

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

|                    |              |
|--------------------|--------------|
| LeRoy Koppendrayer | Chair        |
| Marshall Johnson   | Commissioner |
| Ken Nickolai       | Commissioner |
| Tomas Pugh         | Commissioner |
| Phyllis A. Reha    | Commissioner |

In the Matter of Qwest Corporation's  
Alternative Form of Regulation (AFOR) Plan

ISSUE DATE: January 20, 2006

DOCKET NO. P-421/AR-97-1544

ORDER ON RECONSIDERATION

**PROCEDURAL HISTORY**

On August 4, 2005, the Commission issued its ORDER AMENDING PLAN. The Order granted the request of Qwest Corporation (Qwest) to have the Commission and the Minnesota Department of Commerce (the Department) disburse the Telecommunications Fund created by its Alternative Form of Regulation (AFOR) plan, even though the terms triggering those disbursements have not been fulfilled. The Fund finances telecommunications projects benefitting education, health care and libraries.

On August 24, 2005, the Department asked the Commission to reconsider whether it has the legal authority to grant Qwest's request.

On September 6, 2005, Qwest replied to the Department's request, disputing the Department's challenge to the Commission's authority.

The matter came before the Commission on December 20, 2005.

**FINDINGS AND CONCLUSIONS**

**I. Background**

On January 1, 1999, U S WEST Communications, Inc. (U S WEST), predecessor to Qwest, began operating under an AFOR plan pursuant to Minnesota Statutes §§ 237.76 - 237.772.<sup>1</sup> In accepting the plan, US WEST agreed to make stipulated payments when it failed to meet specified service

---

<sup>1</sup> See *In the Matter of the Petition of U S WEST Communications, Inc. for Approval of its Alternative Form of Regulation Plan*, Modified Alternative Form of Regulation Plan for the State of Minnesota (January 11, 1999).

quality standards. Shortcomings in specific local exchange areas would result in credits to customers served by those exchanges. Statewide shortcomings would result in payments into a Telecommunications Fund to finance telecommunications projects benefitting education, health care or libraries within US WEST's local service area. The plan states that the Minnesota Department of Public Service, predecessor to the Department, would solicit proposals to use the funds whenever the fund balance reached \$500,000.

But the Plan neglected to say what to do with the balance of the Telecommunications Fund when the Plan expired.

On June 6, 2005, Qwest filed a petition that 1) noted this problem, 2) recommended that the roughly \$134,000 balance be used for the same purpose for which the rest of the Fund was used, and 3) recommended implementing its proposed remedy by amending the Plan's language to omit the \$500,000 trigger. The Department acknowledged the problem but argued that Qwest's proposed solution was precluded by Minnesota Statutes § 16A.151.

The Commission granted Qwest's request. The Department now seeks reconsideration of that decision.

## II. Party Comments

The Department questions the Commission's legal authority to grant Qwest's request. The Department notes that "[m]oney recovered by a state official in litigation or in settlement of a matter that could have resulted in litigation is state money and must be deposited in the general fund." Minn. Stat. § 16A.151, subd. 1(c). While Qwest defends the Order's finding that the Telecommunications Fund did not arise from litigation or settlement, the Department argues that the Fund not only could have arisen from litigation, but in fact did so.<sup>2</sup> Moreover, the Department argues that the Commission's interpretation of § 16A.151 could have unforeseen consequences beyond the context of the current docket.

The Department asks the Commission to apply § 16A.151 to the Telecommunications Fund even though that statute was not in effect when the AFOR Plan took effect. The Department notes that retroactive laws do not necessarily violate the U.S. Constitution.<sup>3</sup> But the Department acknowledges that determining whether § 16A.151 applies retroactively is a difficult question of legal interpretation, and agrees to defer to the Commission's judgment in this matter.

Finally, the Department requests clarification regarding the Commission's authority to amend the AFOR agreement.

---

<sup>2</sup> *In the Matter of an Investigation into U S WEST Communications, Inc.'s Service Quality*, Docket No. P-421/CI-95-648 ORDER ACCEPTING SETTLEMENT WITH MODIFICATIONS (May 2, 1996); ORDER DETERMINING PENALTY AMOUNT AND DEFERRING CONSIDERATION OF DISTRIBUTION (February 12, 1999).

<sup>3</sup> See, for example, *Energy Reserves Group, Inc., v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983).

### III. Commission Action

The Commission appreciates the Department's and Qwest's further development of the issues. Their arguments move the Commission to grant reconsideration of its ORDER AMENDING PLAN.

While the Commission had initially ruled that service quality penalties do not qualify as "[m]oney recovered by a state official in litigation or in settlement of a matter that could have resulted in litigation," the Commission concludes that this ruling was premature. It is not necessary to determine whether § 16A.151 governs AFOR service quality plans in general because it is clear that § 16A.151 does not apply to this AFOR plan in particular.

The AFOR Plan became effective in 1999; § 16A.151 was not adopted until 2001.<sup>4</sup> While the Department notes that the Constitution does not always prohibit giving statutes retroactive effect, Minnesota law bars applying a law retroactively unless the Legislature expressed a clear intent to the contrary.<sup>5</sup> The Commission finds no evidence of such Legislative intent regarding § 16A.151 either in the text of the statute or otherwise offered in the record of this case. Consequently the Commission concludes that § 16A.151 does not govern the disposition of the Telecommunications Fund.

Finally, the Department asks the Commission to state the circumstances under which it may amend an existing AFOR Plan. The Commission generally refrains from offering advisory opinions on hypothetical future cases and will maintain that policy here. The only matter currently before the Commission is the disposition of the Telecommunications Fund balance.

While § 16A.151 does not resolve this matter, neither do the terms of the AFOR Plan itself. The Plan simply failed to anticipate and provide for disposing of the Telecommunications Fund balance when the Plan expired. But the Plan is quite explicit about the purposes for which the funds are to be expended:

.... Failure to comply with a statewide standard results in payment to a telecommunications fund to be used to primarily benefit [Qwest]'s customers in the State of Minnesota through a telecommunications project or projects in [Qwest]'s local serving territory.

Selection of the projects will be made by the [Department] in consultation with the [Office of Attorney General] and [Qwest].... If the annual payment into the fund is less than \$500,000, monies shall be escrowed and allowed to accumulate until totaling \$500,000, at which time the Department shall issue [a request for proposal] soliciting project proposals....

---

<sup>4</sup> Laws 2001 Sp. Sess., chap. 10, art. 2 § 23; modified Laws 2002, chap. 379, art. 1 § 7-8; modified Laws 2003 Sp. Sess., chap. 1, art. 2, § 34, and chap. 2, art. 8, § 1.

<sup>5</sup> Minn. Stat. § 645.21.

The selected telecommunications projects shall meet the following criteria:

- a) The project shall benefit K-12 education, health care, or libraries using the support of the telecommunications services regulated by the Commission.
- b) The project shall utilize applications and require infrastructure compatible with [Qwest]'s and other interconnecting telecommunications networks, as required by the project, and shall utilize established industry network standards.
- c) The project shall be capable of implementation in six to twelve months.
- d) The project shall be capable of being financially and technically sustainable on its own merits.<sup>6</sup>

Given this detailed language, Qwest argued that the purpose for the Telecommunications Fund could not be disputed and that the \$500,000 term was merely designed for purposes of the Fund's ongoing administration. Now that the Plan has expired, Qwest argued, the Fund's ongoing administration is no longer relevant. Qwest asked that the balance be disbursed consistent with the Fund's purpose.

The Commission found Qwest's argument persuasive, and therefore granted Qwest's request to disburse the funds. Whether this remedy is characterized as amending the Plan or interpreting the Plan to address new circumstances, the outcome is the same.

Having reviewed the record of this case and the arguments of the parties, the Commission will reaffirm its decision to direct that the balance of the Telecommunications Fund be disbursed for the purposes for which it was collected.

### **ORDER**

1. The Department's motion to reconsider the Commission's ORDER AMENDING PLAN (August 4, 2005) is granted.
2. The Commission finds that Minnesota Statutes § 16A.151 does not apply retroactively to the terms of Qwest's Modified Alternative Form of Regulation Plan for the State of Minnesota (January 11, 1999) (AFOR Plan).
3. The Commission reaffirms that it and the Department shall disburse the funds remaining in the Telecommunications Fund for the purposes set forth in the AFOR Plan, Appendix B, part IV ("Penalties"), notwithstanding the fact that Fund contains less than \$500,000.

---

<sup>6</sup> AFOR Plan, Appendix B, pp. 16-17.

4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 201-2202 (voice), or 1-800-627-3529 (MN relay service).