

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Initiation of A “No Facilities”) WC Docket No. 02-314
Policy by Qwest Communications)
International, Inc. In Violation of)
Its Commitments To The Commission)

**PETITION FOR ENFORCEMENT
PURSUANT TO SECTION 271(d)(6) OF THE ACT**

In this Petition, Cbeyond Communications, LLC (“Cbeyond”), Eschelon Telecom, Inc. (“Eschelon”), Focal Communications Corporation (“Focal”), and New Edge Network, Inc. (“New Edge”) request that the Commission, pursuant to Section 271(d)(6) of the Act, initiate enforcement proceedings against Qwest Communications International, Inc. (“Qwest”) concerning its application for authorization to provide interLATA communications service in Colorado and other Qwest states.¹ Section 271(d)(6) provides that the Commission may issue an order requiring compliance, impose a penalty, or suspend or revoke a Section 271 approval if it appears at any time after grant that the BOC has ceased to meet any of the conditions required for such approval. Qwest has recently initiated a new “no facilities” policy in Colorado and region-wide that repudiates its representations to the Commission in its Section 271 application and that formed a basis for the Commission’s determination that Qwest was providing nondiscriminatory access to UNEs as required by the competitive checklist.

¹ *Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, Memorandum Opinion and Order, WC Docket No. 02-314, FCC 02-332, released December 23, 2002 (“Colorado/Multi-State Application”).

Qwest's Application for Colorado

In its application for long distance approval for Colorado and other states, Qwest made very specific and detailed representations concerning its practices regarding provisioning of CLEC orders for UNE DS-1 loops in circumstances in which it needed to add electronics or otherwise condition the loop in order to provide a DS-1 capable loop. Qwest stated that it would “provide necessary electronics at both ends, including any intermediate repeaters” in order to provide DS-1 loops.² Qwest noted that it had participated in workshops at the state level, and that it had accepted the recommendation of Colorado officials to include a statement in its SGAT to the effect that Qwest will construct for CLECs on the same basis that it decides whether to build for its own customers.³ Thus, Qwest included in its Colorado SGAT that “Qwest will assess whether to build for CLEC in the same manner that it assesses whether to build for itself.”⁴ Qwest also stated that if cable capacity is available, it will complete incremental facility work in order to provide the UNE and that it will locate facilities to provide UNEs on a first-come, first-served basis.⁵ It stated that it would perform “conditioning, place a drop, add a network interface device, card existing subscriber loop carrier systems at the central office and remote terminal, add field cross jumpers, or add central office tie pairs to complete facilities to the CLEC’s end user customer premises.”⁶ Under the SGAT, incremental facility work is performed at no charge to the CLEC.

At the time Qwest filed its application, the “no facilities” issue had become a source of considerable controversy in Verizon territory because that carrier in June 2001 initiated a new policy that greatly expanded the circumstances in which it would decline to provide a DS-1 UNE

² Declaration of William M. Campbell, para. 24 (“Campbell Declaration”).

³ Campbell Declaration, para. 62.

⁴ Colorado SGAT Section 9.19.

⁵ Declaration of Lori A. Simpson and Karen A. Stewart, para. 20.

loop, such as when it needed to install a new repeater case. Verizon contended that it had no obligation under the Act to engage in construction activities in order to provide UNEs to CLECs. Qwest made its specific commitments in its Section 271 application for Colorado and other states in order to remove this as an issue for consideration in connection with its section 271 application both before the Commission and state authorities and with CLECs who might otherwise oppose the application. In effect, Qwest committed, in contrast to Verizon, that it would only deny provision of DS-1 loops UNEs based on “no facilities” in very narrow circumstances.

The Commission relied on Qwest’s statements when it granted its application. The Commission stated: “The record shows that Qwest attempts to locate compatible facilities for competing LECs,” and that Qwest “performs incremental facility work to make UNEs available.”⁷ The Commission quoted portions of the SGAT in which Qwest committed to perform incremental facility work.⁸ On this basis, the Commission found that Qwest was providing non-discriminatory access to loops.

Qwest’s New “No Facilities” Policy

Every loop order submitted by Cbeyond since entering Colorado up to mid-June 2003 has been a DS-1 UNE loop order. While Cbeyond’s UNE loop orders in Colorado did tend to have a higher reject rate for “no facilities” in comparison to other BOCs, the orders generally were worked but with a somewhat longer interval. Until June, roughly 2% of DS-1 orders per month in Cbeyond’s experience were treated by Qwest as “fatal rejects” which meant they would never be worked due to “no facilities.” With the exception of these orders, all other initially rejected orders were ultimately worked with no additional charge to Cbeyond.

⁶ *Id.*

⁷ *Colorado/Multi-State Order*, para. 164.

However, Qwest in June initiated a new policy that caused the number of CLECs' orders for DS-1 loop UNEs in Colorado rejected due to "no facilities" to skyrocket. The percentage of rejected orders climbed from about 2% to 21%. Cbeyond escalated the matter through the account team for an explanation. Qwest responded that there had been no policy change but also that "there has been policy reinforcement within our network organization ..." concerning DS-1 loop provisioning.⁹ Notwithstanding its statement in its SGAT that it would add necessary electronics including repeaters, perform incremental facility improvements, and perform a variety of line conditioning tasks in order to provide DS-1 loop UNEs, Qwest now relies on its Product Catalog. This states that if "no facilities are available to meet the parameters of your request" Qwest is obligated to do no more than determine whether internal build plans would permit Qwest to comply with the UNE request, and, if not, Qwest will reject the order. Qwest stated that its SGAT and Product Catalog make clear that Qwest's obligation to provide DS-1 UNE loops only applies when Qwest has in place a DS-1 capable loop that is "fully capable of providing the service levels associated with DS-1."¹⁰ Qwest also stated that it had updated its construction policy for DS-1 loops to eliminate "conditioning" because this had caused "confusion."¹¹ During the escalation process, Qwest represented that if Cbeyond were purchasing a "finished" service (e.g. special access) the orders would be completed without additional construction charges.

⁸ *Id.* fn. 617, quoting SGAT Section 9.1.2.1.2.

⁹ Letter from Randall P. Lynch, Qwest to Tom Hyde, Cbeyond, July 18, 2003.

¹⁰ *Id.*

¹¹ *Id.* Qwest also stated that it provided notice of its "policy reinforcement" in an April 30, 2003 notice regarding changes to its UNE Construction Process. In a subsequent notice on May 21, 2003, Qwest represented that there would be no impact to products that currently have no conditioning charge. On this basis, Cbeyond chose not to participate in the Change Management Process. As noted in this letter, however, Qwest is, in fact, seeking to apply its new policy to products for which it previously performed conditioning at no charge, such as DS-1 loops UNEs.

Subsequent to the dramatic increase in rejections due to “no facilities,” and without conceding in any respect that Qwest’s new practices were lawful, Cbeyond initiated a program to submit the same UNE orders that had been rejected for “no facilities” as special access because of the commercial necessity of providing service to its customers without further delay. Of the orders submitted to date, the vast majority have been worked without delay and the rest are pending. These orders have been delivered to Cbeyond without any termination liability or application of construction charges even though some conditioning was required in some cases. Given that 21% of Cbeyond’s UNE orders are being rejected for “no facilities” and none of the special access orders for service to the same address were rejected, Qwest is clearly discriminating against CLECs in provision of high capacity loops.

New Edge operates throughout the Qwest region. New Edge is currently experiencing an approximately 20% rejection rate across multiple states, including Colorado, New Mexico, Iowa, Washington, Nebraska, Wyoming, Idaho, and Utah, in contrast to very few order rejects due to “no facilities” prior to June.¹²

Eschelon provides service in Arizona, Colorado, Minnesota, Oregon, Washington, and Utah. Eschelon has experienced a 15% held order rate due to “no facilities” for the current month, but for the most recent week this has more than doubled to 35%.

Request for Enforcement

Qwest’s new practices concerning DS-1 loop provisioning initiated in June are a total repudiation of its representations to the Commission in its application for Section 271 approval for Colorado and other states. It could not have been clearer in that application and in the SGATs relied on by the Commission, state authorities, and CLECs that Qwest would perform loop conditioning, add electronics, and otherwise perform a range of incremental facility

improvements in order to provide DS-1 loops UNEs. While it apparently lived up to this commitment to a considerable extent until June, the dramatic increase in order rejects experienced by Cbeyond and other CLECs, verifies that Qwest changed its provisioning policies and practices at that time. Its disavowals of a change of policy are absurd. Its statement that there has been “policy reinforcement” is no more than obfuscation of the reality, and an admission, that Qwest has decided to implement a “no facilities” policy comparable or worse than Verizon’s. Similarly, its claim that it is eliminating “conditioning” from relevant loop provisioning documents is a candid admission of change of policy.

Moreover, Qwest’s new policy violates the terms of its SGAT. Its reliance on its Product Catalog as a justification for its change is ridiculous since that document has no legal significance and does not void the contrary, express statements in its SGAT that Qwest will provide loop conditioning etc. in order to provide DS-1 loop UNEs. Obviously, Qwest’s new refusal to condition loops violates the terms of its SGAT that it will do so.

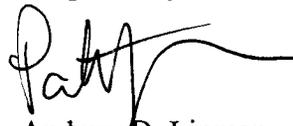
Further, as noted, Qwest spoke very specifically in its application about its DS-1 loop provisioning policies. Contrary to its statements to the Commission, Qwest has now decided that it will not make incremental improvements, provide electronics, or condition loops in order to provide DS-1 loop UNEs. Cbeyond’s experience in ordering special access shows that Qwest is not providing facilities on a first come, first served basis, *i.e.* it is providing facilities for its own retail customers first, and in preference to CLEC orders for UNEs for the very same facility. Nor is Qwest conditioning loops for CLECs on the same terms on which it does for itself as provided in its SGAT and as it committed to Colorado officials to do. Thus, Cbeyond has issued parallel special access orders for the same customers and these orders have been worked without any delay and at no additional charge to the tariffed rate for Cbeyond. Accordingly, Qwest’s new

¹² Focal does not have experience in Qwest territory ordering DS-1 UNEs.

policy violates its commitments to the Commission based on which the Commission found that Qwest met its obligation under Section 271(c)(1)(B)(ii) to provide nondiscriminatory access to UNEs. Accordingly, Qwest's new policy invalidates that finding of compliance with the competitive checklist and the Commission's Section 271 authorization for Colorado and other states.

For these reasons, Cbeyond requests that the Commission, pursuant to Section 271(d)(6), initiate enforcement action against Qwest to assure compliance with its obligation to provide nondiscriminatory access to UNEs and its the commitments and representations made to the Commission in its Section 271 application for Colorado and other states. Cbeyond requests that the Commission promptly issue an order directing Qwest to reinstate its previous DS-1 loop provisioning policies and providing such other relief as may be appropriate.

Respectfully submitted,



Andrew D. Lipman
Patrick J. Donovan
Counsel for Cbeyond Communications
Focal Communications Corporation
New Edge Network, Inc.

Julia O. Strow
Vice President – Regulatory and
Industry Relations
Cbeyond Communications
320 Interstate North Parkway, SE
Suite 300
Atlanta, GA 30339
(tel) (678) 424-2429
julia.strow@cbeyond.net

J. Jeffrey Oxley
Executive Vice President of Law and Policy
Eschelon Telecom, Inc.
730 2nd Avenue South
Suite 1200
Minneapolis, MN 55402
(tel) (612) 436-6692
jjoxley@eschelon.com

Richard Metzger
Vice President & General Counsel
Focal Communications Corporation
7799 Leesburg Pike
850 North
Falls Church, VA 22043
(tel) (703) 637-8778
dmetzger@focal.com

Penny Bewick
Director, External Affairs
New Edge Networks, Inc.
3000 Columbia House Boulevard
Suite 106
Vancouver, WA 98661
(tel) 360 759-9610
pbewick@newedgenetworks.com

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 2003 served a copy of a Petition for Enforcement Pursuant to Section 271(d)(6) of the Act via first-class mail with postage prepaid to:

R. Steven Davis
Dan L. Poole
Andrew D. Crain
John L. Munn
Lynn A. Stang

Peter A. Rohrbach
Mace J. Rosenstein
Linda Oliver
Daivd L. Sieradzki

Qwest Communications International Inc.
1801 California Street
Suite 4700
Denver, CO 80202
(303) 896-2794

Hogan & Hartson L.L.P.
Columbia Square
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600

Counsel for Qwest Communications
International Inc.



Patrick J. Donovan