BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RUBY RANCH INTERNET COOPERATIVE ASSOCIATION,	)	
PETITIONER,	)	
v.	)	ARBITRATION DOCKET NO. 01B-493
QWEST CORPORATION,	)	
RESPONDENT.	)	

PETITION FOR RECONSIDERATION, REARGUMENT, OR REHEARING

The Ruby Ranch Internet Cooperative Association ("Coop"), pursuant to § 40-6-114, C.R.S., respectfully requests the Commission to reconsider its Arbitration Decision adopted on February 25, 2002 and mailed on March 1, 2002 ("Arbitration Decision"). For the Commission's convenience, the Coop addresses the issues in the order the Commission addressed them in its Decision.

I. THE COMMISSION SHOULD RECONSIDER THE SUBLOOP ACTIVATION CHARGE

The Commission adopted Qwest's position that Qwest should be permitted to charge the Coop the $120.67 subloop activation charge contained in its SGAT. The Coop asks the Commission to reconsider this decision, because this price is not "just, reasonable, and nondiscriminatory" as applied to the Coop.[1]

[1] The Communications Act requires that Qwest subloops be provided on rates that are "just, reasonable, and nondiscriminatory." 47 U.S.C. § 251(c)(3).

The evidence is uncontroverted that Qwest must do work at only two locations – at the Qwest cross-connect box and at the individual subscriber's Network Interface Device – to activate the subloops that the Coop requires.[2] The evidence is also uncontroverted that the amount of time that Qwest would spent to activate each subloop the Coop orders is twenty (20) minutes.[3] A charge of $120.67 for 20 minutes of work – an effective hourly rate of $362.01 for outside plant work – is not just and reasonable as the Communications Act requires.

The Communications Act further specifies that Qwest's prices be non-discriminatory.[4] The Commission notes correctly that the prices contained in Qwest's SGAT are based on Qwest's averaged costs to serve "all requesting telecommunications carriers" in Colorado,[5] which include large CLECs such as AT&T and MCI/WorldCom. The Commission further appears to recognize that prices contained in the SGAT can be discriminatory when applied to a particular carrier:

> In order for us to approve a rate different from that established in 99A-577T for a specific carrier, we must be persuaded that a good reason exists for approving a different rate.[6]

The Federal Communications Commission ("FCC"), whose interpretation of the Communications Act is entitled to deference,[7] has held that a good reason for using a different rate is when the costs of providing a service to a specific carrier are different. In fact, the FCC has de-

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[2] *See* Arbitration Decision at 8 n.7.

[3] Hearing Exhibit No. 1 at p. 58, lines 11-13. Qwest chose not to cross-examine the Coop's witness. *See* Hearing Transcript at p. 43, lines 13-14.

[4] *See* 47 U.S.C. § 251(c)(3).

[5] Arbitration Decision at 9.

[6] *Id.*

[7] *See, e.g., U S WEST* v. *Hix,* 57 F. Supp. 2d 1112, 1117 (D. Colo. 1999)("The COPUC was required to apply the FCC's Local Competition Order in conducting the arbitration and in approving the Agreement."); *U S WEST* v. *Hix,* 93 F. Supp. 2d 1115, 1125 (D. Colo. 2000))("The CPUC did not err in apply-

cleared that charging the same rate when the underlying costs differ itself constitutes discrimination under the Act:

> Where costs differ, rate differences that accurately reflect those differences are not discriminatory. . . . An important feature of the economic definition of price discrimination is that it occurs not only when prices are different in the presence of similar costs but also *when the prices are the same and the costs of supplying customers are different.* . . . Strict application of the term "nondiscriminatory" as urged by those commenters who argue that prices must be uniform would itself be discriminatory according to the economic definition of price discrimination. If the 1996 Act is read to allow no price distinctions between companies that impose very different interconnection costs on LECs, competition for all competitors, including small companies, could be impaired.[8]

The Coop does *not* challenge the Commission's pricing decisions in the SGAT proceeding, but that proceeding was focused on large for-profit CLECs as opposed to tiny, non-profit organizations like the Coop. Charging the Coop $120.67 for 20 minutes of work is discriminatory as the FCC has interpreted that term. Charging the Coop $120.67 for 20 minutes of work is certainly not just and reasonable as Section 251(c)(1) of the Act further commands.

The Commission determined in the SGAT proceeding that Qwest is entitled to charge $27.69 for an hour of ordinary outside plant work.[9] As noted above, the evidence is uncontroverted that the activation of a single subloop for the Coop would take Qwest 20 minutes. A subloop activation charge of $9.22 ($27.67/3) would be cost based and just, reasonable and nondiscriminatory under the statute. However, as it previously advised the Commission, the Coop would also be willing to pay $27 per loop – which is half the rate that Qwest charges to activate an entire loop used in business service because, as the Commission acknowledged, Qwest must

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ing the FCC's Local Competition Order in conducting the arbitrations and in approving the Interconnection Agreements.").

[8] *First Local Competition Order*, 11 FCC Rcd 15499, 15928 ¶ 860 (1996)(italics in original; underscore added).

[9] *See* Qwest Colorado SGAT, Attachment A at p. 10 (Dec. 21, 2001).

perform less than half the work to activate a subloop for the Coop than it would spend in activating an entire loop on the Ruby Ranch neighborhood.[10]

II. THE COMMISSION SHOULD RECONSIDER THE MONTHLY SUBLOOP CHARGE

The Coop asked Qwest to rent subloops on June 1, 2001. Eight months later, at the January 31, 2002 hearing, Qwest argued *for the first time* that it should be able to charge the Coop $8.73 per subloop, which is the averaged price the Commission established in C01-1302.[11] The Commission "agree[d] with Qwest" on this issue, stating that "[w]e find no basis in this case for changing our previous decision."[12]

The Coop does *not* ask the Commission to change its decision in C01-1302. The Coop respectfully submits, however, that the parties had agreed to the monthly subloop price and that as a result, the Commission was without authority to address this issue.[13] Simply put, the Commission cannot require the Coop to pay a price (almost double) higher than the rate the parties had voluntarily agreed to use.

As Attachment A indicates, on January 24, 2002, one week before the hearing, Qwest told the Coop that the applicable price for each subloop would be $4.54 monthly.[14] The Coop

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[10] The Commission distinguishes the Coop's analogy on the ground that a business line is "another service." Arbitration Decision at 9. Admittedly, the provision of a subloop and business service is a different service. But to provide business service on Ruby Ranch, Qwest must activate a loop, including the same subloops that the Coop would be renting. If Qwest charges $54 to activate an entire loop that requires work at four locations, it is entirely just and reasonable to charge the Coop $27 to activate a portion of a loop that requires work at only two locations. One point is clear: a charge of $120.67 for 20 minutes of work is not just and reasonable.

[11] *See* Arbitration Decision at 10.

[12] *Id.*

[13] *See* 47 U.S.C. § 252(b)(4)(A)("The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).").

[14] *See* Attachment A, Email from Carl Oppedahl to Timothy Tymkovich dated January 24, 2002.

agreed to this $4.54 price.[15] Thus, the recurring price for renting subloops was not an "unresolved issue" open for Commission action.[16]

Qwest cannot unilaterally change its mind over a material term *after* the parties had reached agreement. Indeed, the Act expressly provides that an incumbent LEC "may negotiate and enter a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of Section 251 of this title."[17] Qwest proposed the $4.54 recurring price, the Coop agreed to this proposal, and Qwest may not legitimately (certainly not in good faith) renege on this agreement.

III. THE COMMISSION SHOULD RECONSIDER ITS DECISION REGARDING THE QUOTE PREPARATION FEE

A majority of the Commission (Commissioner Page dissenting) ruled that Qwest may charge the Coop a quote preparation fee ("QPF") of $1,107.09 and that Qwest is not required to refund this sum to the extent it exceeds the actual costs of construction.[18] The Commission further ruled that Qwest would not be required to providing an itemization of costs for the QPF.[19]

The Commission's decision that a QPF of $1,107.09 without refunds is reasonable is not supported by record evidence. The Coop believes that Qwest will spend $177.69 to install the needed screw terminal block:

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[15] *See id*. Both the Communications Act and the Commission's Rules require parties to continue their negotiations after the submission of an arbitration petition. *See, e.g.,* 47 U.S.C. § 252(b)(5); Hearing Transcript at pp. 1-6. The agreement to the $4.54 monthly rate for subloops was as a result of those post-petition negotiations.

[16] *See* 47 U.S.C. § 252(b)(2)(A)(I).

[17] 47 U.S.C. § 252(a)(1).

[18] *See* Arbitration Decision at 11-12.

[19] *Id.* at 12. While the Coop will not repeat its argument that the Qwest SGAT QPF is unlawful because it attempts to recover recurring costs in a non-recurring fee, neither does the Coop waive its right to make this argument in the future.

Cost of the terminal	$150.00 [20]	
Travel time to the site	9.23	(20 minutes by $27.69 an hour)
Time to install the block	18.46	(40 minutes by $27.69 an hour)
Total Qwest Cost	$177.69	

Although the Commission's decision refers to the possibility that Qwest may incur engineering and administrative expenses in installing a screw terminal block,[21] Qwest did not present any evidence suggesting that it could incur such expenses. In fact, Qwest could not legitimately claim such expenses. Qwest finally admitted that its cross-connect box, installed over 20 years ago, has ample space to fit the screw terminal needed for the Coop's recent of subloops.[22]

Allowing Qwest to charge $1,107.09 when it will incur costs of $177.69 would enable Qwest to realize a profit of $929.40 – a profit margin in excess of 600%. A profit margin of this size might be appropriately considered a monopoly rent. However, in no circumstances can a profit margin of this magnitude be characterized as just and reasonable under the Communications Act.

The Commission also refused to require Qwest to itemize its costs in its QPF because such itemization "may not be an appropriate use of Qwest's resources."[23] The Coop submits that requiring Qwest to demonstrate that its prices are cost-based is not an "inappropriate" use of an incumbent LEC's resources. In any event, Congress made clear that an incumbent LEC like Qwest must provide "a detailed schedule of itemized charged for interconnection and each ser-

[20] *See* Attachment B, Qwest's January 23, 2002 Supplemental Response to Coop Interrogatory No. 8.

[21] *See* Arbitration Decision at 12.

[22] Qwest initially denied under oath that its cross-connect box had spare capacity. *See* Attachment C, Qwest's January 3, 2002 Response to Coop Admission Request No. 24, with supplements of January 23, 2002 and January 29, 2002. A mere two days before the hearing, after being caught in its lie, Qwest changed its position and admitted to the spare capacity. ***Id.*** ***See also*** Hearing Transcript at p. 187.

[23] Arbitration Decision at 11-12.

vice or network element included in the agreement."[24] Given this clear statutory requirement, the Coop submits that Qwest is required to submit an itemized QPF.

IV. THE COMMISSION SHOULD RECONSIDER THE INSURANCE REQUIREMENT

The Commission agreed with Qwest that it may require a $1,000,000 insurance policy to protect Qwest from "groundless and frivolous lawsuits."[25] This decision is not supported by the evidence, and ignores the fact that Qwest already recovers (or could recover) in its SGAT prices its cost of insuring against groundless and frivolous lawsuits.

Qwest abandoned its concern about a Coop member falling off a ladder while climbing a microwave tower after Qwest conceded that such a tower does not exist. [26] At the hearing, Qwest expressed concern that a Coop volunteer, while driving by the cross box while a Qwest technician is working and while another neighbor it watching, might hit and injure the neighbor.[27] Although the injury would not occur on any Qwest property, Qwest fears that it would nonetheless be sued in such a circumstance because it has "deep pockets."

The one risk that Qwest poses – a Coop member while working on Coop matters injures someone else while that someone is watching a Qwest technician work <u>*and*</u> that injured person decides to bring a frivolous lawsuit against Qwest – is so infinitesimal as to not require comment. But, as the Coop has previously explained, Qwest already has insurance to cover the risk of nuisance lawsuits and it recovers (or at least could recover) these general overhead expenses in its UNE prices. The TELRIC standard permits Quest to include in its cost study a *pro rata*

[24] 47 U.S.C. § 252(a)(1).

[25] Arbitration Decision at 13.

[26] *See* Hearing Transcript at pp. 117-21 and 218-19.

[27] *See id.* at pp. 127-30.

share of its joint and common costs – at least in its recurring charges.[28] The FCC has defined a common cost as one "incurred in connection with the production of multiple products or services, and [that] remains unchanged as the relative proportion of those products or services varies (*e.g.,* the salaries of corporate managers)."[29] Insurance is a common, general overhead expense, and Qwest's subloops UNE prices already recover (or could recover[30]) the costs Qwest incurs in insuring against nuisance lawsuits.

V. THE COMMISSION SHOULD ADOPT THE PROPOSED CONTRACT ATTACHED TO THE COOP'S ARBITRATION PETITION

In its October 25, 2001 arbitration petition, the Coop specifically stated that "the subloop rental contract that the Coop asks the Commission to approve is set forth in Attachment C":[31]

> For the foregoing reasons, the Coop respectfully requests that the Commission arbitrate the dispute between the Coop and Qwest, that the Commission approve the contract appended hereto as Attachment C, and that the Commission take whatever steps it can so our Coop can commence service at the earliest possible moment.[32]

In its response, Qwest opposed three of the terms proposed in the contract (*i.e.,* insurance, QPF and activation fee), but it did not oppose the rest of the Coop's contract. Three months later, on January 17, 2002, after the time for responding to the arbitration petition had expired, and long after the issued had been framed by the petition and Qwest's response, Qwest appended its 100-page counterproposal as an exhibit to the testimony of a Qwest witness.[33]

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[28] *See First Local Competition Order,* 11 FCC Rcd at 15844 ¶¶ 672-73.

[29] *Id.* at 15845 ¶ 676.

[30] The Coop does not know whether Qwest actually included its general insurance costs in its UNE prices. The answer to this question really makes no difference, because the Coop cannot legitimately be required to pay the costs of securing a $1 million insurance policy because of Qwest incompetence.

[31] Arbitration Petition at 1.

[32] *Id.* at 20.

[33] Exhibit WRE-1, marked as hearing exhibit 26.

The Communications Act authorizes the Commission to decide "unresolved issues."[34] Qwest chose, voluntarily, not to challenge the Coop's proposed subloop rental contract (other than the three terms that it specifically challenged).[35] Thus, the Coop submits that the Commission did not have the choice of entertaining Qwest's belated contract counterproposal. The Coop requests that the Commission adopt the proposed contract that it appended to its arbitration petition and which Qwest did not challenge in its response.

VI. CONCLUSION

For the foregoing reasons and those contained in its February 11, 2002 Post-Hearing Statement of Positions, the Coop respectfully requests that the Commission reconsider its March 1, 2002 Arbitration Decision. Consistent with § 40-6-114(1), C.R.S., the Coop further requests that the Commission act on this petition within 30 days.

Dated this 13th day of March, 2002.

Respectfully submitted,

RUBY RANCH INTERNET COOPERATIVE ASSOCIATION

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Carl Oppedahl, Director
c/o Oppedahl & Larson LLP

[34] 47 U.S.C. § 252(b)(2)(A)(i).

[35] It is also noted that the Coop's proposed subloop rental contract (attached to its arbitration petition) did not include separate recurring or non-recurring charges relating to network interface devices (NIDs). It is further noted that in Qwest's response to the arbitration petition, Qwest did not propose to charge recurring or nonrecurring charges for NIDs. Yet, remarkably, in the most recent contract proposed by Qwest on March 8, 2002, Qwest proposes to charge the Coop various recurring and and nonrecurring charges for NIDs. The language of Qwest's proposal is unclear, and the Coop intends to seek clarification of Qwest's language as soon as possible. Depending on what Qwest says it meant by proposing recurring and nonrecurring charges for NIDs, it may prove necessary for the Coop to ask for the Commission's assistance in resolving this issue raised by Qwest for the first time *after* the arbitration hearing and *after* the post-hearing submissions.

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 13th day of March, 2002, a true and correct copy of this document was sent to the following persons via email

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