

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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Gregory Scott

Chair  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Commission Review and  
Investigation of Qwest's Unbundled Network  
Elements Prices

ISSUE DATE: September 11, 2003

DOCKET NO. P-421/CI-01-1375

ORDER ADOPTING ALJ REPORTS,  
REQUIRING CUSTOMIZED ROUTING  
AND BULK DOWNLOAD,  
ESTABLISHING RATES, AND  
REQUIRING RATE SCHEDULES

**PROCEDURAL HISTORY**

This Order sets rates for the few remaining unbundled network elements (UNEs) whose prices have not already been set in this docket.<sup>1</sup>

**I. The Initial Section 271 Compliance Docket (1114)**

On October 31, 1996, the Commission issued its ORDER INITIATING PROCEEDING, opening Docket No. P-421/CI-96-1114 (the 1114 Docket) to develop the record it needed to discharge its responsibilities under Section 271(d)(2)(B) of the Telecommunications Act of 1996<sup>2</sup>, i.e. to provide guidance to the FCC in its decision to grant or deny Qwest's request to provide interLATA service within Minnesota. Specifically, the FCC asked the Commission to verify whether Qwest

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<sup>1</sup> In its October 2, 2002 ORDER SETTING PRICES AND ESTABLISHING PROCEDURAL SCHEDULE, the Commission set rates for all UNEs except the four UNEs considered in this Order: Operator Service (OS), Directory Service (DA), InterNetwork Calling Name (ICNAM) and Directory Assistance List (DAL).

<sup>2</sup> Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

has opened its local markets in Minnesota to competition in compliance with the requirements of Section 271 (c).<sup>3</sup>

On February 2, 1998, the Commission issued its ORDER GRANTING INTERVENTION PETITION, ESTABLISHING PROCEDURAL FRAMEWORK, AND REQUIRING FILINGS in the 1114 Docket. The Order established the procedural framework for developing the record for the Commission's recommendation to the FCC on Qwest's compliance with Section 271 (c).

On September 11, 2001, the Commission issued a NOTICE AND ORDER FOR HEARING in the 1114 Docket. In the NOTICE AND ORDER, the Commission identified six subjects that it wanted the Office of Administrative Hearings to hold hearings on and to make recommendations about. Each of the six subjects was assigned to a different docket. One of the subjects, review of Qwest's unbundled network elements (UNE) prices, was later assigned to the current docket, Docket No. P-421/CI-CI-01-1375 (the UNE Pricing Docket or the 1375 Docket).

## **II. UNE Pricing Docket (the 1375 Docket)**

UNE Pricing issues have been developed as follows:

On August 6, 2002, the Administrative Law Judges (ALJs) assigned to the 1375 Docket filed their first Report in this matter, recommending prices for a number of UNEs, but not for Operator Services (OS), Directory Assistance (DA), ICNAM, and the Directory Assistance List (DAL).

On October 2, 2002, the Commission issued an Order substantially adopting the ALJs' August 5, 2002 Report in the 1375 Docket,<sup>4</sup> thereby setting rates for all the UNEs except four: OS, DA, ICNAM, and DAL.

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<sup>3</sup> Under Section 271 of the Telecommunications Act of 1996 (the Act), the FCC is required to consult with state commissions in order to provide guidance to the FCC in its decision to grant or deny a Regional Bell Operating Company's (RBOC's) request to provide interLATA service within a given state. Specifically, Section 271(d)(2)(B) provides:

Before making any determination under this subsection, the Commission [FCC] shall consult with the State Commission of any state that is the subject of the application in order to verify compliance of the Bell operating company with the requirements of subsection (c).

<sup>4</sup> Thus, the Commission reached closure on rates for the major and vast majority of Qwest's UNEs in time to make full and timely recommendations to the FCC regarding Qwest's compliance with the 271 requirement that Qwest provide UNEs at TELRIC-based rates. See Comments of Commissioners filed with the FCC, April 17, 2003.

On February 28, 2003, an ALJ issued the second Report in the UNE Pricing Docket, this time recommending prices for the remaining UNEs (OS, DA, ICNAM, and DAL). It is this ALJ Report and the pricing recommendations made in that Report on the remaining UNEs that are the subject of this Order.<sup>5</sup>

On March 20, 2003, the Minnesota Department of Commerce (the Department) filed exceptions to the ALJ's Report.

On March 31, 2003, Qwest and MCI WorldCom filed responses to the Department's exceptions. In its response, Qwest identified two events since the ALJs' May 10, 2002 Report in the 1370 Docket that established, in Qwest's view, that it did not have an existing legal obligation to provide OS and DA services at TELRIC rates or to provide bulk downloads of the ICNAM database.<sup>6</sup>

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<sup>5</sup> The 1375 Docket (the UNE Pricing Docket) became the docket for determining the prices for the OS, DA, ICNAM, and DAL UNEs as follows. First as to **OS and DA**, on February 5, 2002 in the 1370 Docket, Qwest filed a motion to clarify how its proposal to charge market-based rates for OS and DA would be addressed. On February 13, 2002, Qwest and the Department stipulated that the appropriate pricing standard (cost-based or market-based) would be decided by the ALJ in the 1370 Docket and if the ALJ determined that OS and DA prices should be cost-based, then the costs would be determined in the 1375 Docket. On May 10, 2002, the ALJs in the 1370 Docket found that Qwest should be required to offer OS and DA at cost-based prices. Pursuant to the parties' February 13, 2003 stipulation, therefore, the establishment of the cost-based prices for OS and DA was assigned to the 1375 Docket. Regarding the **DAL** and **ICNAM** UNEs, these were among the UNEs initially considered in the 1375 Docket. While the DAL pricing issues began and remained in the 1375 Docket, the Commission's March 13, 2002 Order in the 1375 Docket moved the ICNAM issue to the 1370 Docket for development. On May 10, 2002, the ALJs' Report in the 1370 Docket found that the ICNAM database should be provided by bulk download, which left pricing of the bulk download of that UNE to be determined in the 1375 Docket.

<sup>6</sup> The relevance of the 1370 Docket and Qwest's challenges to ALJ findings made therein to the current proceeding is as follows. In his February 28, 2003 Report recommending prices for OS, DA, and ICNAM bulk download (prices being established in the current Order), the ALJ relied on the findings and recommendations of other ALJs issued May 10, 2002 in the 1370 Docket (Docket No. P-421/CI-01-1370). The findings in the 1370 Report relied on in the 1375 Report were 1) that Qwest does not provide customized routing and 2) that Qwest, therefore, should be required to offer its OS and DA services at cost-based (TELRIC) prices; and 3) that Qwest should be required to provide ICNAM database by bulk download rather than on "per query" basis. Accordingly, in evaluating the merit of the ALJ's recommendation in the 1375 Report, this Order will necessarily also address the merits of the ALJs' 1370 Report on these pivotal issues. See below at pages 5 to 10.

On April 18, 2003, the Commission issued a Notice inviting parties to submit comments on the issues of Qwest's legal obligations to provide cost-based, unbundled access to OS and DA services and ICNAM bulk download.

On May 5, 2003, the Department, Qwest, and MCI filed comments.

The Commission met on June 19, 2003 to consider this matter.

## **FINDINGS AND CONCLUSIONS**

### **I. Introduction**

In this Order, the Commission addresses pricing issues developed in the course of two related dockets (the 1370 Docket and the 1375 Docket) and, pursuant to Minn. Stat. § 237.06 and § 237.081, establishes just and reasonable rates for four services: Operator Services (OS); Directory Assistance (DA); InterNetwork Calling Name (ICNAM) database; and Directory Assistance List (DAL).

First, the Commission will consider whether Operator Services (OS) and Directory Assistance (DA) should remain available as an unbundled network elements as recommended by the ALJs in their May 10, 2002 Report in the 1370 Docket, and if so, whether the prices recommended by the ALJ in his February 28, 2003 Report in the 1375 Docket for Qwest's OS and DA are just and reasonable.<sup>7</sup> See Part II.

Second, the Commission will consider whether Qwest will be required to provide access to the InterNetwork Calling Name (ICNAM) database via bulk download as recommended by the ALJs in their May 10, 2002 Report in the 1370 Docket and, if so, whether the prices recommended by the ALJ in his February 28, 2003 Report in the 1375 Docket for ICNAM database via bulk download are just and reasonable.<sup>8</sup> See Part III.

Third, the Commission will consider whether the prices recommended by the ALJ in his February 28, 2003 Report in the 1375 Docket for Qwest's Directory Assistance List (DAL) are just and reasonable. See Part IV.

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<sup>7</sup> In the course of considering the ALJ's OS pricing recommendation, the Commission will consider the Department's March 20, 2003 exception to that recommendation, its contention that the OS UNE should be disaggregated into manual OS and automatic OS, with a separate price for each.

<sup>8</sup> When considering the ALJ's recommended pricing for ICNAM bulk download, the Commission will consider the Department's exception to that recommendation, its contention that the amount of the rebate to Minnesota CLEC should be based on the total number of sales, out-of-state sales as well as in-state sales.

## II. Operator Services and Directory Assistance

The questions about OS and DA addressed in this Order are

1. whether Operator Services (OS) and Directory Assistance (DA) should remain available as an unbundled network elements and, therefore, be offered at cost-based rates as recommended by the ALJs in their May 10, 2002 report in the 1370 Docket; and
2. if so, whether the prices recommended by the ALJ in his February 28, 2003 Report in the 1375 Docket for Qwest's OS and DA services are just and reasonable.

### A. Determining the Pricing Standard for OS and DA (the 1370 Docket)

#### 1. ALJ Report and Recommendation on the Pricing Standard Issue

In the 1370 Docket, ALJs Mihalchick and Sheehy addressed whether the pricing standard applied to Qwest's OS and DA should be cost-based standard or market-based. The ALJs concluded that market-based rates would not be appropriate and found that a cost-based standard be used. They reasoned and found as follows:

...there is no real evidence that a competitive wholesale market for OS/DA exists in Minnesota because Qwest is not providing customized routing to any CLEC in Minnesota<sup>9</sup>. . . . Qwest has not accommodated technologies used for customized routing as required by the FCC, and therefore OS/DA must be offered as unbundled network elements. . . .<sup>10</sup>

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Because Qwest does not provide customized routing, it cannot charge market-based rates for OS/DA services. . . . Until Qwest begins providing more reasonable accommodations to the technological problems presented by customized routing,

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<sup>9</sup> See ALJs' FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION issued May 10, 2002 in Docket No. P-421/CI-01-1370 (the ALJs' May 10, 2002 Report in the 1370 Docket), page 33, Paragraph 102.

<sup>10</sup> Id at page 33, Paragraph 103, citing *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, "Third Report and Order and Fourth Further Notice of Proposed Rulemaking," ¶ 463, FCC 99-238, (rel. November 5, 1999) (UNE Remand Order).

OS/DA should remain unbundled network elements and should be priced as such in the UNE pricing docket [the 1375 Docket]. [Bracketed material added.]<sup>11</sup>

The ALJs recommended that the Commission issue an Order adopting their findings.

## **2. Qwest's Comments on the Pricing Standard for OS and DA**

Qwest asserted that DA and OS are not unbundled network elements (UNEs) within the meaning of 47 U.S.C. § 251(c)(3) and that, as a consequence, market-based pricing, not TELRIC (cost-based), must be applied.

In support of its position that OS and DA are not UNEs, Qwest argued that federal law makes clear that DA and OS are not UNEs and prohibits states from contradicting the FCC's decision not to require the unbundling of a particular network element and therefore preempts any attempt by the Commission to require TELRIC rates for DA and OS.

In conclusion, Qwest asserted 1) that the Commission could not require Qwest to require it to provide TELRIC pricing for DA and OS until it had adopted a rule in a separate proceeding, and 2) that the record in this matter lacks any evidentiary development to support such a requirement.

## **3. The Department's Comments on the Pricing Standard for OS and DA**

The Department stated that OS and DA should remain available as unbundled network elements and that the price of Qwest's OS and DA services should be cost based. The Department argued that the Commission has the authority to order that OS and DA remain available as UNEs and be priced at TELRIC based rates, and should adopt the findings and recommendations of the ALJ in the 1370 docket to that effect.

The Department noted that in the 1370 docket, the ALJs extensively reviewed the record, federal law, and arguments of the parties in determining that the price of Qwest's OS and DA services should be cost based.<sup>12</sup> The Department stated that the ALJs' conclusions are appropriate and reasonable and recommended that the Commission adopt the ALJ's recommendation regarding the pricing standard to use for OS and DA .

## **4. MCI's Comments on the Pricing Standard for OS and DA**

MCI submitted comments to support its request that the Commission order Qwest to provide cost-based, unbundled access to OS and DA services. MCI countered Qwest's argument that it had no obligation to provide OS and DA at cost-based rates.

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<sup>11</sup> Id at page 34, Paragraph 104.

<sup>12</sup> Id at pages 30-34, Paragraphs 97-104.

First, MCI disputed whether, as Qwest had asserted, the FCC's Nine States Order<sup>13</sup> relieved Qwest of its obligation to provide cost-based OS and DA. MCI argued that the Nine States Order did not rule on the issue pertinent to the current proceeding, i.e. whether Qwest's custom routing offering is sufficient to enable a CLEC to compete with Qwest by self-provisioning OS and DA services. Indeed, MCI argued that the FCC specifically declined to rule on that issue when it [the FCC] stated:

[W]e decline to resolve this matter within the context of this 271 proceeding.<sup>14</sup>

Second, MCI acknowledged that in the 271 proceeding it had withdrawn its objection that Qwest's failure to provide cost-based, unbundled access to OS and DA services was grounds to deny Qwest's 271 application. MCI stated, however, that this did not mean, as Qwest asserted, that MCI was acknowledging that Qwest had no legal obligation to provide PS/DA as UNEs at cost-based rates. MCI asserted that its objection was relevant to the current proceeding, i.e. the pricing docket. For the current proceeding, MCI cited 1) the policy goals established by the Minnesota State Legislature and listed in Minn. Stat. § 237.011; 2) the Commission's authority under Minn., State. § 237.081, subd. 4 to order "just and reasonable" rates when it finds that any rate or practice affecting or relating to telephone service is in any respect unreasonable, insufficient or unjustly discriminatory; and 3) Minn. Stat. § 237.121(a)(5) which prohibits a telephone company from imposing unreasonable and discriminatory restrictions on the resale of its services.

In short, MCI argued that the Commission has ample authority under state law to require cost-based unbundled access to these elements.

## **5. Commission's Analysis and Action Regarding the Pricing Standard for OS and DA: Cost-Based or Market -Based**

The ALJs' May 10, 2002 analysis and recommendation in the 1370 Docket that cost-based rates are required for Qwest's OS and DA services are sound and Qwest's arguments that it is entitled to charge market-based rates are not persuasive:

### **a. Qwest's March 31, 2003 Arguments**

On March 31, 2003 in response to the Department's exceptions to the ALJ's report in the 1375 Docket, Qwest identified two events occurring since the ALJs' May 10, 2002 recommendations in the 1370 Docket that, according to Qwest, establish that Qwest has no legal obligation to provide OS and DA services at TELRIC (cost-based) rates:

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<sup>13</sup> *In the Matter of the Application of 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 (rel. December 22, 2002) (the Nine State Order).

<sup>14</sup> Id at ¶ 365.

First, on December 23, 2002, the FCC issued the Nine State Order regarding Qwest's nine-state 271 application.<sup>15</sup> According to Qwest, the Order ruled that Qwest is not required to provide OS and DA services as UNEs or at TELRIC (cost-based) rates in order to comply with section 271.

Second, on March 5, 2003, WorldCom withdrew its opposition to Qwest's compliance with the 271 checklist item related to the provision of OS and DA service and that as a consequence, the Commission has not required Qwest to provide OS and DA services as UNEs.

Contrary to Qwest's first argument, the FCC's Nine States Order does not address and resolve the issues presented in the current case. In this Order, the Commission does not address whether Qwest complies with the 271 Checklist as did the FCC in the Nine States Order. In the current Order, the OS and DA issue before the Commission is what price Qwest will be allowed to charge for OS and DA services in Minnesota and the pivotal factual issue in that determination is whether Qwest is providing customized routing of OS and DA adequate to produce a competitive market for those services which would then warrant authorizing Qwest to offer these services at market-based, rather than cost-based rates.

On that pivotal fact, the Commission finds that the ALJ's May 10, 2002 Report in the 1370 Docket is thorough and its finding is correct and will adopt it. First, citing the UNE Remand Order, the ALJ described customized routing:

Customized routing permits requesting carriers to designate the particular outgoing trunks associated with unbundled switching provided by the incumbent, which will carry certain classes of traffic originating from the requesting provider's customers. This feature would allow the requesting carrier to specify that OS/DA traffic from its customers to be routed over designated trunks which terminate at the requesting carrier's OS/DA platform or a third party's OS/DA platform. To the extent that incumbent LECs do not accommodate technologies used for customized routing, such as Feature Group D signaling, they must offer OS/DA as an unbundled network element.<sup>16</sup>

Then, after a thorough factual and legal analysis, the ALJ concluded:

Because Qwest does not provide customized routing, it cannot charge market-based rates. . . . Until Qwest begins providing more reasonable accommodations to the technological problems presented by customized routing, OS/DA should **remain**

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<sup>15</sup> Supra at Footnote 13.

<sup>16</sup> ALJs' May 10, 2002 Report in the 1370 Docket, page 30, Paragraph 97, citing the UNE Remand Order, ¶ 441, n. 867 and ¶ 463.

unbundled network elements and should be priced as such in the UNE pricing docket [1375].<sup>17</sup> [Brackets and emphasis added.]

Likewise, the Commission cannot accept Qwest's second argument, that WorldCom's withdrawal of its opposition to Qwest's compliance with the 271 checklist item related to the provision of OS and DA service should lead the Commission to discount the ALJ's above-cited finding. First, as previously noted, the Commission's task in this Order is to determine just and reasonable rates for Qwest's OS and DA in Minnesota, not its compliance with the Section 271 checklist items. Second, the Commission does not agree with Qwest's assumption that WorldCom's action meant that it accepted that Qwest is providing customized routing in Minnesota, especially since WorldCom has specifically clarified that it intended to pursue the non-provision of customized routing in the context of state law in the pricing docket. Third and most fundamentally, a position taken by a party to this matter such as MCI/WorldCom can, of course, in no way substitute for the Commission's own analysis.

#### **b. Qwest's May 5, 2003 Arguments**

On May 5, 2003, in response to the Commission's April 18, 2003 Notice requesting additional briefing on certain issues, including the OS and DA cost issue, Qwest reiterated arguments it had made before the ALJ in the 1370 Docket such as that federal law makes clear that bulk download of ICNAM is not a UNE and preempts the Commission from redefining the ICNAM UNE or requiring a bulk download of the ICNAM database. In addition, Qwest again cited the two post-ALJ Report events: the FCC's Nine State Order and WorldCom's withdrawal of the OS and DA issues from the Minnesota Section 271 proceeding.

The Commission rejects these arguments as incorrect or off-point since the issue in this case is the establishment of fair and reasonable rates for local telephone services in Minnesota, over which the Commission retains jurisdiction. Qwest's argument appears based on two incorrect assumptions: 1) that the FCC's determination that Qwest's offering of customized routing was sufficient to meet 271 checklist item #7 obligation was the equivalent of an FCC finding that Qwest's offering of customized routing was adequate to warrant market-based rates; and 2) that the burden Qwest bore to show that it was "providing" customized routing to meet checklist item #7 was the same burden it needed to show that it was "providing" customized routing as a prerequisite to charging market-based rates. Since this is clearly not the case, Qwest's arguments are unavailing.

In the current Order, Qwest's "provision" of customized routing must be evaluated in terms of its consistency with the emergence of a competitive market so as to warrant charging market-base rates. Viewed in that context, the way Qwest "provides" customized routing is unreasonable, self-serving, and inimical to the development of a competitive market. For example, the record shows that Qwest cannot state a price for the product or a timetable for its installation and refuses to say

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<sup>17</sup> Id at page 34, Paragraph 104.

whether it will provide routing over Feature Group D trunks.<sup>18</sup> In these circumstances, Qwest's offering is not really an offering at all and the routing it has agreed to make available is not designed to meet the needs of its customers and therefore is "customized" in word only.

In addition, as the ALJ found, Qwest is not capable of furnishing customized routing in quantities that competitors may reasonably demand and at an acceptable level of quality. Qwest's complaint that under the ALJ's view CLEC might prevent development of a competitive market (and hence lock-in cost-based rates) by not subscribing to Qwest's customized routing raises a hypothetical objection based on speculation of what others will do rather than curing its own current non-offer by making a reasonable and realistic offer: stating a price and installation timeline coupled with a commitment to routing that fits the customer's technological needs.

In these circumstances, the Commission finds that Qwest's offering of OS and DA via customized routing contains unreasonable, anti-competitive restrictions that result in preferential OS and DA service for Qwest's own customers in violation of Minn. Stat. §§ 237.121, subd. 5 and 237.09, subd. 2.

Accordingly, the Commission finds that Qwest must provide customized routing service consistent with the following definition:

Customized routing permits requesting carriers to designate the particular outgoing trunks associated with unbundled switching provided by the incumbent, which will carry certain classes of traffic originating from the requesting provider's customers. This feature would allow the requesting carrier to specify that OS/DA traffic from its customers to be routed over designated trunks which terminate at the requesting carrier's OS/DA platform or a third party's OS/DA platform. To the extent that incumbent LECs do not accommodate technologies used for customized routing, such as Feature Group D signaling, they must offer OS/DA as an unbundled network element.<sup>19</sup>

**c. Commission Action on the OS/DA Pricing Standard Issue**

The Commission adopts the ALJs' May 10, 2002 Report in the 1370 Docket (analysis and recommendations) that OS and DA must remain unbundled network elements and be offered at cost-based rates to be determined in the UNE Pricing Docket, the 1375 Docket.

**B. Establishing Rates for OS and DA**

Background: on February 13, 2002 in the 1370 Docket, Qwest and the Department had stipulated if the ALJs determined in the 1370 Docket that the prices of OS and DA should be cost based, then these costs would be determined in the 1375 Pricing Docket. Since the ALJs determined in their

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<sup>18</sup> Id at page 33, Paragraph 103.

<sup>19</sup> Id at Paragraph 97 (footnotes omitted). In reaching this definition, the ALJs cited Paragraphs 441 and 463 of the UNE Remand Order.

May 10, 2002 Report in the 1370 Docket that the prices of OS and DA should be cost based, establishment of those cost-based prices became, as stipulated, ripe for determination in the current docket, the 1375 Docket.

## **1. The ALJ's OS and DA and Pricing Recommendations**

As noted previously in the Procedural History Section, on August 2, 2002, the ALJ issued his first Report in the 1375 docket, recommending prices for a number of UNEs, but not for OS, DA, ICNAM, and DAL and on October 2, 2002, the Commission issued an Order in the 1375 Docket substantially adopting the ALJ's recommendations. This left just four remaining UNEs for future consideration: OS, DA, ICNAM, and DAL.

On February 28, 2003, the ALJ issued his final Report in the 1375 Docket recommending prices for the remaining UNEs: OS, DA, ICNAM bulk downloads and DAL. Regarding OS and DA, the ALJ found that the structure of the cost model used by Qwest in its OS/DA Cost Study was appropriate but that Commission-ordered inputs regarding expense factors, cost of money, depreciation, network operations, general support expenses, and other items were not used in running their model. The ALJ noted that although Qwest disputed these inputs, the company agreed that the cost model should be run with the Commission-established inputs to determine the appropriate cost. The ALJ concluded that with those corrected inputs, Qwest's model for OS and DA costs was appropriate and should be used to establish the prices of OS and DA services.<sup>20</sup>

## **2. The Department's Exception to the ALJ's OS Pricing Recommendation**

The Department filed an exception to the portion of the ALJ's Report that permits Qwest to aggregate manual and automated operator services as a single unbundled network element. The Department argued that the cost differences between the service that requires human intervention (manual operator services) are significantly more costly than automated services and that, therefore, structuring manual and automated services into one UNE compels users of the services to pay too high a price for each automated call and too low a price for each manual call. The Department recommended that manual and automated operator services should be disaggregated and priced per the FCC's cost-based pricing methodology which states:

. . . element rates shall be structured consistently with the manner in which the costs of providing the elements are incurred.<sup>21</sup>

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<sup>20</sup> See Findings of Fact, Conclusions of Law, and Recommendation issued February 28, 2003 in Docket No. P-421/CI-01-1375 (the ALJ's February 28, 2003 Report in the 1375 Docket), page 8, Paragraph 21 and Recommendation 2 on page 12.

<sup>21</sup> 47 C.F.R. 51.507(a).

### **3. Qwest's Comments on the Department's Exception Regarding OS Pricing**

Qwest asserted that the ALJ heard and properly rejected the Department's request that manual OS and automated OS should be priced separately. Qwest stated that the Department offered no new evidence or argument to support its request that the OS UNE should be disaggregated into manual OS and automated OS.

### **4. The Commission's Analysis and Action Regarding OS and DA Prices**

The Commission agrees with the ALJ that Qwest's OS/DA Cost Study, adjusted to include the Commission-established inputs cited above is appropriate. The Commission, therefore, will approve the resulting rates.

Regarding the Department's request that the OS UNE be disaggregated and manual OS and automated OS priced separately, the Commission agrees with the ALJ that the record in this matter is insufficient to demonstrate that disaggregation of that UNE is appropriate.<sup>22</sup> A compliance filing showing a full schedule of such rates will be required.

## **III. Access to ICNAM Database via Bulk Download**

The questions regarding ICNAM Database addressed in this Order are

- 1) whether Qwest will be required to provide access to the InterNetwork Calling Name (ICNAM) database via bulk download as recommended by the ALJs in their May 10, 2002 report in the 1370 Docket; and,
- 2) if so, whether the prices recommended by the ALJ in his February 28, 2003 Report for ICNAM database via bulk download are just and reasonable

### **A. ICNAM Database Access Via Bulk Download or Individual Query**

#### **1. The ALJs' May 10, 2002 Recommendation in the 1370 Docket Regarding Bulk Download**

The ALJs found that the ICNAM data base is a UNE, that it is technically feasible to provide access to that UNE through electronic download, that FCC rules do not preclude a CLEC from obtaining access to the ICNAM database through electronic download, and that Qwest's refusal to provide the database by bulk download was discriminatory because it denied to the CLEC the benefits of bulk access that Qwest enjoyed.

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<sup>22</sup> See the ALJ's February 28, 2003 Report in the 1375 Docket, page 5. In the ALJ's discussion of this point in Paragraph 12, the final two times the term DA appears, he is clearly referring to OS. Paragraph 12 is amended accordingly to reflect that intent.

## **2. Qwest's Comments**

Qwest contended that federal law 1) makes clear that per-query access to the ICNAM database is a UNE but that bulk download of ICNAM is not a UNE and 2) preempts the Commission from redefining the ICNAM UNE or requiring a bulk download of the ICNAM database. Qwest acknowledged an obligation to provide access to a UNE on a nondiscriminatory basis but denied that it was required to “turn [the UNE] over” to or “replicate” the UNE for the CLEC. Qwest denied that per query access discriminated against WorldCom or that Qwest provided access to itself superior to that which it provides to any other CLEC.

Qwest stated that the ALJs erred in relying on the technical feasibility of download in determining that bulk download should be considered a UNE. Qwest argued that the FCC fixed the parameters of the ICNAM UNE and defined the ICNAM database as a UNE only in the context of access on a per query basis. Qwest asserted that the FCC's action precluded the Commission from identifying any additional ICNAM-related UNEs.<sup>23</sup>

Qwest stated that WorldCom has presented no evidence of any cost savings resulting from modifying access per query to bulk download. Qwest asserted that bulk download would be costly and burdensome to the CLEC and raised potential privacy issues, compromising the proprietary information of both end-users and other carriers.

In conclusion: in addition to federal preemption, Qwest asserted 1) that the Commission could not require Qwest to require it to provide the bulk download of the ICNAM database until it had adopted a rule in a separate proceeding, 2) that the record in this matter lacks any evidentiary development to support such a requirement, and 3) that since only one CLEC ever challenged its provision of ICNAM, this was clearly not an issue of competitive importance in Minnesota.

## **3. The Department's Comments on the ICNAM Issue**

The Department recommended that the Commission adopt the ALJs' findings on this issue and require Qwest to provide ICNAM via bulk download. The Department stated that the ALJs' findings are based on a careful and accurate analysis of federal law and an extensive evidentiary

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<sup>23</sup> Qwest misstated the ALJs on this point. Contrary to Qwest's assertion, the ALJs did not rely on technical feasibility as grounds for finding that bulk download of ICNAM was a UNE. They did not find that bulk download of ICNAM was a UNE. The ALJs identified the database itself as the UNE and discussed the relationship of the technical feasibility of bulk download to that UNE as follows:

Requiring that Qwest provide the ICNAM database by bulk download is not, as Qwest argues, the creation of a “new UNE” or a “redefinition” or “removal” of a UNE established by the FCC. The database is and always has been the UNE, and it is now technically feasible to require access by bulk download as opposed to access through the SS7 system. ALJs' May 10, 2002 Report in the 1370 Docket, page 46 at Paragraph 153.

record and reach appropriate and reasonable conclusions. The Department stated that adopting the ALJs' recommendation would prevent Qwest business practices that are unreasonably discriminatory and obstruct development of competitive services.

The Department also stated that it was necessary to order Qwest to provide ICNAM database by bulk download to prevent improper discrimination in violation of Minnesota law. Specifically, the Department cited Minn. Stats. §§ 237.60, subd. 3 and 237.74, subd. 2 as prohibiting telephone companies and telecommunications carriers from offering "telecommunications service within the state *upon terms* or rates that are unreasonably discriminatory". (Emphasis added.) The Department also cited Minn. Stat. § 237.121, subd. 5 which prohibits telecommunications carriers from imposing unreasonable or discriminatory restrictions on the resale of its services. Finally, the Department cited Minn. Stat § 237.09, subd. 2 which prohibits a telephone company from giving preference to its own retail department.

The Department urged the Commission to concur with the ALJs and find that Qwest unreasonably discriminates against competitors, accords itself preferential treatment, and obstructs development of competitive services by giving itself access to the data-base in bulk, while limiting competitors' access to single-name "dips."

#### **4. MCI's Comments on the ICNAM Issue**

MCI recommended that the Commission exercise its authority under Minnesota law to require Qwest to offer access to the ICNAM UNE by bulk download, at cost-based rates.

MCI argued that Qwest's refusal to provide access to the ICNAM database on a bulk download basis is an illegal preference to itself and discrimination against the requesting CLEC because per dip or per query access is grossly inferior to the access Qwest itself enjoys and creates discriminatory advantages for Qwest. MCI argued that CLECs cannot effectively use the ICNAM database unless they are able to populate and maintain their own databases in the way that Qwest does for itself. Without bulk access, MCI stated, CLECs are unable to structure their databases to suit their own customers' needs as Qwest is able to do.

MCI also responded to Qwest's opposition to requiring bulk download of the ICNAM database. In response to Qwest's assertion that FCC Rule 51.319 limits access to a per query basis, MCI argued that nowhere in its rules or its discussion of the calling name databases did the FCC limit access to only that access that can be provided by means of the signaling network. MCI stated that the Qwest witness had acknowledged that the FCC did not address whether an ILEC must provide access to the ICNAM on a bulk download basis.

#### **5. The Commission's Analysis and Action Regarding the ICNAM Issue**

The ICNAM database is a database that allows identifying information regarding the calling party to be provided to the recipient of a call who has Caller ID. The ICNAM database contains the

names and telephone numbers of customer telephone customers and resides as part of Qwest's signaling network. Qwest's ICNAM database includes names and telephone numbers not only of its customers but also those of other telephone service providers.

The Commission approves and adopts the ALJs' May 10, 2002 Report (findings and recommendations) regarding ICNAM.<sup>24</sup>

First, like the ALJs, the Commission finds that the ICNAM database is the UNE in question.<sup>25</sup> The UNE is not "the ICNAM database provided through Qwest's SS7 signaling network", i.e. on a per query basis, as Qwest has asserted the FCC has defined it.<sup>26</sup> The FCC's primary directive regarding call-related databases such as ICNAM is to provide ". . .access to their call-related databases, . . ."<sup>27</sup> The FCC then goes on to give a non-exhaustive list of examples of such access. The non-exhaustive list given by the FCC includes the ICNAM database by means of physical access at the signaling transfer point [STP] linked to the unbundled databases, i.e. on a per query basis. In so ruling, the FCC did not preclude other means of providing access to call-related databases such as ICNAM. The FCC's intent to be non-exhaustive is clear because the FCC introduces its list with the phrase ". . .including but not limited to. . ."<sup>28</sup>

Second, the record demonstrates that it is technically feasible for Qwest to provide the ICNAM database by bulk download.<sup>29</sup>

Third, the per query access to the ICNAM database available through Qwest's SS7 signaling network is substantially inferior to the access that Qwest itself enjoys to that database.

Fourth, in these circumstances, Qwest's refusal to provide access to the ICNAM database by bulk download and its insistence that the CLEC accept per query access via Qwest's SS7 signaling network is discriminatory and anti-competitive, in violation of Minnesota laws.<sup>30</sup> Accordingly, the Commission will require Qwest to provide access to the ICNAM database by bulk download when a CLEC requests it at the price established in the following section.

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<sup>24</sup> ALJs' May 10, 2002 Report in the 1370 Docket, findings on pages 44 - 46, Paragraphs 149 - 155, Conclusions and Recommendations on page 49.

<sup>25</sup> Id at page 46, Paragraph 153.

<sup>26</sup> Id at page 45, Paragraph 149.

<sup>27</sup> Id at page 45, Paragraphs 151.

<sup>28</sup> Id at page 41, Paragraph 135, citing the UNE Remand Order, ¶ 410.

<sup>29</sup> Id at page 45, Paragraph 150.

<sup>30</sup> Minn. Stats. §§ 237.237.60, subd. 3; 237.74, subd. 2; and 237.121, subd. 5.

## **B. Pricing for ICNAM Database Access Via Bulk Download**

### **1. The ALJ's February 8, 2003 Recommendation in the 1375 Docket**

On February 28, 2003, the ALJ issued his final Report in the 1375 Docket recommending, among other things, that the Commission adopt Qwest's proposed charges for ICNAM database download and require Qwest to separately price the initial nonrecurring costs of developing the ICNAM bulk download process and SOPI software update from the initial nonrecurring costs that should be charged on a per customer basis. The ALJ further recommended that the Commission direct Qwest to prorate and rebate the process development and SOPI software update charge among the first ten CLECs purchasing the ICNAM bulk download product in Minnesota. In so recommending, the ALJ rejected Qwest's proposal that the rebate period be limited to three years.

### **2. The Department's Comments on the Price for the ICNAM Download**

The Department agreed with the ALJ's recommendation that the rebate should be to Minnesota customers only and should continue until there were download sales to ten customers rather than for a set time, such as the three year period proposed by Qwest. The Department objected, however, to the ALJ's finding that download sales to out-of-state customers should not count when calculating the rebate amount. While maintaining the ten sales cut-off point as recommended by the ALJ, the Department argued that Qwest's download sales to out of state customers should not be excluded when counting the number of download sales and, hence, when calculating the rebate amount.

Contrary to the ALJ, the Department argued that the Commission had authority to require Qwest to distribute a specific pro-rate rebate whenever Qwest sold an ICNAM download, regardless of the place of the customer or the amount actually received from the customer. Unless such a rebate mechanism was implemented, the Department stated, once Qwest had been paid in full for the cost of the ICNAM download by its first download customer, it would have no financial incentive to seek appropriate recovery from subsequent in-state or out-of-state customers.

### **3. Qwest's Comments Regarding the Pricing of the ICNAM Download**

Qwest asserted that the Department's objection to the ALJ's recommended geographic limitation was without merit.

First, Qwest argued that including demand for ICNAM bulk download service by CLECs in other states in any rebate program here was unreasonable. Qwest stated that those CLECs will not have access to the ICNAM bulk download service that Qwest will be offering CLECs in Minnesota pursuant to the Commission's Order.

Second, Qwest argued that the Department's recommendation was based on the additional unreasonable assumption that the Commission in the state where a CLEC orders the product will or has ordered the same, full recovery price as the ALJ recommended for the service here in Minnesota.

Qwest noted with approval the ALJ's suggested approach to remedy any demonstrated over-recovery by Qwest in the event that Qwest does provide this product to other CLECs in other states:

If Qwest does choose to or is required to offer the ICNAM bulk download in other states, it would seem fair to require those new customers to also contribute to the original setup costs. But the Commission's jurisdiction is limited to Minnesota, so there is no authority to control prices and payment mechanisms in other states. . . . If there do turn out to be customers in other states who do not contribute, it may be appropriate to review the pricing in Minnesota at that time and require a true-up.<sup>31</sup>

#### **4. The Commission's Analysis and Action Regarding ICNAM Pricing**

The Commission finds that the ALJ's discussion and findings on this subject are appropriate. Accordingly, as recommended by the ALJ, the Commission will adopt Qwest's proposed ICNAM charges for bulk download and will require Qwest to separately price the initial non-recurring costs of developing the ICNAM bulk download process and the SOPI software update from the initial nonrecurring costs that should be charged on a per customer basis. The Commission will further require Qwest to prorate and rebate the process development and SOPI software update charge among the first ten CLECs purchasing the ICNAM bulk download product in Minnesota. The Commission will not adopt the Department's recommendation to include download sales to out-of-state customers in that count. However, as the ALJ stated, if there do turn out to be customers in other states who do not contribute, it may be appropriate to review the pricing in Minnesota at that time and require a true-up.

#### **IV. Directory Assistance List (DAL) Pricing**

The Directory Assistance List (DAL) is a download of the database of information used for providing DA services.

##### **A. The ALJ's February 28, 2003 Report and Recommendation in the 1375 Docket**

The ALJ recommended that the Commission adopt Qwest's proposed DAL information charges, adjusted by removing the audit charges.<sup>32</sup> The ALJ stated that removal of the audit charges was urged by WorldCom because the audits benefitted Qwest rather than the CLEC ordering DAL and reported that Qwest agreed to remove the audit costs from the DAL charges.<sup>33</sup>

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<sup>31</sup> ALJ's February 28, 2003 Report in the 1375 Docket, page 10, Paragraph 27.

<sup>32</sup> Id at page 11, Paragraph 33 and Recommendation 3 on page 12.

<sup>33</sup> Id at page 11, Paragraph 32.

The ALJ rejected WorldCom's further objection to the overall charges for DAL information. The ALJ concluded that although WorldCom asserted that Qwest overstated the cost of the DAL daily updates, there was no basis in the record to find that Qwest's cost study overstated or duplicated costs in arriving at the per second charge.<sup>34</sup>

#### **B. Comments of Other Parties**

No parties filed exceptions to the ALJ's recommendation in this regard.

#### **C. Commission Analysis and Action**

The Commission finds that the ALJ's discussion and findings on this subject are appropriate. Accordingly, as recommended by the ALJ, the Commission finds that Qwest's proposed charges, adjusted by removing audit charges, are reasonable and will adopt them.

### **ORDER**

1. The ALJs' May 10, 2002 Report in Docket No. P-421/CI-01-1370 and the ALJ's February 28, 2003 Report in Docket No. P-421/CI-01-1375 are hereby adopted in full and as filed, except that Paragraph 12 on page 5 of the latter Report is hereby modified as to form, consistent with the ALJ's intent, as discussed above at page 13 in Footnote 10 and is adopted as so modified.
2. Based on its determination that Qwest's customized routing offering is not adequate, as explained in the text of this Order, the Commission will require Qwest to continue to price OS/DA as an unbundled network element and to provide customized routing service consistent with the following definition:

Customized routing permits requesting carriers to designate the particular outgoing trunks associated with unbundled switching provided by the incumbent, which will carry certain classes of traffic originating from the requesting provider's customers. This feature would allow the requesting carrier to specify that OS/DA traffic from its customers to be routed over designated trunks which terminate at the requesting carrier's OS/DA platform or a third party's OS/DA platform.
3. The Commission hereby adopts rates for Operator Services (OS) and Directory Assistance (DA) based on Qwest's cost model and Commission inputs, as recommended by the Administrative Law Judge (ALJ).

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<sup>34</sup> Id at page 11, Paragraph 33.

4. Qwest shall provide access to the ICNAM database via electronic bulk download at the rates recommended for ICNAM Bulk Download by the ALJ and Qwest and hereby adopted by the Commission.
5. Within 30 days of this Order, Qwest shall file a compliance run of the OS and DA model and the ICNAM model with a full schedule of rates reflecting the relevant decisions made by the Commission in this Order regarding OS and DA.
6. The Commission hereby adopts the DAL information charges proposed by Qwest, adjusted by removing audit charges, as recommended by the ALJ.. Qwest shall file a compliance run of the DAL model with a full schedule of DAL rates reflecting the relevant decisions made by the Commission in this Order within 30 days of this Order.
7. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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