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: July 5, 2001

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

ORDER APPROVING SETTLEMENT, REQUIRING RELEASE OF FIBERS, FIBER CONNECTIVITY AND CORRIDOR PROVISIONING

PROCEDURAL HISTORY

On December 15, 2000, the Commission approved an interconnection agreement between Desktop Media Inc. (Desktop) and Qwest Corporation (Qwest).[1] 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 had 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.

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

[1] In Docket No. P-5934, 421/IC-00-1509.

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, this matter came before the Commission.

On May 30, 2001, the Commission issued its ORDER PROVIDING CLARIFICATION AND REQUIRING INFORMATION ACCESS AND COMPLIANCE WITH DISCOVERY REQUESTS. The Order tabled any decision on the settlement issue until the June 5, 2001 agenda meeting to allow Desktop, Encore and Qwest time to enter into settlement negotiations, directed Qwest to provide access to information requested by Encore or Desktop, and required Qwest to comply with discovery requests submitted by the DOC. Further, the Order clarified that any resolution of the complaint by Desktop would not preclude the DOC from investigating and bringing allegations based on the facts of this case.

On June 1, 2001, Encore submitted supplemental comments and Qwest submitted a letter regarding the status of negotiations.

On June 4, 2001, Desktop submitted supplemental comments.

On June 5, 2001, this matter came before the Commission.

FINDINGS AND CONCLUSIONS

This Order addresses not only the settlement agreement between Desktop and Qwest but also issues raised by Encore against Qwest.

I. Background

A. 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.

B. Settlement Agreement Between Qwest and Desktop

The settlement agreement between Desktop and Qwest, filed with the Commission on April 9, 2001, addressed the issues set forth in the complaint and provided, inter alia, the following:

- **In order to provide access to network information Qwest will make available a " web process" by which Desktop can access posted information regarding Qwest's facilities, including dark fiber.**

- **Qwest agreed to provide Desktop two strands of dark fiber. Qwest's obligation to provide the two strands of dark fiber, however, 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."**

- **Qwest agreed to provision loop dark fiber[2] that Desktop has requested since November 27, 2000, if such loop dark fiber is available or was available at the time of Desktop's request. The parties agreed to negotiate a loop dark fiber amendment to cover the terms and conditions for the provision of such loop dark fiber.**

- **The parties will work together to complete two remaining collocation projects. As soon as Desktop completes those aspects of the projects that are within its control, Qwest will work diligently to complete its remaining obligations to finalize the collocation projects.**

C. Encore's Position Regarding the Settlement Agreement Between Desktop and Qwest

Encore was not a party to the settlement agreement. Encore stated, among other things, that it did not agree, as part of this proceeding, to relinquish any of the dark fiber facilities it has on reserve and would not release them under any circumstances unless Qwest complied with the interconnection agreement between Encore and Qwest.

Initially, Encore requested that if the Commission allowed the settlement agreement between Desktop and Qwest to become effective, that the Commission find that the settlement and the dismissal of Desktop's complaint did not affect Encore's rights in future proceedings.

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[2] The settlement agreement defined loop dark fiber as a deployed, unlit pair of fiber cable or strands that connect a Qwest wire center and an end user customer premise or CLEC wire center in the same LATA and state.

D. The DOC's Position Regarding the Settlement Agreement

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 also raised the issue of possible anticompetitive behavior by Qwest and requested further investigation.[3]

II. The Parties' Positions on Issues Continuing to be in Dispute

A. Desktop's Position

Desktop's continuing concern was the release of the two dark fibers by Encore. Because it appeared that Desktop will not be able to obtain the two strands of fiber between Rochester and Owatonna that Desktop needs to build its network, Desktop initially asked to withdraw its prior request that the Commission approve the settlement agreement between Desktop and Qwest. Desktop requested that the matter be set for an expedited hearing to resolve the disputed issues. However, at the hearing before the Commission, Desktop agreed that if the Commission ordered that two strands of dark fiber were to go to Desktop, Desktop would request that the settlement agreement be approved.

B. Encore's Position

Encore indicated that its current controversy with Qwest arose from Encore's attempt to transport traffic by two different routes. The first route was from the Qwest Central Office (CO) in Owatonna to the Qwest Rochester CO and from there to the Rochester Holiday Inn (the Owatonna-Rochester Route). The second route was from the Qwest CO in Owatonna to the Midwest Wireless office (Owatonna-Midwest Wireless Route).

In its written materials, Encore indicated that the issues between Encore and Qwest that need resolution included:

- **information on the network information which is needed by Encore to make dark fiber facilities usable by Encore;**
- **Qwest's requirement that Encore buy collocation space in Qwest central offices rather than allowing Encore to cross connect or "recombine" the fiber facilities to avoid the need for collocation on the Owatonna-Rochester route;**
- **Qwest's refusal to provide dark fiber for Encore's intended Owatonna-Midwest Wireless route;**
- **compensation to Encore pursuant to the Interconnection Agreement for delays in provisioning and Direct Measure of Quality (DMOQ)issues.**

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[3] The Commission's May 30, 2001, ORDER PROVIDING CLARIFICATION AND REQUIRING INFORMATION ACCESS AND COMPLIANCE WITH DISCOVERY REQUESTS recognized that the DOC will be carrying on its own investigation because of concerns raised in Desktop's complaint regarding possible anticompetitive behavior by Qwest and addressed several issues of concern to the DOC regarding that investigation.

Each of these will be discussed in turn.

Encore indicated that it had been having a very difficult time getting necessary information from Qwest. This issue was considered in the Commission's May 30, 2001 Order in which the Commission required Qwest to provide information access to Desktop and Encore.

For the Owatonna-Rochester Route, it was Encore's position that collocation was not necessary at Qwest's central office in Rochester. Encore argued that it was entitled to cross-connect the fiber facilities to avoid the need for collocation and that the interconnection agreement did not require collocation. Encore indicated that if collocation was required, rather than just being able to cross connect, it would be much more costly and time consuming.

Encore stated that Qwest was refusing to provide Encore with dark fiber for Encore's Owatonna-Midwest Wireless route claiming that it was part of the local loop. Qwest took the position that dark loop fiber is not addressed in the interconnection agreement and an amendment to this agreement had to be negotiated before Qwest would provide the fiber.

Encore argued that Qwest was arbitrarily defining interoffice facilities as loop facilities whereas the requested dark fiber was intended for interoffice transport purposes (connecting Qwest wire centers with Encore's wire centers) and was not loop fiber but transport fiber. Encore further indicated that as transport fiber unbundled network elements (UNE) rates set forth in the interconnection agreement would apply and Encore would pay $.004 per fiber foot per pair.

Initially, Encore indicated that it should be compensated under the interconnection agreement for delays in provisioning and also raised DMOQ concerns. At the hearing Encore and Qwest agreed that Encore would reserve its right to contest financial compensation and DMOQ credits, however, Encore agreed to give Qwest 30 days notice prior to bringing an action before the Commission or a Court.

C. Qwest's Position

Qwest argued that Desktop's request that the settlement agreement be considered null and void was contrary to the terms of the settlement agreement. Rather, Qwest requested that the Commission determine whether Desktop has the right to zero, two or six strands of the fiber at issue. In the alternative, Qwest requested that a hearing on this issue be held as soon as possible, with the remaining issues between Encore and Qwest to be addressed at a later date as part of a separate hearing.

Qwest indicated that pursuant to the Commission's Order of May 30, 2001 it has provided, to Encore and Desktop, access to its inventory database and provided all of the records its engineers and planners could use to determine the capacity between Rochester and Owatonna.

As to the other issues raised by Encore:

Qwest took the position that on the Owatonna-Rochester Route, Encore was required to collocate in the Qwest Rochester CO. Qwest argued that collocation was required to cross-connect two network elements, that CLECs were required to have a point of presence where interconnecting and that collocation was the way to accomplish this. At the hearing before the Commission, Qwest indicated that hardware-wise, the connection was basically a jumper. Further, at the hearing, Qwest indicated that it was willing to provide the necessary connectivity to Encore but the pricing issue was not resolved.

On the issue of providing dark fiber for the Owatonna-Midwest Wireless Route, Qwest initially indicated that this was loop fiber, that it was not required to provide this under the interconnection agreement and that there needed to be a negotiated amendment to the interconnection agreement to address this. At the hearing before the Commission, Qwest agreed to provision this route but there was no agreement between Qwest and Encore as to whether the dark fiber rates, as set forth in the interconnection agreement, applied.

As to the question of DMOQ credits that Encore may be entitled to, Qwest indicated it had both legal and policy issues with Encore's position.

III. Commission Action

The Commission has a statutory obligation to consider the State's goals for telecommunication which include:

1. **Supporting universal service;**
2. **Maintaining just and reasonable rates;**
3. **Encouraging economically efficient deployment of infrastructure for higher speed telecommunication services and greater capacity for voice, video, and data transmission;**
4. **Encouraging fair and reasonable competition for local exchange telephone service in a competitively neutral regulatory manner;**
5. **Maintaining or improving quality of service;**
6. **Promoting customer choice;**
7. **Ensuring consumer protections are maintained in the transition to a competitive market for local telecommunications service; and**
8. **Encouraging voluntary resolution of issues between and among competing providers and discouraging litigation.**

Minn. Stat. § 237.011

Further, the Commission has a statutory duty to promote local competition.[4]

In the current case, the Commission recognizes that both Desktop and Encore would not be able to go forward with their plans for local telecommunication services without some resolution to the issues between each of these companies and Qwest. Failure to resolve these issues would have the effect of limiting customer choice and discouraging competition,

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[4] Minn. Stat. § 237.16.

clearly in opposition to the Commission's mandate.

During the course of the hearing before the Commission, Encore and Qwest reached agreement on several of the issues in dispute. First, Encore agreed to turn over to Qwest two strands of dark fiber, with the intention that they be used to serve Desktop. Second, Qwest agreed that it would provide the necessary fiber connectivity to Encore on the Rochester-Owatonna Route and that it would provision the Owatonna-Midwest Wireless route. Encore and Qwest, however, could not reach agreement on the issue of whether provisioning the Owatonna-Midwest Wireless Route required an amendment to the interconnection agreement or was governed by the transport fiber UNE rates set forth in the interconnection agreement. The Commission is persuaded that connecting Qwest's wire centers with Encore's wire centers would be interoffice transport and, as such, Encore would be required to pay $.004 per fiber foot per pair, as set forth in the interconnection agreement. The Commission will so order.

Further, the Commission recognizes and finds reasonable Encore's and Qwest's agreement that Encore reserve its rights to contest financial compensation and DMOQ credits with the proviso that Encore give Qwest 30 days notice before bringing any action, either before the Commission or a Court.

The Commission will approve the settlement agreement between Desktop and Qwest and the agreement reached by Qwest and Encore as reasonable negotiated settlements between the parties. The provisions of these two agreements are clearly in the public interest in that they will enable the two CLECs, Encore and Desktop, to enter the market.[5]

For the reasons discussed above and in order to effectuate the entry of both Desktop and Encore into the market, the Commission will order that Encore release two dark fibers that will enable Desktop to proceed, will order Qwest to provide connectivity for Encore's Owatonna to Rochester to the Rochester Holiday Inn route and to provision the Midwest Wireless corridor. Further, the Commission will require that further disagreements on the terms and conditions for provisioning dark fiber to Encore be addressed consistent with the terms of the Interconnection Agreement between Qwest and Encore.

With this Order, the Commission's docket on this complaint will be closed. The Commission recognizes that the DOC will be proceeding with its own investigation into possible anticompetitive behavior including, among other things, facilities information and interconnection agreements interpretation (DOC Docket No. P421/DI-01-814).

ORDER

1. **The Settlement Agreement filed by Desktop and Qwest on April 9, 2001 is approved.**

2. **Qwest shall provide fiber connectivity pursuant to the agreement for a connection from Owatonna to Rochester to the Holiday Inn per Encore's needs.**

3. **Qwest shall provision the Midwest Wireless corridor as soon as possible but no later than 30 days from the date of this Order. Encore shall pay the current**

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[5] See Minn. Stat. § 237.076, subd.2

Interconnection Agreement rate of $.004 cents per fiber foot per pair.

4. **Encore shall release two dark fibers back to Qwest with the primary intention that they be used to serve Desktop.**

5. **Encore reserves the right to contest financial compensation and DMOQ credits. Encore shall give Qwest 30 days notice prior to bringing an action before the Commission or a Court.**

6. **To the extent that there are disagreements over terms and conditions for provisioning the dark fiber to Encore, those matters shall be addressed or worked through consistent with the dispute resolution provisions within the interconnection agreement between Encore and Qwest.**

7. **This Commission hereby closes this docket. The DOC investigation into facilities information and interconnection agreements shall continue consistent with the Commission's Order of May 30, 2001.**

8. **This Order shall become effective immediately.**

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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