

Service Date: December 18, 2002

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

* * * * *

IN THE MATTER OF the Application of)	UTILITY DIVISION
McLeodUSA Telecommunications Services, Inc.))	
and Qwest Corporation)	DOCKET NO. D2001.1.7
Pursuant to Section 252(e) of the)	ORDER NO. 6338a
Telecommunications Act of 1996 for)	
Approval of their Wireline Opt-In Agreement)	

FINAL ORDER ON NEWLY SUBMITTED INTERCONNECTION AGREEMENTS

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 the 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 Qwest Corporation (Qwest) to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. §§ 251 and 252.

2. Qwest entered into the following agreements subject to this order: Facility Decommissioning Agreement, dated December 20, 2001; Confidential Agreement (Re: Escalation Procedures and Business Solutions), dated October 26, 2000; Confidential Settlement Agreement (Re: Facility Availability Parity), dated May 1, 2000; and Confidential Billing Settlement Agreement, dated April 28, 2000, with McLeodUSA, Inc. (McLeod). On March 12, 2002, Qwest submitted a letter to the Montana PSC stating that it had entered into certain agreements that had not been filed with the commission for approval. Qwest filed portions of the agreements with the Montana Public Service Commission (Commission) on August 22, 2002 for Commission approval.

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

3. The Commission issued a Notice of Application for Approval and Notice of Opportunity to Intervene and Comment on September 11, 2002, giving public notice of the requirements that the Commission must approve the agreements unless it finds the agreements discriminate against other telecommunications carriers not parties to the agreement, or are not 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 23, 2002. The notice further stated that interested persons could submit limited comments on whether the agreements met these requirements no later than October 3, 2002.

4. The Montana Consumer Counsel submitted a request to intervene on September 23, 2002, and also submitted comments.

5. These agreements were submitted to the Commission for review under 47 U.S.C. 252(a)(1). The Commission has not addressed whether the agreements are properly characterized as interconnection agreements under the Act.

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 standards set forth in the 1996 Act must issue by November 20, 2002.

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) GROUND 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 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). 47 U.S.C. §§ 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 that 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. The Montana Consumer Counsel, who represents the consumers of the State of Montana, petitioned to intervene in this proceeding on September 23, 2002. The petition was granted on October 9, 2002. The MCC filed comments on September 23, 2002, stating that the agreements Qwest filed on August 22, 2002, appeared to be discriminatory and requesting that Qwest be required to disclose all of the terms of the agreements, and not just portions of those agreements. MCC objected that, without the submission of that relevant information, a determination could not be made that the Agreement does not discriminate against a non-party or is consistent with the public interest, convenience and necessity.

12. Based on the MCC's comments, on October 24, 2002, Qwest was directed to submit all redacted portions of the agreements that were filed on August 22, 2002. Qwest submitted the requested information on October 31, 2002.

13. The Commission finds that the Facility Decommissioning Agreement (December 20, 2001) is approved as filed. The Commission finds the Confidential Agreement (October 26, 2000) regarding escalation procedures is approved subject to the terms and conditions of that agreement being made available to other carriers. The Commission finds the Confidential Settlement Agreement (May 1, 2000) regarding facility availability parity is approved subject to the terms and conditions of that agreement being made available to all other carriers. The Commission finds the Confidential Billing Settlement Agreement (April 28, 2000) is rejected. In rejecting this Agreement, the Commission is guided by provisions in state and federal law that have been enacted to encourage the development of competitive telecommunications markets. Section 69-3-802, MCA, for example, states that it is the policy of the State of Montana to encourage competition in the telecommunications industry and to provide for an orderly transition to a competitive market environment. This agreement does not promote competition in that it, by its terms, requires one of the party's to the agreement to withhold objection to the US West and Qwest merger.

14. McLeod and Qwest can agree that nothing in their agreement prohibits certain conduct, such as withholding participation in a merger proceeding. However, if that conduct otherwise violates the law, the provision in the Agreement that sanctions such conduct is void. §§ 28-2-604, 28-2-701, 28-2-702, MCA. Because this provision or term of the Confidential Billing Settlement Agreement is not in the public interest, it is rejected.

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. McLeod entered into interconnection agreements with Qwest that impact telecommunications services in Montana. As a provider of regulated telecommunications services

in Montana, McLeod will be subject to Commission authority to supervise, regulate and control public utilities. Before providing services in Montana, McLeod 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. § 69-3-805, MCA.

3. 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.

4. 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.

5. 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.

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

7. Action on 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.

8. The Commission may reject a portion of a negotiated agreement and approve the remainder of the agreement if such action is consistent with the public interest, convenience and

necessity and does not discriminate against a carrier that is not a party to the agreement.
47 U.S.C. § 252(e)(2)(A).

Order

THEREFORE, based upon the foregoing, it is ORDERED that the agreements of the parties submitted to this Commission for approval pursuant to the 1996 Act are:

1. The Facilities Decommissioning Agreement, dated December 20, 2001, is approved;
2. The Confidential Agreement regarding escalation procedures, dated October 26, 2000, is approved subject to its terms and conditions being available to all other carriers;
3. The Confidential Settlement Agreement, dated May 1, 2000, regarding facility availability parity is approved subject to its terms and conditions being available to all other carriers; and
4. The Confidential Settlement Agreement, dated April 28, 2000, is rejected.

DONE AND DATED this 19th day of November , 2002, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GARY FELAND, Chairman

JAY STOVALL, Vice Chairman

BOB ANDERSON, Commissioner

MATT BRAINARD, Commissioner

BOB ROWE, Commissioner

ATTEST:

Rhonda J. Simmons
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.