves the CLEC and returns to residential retail service with Qwest gets a waiver of all non-recurring charges and up to two months' free service, in addition to other perks.

Qwest and New Access disagree on what is the relevant retail rate against which the 17.66% wholesale discount should be applied. New Access believes that the relevant retail rate to which the 17.66% wholesale discount should be applied is the win back rate- which includes two months of free service and a waiver of nonrecurring charges.

If Qwest is to provide retail customers with two months of free service and a waiver of nonrecurring charges, New Access argues, it must provide CLEC resellers with two months of free service and a waiver of nonrecurring charges. If this is not done, the resale discount disappears and the wholesale customer may pay more than the retail customer.

2. ASCENT

ASCENT agrees that New Access has raised a significant issue which should be addressed by the Commission. ASCENT argued that Qwest's ability to effectively offer former customers rates that are marginally above the discounted rate resellers may charge the same customers, undermines, if not virtually eliminates, those resale discounts. This outcome could not have been anticipated when Qwest's "Competitive Response Program" was introduced.

3. Qwest

Qwest argues that the Commission's Order of December 11, 2001 created no ambiguity, as Access claims. The Order clarified the effective reach and date of the Commission's 17.66% discount rate. The proper application of the avoided cost discount to this tariff is no different than its application to other tariff offerings.

New Access' argument that Qwest must offer New Access a credit equivalent to the two months waiver of recurring and non-recurring charges available to a win back customer and then provide the avoided cost discount in addition would work untenable results. New Access would be eligible for the win-back tariff benefits, increased by a factor of 17.66%, whether or not the customer at issue ever left New Access in the first place.

⁶ Joined by Choicetel, LLC

B. Commission Action

The Commission concurs that New Access has raised an issue that requires further consideration by the Commission. The question of the application of the wholesale discount rate in these circumstances has not come before the Commission previously and clearly is critical to New Access and may have implications for other CLECs as well.

The parties agreed that it would be most efficient for the Commission to proceed under its general investigatory authority to open an investigation into the issue raised by New Access. Further, it was agreed that all interested parties should have an opportunity to comment or supplement their comments, as the case may be.

The Commission will therefore open an investigation under its general investigatory authority. The Commission, however, rather than proceeding under the current docket will open a new docket to do so.

In order to give all interested parties an opportunity to comment, or to supplement previous comments, interested parties will have 45 days from the date of this Order to file comments on this issue and 15 days to reply.

ORDER

1. The current docket, Docket No. P-999/CI-99-776, is hereby closed.
2. The Commission hereby opens an investigation into the application of the wholesale discount to Qwest's win-back tariff, Docket No. P-421/CI-02-582, In the Matter of a Commission Investigation into the Issues Raised by New Access Communications Regarding the Application of Qwest's Avoided Cost Discount to its Win Back Tariff.
3. Interested parties have 45 days from the date of this Order to file comments followed by 15 days to reply.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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