Decision No. C03-1352

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03B-287T

IN THE MATTER OF PETITION OF QWEST CORPORATION FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. AND TCG-COLORADO PURSUANT TO 47 U.S.C. § 252(b).

DECISION GRANTING, IN PART, APPLICATION FOR REHEARING, REARGUMENT, OR RECONSIDERATION

Mailed Date: December 4, 2003
Adopted Date: November 19, 2003

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I. BY THE COMMISSION

A. Statement

1. On November 6, 2003, AT&T Communications of the Mountain States, Inc., and TCG-Colorado (collectively, AT&T) filed an Application for Rehearing, Reargument, or Reconsideration (RRR) to Decision No. C03-1189. In that decision, we arbitrated disputes between Qwest Corporation (Qwest) and AT&T, and directed the parties to enter into an interconnection agreement consistent with our rulings in the decision. Now being duly advised in the premises, we grant, in part, the application for RRR by AT&T. Except as discussed below, we deny the application for RRR.

II. DISCUSSION

A. Issue 3 – Section 4.0: Definition of Tandem Office Switch

2. AT&T requests that the Commission reconsider: 1) the decision on the definition of Tandem Office Switches; and 2) the Hearing Commissioner's determination that a decision would not be made in the arbitration docket whether AT&T's switches are tandem switches for purpose of reciprocal compensation.[1]

3. AT&T raises concern that the Commission has defined Tandem Office Switch in terms of End Office Switches. AT&T reminds us that it does not generally have "End Office Switches"; instead it has only a single switch that serves a much larger area. AT&T asserts that the issue is whether Qwest should pay AT&T the tandem rate when AT&T's switches are "capable of serving" a comparable geographic area as those served by Qwest's tandem switches.

4. AT&T contends that the Commission may have ignored the relevant evidence related to this issue and that the Commission might have given too much weight to the

[1] *See* Decision No. R03-1099-I.

"imbalance of traffic" arguments presented by the parties. AT&T argues that balance of traffic is irrelevant to resolution of this issue. AT&T asserts that the relevant evidence is the precise geographic scope of AT&T's switches. AT&T cites Federal Communications Commission (FCC) orders as establishing what relevant evidence should be considered by states.

5. AT&T also contends the reasons the Commission expressed for not being bound by the Virginia arbitration ruling are contrary to law. AT&T asserts that with the Virginia arbitration ruling the FCC interpreted its rule and it need not "change the language" of the rule or "extend the ruling" to all other situations in order to make the interpretation valid for future use in similar situations. We reject these arguments.

6. We understand that AT&T's network is not the same as Qwest's network. The Commission relied on the fact that the parties agreed on language for the interconnection agreement defining "End Office Switches" as switches used to terminate End User Customer station loops, or equivalent, for the purpose of interconnecting to each other and to trunks. Both parties also agreed on language that "Tandem Office Switches" are competitive local exchange carrier (CLEC) end office Switch(es).

7. We did not give too much weight to the "imbalance of traffic" arguments. The initial decision merely summarizes the main arguments that the parties offered to support their positions. Clearly, the decision indicates that the Commission gave weight to past decisions on this same issue.

8. We also affirm our conclusion that we are not bound by the Virginia arbitration in this case.

9. We find that the hearing commissioner properly denied AT&T's request that the Commission make a determination in this arbitration as to whether AT&T's switches are tandem switches. That decision is best left to the parties to agree on after a definition is established for the interconnection agreement. If the parties cannot agree, the Commission's complaint process should be used to resolve that disagreement.

10. In general, AT&T has not offered any arguments that the Commission did not consider when making the initial decision on this issue.

11. Therefore, we deny the requests to reconsider the definition of Tandem Office Switches and the decision not to determine in this arbitration docket whether AT&T's switches are tandem switches.

B. Issue 5 – Section 4.0: Definition of Exchange Service and, if Qwest's definition is adopted, whether access charges should be imputed for Foreign Exchange Service.

12. AT&T requests that the Commission reconsider its decision on the definition of Exchange Service or Extended Area Service (EAS)/Local Traffic. AT&T asserts that the entire industry, including Qwest, violates this definition in relation to numerous services and, importantly, the way calls are currently rated and routed today. All carriers route and rate calls by matching NPA-NXXs today. AT&T states that this is not a new practice, nor does this practice violate the Central Office Code Assignment Guidelines (COCAG) or the Numbering Resource Utilization/Forecast (NRUF) requirements. In fact, AT&T claims, there is no way to geographically route and rate calls by street address or local calling area boundaries.

13. According to AT&T, the issue here is whether Qwest may claim for its FX-like and other competing services the COCAG exception, while attempting to preclude its

competitors from claiming the same exception for their competing services. Neither carrier (Qwest or AT&T) requires callers to FX or VNXX customers to pay toll charges, and neither carrier requires FX or VNXX customers to pay toll costs through imputation of access charges, especially in the case of Qwest.

14. AT&T asks the Commission to reconsider its resolution of this issue, and state expressly whether or not it has asserted jurisdiction over ISP-bound traffic in this context.

15. We deny these requests. AT&T does not present new argument for this issue in its application for RRR. We made a decision on this dispute understanding that calls are rated and routed based on NPA-NXX. That practice does not need to change because of the ordered definition of Exchange Service or Extended Area Service(EAS)/Local Traffic. Our decision retains the tie between the NPA-NXX and the rate center to which it is assigned. The separation of the rate center and the NPA-NXX is what violates the COCAG and NRUF guidelines. We stated in the original decision that this definition is applicable to both AT&T's and Qwest's traffic. That is, if either carrier's traffic does not originate and terminate in a local calling area, that traffic is interexchange.

16. As for ISP-bound traffic and this Commission's jurisdiction, we stated in the initial order, and in prior arbitration decisions, that ISP-bound traffic is interstate in nature. Paragraph 86 of the initial order states: "ISP-bound traffic is interstate in nature. This Commission has previously made this finding in various arbitration and § 271 proceedings. While the language might not be necessary to include in a contractual sense, **it is a true statement** and might add some clarity to the parties' responsibilities"(emphasis added). We do not believe there is a need to go beyond that statement in the initial order

17. We deny the request to reconsider the definition of Exchange Service or Extended Area Service (EAS)/Local Traffic.

C. Issue 15 – Section 7.3.1(b): Reciprocal Compensation – Cost of Interconnection Transport and Termination when Private Line is Used for Interconnection Traffic; and

Issue 16 - Section 7.3.1.1.2: Reciprocal Compensation – Inclusion of Relative Use Factor in the Rate for Private Line Transport Service

18. AT&T requests reconsideration of the decision that Qwest should not share in the cost when private line transport service (PLTS) is used to carry local traffic, and that Qwest's local traffic over AT&T's PLTS should not be accounted for in calculating the relative use factor.

19. AT&T argues that the decision denies fair compensation for use of PLTS because such use is not required but instead is an efficient means of interconnection for both parties, and that this is "simply inequitable, unjust and unreasonable in violation of both state and federal law."

20. AT&T contends that this use does not mean that AT&T does not incur costs to transport Qwest traffic, nor does it mean that Qwest is not being paid for the entire cost of PLTS. AT&T further contends that Qwest cannot charge an additional rate for this type of use of PLTS because it would over-recover the cost of the PLTS. AT&T argues that it should not be forced to provide Qwest with a free-ride for the privilege of employing trunking facilities (PLTS) in an efficiently sound matter that is consistent with the use contemplated by the Statement of Generally Available Terms and Conditions (SGAT). We reject these arguments.

21. The Commission's decision is not "inequitable, unjust, and unreasonable." If Qwest's SGAT did not allow AT&T to opt to carry local traffic over spare capacity in facilities that it leases to carry long distance traffic, AT&T would incur additional costs to lease facilities

to carry that local traffic. The Commission is not forcing AT&T to provide Qwest with a free-ride. AT&T makes a choice not to lease additional facilities to carry local traffic, but instead to carry that local traffic over spare capacity in its already leased PLTS facilities. Qwest local traffic is a given when AT&T designates that PLTS facilities should be configured to carry two-way traffic.

22. A review of the statutes cited by AT&T indicates that our decision on this issue is not in violation of state and federal law.

23. AT&T has not offered any arguments that the Commission did not consider when making the initial decision on this issue.

24. We deny the requests to reconsider our decision that Qwest should not share in the cost when PLTS is used to carry local traffic, and that Qwest's local traffic over AT&T's PLTS should not be accounted for in calculating the relative use factor.

D. Issue 19 – Sections 7.3.6.1 and 7.3.6.2.1: ISP-Bound Traffic, UNE-P Minutes, and the 3:1 Ratio of Terminating to Originating Traffic

25. In its application for RRR for Issue 19, AT&T only addresses the Commission's decision on the zero rate for ISP-bound traffic.

26. AT&T claims that it is not clear precisely what the Commission bases its decision upon or why the decision is "pro-competition and anti-subsidy" between carriers with relatively balanced traffic. AT&T states that the Commission, without reference to facts or law, has apparently concluded that its determination in prior arbitrations – that certain CLECs must employ a zero rate – means that it has made such a determination for "all LECs" across the state.

However, AT&T asserts that the sheer volume of differing interconnection agreements and previous versions of the SGAT does not support such a conclusion.

27. AT&T states that the Commission could believe that it was not preempted from setting reciprocal compensation below FCC caps even after the FCC expressly stated that "state commissions will no longer have authority to address this issue."

28. According to AT&T, the Ninth Circuit court has also found that state commissions are pre-empted, noting that the California PUC was precluded from filling in the gaps related to interstate traffic including ISP traffic.

29. AT&T argues: if the Commission is relying on paragraph 80 of the *ISP Remand Order,* which describes the FCC's desired transition to bill and keep, it does not, as a legal matter, reinstate the state commission's authority to determine the appropriate compensation for ISP-bound traffic. The FCC itself decided not to "flash cut" to a bill and keep regime as this Commission seems to be attempting.

30. AT&T states that the Commission may wish to make clearer the reasoning behind its decision on the zero rate for ISP-bound traffic or, alternatively, reconsider it.

31. We deny these requests. AT&T does not present new argument on this issue. The opportunity for arbitrage still exists even if AT&T/Qwest traffic is 2:1. Arbitrage is arbitrage. If AT&T is allowed to charge for the termination of this traffic, it would further incent AT&T to widen the ratio of terminating to originating minutes of use. If the ratio remains at 2:1, or comes closer to 1:1 in the future, AT&T should care even less about a bill and keep arrangement.

32. As for our jurisdiction over compensation for ISP-bound traffic, this issue was put before us for a decision by both parties in this arbitration. As stated in the initial decision, "The FCC made clear that state commissions are not pre-empted from setting reciprocal compensation below those caps."

33. We deny the requests to reconsider our decision that ISP-bound traffic should be billed at a zero, or bill and keep, rate.

E. Issue 21 – Section 7.3.8 (Billing for traffic that does not carry Calling Party Number (CPN)):

1) **Should the threshold for traffic without CPN be 90 percent or 95 percent?**
2) **If the originating party passes CPN on less than the threshold amount, should those calls passed without CPN be billed as intraLATA switched access or based on a percentage local usage? and**
3) **Is the transit provider responsible for no-CPN traffic originated by third parties?**

34. For purposes of the application for RRR, AT&T only addresses the decision on the transit traffic, Issue 21 (3).

35. AT&T states that Qwest simply does not want to cooperate with AT&T so that CPN-less traffic can be properly identified and billed. Instead it argues that it has no legal obligation to allow transit traffic. AT&T does not suggest that Qwest be responsible for such traffic if it merely identifies the originating carrier. If it refuses, it should pay for such traffic because the traffic becomes no different than CPN-less traffic that originates on Qwest's network.

36. AT&T asserts that the Commission's decision essentially allows Qwest to bill the originating carrier, but denies the terminating carrier (AT&T) the right to discover from whom

the traffic originates so that it too can bill for such traffic. AT&T states that from a policy and a legal perspective this is inequitable, unjust, and unreasonable.

37. AT&T also claims that in addition to allowing Qwest to hide the identity of the originating carrier, the Commission concurs with Qwest's assessment that it has no legal obligation to allow AT&T to connect with other carriers through Qwest's network. This notion is contrary to the industry's course of conduct in transiting traffic for each other for years. AT&T disagrees with Qwest's assessment; AT&T and others have the right, pursuant to § 251(a)(1) of the Act, to interconnect directly or indirectly with the facilities and equipment of other carriers. Upon recommendation, AT&T believes the Commission should agree that all carriers should have reciprocal obligations to transit traffic to one another.

38. Finally, AT&T states that whether Qwest will transit traffic to and from AT&T is a "red herring" because it is not even an issue in this arbitration. Qwest agrees in the proposed interconnection agreement to transit traffic, and there are terms by which Qwest will be compensated. The transit question under Issue 21 simply seeks to have Qwest provide information that allows AT&T to bill the originating carrier when Qwest does transit traffic to AT&T.

39. We deny this request for reconsideration. AT&T presents no new arguments and, in fact, has misstated the initial decision. Our decision did not state that Qwest has no legal obligation to transit traffic for other carriers. Our decision stated that Qwest does not have a legal obligation to pay AT&T for transited traffic that has no CPN information. We also stated that it is within AT&T's business discretion to choose not to have Qwest transit traffic, but rather to

interconnect directly with other carriers. Paragraph 124 of our initial decision makes no mention of Qwest's transit obligations.

40. We deny the request to reconsider our decision that Qwest as the transit provider does not have an obligation to pay for CPN-less traffic.

F. Issue 35 – Sections 22.1: Pricing

41. AT&T requests reconsideration of the decision to adopt Qwest's proposed language instead of AT&T's for § 22.1, General Principle.

42. AT&T contends that the Commission erred in finding that AT&T has no relevant tariffs on file with the Commission. AT&T notes that it does have such tariffs.

43. AT&T argues that the Qwest language approved by the Commission is inappropriate because it requires AT&T to charge Qwest's Total Element Long Run Incremental Cost-based charges for non-interconnection services. AT&T asserts that the issue is whether AT&T has the same obligations as Qwest, the incumbent local exchange carrier, under the Telecommunications Act.

44. AT&T is correct in that it does have interconnections tariffs and price lists on file with the Commission. In reviewing the Qwest language that we approved, we conclude that the phrase at the beginning of the second sentence, "To the extent applicable," is inappropriately vague. Clearly, AT&T interprets the language to mean that it would be obligated to charge the Qwest prices for interconnection services that are not subject to reciprocal compensation. However, AT&T's proposed language is also vague. Therefore, we will modify the language for § 22.1.

45. We approve the following language for § 22.1:

> **22.1 General Principle**
>
> The rates in Exhibit A apply to the services provided by Qwest to CLEC pursuant to this Agreement. The rates in Exhibit A also apply to reciprocally compensated interconnection services provided by CLEC to Qwest pursuant to this Agreement. To the extent that CLEC provides services to Qwest, other than reciprocally compensated interconnection services, CLEC may apply its tariffed rates.

III. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration by AT&T Communications of the Mountain States, Inc., and TCG-Colorado is granted, in part only, and is otherwise denied.

2. The 20-day period provided for in § 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this Decision.

3. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING November 19, 2003.

(S E A L)

ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

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JIM DYER

Commissioners

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