

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

In the Matter of a Complaint Against Qwest re:
Transfer of DSL Customer Records to MSN
Internet Services

ISSUE DATE: March 28, 2002

DOCKET NO. P-421/C-02-94

ORDER ACCEPTING THE SETTLEMENT
AGREEMENT AND DISMISSING THE
COMPLAINT WITHOUT PREJUDICE

PROCEDURAL HISTORY

On January 16, 2002, ISPs Working Together (the ISPs), a Minneapolis-based consumer advocacy coalition of Minnesota internet service providers (ISPs), filed a complaint with the Commission alleging that Qwest is forcing tens of thousands of its Minnesota DSL customers to switch to Microsoft Network's (MSN's) Internet Access Service and that these customers have not been clearly informed regarding their options and the consequences with respect to quality of service.

On February 5, 2002, Qwest responded to the complaint denying all allegations and arguing, that the Commission does not have jurisdiction over the matter.

On February 14, 2002, the Minnesota Department of Commerce (the Department) and Microsoft Corporation (Microsoft) filed comments and the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG) filed comments on February 15, 2002.

The Commission met on February 19, 2002 to consider this matter and on February 21, 2002 issued its ORDER REQUIRING NEGOTIATIONS AND ESTABLISHING A REPORTING DATE. In its Order, the Commission directed the Complainant ISPs (including Eric Ostberg of Sound Choice Internet), the Respondent Qwest, Microsoft, and the public agencies (the Department and the RUD-OAG) to negotiate certain issues and report their progress to the Commission at the Commission's February 26, 2002 Telecommunications Agenda Meeting. The parties were directed to report on the results of their negotiations on four points:

- a) allowing customers who have already migrated to MSN to revisit that decision without imposition of fees or delays;
- b) pushing back the proposed March default migration;
- c) requiring Qwest to send a more complete notification that does not provide MSN preferential treatment; and
- d) allowing customers to make seamless transfers (seamless migration) between ISPs.

On February 26, 2002, the RUD-OAG reported an agreement the parties had reached, outlining the issues settled, the issues outstanding, and the next steps in reducing the agreement to writing. The Commission tabled the matter to the Commission's next Telecommunications Meeting, March 5, 2002 and requested that the final settlement be filed the day before, on March 4, 2002, at the latest.

On March 4, the RUD-OAG filed a Settlement Agreement between itself, Qwest, and Microsoft (collectively, the Agreement Signatories or the Settling Parties). These parties jointly requested that the Commission dismiss the ISPs' Complaint with respect to the issues that they (the Agreement Signatories) had agreed to release (settle) as part of their Settlement Agreement.

The Commission met on March 5, 2002 to consider this matter.

FINDINGS AND CONCLUSIONS

I. THE SETTLEMENT AGREEMENT PROPOSED BY RUD-OAG, QWEST, AND MICROSOFT

The Settlement Agreement before the Commission in this Order was proposed by the RUD-OAG, Qwest, and Microsoft. The agreement applies to two categories of customers in Minnesota: 1) Minnesota residential customers who have Qwest DSL and qwest.net as their ISP (QDSL) who are part of MSN's potential customer base who are eligible to migrate to MSN Broadband, but who have not opted to do so; and 2) QDSL customers who have already opted to migrate to MSN Broadband. For a detailed statement of the agreements affecting those customers see the Settlement Agreement, copy attached.

In the proposed Agreement, Qwest and Microsoft stated that they were in no way acceding that the Commission has jurisdiction over any issues raised in the Complaint and were retaining all defenses, including jurisdiction, in this matter. At the hearing, the Agreement signatories requested that the Commission approve the Settlement Agreement without ruling on the jurisdiction question to avoid a prolonged contest of the jurisdiction question and to expedite specific relief to individual end-users, as provided for in the Settlement Agreement.

II. COMMENTS OF THE COMPLAINANT ISPS AND THE DEPARTMENT

The Complainant ISPs and the Department did not sign the Settlement Agreement, indicating that there were issues that they did not believe were adequately addressed in the Settlement Agreement. Both of these parties expressed concern about the final sentence in Part V, A of the Settlement Agreement which states:

The Parties recognize that the Department, MIWT [the Complainant ISPs], and the OAG reserve their rights to pursue any matter before the Commission not covered by this Settlement Agreement.

The Department stated that the sentence appeared to be a claim by the settling parties [OAG, Qwest, and Microsoft] that if the Settlement Agreement "covered" a matter or issue, that the Department and the Complainant ISPs were not reserving their rights with respect to those matters or issues and would somehow be precluded from pursuing those issues/claims at a later date.

Although it is basic that agreements between parties can only bind the parties to those agreements, the sentence in question did raise a reasonable question about what interpretation the settlement parties might later urge and what effect the Commission would later give such an approved sentence. This was not a theoretical concern since the Complainant ISPs and the Department, neither of whom are parties to the Settlement Agreement, indicated that there were unsettled issues relating to the Complaint that they wished to make clear were in no way affected by the Settlement Agreement.

Helpfully, at the hearing on the proposed Settlement Agreement, Settling Parties clarified that the final sentence of Part V, A was not to intended to curtail, eliminate, or diminish in any way any claim by any entity not a party to the Settlement, such as the Complainant ISPs or the Department.

For their part, the Complainant ISPs and the Department clarified that as long as it is clearly understood by the Commission and the Settling Parties that the Settlement Agreement did not prejudice any outstanding issues they had with Qwest and Microsoft in this general area (primarily marketing agreement issues) they supported the Commission approving the Settlement Agreement because it provided appropriate relief for certain individual Qwest customers (end-users) and, as such, was in the public interest.

III. COMMISSION ANALYSIS AND ACTION ON THE SETTLEMENT AGREEMENT

Having reviewed the proposed Settlement Agreement and with the expressed understanding on all sides that the Settlement Agreement does not bind or impact the Complainant ISPs and the Department from bringing any claim or concern they may have against Qwest or Microsoft, the Commission finds that the Settlement Agreement is in the public interest and will approve it. A copy of the Settlement Agreement is attached to this Order.

The Commission clarifies that, as requested by the Agreement proponents, it will not determine in this Order whether it has jurisdiction over any of the issues raised in the ISPs' Complaint. The Commission believes that given the circumstances of this case, it is in the public interest to refrain from ruling on the jurisdiction question so that implementation of the Settlement Agreement can begin forthwith.

IV. JOINT MOTION FOR DISMISSAL OF COMPLAINT AS TO RELEASED CLAIMS

The RUD-OAG, Qwest, and Microsoft also jointly petitioned the Commission to dismiss the ISPs' complaint as to the released claims, i.e. those settled between RUD-OAG, Qwest, and Microsoft in the Settlement Agreement. The Settlement Agreement stated that if the Commission denied the signatories' Joint Motion for Dismissal of Complaint as to Released Claims, any one of them could disavow the Agreement, which would then become null and void and not binding on them, at which point they would be free to assert any position with respect to the issues addressed in the Agreement.

At the hearing, the Complainant ISPs indicated that they would not object to the Commission dismissing their entire complaint as long as they would be allowed to file a subsequent complaint focused on the unresolved marketing agreement issues.

Rather than dismiss part of the ISPs' Complaint (the issues resolved by the Settlement Agreement) and continue with whatever issues remain, the Commission believes it may be clearer to accept the ISP's suggestion and dismiss their entire complaint, with the understanding that the ISPs will be allowed to file a subsequent complaint focused on their marketing agreement concerns. If the ISPs do file a subsequent complaint, Qwest and Microsoft have not waived their right to assert any and all defenses that they may have to that complaint, including the assertion that the Commission lacks jurisdiction over the ISPs' subsequent complaint, just as they have asserted with respect to the ISPs' initial complaint.

Finally, the Commission clarifies that this Order takes no position on the merits of either the ISPs' outstanding concerns or the defenses which Qwest may choose to present in response to them.

Accordingly and with these clarifications and understandings, the Commission will dismiss the ISP's Complaint without prejudicing their right to file a subsequent complaint focused on any unresolved issues they may have.

ORDER

1. The Settlement Agreement proposed by the RUD-OAG, Qwest, and Microsoft and signed by those three parties only is approved, subject to the clarifications offered by the signatories regarding the meaning of Part V, A (discussed above at page 3) and the

understanding by all parties that the rights of the Department and the Complainant ISPs are not affected by the Settlement Agreement. A copy of the Settlement Agreement is attached. The parties to the approved Settlement Agreement shall honor its terms.

2. The ISPs' Complaint is dismissed without prejudicing their right to file a subsequent complaint focused on any unresolved issues they may have.
3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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