BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own motion, seeking to conduct an inquiry into the Commission's jurisdiction as it relates to the US West-Qwest merger.	) Application No. C-2137/PI-32)) FINDINGS AND ORDER) CLOSING DOCKET)) Entered: March 21, 2000

BY THE COMMISSION:

The Commission, on its own motion, opened this docket and investigation on October 14, 1999. The original intent of the investigation was to determine whether the Commission had the jurisdiction to approve or deny the proposed merger between US West and Qwest Communications (Qwest).

On December 21, 1999, after reviewing the comments filed and examining applicable state laws and Commission rules, the Commission determined that "no application for approval of this merger is required" and that "as a merger of this size impacts a large number of Nebraska consumers, the Commission does feel it is necessary to investigate the impact that this merger will potentially have on consumers of telecommunications services in the state of Nebraska."[1]

Pursuant to that finding, the Commission held a series of public hearings as well as an evidentiary hearing on January 27, 2000. The Nebraska State Office Building served as the host site. The public hearing was video-conferenced to sites in Alliance, Grand Island, Norfolk and Chadron. The evidentiary hearing was held in Omaha. Representatives for US West and Qwest appeared at each of the live meetings and were available for questioning at the other state sites via video-conference.

At the evidentiary hearing, US West was represented by Mark Roellig, Todd Lundy and Tim Sandos; Qwest by Mace Rosenstein, counsel, and Mark Pitchford, senior vice president of consumer markets; AT&T by Chuck Ward; and Rhythms, Inc. by Andy Pollock. US West/Qwest had available a support team to answer questions that included eight US West managers and a senior manager from Qwest.

Notice of the opening of this docket was published in The Daily Record on October 15, 1999. Notice of the hearings was mailed to all interested parties by first-class mail on December 22, 1999. The Commission issued press releases to news media in the general area served by US West. The Commission entered into the record, a copy of the Rules of Commission Procedure. In addition, the Commission incorporated into the record of this docket all relevant material, filings and orders from Commission

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[1] Order entered in *Docket C-2137/PI-32*, December 21, 1999 (hereinafter, "December Order"), at 1.

Dockets C-1415[2], C-1097[3], C-1830[4], C-1628[5], and formal complaints filed with the Commission involving US West, specifically, FC-1270[6], FC-1275[7], FC-1276[8] and all interconnection agreements filed with the Commission in which US West is a party.

F I N D I N G S

Jurisdiction

1. On February 3, 1998, prompted by the growing number of mergers and other acquisitions in the telecommunications industry, this Commission opened Docket C-1746/PI-19 in order to examine the question regarding this Commission's jurisdiction over such transfers of control.

After reviewing submitted comments, state law and applicable court cases, we issued a finding that:

> "...acquisitions, mergers or other transfers of control transactions by or directly involving certificated common carriers in the State of Nebraska are subject to the jurisdiction of the Commission. Acquisition, merger or other change of control transactions involving holding companies or other parent entities one or more levels upstream from the Nebraska certificated common carriers, which holding companies and/or other upstream parent entities (are) significantly engaged in interstate commerce beyond the borders of Nebraska, and which transactions

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[2] *The Commission, on its own motion, to investigate US West Communications cost studies and to establish rates for interconnection, unbundled elements, transport and termination, and resale services*, opened September 19, 1996.

[3] *M. Gene Hand, Director of Communications, seeking an order to monitor the service quality of US West Communications, Inc.*, opened August 15, 1994.

[4] *US West Communications, Inc. seeking authority to file its notice of intention to file Section 271(c) application with the FCC and to verify US West compliance with Section 271(c)*, opened June 23, 1998.

[5] *The Commission, on its own motion, to conduct an investigation into access charge reform and intrastate Universal Service Fund*, opened September 15, 1997.

[6] *William D. and E.L. Neater, Wood River, v. US West*, filed June 28, 1999.

[7] *Lawrence T. Ferguson, Jr., North Platte, v. US West*, filed October 26, 1999.

[8] *Nebraska Technology & Telecommunications, Inc., Omaha, v. US West alleging failure to comply with an adopted arbitrated interconnection agreement between US West and AT&T Communications of the Midwest, Inc.*, filed January 5, 2000.

> only indirectly affect the Nebraska certificated carrier, shall not be subject to Commission jurisdiction.[9]

We further noted that all future mergers would be processed in accordance with those findings.[10]

2. The proposed merger between US West, Inc. and Qwest Inc. will occur upstream from the level of the wholly-owned subsidiary of US West Communications, Inc., the entity that holds the certificate to operate from this Commission.[11] As assured by the merging entities, "No changes in the names of the certificated subsidiaries, no transfers of certificates of public convenience and necessity, and no assignment of assets of those certificated subsidiaries are contemplated."[12] The certificated entities operating within the state, including US West Communications, are not merging with any Qwest entity and will maintain their separate existence; only ultimate ownership will change.[13]

3. This finding conforms to our earlier finding regarding jurisdiction. The merger between Qwest, Inc. and US West, Inc., parent companies primarily and significantly engaged in interstate commerce beyond the borders of Nebraska, is a transaction that will only indirectly affect the certificate holder in the state of Nebraska.

4. Due to the circumstances of the merger, we affirm our conclusion that the Commission does not currently have the statutory authority to approve or deny the pending merger.

5. Our responsibility does not end there, however. We have already made a finding that we have a duty to examine the impact of any merger, acquisition, or transfer of control of any size that impacts a large number of Nebraska consumers.[14] However, state law also gives this Commission the authority to exercise "general control" over carriers furnishing telecommunications services[15] as well as the authority "to do all things reasonably necessary and

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[9] *In the Matter of the Nebraska Public Service Commission, on its own motion, to conduct an investigation to determine when the Commission has jurisdiction to authorize acquisitions, mergers, or other transfers of control*, Docket C-1746/PI-19, March 10, 1998, at 6.

[10] *Id.*

[11] *Qwest's and US West's Comments*, filed November 5, 1999, at 7.

[12] *Id.*

[13] *Id.*, at 8.

[14] *December Order*, at 1.

[15] See Neb. Rev. Stat. §75-109(1) (Supp. 1999).

appropriate to implement the federal Telecommunications Act of 1996" which power should be "broadly construed."[16]

6. Relying on that authority, we found it appropriate and necessary to investigate the impact of the merger on Nebraska consumers, and thereby, opened this docket to accept comment, to hold hearings, to make findings and to determine methods of implementation for any of those findings. The rationale for holding public meetings and the evidentiary hearing was two-fold. First, we afforded the public the right to provide input as to how this proposed merger might impact them. Second, we allowed US West to "go on the record" to state its intention regarding the merger and to allow the Commission to develop a record on issues important and relevant to the Commission and to the public.

Quality of Service

7. As comments point out, there is no question regarding the Commission's authority to review quality of service.[17] State law provides that the "commission shall retain quality of service regulation over the services provided by all telecommunications companies."[18]

8. We begin by recognizing attempts to improve the quality of service to retail customers that US West has made. US West has recently added a Center for Customer Experience in Omaha which employs over 190 customer experience managers to handle customer questions and concerns. In addition, US West continues to work constructively with the Commission in regard to service quality reporting and accountability. While there are still areas of deficiency and lack of consistency, the company continues to strive toward delivering quality customer service to its retail customers. The Commission expects continued efforts in improving service quality. The Commission received assurances from US West and Qwest officers during the public hearing that US West would continue to comply with Commission the order in Docket No. C-1097 to provide the Commission with monthly reports designed to monitor the progress of US West to an improved level of service.

9. Nonetheless, the Commission remains concerned about the self-reported performance level of US West on a number of the service quality measures. US West continues to experience service problems to its retail customers. For fiscal year 1998-1999, the Commission received 242 complaints against US West from its retail

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[16] See Neb. Rev. Stat. §75-109(2) (Supp.1999).

[17] *Comments of McCleodUSA Telecommunications*, filed November 5, 1999, at 10.

[18] Neb. Rev. Stat. §86-803(7) (Reissue of 1999).

customers; of these, 147 were service complaints.[19] In addition, US West still continues to underperform on a number of service quality measures set through Docket No. C-1097. US West and Qwest officials, at the public hearings, pledged to continue to make improvements in service quality a high priority. The Commission intends to continue to monitor quality of service levels of US West to its retail customers. Given the assurances of efforts for improved service quality, we expect improvements as a result of the merger with Qwest. If the performance measures demonstrate backsliding of quality of service after the proposed merger, the Commission will take positive steps to ensure proper performance of the post-merger US West.

10. Of greater concern to competitors participating in this docket was the quality of service that US West supplies to its wholesale customers. The Commission shares these concerns. We do, however, recognize the challenges that the incumbent carrier has during the transition to a competitive environment. A review of the comments filed and the testimony given in this docket is illustrative, though, of the challenges that remain for US West and which we expect US West to meet.

11. Comments filed by AT&T Communications of the Midwest included the following complaint:

> "The service US West provides its wholesale customers is as poor, if not worse than, (sic) the service it provides its retail customers, as evidenced by AT&T's own internal data. AT&T monitors the performance of Regional Bell Operating Companies (RBOCs), and its survey shows that US West's service quality has been steadily declining so that it is now last or second to last among all RBOCs in meeting direct measures of quality... As just one example, on average across US West's fourteen state region, US West's percentage for meeting the customer's desired due date in provisioning DS1 service has fallen to 59.31% in 1999, from 75.14% in 1995. By contrast, at least three other RBOCs have achieved at least 90% compliance with these measures of quality."[20]

12. McLeodUSA cited a full page listing of US West "deficiencies" in its wholesale dealings with US West including: delays in extending trunking interconnection; collocation delays which exceed the FCC's 90-day requirement for provisioning such collocation; limitations on service conversion; failure by US West

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[19] Memo from Gene Hand to Commissioners dated December 20, 1999. See also *Comments of AT&T Communications of the Midwest*, filed January 18, 2000, at 18.

[20] *Comments of AT&T Communications of the Midwest, Inc.*, filed January 18, 2000, at 18.

to provide accurate firm order commitment and order rejection; failure of US West to implement adequate order entry processes; failure, in 80 percent of the cases, by US West to meet the standard five-day interval for processing resale orders; and, failure of US West to provide updated and accurate CMS station message detail.[21]

13. Similar questions on US West's service to wholesalers were made by another competitive local exchange carriers (CLECs), Rhythms Links, Inc. (Rhythms) when they registered this concern regarding the proposed merger:

> "This transfer of financial and human resources is occurring at a time when US West is not currently meeting its obligations to competitors...[We] are concerned that the reduction of these resources will adversely affect the level of services that Rhythms and other carrier customers receive...US West rarely provides competitors with timely and accurate firm order confirmations. US West rarely provides timely loop installations.[22]

14. The Commission is concerned that, with the completion of the proposed merger, financial resources that might have gone to improve service quality with US West wholesale customers would be diverted to other corporate needs. One of the reasons that US West and Qwest are merger candidates is that US West provides critical links in the strategic and long-range planning of Qwest. As noted by Qwest's senior vice-president, Qwest is relying on certain assets and areas of expertise of US West including central office management, engineering and planning local loop.[23] With the completion of the proposed merger, the problem of the already deficient deployment of resources to servicing wholesale customers could be exacerbated.

15. The Commission finds merit in the recommendation of Rhythms that a wholesale service quality proceeding should be commenced.[24] In such a proceeding, the Commission will establish quality service standards for incumbent local exchange carriers (ILECs) in provisioning services to wholesale customers. Performance would be measured, monitored and examined to determine that proper provisioning of services to wholesale customers was unimpaired. The establishment of the docket and the resultant performance quality standards should help allay concerns of wholesale

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[21] *Comments of McLeodUSA Telecommunications Services, Inc.*, filed January 18, 2000, at 4-5.

[22] *Comments of Rhythms Links, Inc.*, filed January 18, 2000, at 5.

[23] *Id.*

[24] *Id.*, at 8.

users of telecommunications services, as well as this Commission, that mergers are counter-productive to competition. In addition, the Commission shall prevent backsliding of service quality provided by incumbents to their wholesale customers as parent companies become more distant from Nebraska consumers.

Levels of Network Investment

16. From 1994 to 1998, US West additions to plant in service have declined in each calendar year. These annual declines have occurred notwithstanding increasing consumer demand for access to advanced services and for parity of services with other US West consumers (for example, digital switching in the Omaha area).

17. Confidential information supplied to the Commission during the course of the hearings in this docket indicated that US West in 1999, will increase the amount of additions to plant in service, although the additions will still fall short of the additions to plant in service in the five preceding years.

18. Officials from both Qwest and US West gave assurances to this Commission during the course of the public hearings that the post-merger entity will continue to commit additional capital expenditures into the network in the state. This commitment, we expect, will mean an accelerated increase in the roll-out of advanced services and access to advanced services, not only in the metro-Omaha area, but also in the rural exchanges still served by US West.

19. The Commission is concerned that the merger will result in capital being funneled out of Nebraska and into the more affluent markets of the larger cities in the US West service area and into the international markets. This concern was shared in part in comments filed by McLeodUSA who noted its fear that:

> "If the merger is approved in its present form, the merged entity will divert revenues and resources from its regulated services division to the expansion of its unregulated services division - notably, out-of-region and those involved in high-speed data access and other advanced services - which will result in a neglect of the local basic services and facilities, and the degradation of local services competition."[25]

20. Wholesale customers, whose testimony reflects widespread frustration in dealing with US West, believe that at least part of the problem they have in doing business with US West is a result of inadequate resources being committed to the wholesale division.

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[25] *Comments of McLeodUSA Telecommunications Services*, filed January 18, 2000, at 2.

One example complained of is the "unreasonable number" of orders placed on "facility hold" by US West. As noted:

> "This means that the installation of service to McLeodUSA's customers is delayed due to lack of cable pairs, node or switch ports, or network capacity. These problems, which probably result from inadequate investment by US West in its network infrastructure, are widespread and affect McLeodUSA in different ways."[26]

The Commission recognizes the direct link between failure to adequately invest in the network in regard to the provisioning of wholesale services, problems experienced by wholesale customers, and the development of a competitive environment envisioned by section 271(c) of the Federal Act. We expect that a post-merger entity, presumably eager to enter the local long-distance market, will take positive steps to committing additional network resources to its wholesale divisions in order to better service its wholesale customers.

21. The Commission declines to adopt the suggestion by McLeodUSA to impose conditions precedent to the merger that would involve commitments by US West and Qwest to sustain levels of investment in network infrastructure.[27] However, the Commission will continue to monitor the capital investment level of US West and the post-merger entity to ensure that Nebraska consumers are not shortchanged in the development of the telecommunication infrastructure that is necessary for continued telecommunication and economic development in the state. In short, it is, and will continue to be, our duty to see that Nebraskans have their fair share of construction of the information super-highway and that other areas of the US West/Qwest service area do not benefit at the expense of our constituents.

Pensioners' Concerns

22. The public hearings were attended by large numbers of US West retirees and pensioners who had concerns regarding the diversion of the surplus in the US West pension fund, the failure of US West to provide even a cursory cost-of-living adjustment to pension distributions, continuance of health care benefits and continued discounts of US West products and services. We made clear at those hearings, and we affirm now, that this Commission lacks statutory subject matter jurisdiction to address those concerns. As such, we can not attach conditions to the merger protecting pensioner rights nor entertain complaints regarding the handling of pension funds. Those issues are matters of federal jurisdiction and could, very

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[26] *Direct Testimony of Mr. Stacy Stewart*, filed January 18, 2000, at 13.

[27] *Comments of McLeodUSA*, at 2.

likely, be addressed by the courts. In response to questioning by the retirees, US West and Qwest officials stated that they had a duty to balance the concerns of ratepayers, shareholders, and employees, present and past. We agree. We can only exhort the officers of both companies to recognize that they have duties to all three parties of that triad. We encourage those officers not to neglect the interests of the employees who served US West dutifully. It is the efforts of the retirees that built the company to the point where today, its officers can reap the benefits of the proposed merger. As they "balance" all of those interests, there is a place on the scales for the US West retirees as well as the shareholders and the ratepayers.

Conclusion

23. Because of our earlier finding on jurisdiction, this Commission must decline to address any preconditions to the merger between US West and Qwest. While we believe that the merger could offer additional opportunities for consumers, we have no written guarantees that the post-merger entity will follow through on promises made at the public meetings and the evidentiary hearing regarding improvements to service quality, investments in the company's network infrastructure in this state and making the necessary changes in provisioning wholesale services to enhance and promote competition. We do have these commitments on the record and it is our intention, as the proper regulatory body, to monitor the post-merger US West to ensure that those commitments are kept.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the investigation of the impact of the proposed merger between US West Communications, Inc. and Qwest Communications Corporation, LCI International Telecom Corp., d/b/a Qwest Communications Services, on behalf of their parent corporation Qwest Communications International, Inc. is completed and that Docket No. C-2137/PI-32 should be, and is hereby, closed.

MADE AND ENTERED in Lincoln, Nebraska on this 21st day of March, 2000.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Lowell Johnson

Chairman

Anne C. Boyle

ATTEST:

Rod Johnson

Robert R. Logsdon

Executive Director

//s//Frank E. Landis

//s//Daniel G. Urwiller