

Service Date: June 4, 2001

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

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| IN THE MATTER OF the Application of |) | UTILITY DIVISION |
| Essex Communications, Inc. d/b/a eLEC |) | |
| Communications and Qwest Corporation |) | DOCKET NO. D2001.1.9 |
| Pursuant to Section 252(e) of the |) | ORDER NO. 6340 |
| Telecommunications Act of 1996 for |) | |
| Approval of their Agreement for Terms and |) | |
| Conditions for Interconnection, Unbundled |) | |
| Network Elements, Ancillary Services, and Resale |) | |
| of Telecommunications Services |) | |

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 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 an interconnection agreement with Essex Communications, Inc. dba eLEC Communications (Essex) for interconnection and resale of Qwest services according to the 1996 Act. Qwest filed the parties' agreement, entitled "Agreement for Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services Provided by Qwest Corporation in the State of Montana for Essex Communications, Inc. dba eLEC Communications" (Agreement) with the Montana Public Service Commission (Commission) on January 18, 2001. The Agreement provides for interconnection and for Essex to resell Qwest's local exchange services in Montana.

3. The Commission issued a Notice of Application for Approval of Resale Agreement and Notice of Opportunity to Intervene and Comment on January 30, 2001, giving

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

public notice of the requirements that the Commission must approve the Agreement unless it finds the Agreement discriminates against other telecommunications carriers not parties to the agreement, or is 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 February 10, 2001. The notice further stated that interested persons could submit limited comments on whether the agreements met these requirements no later than February 21, 2001.

4. No hearing has been requested and no comments or requests for intervention were received. The Essex Agreement is similar to previously approved agreements between Qwest and other competitive local exchange carriers (CLECs).

Applicable Law and Commission Decision

5. 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).

6. 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 April 18, 2001, 90 days following the submission of Essex's Agreement for Commission approval.

7. 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[.]

8. 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.

9. 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 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.

10. 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.

11. No comments have been received that indicate the Agreement does not comply 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.

12. Except as discussed at paragraphs 13 and 14 below, the Commission finds that the terms in the Agreement appear to conform to the standards required by the Act and should be approved. In approving this Agreement, the Commission is guided by provisions in state and federal law which 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.

13. Section 6.2.12 of the Agreement is rejected. The parties still shall substitute for section 6.2.12 the following or similar language, which the Commission has required in other interconnection agreements.

If Qwest elects to disconnect Essex pursuant to this Section, Qwest will notify Essex and the Commission of such disconnection thirty (30) days prior to the effective date of the disconnection. Immediately upon receipt of such notice, Essex shall notify its end user customers that service will be disconnected on the date specified in Qwest's notice to Essex for [Reseller's] failure to make payments due hereunder. Essex shall not disparage Qwest or make otherwise false or misleading statements about Qwest or the disconnection in Essex's notice to its end user customers. Qwest will not disconnect an end user customer without first obtaining the approval of the Commission.

See, e.g., Order No. 6297, paragraph 17, Docket No. D2000.8.138.

14. Section 6.2.14 of the Agreement reads as follows

6.2.14 Resold services are available only where facilities currently exist and are capable of providing such services without construction of additional facilities or enhancement of existing facilities. However, if CLEC requests that facilities be constructed or enhanced to provide resold services, Qwest will review such requests on a case-by-case basis and determine if it is economically feasible for Qwest to build or enhance facilities. If Qwest decides to build or enhance the requested facilities, Qwest will develop and provide to CLEC a price quote for the construction. Construction charges associated with resold services will be applied in the same manner that construction charges apply to Qwest retail end users. If the quote is accepted by CLEC, CLEC will be billed the quoted price and construction will commence after receipt of payment.

A similar section in a U S WEST (Qwest)/Sprint interconnection agreement was rejected as follows:

Construction – Section 31.5.7 of the Agreement (pp. 174-75) states:

Resold services are available where facilities currently exist or are provided in the future as part of U S WEST's normal course of business operations for its end users and are capable of

providing such services without construction of additional facilities or enhancement of existing facilities. However, if Sprint requests that facilities be constructed or enhanced to provide resold services, USWC will review such requests on a case-by-case basis and determine, in its sole discretion, if it is economically feasible for USWC to build or enhance facilities. If USWC decides to build or enhance the requested facilities, USWC will develop and provide to Sprint a price quote for the construction. If the quote is accepted, Sprint will be billed the quoted price and construction will commence after receipt of payment.

The Commission finds that this provision could conflict with the public interest and should be rejected because there may be circumstances which arise where U S WEST (Qwest), pursuant to its duties as a carrier of last resort, is required by law to construct facilities. The parties may amend this section to address this concern. The agreed upon terms may apply for instances where U S West has no carrier of last resort responsibilities.

Order No. 6030, paragraph 29, Docket No. D97.8.160. Sprint and U S WEST amended the provision, which amendment was discussed as follows:

Conforming amendment on Construction: The Commission rejected Section 31.5.7 of the parties' Agreement because it did not consider U S WEST's "carrier of last resort" obligations which might require the construction of new or enhanced facilities. The parties amended this section as follows:

The following Language applies to the state of Montana only: (Final Order Approving Interconnection Agreement, 11-26-97, para. 29). This provision applies only where U S WEST has no "carrier of last resort" obligations as assigned by the commission which require by law the construction of facilities.

Although this section appears to address the Commission's concerns about "carrier of last resort" responsibilities on the part of U S WEST, it does not adequately comply with the Commission's Order. We stated that there may be instances where U S WEST is required to construct facilities because of its duties as a "carrier of last resort." Those duties are not specifically stated in Montana statutes, precedential court rulings, Commission regulations, or Commission Orders. Therefore, the Commission has not technically "assigned" these duties to any carrier for any area of Montana. The fact that they are not legally assigned does not

preclude their being “de facto” obligations. The amendment would conform adequately if the words “as assigned by the commission” are deleted. As it is, it should be rejected.

Order No. 6030a, paragraph 8, Docket No. D97.8.160. Qwest and Essex can amend section 6.2.14, or provide further argument. As it stands, section 6.2.14 is rejected.

15. Essex and Qwest can agree that nothing in their Agreement prohibits certain conduct, but 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. Any provision or term of this Agreement that is in conflict with the law, whether or not specifically addressed by the Commission, is rejected as a matter of law and not in the public interest.

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. Essex intends to resell Qwest's telecommunications services in Montana. As a reseller of regulated telecommunications services in Montana, Essex will be subject to Commission authority to supervise, regulate and control public utilities. Before providing services in Montana, Essex 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. Compliance with § 69-3-805(1)(e), MCA, has been waived by the Commission.

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 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.

7. 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 Essex Agreement by April 18, 2001, or the Agreement will be deemed approved.

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 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 agreement of the parties submitted to this Commission for approval pursuant to the 1996 Act is approved subject to the following condition:

The parties shall file subsequent amendments to the Agreement with the Commission for approval pursuant to the 1996 Act.

DONE AND DATED this 19th day of April, 2001, 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.