

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: U S WEST COMMUNICATIONS, INC. (n/k/a QWEST CORPORATION)	DOCKET NO. RPU-00-1 (TF-00-64)
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**ORDER SUSTAINING OBJECTIONS TO
CONSIDERATION OF CERTAIN REMANDED ISSUES**

(Issued August 2, 2000)

INTRODUCTION AND SUMMARY

On March 15, 2000, U S WEST Communications, Inc., n/k/a Qwest Corporation (Qwest)¹, filed a proposed tariff identified as TF-00-64 in which Qwest proposes to deaverage its wholesale and retail rates in Iowa. On April 14, 2000, the Utilities Board (Board) issued an order suspending the tariff and docketing the matter for investigation.

On June 22, 2000, the Board issued an order in this docket revising the procedural schedule and giving the parties notice that the Board intended to consider several issues in this docket that were the subject of a remand order from the federal district court in its review of the Board's first UNE cost order. Several parties filed objections to the perceived expansion of the scope of this proceeding. Because of the state of the record in this docket, the limited time available to the Board to

¹ On June 30, 2000, U S WEST Inc., the parent company of U S West, merged with Qwest Inc. Effective that date, the Iowa operating entity changed its name from U S WEST Communications, Inc., to Qwest Corporation.

complete geographic deaveraging of Qwest's wholesale rates, and a recent decision by the Eighth Circuit Court of Appeals, the Board will sustain the objections of the various parties and clarify the scope of this docket.

BACKGROUND

On March 15, 2000, Qwest filed a proposal to geographically deaverage its rates for interconnection and UNEs, pursuant to 47 CFR § 51.507(f), and to begin deaveraging some of its retail rates. Qwest proposed to use the cost model and inputs adopted by the Board in Docket No. RPU-96-9 as the basis for its deaveraged interconnection and UNE rates.

The rates from that 1996 docket, which were incorporated into arbitrated interconnection agreements, were the subject of judicial review in the federal district court. The district court ultimately found that the Board's cost model and inputs did not comply with the FCC requirement that UNE rates be based upon TELRIC methodology². The court remanded the cost issue, and a variety of other issues, to the Board for further proceedings.

In this docket, QWEST proposes use of the same cost model and inputs as the basis for deaveraging its UNE loop rate.

² U S West Communications, Inc., v. Thoms, et al., Civil No. 4097-CV-70082, "Orders Affirming Some Provisions Of The Interconnection Agreements And Remanding Others," issued January 25, 1999, and "Memorandum Opinion, Ruling Granting AT&T's And MCI's Motion For Reconsideration And Order Amending Judgment," issued April 19, 1999. Those orders are now on appeal in the Eighth Circuit; the appeal has been stayed pending rulings in other, related cases, as discussed below.

On or about April 4, 2000, AT&T Communications of the Midwest, Inc. (AT&T), McLeodUSA Telecommunications Services, Inc. (McLeodUSA), Goldfield Access Network, L.C. (Goldfield), and Crystal Communications, Inc. (Crystal), each intervened in this docket and objected to Qwest's proposal. Among other objections, AT&T argued that the Board should not attempt to set final deaveraged rates in this docket, but instead should set only temporary rates to be followed by another proceeding in which cost methodology and other issues could be examined.

On April 14, 2000, the Board issued an order docketing this case and expressly rejecting AT&T's proposal to set temporary rates. It appears, however, that AT&T and the other intervenors continued to prepare their cases on the assumption that the Board will only be setting temporary rates in this docket, rather than permanent ones.

On June 22, 2000, the Board issued an order revising the procedural schedule and giving all of the parties express notice that the Board intended to consider in this docket all of the issues remanded to the Board by the court.

THE OBJECTIONS

On June 28, 2000, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) and AT&T filed objections to the Board's June 22 order, arguing that the Board should not include in this proceeding a review of Qwest's cost methodology. Consumer Advocate identified several other issues that

were remanded to the Board for further consideration and suggested that these issues should also be considered beyond the scope of this proceeding, which should be focused on the issue of geographic deaveraging.

AT&T repeated its earlier argument that the Board should only address deaveraging issues in this docket, leaving cost issues to an unspecified future proceeding. AT&T notes that the status of the FCC's TELRIC rules is currently "unsettled," suggesting the Board may prefer to await decisions on those rules before beginning the remand proceedings.

Consumer Advocate also filed an alternative motion for an extension of time, arguing that if the Board intends to consider cost issues in this docket, it should first require that QWEST file testimony in support of its cost calculations, followed by at least ten weeks for Consumer Advocate and the other parties to analyze and respond to Qwest's case.

Subsequently, Goldfield and Crystal joined in both of Consumer Advocate's and AT&T's objections, while McLeodUSA joined in Consumer Advocate's objection.

On July 12, 2000, Qwest filed a response to the Consumer Advocate and AT&T objections, arguing that the UNE pricing issues are appropriately addressed in this docket. Qwest notes that the court's remand order holds that the Board's pricing approach complies with the statutory standards of 47 U.S.C. §§ 251(c) and 252(c). The court's remand is only to comply with the FCC regulations interpreting

those statutes, and those pricing rules were, at the time of the Qwest filing, still being reviewed by the Eighth Circuit Court of Appeals.

Qwest further argues that the Board used AT&T's own Hatfield model in Docket No. RPU-96-6, with some different inputs, so AT&T cannot now argue that the resulting rates are not cost-based.

Qwest also argues that the Board does not need to create a new cost record in this case because it can address the cost issues on the basis of the record made in Docket No. RPU-96-9.

Finally, Qwest argues that the other issues remanded by the court to the Board are either moot or are already being addressed in another docket, so they will not complicate this docket. Qwest states that it already provides UNE combinations and dark fiber to CLECs, so those remanded issues are moot. The other remanded issues are being addressed in the Board's § 271 and SGAT dockets, according to Qwest.

THE INITIAL TESTIMONY

On July 3, 2000, Consumer Advocate, AT&T, Goldfield, Crystal, and McLeodUSA each filed prepared direct testimony in this docket. Some of that testimony is consistent with the theory of the case advanced by AT&T and Consumer Advocate; that is, that the Board should set deaveraged rates in this docket based upon the cost methodology used in Docket No. RPU-96-9. However, the testimony of at least two parties appears to be inconsistent with that theory.

First, the direct testimony of Darrell Seaba, filed by Goldfield Access Network, appears to be inconsistent with the approach supported by AT&T and Consumer Advocate. Mr. Seaba argues that because Qwest's supporting cost studies are not based on the FCC's TELRIC methodology, Qwest's proposed geographically deaveraged UNE rates are unjust, unreasonable, and unlawful. (Seaba Dir. Test. at p. 8.) Goldfield argues the Board must use the proxy rates set by the FCC in its First Report and Order in 1996; because those proxy rates are geographically averaged into a single, statewide rate, Goldfield argues the Board must then deaverage that proxy rate and apply those rates until a full cost case, using TELRIC methodology, can be completed.

Similarly, the testimony of Milo DePhillips, filed by Crystal, argues that the cost studies filed by QWEST have already been found to be inconsistent with the FCC's regulations and "it would not seem appropriate to allow this type of cost study to continue to be utilized; [sic] thereby perpetuating illegal rates." (DePhillips Dir. Test. at p. 6.)

Thus, both Goldfield and Crystal have filed direct testimony stating that the Board cannot use the approach favored by AT&T and Consumer Advocate; that is, setting deaveraged rates based upon the cost studies that the federal district court remanded to the Board because they were not TELRIC. However, on June 29, 2000, Goldfield and Crystal expressly joined in the objections of both AT&T and Consumer Advocate, stating that they "hereby restate all those arguments contained in said objections." It appears that their decision to join in those

objections, which contemplate setting deaveraged rates based on the Board's earlier cost studies, constitute a waiver of their argument that the Board must use the FCC proxy rates at this time.

THE EIGHTH CIRCUIT DECISION

On July 18, 2000, the United States Court of Appeals for the Eighth Circuit issued its decision in Iowa Utilities Board, et al., v. Federal Communications Comm'n and United States of America, No. 96-3321 (and consolidated cases). This is not the same case as the appeal from the Board's initial UNE rate decision, but it is a different case in which the Court considered the FCC's TELRIC rules and proxy rates, among other issues. The Court vacated and remanded the FCC's rule 51.505(b)(1)³, which requires the use of TELRIC for setting UNE rates. The Court found the federal statute does not permit use of TELRIC's hypothetical network for determining an incumbent local exchange carrier's UNE rates. (Slip op. at pp. 4-8.) The Court also vacated the FCC's proxy rate rules⁴, finding that the FCC disavowed the proxy prices before the United States Supreme Court and is therefore judicially estopped from reviving those prices; that the FCC does not have jurisdiction to set the UNE prices that state commissions must use; and that the proxy prices rely on the same hypothetical network (and definition of "avoided retail costs") that the Court had already found to be violative of federal law.

³ 47 C.F.R. § 51.505(b)(1).

⁴ 47 C.F.R. §§ 51.513, 51.611, and 51.707.

ANALYSIS

Given the approach taken by all of the intervenors in their direct testimony, the Board believes it is unlikely an adequate record will be developed in this case, within the existing procedural schedule, to permit the Board to fully address the UNE cost issues remanded to it by the federal district court. This leaves three alternatives:

1. The Board can continue to try to consider and resolve all of the remanded issues in this docket. This approach has the advantage of resolving all UNE pricing issues in a single docket; however, it would require setting a new, extended procedural schedule, with Qwest filing new cost studies and supporting testimony and an opportunity for each of the other parties to respond to Qwest and to file their own proposals. The resulting extension of the procedural schedule would require filing a motion with the Federal Communications Commission (FCC) for at least another six-month extension of time to implement geographically-deaveraged wholesale rates.

Moreover, it is unclear what standards the Board would be required to apply to any new cost studies. The remand from the federal district court requires that the Board use the FCC's TELRIC methodology, but the recent Eighth Circuit decision vacates and remands the FCC's TELRIC rules. It appears it would be an inefficient use of the resources of the Board and the parties to conduct a full-scale UNE and wholesale cost review at this time, when the standards applicable to that review are uncertain.

2. The Board can accept the Goldfield and Crystal argument that the existing cost studies are illegal and use the FCC's proxy rates as a starting point for setting temporary deaveraged rates for Qwest. However, the FCC's proxy rates were vacated by the recent Eighth Circuit decision and are no longer available to the Board.

Even if the proxy rates were still available to the Board, this alternative would have significant disadvantages that would lead the Board to reject it. If the Board were to adopt the proxy rates, it is likely that Qwest and Consumer Advocate, and perhaps other parties, would seek time to file additional testimony concerning the possible impact of the proxy rates on Qwest, its retail and wholesale customers, and local exchange competition in Iowa. Again, this would require returning to the FCC for an additional extension of time to set deaveraged UNE rates for Qwest.

3. The Board can set deaveraged rates based upon the cost studies from Docket No. RPU-96-9, with the possibility of having to re-visit those rates in some future, full-blown cost case. This approach has the advantage of permitting the Board to maintain the existing procedural schedule and provides the simplest case in this docket. The disadvantage is that it may be necessary to conduct yet another Qwest UNE rate case in the future, depending upon the final outcome of the various judicial review proceedings. However, it is also possible that the Board may not have to conduct a future cost proceeding using TELRIC or some other cost methodology, given the recent decision of the Eighth Circuit; if the Board's original

determination of Qwest's (then U S West's) UNE costs is affirmed by the Court, then there will not be any need to revisit that determination on remand⁵.

The Board will choose alternative 3, above, and hereby states that the issue in this case is how the Board should set deaveraged UNE rates based upon the cost studies used in Docket No. RPU-96-9. The other issues remanded to the Board by the federal district court will be left to future proceedings if necessary.

ORDERING CLAUSE

IT IS THEREFORE ORDERED:

The objections filed in this matter by AT&T Communications of the Midwest, Inc., and the Consumer Advocate Division of the Iowa Department of Justice on June 28, 2000, are sustained.

UTILITIES BOARD

/s/ Allan T. Thoms

/s/ Susan J. Frye

ATTEST:

/s/ Sharon Mayer
Executive Secretary, Assistant to

/s/ Diane Munns

Dated at Des Moines, Iowa, this 2nd day of August, 2000.

⁵ This does not mean the Board would never have to revisit Qwest's UNE rates; it only means the Board would not have to do so until such time as there is reason to believe the UNE rates should be changed.