BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Phyllis A. Reha	Commissioner
Gregory Scott	Commissioner

In the Matter of the Application of Qwest Long Distance Corporation for Approval of Authority to Resell Interexchange Services in Minnesota

ISSUE DATE: August 13, 2003

DOCKET NO. P-6237/NA-03-508

ORDER GRANTING AUTHORITY TO PROVIDE LONG-DISTANCE SERVICE

PROCEDURAL HISTORY

On March 28, 2003, Qwest LD Corporation (QLDC) filed an application for authority to provide interLATA[1] interexchange telecommunications service ("long-distance") in Minnesota. QLDC seeks authority to serve customers by reselling interexchange service. QLDC revised its filing on May 2 to address concerns raised by the Minnesota Department of Commerce (the Department).

On May 12, 2003, the Department filed comments raising concerns about QLDC's proposed tariff.

On May 14, 2003, the Commission solicited comments on QLDC's application and the Department's concerns. The Commission received comments from AT&T Communications of the Midwest, Inc. (AT&T), the Department and QLDC on May 27.

The issue came before the Commission on July 8, 2003.

[1] The term "LATA" comes from the break-up of American Telephone & Telegraph Co. (A.T.& T.). In 1982 A.T.& T. agreed to settle an antitrust suit by divesting its local telephone business to form the Bell operating companies (BOCs), while continuing to provide long-distance service. To implement this change, the settlement defined 196 geographic areas called "local access and transport areas" (LATAs). A BOC was prohibited from completing a call that crosses LATA boundaries. *United States v. Western Electric*, 552 F.Supp. 131 (D.D.C. 1982), affirmed sub nom. *Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed. 472 (1983).

FINDINGS AND CONCLUSIONS

I. Background

A. Minnesota law

The qualifications for authority to provide telephone service in the parts of Minnesota served by Qwest are set forth at Minnesota Statutes §§ 237.16, subdivision 1(b) and 237.74, subdivision 12; and Minnesota Rules parts 7812.0300 through 7812.0500. Generally, they require a provider to demonstrate that it has the technical, managerial, and financial resources to provide the proposed services.

B. Telecommunications Act § 272

The federal Telecommunications Act of 1996[2] bars a Bell operating company (BOC) from competing in the long-distance business for calls originating where the BOC is the incumbent local service provider. But § 272 of the Act permits a BOC to create an affiliate to compete for this business, provided that the affiliate meet certain criteria including, among other things –

> maintain[ing] books, records, and accounts in the manner prescribed by the [Federal Communications] Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate....[3]

C. Actions to date

Minnesota's sole BOC is Qwest Corporation (Qwest). Qwest, through its parent companies Qwest Services Corporation and Qwest Communications International, Inc. (collectively, Qwest International), created an entity called Qwest Communications Corp. (QCC) to serve as a § 272 affiliate for the purpose of competing in the long-distance market. According to QLDC, QCC owns switching facilities and has developed the systems and processes to provide long-distance service to customers throughout the state, upon regulatory approval. But questions about the adequacy of QCC's accounting have delayed QCC's certification as a § 272 affiliate, blocking QCC's entry into the market.

Consequently, Qwest International created QLDC. Like QCC, QLDC was created for the purpose of fulfilling the requirements of § 272 to compete in the long-distance market, but only on an interim basis. QLDC plans to merge into QCC as soon as QCC obtains regulatory approval to provide service.

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[2] Pub. L. No. 104-104, 110 Stat. 56 (codified throughout title 47, United States Code).

[3] 47 U.S.C. § 272(b)(2).

The Federal Communications Commission has approved QLDC's status as a § 272 affiliate.[4]

II. Application

QLDC's application sets forth its technical, managerial, and financial resources to provide long-distance service. These materials are largely undisputed.

QLDC is a smaller enterprise than QCC. Unlike QCC, QLDC does not own its own switching facilities; instead, QLDC proposes to resell long-distance service provided by other carriers. And unlike QCC, QLDC lacks the systems and processes to bill and collect payments from customers; instead, QLDC contracts for this service from Qwest.

But QLDC has systems and procedures in place to bill and collect payments only from its own local service customers. While this contractual relationship would permit QLDC to offer long-distance service to most of the state's access lines, QLDC does not plan to serve households and businesses that do not subscribe to Qwest's local service. In order to preserve its discretion to withhold service in this manner, QLDC proposes to state in its tariff that "Service is offered subject to the availability of facilities and the provisions of this Price List,"[5] and that –

> Services are provided ... subject to the availability of facilities and/or equipment. The Company reserves the right to refuse to provide service where facilities or equipment are not available or in circumstances where it is not economically feasible. [6]

III. Comments

A. AT&T

AT&T argues that QLDC should not be allowed the discretion to refuse service to people who do not subscribe to Qwest's local service. According to AT&T, granting QLDC's request would circumvent legal prohibitions, damage the emerging competitive market in telecommunications, and undercut § 272.

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[4] See *In the Matter of Application by Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02-314, Memorandum Opinion and Order, FCC 02-332 (rel. Dec. 23, 2002); see also *In the Matter of Application by Qwest Communications, International, Inc. for Authorization to Provide In-Region, InterLATA Service in New Mexico, Oregon and South Dakota*, WC Docket 03-11, Memorandum Opinion and Order, FCC 03-81 (rel. April 15, 2003).

[5] QLDC application (March 28, 2003), proposed tariff at 2.2.2.A. ("Limitations [on offerings]").

[6] *Id.* at 3.1.1.B. ("General Description of [long distance] Services").

1. Legal prohibition

AT&T notes that Minnesota statutes generally direct long-distance carriers in Minnesota to offer their services statewide at uniform rates.

> No telecommunications carrier shall unreasonably limit its service offerings to particular geographic areas unless facilities necessary for the services are not available and cannot be made available at reasonable cost.[7]

AT&T argues that QLDC's unprecedented tariff language would grant QLDC the discretion to violate this statute. While QLDC protests that it lacks billing and collections mechanisms to serve customers other than Qwest's customers, AT&T argues that QLDC should simply contract with more carriers that provide these services, just as other long-distance companies do.

2. Anticompetitive effects

AT&T argues further that if QLDC were to offer service exclusively to Qwest local service customers, QLDC could engage in an anticompetitive "price squeeze." A price squeeze results when a monopolist wholesale supplier sells a product to retailers at an inflated price, while also selling the product at retail. Competitors are caught between the need to pay the monopolist's wholesale prices on the one hand and the need to compete with the monopolist's retail price on the other.[8] By undercutting the retail market in this way, the wholesale monopolist extends its monopoly power from the wholesale market into the retail market.

In the current case, Qwest is the incumbent monopolist in the local telephone market and charges long-distance companies a fee to gain access to the local telephone network to serve subscribers living there. AT&T alleges that Qwest's access charges are inflated above its costs, and that long-distance companies will be squeezed between the need to pay Qwest's access charges on the one hand, and the need to compete with QLDC's prices on the other.

3. Vindication of § 272

Finally, AT&T argues that QLDC's excuse for the need for its tariff language is disingenuous. QLDC and its affiliates do not lack "facilities and equipment" necessary for the provision of long-distance service throughout the state. To the contrary, QLDC acknowledges that those facilities are available in QCC. The only reason those facilities are not being employed is because of the accounting shortfalls that have kept QCC from fulfilling the requirements of § 272. These firms have only themselves to blame for not keeping adequate accounting records, and the inability to employ QCC's assets to enter the long-distance market is a natural consequence of their own shortcomings.

If this Commission were now to excuse QLDC from the need to comply with statute, AT&T argues, it would undermine the policies underlying § 272.

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[7] Minnesota Stat. § 237.74, subd. 2.

[8] *Federal Power Commission v. Conway Corp.*, 426 U.S. 271 (1976).

B. QLDC

QLDC asks the Commission to reject AT&T's objections and to grant QLDC's petition, including its proposed tariff language and service limitations.

Contrary to AT&T's assertion that QLDC's tariff is unprecedented, QLDC notes that various long-distance companies have similar language in their tariffs. In particular, QLDC asserts that two incumbent local carriers – Frontier Communications of Minnesota, Inc. (Frontier) and Mankato Citizens Telephone Company d/b/a HickoryTech (HickoryTech) – have affiliated long-distance carriers with similar tariff language in their tariffs, and that the Department expressed no objection to these tariffs. Further, QLDC asserts that these companies refuse to offer long distance service to people who do not subscribe to local service from an affiliated entity. QLDC argues that it should not be subject to any different treatment than the Commission accorded to these other firms.

C. The Department

Upon review of QLDC's filing, the Department concludes that QLDC fulfills all the requirements for providing long-distance service in Minnesota. The only outstanding issue is the propriety of QLDC's tariff language.

Initially the Department shared AT&T's concerns, but following discussions with the company about the burdens of offering service on a state-wide basis, and the temporary nature of QLDC's operations, the Department concluded that QLDC's proposed tariff language on service restrictions is reasonable. The Department confirms QLDC's assertion that other long-distance providers have similar tariff language to QLDC's, and that the Department did not express objection to this tariff language. And the Department affirmed that at least one of these carriers refuses to serve people who do not subscribe to the local service of an affiliated company.

IV. Commission Action

Having reviewed the filing, and on the basis of the Department's recommendation, the Commission will grant QLDC's petition for authority to provide long-distance service in Minnesota on a temporary basis. The Commission will now address the issue of QLDC's tariff language.

A. Legal prohibition

AT&T correctly cites Minnesota Statutes for the proposition that a long-distance company may not unreasonably limit its service offerings unless facilities necessary for the services are not available and cannot be made available at reasonable cost. But AT&T is mistaken in its suggestion that QLDC's tariff language is unprecedented, or that the statute necessarily precludes QLDC from limiting the scope of its service offering.

As QLDC observed and the Department confirms, other long-distance companies have adopted tariffs with similar language to QLDC's. Frontier Communications of America, Inc., the long-distance affiliate of incumbent local telephone company Frontier,[9] and Crystal Communications, Inc., the long-distance affiliate of incumbent local telephone company HickoryTech,[10] each have adopted similar language. These tariffs demonstrate that QLDC's tariff language is hardly unprecedented. Given the Department's support for this type of language, and with due regard for according equal treatment to competitors, the Commission is disinclined to interject itself into this aspect of QLDC's tariff.

Nor is the Commission persuaded that Minnesota Statutes precludes QLDC from limiting the scope of its services; the statute merely requires that any limit on QLDC's services be *reasonable*. The negotiation of contracts for billing and collections throughout the state represents a start-up cost to a long-distance company. Whether such a cost is reasonable depends upon the opportunities the company anticipates for recouping those costs. Where a firm anticipates going out of business shortly, it may be justified in keeping its start-up costs correspondingly limited. Given that QLDC anticipates a brief period of operation, the company may well be justified in concluding that the cost of negotiating contracts throughout the state would be unreasonable.

1. Anticompetitive effects

The Commission is unpersuaded by AT&T's price squeeze argument. Even if the allegation were true, it has no relevance to QLDC's proposal to serve Qwest's local customers exclusively. The competitive dynamics of Qwest's access charges would be the same even if QLDC were to offer its long-distance service to all Minnesotans.

At its base, AT&T's price squeeze argument is simply a complaint that Qwest's access charges are too high. This allegation exceeds the scope of the current docket.

2. Vindication of § 272

Finally, AT&T has one last objection to QLDC's request to be relieved of the obligation to offer service throughout the state. QLDC argues that it lacks the facilities and equipment to provide service more broadly. AT&T notes that the necessary facilities and equipment are available in the QCC affiliate. Those facilities cannot yet be used in the long-distance market, however, because QCC failed to keep adequate accounts as required by § 272. By granting QLDC's request, AT&T argues, the Commission would simply facilitate Qwest International's efforts to evade the consequences of violating § 272.

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[9] See tariff of Frontier Communications of America, Inc., Section 1.3. ("Obligation of the Company").

[10] See tariff of Crystal Communications, Inc., Section 3. I.B. ("Shortage of Equipment or Facilities").

The Commission does not entirely share AT&T's view of § 272, however. The purpose of § 272 is not to punish BOCs or their affiliates; rather, it is designed to promote competition by ensuring that there is an adequate degree of independence between the incumbent monopolist BOC and an affiliate operating in a competitive environment.

The fact that Qwest International is able to create a new § 272 entity does not render § 272 toothless. As AT&T acknowledges, the assets that Qwest International invested in QCC are unavailable for use in the long-distance market in Minnesota and elsewhere precisely because of that statute's requirements. The efficacy of § 272 is demonstrated in the fact that Qwest International must now turn to a more limited entity such as QLDC as its means of competitive entry.

That being said, while QCC has not yet demonstrated compliance with all the § 272 safeguards, QLDC has. Consequently, no further steps are needed to vindicate that statute before QLDC is authorized to provide service.

3. Conclusion

QLDC represents a stop-gap measure to enable Qwest International to enter the long-distance market while QCC's troubles are being resolved, and QLDC proposes tariff language and a service plan that is consistent with this role. Given Qwest International's commitment to begin offering long-distance service on a state-wide level promptly, the Commission is persuaded that QLDC's plan to offer a more limited scope of service temporarily is reasonable. Consistent with the Commission's duty to promote competition in the telecommunications market, the Commission will welcome one more competitor to the long-distance market. The Commission will grant QLDC authority to provide service consistent with its proposed tariff.

ORDER

1. Qwest Long Distance Corporation's request for a certificate of authority to provide interLATA service is approved, along with QLDC's proposed tariff language.

2. The effective date of this Order is July 8, 2003.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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