

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye  
Marshall Johnson  
Ken Nickolai  
Phyllis A. Reha  
Gregory Scott

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Petition of Qwest  
Corporation for Approval of its Revised  
Alternative Form of Regulation (AFOR) Plan

ISSUE DATE: February 23, 2004

DOCKET NO. P-421/AR-03-1688

ORDER GRANTING INTERVENTION,  
MODIFYING PROTECTIVE ORDER AND  
DIRECTING DISCLOSURE

**PROCEDURAL HISTORY**

On October 31, 2003, Qwest Corporation (Qwest) filed a Revised Alternative Form of Regulation Plan (Revised AFOR Plan) and Request for Extension of Time, seeking to extend its current Alternative Form of Regulation (AFOR) Plan<sup>1</sup> until the parties complete negotiations regarding Qwest's Revised AFOR Plan. AFOR plans are governed by Minnesota Statutes §§ 237.76 through 237.772.

On November 26, 2003, the Commission issued its ORDER ADOPTING PROCEDURES FOR AFOR RENEWAL PROPOSAL AND SETTLEMENT CONFERENCE, extending the Current Plan's duration and requiring parties seeking intervention to file a petition by December 16.

By December 16, 2003, the Commission had received petitions for intervention from AT&T Communications of the Midwest, Inc. and TCG Minnesota, Inc. (collectively, AT&T); Eschelon Telecom, Inc. (Eschelon); the Office of Attorney General's Residential and Small Business Utilities Division (OAG-RUD); a collection of municipalities called the Suburban Rate Authority (SRA); and WorldCom, Inc. and its regulated subsidiaries (collectively, MCI).

On December 17, 2003, the Commission received a petition for intervention by a coalition of competitive local exchange carriers consisting of McLeodUSA; Ace Telephone Association; C-I Communications, Inc.; HomeTown Solutions, LLC; Hutchinson Telephone; Mainstreet Communications; NorthStar Access, LLC; Otter Tail Telecom, LLC; Paul Bunyan Rural Telephone Company; Tekstar Communications; Unitel Communications; U.S. Link, Inc.; and VAL-ED Joint Venture, LLP (collectively, the CLEC Coalition).

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<sup>1</sup> See *In the Matter of the Petition of U S WEST Communications, Inc. for Approval of its Alternative Form of Regulation Plan*, Docket No. P-421/AR-97-1544, Modified Alternative Form of Regulation Plan for the State of Minnesota (January 11, 1999).

On December 19, 2003, Qwest filed a proposed protective order governing the handling of certain confidential information. The Commission issued a notice approving the protective order on January 6, 2004.

On December 22, 2003, Qwest filed an objection to the petitions for intervention from AT&T, the CLEC Coalition and Eschelon. AT&T replied to Qwest's objection in January 9, 2004.

On December 30, 2003, the Minnesota Department of Commerce (the Department) filed to intervene.

On January 12, 2004, Qwest asked the Commission to direct it to produce information in response to discovery requests, or on Qwest's own initiative, even if producing the information might reveal a carrier's identity.

The Commission met to consider all these matters on January 29, 2004. At the hearing the parties agreed on language to govern the disclosure of certain confidential information, discussed further below.

## **FINDINGS AND CONCLUSIONS**

### **I. INTERVENTION**

#### **A. Positions of the Parties**

Qwest objects to letting AT&T, the CLEC Coalition and Eschelon intervene in this docket. Qwest argues that these parties have failed to articulate suitable grounds to warrant intervention. More specifically, Qwest notes that these parties are wholesale customers of Qwest, and Qwest argues that its AFOR plan should address the needs of Qwest's retail customers. Qwest notes that the AFOR statutes provide for an AFOR plan to include a service quality plan explicitly for retail customers.<sup>2</sup> Qwest states that it did not object to MCI's request for intervention because Qwest understood MCI's petition to be limited to addressing MCI's status as a retail customer of Qwest's services. Qwest argues that if the Commission permits AT&T, the CLEC Coalition and Eschelon to intervene, the Commission should limit their participation exclusively to retail issues.

AT&T, the CLEC Coalition and Eschelon contest Qwest's allegations. They variously cite Minnesota Rules part 7829.0800 and 7829.1400 as establishing the standards by which they qualify for intervention. Moreover, they argue that Qwest's AFOR plan may address the needs of all Qwest's customers, wholesale as well as retail. AT&T notes that it and other CLECs had participated in the docket crafting Qwest's current AFOR Plan without objection, and that the relevant laws governing AFORs have not changed in the meantime. And the parties note that Qwest's current AFOR Plan and its proposed Revised AFOR Plan both address wholesale services.

The Department and OAG-RUD argue that granting intervention would serve the public interest by ensuring a more fully developed record. The Department argues that AT&T, the CLEC Coalition and Eschelon have interests that otherwise might not be represented if they were excluded from the docket.

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<sup>2</sup> Minn. Stat. § 237.765.

## **B. Commission Action**

The Department and the OAG-RUD have the right to intervene in this docket pursuant to Minnesota Statutes § 216A.07, subdivision 3, and Minnesota Rules part 7829.0800, subpart 3. Additionally, given that MCI's and the SRA's petitions were timely filed and without objection, those petitions were granted by operation of law.<sup>3</sup> Only the petitions of AT&T, the CLEC Coalition and Eschelon remain at issue.

Minnesota Rules part 7829.0800, subpart 2 states that –

intervention ... must be granted upon a showing that: the person is specifically considered by statute to be interested in the particular type of matter at issue; the person is specifically declared by statute to be an interested party; or the outcome of the proceeding will bind or affect the person with respect to an interest peculiar to that person, as distinguished from an interest common to the public or other ratepayers in general, or the person's interests are not adequately represented by one or more other parties participating in the case.

Clearly, a wholesale customer of Qwest has interests distinct from the interests of the general public. Whether the Commission should grant intervention to AT&T, the CLEC Coalition and Eschelon, therefore, depends on whether the proceeding's outcome will bind or affect wholesale interests. The Commission finds a substantial likelihood that it will.

While Qwest correctly observes that the AFOR statutes make an express reference to retail services at one point, this does not persuade the Commission that the entire statutory scheme was intended to refer exclusively to retail matters. The Legislature is aware of the distinction between the retail and wholesale telecommunications markets, as reflected in various statutes.<sup>4</sup> The fact that the Legislature included only one express reference to retail matters in the AFOR statutes implies that the Legislature did not intend a similar restriction to apply elsewhere. This implication is made conclusive by the fact that the AFOR statutes include an express reference to “switched network access services,”<sup>5</sup> an exclusively wholesale service. Given all the years that AFOR Plans have addressed wholesale matters, the Commission finds it instructive that the Legislature has never sought to clarify any intent to the contrary.

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<sup>3</sup> Minn. Rules part 7829.0800, subp. 5.

<sup>4</sup> See, for example, Minn. Stat. §§ 237.065, subd. 2 (schools and cooperatives may purchase “advanced telecommunications services at reduced wholesale rates”); 237.072 (limiting changes in Qwest's retail rates); 237.09, subd. 2(a) (barring discrimination in favor of a telephone company's “retail department that sells to consumers”); 237.22 (addressing how depreciation expenses may be recovered through “any wholesale or retail rate”).

<sup>5</sup> Minn. Stat. § 237.761, subd. 3(3).

Moreover, Qwest's own proposed Revised AFOR Plan includes provisions addressing "Wholesale Billing and Collection Service,"<sup>6</sup> "PIC Change Services,"<sup>7</sup> and "Wholesale Directory Assistance Services,"<sup>8</sup> all wholesale matters.

The Commission finds no merit to Qwest's assertion that wholesale issues are beyond the scope of this docket. Finding that AT&T, the CLEC Coalition and Eschelon have articulated interests at stake that differ from the interests of the general public, the Commission will grant their petitions for intervention. In so doing, the Commission will vary the deadline set in its November 26, 2003 Order to accept the late-filed petition of the CLEC Coalition.

## **II. DISCLOSURE**

### **A. Positions of the Parties**

Qwest asks the Commission to authorize the disclosure of information in its possession, even if that information might be linked to a specific carrier. Parties are asking Qwest about its provisioning and billing activities. In some instances, Qwest alleges, producing this information would reveal the identity of particular carriers and their purchases or services. Qwest is concerned that laws may prohibit such disclosures in the absence of a Commission directive. According to Qwest, such a directive need not interfere with any party's right to raise appropriate objections to discovery requests.

During the Commission's hearing on January 29, 2004, the parties agreed to the wording of an appropriate order. They recommend directing Qwest to disclose to the Department and OAG-RUD pursuant to the "Highly Sensitive Trade Secret" provisions of the January 6, 2004 Protective Order (a) information that might specifically identify a CLEC or carrier's purchases or orders and (b) data that might permit the recipient to guess a carrier's identity due to the small volume of data. In addition, they recommend permitting the information to be disclosed to other parties only when the information is presented on an aggregated level by wire center.

As part of this agreement, the parties also recommend that the Commission modify the January 6, 2004 Protective Order to permit a party to designate no more than three in-house experts to view materials marked "HIGHLY SENSITIVE TRADE SECRET INFORMATION – USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET P421/AR-03-1688." The Protective Order currently authorizes five. The parties argue that restricting the number of people authorized to see the protected information would help keep the information confidential.

### **B. Commission Action**

Having reviewed the parties' requests, including the proposed ordering language, the Commission finds the requests reasonable and will grant them. They strike an appropriate balance between facilitating disclosure to advance the purposes of this docket while limiting disclosure to protect the interests of private parties.

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<sup>6</sup> Revised AFOR Plan, Appendix A at 6.

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* at 6.

The Commission will so order.

**ORDER**

1. The filing deadline set in the Commission's ORDER ADOPTING PROCEDURES FOR AFOR RENEWAL PROPOSAL AND SETTLEMENT CONFERENCE (November 26, 2003) is varied to accept the late-filed intervention petition filed by the CLEC Coalition.
2. The petitions for intervention filed by AT&T, the CLEC Coalition and Eschelon are approved.
3. Discovery requested by the Commission or other parties in the above-referenced matter may require Qwest to submit Qwest provisioning or billing information that identifies specific CLECs or carriers and their purchases, such as order for facility information ("information"). This information may be subject to Section 222 of the Telecommunications Act as well as other state and federal privacy laws. In order to provide all necessary protection to Qwest with respect to its use and distribution of the information in this case, the Commission directs Qwest to disclose to the Department of Commerce and the Office of the Attorney General (a) information that might specifically identify a CLEC or carrier's purchases or orders and (b) data that might through small volumes reveal CLEC/carrier identifying information under the "Highly Sensitive Trade Secret" provisions of the Protective Order. Such information may only be disclosed to other parties if presented on an aggregated level by wire center. This Order does not affect the right of Qwest or any party to raise objections to discovery or information requests.
4. The protective order approved on January 6, 2004, is modified to say that no party may designate more than three in-house experts to view materials marked "HIGHLY SENSITIVE TRADE SECRET INFORMATION – USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET P421/AR-03-1688."
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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