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& P-421/C-07-371

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

In the Matter of Qwest Corporation's Conversion of UNEs to Non-UNEs

In the Matter of Qwest Corporation's Arrangements for Commingled Elements

RECOMMENDED ORDER ON MOTION FOR SUMMARY DISPOSITION

This matter is before Administrative Law Judge Kathleen D. Sheehy on Qwest's Motion for Summary Disposition, filed September 15, 2008. The motion record closed October 31, 2008, upon receipt of Qwest's Reply Memorandum.

Jason D. Topp, Qwest Corporation, 200 South Fifth Street, Room 2200, Minneapolis, MN 55402, appeared on behalf of Qwest. Dennis D. Ahlers, Associate General Counsel, Integra Telecom, 730 Second Avenue South, Suite 900, Minneapolis, MN 55402, appeared for Integra. Dan Lipschultz, Moss & Barnett, 4800 Wells Fargo Center, 90 South Seventh St., Minneapolis, MN 55402-4129, appeared on behalf of the CLEC Coalition. Linda S. Jensen, Assistant Attorney General, 445 Minnesota Street, Suite1400, St. Paul, MN 55101-2131, appeared on behalf of the Department of Commerce (Department).

Based upon all of the files, records, and proceedings herein, and for the reasons explained in the attached Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION AND ORDER

1. IT IS HEREBY RECOMMENDED that Qwest's Motion for Summary Disposition be DENIED.

2. IT IS HEREBY ORDERED that this Recommendation is certified for final decision to the Minnesota Public Utilities Commission.

Dated: December 9, 2008

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KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

The Minnesota Public Utilities Commission opened these dockets to further investigate issues that arose during the arbitration of an interconnection agreement between Qwest and Eschelon (now Integra). In the arbitration proceeding, Eschelon and Qwest disagreed about the appropriate language in the interconnection agreement relating to Qwest's processes and prices for converting unbundled network elements (UNEs)—which Qwest is no longer obligated to offer at TELRIC prices under § 251 of the Telecommunications Act of 1996—into services available (at higher prices) through Qwest's tariff or through a commercial agreement. In addition, the parties disagreed about the appropriate language relating to Qwest's processes and prices for providing commingled enhanced extended loops (EELs), which are composed of both a § 251 UNE (the loop) and a non-UNE facility (the transport circuit).

Qwest objected to the Commission's assertion of authority over these issues, and in its order referring this matter to the Office of Administrative Hearings, the Commission requested that Qwest's jurisdictional objections be addressed before any further proceedings take place.[1] The parties jointly agreed to defer consideration of these issues for a time in order to focus on other pending dockets.[2] They have slightly reframed the wording of the legal issues referred by the Commission.[3] And they have further agreed that Qwest's motion for summary disposition is the best procedural method for presenting these jurisdictional issues and that there are no genuine issues of material fact that would preclude resolution of these issues as a matter of law.[4]

Legal Issues

1. Does the Commission have authority with respect to issues arising over the rates, terms and conditions for conversions from UNE to non-UNE facilities? (Docket 07-370)

2. Does the Commission have authority with respect to disputes arising over the terms and conditions for the UNE and non-UNE components and the interrelationship of them in commingled arrangements? (Docket 07-371)

Arguments of the Parties

Qwest maintains that state commissions are limited to setting rates, terms, and conditions for UNEs and other services that incumbent local exchange carriers (ILECs) are required to provide pursuant to § 251. Because UNE conversions and commingled EELs involve non-251 services, state commissions lack authority to set rates, terms, and conditions for them. It maintains that a

[1] Notice and Order for Hearing (June 26, 2007).
[2] Joint Request for Continuance (September 21, 2007).
[3] Joint Statement of Legal Issues (May 29, 2008).
[4] First Prehearing Order ¶ 5 (September 12, 2007).

state commission's only authority with respect to these arrangements is to establish rates and terms for the UNE component of a commingled EEL, because that is the only component that is within a commission's § 251 authority. Qwest cites a variety of commission decisions and federal court decisions for the proposition that the arbitration authority of state commissions under § 252 only permits the imposition of terms and conditions for services and UNEs included within § 251. Accordingly, Qwest contends the commission "has no jurisdiction to determine how Qwest should provide the non-251 services used with UNE conversions or the non-251 services used with commingled EELs."[5] Qwest also maintains that the UNE and non-UNE components of commingled EELs are subject to different regulatory schemes and that Qwest cannot be compelled to provide the non-UNE elements and services under the "ultra-regulatory framework" of § 251. Finally, Qwest maintains that a state commission lacks jurisdiction to establish terms and conditions for interstate access services, because that is within the exclusive regulatory authority of the FCC.

Integra maintains that the FCC has explicitly addressed conversion processes and has made it clear that carriers are to negotiate those processes through the § 252 arbitration process and that state commissions have the obligation to address and resolve these issues through that process. In addition, Integra argues that the FCC has provided guidance on the pricing and procedures to be employed, indicating that conversion should be a "seamless" process that does not affect a customer's perception of service quality. Consequently, Integra contends the Minnesota Commission has not only the authority but the obligation to oversee this process under § 252. With regard to commingling, Integra maintains that because Qwest is obligated under § 251 to provide commingled EELs, the Commission has the authority to prohibit Qwest from erecting operational barriers that would make the process of ordering, provisioning, and repairing commingled EELs difficult or impossible for competitive local exchange carriers (CLECs) to use. Both Integra and the CLEC Coalition urge the Commission to follow the approach taken by the Washington State Utilities and Transportation Board, which concluded that conversions and commingled arrangements fall within the arbitration authority of state commissions.[6]

The Department contends that Qwest has overstated the distinction between § 251 and non-251 elements, maintaining that conversion involves the process of moving a § 251 element to a different status and that all activities involved in the process therefore relate to the cost, provisioning, and pricing of § 251 UNEs, over which the Commission has exclusive authority. The Department also argues that the Commission has independent authority under state law to ensure that the wholesale pricing of converting and commingling non-251 elements is fair and reasonable.

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[5] Qwest Memorandum in Support of Motion for Summary Disposition at 9.

[6] *In the Matter of the Petition of Qwest Corporation and Eschelon Telecom, Inc.*, Order No. 18, Commission's Final Order at ¶¶ 68-70, 92-108, Docket No. UT-063061 (WUTC Oct. 16, 2008).

Analysis

Under 47 U.S.C. § 251, ILECs are required to negotiate in good faith the terms and conditions of interconnection agreements with CLECs and to lease certain network facilities at TELRIC rates. If an agreement cannot be negotiated, the Act requires that unresolved § 251 disputes be submitted to arbitration, subject to oversight by state public service commissions. Initially, the FCC took the position that ILECs had to "unbundle" and provide most basic network elements at TELRIC prices. Since then, the FCC has changed its analysis of unbundling and interconnection obligations and has progressively limited the number of network elements ILECs must provide under § 251. Those changes were announced in 2003, in the Triennial Review Order (TRO),[7] and in 2005, in the Triennial Review Remand Order (TRRO).[8] The issues in this case arise as a result of the FCC's de-listing of certain § 251 elements in those orders, which have required ILECs and CLECs to address both the conversion of a product originally provided as a UNE to an alternative service arrangement and the commingling of a UNE with another product.

Conversions

In a section of the TRO addressed to the scope of unbundling obligations, the FCC addressed conversion issues as follows:

> We decline the suggestions of several parties to adopt rules establishing specific procedures and processes that incumbent LECs and competitive LECs must follow to convert wholesale services (e.g., special access services offered pursuant to interstate tariff) to UNEs or UNE combinations, and the reverse, *i.e.*, converting UNEs or UNE combinations to wholesale services. Because both the incumbent LEC and requesting carriers have an incentive to ensure correct payment for services rendered, and *because both parties are bound by duties to negotiate in good faith, we conclude that these carriers can establish any necessary procedures to perform conversions with minimal guidance on our part*.[9]
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> . . . Converting between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the customer's perception of service quality. We recognize that conversions may increase the risk of service disruptions to

[7] Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003), *vacated in part, remanded in part*, *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C.Cir. 2004) (TRO).
[8] Order on Remand, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd. 2533 (2005), *aff'd, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (TRRO).
[9] TRO ¶ 585 (emphasis added) (footnote omitted).

> competitive LEC customers because they often require a competitive LEC to groom interexchange traffic off circuits and equipment that are already in use in order to comply with eligibility criteria. Thus, *requesting carriers should establish and abide by any necessary operational procedures to ensure customer service quality is not affected by conversions*.[10]
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> . . . We recognize . . . that once a competitive LEC starts serving a customer, there exists a risk of wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time. We agree that such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an incumbent LEC as a result of converting a UNE or UNE combination to a wholesale service. Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions. Moreover, we conclude that such charges are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any person or class of persons (e.g., competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or advantage.[11]
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> We conclude that conversions should be performed in an expeditious manner in order to minimize the risk of incorrect payments. *We expect carriers to establish any necessary timeframes to perform conversions in their interconnection agreements or other contracts*.[12]

Qwest argues, creatively, that the TRO addressed only the reverse of the situation here—conversions from wholesale non-251 services to Section 251 UNEs—and that the absence of codified regulations governing conversions to non-251 services underscores the fact that state commissions lack authority over this process.[13] On the contrary, the FCC could not have been more clear in its direction that conversion processes include both the procedures to convert wholesale services to UNEs "and the reverse, *i.e.*, converting UNEs or UNE combinations to wholesale services."[14] The FCC clearly envisioned that the availability of an element as a UNE might change, depending on other

[10] TRO ¶ 586 (emphasis added) (footnotes omitted).
[11] TRO ¶ 587 (footnotes omitted).
[12] TRO ¶ 588 (emphasis added).
[13] Qwest Reply Memorandum at 4-5.
[14] TRO ¶ 585.

circumstances, and that ILECs and CLECs should be prepared to shift their billing for these elements between prices set in interconnection agreements and those contained in long-term commercial contracts.[15] The FCC did not adopt rules for the conversion process because it determined the parties should negotiate these terms in good faith in their interconnection agreements.

Moreover, in the TRRO the FCC reaffirmed the validity of its existing rules governing conversions and commingling in the situation where one element used as part of an EEL (dedicated transport) is no longer subject to unbundling pursuant to section 251(c)(3).[16] It also declined to prohibit conversions entirely, as requested by Bell Operating Companies (including Qwest), in part because of the difficulty CLECs have in purchasing circuits as UNEs:

> For example, competitive LECs demonstrate that they often must purchase special access circuits because they encountered difficulties in purchasing the circuits as UNEs. In those cases, the competitive LECs accept special access pricing in order to provide prompt service to their customers, then convert those circuits to UNEs as soon as possible. Competitive LECs also explain that they may purchase special access services as part of a broader contract, which enables them to avoid having to coordinate connectivity through the access service request and local service request processes. But that option is available only because the availability of UNEs gives the competitive LECs leverage to negotiate lower prices for tariffed services.[17]

The Administrative Law Judge has concluded, based on the provisions of the TRO and the TRRO, that the FCC has expressly directed the negotiation of rates, terms, and conditions relating to conversion processes in interconnection agreements, and consequently the Commission has legal authority under § 252 to address these issues in this docket.

Commingling

At one point in time, the FCC had restricted the obligation of an ILEC to "commingle" UNEs and combinations of UNEs with tariffed services; in the TRO, the FCC eliminated this restriction. The TRO provides, in relevant part:

> We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (e.g., switched and special access services offered pursuant to tariff), and *to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request*.

[15] TRO ¶ 587.
[16] TRRO ¶ 142 n. 398 (citing TRO ¶¶ 585-89 (conversions) and ¶¶ 579-84 (commingling)).
[17] TRRO ¶ 231.

> By commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services.[18]
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> . . .
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> We conclude that the Act does not prohibit the commingling of UNEs and wholesale services and that section 251(c)(3) of the Act grants authority for the Commission to adopt rules to permit the commingling of UNEs and combinations of UNEs with wholesale services, including interstate access services. An incumbent LEC's wholesale services constitute one technically feasible method to provide nondiscriminatory access to UNEs and UNE combinations. . . . For these reasons, we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations.[19]

Finally, the FCC addressed arguments advanced by incumbent LECs that commingling should be prohibited because of the billing and operational issues involved in commingling a UNE with an interstate access service. It concluded that these issues could be addressed "through the same process that applies for other changes in our unbundling requirements adopted herein, i.e., through change of law provisions in interconnection agreements."[20] As noted above, the FCC reaffirmed the validity of these commingling rules in the TRRO.[21]

Qwest's argument that the Commission lacks authority is based more on semantics than on any substantive analysis of a state commission's legal authority to address the terms and conditions under which an ILEC is obligated to provide commingled facilities. It does not appear to the ALJ that Integra has advocated contract language that would impermissibly require Qwest to provide transport or any other non-251 facility as a UNE or at a TELRIC rate.[22] What

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[18] TRO ¶ 579 (emphasis added).
[19] TRO ¶ 581 (footnotes omitted).
[20] TRO ¶ 583.
[21] TRRO ¶142 n. 398.
[22] *See* Integra Memorandum at 6 (UNE component of a commingled EEL is priced at TELRIC; the non-UNE may be priced at a tariffed or other non-UNE rate). *See also In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an interconnection Agreement with Qwest Corporation*, Arbitrator's Report at PP 46, 48 (Dec. 15, 2004), adopted by Minnesota Public Utilities Commission, Docket No. P-5692, 421/IC-04-549 (Mar. 14, 2005) (declining to characterize non-251 elements and services as UNEs or to require their provision at TELRIC rates); *Qwest Corp. v. Arizona Corporation Commission*, 496 F.Supp.2d 1069 (D. Ariz. 2007) (state commission cannot require unbundling of non-251 elements or require their provision at TELRIC rates as a matter of state law); *Bellsouth Telecommunications, Inc., v. Kentucky Public Service Commission*, 2007 WL 2736544 (E.D. Ky.) (state commission cannot arbitrate rates for switching, a non-251 element).

Integra has disputed are the duplicative operational processes involved in ordering, provisioning, billing, and repairing UNEs separately from interstate access services, maintaining these processes constitute an operational barrier to obtaining access to a UNE. The FCC has clearly stated that these are the types of issues to be addressed in interconnection agreements, and the Administrative Law Judge accordingly concludes the Commission has the legal authority under § 252 to resolve issues in this docket relating to the terms and conditions under which Qwest provides commingled elements and services.

Based on the agreement of the parties, the Administrative Law Judge hereby certifies this Recommended Order to the Commission for its consideration and final order pursuant to Minn. R. 1400.7600 A & B before any further proceedings take place in this docket.[23]

K.D.S.

[23] Fourth Prehearing Order (June 27, 2008).