

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott	Chair
Edward A. Garvey	Commissioner
Marshall Johnson	Commissioner
LeRoy Koppendrayer	Commissioner
Phyllis A. Reha	Commissioner

**In the Matter of a Complaint by Desktop  
Media, Inc. (Desktop) Against Qwest  
Corporation (Qwest)**

**ISSUE DATE: May 30, 2001**

**DOCKET NO. P-421/C-01-235**

**ORDER PROVIDING CLARIFICATION  
AND REQUIRING INFORMATION  
ACCESS AND COMPLIANCE WITH  
DISCOVERY REQUESTS**

**PROCEDURAL HISTORY**

**On December 15, 2000, the Commission approved an interconnection agreement between Desktop Media Inc. (Desktop) and Qwest Corporation (Qwest)<sup>1</sup> Desktop adopted the interconnection agreement between AT&T Communications of the Midwest, Inc. and US WEST Communications, Inc. that was approved by the Commission on March 14, 1997.**

**On February 14, 2001, Desktop filed a complaint with the Commission against Qwest, pursuant to Minn. Stat. § 237.462, alleging that Qwest has violated the terms of its interconnection agreement with Desktop as well as the federal Telecommunications Act of 1996 and Minnesota Statutes. Desktop claimed that Qwest's conduct has hindered Desktop in its ability to compete in the market to provide local telecommunication services.**

**On March 1, 2001, Qwest filed an answer to the complaint requesting that the Commission dismiss the complaint with prejudice.**

**On March 12, 2001, Encore Communications LLC (Encore) submitted a petition to intervene in the matter. Encore was concerned that the outcome of this proceeding would affect its rights.**

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<sup>1</sup> In Docket No. P-5934, 421/IC-00-1509.

**On March 14, 2001, Desktop, Encore and Qwest contacted the Commission by telephone requesting that the Commission delay hearing arguments as the parties were working towards a negotiated settlement.**

**On April, 9, 2001, Qwest and Desktop submitted a settlement agreement for Commission approval.**

**On April 11, 2001, the Commission issued a request for comments regarding the settlement agreement.**

**On April 20, 2001, comments were received from Desktop, Encore and the Department of Commerce (DOC).**

**On April 30, 2001, Qwest filed reply comments.**

**On May 22, 2001, the matter came before the Commission.**

## **FINDINGS AND CONCLUSIONS**

### **I. Summary of Desktop's Complaint**

**Desktop alleged in its complaint that Qwest refused:**

- **Desktop's requests for access to network information necessary for Desktop to plan its network;**
- **to provide Desktop with access to dark fiber between Owatonna and Rochester;**
- **to provide Desktop with access to dark fiber between Desktop's equipment and Qwest's central offices without an amendment to the interconnection agreement;**
- **to provide Desktop with collocation in a timely manner.**

**Desktop requested expedited proceedings to resolve this matter.**

### **II. Settlement Agreement between Qwest and Desktop**

**The settlement agreement addressed the issues set forth in the complaint. Specifically regarding the issue of dark fiber, Qwest agreed to provide Desktop two strands of dark fiber. However, Qwest's obligation to provide the two strands of dark fiber was "expressly conditioned on obtaining an agreement from Encore to release the two strands of dark fiber**

from the six strands Qwest previously agreed to provide to Encore.”<sup>2</sup>

### **III. Encore’s Position and Comments on the Settlement Agreement**

Encore petitioned to intervene in this complaint proceeding because it had requested dark fiber facilities in the same Qwest wire centers as Desktop. Encore was concerned that Qwest or the Commission would grant dark fiber facilities reserved by Encore to Desktop.

Encore was not a party to the settlement agreement and requested that the Commission find that neither the settlement agreement nor the outcome of the proceedings before the Commission affects any rights of Encore.

Encore argued that the settlement agreement entered into by Qwest and Desktop is inconsistent with and fails to implement the existing AT&T/US West Interconnection Agreement, which both Encore and Desktop have adopted. Encore stated that it does not agree as part of this proceeding to relinquish any of the dark fiber facilities it has on reserve and will not release them under any circumstances unless Qwest complies with the Interconnection Agreement.

### **IV. Position of the DOC**

The DOC indicated that as long as the settlement agreement allowed Desktop to proceed with its business plan and compete, the DOC supported the settlement agreement.

The DOC argued that it was concerned that the broader issues raised in the Desktop complaint may reflect practices by Qwest that make it difficult for Competitive Local Exchange Carriers (CLECs) to compete in Minnesota using Qwest facilities. The settlement between Qwest and Desktop does not change the situation for other CLECs who must rely on Qwest to establish their networks. For this reason, the DOC wishes to continue an investigation into the issues raised in the complaint. Towards that end the DOC, on March 23, 2001, issued extensive information requests to Qwest, which were answered on or about Friday, May 18, 2001. The DOC, although it has investigatory authority, requested that the Commission open such an investigative docket arguing that a Commission investigation would facilitate the timely collection of information to move the matter forward.

### **V. Commission Action**

#### **A. On the Settlement Agreement**

During the course of the proceedings before the Commission it became clear that participation by Encore in the settlement agreement was necessary for any effective relief.

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<sup>2</sup> Settlement Agreement page 4, paragraph 2c.

Desktop requested, and the other parties agreed, that the Commission give all three parties (Desktop, Encore and Qwest) a chance to enter settlement negotiations. The Commission granted the request and tabled any decision on the settlement issue. Since time was a critical factor stated by the parties, the Commission will grant the parties' request to bring this issue again before the Commission on the June 5, 2001 agenda.

The Commission recognized that one of the obstacles faced by Desktop and Encore in this situation is acquiring information that is under the control of Qwest. For this reason the Commission will order that Qwest provide access to all the information needed by Encore and Desktop to determine the unused capacity available for use by Qwest or any other provider for both lit and dark fiber on the relevant routes.

**B. On an Investigation**

The DOC indicated that it wanted to continue to investigate the issues raised in Desktop's complaint because of concerns of possible anticompetitive behavior by Qwest. The DOC requested that the Commission clarify certain issues of concern including questions of scope and discovery so that the DOC's investigation could continue in an efficient and timely manner. At the end of the investigation, at the discretion of the DOC, the matter would be brought to the Commission for final resolution. The Commission finds this reasonable and efficient and will address the issues of concern as set forth below.

Among other things, the DOC was concerned that discovery requests to Qwest would not be complied with in a timely or reasonable manner. To address this concern, the Commission will order Qwest to comply with discovery requests submitted by the DOC. Also, the Commission assures the parties that the Commission will entertain prompt resolution of any discovery disputes in this matter.

Further, the Commission will clarify that the resolution of the Desktop complaint will not preclude the DOC from investigating and bringing forth allegations based on the facts or conduct alleged to have occurred in this complaint. It also will clarify that the discovery requests served by the DOC in this case need not be reissued and will be acknowledged and considered part of the DOC's investigation for purposes of a new docket.

**ORDER**

- 1. Qwest shall provide access to all information needed by Encore or Desktop to determine the unused capacity available for use by Qwest or any other provider on all the relevant routes, whether lit fiber or dark.**
- 2. Qwest shall comply with all discovery requests submitted by the DOC in the course of its investigation.**

3. **The Commission clarifies that the resolution of the complaint herein will not preclude the DOC from investigating and bringing forth allegations based upon the facts of this case. Further, the discovery requests served by the DOC in this case need not be reissued and will be acknowledged and considered part of the DOC's investigation.**
4. **This Order shall become effective immediately.**

**BY ORDER OF THE COMMISSION**

**Burl W. Haar  
Executive Secretary**

**(S E A L)**

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