

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF QWEST)
CORPORATION'S PERFORMANCE OF THE)
SECOND AMENDED SETTLEMENT)
AGREEMENT)**
_____)

Case No. 07-00184-UT

PROCEDURAL ORDER

This Matter comes before the New Mexico Public Regulation Commission (the "Commission") upon Qwest Corporation's Request for Expedited Oral Argument ("Request for Oral Argument") on issues raised in its earlier Request for Expedited Declaratory Order Approving CyberCenter Investment ("Request for Declaratory Order"). The Commission, having considered the Request for Oral Argument and being otherwise sufficiently advised FINDS AND CONCLUDES:

1. Qwest filed its Request for Declaratory Order on June 13, 2008. In that Request, Qwest asks the Commission to issue an order declaring that Qwest may properly credit expenditures of up to \$10 million on a "CyberCenter" to be located in Albuquerque toward the \$255 million that Qwest is obliged to spend on New Mexico infrastructure and related projects under the Second Amended Settlement Agreement ("SASA") entered into in Case No. 06-00325-UT. More particularly, Qwest's Request for Declaratory Order asks the Commission to approve the CyberCenter investment as an expense allowable under Paragraphs 4(d) and 4(e) of the SASA.

2. In its Request for Declaratory Order, Qwest describes its CyberCenter as "a controlled environment with direct connections to 10 gigabits per second of advanced broadband technology, useful for state-of-the-art hosting for mission-critical Web sites and enterprise applications." (Request for Declaratory Order at 1.) Qwest also states that

“[t]his information infrastructure will help New Mexico gain greater access to advanced communications technology, supporting greater investment in businesses dependent on advanced technology and communications.” (Id. at 2.)

2. Paragraph 4(d) of the SASA requires Qwest, during the 42-month settlement period, to expend at least \$50 million on “advanced telecommunications technologies projects” that “will deploy facilities associated with providing access to advanced telecommunications technology services for customers throughout Qwest’s New Mexico territory who do not currently have such access . . .” such as fiber feeder projects, copper to fiber migration for schools, business parks, state governmental facilities and other priority facilities; extension of optical Ethernet availability; expansion of ATM capacity; augmenting Qwest’s network with facilities capable of delivery speeds of 45 Mbps or higher; and central office upgrades which promote the extension and utilization of advanced telecommunications technologies in locations where those services are not currently available. Paragraph 4(d) also requires Qwest to provide the parties to the SASA a revolving list of advanced telecommunications technology projects and locations designed to fulfill the investment requirements required by Paragraph 4(d).

3. Paragraph 4(e), Network Improvement and Capacity Augmentation Projects, requires Qwest to “create a forty-two month network improvement and capacity augmentation plan by designing, describing and prioritizing a number of specific projects, at least twenty-five of which shall be described and listed in an initial list as a separate attachment to this Settlement Agreement,” Appendix C. Appendix C to the SASA lists 25 specific network improvement projects such as “pressurized cable upgrades” for Clovis, Belen, Artesia, and Gallup; placing fiber

cable to Double Eagle Airport in Albuquerque; and replacing four miles of copper with fiber in Silver City. Paragraph 4(e) states that “such projects include without limitation . . . new network facility locations [and] upgrades of high bandwidth network connections.” Qwest maintains that its CyberCenter falls into one or both of those subcategories. (Request for Declaratory Order at 3.) Paragraph 4(e) also requires Qwest to update and expand its list of such network improvement and capacity augmentation projects quarterly.

4. On June 25, 2008, the New Mexico Department of Information Technology (“DoIT”) filed a Response and Opposition to Qwest’s Request for Declaratory Order. In its Response, DoIT stated that it does not object to Qwest’s proposed CyberCenter project but does object to the use of SASA funds for that project because “the proposed CyberCenter project does not fall within the project categories of the SASA” and “would use a large amount of funds which would otherwise be spent on the types of projects for which the SASA was negotiated.” Qwest would need to apply to the Commission for modification of the SASA in order to use SASA funds for the CyberCenter, and discovery among the parties would be needed in the process of deciding on any such modification. (DoIT Response at 1-2.) Responding to Qwest’s contention that the CyberCenter falls within Paragraph 4(d) of the SASA (described in Paragraph 2 above), DoIT states that “[t]his project category is . . . designed for New Mexico to get improvements and advances in outside plant and central office switching technologies for customers who do not have access to those outside plant and central office upgrades . . . not . . . to provide for construction of data warehousing capacity, nor to provide a subsidy provide competitive data warehousing where that warehousing

already is available from other sources.” (DoIT Response at 5-6.) Concerning Qwest’s position that the CyberCenter falls within Paragraph 4(e) of the SASA (described in Paragraph 3 above), DoIT states, “all of the contemplated upgrades in this category are to the telecommunications network itself, both as to transmission and switching improvements and capacity upgrades.” (Response at 6.) In conclusion, DoIT stated that the Commission should not contemplate the use of SASA funds for the CyberCenter without a separate proceeding involving discovery that would allow the Commission to weigh the nature and benefits of the CyberCenter against the nature and benefits of the investments that would be lost as a result of allowing \$10 million of the SASA money to be spent on the CyberCenter. (DoIT Response at 6-7.)

5. On June 26, 2008, Staff filed its Response to Qwest’s Request for Declaratory Order. Staff stated in its Response that information Qwest presented to Staff informally “indicates that Qwest’s proposed CyberCenter includes an unspecified amount of telecommunications infrastructure that might be eligible toward Qwest’s investment commitment, but it also includes a larger amount of information technology investment that is not eligible under the SASA” and that “is of a type that is already in place at several existing companies” in the Albuquerque area. (Staff Response at 1-2.) Staff also states that “Qwest, at this point, has only a general description of the work to be performed and general estimate of costs.” (Response at 3, fn. 2.) “Staff submits that testimony, discovery and a hearing are necessary to determine which elements of the CyberCenter will be eligible as counting toward Qwest’s investment obligation.” (Id. at 2.)¹

¹ Staff also maintained that in submitting its Request for Declaratory Order, Qwest failed to follow certain requirements of the Commission’s Declaratory Order Rule, 17.1.2.24 NMAC, namely that a petition for

6. On July 3, 2008, Qwest filed a Request for Expedited Oral Argument (“Oral Argument Request”). In its Oral Argument Request, Qwest asks for oral argument (rather than an evidentiary hearing) to resolve the issues raised in its Request for Declaratory Order because “time is of the essence” and “the facts are not in dispute.” Regarding the time sensitive nature of the Commission’s action on the request to approve expenditure of SASA funds for the CyberCenter, Qwest states that a pending “request for service from a single, large customer” is at issue and “unless Qwest can promise delivery of the New Mexico CyberCenter to the customer in the very near future, the customer will go elsewhere . . .” (Oral Argument Request, ¶ 1.)² Regarding the assertion that the facts are not in dispute, Qwest maintains that it is “not asking for a final determination of whether all the funds it may claim in connection with the CyberCenter project are ‘directly related to the design and construction’ of the CyberCenter project within the meaning of section 2 of the SASA,” but only for a determination “that the CyberCenter is included in the ‘Settlement Projects’ identified in subparagraphs d and e of paragraph 4 of the SASA,” which Qwest asserts is a legal question suitable for “summary resolution” by the Commission following oral argument. (Id. at ¶ 3.)

6. On July 10, 2008, Commission Staff filed its Response to Qwest’s Oral Argument Request. Staff opposes Qwest’s request to resolve the SASA expenditure issues by oral argument stating that “an evidentiary hearing . . . is required.” (Staff Response to Oral Argument Request at 1.) Staff states that it is doubtful that the CyberCenter project is a project for which expenditures can properly be expended under

declaratory order be accompanied by a brief setting out “all facts and arguments known in support of *and in opposition to*” the proponent’s position (emphasis Staff’s) and that the petition be accompanied by affidavits attesting to the facts alleged in the petition or brief. (Staff Response to Request for Declaratory Order at 3-4.) It appears that Qwest has cured these deficiencies in its Request for Expedited Oral Argument filed on July 3, 2008 and the affidavit attached thereto.

² Qwest does not identify the customer.

the SASA and disagrees with Qwest's position that the facts underlying the request are not in dispute. Staff states that discovery and an evidentiary hearing are necessary in order to determine the facts underlying Qwest's request. (Id. at 2.) Staff states that it issued a set of discovery requests to Qwest on July 7 to address several issues: (1) whether the CyberCenter project or any of its elements satisfies the eligibility standards of Paragraphs 4(d) and/or 4(e) of the SASA; (2) whether the CyberCenter promotes the SASA's goals of an improved New Mexico telecommunications infrastructure; and (3) whether the expenditures for the proposed CyberCenter will benefit an unregulated Qwest affiliate, Qwest Communications International given that in the AFOR I case (04-00237-UT) the Commission ruled that expenditures of certain Qwest affiliates could not be counted toward Qwest's investment commitments. In connection with these discovery issues, Staff asks, among other things, "How many more communities could be connected to high-speed bandwidth . . . services with \$10 million?" and "Has Qwest's aging infrastructure been fully rehabilitated to operate during rainy weather?" (Id. at 3.) Staff also indicates that its discovery requests address the issue of the existence of other facilities in the Albuquerque area similar to the proposed CyberCenter when the other facilities are "carrier-neutral." (Id. at 4.) Staff states that "discovery and evidentiary hearings are required to fully elicit the relevant facts and to resolve factual disputes" and that Staff "is willing to proceed with an evidentiary hearing on an expedited basis." (Id. at 5.)

7. DoIT also submitted a Response to Qwest's Oral Argument Request. In its Response, DoIT reiterates its basic position that the proposed CyberCenter "is not within the investments approved by the Commission in the SASA" and therefore in order

to entertain Qwest's request for approval of CyberCenter expenditures as SASA expenditures, the Commission would have to amend the SASA. In so doing, DoIT says, to assure the parties to the SASA their due process rights, the Commission would have to "hold an evidentiary hearing to determine whether modification of the SASA to include the CyberCenter and . . . is in the public interest, in light of the limited nature of the funds available under the SASA and the loss if investment in telecommunications projects which would otherwise occur." (Id. at 2.) DoIT, nevertheless, does not oppose Qwest's request for oral argument, but indicates that the Commission should not and cannot grant Qwest's request for approval of CyberCenter expenditures as SASA expenditures as a result of any such oral argument, but rather should deny that request. (Id. at 1.) DoIT states that in order for the Commission to approve a modification of the SASA that would allow the CyberCenter expenditures under the SASA, "necessarily would involve a significant factual investigation into what would be lost in telecommunications network investment if the CyberCenter were approved" and that the burden would be on Qwest in any such hearing. (Id at 2.)

8. DoIT also argues in its Response to the Oral Argument Request that "even if the Commission were to conclude that some portion of the CyberCenter expenditures could be considered a SASA project without amendment of the SASA (which NM DoIT believes is incorrect . . .), those portions of the project could not be considered as a subparagraph 4(d) project because there are two or more other data centers already operating in Albuquerque, and therefore Qwest's center would not 'provide access . . . to customers throughout Qwest's New Mexico territory who do not currently have such access.'" (Id. at 2.) Moreover, DoIT says, such portions of the CyberCenter project also

should not be approved as a subparagraph 4(e) project, because devoting substantial sums of the SASA money to that project “would plainly ‘interfere with or impair the full completion of the priority projects described in subparagraphs 4(a), 4(b), 4(c) and 4(d).’” (Id at 2-3.)

9. In conclusion, DoIT states that the Commission should deny Qwest’s underlying request to use \$10 million of SASA funds for the CyberCenter Project, but asserts that “[i]f the Commission contemplates taking any action other than out-and-out denial of the Qwest motion,” the Commission should “schedule an evidentiary hearing on these issues, to determine whether the SASA categories should be amended to include a commercial building renovation project under SASA.” (Id. at 3.)

10. It is clear from the above that Qwest’s Request for a Declaratory Order raises numerous factual issues that should be resolved through an evidentiary hearing. Even granting Qwest’s point that Qwest is not now asking for final Commission approval as SASA expenditures of all CyberCenter related expenses it may incur, but only for more general Commission approval of the CyberCenter as a project appropriate for the expenditure of SASA funds, Staff and DoIT have pointed out important factual issues that must be resolved in order for the Commission to answer that question in an informed and considered manner. These factual issues include whether particular CyberCenter expenses fall within any of the particular subcategories of SASA Paragraphs 4(d) and 4(e) expenses; if so, which expenses and in what dollar amount; to what extent CyberCenter expenses, if permitted under SASA, would prevent, cause the cancellation or adversely affect other New Mexico infrastructure projects that are within the letter and the spirit of the SASA; whether facilities similar to the proposed CyberCenter already

exist in the Albuquerque area; and, if so, what effect that fact has on the relevant public interest considerations.

11. Because Qwest's Request for Declaratory Order and the responses filed by Staff and DoIT raise factual issues that should be resolved through a hearing, Qwest's Request for Expedited Oral Argument should be denied, and the Commission should set this case for an expedited evidentiary hearing. The evidentiary hearing should be held by the Commission itself (rather than referral to a Hearing Examiner) in order to expedite the process. Prior to the hearing, the parties should be allowed a reasonable opportunity to complete the discovery process that is now underway concerning Qwest's CyberCenter request, also on an expedited basis.

IT IS THEREFORE ORDERED:

- A. Qwest's Request for Expedited Oral Argument is denied.
- B. The parties to the Second Amended Settlement Agreement (SASA) will have one week after a discovery request from another party is served to submit a response to that discovery request.
- C. An evidentiary hearing before the Commission (or one or more Commissioners so designated) concerning the issues presented by Qwest's Request for Expedited Declaratory Order Approving CyberCenter Investment shall be held commencing at 9:30 a.m. on July 28, 2008 in the Commission's Fourth Floor Hearing Room in the PERA Building, 1120 Paseo de Peralta, Santa Fe, New Mexico.
- D. The Commission will hear oral argument on this matter at its Regular Open Meeting on July 29, 2008 at the same location as the evidentiary hearing described

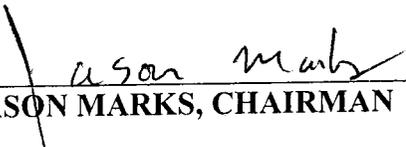
in Paragraph C above. The Regular Open Meeting is scheduled to commence at 9:30 a.m.

E. This order is effective immediately.

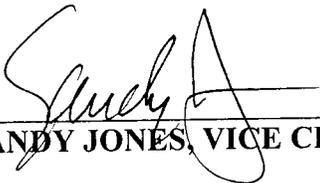
F. This order shall be served on all persons whose names appear on the Certificate of Service.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 12 day of July, 2008.

NEW MEXICO PUBLIC REGULATION COMMISSION

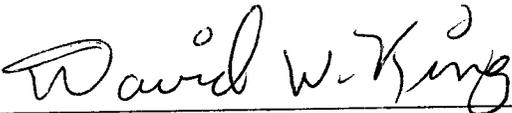


JASON MARKS, CHAIRMAN



SANDY JONES, VICE CHAIRMAN





DAVID W. KING, COMMISSIONER

EXCUSED

BEN R. LUJAN, COMMISSIONER



CAROL K. SLOAN, COMMISSIONER

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**IN THE MATTER OF QWEST
CORPORATION'S PERFORMANCE OF THE
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Case No. 07-00184-UT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PROCEDURAL ORDER issued on July 17, 2008, was mailed on July 17, 2008, by first class, postage prepaid, to the following parties, and by e-mail to the parties indicated below:

Cynthia Manheim
AT&T Wireless
7277 164th Ave., NE - RTC Bldg. 1
Redmond, WA 98052

Thomas W. Olson, Esq.
Montgomery & Andrews, P.A.
Post Office Box 2307
Santa Fe, NM 87504-2307

Annelle Briesch
Baca Valley Telephone Co.
Box 67
Des Moines, NM 88418

Denny Bergstrom
Susan Barker, Accounting Manager
Dell Telephone Coop., Inc.
PO Box 678, 610 South Main
Dell City, TX 79837

Patrick J. Rogers, Esq.
Modrall, Sperling, Roehl, Harris & Sisk
Post Office Box 2168
Albuquerque, NM 87103-2168

Mark Rutherford
GVNW Consulting, Inc.
1001 Water St, Suite A-100
Kerrville, TX 78028

Laura Phipps
LEACO Rural Telephone Coop.
1500 N. Love
Lovington, NM 88260

Patricia Salazar Ives, Esq.
Cuddy, Kennedy, Hetherington, Albetta
Post Office Box 4160
Santa Fe, NM 87502-4160

Curt Huttzell
Frontier Communications of America
3 High Ridge Park,
Rochester, NY 14646

Lance A. Tade
Tularosa Basin Telephone Co.
Post Office Box 550
Tularosa, NM 88352

William Templeman, Esq.
Comeau, Maldegen, Templeman & Indall
Post Office Box 669
Santa Fe, NM 87504-0669

Launa B. Waller
ENMR Telephone Coop.
Plateau Telecommunications
Post Office Box 1947
Clovis, NM 88102-1947

Karen Kilgore, Esq.
White, Koch, Kelly & McCarthy
Post Office Box 787
Santa Fe, NM 87504-0787

Lisa Curry Gray
Attorney at Law
P.O. Box 31085
Santa Fe, NM 87594

Rodney, Dickason, Sloan, Akin and Robb, P.A.
315 Paseo de Peralta
Santa Fe, NM 87501

Bruce C. Throne, Esq.
Attorney at Law
1440 B South St. Francis Drive
Santa Fe, NM 87505

Bill R. Garcia, Esq.
Windsteam Communications
1800 Old Pecos Trail, Suite J
Santa Fe, NM 87505

Judy D. Bruns
Valley Telephone Co-op. Inc.
Post Office Box 970
Willcox, AZ 85644

Richard H. Levin
Attorney at Law
6741 Sebastopol Ave., Suite 230
Sebastopol, CA 95472

Jeffrey H. Albright, Esq.
Lewis and Roca Jontz Dawe, LLP
201 Third Street, N.W., Suite 1950
Albuquerque, NM 87102

Timothy Goodwin, Corporate Counsel
Qwest Services Corporation
1801 California Street, 9th Floor
Denver, CO 80202

Carolyn S. Fudge, Esq.
Assistant City Attorney
City of Albuquerque
PO Box 2248
Albuquerque, NM 897103

The Honorable Gary King
New Mexico Attorney General
Post Office Drawer 1508
Santa Fe, NM 87504-1508

Sarah Weisman Trosh
Verizon Wireless
1300 I Street, NW, Suite 400 West
Washington, D.C. 20005

Andrew Carey
ALLTEL
11333 North Scottsdale Rd. Suite 200
Scottsdale, AZ 85254

Jack Keen
Western NM Telephone Co.
Post Office Box 3079
Silver City, NM 88062

Victoria B. Garcia, General Counsel
Department of Information Technology
John F. Sims Building
715 Alta Vista
Santa Fe, NM 87503

W. Mark Mowery, Esq.
Rodey Law Firm
Post Office Box 1357
Santa Fe, NM 87504-1357

Rob Strait & Doug Kitch
Beacon Telecom Advisors
2055 Anglo Dr., Ste. 201
Colorado Springs, CO 80918

Jaime Flores
MATI
P.O. Box 229
Mescalero, NM 88340

Carl Wibel, Project Coordinator
Cellular One of NE AZ
10504 Toltec Rd NE
Albuquerque, NM 87111

Nerissa Whittington/Claude McFarlane
Big Byte
123 Central Ave. NW
Albuquerque, NM 87102

Via e-mail
Lynn Hankins, Paralegal
Covad Communications
lhankins@covad.com

Randy Asselin
Oso Grande Technologies
5921 Jefferson NE
Albuquerque, NM 87109

Alan P. Morel, Attorney-at-law
P.O. Box 1030
Ruidoso, NM 88355

Scott Arnold
Yucca Telecom
201 W. 2nd
Portales, NM 88130

Lewis C. Cox, III, Esq.
Gene Samberson, Esq.
Heidel, Samberson, Newell, Cox & McMahon
PO Drawer 1599
Lovington, NM 88260

Marianne Granoff
Zianet
801 Calle Fuerte NE
Albuquerque, NM 87113

Paul J. Gutierrez
MFG Services, Inc.
P.O. Box 23409
Santa Fe, NM 87502

McLeod USA Telecom. Services, Inc.
Office Of General Counsel
6400 C Street SW, PO Box 3177
Cedar Rapids, IA 52406-3177

Ms. Luralene D. Tapahe
Navajo Nation Department of Justice
PO Box 2010
Window Rock, AZ 86515

Lawrence Krajci
Alltel
P.O. Box 2177
Little Rock, AR 72203

Via e-mail
Matt Middlebrooks, Jr., Esq.
Sprint Nextel Southwest Region
Matt.w.middlebrooks@sprint.com

Hand-delivered to:
Joan Ellis, Staff Counsel
Ashley Schannauer, Staff Counsel
NMPRC
224 E. Palace Ave.
Santa Fe, NM 87501

Mary Jane Rasher
10005 Gwendelyn Lane
Highlands Ranch, CO 80129

Susie Rao/Jim Blundell
Western Wireless Corp.
36501 131st St., Ave. SE, Ste. 400
Bellevue, WA 98006

Michael Bagley
Verizon Wireless
3rd Floor, Building E
15505 Sand Canyon Avenue
Irvine, CA 92618

Amy Linzey
CHR Solutions
3721 Exec. Center Dr. Suite 200
Austin, TX 78731

Dan Foley
AT&T Communications
645 East Plum Lane, Rm B 132
Reno, Nevada 89502

Edie Ortega
CenturyTel
1301 Pennsylvania Street, Suite 900
Denver, CO 80203

Jerome D. Block
Mescalero Apache Telecom, Inc.
1308 Lejano Lane
Santa Fe, NM 87501

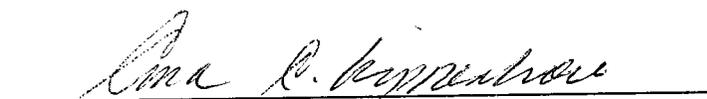
Jim Miller
GVNW Consulting, Inc.
1001 Water Street, Suite A-100
Kerrville, TX 78028

Via e-mail
Greg Diamond
Covad Communications company
gdiamond@covad.com

Hand-delivered to:
Allen Ferguson
Associate General Counsel
NM Public Regulation Commission
1120 Paseo de Peralta; PO Box 1269
Santa Fe, NM 87504-1269

DATED this 17th day of July, 2008.

NEW MEXICO PUBLIC REGULATION COMMISSION


ANA C. KIPPENBROCK, Paralegal