

Decision No. R04-0091-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03F-534T

SUNWEST COMMUNICATIONS, INC.,

COMPLAINANT,

V.

QWEST CORPORATION,

RESPONDENT.

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
WILLIAM J. FRITZEL
DENYING MOTION TO DISMISS**

Mailed Date: January 26, 2004

I. STATEMENT

1. On December 12, 2003, SunWest Communications (Complainant) filed a complaint naming Qwest Corporation (Qwest) as Respondent.
2. On December 15, 2003, the Commission issued an Order to Satisfy or Answer, and an Order Setting Hearing for February 2, 2004.
3. On December 23, 2003, Respondent filed a Motion to Dismiss the Complaint.
4. On January 9, 2004, Complainant filed its response to the Motion.
5. Complainant alleges that Respondent is engaged in predatory and discriminatory pricing for rate group charges in the Monument and Gatehouse Central Offices calling areas, located in El Paso County, Colorado.

6. Complainant states that Respondent charges an excessive rate for residential unbundled network element (UNE) loops. The Monument and Gatehouse Central Offices are in Rate Group 3. Complainant contends that the Monument and Gatehouse wire centers should be placed in Rate Group 2, which would result in a lower loop charge. Complainant requests that the Commission order Respondent to redesignate the Monument and Gatehouse wire centers as Rate Group 2 and that Respondent be required to realign its cost structure so that the UNE loop cost be the same as the other central offices located in Colorado Springs.

7. On December 23, 2003, Respondent filed a Motion to Dismiss the Complaint. Respondent argues that the complaint should be dismissed for the failure of Complainant to state a claim upon which relief can be granted. Respondent states that the relief requested by Complainant, namely to require Qwest to redesignate the Monument and Gatehouse wire centers as Rate Group 2 would not comply with Commission orders at which statewide rate groups were established and would destroy the statewide deaveraged wholesale loop rate structure. Respondent contends that the complaint does not state that Respondent violated any state law, order, or rule of the Commission, but rather is an improper collateral attack on previous Commission decisions.

8. Respondent states that the Commission established three rate groups throughout the State of Colorado. Under the Commission's decision, Respondent's Colorado wire centers were placed into one of three rate groups established by the Commission. The Monument and Gatehouse wire centers were placed in Rate Group 3 by Commission order. The wire centers were placed into one of three rate groups based on a cost model developed in evidentiary hearings.

9. On January 9, 2004, Complainant filed a Response to the Motion to Dismiss.

10. Complainant argues that a motion to dismiss a complaint for failure to state a claim upon which relief can be granted is an extraordinary remedy and that a complaint should not be dismissed if the allegations in the complaint support relief on any possible theory, citing cases.

11. Complainant alleges that Respondent is engaged in predatory and discriminatory pricing for residential UNE loops in the central offices of Monument and Gatehouse. Respondent states that under the provisions of § 40-3-102, C.R.S., the Commission is charged with the responsibility “to correct abuses; to prevent unjust discriminations and extortions in the rates, charges, and tariffs of ... public utilities of this state.”

12. Complainant contends that the motion should be denied and that the complaint proceed to hearing.

13. Having reviewed the motion of Respondent, the response of Complainant, and the allegations of the complaint, it is found and concluded that the motion to dismiss for failure to state a claim upon which relief can be granted should be denied.

14. As pointed out by both parties, a motion filed pursuant to Rule 12(b)(5) of the Colorado Rules of Civil Procedure and 4Colorado Code of Regulations, 4CCR 723-1-12(b)(5) is an extraordinary remedy, and the complaint should not be dismissed for failure to state a claim unless it is clear that Complainant could not prevail on any possible theory. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286 (Colo. 1992).

15. In viewing the allegations of the complaint in a light most favorable to Complainant, it cannot be concluded that Complainant could assert no possible theory, which would, if proven, entitle it to relief.

16. Since the motion to dismiss will be denied by this interim decision, and Respondent will be ordered to file its answer within 10 days pursuant to 4CCR 723-1-61(d)(2), the hearing currently scheduled for February 2, 2004 will be vacated and reset since there is insufficient time before the hearing for Respondent to file an answer, and for the parties to prepare for hearing.

II. ORDER

A. It Is Ordered That:

1. The motion of Qwest Corporation to dismiss the complaint is denied.
2. Qwest Corporation shall within ten days of the service date of this Order answer the complaint.
3. The hearing currently scheduled for February 2, 2004 is vacated.
4. Complainant and Respondent shall within 15 days of the mailing date of this Interim Decision submit their available dates to the Commission for the rescheduling of the hearing.
5. This Order is effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge