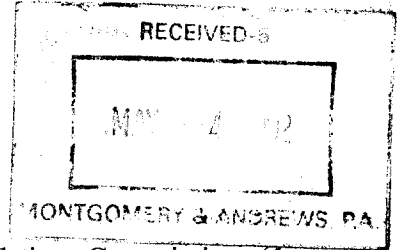


BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF QWEST)
CORPORATION'S SECTION 271)
APPLICATION AND MOTION FOR)
ALTERNATIVE PROCEDURE TO)
MANAGE THE SECTION 271 PROCESS)

Utility Case No. 3269



**ORDER ON REHEARING CONCERNING
PROPORTIONAL PRICING SYSTEM
FOR ENTRANCE FACILITIES**

THIS MATTER comes before the New Mexico Public Regulation Commission (the "Commission") on Qwest Corporation's Motion for Reconsideration of Order On Rehearing of Portions of Group 2 Order (Qwest's "Motion").¹ Having reviewed the pertinent pleadings,² the record concerning this matter generally and being otherwise fully advised, the Commission

FINDS AND CONCLUDES:

1. In the *Order on Rehearing of Portions of Group 2 Order (Group 2 Rehearing Order)*, the Commission determined the description of entrance facilities,³ an issue we had previously found the Facilitator left partially unresolved.⁴ Having resolved the technical description of entrance facilities, *i.e.*, that Qwest had agreed in subsequent proceedings before other state commissions that the SGAT should permit interconnection using entrance facilities at any technical feasible point of interconnection

¹ Our rules dictate that Qwest's "motion for reconsideration" should be regarded as a motion for rehearing pursuant to 17 NMAC 1.2.39.6.1.

² Properly before the Commission respecting this matter are the following: Qwest's Motion, AT&T's Response to Qwest's Motion for Reconsideration of the Group 2 Order ("AT&T's Response"), and Qwest's Reply to AT&T's Response, for which Qwest sought leave to file, such leave hereby being granted. As provided in the *Order* entered today in this docket and Utility Case No. 3567, *In the Matter of the Customer Protection Rule (17.11.16 NMAC) and the Quality of Service Standards Rule (17.11.22 NMAC) Adopted in Utility Case No. 3437*, outside the scope of this matter, pursuant to 17 NMAC 1.2.9.4, and, consequently, disregarded and stricken from the record of these proceedings is the letter to Commissioners submitted on or about February 19, 2002 by Qwest New Mexico Vice President, John W. Badal.

³ Entrance facilities are telecommunications facilities that interconnect the networks of local exchange carriers and interexchange carriers so that long distance calls can be completed.

⁴ See *Group 2 Order on Rehearing*, at 7-8.

chosen by the CLEC,⁵ the Commission proceeded to reconsider the related economic issue of the what CLECs should pay for interconnection at facilities that can also be used for exchange access.

2. When we initially confronted this issue in our *Order Regarding Report on Checklist Items 1, 11, 13 and 14 (Group 2 Order)*, our decision to require the pricing for interconnection of spare special access circuit capacity – essentially spare DS1 circuits on DS3 facilities – at the Federally-tariffed special access rates⁶ was driven by the FCC’s policy against permitting interexchange carriers the ability to engage in what amounts to a regulatory arbitrage between special access facilities and combinations of UNEs, a practice that, if left unchecked, the FCC found “would threaten an important source of funding for Federal universal service” and “would amount to a ‘roundabout termination’ of the access charge regime.”⁷

3. However, on rehearing this close issue, we were persuaded that the orders addressing the FCC’s policy concerns regarding interexchange carriers’ conversion of tariffed special access circuits to combinations of unbundled loops and transport network elements did not prohibit the pricing at TELRIC⁸ of spare special access capacity used *exclusively* for interconnection purposes.⁹ Therefore, given the apparent limitation of the FCC policy expressed most recently in the *Supplemental Order Clarification* to prohibiting the conversion of special access circuits to combinations of unbundled

⁵ *Id.* at 9.

⁶ See *Group 2 Order*, at 59-63.

⁷ *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587, 9591-92, ¶ 7 (2000) (*Supplemental Order Clarification*). See *Implementation of Local Competition Provisions in the Telecommunications Act of 1996*, Supplemental Order, 15 FCC Rcd 1761, FCC 99-370, at 7 (1999) (*Supplemental Order*).

⁸ Section 251(c) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (hereinafter the “Act”) imposes on incumbent LECs the duty to provide interconnection with their local networks, *inter alia*, “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.” 47 U.S.C. § 251(c)(2)(D). See 47 U.S.C. § 252(d)(1). The cost-based pricing methodology for setting prices for interconnection and UNEs is known as Total Element Long Run Incremental Cost (“TELRIC”). See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15844, ¶ 672 (1996).

⁹ *Group 2 Order on Rehearing*, at 11-13.

loops and transport network elements (or enhanced extended links [“EELs”]), the Commission decided that the likewise important policy of promoting competition in the local exchange services market warranted the institution of a proportional pricing system for commingled entrance facility traffic that comported with the uncontested technical description of entrance facilities. Consequently, the Commission ordered Qwest to submit in our companion cost docket, Utility Case No. 3495,¹⁰ a proposal for a proportional pricing system essentially along the following lines suggested by AT&T:

[a CLEC such as AT&T would purchase] as it typically does, a DS3 facility from Qwest. A DS3 facility contains 28 DS1 trunks. Some of the DS1 trunks would be designated as carrying special access (long distance) traffic and some would be designated as carrying local traffic (interconnection trunks). Still others might be designated as being used to access UNEs. Qwest would know which trunks are which and no traffic should be routed over the local traffic trunk could traverse the special access trunks. Furthermore, AT&T would pay for DS1 trunks according to their designations. Thus, the DS1s designated for interconnection should be paid for using TELRIC rates, the DS1s designated for special access would be paid for using the access rates, and the DS1s used to access UNEs would be paid for using TELRIC rates.¹¹

4. Qwest argues in its Motion, among other things,¹² that the proportional pricing system proposed by AT&T runs afoul of the prohibition against conversion of special access circuits to UNEs contained within the *Supplemental Order Clarification*'s third local usage option (“Option 3”).¹³

5. Qwest's argument is buttressed by a recent FCC decision, *Net2000 Communications*,¹⁴ which was brought to the Commission's attention for the first time in the instant Motion. Qwest

¹⁰ Utility Case No. 3495 is captioned *In the Matter of the Consideration of Costing and Pricing Rules for OSS, Collocation, Shared Transport, Non-Recurring Charges, Spot Frames, Combination of Network Elements and Switching*.

¹¹ *Group 2 Order on Rehearing*, at 12.

¹² Qwest's also argued, *inter alia*, that a proportional pricing system would impermissibly modify Qwest's federal special access tariff and that it would upset Qwest's current billing system. Since Qwest's Motion is decided on the grounds elucidated below, we will not address Qwest's additional arguments.

¹³ 15 FCC Rcd at 9599-9600, ¶ 22(3).

adduces the FCC's amplification of Option 3 in *Net2000 Communications* leaves no room for doubt that the *Supplemental Order Clarification* prohibits AT&T's proportional pricing proposal for commingled traffic. Qwest therefore urges the Commission to rescind the requirement that Qwest implement a proportional pricing system for entrance facilities.

6. For its part, AT&T maintains the FCC's *Supplemental Order* and *Supplemental Order Clarification*, strictly limited as AT&T asserts the orders are to prohibiting the conversion of special access circuits to EELs, do not address or in any way proscribe its commingling and ratcheting proposal.¹⁵ Moreover, AT&T insists the FCC's statements in *Net2000 Communications* present no basis for alteration of our prior ruling.¹⁶ Further, AT&T relates that subsequent to the issuance of the ruling in issue, the Arizona Corporation Commission joined this Commission and the Washington Utilities and Transportation Commission in ordering Qwest to implement a proportional pricing system for entrance facilities.¹⁷

7. Having considered the parties' respective arguments, the Commission believes the ultimate decision in this matter turns on whether the FCC's amplification of the *Supplemental Order* and *Supplemental Order Clarification* in *Net2000 Communications* coupled with our experience in pricing interconnection facilities and UNEs warrant the Commission's reassessment of the proportional pricing requirement for entrance facilities.

8. *Net2000 Communications* involved a complaint proceeding filed with the FCC in the wake of failed efforts by Net2000, a CLEC providing local exchange, exchange access and interexchange

¹⁴ *Net2000 Communications, Inc. v. Verizon – Washington, D.C., Verizon – Maryland, Inc., and Verizon – Virginia, Inc.*, FCC 01-381, 17 FCC Rcd 1150 (rel. Jan. 9, 2002).

¹⁵ AT&T's Response, at 3.

¹⁶ *Id.* at 3-4.

¹⁷ *Id.* at 4.

services within the service areas of the Verizon defendants, to have its special access circuits converted to EELs. In the process of determining that Verizon did not violate the Act or the *Supplemental Order* and *Supplemental Order Clarification* in denying Net2000's requests for conversion, the FCC explained as follows:

Net2000 argues that whether circuits are used for 'a significant amount of local exchange service' and therefore qualify for conversion to EEL should be judged on an 'end-user-by-end-user basis.' It should not matter, Net2000 contends, whether a dedicated DS1 between the CLEC's office and the customer's premises that is used to provide local exchange service is carried on a multiplexed DS3 transport channel that includes other DS1s used for other services. It proposes that DS3 circuits derived from both EEL-eligible and non-EEL-eligible DS1 circuits be priced utilizing 'ratcheting,' similar to mixed use DS3 circuits carrying both special access and switched access DS1s, so that proportionate unbundled network element rates would apply to the converted DS1s and proportionate special access rates would apply to the non-converted DS1s. The arguments made by Net2000, however, ignore the specific language of Option 3. There is no provision anywhere in the *Supplemental Order Clarification*, or in prior orders for "ratcheting." The language of Option 3 clearly and specifically requires that 'when a loop-transport combination includes multiplexing (e.g., DS1 multiplexed to DS3 level), each of the individual DS1 circuits must meet [the substantial local exchange service use] criteria.' There is no ambiguity in this language. Although Net2000 argues that it would be better if CLECs were permitted to convert only the parts of their DS3s that are used to provide local exchange service and to continue to obtain the remaining parts of the DS3s by tariff, this clearly is not permitted under our rules.¹⁸

9. Although addressed to the criteria for converting DS3s for EELs, the FCC's explanation of the *Supplemental Order Clarification's* Option 3, coupled with, among other things, the FCC's observations regarding the FCC's prohibition on commingling as a means of preventing IXCs from using UNEs to bypass special access services,¹⁹ warrant a re-examination of the scope of the FCC's policy against regulatory arbitrage. That is, given the FCC's pertinent policy statements in *Net2000*

¹⁸ *Net2000 Communications*, FCC 01-381, at 9-10, ¶ 28.

¹⁹ *Id.* at 10, ¶¶ 29-30.

Communications, the Commission is constrained to ask whether, in seeking to promote the policy of fostering local competition through the proportional pricing of entrance facilities, the Commission inadvertently would create an insupportable tension with the FCC's application of its policy against bypassing special access services through TELRIC pricing of mixed-use DS3 facilities, a policy that serves the critical purpose of preserving the universal service revenue stream. Indeed, *Net2000 Communications* causes the Commission to doubt the proportional pricing system AT&T has proposed does not fall within the prohibitions laid down in the *Supplemental Order* and *Supplemental Order Clarification*.

10. Our doubts are further compounded by our experience with the pricing of interconnection facilities and UNEs under the TELRIC methodology. Our experience indicates that interconnection facilities often are priced at TELRIC levels, the same pricing principle that determines UNE prices.²⁰ Therefore, it necessarily follows that the differentiation between interconnection and UNEs is a distinction without a difference, at least insofar as the policy considerations driving the *Supplemental Order* and *Supplemental Order Clarification* are concerned. As a consequence, given the manner in which interconnection facilities tend to be priced under the TELRIC methodology, the concerns about regulatory arbitrage between special access and UNEs must apply equally to interconnection facilities.

11. Accordingly, the Commission concludes consistent with the foregoing that Qwest's Motion is well taken and should be granted and, therefore, the proportional pricing system requirement contained in the *Group 2 Rehearing Order* should be rescinded.

²⁰ See, e.g., *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, No. 96-98, 11 FCC Rcd 15499, 15816, 15844, 15847-48, 16023-24, ¶¶ 628, 672, 682, 1054-55 (1996).

IT IS THEREFORE ORDERED:

A. In accordance with the foregoing findings and conclusions, Qwest Corporation's Motion for Reconsideration of Order On Rehearing of Portions of Group 2 Order is **GRANTED** to the extent provided in this *Order*.

B. Except as expressly modified by this *Order*, the *Group 2 Order* and the *Group 2 Order on Rehearing* shall remain in full force and effect.

C. Copies of this *Order* shall be served on all parties of record in this case and shall be promptly posted to portion of the Commission's website dedicated to this case.

D. This *Order* is effective immediately.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 7th day of May 2002.

NEW MEXICO PUBLIC REGULATION COMMISSION


TONY SCHAEFER, CHAIRMAN


LYNDA M. LOVEJOY, VICE-CHAIRWOMAN


HERB H. HUGHES, COMMISSIONER

EXCUSED


RORY McMINN, COMMISSIONER


JEROME D. BLOCK, COMMISSIONER

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF QWEST CORPORATION'S)
SECTION 271 APPLICATION AND MOTION FOR)
ALTERNATIVE PROCEDURE TO MANAGE)
THE SECTION 271 PROCESS.)
_____)

Utility Case No. 3269

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of **Order On Rehearing Concerning Proportional Pricing System For Entrance Facilities** issued May 7 2002, were mailed first-class, postage prepaid, to each of the following on May 8, 2002:

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DATED this 8th day of May 2002.

NEW MEXICO PUBLIC REGULATION COMMISSION

Mona Varela

Mona Varela, Administrator