Decision No. C06-0692

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 DENYING APPLICATION FOR REHEARING, REARGUMENT, OR RECONSIDERATION

Mailed Date: June 13, 2006
Adopted Date: May 31, 2006

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of an application for rehearing, reargument, or reconsideration (RRR) of the substantive issues of Commission Decision No. C06-0234, as provided for in Commission Decision No. C06-0548, filed by Qwest Corporation (Qwest) on May 16, 2006.

2. Qwest seeks RRR regarding our findings in Decision No. C06-0234 granting Ruby Ranch Internet Cooperative Association's (Ruby Ranch) petition for declaratory order that Qwest may negotiate prices for unbundled subloops located on Ruby Ranch property, based on the specific costs Qwest incurs in providing these subloops. We further declared that Qwest may negotiate a price different from its prices contained in its Statement of Generally Available Terms (SGAT) for unbundled loops without running afoul of the Telecommunication Act's (Telecom Act) determinations regarding discriminatory pricing.

3. Now, being fully advised in the matter, we deny Qwest's RRR regarding our findings in Decision No. C06-0234.

B. Background

4. Ruby Ranch sought a declaratory order from the Commission that Qwest could negotiate prices for unbundled subloops located on Ruby Ranch property. According to Ruby Ranch's petition, Qwest had indicated in negotiations that it was bound to charge only the rates indicated in its SGAT.

5. In our decision granting Ruby Ranch's petition, we found that Qwest was not legally bound to charge only its SGAT rates for the unbundled subloops, but could indeed negotiate the price to lease the subloops based on the costs incurred by Qwest in providing them. We found that § 251 of the Telecom Act required Qwest to negotiate the rates, terms, and conditions for the offering of unbundled network elements, such as the subloops at issue here.

6. We further held that § 252 of the Telecom Act provides that parties may enter into voluntary negotiations "without regard to the standards set forth in subsections (b) and (c) of section 251." We also noted that § 252(f)(5) states that submission or approval of a SGAT under § 252 does not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under § 251. Consequently, we ordered the parties to continue negotiations of an interconnection agreement for use of Qwest's dedicated subloops located on Ruby Ranch property. We indicated that Qwest may negotiate a cost-based price (which may include a reasonable profit) different from that contained in its SGAT for unbundled, dedicated subloops. We further stated that, should the parties fail to reach a voluntary agreement, they were free to submit the matter to the Commission for arbitration. However, we declined to impose or suggest a price for the dedicated subloops as Ruby Ranch requested.

7. In Decision No. C06-0548, we denied Qwest's RRR on procedural grounds. We found that Qwest had incorrectly argued that the Commission's procedure for addressing Ruby Ranch's petition for declaratory order was deficient. However, as part of that decision, we allowed Qwest another opportunity to argue the substantive merits of our decision.

8. Qwest in its most recent RRR filing argues that ordering it to continue to negotiate over terms it finds unacceptable will not make the terms of Ruby Ranch's offer any more palatable to Qwest. Qwest points out that the need for Ruby Ranch to follow federal law and seek arbitration with Qwest will not be obviated by our order to continue negotiations.

9. Qwest generally takes issue with Ruby Ranch's offer of $1.50 per dedicated subloop. Qwest indicates that Ruby Ranch's justification for this offer is faulty and contrary to the Telecom Act. According to Qwest, Ruby Ranch's proposal would result in the conclusion that, where Qwest is not currently utilizing a facility, it should offer that facility at any rate as that would result in Qwest making a profit on its unused plant. Qwest points out that this method is not normally used to price unbundled network elements under the Telecom Act.

10. Qwest further argues that Ruby Ranch is negotiating in bad faith by offering $1.50 per subloop because this offer does not permit Qwest to recover its costs, as determined by the Commission in cost docket proceedings. Qwest also alleges that Ruby Ranch has failed to offer any accompanying concessions to supplement its offer of $1.50 per subloop.

11. Qwest argues that, if it determines that a rate structure other than the Commission-ordered rate structure is administratively unworkable, and/or that a competitive local exchange carrier's (CLEC) offer is such that Qwest would be unable to recover its costs in providing the facility, Qwest is not required to accede to the demands of the CLEC. Rather, the

parties may, pursuant to § 252(b) of the Telecom Act, request a state commission to arbitrate the unresolved issues. Qwest states that it cannot accept Ruby Ranch's offer of $1.50 per subloop.

C. Analysis

12. We agree with Qwest that, when an incumbent local exchange carrier (ILEC) and CLEC enters into negotiations for the terms of an interconnection agreement, should the parties fail to reach an agreement, they may certainly submit a request for arbitration to the Commission pursuant to § 252(b) of the Telecom Act. However, prior to reaching such a point, § 251 of the Telecom Act requires an ILEC and CLEC to negotiate the rates, terms, and conditions for the offering of unbundled network elements.

13. While Ruby Ranch argues in its petition that Qwest has failed to negotiate in good faith by refusing to offer a price for the subloops other than its SGAT price, Qwest counters that Ruby Ranch itself is guilty of bad faith negotiations in offering no other price than the $1.50 for each subloop. It would appear that we have reached the heart of the controversy here and indeed the impasse – the perception of each party that the other is negotiating in bad faith.

14. Notably, this brings us back to our decision on the petition for declaratory order. We ordered the parties to continue negotiations and, should they appear fruitless, the parties could submit the matter to the Commission for arbitration. We found that Qwest was not required to charge its SGAT price for the unbundled subloops, but was free to negotiate the price with Ruby Ranch. Qwest concedes as much in its RRR here. It points out that, "Qwest must negotiate the rates, terms and conditions for the offering of unbundled network elements pursuant to 47 U.S.C. § 251 …" (*See* Qwest's Application for RRR p. 4 sec. II and p. 5). Indeed, Qwest points out that such a requirement is "undisputed."

15. We find ourselves now with the following situation. Ruby Ranch does not wish to pay $24.13 for each subloop (Qwest's offer). Qwest does not wish to charge $1.50 for each subloop (Ruby Ranch's offer). In its petition for declaratory order, Ruby Ranch indicates it is willing to negotiate a price other than Qwest's SGAT price of $24.13. In its RRR, Qwest notes that it must negotiate the rates, terms, and conditions of interconnection, including the offering of unbundled network elements. It would appear we have come full circle back to Decision No. C06-0234.

16. We find nothing in Qwest's RRR to change our minds. We find that our requirement for the parties to continue to negotiate and, should negotiations fail, submit the matter to the Commission for arbitration, is sound. Obviously each party is free to negotiate the rates, terms, and conditions most favorable to each other. By the same token, each party is free to reject the proposed rates, terms, and conditions that it finds unpalatable and look to arbitration for resolution. Therefore, we deny Qwest's RRR and uphold Decision No. C06-0234 in its entirety. Qwest and Ruby Ranch should begin negotiations as soon as possible to determine if resolution of this matter is possible. If not, we would expect to see a petition for arbitration filed with the Commission forthwith.

II. ORDER

A. The Commission Orders That:

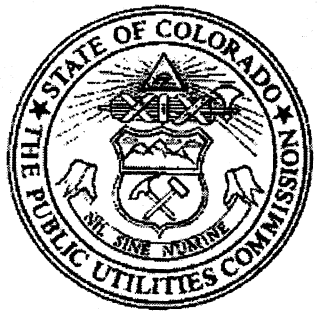
1. The application for rehearing, reargument, or reconsideration filed by Qwest Corporation on May 16, 2006 is denied consistent with the discussion above.

2. Decision No. C06-0234 is upheld in its entirety.

3. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING May 31, 2006.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

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CARL MILLER

Commissioners

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