

Service Date: December 4, 2000

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Application of)	
American Fiber Network, Inc.)	UTILITY DIVISION
and Qwest Corporation f/k/a)	
U S WEST Communications, Inc.)	DOCKET NO. D2000.8.134
Pursuant to Section 252(e) of the)	
Telecommunications Act of 1996 for)	ORDER NO. 6304
Approval of their Adoption of a Wireline)	
Interconnection Agreement and First Amendment)	

FINAL ORDER

Introduction and Procedural Background

1. On February 8, 1996, the Telecommunications Act of 1996 (1996 Act)¹ was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to local exchange markets. The 1996 Act sets forth methods by which local competition may be encouraged in historically monopolistic local exchange markets. The 1996 Act requires companies like U S WEST Communications, Inc., now known as Qwest Corporation (Qwest), to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. §§ 251 and 252.

2. Qwest has entered into a resale agreement with American Fiber Network, Inc. (American) for resale of Qwest services according to the 1996 Act. Qwest filed the parties' agreement, entitled "Local Interconnection Agreement Between U S WEST Communications, Inc. and American Fiber Network, Inc. for the State of Montana" (Agreement) with the Montana Public Service Commission (Commission) on August 28, 2000. The Agreement was docketed as D2000.8.134 and it provides for American to resell Qwest's local exchange services in Montana.

3. On August 30, 2000, the Commission issued a Notice of Application for Approval of Resale Agreement and Opportunity to Intervene and Comment, giving public notice of the

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

requirements that the Commission approval of the filing be nondiscriminatory toward other telecommunications carriers not parties to the agreement and be consistent with the public interest, convenience and necessity. The notice stated that no public hearing was contemplated unless requested by an interested party by September 14, 2000. The notice further stated that interested persons could submit limited comments on whether the agreement met these requirements no later than September 25, 2000.

4. No hearing has been requested and no comments or requests for intervention received in regard to the American Agreement.

5. On review of the Agreement, the Commission makes the following findings, conclusions and order.

Applicable Law and Commission Decision

6. The standards for approving an interconnection agreement differ, depending on whether the agreement has been voluntarily negotiated or has been arbitrated by a state commission. 47 U.S.C. § 252(e)(2). The Agreement submitted for approval in this proceeding was negotiated voluntarily by the parties and thus must be reviewed according to the provisions in 47 U.S.C. § 252(e)(2)(A).

7. Section 252(e)(4) of the 1996 Act provides that a negotiated agreement submitted for a state commission's approval must be approved or rejected within 90 days or it will be deemed approved. Thus, Commission approval or rejection according to the substantive standards set forth in the 1996 Act must issue by November 26, 2000, 90 days following the submission of the American Agreement for Commission approval.

8. The Commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Section 252(e)(2)(A) prescribes the grounds for rejection of an agreement reached by voluntary negotiation:

(2) GROUNDS FOR REJECTION.--The State commission may only reject--

(A) an agreement (or any portion thereof)
adopted by negotiation under [47 U.S.C. § 252(a)]
if it finds that

- (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
- (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity;

9. Notwithstanding the limited grounds for rejection in 47 U.S.C. . 252(e)(2)(A), the Commission's authority is preserved in . 252 (e)(3) to establish or enforce other requirements of Montana law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to . 253 of the 1996 Act, which does not permit states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

10. Unlike an agreement reached through arbitration, a voluntarily negotiated agreement need not comply with standards set forth in . . 251(b) and (c). Sections 251(b), 252(c) and 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in . 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission.

11. By approving this Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that . . 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

12. No comments have been received that express any reservations about the parties' agreement not complying with federal law as cited above or with state telecommunications requirements. The Montana Consumer Counsel, who represents the consumers of the State of Montana, has not intervened in this approval proceeding, and has not filed comments to indicate that any portion of the agreement is not consistent with the public interest, convenience and

necessity. There have been no objections raised that the Agreement discriminates improperly or is not consistent with the public interest, convenience and necessity.

13. This Agreement is an "opt-in" to the Agreement between U S WEST (Qwest) and Pathnet, Inc., which was approved/rejected in Order No. 6236, Docket No. D99.12.286. "Opt-in" means that the parties agree to provisions identical to those in another Agreement.

The Commission addresses the following:

14. As noted, this Agreement is an "opt-in" to the Pathnet, Inc./Qwest Agreement, and will be approved, along with Amendment No. 1, with the following exception and clarification. At Order No. 6236, Docket No. D99.12.286 (Pathnet), paragraph 17, the Commission required Pathnet/Qwest to add the following language to their Agreement: "If [Qwest] elects to disconnect [Pathnet] pursuant to this Section, [Qwest] will notify [Pathnet] and the Commission of such disconnection ten (10) days prior to the effective date of the disconnection." Pathnet/Qwest amended their agreement to conform to this requirement, and, in opting into the Pathnet Agreement, American, in its Amendment No. 1, has adopted the language consistent with Order No. 6236. The Commission, however, in more recent orders, has recognized that 10 days notice of disconnection is not sufficient and has required that interconnection agreement provisions contain 30 days notice. Therefore, the Commission requires that the 1st Amendment be amended to reflect 30 days notice. In addition, the Pathnet Agreement currently contains an extensive Amendment No. 2, which was approved by the Commission on October 31, 2000. Notice of Commission Action, Docket No. D99.12.286, November 2, 2000. To the extent it is necessary to amend this Agreement to conform to the Amendment No. 2 to the Pathnet agreement, such amendment is approved to the extent it contains provisions identical to Amendment No. 2 to the Pathnet Agreement. American and Qwest are authorized to file such an amendment, as necessary, and should make reference to this order.

Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. Qwest is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. American intends to resell telecommunications services and interconnect with Qwest in Qwest territories throughout Montana. As a reseller of regulated telecommunications services in Montana, American is subject to Commission authority to supervise, regulate and control public utilities. Section 69-3-803(6), MCA.

3. Before providing services in Montana, American initially will be required to register with the Commission as a telecommunications provider and to provide the requested information to the Commission, if it has not already done so. Section 69-3-805, MCA. Section 69-3-805(1)(e), MCA, requiring the filing of initial price lists or tariffs for regulated telecommunications services has been waived by the Commission.

4. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

5. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the Communications Act of 1934, 47 U.S.C. . . . 151, et seq.*). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

6. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

7. The Commission has jurisdiction to approve the resale agreement negotiated by the parties and submitted to the Commission for approval according to . 252(e)(2)(A). Section 69-3-103, MCA.

8. Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. . 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to approve or reject the American Agreement by November 26, 2000, or the Agreement will be deemed approved.

Order

THEREFORE, based upon the foregoing, it is ORDERED that the Agreement and Amendment No. 1 to the Agreement, submitted to this Commission for approval pursuant to the 1996 Act, are approved, consistent with Order No. 6175, Docket No. D99.3.68, and subject to paragraph 14 of this order. Parties must file all subsequent amendments to the Agreement with the Commission for approval pursuant to the 1996 Act.

DONE AND DATED this 21st day of November, 2000, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

GARY FELAND, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision.
A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.