

TC01-165

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of)
)
Application by Qwest)
Communications International, Inc.)
for Authorization to Provide In-)
Region, InterLATA Services in New)
Mexico, Oregon and South Dakota)

WC Docket No. 03-11

February 26, 2003

REPLY COMMENTS OF THE PUBLIC UTILITIES COMMISSION
OF SOUTH DAKOTA

Robert K. Sahr
Chairman

Gary Hanson
Commissioner

James A. Burg
Commissioner

South Dakota Public Utilities
Commission
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EXECUTIVE SUMMARY

The South Dakota Public Utilities Commission ("SDPUC") recommends that the Federal Communications Commission ("Commission") grant the application of Qwest Communications International, Inc. ("Qwest") for authority under section 271 of the Telecommunications Act of 1996 to provide in-region, interLATA services in the state of South Dakota. The SDPUC bases this recommendation on the record developed in its section 271 proceeding, Docket TC01-165, Petition for Commission Recommendation that the Federal Communications Commission Grant Qwest Corporation Entry into the In-Region InterLATA Market Under Section 271 of the Telecommunications Act Of 1996. As noted in more detail below, the SDPUC has issued numerous orders with detailed findings regarding disputed issues raised by the intervenors and the SDPUC Staff. Most of these orders were contained in Qwest's application to the Commission, and, therefore, are already in the record. Since Qwest filed its application, the SDPUC has issued two more orders. The first order was attached to the SDPUC's initial comments. The SDPUC's second order is attached to these comments.

PROCEDURAL HISTORY OF PROCEEDINGS BEFORE THE SDPUC

On October 25, 2001, Qwest filed with the SDPUC a Petition for Commission Recommendation that the Federal Communications Commission Grant Qwest Corporation Entry into the In-Region InterLATA Market Under Section 271 of the Telecommunications Act Of 1996. Specifically, Qwest requested that the SDPUC find that Qwest has met the competitive checklist and other requirements of 47 U.S.C. section 271, which prescribe the mechanism by which Qwest may be found eligible to provide in-region, interLATA services. Qwest requested that the SDPUC provide a favorable recommendation to the Commission. In support of its petition, Qwest submitted 25 affidavits, a revised Statement of Generally Available Terms ("SGAT"), and seven reports submitted in the Multi-state Proceeding.

Intervention was granted to Black Hills FiberCom, L.L.C., Midcontinent Communications, and AT&T Communications of the Midwest, Inc. on November 27, 2001. A hearing was held beginning on April 22, 2002 and ending on April 30, 2002. A hearing on OSS issues was held on July 11, 2002. After extensive briefing, the SDPUC issued the following orders.

On September 19, 2002, the SDPUC issued its order concerning checklist items 3, 7, 8, 9, 10, and 12. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Procedural History; Order Regarding Checklist Items 3, 7, 8, 9, 10, and 12*, Docket TC01-165, issued September 19, 2002. The SDPUC found that, subject to its findings regarding the OSS results, Qwest was in substantial compliance with checklist items 7, 8, 9, 10, and 12. The SDPUC further found that Qwest was in substantial compliance with checklist item 3, subject to Qwest making certain revisions. On September 25, 2002, Qwest submitted a revised SGAT with the SDPUC's required revisions.

On September 19, 2002, the SDPUC issued its order concerning checklist items 1, 11, 13, and 14. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Checklist Items 1, 11, 13, and 14*, Docket TC01-165, issued September 19, 2002. The SDPUC found that Qwest was in substantial compliance with checklist items 1, 11, 13, and 14, subject to the SDPUC's review of the OSS results. On September 25, 2002, Qwest submitted a revised SGAT with the SDPUC's required revisions.

On November 12, 2002, the SDPUC issued its order concerning checklist items 2, 4, 5, and 6. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Checklist Items 2, 4, 5, and 6*, Docket TC01-165, issued November 12, 2002. The SDPUC found that, subject to its findings regarding Qwest's



With respect to compliance with its *Order Regarding the Public Interest*, the SDPUC noted specific areas where Qwest did not comply with the SDPUC's order. Based on those areas of noncompliance, the SDPUC was unable to recommend to the Commission that the granting of section 271 approval to Qwest in South Dakota was in the public interest. The SDPUC directed Qwest to make the changes as specified in its February 4, 2003, order. On February 17, 2003, the SDPUC received Qwest's revised QPAP.

On February 26, 2003, the SDPUC issued its order concerning Qwest's compliance filing and its final recommendation to the Commission. See In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Public Interest Compliance Filing and Final Recommendation to the FCC*, Docket TC01-165, issued February 26, 2003. (Attached as Appendix A.) The SDPUC found that Qwest's entry into the in-region interLATA market was in the public interest. The SDPUC further found that it would recommend to the Commission that the Commission grant Qwest's application for authority under section 271 to provide in-region interLATA service in the state of South Dakota.

COMMENTS

The SDPUC first notes that in its initial comments to the Commission, the SDPUC was unable, at that time, to provide a favorable recommendation to the Commission. The SDPUC pointed out that its 271 proceedings were not yet completed. As its initial comments, the SDPUC submitted its most recent order which required Qwest to make further changes to its QPAP. In that order, the SDPUC noted a number of areas where Qwest had not complied with the SDPUC's *Order Regarding the Public Interest*. One of the areas of noncompliance concerned the cap on liability. The SDPUC had required no cap but Qwest had instead inserted an initial cap on annual liability of 36% of the prior year's ARMIS results. Based on the Commission's stance on this issue and Qwest's continuing concerns regarding a QPAP without any limitation of financial liability, the SDPUC modified its decision on this issue and required Qwest to place language in the cap section that provides for a floor of \$15,000,000.00. This would mean that the limit on liability would be 36% of the prior year's ARMIS net return, or \$15,000,000.00, whichever is greater. A second area of noncompliance concerned section 15.2 of the audit section. Qwest proposed alternative language and the SDPUC agreed to this alternative language. A third area of noncompliance involved the six month review provisions. The SDPUC continued to require Qwest to use the language that the SDPUC had first ordered, which was modeled on language in the New Mexico QPAP. A fourth area of noncompliance regarded Qwest's removal of language regarding the South Dakota Discretionary Fund which would be funded by Tier 2 payments. Qwest stated that it had assumed that the SDPUC wanted this language removed. The SDPUC clarified that it did not require the removal of this language. The SDPUC also pointed out other areas where changes were made or not made by Qwest.

In its February 17, 2003, compliance filing, Qwest stated that it had complied with the SDPUC's February 4, 2003, order but had also added one paragraph. The added paragraph stated as follows:

16.1.2 Nothing in this PAP precludes the Commission from modifying the PAP based upon its independent state law authority, subject to judicial challenge. Nothing in this PAP constitutes a grant of authority by either party to this agreement nor does it constitute a waiver by either party to this agreement of any claim either party may have that the Commission lacks jurisdiction to make any modifications to this PAP, including any modifications resulting from the process described in Section 16.0.



With these comments, the SDPUC submits its final order in its 271 proceeding. See Appendix A (In the Matter of the Analysis of Qwest Corporation's Compliance with Section 271(c) of the Telecommunications Act of 1996, *Order Regarding Public Interest Compliance Filing and Final Recommendation to the FCC*, Docket TC01-165, issued February 26, 2003). In this order, the SDPUC found that Qwest has complied with the SDPUC's previous order and further found that the addition of section 16.1.2 does not significantly impair the SDPUC's ability to make changes to the QPAP, if necessary. As noted in the order, a party always has the opportunity to raise the issue of jurisdiction. Thus, the SDPUC found that Qwest's entry into the interLATA market in South Dakota is in the public interest. The SDPUC further found that it would recommend that the Commission approve Qwest's section 271 application regarding South Dakota.

CONCLUSION

For the reasons set forth above and based on all of its orders, the SDPUC recommends that the Commission approve Qwest's application for authority under section 271 of the Telecommunications Act of 1996 to provide in-region interLATA services in the state of South Dakota.

Respectfully submitted,



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