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IN THE MATTER OF QWEST
CORPORATION'S COMPLIANCE WITH
§ 271 OF THE
TELECOMMUNICATIONS ACT OF
1996.

DOCKET NO. T-000004-97-0238

**QWEST'S EXCEPTIONS AND COMMENTS ON THE ALJ'S
RECOMMENDED OPINION AND ORDER
REGARDING NIDs AND LINE SPLITTING**

INTRODUCTION

Qwest Corporation submits these Exceptions and Comments on the Administrative Law Judge's Recommended Opinion and Order regarding Qwest's compliance with two components of Checklist Items 2 and 4: access to Network Interface Devices ("NIDs") and line splitting. Qwest appreciates the time and attention the ALJ has devoted to reviewing the comments and reports Staff and the parties have submitted in this proceeding. For the most part, Qwest takes no exception with the ALJ's recommendations. As set forth below, Qwest challenges only one issue: the ALJ's recommendation that Staff investigate the "nature of" Qwest's relationship with MSN, the effect of that relationship on end users, and whether Qwest can provide Qwest DSL when the CLEC provides service to the end user over an unbundled loop. On the issues of Qwest's relationship with MSN, Qwest respectfully submits that this Commission has no

jurisdiction to investigate the matter. Qwest provides DSL to Internet Service Providers ("ISPs"), such as MSN, pursuant to federal tariffs. The FCC has also concluded that DSL is an interstate service. In fact, the FCC is currently considering a request for a declaratory ruling regarding Qwest's wholesale DSL services. Accordingly, the nature of Qwest's relationship with MSN is a matter of federal tariffs and federal law over which the FCC has jurisdiction.

On the issue of whether Qwest should be required to provide Qwest DSL to a CLEC when the CLEC provides service to its end user customer over an unbundled loop, the Commission previously determined in Decision No. 64215, regarding emerging services, that a feasibility study on this issue was unnecessary. Under current FCC rules, Qwest has no obligation to provide its DSL service when the CLEC captures the voice customer. Thus, Qwest's commitment already exceeds its obligations under the law. Regardless, no CLEC is requesting that Qwest continue to provide Qwest DSL if the CLEC provides voice service over an unbundled loop. AT&T acknowledged at the Special Open Meeting on emerging services that it has only requested the option to have Qwest continue to provide Qwest DSL service to the CLEC if the CLEC provides service over the unbundled network element platform ("UNE-P"). No other CLEC has stepped forward to make this demand. Indeed, demand for line splitting and loop splitting in general is virtually nonexistent at this time. Accordingly, Qwest respectfully requests that the Commission decline to adopt the ALJ's recommendation to open an investigation on these issues.

EXCEPTIONS AND COMMENTS

A. The FCC has Exclusive Jurisdiction Over Qwest's Federally-Tariffed Arrangement with MSN.

In the Commission's Decision relating to emerging services, Decision No. 64215, the Commission determined that Qwest should continue to provide Qwest DSL service to a CLEC on behalf of the CLEC's end user if the CLEC provides service over UNE-P. Decision No.

64215 ¶ 35. To memorialize this commitment, Qwest added Section 9.23.3.11.7 to its Arizona SGAT. This section provides:

9.23.3.11.7 CLEC may order new or retain existing Qwest DSL service on behalf of End User Customers when utilizing UNE-P-POTS, UNE-P-Centrex, and UNE-P-PBX (analog, non-DID trunks only) combinations, where Technically Feasible. The price for Qwest DSL provided with UNE-P combinations is included in Exhibit A to this Agreement. Qwest DSL service provided to Internet service providers and not provided directly to Qwest or CLEC's end users is not available with UNE-P combinations.

To Qwest's knowledge, no CLEC has filed comments in this proceeding taking issue with this SGAT language.

In the Recommended Opinion and Order on NIDs and line splitting, the ALJ revisits this issue. In paragraph 45 of the Recommended Opinion and Order, the ALJ states:

Because the manner in which Qwest provides its DSL service can be potentially anti-competitive, the Commission needs additional information. We direct Staff to investigate and file a report with the Commission on the nature of the MSN relationship, the affect that relationship has on the end-user of Qwest's DSL service, in particular whether there is any difference in service between Qwest's DSL service where Qwest is the voice provider and where it is not, and whether Qwest is able to provide DSL service when it is not also the voice carrier over an unbundled loop (as opposed to just UNE-P).

The Commission should not order the Staff to investigate Qwest's provision of DSL or its relationship with MSN for the following reasons. First, the Commission does not have jurisdiction over Qwest's provision of DSL. The Communications Act of 1934 ("the 1934 Act") provides that the regulation of interstate service is exclusively within the jurisdiction of the FCC.¹ In marked contrast to the Telecommunications Act of 1996 ("the 1996 Act"), which assigns the FCC and states complimentary roles, Congress, in the 1934 Act, granted the FCC

¹ 47 U.S.C. § 152(a).

sole jurisdiction over interstate and foreign wire communications.² The 1996 Act does not change that grant.

The FCC has determined that DSL service is an interstate service. In *GTE Telephone*,³ the FCC determined that GTE's DSL service, which permits ISPs to provide their end user customers with high-speed Internet access, is an interstate service properly tariffed at the federal level. In accordance with that order, Qwest offers both its retail Qwest DSL to end users as well as its DSL Volume Plan to ISPs pursuant to federal tariffs.⁴

The history of the FCC's subsequent orders on inter-carrier compensation for Internet-bound traffic lends further support for the proposition that DSL service is interstate in nature. In the *ISP Order*, the FCC used its traditional "end-to-end" analysis to determine that Internet-bound calls are not local telecommunications calls subject to reciprocal compensation under 47 U.S.C. § 251(b)(5).⁵ The court acknowledged that the FCC has traditionally used the "end-to-

² *Id.*

³ Memorandum Opinion and Order, *GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, 13 FCC Rcd 22466 (Oct. 30, 1998) ("*GTE Telephone*").

⁴ Interstate tariffs are subject to the sole and exclusive jurisdiction of the Federal Communications Commission. As the court stated in *AT&T Communications of the Mountain States, Inc. v. Public Serv. Comm'n of Wyoming*, 625 F. Supp. 1204, 1208 (D. Wyo. 1985), citing *Smith v. Illinois Bell Tel. Co.*, 282 U.S. 133 (1930),

The *Smith* Court went on to say that the interstate tolls were not a matter for determination by state commissions, but rather were exclusively federal matters.

See also *In re AT&T Co. & Associated Bell System Companies Interconnection with Specialized Carriers in Furnishing Interstate Foreign Exchange Service & Common Control Switching Arrangements*, 56 FCC 2d 14, 20 (1975), *aff'd*, *California v. FCC*, 567 F.2d 84 (D.C. Cir 1977). States may take action with respect to interstate services and services in federal tariffs only to the extent permitted by law or, in limited circumstances, by the FCC itself. See *General Communication, Inc. v. Alaska Communications Sys. Holdings, Inc.*, 16 FCC Rcd 2834, 2844 (2001).

⁵ Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket 99-98, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689 (Feb. 26, 1999) ("*ISP Order*"). While the Court of Appeals for the District of Columbia vacated and remanded this declaratory ruling in *Bell Atlantic*, it speciacally maintained that the law on the subject should maintain the *status quo* at this time. *Bell Atlantic Telephone Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).

end" analysis "to determine whether a call is within its interstate *jurisdiction*."⁶ While the court concluded that the FCC had not supplied an explanation for its decision to treat the "end-to-end" jurisdictional analysis as controlling for the specific statutory interpretation questions implicated under Section 251(b)(5), the court found: "[t]here is no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is jurisdictionally interstate."⁷ Accordingly, the FCC's assertion of jurisdiction over DSL services remains undisturbed.

In its *ISP Order on Remand*,⁸ the FCC reaffirmed its assertion of jurisdiction over "LEC-provided access to enhanced services providers, including ISPs."⁹ The FCC explained: "Internet service providers are a class of ESPs. Accordingly, the LEC-provided link between an end-user and an ISP is properly characterized as interstate access."¹⁰ Although the Court of Appeals recently remanded this decision to the FCC,¹¹ it did not vacate the FCC's order nor did it challenge the FCC's determination that Internet access is jurisdictionally interstate. Instead, the court held only that the FCC could not rely upon 47 U.S.C. § 251(g) as authority for not applying Section 251(b)(5).

Furthermore, the FCC has previously determined that "advanced services sold to Internet Service Providers as an input component to the Internet Service Providers' retail Internet service

⁶ *Id.* at 3 (emphasis in original).

⁷ *Id.* at 5.

⁸ Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 & 99-68, 16 FCC Rcd 9151 (April 27, 2001) ("*ISP Order on Remand*").

⁹ *Id.* ¶ 57.

¹⁰ *Id.*

¹¹ *WorldCom, Inc. v. FCC*, 2002 U.S. App. LEXIS 8542 (D.C. Cir. May 3, 2002).

offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers."¹² To seek clarification on the this rule, Qwest has filed a petition for declaratory ruling with the FCC concerning its wholesale DSL services and its resale obligations under Section 251(c)(4) of the Act. In its petition, Qwest asks the FCC to determine that even if a LEC acts as a billing, collection or marketing agent for an ISP to whom it sold DSL as an input to the ultimate bundled offering sold to an end user, the provisions of 47 C.F.R. § 51.605(c) still apply. This request for a declaratory ruling goes to the very heart of Qwest's relationship with ISPs that purchase DSL on a volume basis from Qwest, including MSN. Accordingly, there is already a proceeding before the FCC addressing Qwest's provision of wholesale DSL services to ISPs such as MSN.

Finally on the jurisdictional issue, the FCC has tentatively concluded that a bundled offering of DSL and Internet access service, such as MSN Broadband, is an "information service" and not a "telecommunications service."¹³ Under this regulatory scheme, the bundled offering would be governed by the terms of Title I of the Communications Act of 1934 and again would fall within the jurisdiction of the FCC and outside the jurisdiction of this Commission. For these reasons, Qwest respectfully contends that this Commission does not have jurisdiction to analyze Qwest's DSL offerings provided under a federal tariff.

¹² 47 C.F.R. § 51.605(c). See Second Report and Order, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19237 (1999), *aff'd*, *Association of Communications Enterprises v. FCC*, 253 F.3d 29 (D.C. Cir. 2001).

¹³ Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 02-33, 95-20, 98-10, FCC 02-42 ¶¶ 24-25 (Feb. 15, 2002).

B. An Investigation is Not Warranted.

Putting these important jurisdictional issues aside, there is also no basis upon which to open an investigation. The ALJ's recommendation is predicated on a single page of hypothetical questions filed by AT&T. In its comments on Staff's final report on NIDs and line splitting, AT&T queries whether Qwest will abide by its commitments in the SGAT to resell Qwest DSL and to provide Qwest DSL to UNE-P CLECs on behalf of the CLEC's end users. Qwest has not reneged on its resale commitments or its commitments in Section 9.23.3.11.7. In addition to the wholesale volume arrangements with ISPs such as MSN, discussed above, Qwest continues to sell Qwest DSL service directly to end user customers under a federal tariff. Under this arrangement, Qwest provides the DSL service, and the end user chooses an ISP from a list of "non-restricted" ISPs. Qwest continues to offer this Qwest DSL service that Qwest sells to its own end user customers for resale to CLECs.

Qwest reiterates that where the CLEC provides service over UNE-P, Qwest will provide Qwest DSL service to the CLEC on behalf of the CLEC's end user. It will also permit UNE-P CLECs to sign up for "new" Qwest DSL service on behalf of their end users as described in Section 9.23.3.11.7.

No CLEC has alleged that Qwest has failed to abide a request under Section 9.23.3.11.7, and no Arizona CLEC presented specific evidence of "anti-competitive" conduct as a result of Qwest's arrangement with a volume ISP. Furthermore, Qwest is unaware of any basis for the ALJ's recommendation that Staff should investigate "the affect that relationship has on the end-user of Qwest's DSL service, in particular whether there is any difference in service between Qwest's DSL service where Qwest is the voice provider and where it is not" as a result of any evidence in this docket.

Accordingly, because DSL service is an interstate service provided through a federal tariff, Qwest already has a declaratory ruling pending before the FCC relating to its arrangements

with MSN, and there is no factual support for opening an investigation, the Commission cannot and should not open an investigation regarding Qwest's "relationship" with MSN.

C. The Commission Has Already Determined That There is No Need to Study Whether Qwest Can Provide Qwest DSL to CLECs on Behalf of CLEC End Users When the CLEC Provides Voice Service Over an Unbundled Loop.

Lastly, Qwest takes issues with the ALJ's recommendation that Staff also investigate "whether Qwest is able to provide DSL service when it is not also the voice carrier over an unbundled loop (as opposed to just UNE-P)." This issue was discussed at length in Qwest's comments on emerging services and in the Commission's November 16 Special Open Meeting on emerging services, and the Commission determined that there was no need for further investigation of this issue at this time. Nothing has changed in the few intervening months to warrant opening an investigation on this issue.

By way of background, in the Recommended Opinion and Order on emerging services, the ALJ suggested that Qwest should continue to provide Qwest DSL service to a CLEC on behalf of its end user even if the CLEC provided service over an unbundled loop. In Qwest's Comments to the Hearing Division's Emerging Services Report, filed on October 9, 2001, Qwest demonstrated that while it can provide Qwest DSL if the CLEC provides service over the UNE-P, Qwest's billing systems will not enable it to continue to provide Qwest DSL service if the CLEC provides voice service over a stand-alone unbundled loop. As described in those Comments and in the accompanying verification of Ms. Mary LaFave, Qwest's systems for provisioning Qwest DSL service recall information by telephone number. CLECs that provide service over an unbundled loop, however, have their own telephone numbers. Accordingly, loops provisioned to CLECs are identified in Qwest's systems by "Circuit ID." Thus, to provide Qwest DSL when the CLEC provides voice service via an unbundled loop would require Qwest to modify numerous retail systems to recognize Circuit IDs. As Ms. LaFave verified, these modifications would cost several million dollars.

At Open Meeting, Qwest explained its position, and the participants discussed the issue at length. Qwest reiterated that it currently has no legal obligation to provide its Qwest DSL service when the CLEC serves the end user as a voice customer, and certainly not when the CLEC provides service over an unbundled loop. Specifically, in its *Line Sharing Reconsideration Order*, the FCC confirmed that an incumbent LEC has no obligation to provide xDSL service when it is no longer the voice provider.¹⁴ Indeed, the FCC left no room for doubt on this issue:

We deny, however, AT&T's request that the Commission clarify that incumbent LECs must continue to provide xDSL services in the event customers choose to obtain voice service from a competing carrier on the same line because we find that the *Line Sharing Order* contained no such requirement.¹⁵

In the *SBC Texas Order*, the FCC also stated: "[u]nder our rules, the incumbent LEC has no obligation to provide xDSL service over this UNE-P carrier loop."¹⁶ Thus, by agreeing to continue to provide Qwest DSL to the UNE-P CLEC if that CLEC provides the end user's voice service, Qwest is already going farther than federal law requires.

When asked by this Commission whether the law went *further* and required Qwest to provide Qwest DSL when the CLEC provides voice service over an unbundled loop, Staff agreed that Qwest has no such obligation:

¹⁴ See Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking in CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 98-147, 96-98, 16 FCC Rcd 2101 ¶ 26 (rel. Jan. 19, 2001) ("*Line Sharing Reconsideration Order*").

¹⁵ *Line Sharing Reconsideration Order* ¶ 16.

¹⁶ Memorandum Opinion and Order, *Application of SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, 15 FCC Rcd 18354, ¶ 330 (June 30, 2000) ("*SBC Texas Order*").

MS. SCOTT: Chairman, Commissioners, I would have to agree with Mr. Steese [counsel for Qwest]. I don't think that right now there is a requirement that they would provide xDSL with a stand-alone unbundled loop. And I can clarify that somewhat. This issue was, in fact, raised by Qwest. Qwest sought clarification of Staff's Report on this issue, which had recommended that Qwest be required to provide it on a UNE-P basis. And Qwest came back and sought clarification to make sure that it wasn't required to provide it with a stand-alone unbundled loop. That is how the issue came up.

But I would agree with Mr. Steese that right now, Qwest is under no legal obligation to provide it on a stand-alone loop.¹⁷

In addition to the absence of any legal obligation, it remains true that there is no demand for this option. Specifically, at Special Open Meeting, AT&T confirmed that it has not requested and is not requesting that Qwest continue to provide Qwest DSL service if the CLEC provides voice service to the end user over an unbundled loop.

MR. WOLTERS: Chairman Mundell, Commissioners, this is Rick Wolters, AT&T.

I've gone through our documents and the pleadings that we've filed, and I can't find anything from AT&T that took the next step asking that service for – that we be able to provide the voice service with an unbundled loop and still get the DSL, so I don't know where this issue came from. So at this point I really don't have a position. What we did ask for was the DSL when we provide service over UNE-P. So I don't know where this came from, the documents that I've looked at, so I don't have an opinion.¹⁸

At the Special Open Meeting, Qwest also discussed the competitive demand for Qwest's line splitting offering and stated that at that time, no CLEC had even ordered line splitting (an arrangement in which a UNE-P CLEC partners with another CLEC or data LEC for DSL service). *Id.* at 24. An arrangement in which *Qwest* provides the DSL service where the CLEC provides voice service over UNE-P is even farther removed. The scenario the ALJ claims Staff

¹⁷ 11/16/01 Special Open Meeting Tr. at 32.

¹⁸ *Id.* at 28.

should investigate is even more remote. Based upon the absence of any federal requirement, the lack of any specific CLEC demand in this docket, and the absence of any competitive demand generally, the Commission declined to adopt the ALJ's recommendation that Qwest file a feasibility study regarding its ability to provide Qwest DSL when the CLEC serves the end user via unbundled loop and deleted those requirements from its final order.¹⁹

Since that time, competitive demand for line splitting and loop splitting has not changed in Arizona. Although Qwest has received a very few line splitting orders in one state, it has not received any line splitting orders in Arizona. It has not received any loop splitting orders anywhere in its region. In short, as there was no need for a study in November when the Commission addressed this same issue. Nothing has changed since that time. There is no need for Staff to open an investigation now. Qwest respectfully suggests that Staff and this Commission's time not be spent investigating a "product" with no demand.

CONCLUSION

For the foregoing reasons, Qwest respectfully contends that the Commission should not open an investigation as recommended in paragraph 45 of the ALJ's Recommended Opinion and Order on NIDs and Line Splitting.

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¹⁹ See *id.* at 33-34, 56-60.

Respectfully submitted this 24th day of May, 2002.



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A handwritten signature in cursive script, appearing to read "Alan S. Vega", is written over a solid horizontal line.

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