Decision No. C06-0234

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 05M-364T

REQUEST BY QWEST CORPORATION THAT THE COLORADO PUBLIC UTILITIES COMMISSION MEDIATE ITS INTERCONNECTION AGREEMENT NEGOTIATIONS WITH RUBY RANCH INTERNET COOPERATIVE ASSOCIATION.

ORDER GRANTING PETITION FOR DECLARATORY ORDER

Mailed Date: March 13, 2006
Adopted Date: January 25, 2006

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of a Petition for Declaratory Ruling or, in the Alternative, for Variance (Petition), filed by Ruby Ranch Internet Cooperative Association (Ruby Ranch or Petitioner). Petitioner seeks a declaratory order that federal law requires Qwest Corporation (Qwest) to negotiate prices for unbundled subloops located on Ruby Ranch property based on the specific costs Qwest incurs in providing these subloops, and that Qwest cannot require Ruby Ranch to use the prices contained in Qwest's Statement of Generally Available Terms (SGAT). In the alternative, should the Commission determine that Qwest may only use its SGAT prices, Ruby Ranch seeks a variance because the interim subloop price set years ago is above Qwest's costs.

2. Now, being fully advised in the matter, we grant Ruby Ranch's Petition in part consistent with the discussion below.

B. Background

3. Ruby Ranch is a residential community located in Summit County Colorado. Currently, the Ruby Ranch development consists of approximately 46 homes. Space is available in the development for 11 more homes. In 2001, the homeowners formed a nonprofit co-op in order to obtain broadband Internet service to the development. Broadband service was commenced in May 2002. According to the Petition, the co-op provides Digital Subscriber Loop (DSL) broadband Internet access services to 34 residents, with some residents using the service for their home businesses. Ruby Ranch represents that Qwest does not offer DSL service in the area.

4. The co-op operates as a facilities-based provider in that it uses a digital subscriber line access multiplexer to provide DSL service to its members. The co-op rents unused spare copper pairs in buried cables from Qwest. The subloops are necessary for the co-op to provide broadband Internet services to Ruby Ranch residents. In 2001, Ruby Ranch proposed renting dedicated subloops from Qwest rather than sharing subloops with Qwest Plain Old Telephone Service. Ruby Ranch represents that the dedicated subloops it wished to rent were not in use and would never be used by Qwest.

5. Because Ruby Ranch and Qwest could not reach agreement as to the lease of the dedicated subloops, Ruby Ranch requested that the Commission arbitrate the matter. In Commission Decision Nos. C02-0209 and C04-0458, the Commission determined that Ruby Ranch should pay $8.73 per subloop and approved a revised subloop agreement that contained that price. Subsequently, in Decision No. C02-0636, the Commission approved an interim subloop price of $24.13 for use in the SGAT. According to Ruby Ranch, the $24.13 subloop price remains in effect as of the date of its Petition. Qwest charges $24.13 for dedicated

subloops and charges $3.50 for shared subloops. Consequently, Ruby Ranch uses a mix of dedicated and shared subloops which averages to approximately $10 per subscriber.

6. Ruby Ranch notes that in August 2003, the Federal Communications Commission (FCC) released its *Triennial Review Order*[1] which had the effect of limiting its options. In that Order, the FCC reaffirmed that incumbent local exchange providers (ILECs) like Qwest must continue to offer dedicated subloops to competitive local exchange carriers (CLECs) like Ruby Ranch. However, the FCC also determined that ILECs were no longer required to provide shared subloops, except on a grandfathered basis, whereby existing ILEC customers could continue to receive service via shared subloops.[2]

7. The FCC additionally adopted a three-year transition period to allow CLECs to continue to order shared subloops for new customers. That three-year period ends October 2, 2006.[3] Ruby Ranch interprets this provision to mean that while it may continue to order shared subloops to serve new customers, Qwest may nonetheless "pull the plug" after October 2, 2006 and prevent Ruby Ranch from continuing to serve those customers with the shared subloops. Ruby Ranch further interprets the FCC Order to mean that while it can continue to serve existing customers using shared subloops at the $3.50 rate, all new customers must use dedicated subloops at the $24.13 rate.

8. On April 1, 2005, the agreement between Ruby Ranch and Qwest expired and the parties agreed to a month-to-month subloop rental arrangement. Subsequently, Qwest petitioned the Commission to mediate these issues, which the Commission agreed to do in Decision

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[1] *Triennial Review Order*, CC Docket Nos. 01-338, 98-147, 96-98, FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003), *aff'd in part, vacated in part on other grounds, USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[2] *Id.* at ¶¶ 255 and 264.

[3] *Id.*

Nos. C05-1057 and R05-1102. At the mediation session held on November 9, 2005, Ruby Ranch indicates that Qwest represented it had dedicated subloops available and that it was required to charge Ruby Ranch the $24.13 SGAT price for those subloops. Ruby Ranch contends that it is Qwest's position that it cannot negotiate a different price.

9. While Ruby Ranch indicates that the parties continue discussions on the terms relating to shared subloops, this option will be moot since Qwest need not offer shared subloops after October 2, 2006. As such, Ruby Ranch requests that the Commission determine that Qwest may negotiate a price for the dedicated subloops lower than its $24.13 SGAT price.

10. In its argument supporting its Petition, Ruby Ranch states that a controversy exists between it and Qwest inhibiting their ability to negotiate a new interconnection agreement, that is, whether the Commission requires Qwest to rent subloops only at the price contained in its SGAT. Consequently, Ruby Ranch petitions the Commission for a declaration that Qwest is required by governing federal law to rent subloops to Ruby Ranch based on its costs of providing those particular subloops, and that Qwest may negotiate a price other than that stated in its SGAT.

11. Ruby Ranch argues that Section 251(c)(3) of the Federal Telecommunications Act (Act) (47 U.S.C. § 251(c)(3)) requires Qwest to provide unbundled network elements (UNEs) such as subloops to any other carrier "in accordance with … the requirements of this section and section 252 of this title." *Id.* Section 47 U.S.C. § 252(d)(1) specifies that Qwest's UNE prices "shall be based on the cost … of providing the … network element." Additionally, Ruby Ranch points to § 252 of the Act that indicates parties are to negotiate any issues and are free to reach an agreement "without regard to the standards set forth in section 251(b) or (c)." Further, § 252(b)

provides that, in the event a voluntary agreement cannot be negotiated, either party may request a state commission to arbitrate the unsolved issues.

12. Ruby Ranch cites 47 *Code of Federal Regulations* (C.F.R.) § 51.809 as well as the FCC's *Local Competition Order*[4] indicating that § 252(i) permits differential price treatment based on an ILEC's cost of serving a carrier. According to Ruby Ranch, Congress established a statutory scheme under the Act that defines cost-based prices as the cost an ILEC incurs in providing the specified UNEs to the specific CLEC requesting the UNEs.

13. Qwest, according to Ruby Ranch, takes the position that by filing its SGAT, it may now only charge the price for subloops contained therein and need not negotiate prices based on specific costs of providing specific UNEs to Ruby Ranch, and thus Ruby Ranch's only option is to pay the SGAT prices. Ruby Ranch argues that Qwest's position (as Ruby Ranch represents it) is incompatible with the terms of the SGAT. Ruby Ranch points to language in the SGAT stating that CLECs "may adopt this SGAT in lieu of entering into an individually negotiated interconnection agreement."[5]

14. Based on its analysis of the Act, Ruby Ranch contends Qwest's position, that it may only charge the SGAT price for the loops, is inconsistent with the plain commands of Congress pursuant to the Act. Ruby Ranch points to § 252(f)(5) of the Act which states that "the submission or approval of a[n] [SGAT] under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251." The FCC in addressing this section indicates that "the existence of an approved SGAT does not

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[4] *Local Competition Order*, 11 FCC Rcd 15499, 16140 ¶ 1317 (1996).

[5] *See* Qwest's Colorado SGAT at §§ 1.4 and 1.5 (9th Rev., March 4, 2003), stating:

This SGAT ... offers CLECs an alternative to negotiating an individual interconnection agreement with Qwest. ... [N]either the submission nor approval of this SGAT nor any provision herein shall affect Qwest's willingness to negotiate an individual agreement with any requesting Carrier pursuant to Section 252.

vitiate a Bell Operation Company's obligation to engage in negotiations for different terms, if a competitive LEC requests."[6] Ruby Ranch concludes that Qwest's position is not only inconsistent with the terms of the Act, but is also inconsistent with the express terms of its own SGAT.

15. If the Commission determines that Qwest is required to charge Ruby Ranch only the prices contained in its SGAT for the subloops, then Ruby Ranch requests entry of any waiver necessary to allow it to pay a rate lower than the SGAT rate for dedicated subloops in order to transition its customers off the current shared subloop arrangement.

16. In its response to the Petition, Qwest argues that it disagrees with many of the factual assertions and legal arguments made by Ruby Ranch. For example, Qwest maintains that federal law (47 U.S.C. § 252(d)) requires it must charge a state commission approved rate for standard UNEs it is required to provide pursuant to §§ 251(b) and (c) of the Act, like a subloop. To the extent Qwest is permitted to charge a negotiated rate for a particular product or service, the rate must still be offered consistent with the law, including those provisions of federal law that require rates to be just, reasonable, and non-discriminatory. *See* 47 U.S.C. § 202.

17. Qwest also asserts that no controversy exists such that the Commission should exercise its powers to issue a declaratory order. Qwest points out that Ruby Ranch does not dispute that Qwest is charging it the Commission approved rate for unbundled subloops. However, Qwest maintains that Ruby Ranch's objection is that each time Ruby Ranch requests a lower rate for dedicated subloops than the SGAT rate, Qwest responds that offering a lower rate to Ruby Ranch would trigger concerns that Qwest was discriminating between carriers.

[6] *See, Core Communications v. Verizon*, 18 FCC Rcd 7962, 7953 n. 14 (2003).

18. Qwest offers that changing the SGAT rate for unbundled subloops is an issue best decided in the current Qwest-specific docket the Commission has initiated as Docket No. 04M-111T. According to Qwest, the issue raised by Ruby Ranch here is the same issue it seeks to have adjudicated in the cost docket. Qwest additionally requests that Ruby Ranch's request that it be granted a variance should the Commission decide that Qwest may only use its SGAT prices should also be denied.

C. Analysis

19. Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-1-60(a) provides that the Commission may issue a declaratory order "to terminate a controversy or to remove an uncertainty as to the applicability to a petitioner of any statutory provision or Commission rule, regulation or order." The Commission may decline to enter a declaratory order if it concludes that "the subject matter should be determined by a court or another administrative agency or in another proceeding." *See* 4 CCR 723-1-60(a)(3).

20. Ruby Ranch requests a declaratory ruling that Qwest must negotiate prices for unbundled subloops located on Ruby Ranch based on the specific costs Qwest incurs in providing these subloops. Further, Ruby Ranch requests a declaratory ruling that Qwest cannot require it to use the prices contained in Qwest's SGAT. Ruby Ranch indicates that Qwest's position that it must charge its SGAT rate for the subloops and Ruby Ranch's position that pursuant to the Act, Qwest must negotiate a price for the subloops, creates the type of controversy contemplated by Commission Rule 60.

21. We find that a controversy does indeed exist here. Qwest maintains that it may not offer a lower rate (than its SGAT rate) to Ruby Ranch without triggering concerns that Qwest is discriminating between carriers pursuant to 47 U.S.C. § 251(d)(1)(A)(ii), which would be

better addressed in a Qwest-specific cost docket. However, we are not persuaded by Qwest's reasoning. Clearly the two parties are in disagreement over the price Qwest may charge for the Ruby Ranch unbundled subloops. While Ruby Ranch argues that Qwest is bound by the Act to negotiate a cost-based price, Qwest maintains it must charge the SGAT rate. We find that a *bona fide* controversy exists that requires a declaratory ruling from the Commission to resolve the issue.

22. The Telecom Act provides plain direction to ILECs and CLECs negotiating terms of an interconnection agreement. Section 252 of the Act provides that parties may enter into voluntary negotiations "without regard to the standards set forth in subsections (b) and (c) of section 251." Further, 47 U.S.C. § 252(b) provides that, in the event a voluntary interconnection agreement cannot be negotiated, either party may request a state commission to arbitrate the unsolved issues. Notably, § 252(f)(5) states that submission or approval of a SGAT under subsection 252 does not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under § 251.

23. Qwest does not dispute the requirements of the Act pursuant to §§ 251 and 252. It is the inherent duty of ILECs to negotiate interconnection agreements in good faith, even when a SGAT is on file with the state commission. The ILEC is nonetheless required to negotiate terms different from its SGAT if a CLEC so requests. We therefore find that Qwest must negotiate in good faith with Ruby Ranch the price of dedicated subloops located on Ruby Ranch, even though Qwest has an effective SGAT on file that lists a price of $24.13 for such subloops.

24. Additionally, 47 U.S.C. § 252(d)(1) provides that the determination by a state commission of a just and reasonable rate for the interconnection of facilities and equipment shall be: "(i) based on the costs (determined without reference to rate-of-return or other rate-based

proceeding) of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and (B) may include a reasonable profit." *Id.* We agree with Ruby Ranch's citation to 47 C.F.R. § 51.809 and to the FCC's *Local Competition Order* which indicate that § 252(i) permits differential price treatment based on the ILEC's costs of serving a carrier. Consequently, we find that Qwest may negotiate a price different from its SGAT price for unbundled subloops without running afoul of the Act's determinations regarding discriminatory pricing. However, to the extent Ruby Ranch requests we order a specific price for the dedicated subloops, we decline to do so. That is a matter of negotiation between the parties.

25. We further agree with Ruby Ranch that the public interest would be served in this instance through negotiations between the parties for a reasonable price for the dedicated subloops. Certainly benefits would accrue to both parties under a voluntarily negotiated agreement for use of the dedicated subloops.

26. We note that to the extent Qwest has concerns that entering into such an agreement may compromise it in negotiations with other CLECs, this is certainly a unique circumstance whose terms may not be attractive to other CLECs. Ruby Ranch is a small co-op with a finite customer base. Its facilities are located in a horse barn on its property. Further, Ruby Ranch has represented in its Petition that it is willing to include language in its agreement with Qwest to ensure that only carriers truly similarly situated with Ruby Ranch are eligible for the same terms and conditions.

27. We therefore order the parties to continue negotiation of an interconnection agreement for use of Qwest's dedicated subloops located on Ruby Ranch. Qwest may negotiate a cost-based price (which may include a reasonable profit) different from that contained in its SGAT for unbundled, dedicated subloops. In the event the parties are not able to reach a

voluntary agreement, they may submit this matter to the Commission for arbitration. However, we decline to impose or suggest a price for the dedicated subloops as Ruby Ranch requests.

II. ORDER

A. The Commission Orders That:

1. The Petition for Declaratory Order filed by Ruby Ranch Internet Cooperative Association (Ruby Ranch) is granted consistent with the discussion above.

2. Qwest Corporation (Qwest) and Ruby Ranch are ordered to enter into negotiations for rental of Qwest's unbundled, dedicated subloops located on Ruby Ranch.

3. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Mailed Date of this Order.

4. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING January 25, 2006.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

CARL MILLER

Commissioners