

Service Date: July 17, 2002

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 |
| KMC Telecom V, Inc. and |) | |
| Qwest Corporation |) | DOCKET NO. D2002.3.37 |
| Pursuant to Section 252(e) of the |) | ORDER NO. 6428 |
| Telecommunications Act of 1996 for |) | |
| Approval of their Interconnection Agreement |) | |

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 KMC Telecom V, Inc. (KMC) for interconnection and resale of Qwest services according to the 1996 Act. Qwest filed the parties' agreement, entitled "Interconnection Agreement Adopting Qwest's Statement of Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services" (Agreement) with the Montana Public Service Commission (Commission) on March 26, 2002. The Agreement provides for interconnection and for KMC to resell Qwest's local exchange services in Montana.

3. The Commission issued a Notice of Application for Approval of Interconnection Agreement Adopting Qwest's Statement of Generally Available Terms and Conditions for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services and Opportunity to Intervene and Comment on March 29, 2002, giving public notice of the requirements that the Commission must approve the Agreement unless it

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

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 April 15, 2002. The notice further stated that interested persons could submit limited comments on whether the agreements met these requirements no later than April 26, 2002.

4. No hearing has been requested and no comments or requests for intervention were received. The KMC 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 June 24, 2002, 90 days following the submission of KMC'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 through 15 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 9 of the Agreement suffers from defects with respect to Qwest's obligations regarding fill orders, identified in previous Commission orders. The Commission requires this language because it is in the public interest to take the steps required therein to protect Reseller's customers.

14. KMC 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.

15. The parties are advised that updated language reflecting Commission orders is available in the most recent Statement of Generally Available Terms, and are encouraged to take advantage of that where appropriate.

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. KMC intends to resell Qwest's telecommunications services in Montana. As a reseller of regulated telecommunications services in Montana, KMC will be subject to Commission authority to supervise, regulate and control public utilities. Before providing services in Montana, KMC 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.

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 2nd day of July, 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.