

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF)
QWEST CORPORATION AND MCLEODUSA)
TELECOMMUNICATIONS SERVICES, INC.) CASE NO. QWE-T-02-17
FOR APPROVAL OF AMENDMENTS TO AN)
INTERCONNECTION AGREEMENT FOR THE)
STATE OF IDAHO PURSUANT TO 47 U.S.C. §)
252(e). (PRIOR CASE NO. QWE-T-00-7))

IN THE MATTER OF THE APPLICATION OF)
QWEST CORPORATION AND ESCHELON)
TELECOM, INC. FOR APPROVAL OF AN)
AMENDMENT TO AN INTERCONNECTION)
AGREEMENT FOR THE STATE OF IDAHO)
PURSUANT TO 47 U.S.C. § 252(e). (PRIOR) ORDER NO. 29154
CASE NO. QWE-T-00-13))

IN THE MATTER OF THE APPLICATION OF)
QWEST CORPORATION AND COVAD)
COMMUNICATIONS COMPANY FOR)
APPROVAL OF AMENDMENTS TO AN)
INTERCONNECTION AGREEMENT FOR THE)
STATE OF IDAHO PURSUANT TO 47 U.S.C. §)
252(e). (PRIOR CASE NO. USW-T-99-3))

On August 21, 2002, Qwest Corporation filed six negotiated agreements (four containing reductions made by the Company) with the Commission that it had previously made with McLeodUSA Telecommunications Services, Inc. (three agreements), Eschelon Telecom, Inc. (one agreement) and Covad Communications Company (two agreements).¹ Qwest filed these agreements under the case numbers from previously approved interconnection agreements, *see* Case Nos. QWE-T-00-7, QWE-T-00-13 and USW-T-99-3.

Recently, Qwest has been filing similar and identical agreements with other state commissions in its operating territory. Because many of these agreements were not filed with state commissions at the time they were executed, some have alleged that Qwest has not complied with the Telecommunications Act of 1996 in several states. Currently, there are proceedings in several states addressing these questions. Qwest also filed a Petition for

¹ Qwest entered these agreements with these Companies between April 19, 2000 and March 1, 2002.

Declaratory Ruling with the Federal Communications Commission ("FCC") requesting that it rule on the scope and duty to file and obtain prior approval of certain types of negotiated contractual arrangements under 47 U.S.C. § 252.

The Commission found that because these Applications raised important issues they should not be summarily approved. Accordingly, on September 19, 2002, the Commission issued Notice of Applications, Modified Procedure (i.e., by written submission rather than by hearing, IDAPA 31.01.01.201-204), Intervention Deadline and Comment Deadlines. Order No. 29116. The Commission also ordered that these six applications, agreements and their associated case numbers be consolidated into one proceeding with the Case No. QWE-T-02-17. On September 19, 2002, Qwest filed an additional application requesting that the Commission approve an amendment to the existing interconnection agreement it has with McLeodUSA. The Commission found that this new amendment should be reviewed in this consolidated case. Order No. 29128 at 2. Order No. 29128 also amended the time deadlines for filing written comments and reply comments. The Commission Staff and PageData of Boise, Idaho filed written comments on October 25, 2002. Qwest filed reply comments on November 8, 2002.

TELECOMMUNICATIONS ACT OF 1996

Under the provisions of the federal Telecommunications Act of 1996, interconnection agreements must be submitted to the Commission for approval. 47 U.S.C. § 252(e)(1). The Commission may reject an agreement adopted by negotiations only if it finds that the agreement: (1) discriminates against a telecommunications carrier not a party to the agreement; or (2) implementation of the agreement is not consistent with the public interest, convenience and necessity. 47 U.S.C. § 252(e)(2)(A). Pursuant to 47 U.S.C. § 252(e)(4) the Commission has 90 days after the filing of an agreement that is adopted by negotiation by the parties to approve or reject it. Qwest filed these agreements on August 21, 2002.

BACKGROUND

Qwest in its Applications claims that it has at all times operated in good faith by filing pertinent interconnection agreements and amendments with the Commission and is committed to full compliance with the Act. Accordingly, Qwest contends that as a demonstration of its good faith, the Company is now broadly filing all contracts, agreements or letters of understanding between Qwest and CLECs that create obligations to meet the requirements of 47 U.S.C. § 251(b) or (c) on a going forward basis. Qwest states that it believes its new filing policy goes

well beyond the requirements of 47 U.S.C. § 252(a). However, Qwest states that it has not been filing routine day-to-day paperwork, orders or specific services, or settlements of past disputes that the Company believes do not create going forward obligations.

The Company also states that it has also reviewed older unfiled agreements that were entered prior to adoption of the new policy. The Company has now determined that some should now be filed as interconnection agreements so that their terms are available to other CLECs under 47 U.S.C. § 252(i). The original six agreements filed in this case fall within this group. Four of the six agreements have been submitted in a redacted form by Qwest.²

In regard to the agreements that it has now filed, Qwest requests that the Commission approve them as soon as reasonably practicable. In addition, Qwest states that it has marked, highlighted or bracketed those terms and provisions in the agreements that the Company believes relate to Section 251(b) or (c) services, have not been terminated or superseded by agreement, Commission Order, or otherwise, and thus subject to filing and approval under Section 252. In this proceeding Qwest only requests that the Commission decide whether these agreements should be approved under the Act as interconnection agreements, not whether as a matter of law the agreements should have been filed under Section 252.

Qwest realizes that its decision to file these agreements now does not bind the Commission in respect to questions regarding the Company's past compliance with the Act. However, the Company submits that it has acted in good faith and that, as in Iowa, this Commission will conclude that penalties are not appropriate. In addition, Qwest contends that its filings remove any argument with respect to compliance with Section 252 now and going forward in relation to these individual agreements. Finally, Qwest states that it reserves its right to demonstrate that these Agreements need not have been filed in the event of an enforcement action.

² The redacted agreements are as follows: The McLeodUSA "Confidential Settlement Agreement" dated May 1, 2000 and "Confidential Billing Settlement Agreement" dated April 28, 2000; The Eschelon "Settlement Agreement" dated March 1, 2002; and, the Covad "Facility Decommissioning Agreement" dated January 3, 2002.

COMMENTS

The Commission Staff

In its written comments the Commission Staff outlined the contents of each of the agreements at issue in this case. After reviewing these matters Staff makes the following recommendations.

Staff found that each of the six late-filed agreements, including the redacted versions (excluding the September 19, 2002 Amendment) contained terms relating to Sections 251(b) and/or (c), and that these terms impose an ongoing obligation upon the parties. Therefore, Staff found the filing and consideration of these agreements in accordance with Section 252(a)(1) to be appropriate.

Staff noted that the Commission may reject an agreement adopted by negotiations only if it finds that the agreement: (1) discriminates against a telecommunications carrier not a party to the agreement; or (2) implementation of the agreement is not consistent with the public interest, convenience and necessity. 47 U.S.C. § 252(e)(2)(A).

Staff reviewed these agreements and found the majority of the terms to be nondiscriminatory and in the public interest. Thus, Staff believes the terms of these agreements may enhance the ability of other competitors to compete in the marketplace.

However, Staff believed that some terms of these agreements are not in the public interest. Staff stated that the confidentiality clauses contained in these agreements and terms in some of them that required the CLEC to withdraw its opposition to certain Qwest proceedings are contrary to the intent of Section 252 and not in the public interest. Staff recommended the Commission condition any approval of these six agreements upon notice that these terms are not part of that approval.

Based on these recommendations Staff encouraged the Commission to approve these six agreements (four of which were redacted by Qwest) in accordance with 47 U.S.C. § 252(e)(1), subject to the conditions identified above. Staff also recommended that the Commission approve the September 19, 2002 Amendment.

Despite its recommendation Staff noted that the filing of these agreements raised a number of other issues. Each of these agreements was implemented long before the Company's filing in this case. In addition, at least one of these agreements refers to previous agreements that have yet to be filed with the Commission. Thus, Staff believed there may be questions about

whether Qwest failed to timely file these six agreements and others in violation of the requirements of the Telecommunications Act of 1996. Thus, Staff stated that the Commission may wish to investigate these issues in a new case. In addition, Staff recommended that should the Commission approve these six agreements that decision would not foreclose consideration of Qwest's compliance with the filing requirements of the Act in a future proceeding.

As indicated above, Staff was concerned that other agreements exist that may be subject to the filing requirements of Section 252(a)(1). Thus, Staff recommended that the Commission instruct Qwest to review any and all agreements it may have executed with competitive carriers in Idaho that had terms that went in effect after the effective date of Section 252(a)(1) and that the Commission direct the Company to file any of these agreements that fall within the scope of the FCC's recent decision and the Act.

PageData

PageData filed written comments on October 25, 2002. PageData is headquartered in Boise, Idaho and provides paging services and other products to its customers. In general, PageData contends that Qwest has damaged the Idaho telecommunications market by its failure to timely file these agreements. PageData asserts this has hindered competition in Idaho and creates higher prices for Idaho consumers.

PageData argues despite the filing of these agreements, all unfiled agreements that Qwest has made have not been filed with the Idaho Commission. PageData requests that the Commission order Qwest to file all interconnection agreements that are applicable to Idaho, within 10 days, including those that have been recently filed in Iowa, New Mexico, Arizona and Minnesota. PageData also suggests that the Commission consult with other states that have investigated Qwest for unfiled interconnection agreements and determine whether agreements filed in those states should also be filed in Idaho. PageData also states that the Commission should send a letter to all carriers in Idaho that instructs them to send in a copy of all interconnection agreements and documents relating to interconnections or letter agreements they have entered into with Qwest that have not yet been filed with Commission. PageData asserts that the Commission should require Qwest to file all applicable, cancelled unfiled agreements in Idaho. PageData also contends that the Commission should require Qwest to reveal all past and present oral agreements made with other carriers and have them filed as interconnection agreements in Idaho.

PageData requests that the Commission create a broad definition of what constitutes an interconnection agreement. PageData also argues that should the Commission approve the current agreements before it, the confidentiality provisions contained in them should be removed from them. Finally, PageData argues that should Qwest and other carriers not respond in an appropriate manner consistent with Commission directives it should turn uncooperative carriers over to the Idaho Attorney General's Office for legal action.

Qwest Reply Comments

Qwest asserted that the only question to be decided in this consolidated docket is whether the provisions of the subject agreements relating to services provided pursuant to Section 251(b) or (c) of the Act are to be approved under Section 252(e)(2). Qwest also supports the Staff's findings that the agreements, including the September 19, 2002 Agreement, are non-discriminatory, in the public interest and should be approved.

Qwest states that in regard to the first six agreements filed on August 21, 2002, the confidentiality language contained within them is no longer applicable because the agreements have now been made public. Accordingly, the Company has no objection to these agreements being approved without that provision.

Qwest does not agree with Staff's position on certain withdrawal provisions in these agreements. However, the Company states it is not seeking Commission approval of any withdrawal provision and has no objection to the Commission excluding such provisions from the scope of any approval of the agreements in this consolidated docket.

Qwest states that in contrast with the Staff whose comments focus on the language of the agreements submitted and apply the relevant standards for approval, PageData seeks to turn the present docket into a forum for discussion of its unrelated grievances, many of which have previously been decided by this Commission. In addition, Qwest contends that PageData's comments provide no meaningful input into the present case. Qwest also argues that PageData's assertion that additional agreements exist that have not been filed is irrelevant to the subject matter of this proceeding. Qwest remarked that PageData offers no evidence that these agreements should not be approved.

Qwest also states that by approving these agreements the Commission in no way commits itself to a position on whether other agreements exist that should be submitted. The Company realizes that the Commission has been asked to consider whether further proceedings

are required to determine if its alleged violation of the requirement to file interconnection agreements warrants some further action by the Commission. Qwest states that it is prepared to debate those questions at the appropriate time but that these matters should not affect the approval of the agreements now before the Commission.

COMMISSION FINDINGS AND DECISION

Under the terms of the Telecommunications Act, interconnection agreements must be submitted to the Commission for approval. 47 U.S.C. § 252 (e)(1). The Commission's review is limited, however. The Commission may reject an agreement adopted by negotiation only if it finds that the agreement discriminates against a telecommunication carrier not a party to the agreement or implementation of the agreement is not consistent with the public interest, convenience and necessity. *Id.* Guiding the Commission's review in this case is a recent decision regarding the filing requirements for interconnection issued by the FCC. The FCC found an agreement that created ongoing obligations regarding resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements or collocation is an interconnection agreement. *Qwest Petition for Declaratory Ruling*, 2002 WL 31204893, at 5 (F.C.C. 2002). The FCC also found that dispute resolution and escalation provisions relating to obligations set forth in Sections 251(b) and (c) are appropriately deemed interconnection agreements. *Id.* However, the FCC also ruled that agreements which simply provided for "backward looking consideration" need not be filed as interconnection agreements. *Id.* at 6.

The Commission finds that the agreements and those that are redacted that are filed in this consolidated proceeding create ongoing obligations between the contracting parties. Our findings are consistent with Staff's and Qwest's representations.

The Commission Staff and Qwest agree that the confidentiality and withdrawal provisions do not need to be a part of any of the six agreements Qwest filed on August 21, 2002, subject to Commission review and approval. Thus, the Commission finds that these provisions in the six agreements shall not be a part of the agreements that we are asked to approve in this proceeding.

After reviewing the remaining language of each of the agreements and those that are redacted filed in this consolidated case, including the amendment filed on September 19, 2002 and considering the written comments filed by the Commission Staff, PageData and Qwest, the

Commission finds that these redacted agreements are consistent with the public interest, convenience and necessity and do not discriminate. Thus, the Commission approves Qwest's Applications and Agreements.

The written comments filed in this case raise several issues not directly related to our review of whether these agreements should be approved as interconnection agreements or amendments to them. Although not directly relevant to our decision to approve these agreements, the Commission is concerned that Qwest may have violated its duty under the Act to file applicable interconnection agreements in this State. However, these questions are beyond the scope of this proceeding and shall not be addressed directly at this time. This proceeding was not intended to be an enforcement action, rather it is limited only to whether the agreements now before us should be approved under the Act. Furthermore, the parties in this case have not provided sufficient evidence at this time to demonstrate that Qwest has violated either state or federal law.³ This decision does not foreclose consideration of the serious questions regarding Qwest's actions with regard to these agreements and possible others should the need arise in the future. The Commission finds that it is necessary to order Qwest, in addition to its duties under the Act, to continue to review any and all unfiled agreements to determine whether they should be filed with the Commission under the provisions of the Act and the FCC's recent order.

PageData requests that we issue an Order that: 1) requires all carriers in Idaho to send copies of all interconnection agreements, documents relating to interconnections or letter agreements they have entered into with Qwest that have not as of yet been filed with

³ PageData has raised arguments about secret agreements that were addressed in Order No. 29140, in Case No. USW-T-99-24. Specifically, the Commission addressed arguments made by PageData that it should be able to pick and choose terms from an interconnection agreement between Qwest and another carrier approved by another state commission and apply those terms in Idaho so long as that other carrier "also conducts business in" Idaho. Order No. 29140 at 16. The Commission found that:

Absent agreement contract language to the contrary, we do not believe this argument comports with the federal Act or FCC regulations. *Local Competition Order* at ¶¶ 1310-21, 1315; 49 C.F.R. § 51.809. The ability to pick and choose applies to interconnection agreements approved by this Commission. We do not, for example, find that the Pagers could adopt terms in a Qwest-WorldCom agreement from Nebraska for use in Idaho. We are unaware of any FCC order or regulation applying this procedure to state interconnection agreements. The requirements to file agreements with the state commission applies to carriers operating in a particular state (unless the parties agree to multi-state applicability). 47 U.S.C. § 252(e). Even Section 252(h) only requires a state commission to make available for inspection those interconnection agreements that it has approved. 47 U.S.C. § 252(h).

Order No. 29140 at 17 (footnote omitted).

Commission; 2) Qwest file all applicable, cancelled unfiled agreements in Idaho; 3) Qwest reveal all past and present oral agreements made with other carriers and have them filed as interconnection agreements in Idaho; and 4) creates a broad definition of what constitutes an interconnection agreement. The Commission finds that these requests are beyond the scope of this proceeding and may be more appropriate in a separate proceeding. Furthermore, PageData has not provided any evidence that convinces us that considering or granting these requests at this time would be at all relevant to the sole purpose of this proceeding, whether to approve these agreements under the terms of the Telecommunications Act of 1996. Accordingly, the Commission shall deny these requests without prejudice in this proceeding.

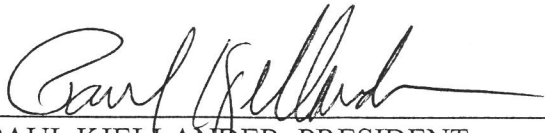
ORDER

IT IS HEREBY ORDERED that the seven Applications and agreements filed in this case are approved under the terms of 47 U.S.C. § 252 as amendments to the previously approved interconnection agreements which they pertain to and are contained in Case Nos. QWE-T-00-7 (McLeodUSA), QWE-T-00-13 (Eschelon) and USW-T-99-3 (Covad) are approved. In the case of redacted agreements the Commission is only approving the redacted version of that contract. Terms of these agreements that are not already in effect shall be effective as of the date of this Order.

IT IS FURTHER ORDERED that PageData's requests made in its written comments are denied without prejudice.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) or in interlocutory Orders previously issued in this Case No. QWE-T-02-17 may petition for reconsideration within twenty-one (21) days of the service date of this Order with regard to any matter decided in this Order or in interlocutory Orders previously issued in this case. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. *See Idaho Code* §§ 61-626 and 62-619.

DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho, this 19th
day of November 2002.



PAUL KJELLANDER, PRESIDENT

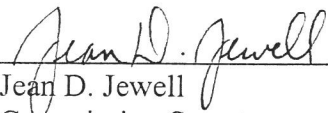


MARSHA H. SMITH, COMMISSIONER



DENNIS S. HANSEN, COMMISSIONER

ATTEST:



Jean D. Jewell
Commission Secretary

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