Decision No. R04-1488

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02I-572T

IN THE MATTER OF THE INVESTIGATION INTO UNFILED AGREEMENTS EXECUTED BY QWEST CORPORATION.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE WILLIAM J. FRITZEL THAT THE COMMISSION OPEN A SHOW CAUSE PROCEEDING AGAINST QWEST

Mailed Date: December 15, 2004

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I. STATEMENT OF THE CASE

1. By Decision No. C02-1214, mailed on October 28, 2002, the Commission issued an order for the investigation into unfiled interconnection agreements (ICAs).

2. The Commission stated that the Staff of the Colorado Public Utilities Commission (Staff) conducted a preliminary investigation of practices and policies of Qwest Corporation (Qwest), formerly known as U S WEST Communications, Inc., pertaining to the execution of ICAs with other telecommunications carriers.

3. Qwest filed several formerly unfiled ICAs with the Commission and the Commission also has obtained other ICAs not filed in a formal docket. These documents were obtained by Staff under its audit authority.

4. The Commission stated that it will examine the general nature of an ICA. The Commission stated that this investigation proceeding shall also examine, with interested parties' input:

(1) Potential remedies available if the agreements were not filed that should have been filed;

(2) The measure of harm or prejudice, if any, if agreements were not filed that should have been filed; and

(3) The regulatory controls that should or could be implemented by the Commission to ensure that interconnection agreements are timely and appropriately filed.

5. The Commission stated that this investigation docket will be used as a means of determining whether additional, undisclosed ICAs exist. In this light, the Commission encouraged interested parties to file documents executed with Qwest that had not previously been filed with the Commission.

6. In addition, the Commission directed all competitive local exchange carriers (CLECs) and Qwest to file in this proceeding, any additional evidence of oral or written agreements that may constitute agreements or adjunct ICAs that became effective after February 8, 1996 between Qwest and any other party or parties.

7. The Commission's order referred this docket to an Administrative Law Judge (ALJ). The Commission directed the ALJ to conduct status conferences and to provide a report or reports to the Commission.

8. The Commission ordered Qwest to file documents as identified in Appendix No. 2 to the Commission's order within ten calendar days of the effective date of the Order.

9. In addition, the Commission listed in Appendix 1 to its decision companies that were joined in this docket as essential parties. Finally, the Commission in its order scheduled an initial status conference for November 26, 2002.

10. The initial status conference was held as scheduled on November 26, 2002. Appearances were entered on behalf of Qwest; the Colorado Office of Consumer Counsel (OCC); Staff; WorldCom, Inc. (MCI/WorldCom); AT&T Communications of the Mountain States, Inc. (AT&T); TCG Colorado (TCG); Level 3 Communications, LLC (Level 3); Allegiance Telecom of Colorado; (Allegiance) XO Communications (XO); Time Warner Telecom (Time Warner); McLeodUSA, Inc. (McLeodUSA); Eschelon Telecommunications (Eschelon); and Covad Communications (Covad). Oral rulings were entered concerning various

procedural matters and a procedural schedule was developed. The parties were ordered to file initial comments on or before February 18, 2003, and reply comments on or before March 17, 2003. The next status conference was scheduled for January 3, 2003. On December 13, 2002, Decision No. R02-1401-I was issued memorializing the oral rulings that were issued at the initial status conference.

11. On January 3, 2003, the second status conference was held. Decision No. R03-0021-I was issued on January 9, 2003 memorializing the oral rulings.

12. By Decision No. R03-0160-I (February 12, 2003), the motion of OCC for an extension of time to conduct discovery and to modify a portion of the procedural schedule was granted. It was ordered that all discovery shall be completed no later than March 3, 2003, that the parties file initial comments on or before March 18, 2003, and that reply comments are to be filed on or before April 17, 2003.

13. On March 12, 2003, Staff filed an Unopposed Motion to Modify the Procedural Schedule and to Adjust the Deadlines to File Comments in this docket. The motion of Staff was granted by Decision No. R03-0281-I (March 17, 2003). The time for filing initial comments was extended to April 8, 2003 and reply comments May 8, 2003.

14. By Decision No. R03-0352-I (April 4, 2003), the motion of Staff to adjust procedural schedule was granted. The time for the filing of initial comments was extended to and including June 18, 2003 and reply comments to July 18, 2003.

15. Staff, OCC, and Qwest either in a combination or individually filed four additional motions to extend the procedural schedule to allow for extensions of time to file

comments for the reason that the parties were actively negotiating a potential settlement, and needed more time to file comments. All of the motions for an extension of time were granted.[1]

16. In Interim Order No. R03-1288-I (November 14, 2003) a status conference was scheduled for January 15, 2004 for a report by the parties on the progress of settlement negotiations.

17. The status conference was held on January 15, 2004. The parties stated that although they have been engaged in substantial settlement negotiations, it now became apparent that a comprehensive, global settlement could not be achieved. By Decision R04-0075-I, it was ordered that comments would be due on April 9, 2004 and that reply comments would be due on May 28, 2004. Given the nature of this investigatory docket, and the Commission's directives in its order opening this docket, it was decided with concurrence of the parties that an evidentiary hearing would not be appropriate in this investigation docket, but rather a report or recommendation to the Commission for further action after the reception of the comments by the interested parties.

18. After further adjustments to the procedural schedule, comments were filed beginning in April, 2004. Numerous comments were filed by the following parties: AT&T; TCG; Global Crossing; Qwest; Electric Lightwave; Time Warner; Covad; Eschelon; Level 3; XO; McLeodUSA; MCI/WorldCom; OCC; and Staff. The last comments were filed by Qwest on June 11, 2004.

19. On April 15, 2004, Qwest and OCC filed a Stipulation and Settlement Agreement.

[1] Interim Order Nos. R03-0677-I; R03-0931-I; R03-1063-I, and R03-1288-I.

II. COMMENTS

A. Staff's Investigation/Comments/Position

20. Staff in its initial comments filed on February 27, 2004, addresses the central question presented in this investigation docket. This question is whether this Commission should take action against Qwest and various CLECs for failure of Qwest and the CLECs to file with the Commission the executed ICAs.

21. Staff believes that the Commission should take corrective action against Qwest and selected CLECs with specific recommendations.

22. Staff has identified numerous ICAs executed by Qwest and various CLECs. These ICAs are listed in Appendices 2 and 3 of the Commission's decision opening this docket. These ICAs, as well as possibly others, were not filed with the Commission for approval as required by the Telecommunications Act of 1996 (the Federal Act), the Colorado Intrastate Telecommunications Act of 1995 (Colorado Act), and the Commission's Rules, 4 *Code of Colorado Regulations* (CCR) 723-44.

23. Staff believes that these unfiled ICAs with certain CLECs were discriminatory and anti-competitive.

24. Staff contends that of the 166 documents reviewed by Staff as part of this investigation docket, 72 agreements are ICAs that were not filed with this Commission for review.[2]

25. In its analysis of the unfiled ICAs executed by Qwest and the CLECs, Staff looked for guidance from the Federal Act, the Colorado Act, and this Commission's rules.

[2] Six ICAs were filed by Qwest in Docket No. 96A-287T *et al.* Fifty-six remain unfiled.

Pursuant to the Federal and State Acts, the State commissions are required to apply and enforce certain provisions of the Federal Act and to apply Colorado statutes that are not in conflict with the Federal Act.

26. Section 47 U.S.C., §§ 251 and 252 are the key provisions of the Federal Act that impose interconnection and other obligations on the telecommunications carriers. The clear intent of Congress in adopting the Federal Act was to promote competition.

27. Section 251(a) of the Federal Act requires telecommunications carriers to interconnect facilities and equipment with other carriers. This provision of course requires the incumbent local exchange carriers (ILECs), who formerly had a monopoly on local exchange calling, to interconnect with the CLECs.

28. Section 251(b) imposed obligations on all local exchange carriers (LECs) including resale, number portability, dialing parity access to rights-of-way, and reciprocal compensation.

29. Section 251(c) is of particular significance to the instant investigation docket in that ILECs are required to negotiate in good faith the terms and conditions of interconnection. This section also imposes further obligations on ILECs including interconnection with other carriers, allowing access to unbundled network elements (UNEs), allow resale of service, and the duty to allow collocation.

30. Section 47 U.S.C. § 252 provides the mechanisms for implementing the overall goal of the development of competitive markets and the obligations of telecommunications carriers stated in § 251.

31. Sections 252(a) and (b) establish procedures for voluntarily negotiated agreements and for agreements reached through arbitration. Any agreement including ICAs must be submitted to the State commissions (§ 252(a)(1).

> … The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

32. Section 252(e)(1) requires that all ICAs whether adopted by voluntary negotiation or arbitration be submitted to a State commission for approval.

> … Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

33. The Federal Act provides that State commissions have the authority and obligation to apply federal law in implementing competition, and administering and enforcing the requirements of the Federal Act. In addition, the State commissions are to apply state law not in conflict with the Federal Act. Section 252(e)(3) states:

> … Notwithstanding paragraph (2), but subject to § 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

34. Another example where the Federal Act provides for State commission jurisdiction is found in § 251(d)(3):

> (3) **Preservation of State Access Regulations** – In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with requirements of this section; and

> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

35. In addition to applying certain provisions of the Federal Act, Staff lists areas of Colorado law applicable to this docket.

36. The term "interconnection agreement" is defined in 4 CCR 723-44-2.5 (Rules Establishing Procedures Relating to the Submission for Approval of Interconnection Agreements and Any Amendments to Interconnection Agreements Within Colorado by Telecommunications Carriers). Rule 4 CCR 723-44-2.5 defines "interconnection agreement" as:

> An agreement for interconnection, services, or network elements entered into between or among LECs or telecommunications carriers for the purpose of transmission of information by electronic, optical, or any other means between separate points by prearranged means.

37. In addition, this Commission[3] adopted a provisional definition of an ICA for limited purposes in its Decision No. C02-1183 (October 18, 2002), Docket No. 96A-287T *et al.* as follows:

> An interconnection agreement, for purposes of § 252(e)(1) of the Telecommunications Act of 1996, is a binding contractual agreement or amendment thereto, without regard to form, whether negotiated or arbitrated, between an Incumbent Local Exchange Carrier and a telecommunications carrier or carriers that includes provisions concerning ongoing obligations pertaining to rates, terms, and/or conditions for interconnection, network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, or collocation.

38. Rule 4 CCR 723-44-5.2 requires that an ICA be submitted to this Commission referencing § 252(a)(1) of the Federal Act. This rule requires submission of the entire ICA or amendment including attachments, and a detailed schedule of itemized charges for interconnection in each service or network element.

[3] Based partially on the Federal Communications Commission's declaratory order of the types of negotiated agreements that are subject to the filing requirements of § 252(a)(1).

39. Thus it is clear that under the terms of the Federal Act and this Commission's rules, ICAs must be submitted to the Commission for approval.

40. Under joint federal and state jurisdiction relating to ICAs, State commissions have the obligation to review, approve, and enforce the filing of ICAs with the State commissions, § 47 U.S.C. § 252 (e)(1). Section (e)(3) provides that:

> Notwithstanding paragraph (2) but subject to § 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

41. In its initial comments, Staff summarizes Colorado law that in conjunction with the Federal Act provides this Commission with the authority to investigate and to act relative to unfiled ICAs.[4] For example, some important provisions of Colorado law

- requires rates to be just and reasonable (§ 40-3-10, C.R.S.);
- Commission has wide powers and duties to correct abuses, prevent
- discrimination and extortion in rates (§ 40-3-102, C.R.S.);
- forbids preferential rate treatment (§ 40-3-105, C.R.S.);
- prohibits preferences or advantages to public utilities (§ 40-3-106, (C.R.S.);
- requires intrastate access charges to be cost-based and non- discriminatory (§ 40-15-105, C.R.S.);
- requires that ICAs approved by the Commission shall supercede filed tariffs but only in regard to specific services covered by the ICAs and only to the terms that are applicable to persons other than parties to the ICAs. (Section 40-15-503(2)(g)(III), C.R.S.).

42. Staff states that it has reviewed 166 unfiled documents in this investigation docket. In order to determine whether these documents were ICAs that should have been filed with the Commission for approval, Staff considered the language of the Federal Act, evidence

[4] Staff's initial comments, filed February 27, 2004 pages 8 through 10 in Appendix C to comments.

presented in unfiled agreements cases opened in several states, decisions of the Commission, and the Commission's rules. Staff contends that many of these unfilled documents are ICAs, and it believes that Qwest and certain CLECs violated federal and state law by failing to file the ICAs with the Commission.[5]

43. Staff believes that Qwest intentionally executed discriminatory agreements with selected CLECs. Staff contends that Qwest and the CLECs who were a part of the agreements violated the following Colorado statutes:

(1) Discriminatory rates, terms, and conditions that were provided to certain CLECs are not just and reasonable pursuant to § 40-3-101, C.R.S., and prohibited by § 40-3-106, C.R.S.

(2) The rates, terms, and conditions offered certain CLECs, other then were on file with the Commission, violated § 40-3-103, C.R.S.

(3) Qwest granted preference to selected CLECs in violation of § 40-15-105(1), C.R.S.

44. In addition to Staff's belief that Qwest violated federal and Colorado law by failing to file and obtain Commission approval of ICAs, Staff also contends that the CLECs who entered into these agreements with Qwest are also culpable. Staff cites § 252(e)(1) of the Federal Act that states: "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission." Staff contends that since the above quoted language does not specify which party to the ICA either Qwest or the CLEC is required to file, Staff believes that Qwest as well as the CLECs have the responsibility to file the ICAs.

45. Under the provisions of 4 CCR 723-44-4.4, either party to an ICA or both may file.

[5] *See* Appendix M of Staff's initial comments. Staff lists 74 agreements that it believes are ICAs that Qwest and CLEC parties to the agreements failed to file.

B. The Measure of Harm or Prejudice to Clecs

46. Staff states in its initial comments that through discovery, it sought to quantify any harm suffered by the CLECs as a result of the unfiled ICAs. Because of the relative lack of response from the CLECs, Staff is somewhat limited in its analysis of harm to CLECs. However, Staff believes that it is possible to quantify harm to all the CLECs who were not given preferential treatment as afforded certain CLECs by measuring the impact on the non-benefiting CLECs' income statement.

47. AT&T responded in discovery that it believes that severe discrimination occurred in the Colorado market as a result of ICAs of Qwest and certain CLECs that were not filed and approved by the Commission. AT&T contends that selected CLECs were given favorable treatment such as lower prices and other advantages. AT&T, at the time it filed its comments could not measure in monetary terms the harm to itself or other CLECs.

48. MCI/WorldCom responded that it believes Qwest's favorable treatment of certain CLECs negatively impacted it as well as other non-favored CLECs. However, it was unable to quantify any harm to it at the time it filed comments.

49. Although it may not be possible to quantify the monetary harm to non-favored CLECs, it appears that it negatively affected the non-favored CLECs' ability to effectively compete in the Colorado market.

C. Harm to the Competitive Market

50. The Colorado General Assembly made it clear that it intended that there be competition in the basic local exchange market. Section 40-15-501(1), C.R.S., states:

> (1) The general assembly hereby finds, determines, and declares that competition in the market for basic local exchange service will increase the choices available to customers and reduce the costs of such service.

> Accordingly, it is the policy of the state of Colorado to encourage competition in this market and strive to ensure that all consumers benefit from such increased competition. The commission is encouraged, where competition is not immediately possible, to utilize other interim marketplace mechanisms wherever possible, with the ultimate goal of replacing the regulatory framework established in Part 2 of this article with a fully competitive telecommunications marketplace statewide as contemplated in this Part 5.

51. The legislature also declared that this Commission was to take an active role in implementing its competitive policy, § 40-15-503, C.R.S. by adopting rules and other measures.

52. Staff contends that the unfiled agreements executed between Qwest and certain CLECs favored the CLECs by providing favorable rates, terms, and conditions not offered to other CLECs. This is unlawful discrimination. By this conduct which Staff considers willful, Qwest retained a competitive advantage and created conditions for favored CLECs to enjoy a competitive advantage over other CLECs.

D. Harm to Consumers

53. Staff believes that by subverting the competitive market through secret favorable terms to certain CLECs, Qwest and the favored CLECs interfered with the development of a functioning competitive market for local exchange by creating artificial barriers to entry. The lack of a vigorous competitive market for local exchange harmed consumers since they were not able to enjoy lower prices that presumably effective competition would provide.

E. Harm to the Regulatory Process

54. Staff also contends that the conduct of Qwest and certain CLECs by violating Colorado statutes, Commission rules, and the Federal Act, harmed the regulatory process. The Commission had to expend resources such as in this docket that it could have spent on other matters of importance. Staff also contends that proceedings that the Commission handled with

respect to competitive questions have been distorted and compromised such as in the § 271 proceedings and the U S WEST/Qwest merger.[6]

F. Potential Remedies

55. In the context of discussing potential remedies available to this Commission if it finds that sufficient cause exists to initiate a show cause proceeding, Staff in its comments lists potential remedies that can be considered by the Commission after an evidentiary hearing.

56. Because the instant docket is merely an investigative docket, Staff recommends that an evidentiary proceeding be initiated in a separate docket to consider the culpability of Qwest and certain CLECs. Staff recommends that this Commission initiate a show cause proceeding.

57. Staff lists the following remedies that the Commission can consider upon a finding of a violation of law.

1. Penalties

58. Upon a finding that a public utility violated Colorado law, the Commission may under the provisions of § 40-7-104, C.R.S., request the Attorney General to file an action with a request for penalties in the District Court.

2. Reparations

59. The Commission has the authority under the provisions of § 40-6-119(1), C.R.S., and § 40-3-102, C.R.S., to order reparations.

[6] Staff states that of the agreements reviewed in this investigation proceeding, 20 of the agreements required the CLECs to refrain from participating in the proceedings.

3. Revocation of Letter of Registration (LOR) to Provide InterLATA Toll Service

60. The Commission has the authority pursuant to § 40-15-301, C.R.S., and 4 CCR 723-25 to revoke or temporarily suspend Qwest's LOR to provide interLATA toll service.

4. Voiding Interconnection Agreements

61. The Commission has the power to void offending ICAs under the provisions of 4 CCR 723-44-5.7.

5. Disgorgement of Benefits

62. Section 40-3-105, C.R.S., requires that public utilities file tariffs with the Commission describing rates, terms of service, and other matters. However, Commission approved ICAs supercede tariffs. Staff states that if a CLEC received discounts for service through an unfiled ICA, the Commission may order the CLEC to disgorge the benefit. Qwest could also be ordered to disgorge benefits it derived as a result of unfiled ICAs such as all revenues paid by the CLECs who were treated favorably during the terms of the unfiled ICAs.

6. Referral for Criminal Prosecution/Anti-Trust Action

63. Although it does not recommend the above remedy, Staff lists this as a possibility for the Commission's consideration.

III. REGULATORY CONTROLS

64. In response to the Commission's order initiating this investigation docket, Staff recommends new regulatory controls that the Commission can adopt to require that ICAs are filed with the Commission.

(a). The Commission should define an ICA in its rules in the form proposed by Staff in the draft telecommunications rules.

(b) The term "interconnection agreement" should be defined with more specificity than the definition adopted by the Commission in Docket No. 96A-287T, *et al.*

(c) ILECs should be clearly required to file ICAs in the Commission's rules. CLECs should also be required to file notice with the Commission within 30 days of executing an ICA with an ILEC.

(d) Provide a provision in the Commission's rules that allow an ILEC or CLEC to petition for a declaratory order as to whether a specific agreement is an ICA.

(e) The Commission should initiate a new Performance Indicator Definition (PID) with associated penalties in the Colorado Performance Assurance Plan (CPAP) that address the filing of ICAs in the first instance and the timeliness of such filings.

(f) Provide oversight of Qwest's internal operations concerning its decision process on whether to file an agreement with the Commission.

(g) Establish rules, policies, and procedures to address problems created as a result of unfiled ICAs such as disallowing executive compensation, and bonuses to employees in future rate proceedings.

IV. CLEC COMMENTS

65. Most of the CLECs who filed comments support the recommendations of Staff for a show cause proceeding against Qwest. Most of the commenting CLECs also support the recommendations of Staff for corrective action against Qwest.

66. Most of the commenting CLECs also concur with the analysis of Staff relating to the conduct of Qwest in Colorado, as well as in other states, the harm caused by Qwest to CLECs, the public, competition, and the regulatory process. The CLECs, however, are generally opposed to including in the show cause proceeding CLECs who negotiated agreements with Qwest that were not filed with the Commission.

67. MCI/WorldCom and other CLECs unlike Staff, believe that the Federal Act does not impose an obligation on the CLECs to file ICAs with the Commission. In support of this assertion, MCI/WorldCom and other CLECs such as McLeodUSA cite § 252 of the Federal Act

and the First Report and Order of the Federal Communications Commission (FCC) wherein the FCC states that § 252 does not require CLECs to file ICAs.[7] The CLECs therefore believe that CLECs should not be subject to a show cause proceeding for the failure of CLECs to file ICAs under § 252 of the Federal Act, or the Commission's rules, 4 CCR 723-44.

68. AT&T comments that Qwest by offering favorable terms to certain CLECs such as Eschelon and McLeodUSA, not offered to other CLECs, and by keeping the agreements secret, by not filing the ICAs, the non-favored CLECs were harmed by Qwest's discriminatory action.[8]

V. QWEST COMMENTS

69. Qwest disagrees with the show cause recommendations of Staff and the CLECs. Qwest acknowledges that the Federal Act requires ILECs to file ICAs with the State commissions for approval. Although acknowledging that the ILECs have an obligation to file ICAs, Qwest comments that the Federal Act does not define ICAs or provide guidance concerning what type of agreement triggers the filing requirement. Qwest believes that many of the agreements identified by Staff in its investigation are not ICAs required to be filed.

70. Qwest acknowledges that some of the ICAs, identified by Staff should have been filed.[9] However, Qwest does not believe that harm occurred automatically to the CLECs. Qwest contends that there must be a factual basis developed to determine whether a CLEC was harmed by not being offered terms and prices offered to other CLECs. In order to establish harm, there should be an inquiry as to whether CLECs could have received favorable prices and terms

[7] In re: Implementation of the Local Competitive Provisions in the Telecommunications Act of 1969, 11 FCC Rcd 15499 (1996) First Report and Order at ¶ 1230.

[8] *See* AT&T's comments filed on April 5, 2004 at page 5.

[9] Qwest asserts that CLECs share the responsibility to file ICAs. Qwest comments, June 11, 2004.

comparable to the "favored" CLECs if they made comparable volume purchase commitments of certain CLECs by "opting in" to a rate offered to these CLECs by accepting terms and conditions and obligations of the original agreement. If a CLEC could not make certain volume or other commitments, Qwest believes that it suffered no harm or prejudice.

71. Qwest asserts that 26 of the agreements identified by Staff in its investigation are not ICAs subject to the Federal Act's § 252 filing requirements. Qwest states that 14 of the 26 are settlement agreements that are "backward-looking" that do not invoke § 251 obligations. Four agreements are not binding agreements, five concern matters such as FCC tariffed interstate services outside this Commission's jurisdiction and three agreements do not concern service in Colorado.

72. Qwest asserts that there has not been a threshold showing that the CLECs were harmed by the failure to file certain ICAs in order to justify the opening of a show cause action against Qwest. Qwest comments that the investigation by Staff fails to demonstrate that the CLECs were able to satisfy the opt-in provisions of § 252(i) of the Federal Act such as a commitment to volume purchases agreed to by other CLECs who have received favorable terms. Qwest states that there has been no proof of actual damages suffered by the CLECs.

73. Qwest likewise believes that there exists no threshold showing that the competitive market or regulatory process suffered harm, but rather speculation that competition was harmed since Qwest offered favorable terms to selected CLECs.

74. In discussing suggested remedies asserted by Staff, Qwest believes that a formal show cause proceeding is unnecessary. Qwest asserts that the CLECs have not come forward with evidence to establish specific harm suffered by the CLECs. Qwest believes that if the CLECs wish to establish evidence of harm, they could file individual complaints.

75. Qwest contends that the Staff's other list of possible remedies such as referral to the Attorney General for an action to obtain penalties, a Commission order for reparations, revocation of Qwest's LOR and voiding ICAs, disgorgement of benefits, are unnecessary, without a factual basis and legally deficient.[10]

76. Qwest asserts that it has established internal controls to ensure that all agreements that are determined by Qwest to be ICAs are filed with this Commission for approval and available to CLECs on an opt-in basis. In addition, since the FCC and this Commission have established standards and provided guidance to ILECs and CLECs as to what constitutes an ICA, there should be no future problems. Qwest urges this Commission to adopt a formal definition of an ICA in its rules for the § 252 ICA filing requirements.

VI. SETTLEMENT AGREEMENT

77. On April 15, 2004, Qwest and OCC filed a Stipulation and Settlement Agreement. On April 27, 2004, Qwest and OCC filed a Joint Motion to Approve the Settlement Agreement and to Close Docket.

78. Under the terms of the Settlement Agreement, Qwest agrees to pay a total of $7.5 million dollars to be allocated as follows: $5.5 million to the Colorado Low Income Telephone Assistance Program (LITAP); and $2 million to Commission-designated private non-profit foundation(s) in order to fund a 9-1-1 resource center.[11]

[10] *See* Qwest comments filed April 15, 2004 pages 35 through 46.

[11] The 9-1-1 resource center would assist local Public Safety Answering Points (PSAPs) in implementing Wireless Phase 2 E9-1-1, assisting CLECs and meeting E9-1-1 requirements, serving as a single information source on E9-1-1 in Colorado and other related purposes including providing funds to local PSAPs for upgrades needed for E9-1-1 (page 4 of the Settlement Agreement).

79. In addition to the payments totaling $7.5 million, eligible CLECs that elect to participate in the Settlement Agreement upon release of claims against Qwest, will receive bill credits. Qualifying CLECs are those that purchased UNEs or other § 251(b) or (c) services during the period November 1, 2000 through June 30, 2002. By the terms of the Settlement Agreement, Eschelon and McLeodUSA do not qualify for the bill credits.[12]

80. Qwest agrees to retain an independent third-party monitor that is approved by this Commission to review Qwest's wholesale review committee for a period of three years. Qwest also agrees to continue its internal compliance training program.

81. No party elected to participate in the Settlement Agreement besides Qwest and OCC.

82. Comments/objections to the proposed Settlement Agreement between Qwest and OCC were filed by AT&T, TCG, Time Warner/Covad, MCI/WorldCom, and Staff.

83. The CLECs that commented on the Settlement Agreement recommended that the Commission reject the Settlement Agreement. Staff also recommends against the approval of the Settlement Agreement. The commentators in summary state the following reasons for rejection:

A. The settlement terms and the dollar amounts are inadequate to address the damage done by Qwest to the CLECs, competition and the regulatory process. The Commentators cite actions taken by other jurisdictions including Minnesota, Arizona, and the FCC against Qwest in support of their opinion that the settlement is inadequate.

B. The Settlement Agreement is not global in scope since the settlement was negotiated without the participation by the CLECs and Staff.[13]

C. The Settlement Agreement is prejudicial to the rights of the CLECs.

[12] CLECs must file their individual claims separately in separate dockets under the terms of the Stipulation.

[13] Qwest sharply disagrees that the CLECs and Staff did not participate in the negotiations, or that the negotiations were conducted in secret. Qwest notes that during the initial discussions, Staff and the CLECs participated. OCC states that it invited all of the parties to the negotiations.

D. The Settlement Agreement does not address the concerns and objectives of the Commission in opening the investigation docket such as whether Qwest should have filed certain ICAs, harm to the CLECs, competition, and regulatory controls to prevent future harm.

E. Qwest would benefit from its alleged wrongdoing and neglect under the Settlement Agreement in that the part of the Settlement Agreement that requires contributions to the LITAP Fund will potentially have favorable tax consequences and positive public relations for Qwest. The commentators point out that since Qwest is the dominant LEC in Colorado, it draws support from LITAP. Thus some of Qwest's payments to LITAP would return to Qwest, thus diminishing the overall dollar amount and effectiveness of the settlement.

F. The provision for credits for CLECs who elect to participate in the settlement includes only § 251(b) and (c) services.

G. Paragraph no. 6 of the Settlement Agreement would bar future action by the Commission with respect to possible sanctions against Qwest because of its alleged conduct in favoring certain CLECs as alleged in this docket.

VII. CONCLUSIONS/RECOMMENDATIONS

84. The record in this investigation docket consists of numerous written comments filed by the interested parties. These comments, reports, and recommendations of the parties are the result of extensive research and discovery by the parties. In addition, the parties have engaged in settlement negotiations, at least initially, in order to achieve a global settlement. These negotiations resulted in the settlement between only two interested parties, Qwest and OCC.

85. The Settlement Agreement presented to this Commission for approval is found to be deficient in two major respects, namely it fails to provide an adequate remedy to address the alleged harm to competition, the regulatory process, and the CLECs, particularly when compared to recent similar cases, notably in Minnesota and Arizona, and it represents the agreements of only two parties.

86. In order for a settlement agreement to be meaningful, just, and in the public interest, it should represent the agreement of most if not all of the competing interests both public and private. A global agreement would tend to include these competing interests and result in a balanced resolution of the issues. It is recommended that the Commission not approve the Settlement Agreement.

87. The recommendation of Staff for a show cause proceeding in a separate docket is persuasive. The extensive investigation of Staff detailed in its comments supports its recommendation. The CLECs also support the initiation of a show cause proceeding against Qwest.

88. The opening of a show cause proceeding will require a full evidentiary hearing to consider the factual allegations against Qwest, and potential remedies. It will also afford the opportunity for the CLECs that contend that they were harmed because of the favorable treatment by Qwest of certain other CLECs, to establish a factual basis on the record, the harm and the damages sustained. Some of the issues to be addressed at a show cause hearing would be whether the agreements at issue were ICAs required to be filed and approved by the Commission, discrimination against certain CLECs, anti-competitive behavior by Qwest, violations of state law, the Commission's rules, and the Federal Act.

89. The record as it exists in this docket demonstrates a pattern of conduct by Qwest, if proven at a subsequent proceeding, that it engaged in anti-competitive behavior.

90. Although there exists some support and basis to include certain CLECs, such as Eschelon and McLeodUSA, in a show cause action, the basis asserted by Staff is somewhat tenuous since the CLECs who appear to have received favorable treatment were merely

customers of Qwest's wholesale offerings. The CLECs also do not have the same obligations as the ILECs under the Federal Act and Colorado state law.

91. Pursuant to § 40-6-109, C.R.S., it is recommended that the Commission open a show cause proceeding against Qwest and enter the following order.

VIII. ORDER

A. The Commission Orders That:

1. A show cause docket naming Qwest Corporation as Respondent shall be initiated by Staff of the Commission.

2. The Stipulation and Settlement Agreement filed on April 15, 2004 by Qwest Corporation and the Colorado Office of Consumer Counsel is rejected.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the

administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

_____
Administrative Law Judge

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