

BEFORE THE PUBLIC SERVICE COMMISSION OF WYOMING

IN THE MATTER OF THE)
APPLICATION OF QWEST)
CORPORATION REGARDING RELIEF)
UNDER SECTION 271 OF THE)
FEDERAL TELECOMMUNICATIONS)
ACT OF 1996, WYOMING'S)
PARTICIPATION IN A MULTI-STATE)
SECTION 271 PROCESS, AND)
APPROVAL OF ITS STATEMENT OF)
GENERALLY AVAILABLE TERMS)

Docket No. 70000-TA-00-599
(Record No. 5924)

ORDER DENYING PETITION FOR RECONSIDERATION
AND SETTING PUBLIC HEARING AND PROCEDURE
(Issued March 27, 2002)

This matter is now before the Wyoming Public Service Commission (Commission) upon Qwest Corporation's (Qwest) Petition for Reconsideration of the Commission's QPAP Recommendation (the Petition), the written responses thereto filed by [i] AT&T (with Covad Communications), and [ii] Visionary Communications, InTTech Inc. and Netwright, LLC, and the arguments presented by counsel for Qwest, AT&T, the Consumer Advocate Staff of the Commission, Visionary Communications, InTTech Inc., Netwright, LLC, and Contact Communications. We also must consider the procedural effect on this issue and the public hearing hereon of Qwest Corporation's March 15, 2002, Motion to Require Prefiling a Summary of Issues, (the Qwest Motion), the March 22, 2002, Motion of Contact Communications to Require Response to Prefiled Issues (the Contact Communications Motion), the March 26, 2002, response of Qwest to the Contact Communications Motion (the Qwest Response), all filed with respect to the hearing scheduled by the Commission on Wyoming-specific issues remaining in the case. The Commission, having reviewed the Petition, the responses, the pleadings on the Wyoming-specific issues hearing, having heard the arguments of counsel, having reviewed the record in this case, its files concerning the case, applicable Wyoming and federal law, and being otherwise fully advised in the premises, HEREBY FINDS AND CONCLUDES:

1. On January 30, 2002, the Wyoming Public Service Commission (Commission) issued its First Order on Group 5A Issues (the First Order), which directed Qwest to file a revised Qwest Performance Assurance Plan (QPAP) in conformance with that Order on or before February 28, 2002.

2. On February 28, 2002, Qwest filed its Petition asking the Commission to "grant reconsideration" of the First Order. On March 11, 2002, AT&T (with Covad Communications), and Visionary Communications, InTTech Inc. and Netwright, LLC, filed responses in opposition to the Petition. We set the Petition and the responses for

deliberation in our March 14, 2002, Order for Continuance of Hearing (Group 5a Issues) and Scheduling Deliberations.

3. On March 14, 2002, the argument on the Petition was held pursuant to due notice and the order of the Commission, with counsel for Qwest, AT&T, the Consumer Advocate Staff of the Commission, Visionary Communications, InTTech Inc., Netwright, LLC, and Contact Communications appearing and presenting their positions and arguments on the subject.

4. On March 18, 2002, and pursuant to due notice, the Commission deliberated the Petition and directed the preparation of this order consistent therewith. Thereafter, the Commission received the pleadings of parties regarding the Wyoming-specific public hearing in this case, and changed the procedural schedule for that hearing. We must consider and accommodate the effect of these changes in this order.

5. Qwest argued that the Commission's order of January 30, 2002, while styled as an "order," was no more than a "recommendation" with no binding legal effect. We are engaged in reviewing Qwest's compliance with Section 271 of the federal Telecommunications Act of 1996; and it is true that we will make a recommendation to the Federal Communications Commission (FCC) as it considers giving Qwest access to interLATA originating long distance markets in the states where it provides local service. However, according to W.S. §§ 37-2-212 and 37-2-213, our orders must be in writing and we retain continuing jurisdiction to ". . . alter, amend, annul or otherwise modify" them. W.S. § 37-2-102 tells us that "no finding or order of the commission shall be effective without the concurrence of a majority of the commission." This proceeding is of such importance that the Commission will continue, as it has from the very outset of its involvement in this multi-state endeavor, to proceed with its decisions as written orders, evidencing the official action of the Commission, and also evidencing the necessity, as we have also stated repeatedly, of retaining jurisdiction to make certain that the public interest of the people of Wyoming is protected and to modify our orders as needed to accomplish this. Our orders may be examined by the courts and the FCC, but that is not an argument that the Commission is engaged in a casual matter. Most importantly, the argument is immaterial to the final disposition of this matter which is in the hands of the FCC according to the federal Act.

6. Qwest argues that the Commission should not disturb the compromise developed by the facilitator and recommended to us in his report on Group 5A issues. We have found the multi-state workshop process to be a valuable and efficient way of developing issues and better understanding the parties' points of view on them. It is true that Qwest and the other parties to the proceeding have reached compromises on a wide range of issues, and we have accepted the vast majority of them as being well reasoned and serving the pro-competitive policies of the federal Act. However, we have never abdicated our Wyoming regulatory responsibility to a multi-state facilitator and do not believe that it is in our power to do so. The legislature may have delegated some measure of administrative jurisdiction to the Commission; but it has not provided that we may, in turn, delegate it to others. We must decide in the Wyoming public interest

based on the record, and we have done that. *See, In the Matter of the Fair Hearing Request of R.M. & S.M. v. Dept. of Family Services*, 953 P.2d 477, 482 (Wyo. 1998).

7. In its Petition and its oral argument, Qwest argues that we have departed impermissibly from FCC precedent in our January 30, 2002, order on the QPAP, citing instances in which the FCC has approved plans for other states containing the provisions Qwest wants in Wyoming, citing among others, decisions regarding Texas, Kansas and Oklahoma. On the other hand, AT&T, in its response and in oral argument cites a number of cases in which states have reached conclusions different from those cited by Qwest and similar to those made in our January 30, 2002, order. We reiterate here what we said there:

“5. The QPAP is intended to provide assurances that Qwest will live up to its obligations under Section 271 if it is allowed to enter the in-region originating interLATA market. We understand from the Federal Communications Commission that it clearly does not expect that all post-entry performance plans, like the QPAP, will be identical:

“We recognize that states may create plans that ultimately vary in their strengths and weaknesses as tools for post-section 271 authority monitoring and enforcement. We also recognize that the development of performance measures and appropriate remedies is an evolutionary process that requires changes to both measures and remedies over time. We anticipate that state commissions will continue to build on their own work and the work of other states in order for such measures and remedies to most accurately reflect commercial performance in the local marketplace.” (Verizon Pennsylvania Order, FCC 01-029, released Sept. 19, 2001, paragraph 128.)

“The FCC has also developed a simple and logical set of criteria for evaluating the QPAP and similar plans on a rational and consistent basis. Plans should contain:

- Meaningful and significant incentive to comply with designated performance standards;
- Clearly articulated and predetermined measures and standards encompassing a range of carrier-to-carrier performance;
- Reasonable structure designed to detect and sanction poor performance when and if it occurs;
- A self executing mechanism that does not open the door unreasonably to litigation and appeal; and
- Reasonable assurance that the reported data are accurate.”

Again, we agree with the FCC that the states are engaged in creating monitoring and enforcement tools which may legitimately differ according to local circumstance. We also agree that the FCC’s criteria are well reasoned and should apply. We do not, however, agree with Qwest that this somehow forecloses us from considering how best

to apply these criteria to obtain a positive and pro-competitive result for Wyoming. The size, character, composition and physical distribution of Wyoming's telecommunications markets, and the well understood high cost of providing service in the state, are clearly different from those of other states, including those cited by Qwest as being the subject of decisions useful to us for their precedential value. If the FCC's approval of other plans for other states constitutes binding precedent which forecloses our ability to contribute meaningfully to the process, the parameters discussed above are rendered, along with our state-specific process, the multi-state process and large portions of the federal Act, moot and ultimately useless. Regarding the QPAP, we have acted in a manner consistent with the pro-competitive intent of the federal Act and the Wyoming Telecommunications Act of 1995, as well as the clearly pro-competitive intentions expressed by the FCC. We thus agree with Visionary Communications, InTTEch Inc. and Netwright, LLC, when they state that Qwest has a remedy before the FCC.

8. Qwest also argues that the QPAP should be viewed as a simple matter of contract law and that competitors signing up to compete under the Wyoming SGAT should have thereby "elected" limits on their remedies. In the January 30, 2002, order, we stated that:

"The QPAP is heavily enmeshed in federal and state telecommunications law and public policy and is not, either by itself or as a part of the SGAT, capable of being analyzed merely as a simple contract."

This remains true, and the SGAT is not a simple contract. We do not believe that the QPAP should be a source of profit to Qwest's competitors or a device to forestall competition. We do not believe that Qwest should have to pay twice for the same violation of the terms of the SGAT. Nevertheless, we also understand that the participants' knowledge of the future is imperfect and that this is the wrong time for us to foreclose avenues of recovery. The Qwest argument on "liquidated damages" illustrates the point. Qwest states that such contract arrangements have the advantage of liquidating them for *both* parties to the SGAT and that there is "no reasonable basis for requiring one party to take the risk that the payments will exceed actual harm while allowing the other party to avoid the risk that payments will be less than actual harm." (Qwest Petition at p. 18.) However, when pressed for details, Qwest did not offer information which might be used to flesh out this assertion. We thus remain convinced that the better course of action is to let the process go forward with the clear understanding that we are prepared to act swiftly to cure abuses if they arise and certainly before they can do damage. We will not tolerate the use of the QPAP as a tool for abuse by any party. Qwest may obtain from the Commission a fair and expeditious hearing, just as any other signatory might.

9. The other QPAP provisions required by the Commission and discussed in the January 30, 2002, order similarly address the well reasoned criteria of the FCC which they will apply in evaluating the QPAP and similar performance plans for their effectiveness in securing continued good performance by Qwest under the SGAT. Similarly, they may be the subject of further consideration if they begin to operate

oppressively with respect to any signatory and therefore cease to serve the interests of the people of Wyoming.

10. Qwest also questions our decision in light of the role of QSI Consulting in this case, arguing that it worked in New Mexico for an advocacy staff and in Wyoming for the Commission and that this “tainted” our decision here. QSI’s open and public participation throughout the multi-state process in Wyoming raised no issues for Qwest in the past; and we observe that the opinions offered by QSI in the two instances cited by Qwest appear to be quite similar. Qwest does not seek a reexamination of the more than 150 issues on which QSI suggested that the facilitator’s report or a Qwest position contrary to a suggestion by the facilitator should be approved by the Commission. Additionally, as we stated in the January 30, 2002, order on the QPAP, our decision was based on the evidence, and sometimes the lack of evidence, in the record before us. It is important to emphasize that we could reach the same result in the absence or the presence of QSI.

11. Qwest suggested, in the above described Qwest Response, that the QPAP hearing should be reset for May 3, 2002. At our March 26, 2002, regular open meeting and pursuant to due notice, we heard argument on the various pleadings concerning the Wyoming-specific issues and decided that, in fairness to the parties wishing to participate in either hearing, that the further examination of the QPAP should take place, as suggested by Qwest, beginning on May 3, 2002.

12. The legal standard which the Commission must apply is relatively simple, straightforward and discretionary. W.S. § 37-2-214 allows any interested person to petition for a rehearing with respect to any matter determined in an order of the Commission. The Commission “. . . shall grant and hold such rehearing if in its judgment *sufficient reason therefor* be made to appear, which rehearing shall be subject to such rules as the commission may prescribe.” [Emphasis added.] Section 116 of the Commission’s Rules furnishes further guidance on the procedure to be followed in the case of a rehearing. Rule 116(b)(ii) calls for a petitioning party to furnish a statement of the facts and law relied upon; and Section 116 (e) of the Commission’s rules states, in part, that:

“. . . the Commission will give consideration to such applications and any answers thereto that may be filed and will make such decision and order as appears to be warranted. . . .”

Taken together, these Rule provisions clarify the procedure to be followed but do not change the statutory standard, which is made applicable to telecommunications matters by W.S. § 37-15-408 in the Wyoming Telecommunications Act of 1995. This is an intentionally general standard which allows the Commission to exercise its discretion in granting or disallowing rehearings. This standard does not require that there be a legal issue or significant new evidence that was not considered previously which would change the outcome of the case if it were to be considered. The Commission may legitimately consider a petition for rehearing if its subject matter has been “determined” in the Commission’s relevant order. Our paramount concern must be for the public interest of the people of Wyoming with the desires of the utility (or in

this case, telecommunications company) being secondary, as the Wyoming Supreme Court has unambiguously stated in *Tri County Tel. v. Public Service Com'n*, 11 P.3d 938,941 (Wyo. 2000).

13. Although styled as a Petition for Reconsideration, we chose to treat Qwest's Petition as an application for rehearing under W.S. § 37-2-214, which it most closely resembles. Consequently, we apply the described statutory standard to our consideration of this Petition.

14. We have been asked, essentially, either to hear the same evidence again or simply to change our decision to conform with the desires of a party to this proceeding. Qwest has not offered the Commission grounds for a reexamination of its order of January 30, 2002. What we said there remains true, and we understand that the QPAP must remain a work in progress with refinements still to be made, if needed, swiftly, but on the basis of experience.

15. We conclude that sufficient reason to grant a rehearing -- or a "reconsideration" -- as described in Qwest's Petition has not been made to appear and that the rehearing or reconsideration is not warranted.

16. The changes we directed in the January 30, 2002, order require revisions to the QPAP; and we again direct that Qwest make those changes, using its November 6, 2001, draft version of the "Exhibit K" QPAP as a starting point. Qwest shall thereafter file the revised QPAP with the Commission and serve copies on all parties to the Wyoming proceeding on or before April 16, 2002. It should include in its filing conforming changes necessary to bring the SGAT into harmony with the revised QPAP.

17. By our March 27, 2002, Order Rescheduling Public Hearing and Revising Procedure (Wyoming-specific Issues), issued on March 27, 2002), we set a public hearing on Wyoming-specific issues for May 6, 2002, at Cheyenne. To allow for a full consideration of the QPAP and for efficiency in accommodating the revised procedural schedule in this other hearing, we will consider the revised QPAP at a public hearing beginning at 9:00 a.m. on May 3, 2002, at the Commission's hearing room at 2515 Warren Avenue, Suite 300, Cheyenne, Wyoming. The purpose of the QPAP hearing will be to examine the revised QPAP and the extent to which it embodies the Commission's decision in this case.

18. Our findings and conclusions hereinabove are supported by the substantial evidence in the record of this proceeding, including, without limitation the pleadings in this case, the specific and credible responses filed in opposition to the Petition and the arguments thereon, and the evidence developed in the multi-state proceeding.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Petition of Qwest is hereby denied. The further filings by Qwest and the public hearing described hereinabove shall be done as specified above.

2. The decision of the Commission embodied in the January 30, 2002, order is hereby expressly reconfirmed.

3. Previous orders of the Commission in this proceeding are hereby deemed amended, but only to the extent necessary to give full effect to this order.

4. This order is effective immediately.

MADE and ENTERED at Cheyenne, Wyoming, on March 27, 2002.

PUBLIC SERVICE COMMISSION OF WYOMING

STEVE ELLENBECKER, Chairman

STEVE FURTNEY, Deputy Chair

KRISTIN H. LEE, Commissioner

(SEAL)
Attest:

STEPHEN G. OXLEY, Secretary and Chief Counsel