BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

NORTHWEST TELEPHONE, INC.,	)	
	)	Docket No. UT-053081
Complainant,	)	
	)	NTI OPPOSITION TO
v.	)	QWEST MOTION TO
	)	DISMISS COMPLAINT
QWEST CORPORATION,	)	
	)	
Respondent.	)	
	)	

Pursuant to WAC 480-07-380(1), Northwest Telephone, Inc. ("NTI"), provides the following opposition to the Motion of Qwest Corporation ("Qwest") to dismiss NTI's Complaint for Payment of Interconnection Facilities ("Complaint"). The Commission has jurisdiction over the subject matter of the Complaint and should deny the Motion.

DISCUSSION

1. NTI's Complaint seeks a Commission order requiring Qwest to pay its proportional share of the facilities the parties use to exchange traffic pursuant to section 251(b)(5) of the Telecommunications Act of 1996 ("Act"). Federal Communications Commission ("FCC") rules implementing that section require Qwest to "establish reciprocal compensation arrangements for transport and termination of local telecommunications traffic."[1] In other words, Qwest is responsible for compensating NTI

[1] 47 C.F.R. § 51.703. The FCC has clarified that "section 251(b)(5)" should be substituted for "local" in this context. *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 96-98 & 99-68, FCC 01-131, Order on Remand and Report and Order ¶ 46 (rel. April 27, 2001).

for the costs NTI incurs to receive and complete calls from Qwest's customers, and vice versa. More specifically in the context of interconnection facilities, "[t]he rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network."[2] Qwest, therefore, must pay the costs of the facilities that Qwest uses to send calls rated as "local" calls to NTI, and vice versa.

2. Qwest has moved to dismiss NTI's Complaint claiming that "the Commission is without jurisdiction to order the vast majority of relief requested by NTI" because "the Commission has already ruled, consistent with FCC requirements, that it does not have jurisdiction to order such cost allocation on tariffed interstate circuits."[3] Qwest, however, ignores the factual circumstances of this case, as well as subsequent legal developments. Qwest effectively has compelled NTI to use Qwest's special access service for "local" interconnection, and a recent Minnesota federal District Court decision concluded that Qwest's obligations to pay a proportional share of interconnection facilities includes facilities obtained out of Qwest's federal tariff. The Commission thus has ample jurisdiction to address NTI's Complaint.

A. Qwest Is Evading Its Obligation to Pay for Interconnection Facilities by Requiring NTI to Use Special Access Services.

3. The Commission has yet to consider factual circumstances comparable to

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[2] 47 C.F.R. § 51.709(b).

those posed by NTI's Complaint. NTI ordered special access services from Qwest to exchange section 251(b)(5) traffic because Qwest refused to provide those facilities any other way. NTI provides local service to Internet Service Providers ("ISPs") in several local calling areas using a single switch. Qwest has taken the position that this results in NTI providing "virtual NXX" or "VNXX" service and that "VNXX" ISP-bound traffic may not be routed over local interconnection service ("LIS") trunks. NTI cannot provide service to its customers without interconnection with Qwest. Accordingly, NTI ordered the necessary facilities as special access services because NTI had no viable alternative.

4. One of the issues presented in this case, therefore, is whether Qwest may avoid its obligation to pay for its proportional share of interconnection facilities by requiring NTI to obtain those facilities as special access services. The AT&T arbitration that Qwest cites in its Motion presented no such issue. In its decision in that arbitration, however, the Commission approved the Arbitrator's determination that "ISP-bound traffic should be included in relative use calculations."[4] The Arbitrator further "conclude[d] that AT&T should be entitled to take advantage of the same exceptions to the typical relationship between NPA-NXX and a single local calling area as Qwest takes advantage of in offering [foreign exchange] and Internet access numbers."[5] This conclusion is fully consistent with a Commission decision in an earlier arbitration that

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[3] Qwest Motion ¶ 2.

[4] *In re Petition for Arbitration of AT&T with Qwest*, Docket No. UT-0333035, Order No. 4, Arbitrator's Report ¶ 42 (Dec. 1, 2003).

[5] *Id.* ¶ 36.

"ISP-bound calls enabled by virtual NXX should be treated the same as other ISP-bound calls for purposes of determining intercarrier compensation requirements consistent with the FCC's ISP Order on Remand."[6]

5. The Commission unambiguously has found that all locally-dialed ISP-bound traffic should be treated the same and that ISP-bound traffic is included when determining each carrier's respective responsibility for the costs of interconnection facilities. Qwest, therefore, is violating federal law and its interconnection agreement with NTI by refusing to provide LIS facilities for the exchange of all locally dialed traffic, including "VNXX" ISP-bound traffic. NTI attempted to mitigate the harm resulting from Qwest's unlawful conduct by obtaining the necessary facilities as Qwest special access services. NTI, however, is no longer willing to pay the entire cost of facilities used to exchange section 251(b)(5) traffic – particularly when NTI is compelled to pay Qwest's special access rates, rather than the cost-based rates established by the Commission, to obtain those facilities.

6. NTI, therefore, seeks compensation for the portion of the interconnection facilities that Qwest uses to deliver locally-dialed traffic to NTI. The Commission unquestionably has jurisdiction to conclude that Qwest has unlawfully refused to provide LIS facilities; that the facilities Qwest has provided should be considered to be LIS

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[6] *In re Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC, and CenturyTel of Washington, Inc.*, Docket No. UT-023043, Seventh Supplemental Order: Affirming Arbitrator's Report and Decision ¶ 35 (Feb. 28, 2003).

facilities, rather than special access services, that should have been priced at the rates specified in the parties' interconnection agreement; and that those rates are subject to applicable cost sharing. Accordingly, Qwest has failed to demonstrate that the Complaint fails to state a claim on which the Commission can grant relief, and the Commission should deny Qwest's Motion.

B. The Commission Has Jurisdiction to Require Cost Sharing of Interconnection Facilities NTI Provides, Including Facilities NTI Obtains From Qwest as Special Access Services.

7. The Commission has jurisdiction over the subject matter of NTI's Complaint even if the Commission ultimately were to conclude that Qwest was somehow authorized to provide NTI with interconnection facilities used to exchange section 251(b)(5) traffic out of Qwest's federal tariff. Contrary to Qwest's assertions, NTI's request for compensation for the portion of those facilities that Qwest uses is not governed by Qwest's federal tariff.

8. There are two separate transactions involved when NTI uses Qwest's special access services or private lines to exchange section 251(b)(5) traffic. In the first transaction, NTI leases a private line from Qwest, and NTI has not challenged or sought to modify the rates, terms, and conditions in Qwest's federal tariff applicable to that transaction. In the second transaction, however, NTI is subleasing a portion of the private line circuit to Qwest for Qwest to use to deliver section 251(b)(5) traffic to NTI. Qwest's federal tariff does not apply to this second transaction. The Act, FCC rules and the rates, terms, and conditions in the parties' interconnection agreement apply, just as they apply

to any other facility that Qwest and NTI use to exchange section 251(b)(5) traffic.

9. These transactions do not result in "apportionment" of the charges for a private line if the facility is also used to exchange local traffic. If NTI must use a Qwest private line to deliver its locally-dialed calls to Qwest, NTI pays the tariff private line rate to use the facility for that purpose. Indeed, NTI pays Qwest the full tariff private line rate for the portion of the circuit that Qwest uses to deliver section 251(b)(5) to NTI. NTI turns around and, in a separate transaction, charges Qwest for that use pursuant to the rates, terms, and conditions for interconnection facilities in the interconnection agreement. By way of analogy, NTI is leasing a house from Qwest, but once NTI takes possession of the house, NTI is renting some of the rooms to Qwest under an entirely separate agreement. There is no "apportionment" of Qwest's tariff rates.

10. The federal District Court in Minnesota recently agreed. That court upheld a Minnesota Public Utilities Commission order requiring Qwest to pay its share of the costs of interconnection facilities provided by AT&T through its lease of Qwest special access services:

> Once AT&T has leased the private line in accordance with the tariff terms, the line belongs to AT&T and the transaction is complete. The federal tariff rules do not dictate what AT&T does with the line after it is leased from Qwest. The dispute here concerns the terms under which Qwest may use a private line leased by AT&T. Hence, the tariff terms no longer apply. Instead, such conduct is controlled by the FCC's cost-sharing rules.[7]

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[7] *Qwest v. Minnesota Public Utils. Comm'n*, Civil No. 04-1164 (JRT/SRN), Memorandum Opinion and Order Denying Plaintiff's Motion for Summary Judgment at

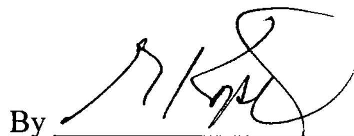
11. NTI understands that the Commission reached a different conclusion in the arbitration between AT&T and Qwest in Washington, but that does not preclude the Commission from revisiting this issue. Indeed, the Commission has revised decisions it has made in the past based on the evolving nature of federal law and the Commission's experience with local exchange competition.[8] The Commission should re-examine this issue and should conclude that federal law requires Qwest to pay for its proportional share of all facilities used to exchange section 251(b)(5) traffic, including facilities that NTI obtains as special access services from Qwest's tariff.

CONCLUSION

12. The Commission has jurisdiction over the subject matter of NTI's Complaint and has full authority to award the relief that NTI has requested. The Commission, therefore, should deny Qwest's Motion to dismiss the Complaint.

DATED this 6th day of October, 2005.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Northwest Telephone, Inc.



By ______________________
Gregory J. Kopta
WSBA No. 20519

8-9 (March 31, 2005) (citation omitted) (attached to this Brief as Attachment 1).

[8] *In re Arbitration Between Level 3 Communications and Qwest*, Docket No. UT-023042, Fourth Supp. Order (Feb. 5, 2003) (reversing prior decision to permit Qwest to exclude ISP-bound traffic from relative use calculations).

Docket No. UT-053081

ATTACHMENT 1
to
NTI Opposition to Qwest Motion to Dismiss Complaint

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

QWEST CORPORATION,

Plaintiff,

v.

THE MINNESOTA PUBLIC UTILITIES COMMISSION, and

LEROY KOPPENDRAYER, in his official capacity as Chairman of the Minnesota Public Utilities Commission; R. MARSHALL JOHNSON, in his official capacity as a member of the Minnesota Public Utilities Commission; KENNETH NICKOLAI, in his official capacity as a member of the Minnesota Public Utilities Commission; PHYLLIS REHA, in her official capacity as a member of the Minnesota Public Utilities Commission; GREGORY SCOTT, in his official capacity as a member of the Minnesota Public Utilities Commission; and

AT&T COMMUNICATION OF THE MIDWEST, INC., and

TCG MINNESOTA, INC.,

Defendants.

Civil No. 04-1164 (JRT/SRN)

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

John M. Baker, **GREENE ESPEL, P.L.L.P.**, 200 South Sixth Street, Suite 1200, Minneapolis, MN 55402; Jason D. Topp, **QWEST CORPORATION**, 200 South Fifth Street, Suite 395, Minneapolis, MN 55402; and Mary Rose Hughes, **PERKINS COIE**, 607 Fourteenth Street Northwest, Suite 800, Washington, D.C. 20005, for plaintiff.

Brian Hans Sande, **OFFICE OF THE MINNESOTA ATTORNEY GENERAL**, 445 Minnesota Street, Saint Paul, MN 55101, for defendant Minnesota Public Utilities Commission and its members.

Mark J. Ayotte, **BRIGGS & MORGAN, P.A.**, 332 Minnesota Street, Suite 2200, Saint Paul, MN 55101, for defendant AT&T Communication of the Midwest, Inc., and TCG MINNESOTA, INC.

Plaintiff Qwest Corporation is appealing an arbitration order issued by defendant Minnesota Public Utilities Commission ("MPUC"). The Arbitration Order established some of the terms of Qwest's most recent interconnection agreement with defendant AT&T. Qwest asserts that terms established by the Arbitration Order violate certain provisions of the Telecommunications Act of 1996 ("the Act") and rules issued by the Federal Communications Commission ("FCC") for implementation of the Act. Qwest moves for summary judgment and remand to the MPUC for reconsideration of the contested terms. For the reasons discussed below, the Court denies Qwest's motion.

BACKGROUND

In 1996, Congress passed the Telecommunications Act in an effort to increase competition in the local telephone market. Congress recognized that the high cost of constructing new telecommunications networks for local telephone service effectively precluded competition in the market. Therefore, the Act requires incumbent local exchange carriers ("I-LECs"), here Qwest, to allow competitive local exchange carriers ("C-LECs"), here AT&T, to interconnect with and access the I-LEC's network. As a result, customers of a C-LEC can call customers of an I-LEC, and vice versa.

Telecommunications networks are generally interconnected via dedicated transmission facilities known as "trunks." One-way trunks send calls, or traffic, from one carrier's network to the network of another. Two-way trunks allow two carriers to send traffic between their respective networks. Pursuant to FCC rules, the sending carrier bears the entire cost of a one-way trunk, while carriers share the cost of two-way trunks in proportion to the percentage of traffic each sends on the trunk. In addition, C-LECs can lease Private Line Transport Services ("PLTS" or a "private line") from an I-LEC. These private lines are leased at a fixed rate based on the I-LEC's federal tariff, and are more expensive than local trunks.[1] C-LECs typically use the private lines to carry their long distance traffic. The private line may be composed of a single trunk, or it may be composed of multiple trunks.

The FCC also requires I-LECs to modify their communication networks to facilitate network interconnection for the benefit of C-LECs. This requirement ensures that C-LECs can offer local telephone service that is equal to that offered by I-LECs. The obligation of I-LECs to perform tasks that benefit the competition is not unlimited, however, and is reserved to those modifications that are routine.

The Act directs competing carriers to negotiate an interconnectivity agreement to determine how traffic will be transported between the two networks, how and when networks will be modified, and how costs will be distributed. If negotiations between the

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[1] Local trunk costs are TELRIC-based. TELRIC stands for Total Element Long Run Incremental Cost, and is a formula established by the FCC to allow I-LECs to recoup the costs of providing local telephone service to C-LECs and garner a reasonable profit.

parties are unsuccessful, the Act allows either carrier to ask the governing state communications commission, here the MPUC, to arbitrate the disputed issues. The commission's arbitration order becomes part of the final interconnectivity agreement, which the commission must approve. A party dissatisfied with the arbitration order may seek review in federal court.

Qwest and AT&T first entered into an interconnectivity agreement in 1997, but attempts to reach a successor agreement failed. In early 2003, AT&T petitioned the MPUC to arbitrate the outstanding issues. The MPUC referred the matter to two Administrative Law Judges ("ALJs"), who conducted hearings, established an evidentiary record, and filed a report and recommendation. Both AT&T and Qwest submitted exceptions to the report, which the MPUC considered before it issued its Arbitration Order.

Qwest now seeks review and reversal of the Arbitration Order with respect to three issues. First, Qwest argues that it should not have to share the cost of routing its local traffic through AT&T's private line. Second, Qwest disputes the terms and conditions under which the Arbitration Order requires Qwest to modify its network for AT&T. Finally, Qwest requests that this Court order the MPUC to alter the Arbitration Order to the extent that Minnesota wholesale quality service standards contained therein might be modified or overturned by the Minnesota Supreme Court.

ANALYSIS

I. STANDARD OF REVIEW

The MPUC's interpretation of the Act and FCC regulations are questions of law, which the Court reviews *de novo*. *U.S. West Communications, Inc. v. Minn. Pub. Utils. Comm'n*, 55 F. Supp. 2d 968, 970 (D. Minn. 1999); *see also Mich. Bell Tel. Co. v. MFS Intelnet of Mich. Inc.*, 339 F.3d 428, 433 (6th Cir. 2003); *Southwestern Bell Tel. Co. v. Apple*, 309 F.3d 713, 717 (10th Cir. 2002). The Court reviews the MPUC's findings of fact under an arbitrary and capricious standard. *Id.*

II. COST-SHARING

Qwest first objects to the Arbitration Order's cost-sharing provisions. AT&T leases PLTS from Qwest to carry its long distance calls. Qwest has agreed that, when AT&T has spare capacity on its PLTS, AT&T may use that capacity to deliver local calls to Qwest.[2] Qwest also honors AT&T's requests for Qwest to send its local calls to AT&T via AT&T's spare PLTS, thus creating a local two-way trunk on AT&T's private line.[3] The Arbitration Order requires Qwest to share the cost of those two-way trunks.

Cost-sharing requirements regarding two-way trunks not located on a private line are clearly established. The FCC requires I-LECs and C-LECs to share the cost of two-

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[2] The private line may be a DS-1 trunk; or it may be a DS-3 facility, which is composed of 28 DS-1 trunks. Thus, if AT&T leases a DS-3 facility from Qwest and is only using 27 of the 28 DS-1 trunks for long distance, for example, it may use the remaining DS-1 trunk to send local traffic to Qwest.

[3] The record reflects that Qwest honors AT&T's requests to establish two-way local trunks at least in part because its engineers prefer to send calls on two-way trunks.

way local trunks based on each carrier's percentage of use. *See* 47 C.F.R. § 51 (2004). Qwest disputes, however, the MPUC's finding that those requirements also apply when Qwest and AT&T send local traffic on AT&T's private line. Qwest challenges that determination on five grounds. Qwest maintains that: 1) AT&T incurs no additional cost when its private line is used for local calls, thus there are no costs to share; 2) even if AT&T does incur additional costs, requiring Qwest to share in those costs violates FCC regulations regarding symmetrical pricing; 3) cost-sharing violates Qwest's federal tariff; 4) cost-sharing constitutes ratcheting, or discounting, in violation of FCC regulations; and 5) cost-sharing runs afoul of Qwest's Minnesota Section 271 proceedings, which were endorsed by the FCC. The Court will discuss each of these arguments in turn.

A. Additional Costs

Qwest argues that cost-sharing is inappropriate because AT&T does not incur any additional costs when Qwest sends its local traffic over AT&T's private line. In other words, because AT&T pays a flat fee for PLTS in advance, Qwest's use of otherwise idle capacity does not create any additional costs. Therefore, Qwest argues that there are no costs to share. The MPUC disagreed, reasoning that Qwest's use of AT&T's private line prevents AT&T from using the spare capacity for itself should it experience a surge in traffic. Under such circumstances, AT&T would be forced to purchase additional capacity, and thus incur additional costs.

The MPUC determined that "Qwest's use of the private line's capacity reduces the capacity available for AT&T" which, in turn, could result in future costs to AT&T. (*Arbitration Order*, Doc. No. 69 at 22.) This is a finding of fact that the Court will

overturn only if it is found to be arbitrary and capricious. After careful review of the record, giving due regard to the fact that the MPUC is uniquely situated to make such determinations, the Court finds the MPUC's determination is reasonable.

B. Symmetrical Pricing

Qwest next argues that the Arbitration Order's cost-sharing requirement violates the FCC's symmetrical pricing rules, which provide that "[r]ates for transport and termination of telecommunications traffic shall be symmetrical." 47 C.F.R. at § 51.711(a) (2004). Qwest asserts that when it uses AT&T's private line for local service AT&T charges it a tariff-based rate rather than the TELRIC-based rate that Qwest charges AT&T for local service. In other words, AT&T charges a higher rate to carry Qwest's local traffic on its private line than Qwest charges to carry AT&T's local traffic on its local trunks. Qwest maintains that this violates the symmetrical pricing rules.

The defendants counter that the symmetrical pricing rules concern charges assessed for *terminating* calls on another carrier's network and do not concern the allocation of costs on a shared interconnection facility. Instead, defendants argue, 47 C.F.R. 51.507(c) and 51.709(b) govern such shared facilities. In other words, § 51.711, governs what a carrier charges once a call is "handed off" to another carrier, and §§ 51.507 and 51.709 govern the charges for transporting a call to another carrier before the call is "handed off." The Court agrees. The Arbitration Order provides that AT&T shall charge Qwest for it proportional use of AT&T's private line at the same rate AT&T was originally charged for the line. The Court finds that this comports with the FCC's rules. *See* 47 C.F.R. § 51.507(c) ("The costs of shared facilities shall be recovered in a manner

that efficiently apportions costs among users."), and *id.* § 51.709(b) ("The rate of a carrier providing transmission facilities dedicated to the transmission of traffic between two carriers' networks shall recover only the costs of the proportion of that trunk capacity used by an interconnecting carrier to send traffic that will terminate on the providing carrier's network.") Therefore, Qwest's motion is denied with respect to this issue.

C. Federal Tariff

Qwest also argues that sharing the costs of sending traffic on AT&T's private line violates Qwest's federal tariff. Specifically, Qwest alleges that the tariff precludes apportionment based upon the type of traffic carried on the line. Qwest further argues that state commissions cannot modify a federal tariff and that the filed-tariff doctrine precludes any modification of a federal tariff. The Arbitration Order rejected these arguments.

The Court agrees that Qwest's contentions are unfounded. The tariff governs the terms under which AT&T may lease a private line from Qwest. *See Qwest Corporation Access Service F.C.C. Tariff No. 1, available at* http://tariffs.uswest.com:8000/docs/TARIFFS/FCC/FCCA/ (explaining that the tariff concerns "regulations, rates and charges applicable to the provision of . . . Private Line Transport Services . . . provided by Qwest Corporation . . . to [its] customers."). Once AT&T has leased the private line in accordance with the tariff terms, the line belongs to AT&T and the transaction is complete. The federal tariff rules do not dictate what AT&T does with the line after it is leased from Qwest. *See id.* The dispute here concerns the

terms under which Qwest may use a private line leased by AT&T. Hence, the tariff terms no longer apply. Instead, such conduct is controlled by the FCC's cost-sharing rules.

D. Ratcheting

Qwest maintains that the MPUC ignored language in the FCC's *Triennial Review Order*,[4] which prohibits price ratcheting, or discounting, when a C-LEC commingles services such as local telephone service and PLTS. The defendants counter that because the dispute here does not concern commingling, there can be no ratcheting.

In its *Triennial Review Order*, the FCC noted that when services are commingled it will not require I-LECs to bill a private line leased by a C-LEC at a lower, blended rate. *Triennial Review Order*, 18 F.C.C.R. at 17,343, ¶ 580. That is, when a C-LEC uses a portion of its private line for local service, it will not be entitled to a discounted rate as a result. Qwest contends that when it is charged for sending local traffic on AT&T's private line, such a blended rate results.

The section of the *Triennial Review Order* that Qwest relies on concerns the manner in which Qwest can bill AT&T when AT&T sends local traffic on its private line. The Arbitration Order says nothing about how Qwest should bill AT&T in such a circumstance. Instead, the Arbitration Order deals with how AT&T may bill Qwest, and directs Qwest to *pay* for its proportional use of that line. As these are two distinct issues, Qwest's argument misses the mark and there is no ratcheting.

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[4] The *Triennial Review Order*, formally known as, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978 (2003), *aff'd in part, rev'd in part on other grounds*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), is the FCC's interpretation of the Telecommunications Act.

E. Minnesota Section 271 Proceedings

Section 271 proceedings are a process by which I-LECs, such as Qwest, may apply to the FCC to enter the long distance telephone market. In order to receive permission, applicants must demonstrate that they have opened their local telephone service markets to competition pursuant to 47 U.S.C. § 271. As part of Qwest's Minnesota Section 271 proceedings, an ALJ assigned to the matter determined that, "there is no basis for ... requiring the I-LEC to re-price proportionately the special access facility [PLTS] by the type of traffic carried." (Pl.'s Ex. E at 17, ¶ 42.)

According to Qwest, the MPUC took no exception to, and the FCC ultimately approved, the ALJ's findings as part of the Minnesota Section 271 proceedings. Qwest now argues that the Arbitration Order effectively re-prices AT&T's private line on a proportional basis by the type of traffic carried in violation of the findings.

Assuming, arguendo, that the determinations resulting from the Section 271 proceedings have some precedential value in this context, it is nonetheless clear that they do not apply to this dispute. The central dispute in this case is not how Qwest must price its special access facility, or PLTS, but how AT&T may charge for use of its property. The findings from the Minnesota Section 271 proceedings, which focused on how Qwest, as an I-LEC, must price its special access facilities, do not present a barrier to the cost-sharing the Arbitration Order commands.

For the reasons discussed *supra*, the Court finds that the Arbitration Order appropriately requires Qwest to share costs when it sends local traffic on AT&T's private

line. Accordingly, the Court denies Qwest's motion for summary judgment with respect to this issue.

III. NETWORK MODIFICATION

Qwest next objects to the terms of the Arbitration Order requiring it to modify its network for AT&T's use. The Arbitration Order directs Qwest to "build facilities for [AT&T] on the same basis that it would build one for [itself]." (*Arbitration Order*, Doc No. 69 at 34.) Qwest asserts that such a requirement exceeds I-LEC obligations under the Act and FCC regulations.

The Act instructs I-LECs to provide interconnection to their networks on a nondiscriminatory basis. *See* 47 U.S.C. § 271(c)(3) (2000). The Eighth Circuit has interpreted this requirement to mean that I-LECs must modify their networks "to the extent necessary to accommodate interconnection." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 n.33 (8th Cir. 1997) *aff'd in part, rev'd in part on other grounds sub nom. AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Such modifications are usually requested by C-LECs.

In the section of the *Triennial Review Order* entitled, "Routine Network Modifications to Existing Facilities," the FCC directs I-LECs to perform requested network modifications that are "routine." *Triennial Review Order*, 18 F.C.C.R. at 17,371–17,380. As clarification, the FCC stated that "[b]y 'routine network modifications' we mean that [I-LECs] must perform those activities that [I-LECs] regularly undertake for their own customers." *Id.* at 17,372, ¶ 632. In other words, an I-LEC must perform a C-LEC's requested network modification if the I-LEC would

make the same modification for the benefit of its own customers. The FCC goes on, however, to state that "routine network modifications" do not include constructing new wires, trenching or placing new cables, or constructing an "altogether new loop," for a requesting C-LEC. *Id.* at 17,372–17,378, ¶¶ 632, 636, 639.

The defendants argue that the Arbitration Order is not offensive to the *Triennial Review Order*[5] because the Arbitration Order mimics the standard set out by the FCC, in that it commands Qwest to build for AT&T facilities that Qwest would build for itself. Qwest, on the other hand, argues that because the Arbitration Order does not add the additional caveats concerning new construction found in the *Triennial Review Order*, the Arbitration Order exceeds the obligations the *Triennial Review Order* set for I-LECs.

The Court finds that the standard set by the MPUC in the Arbitration Order for determining when Qwest must construct new facilities for the benefit of AT&T accurately tracks the FCC's standard as stated in the *Triennial Review Order*. The MPUC was not required to include the specific examples of new construction that I-LECs are not required to perform as set out in the *Triennial Review Order*. Those requirements have already been explicitly excluded by the FCC. Therefore, the Court reads the

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[5] The defendants also argue that the Arbitration Order is valid because it does not require Qwest to provide AT&T with "superior quality" interconnection in accordance with the Eighth Circuit's holding that I-LECs are not required to provide requesting C-LECs with "superior quality interconnection." *Iowa Utils.*, 120 F.3d at 812–813. The issue here, however, is not "superior quality" interconnection, but whether Qwest must build AT&T new facilities at all.

Arbitration Order to implicitly contain the limitations contained in the *Triennial Review Order*, and denies Qwest's motion for summary judgment with respect to this issue.[6]

IV. WHOLESALE QUALITY SERVICE STANDARDS

The Arbitration Order requires Qwest and AT&T's interconnection agreement to incorporate the Minnesota Wholesale Quality Service Plan. Qwest has appealed the standards to the Minnesota Supreme Court, and now asks this Court to direct the MPUC to bring the interconnectivity agreement into compliance with those standards to the extent that they are modified or overturned by the Minnesota Supreme Court.

The Minnesota Supreme Court has not yet ruled on the legality of the contested standards, and this Court will not speculate as to what the Minnesota Supreme Court might or might not do in the future. For the time being, it is enough to say that the Minnesota Court of Appeals has upheld the contested standards. *See Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 883 (8th Cir. 2000) (stating that while not binding, the court must follow decisions of the Minnesota Court of Appeals when they are the best evidence of what [state] law is). As a result, the Court declines to modify the Arbitration Order in the manner Qwest seeks, and denies Qwest's motion for summary judgment on this issue.

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[6] The defendants also contend that Minnesota state law supports the requirement imposed by the Arbitration Order. *See* Minn. Stat. § 237.09, subd. 2(a) (2004). Federal law, however, controls in this setting. The Act does permit states implementing the Act some leeway, but only to the extent that it is "consistent with the requirements of [§ 251]." 47 U.S.C. 251(d)(3) (2004). The FCC has interpreted § 251 to not require certain network modifications. In order to remain consistent, state law cannot be interpreted to allow something § 251 prohibits.

ORDER

Based upon all of the files, records and proceedings herein, **IT IS HEREBY ORDERED** that plaintiff's motion for summary judgment [Docket No. 29] is **DENIED.**

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: March 31, 2005
at Minneapolis, Minnesota.

s/ John R. Tunheim
JOHN R. TUNHEIM
United States District Judge

CERTIFICATE OF SERVICE **Docket No. UT-053081**

I hereby certify that on the date given below, in the above referenced docket, the original and 7 true and correct copies of NTI Opposition to Qwest Motion to Dismiss Complaint were sent by Federal Express and electronically filed with:

Ms. Carole J. Washburn, Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
Olympia, WA 98504-7250
Email: http://www.wutc.wa.gov/efilingpilot

On the same date, a true and correct copy was sent by regular U.S. Mail, postage prepaid, and by email to:

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DATED this 6th day of October, 2005.

By: Melissa K. Geraghty
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