

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Thomas Pugh	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of CLECs' Request for
Commission Approval of ILEC Wire Center
Impairment Analysis

ISSUE DATE: May 11, 2006

DOCKET NO. P-5692,5340,
5643,5323,465,6422/M-06-211

In the Matter of a Commission Investigation
Identifying Wire Centers in Which Qwest
Corporation Must Offer High-Capacity Loop
or Transport UNEs at Cost-Based Rates

DOCKET NO. P-999/CI-06-685

ORDER INITIATING INVESTIGATION
AND
NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On February 16, 2006, some competitive local exchange carriers¹ (collectively, the Joint CLECs) asked the Commission to initiate a docket to determine the extent of the duty of Qwest Corporation (Qwest) to provide certain unbundled network elements (UNEs) at cost-based rates in each of its wire centers.

On March 3, 2006, the Commission received comments from the Minnesota Department of Commerce (the Department) and Qwest Corporation (Qwest) generally supporting the Joint CLECs' proposal. Qwest asked that the Commission make its determinations arising from the proceeding binding on all CLECs in the state.

On March 14, 2006, the Joint CLECs² acknowledged the support for their request, but expressed concern that Qwest might apply inappropriate non-recurring charges to UNE conversions and might inappropriately reject UNE orders.

This matter came before the Commission on April 11, 2006.

¹ DIECA Communications, Inc. d/b/a Covad Communications Company, Eschelon Telecom, Inc., Integra Telcom of Minnesota, Inc., McLeodUSA Telecommunications Services, Inc., TDS Metrocom and XO Communications Services, Inc.

² Here the Joint CLECs include POPP.com but exclude XO Communications Services, Inc.

FINDINGS AND CONCLUSIONS

I. Background

The federal Telecommunications Act of 1996 (“1996 Act” or Act)³ seeks to open the local telecommunications market to competition.⁴ To this end, the 1996 Act requires each incumbent local exchange carrier (“incumbent LEC” or ILEC) to enter into an interconnection agreement with any requesting carrier (CLEC) establishing the terms under which they would connect their networks to permit each carrier’s customers to call the other’s. To facilitate competition, the Act requires ILECs to permit CLECs to use elements of the incumbent’s network (“unbundled network elements” or UNEs). And the Act directs the Federal Communications Commission (FCC) to identify the UNEs that ILECs must make available to CLECs.⁵

ILECs must provide access to UNEs on just, reasonable and nondiscriminatory terms,⁶ including cost-based rates.⁷ In addition, § 271 of the Act requires Bell-operating companies (BOCs) such as Qwest to provide access to certain elements⁸ even if they do not qualify as UNEs.⁹ In particular, BOCs must provide access to “[l]ocal transmission from the central office to the customer’s premises...” and “[l]ocal transport from the trunk side of a wireline local exchange carrier switch...”¹⁰ BOCs must provide access to these § 271 elements on just, reasonable and nondiscriminatory terms¹¹ – but unlike UNEs, the Act does not require BOCs to provide § 271 elements at cost-based rates.

³ Pub.L.No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

⁴ See conference report accompanying S. 652.

⁵ 47 U.S.C. § 251(d).

⁶ 47 U.S.C. § 251(c).

⁷ 47 U.S.C. § 252(d)(1)(A)(i); 47 C.F.R. § 51.501 *et seq.*

⁸ 47 U.S.C. § 271(c)(2)(B).

⁹ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 664 (2003), *corrected by* Errata, 18 FCC Rcd 19020 (2003) (collectively, *Triennial Review Order*), *vacated and remanded in part, affirmed in part, United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004).

¹⁰ 47 U.S.C. § 271(c)(2)(B)(iv) and (v).

¹¹ 47 U.S.C. §§ 201, 202.

In determining whether an element qualifies as a UNE, the FCC must consider, among other things, whether “the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”¹² Because this determination is fact-specific and the telecommunications market is constantly evolving, the FCC decided that it would seek to review its UNE decisions every three years.¹³ This decision initiated the Triennial Review process.

The Court of Appeals for the D.C. Circuit rejected parts of the FCC’s first *Triennial Review Order*¹⁴ and remanded it to the FCC for further analysis.¹⁵ On February 4, 2005, the FCC released its *Triennial Review Remand Order (TRRO)*,¹⁶ revising the criteria for determining which UNEs are required to be offered to CLECs.

According to the *TRRO*, a CLEC’s right to gain access to dedicated transport or high-capacity loops within a given wire center at cost-based rates now depends upon a factual inquiry into the number of business lines and the number of fiber-based collocators at that wire center and adjoining wire centers.¹⁷ At ¶ 234 of the *TRRO*, the FCC establishes a process for CLECs to obtain these UNEs:

[T]o submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed ... above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3). Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed ... above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that

¹² 47 U.S.C. § 251(d)(2)

¹³ *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, 15 FCC Rcd 3696, 3699, para. 2 (1999) (*UNE Remand Order*), *reversed and remanded in part sub. nom. United States Telecom Ass’n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA*), *cert. denied sub nom. WorldCom, Inc. v. United States Telecom Ass’n*, 123 S.Ct 1571 (2003).

¹⁴ *Triennial Review Order*, 18 FCC Rcd at 17145, ¶ 278.

¹⁵ See *USTA II, supra*.

¹⁶ *Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533 (released February 4, 2005).

¹⁷ *Id.*, ¶¶ 118, 129, 133, 146, 155, 166, 174, 178, 182, 195.

issue through the dispute resolution procedures provided for in its interconnection agreements. In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.

But the FCC acknowledged that carriers are free to negotiate different ways to address this issue.¹⁸

Between February 18 and August 18, 2005, Qwest filed with the FCC analyses of its own wire center data and the extent to which Qwest retains the obligation to provide high-capacity loop or transport UNEs at cost-based rates. But neither the Joint CLECs nor the Department have found Qwest's analyses persuasive. Having failed to reach agreement on this matter, the parties ask the Commission to establish a forum for acquiring and reviewing the relevant data regarding Qwest's wire centers, as discussed below.

II. Party Positions

The Department, the Joint CLECs and Qwest have reached agreements on many aspects of this docket.

They all recommend that the Commission create a state-wide process determining the extent to which Qwest retains the obligation to provide high-capacity loop and transport UNEs at each of its wire centers. They generally agree that the FCC's process for ordering high-capacity loop or transport UNEs – with the potential for a factual dispute arising with each order – could prove needlessly cumbersome. They prefer establishing the relevant facts, and establishing a mechanism to keep abreast of changing facts, in a single, state-wide process.

The parties also agree that the Commission should permit the parties to enter into agreements to facilitate the sharing of nonpublic information while protecting that information from disclosure. In particular, they ask the Commission to order Qwest, as necessitated by the 1996 Act's § 222, to disclose relevant CLEC-specific information to parties that have entered into protective agreements. Also, the Joint CLECs included with their petition a list of information that Qwest should disclose, labeled Attachment B; at hearing Qwest agreed to comply with this request.

But many details remain unresolved. For example, Qwest's interest in avoiding UNE orders made in bad faith has provoked concern among the Joint CLECs that Qwest might exploit ambiguities in this process to unilaterally deny a CLEC's order. This issue becomes especially acute when discussing the process for updating the list of wire centers at which Qwest no longer has the obligation to provide cost-based UNEs.

¹⁸ *Id.* at ¶ 234, fn. 660, citing 47 U.S.C. § 252(a)(1).

Also, Qwest seeks a declaratory ruling that Qwest may assess a one-time charge (“non-recurring charge” or NRC) at tariffed rates if it must convert a high-capacity loop or transport UNE to alternative facilities or arrangements. If Qwest has such discretion, the Joint CLECs seek a ruling on the amount of such NRC, and a ruling on when such charges would apply.

Based on its own investigation,¹⁹ the Department has identified a number of questions that arguably must be resolved before the *TRRO* factual determinations can be made. For example, for what period must Qwest provide data regarding the numbers of collocations and business lines? Must these periods coincide? If a collocation does not serve any end-use customer, does it count as a collocation for purposes of the *TRRO*? Should all UNE loops be counted as business loops? Should unlisted phone numbers receiving service via a UNE platform be counted as business numbers? The Joint CLECs agree that Qwest’s obligations to provide UNEs in some wire centers may depend upon the resolution of these questions, among others.

III. Commission Analysis and Action

A. Jurisdiction and Referral for Contested Case Proceedings

The Commission has jurisdiction over this matter under Minn. Stat. §§ 237.011, 237.06 and 217.16, among other statutes.

The Commission will grant the request of all parties to initiate a docket to identify Qwest’s wire centers in which a competitive local exchange carrier would suffer impairment pursuant to the criteria established in the *TRRO* if the CLEC lacked the opportunity to purchase high-capacity loops and transport UNEs at cost-based rates. The Commission concludes that a centralized analysis of the relevant facts will serve all parties and, indirectly, Minnesota’s telecommunications customers.

However, the Commission concludes that the record of this proceeding is inadequate to resolve the issues raised. Contested case proceedings are clearly the most effective procedural vehicle for developing the necessary record. Upon initiating this state-wide investigation, therefore, the Commission will refer this matter to the OAH for a contested case proceeding.

In the interest of expedience, the Commission will encourage the administrative law judge assigned to the case convene a prehearing conference to encourage early resolution of as many issues as possible. If appropriate, the ALJ may send the Commission earlier reports identifying where Qwest’s obligations are clear, and send subsequent reports addressing circumstances in which Qwest’s obligations are more in doubt.

In the meantime the Commission will direct interested parties to negotiate and enter into agreements to permit the exchange of confidential information without unauthorized disclosure. The Commission accepts Qwest’s offer to provide the information sought in Attachment B to the

¹⁹ See *In the Matter of DOC Investigation of the Implementation of the TRO and the TRO Remand Order*, Docket No. P-421/DI-05-440.

Joint CLECs' petition, and will order Qwest to respond within 10 days to data requests by all parties to who enter into a protective agreement. To the extent necessary for a full analysis of the issues, the Commission authorizes and orders Qwest to produce wire center data in a form that will permit interested parties to match the data with individual carriers. For example, this information may identify carriers that made specific purchases or received specific services from Qwest. This order does not prevent any party from asserting objections to discovery requests where appropriate.

Finally, during the pendency of this proceeding the Commission will direct Qwest not to reject orders for UNEs within the scope of this proceeding without the opportunity for Commission review and approval for rejecting such orders, pursuant to *TRRO* ¶ 234.

B. Issues to be Addressed

The issues in this case center around the extent of Qwest's obligations to provide high-capacity loop or transport UNEs at cost-based rates to CLECs. The Commission asks the ALJ to develop a record of the relevant facts, state how the ALJ would apply the facts to the *TRRO* standards to determine Qwest's UNE obligations in each wire center, and recommend a process whereby the conclusions regarding Qwest's obligations may be revised to reflect changing circumstances. The Commission further asks the ALJ to recommend resolutions for all issues relevant to addressing these questions.

C. Procedural Outline

1. Administrative Law Judge

The Administrative Law Judge assigned to this case is Barbara L. Neilson. Her address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 341-7604.

2. 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, 660 Olive Street, 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 Jeanne Cochran, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 296-2106.

- *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 evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and the 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.

3. Parties and Intervention

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.

4. Prehearing Conference

A prehearing conference will be held on Friday, May 26, 2006 at 9:30 a.m. in the Large Hearing Room, Minnesota Public Utilities Commission, 121 7th Place East, Suite 350, Saint Paul, Minnesota 55101, (651) 296-7124.

Parties and persons intending to intervene in the matter should attend the conference, prepared to discuss time frames and scheduling. Other matters which may be discussed include the locations and dates of hearings, discovery procedures, settlement prospects, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

D. 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.

E. 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 hereby initiates Docket No. P-999/CI-06-685, *In the Matter of a Commission Investigation Identifying Wire Centers in Which Qwest Corporation Must Offer High-Capacity Loop or Transport UNEs at Cost-Based Rates*. This docket is opened for the purpose of identifying wire centers operated by Qwest in which a competitive local exchange carrier would suffer impairment if it lacked the opportunity to purchase unbundled network elements, pursuant to the criteria established in the *TRRO*.

2. The Commission hereby refers this matter to the OAH for a contested case proceeding as set forth above, and asks that the administrative law judge assigned to the case convene a prehearing conference to encourage early resolution of as many issues as possible.
3. Interested parties shall negotiate and enter into agreements for protecting confidential information from unauthorized disclosure.
4. Qwest shall respond within 10 days to data requests from parties that enter into a protective agreement.
5. Pursuant to *TRRO* ¶ 234, Qwest shall not reject orders for UNEs within the scope of this proceeding without the opportunity for Commission review and approval for rejecting such orders.
6. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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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 a Commission Investigation MPUC Docket No. P-999/CI-06-685
Identifying Wire Centers in Which Qwest
Corporation Must Offer High-Capacity Loop or OAH Docket No.
Transport UNEs at Cost-Based Rates

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Barbara L. Neilson, Office of Administrative Hearings, Suite 1700, 100 Washington Square,
Minneapolis, Minnesota 55401-2138; (612) 341-7604.

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 AND E-MAIL ADDRESS:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER AND E-MAIL ADDRESS:

SIGNATURE OF PARTY OR ATTORNEY: _____

DATE: _____