

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Marshall Johnson
Ken Nickolai
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner

In the Matter of a Complaint by the Minnesota
Telecom Alliance against Qwest
Communications, Inc. regarding Traffic
Terminating from Qwest Communications, Inc.
Tandem Switches

ISSUE DATE: July 29, 2004

DOCKET NO. P-421/C-04-200

NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On February 6, 2004, the Minnesota Telecom Alliance (MTA) filed a Complaint against Qwest Corporation (Qwest) alleging the failure of Qwest to either identify traffic delivered from its tandems to incumbent local exchange carrier (ILEC) members of the MTA (by providing accurate, verifiable and timely billing records) or pay to the ILEC members of the MTA the relevant charges for termination of all unidentified traffic delivered from the Qwest tandem switches.

On March 29, 2004, Qwest filed its Answer, Counterclaims, and Third Party Complaint, and its Motion to Dismiss.

On May 6, 2004, AT&T Communications of the Midwest, Inc. and TCG Minnesota, Inc. (AT&T), filed comments and a Motion to Dismiss and/or For More Definite Statement, the Wireless Consortium¹ filed comments and a Motion to Dismiss, Sprint Corporation (Sprint) filed a Motion to Dismiss.

On May 6, 2004, the Minnesota Telecom Alliance and the Department of Commerce (DOC) each filed a reply.

On June 7, 2004, Qwest and the Minnesota Telecom Alliance each filed a further reply.

This matter came before the Commission on July 8, 2004.

¹ AT&T Wireless Services, Inc., Verizon Wireless, Rural Cellular Corporation, Midwest Wireless Holdings, LLC, WWC Holding Co., Inc. NPCR, Inc., and T-Mobile USA, Inc. and its affiliates including VoiceStream Minneapolis, Inc., and American Cellular Corporation f/k/a ACC of Minnesota LLC.

FINDINGS AND CONCLUSIONS

I. MTA's Complaint

The MTA brought this complaint against Qwest on behalf of the incumbent local exchange carriers that are members of MTA (MTA LECs) alleging that Qwest fails to provide traffic records to the MTA LECs for much of the traffic Qwest delivers from its tandem switches to the MTA LECs, including both Qwest's own toll traffic and the traffic of other carriers.

The MTA requested that Qwest be required to identify all of the traffic that it delivers from its tandems to MTA LECs by providing accurate, verifiable and timely billable terminating records without additional charge, or be required to pay to the MTA LECs their applicable charges for termination of all unidentified traffic delivered from the Qwest tandem switches.

II. Qwest's Position

A. Qwest's Answer

Qwest requested that the Commission dismiss MTA's complaint with prejudice for lack of jurisdiction, failure to state a claim upon which relief can be granted and failure to join necessary and indispensable parties.

Qwest argued that the Commission does not have jurisdiction under Minn. Stat. §§ 237.12, subd. 1 or 237.081, as the MTA alleged. Qwest argued that the MTA complaint did not involve a telephone service provided by Qwest to the MTA or MTA LECs. Rather, Qwest argued that the services provided were either provided by Qwest to others (transit service) or by the MTA LECs to the originators of the traffic at issue (terminating access service). Further, Qwest argued that MTA is not a telephone company and this proceeding does not seek to either establish or discontinue a physical connection between telephone companies.

Qwest also argued that the complainant has failed to identify the complaining parties. Qwest stated that the contested facts may differ among providers and MTA has failed to identify which members are joining in the complaint.

Qwest also argued that MTA has failed to join the originators of the traffic at issue. Qwest argued that the traffic originators are indispensable parties.

Qwest argued that resolving the claims of the MTA does not lend itself to contested case proceedings. Qwest acknowledged that while there may be some factual issues that need to be resolved, the factual issues are secondary to the policy issues. Further, Qwest argued that the Commission does not have jurisdiction to fashion relief without a rulemaking as is required by Minn. Stat. § 237.10.

B. Qwest's Counterclaim

Qwest seeks a declaratory ruling from the Commission that Qwest is not required to provide free data collection services on behalf of MTA LECs. It argued that it has no obligation to create transit records for the sole benefit of MTA LECs and that the records sought by the MTA LECs are available to MTA members from other sources.

Further, Qwest requested a declaration that it is entitled to compensation for transiting traffic delivered by MTA independent telephone companies. Qwest argued that the MTA independent telephone companies currently do not pay Qwest for transiting traffic from their networks to other providers. Qwest gave as an example metro extended area service (EAS) areas where independent local exchange carriers do not pay transit charges to Qwest when terminating traffic through Qwest facilities to a third party carrier.

C. Qwest's Third Party Complaint

Qwest argued that to the extent MTA LECS are entitled to additional compensation, they are entitled to receive that compensation from the originator of such traffic. Qwest identified over 500 parties that originate traffic that transits Qwest's network and terminates with MTA members and other LECS.

Qwest seeks a declaration from the Commission that under Minn. Stat. chapter 237 generally and Minn. Stat. §§ 237.06 and 237.07 in particular, as well as under the terms of the applicable tariffs of the terminating carriers, all originators of traffic in Minnesota have a duty to pay the appropriate terminating charges for the terminating services they take from the terminating provider and that transit providers carry no such duty since they receive no service.

Qwest requested, among other things, that all originators of traffic in Minnesota and all terminating companies in Minnesota be included as parties to this proceeding.

III. MTA's Position

A. Jurisdiction

MTA requested that Qwest's motion to dismiss be denied. MTA argued that the Commission has jurisdiction under Minn. Stat. § 237.12, subd.1, which provides the Commission authority to investigate and determine issues of interconnection and compensation between telephone companies. The MTA also stated that the Commission has jurisdiction under Minn. Stat. § 237.081, which provides the applicable standards of reasonableness, sufficiency and nondiscrimination.

B. The Third Party Complaint

MTA argued that Qwest's third party complaint, which would join over 600 parties as third party defendants, should be dismissed. It argued that joining the originating carriers was unnecessary because the MTA LECs are not seeking to impose the obligations of the originating carriers on Qwest. All the MTA LECs are requesting is that Qwest identify the carrier delivering traffic to it. The joining of over 600 parties would have the effect of grid- locking the resolution of the core issue of Qwest's obligations to the LECs that receive traffic from the Qwest tandems.

C. The Counterclaim

MTA also argued that Qwest's counterclaim should be dismissed because it is far outside the scope of this proceeding. The issue of compensation in connection with EAS traffic between Qwest's local areas and local areas served by MTA LECs has been covered in Commission orders and should not be reopened as part of this proceeding.

D. Contested Case Proceedings

The MTA recommended that this matter be sent for a contested case proceedings because a substantial factual record will be needed to resolve probable disputes of material facts. It argued that a rulemaking, as proposed by Qwest, is unnecessary to address the specific issues in this proceeding, which focus on Qwest as the operator of terminating tandems.

IV. The DOC

A. Jurisdiction

Minn. Stat. § 237.081 provides broad authority to the Commission to investigate, address and remedy acts or omissions in telephone service or in services in connection with telephone service. The DOC argued that the MTA put forth a credible complaint regarding inadequate provision of transit services which the Commission has the authority to investigate under this statute.

B. Identification of Complainants

The DOC recommended that the Commission require the MTA to file the information necessary for Qwest to identify the members participating in this complaint. However, the DOC does not recommend that the complaint be dismissed because of this failing, arguing that it is clear that the complainants are Minnesota LECS.

C. Necessary Parties to the Proceeding

The DOC argued that the joinder of over 600 carriers, as Qwest requests, would paralyze the proceedings and does not appear to be necessary for the resolution of the issues.

D. Contested Case Proceedings vs Rulemaking

DOC supported the MTA's request for contested case proceedings to address the issues raised herein. The DOC argued that these are exactly the type of technical, economic and factual issues that should be resolved through evidentiary proceedings.

The DOC disagreed with Qwest that a rulemaking would be the appropriate vehicle to address the complaint issues. A rulemaking involving all nationwide potential providers of traffic transiting Qwest and terminating with the MTA would be impossibly complex. The facts are not suited to a rulemaking, which is meant to address agency actions of "general applicability and future effect."² In the present case, the issues involve allegations of harm to MTA members by Qwest's allegedly inadequate provision of transit traffic. A resolution favorable to the complainants would involve Qwest being directed to make a change to its provision of transit services, not a generally applicable directive to Minnesota telephone providers.

E. Stipulation of Facts

The DOC agrees with Qwest that the parties be directed to prepare a stipulation of facts identifying all factual issues that can and cannot be resolved. The stipulation should contain a list defining the issues that are in dispute.

V. Sprint

Sprint filed a motion to dismiss Qwest's third party complaint arguing that it was not appropriate or necessary to address the allegations in Qwest's third party complaint and, therefore, not appropriate to join every carrier that delivers traffic to Qwest for termination to the MTA companies.

Further, Sprint argued that the MTA complaint addresses Qwest's responsibility to deliver traffic information to terminating carriers. The terminating carriers will use that information to obtain compensation from originating carriers.

Finally, Sprint argued that any concerns that Qwest has with the originating carriers' responsibilities should be addressed through Qwest's individual Interconnection Agreement with those carriers.

For the above reasons Sprint requests that Qwest's Third Party Complaint be dismissed and that the Commission reject Qwest's attempt to broaden the scope of this proceeding to join every carrier that delivers traffic to Qwest for delivery to MTA companies.

² Minn. Stat. 237.02, subd. 4.

VI. AT&T

AT&T requested that the Commission dismiss Qwest's Third Party Complaint against AT&T. AT&T argued that Qwest presents no evidence that AT&T or any other third party defendant has failed to provide the relevant information or has breached any legal duty.

VII. The Wireless Consortium

The Wireless Consortium also requested that Qwest's Third party Complaint be dismissed. It argued that if Qwest asserts that any wireless carrier is not abiding by the terms of an Interconnection Agreement addressing transit traffic, the dispute resolution procedures in the interconnection agreements are the proper procedures to be followed. Further, the Wireless Consortium argued that the Commission should exclude from this docket any questions regarding compensation for commercial mobile radio service traffic.

VIII. Commission Action

A. Jurisdiction

The Commission finds that it has jurisdiction over this complaint pursuant to Minn. Stat. §§ 237.12, subd. 1 and 237.081 (authority to investigate and make appropriate orders concerning interconnections and compensation between telephone companies, authority to investigate, address, and remedy acts or omissions in telephone service or services in connection with telephone service, respectively).

B. The Counterclaim

The issues that Qwest raises in its counterclaim relating to compensation to Qwest for transiting traffic delivered by MTA companies are far broader than the scope of the MTA complaint. The Commission finds that it is not reasonable to investigate those issues raised in the counterclaim in this proceeding. However, nothing herein precludes Qwest from raising those issues in a separate proceeding.

C. Qwest's Third Party Complaint

Qwest's request to join the over 600 originators and terminators of traffic in Minnesota to this proceeding is denied. The Commission agrees that Qwest's Third Party Complaint should be dismissed. The allegations in the complaint concern the adequacy of the billable records transited by Qwest to MTA LECs, not what the originating carriers provide. The additional 600 carriers are not required to resolve this matter.

D. Request for Contested Case Proceedings

The Commission recognizes that there are contested issues of material fact arising from this complaint that the Commission cannot resolve on the basis of the parties' filings. For this reason the Commission will refer this matter to the Office of Administrative Hearings for contested case proceedings.

Both the MTA, Qwest and the DOC recommended that the parties be required to prepare a stipulation of facts resolving all facts that can be resolved and identifying all relevant issues that cannot be resolved. The Commission will urge the Administrative Law Judge to direct parties to stipulate to all undisputed material facts and direct the parties to prepare a stipulation of facts resolving all factual issues that can be resolved and identifying relevant factual issues that cannot be resolved.

The Commission finds that the issues presented in the MTA complaint are not suitable to a rulemaking, as Qwest alleges. The complaint alleges harm to MTA members from Qwest's provision of transit service. Qwest is in a unique position as it provides almost all of the transit service in the state. If the Commission determines that the complainants have made their case, the complaint issues would be resolved by a Commission order directed to Qwest's provision of transit services, not by a directive generally applicable to Minnesota telephone providers. Since this is not a matter of general applicability, a rulemaking is not appropriate.

E. Issues to be Addressed

The scope of the issues to be addressed in the contested case proceeding is as follows:

- What responsibilities, if any, does Qwest have for unidentified traffic it delivers to independent local exchange carriers?
- Does Qwest have adequate information within its control to pass on to the receiving company so that the receiving company can do proper billing and, if not, what needs to be done to achieve this goal?

Further, the Commission directs the Administrative Law Judge (ALJ) to address any other issues the ALJ believes are necessary for the Commission to resolve the complaint;

IX. Procedural Outline

A. Administrative Law Judge

The Administrative Law Judge assigned to this case is Steve M. Mihalchick. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 349-2544.

B. Hearing Procedure

Controlling Statutes and Rules

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200.

Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 660 Olive Street, St. Paul, Minnesota 55155; (651) 297-3000. These rules and statutes also appear on the State of Minnesota's website at www.revisor.leg.state.mn.us.

The Office of Administrative Hearings conducts contested case proceedings in accordance with the Minnesota Rules of Professional Conduct and the Professionalism Aspirations adopted by the Minnesota State Bar Association.

Right to Counsel and to Present Evidence

In these proceedings, parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions.

Discovery and Informal Disposition

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Marc Fournier, Public Utilities Rates Analyst, Minnesota Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651)296-3793; or Brian Sande, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 296-6839.

Protecting Not-Public Data

State agencies are required by law to keep some data not public. Parties must advise the Administrative Law Judge if not-public data is offered into the record. They should take note that any not-public data admitted into evidence may become public unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

Accommodations for Disabilities; Interpreter Services

At the request of any individual, this agency will make accommodations to ensure that the hearing in this case is accessible. The agency will appoint a qualified interpreter if necessary. Persons must promptly notify the Administrative Law Judge if an interpreter is needed.

Scheduling Issues

The times, dates, and places of public and evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

Notice of Appearance

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing.

Sanctions for Non-compliance

Failure to appear at a prehearing conference, a settlement conference, or the hearing, or failure to comply with any order of the Administrative Law Judge, may result in facts or issues being resolved against the party who fails to appear or comply.

C. Parties and Intervention

The current parties to this case are Minnesota Telecom Alliance, Qwest and the Minnesota Department of Commerce. Other persons wishing to become formal parties shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

D. Prehearing Conference

A prehearing conference will be held in this case on Tuesday, August 10, 2004, at 9:30 a.m. in the Small Hearing Room of the Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101. Persons participating in the prehearing conference should be prepared to discuss time frames, scheduling, discovery procedures, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

X. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 et seq., may apply to this case. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

XI. Ex Parte Communications

Restrictions on ex parte communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The Commission hereby refers this case to the Office of Administrative Hearings for contested case proceedings as set forth above.
2. A prehearing conference shall be held on Tuesday, August 10, 2004, at 9:30 a.m. in the Small Hearing Room, Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101.
3. Qwest's Third Party Complaint is dismissed, including Qwest's request to join as parties all originators and terminators of traffic in Minnesota.
4. The issues raised in Qwest's Counterclaim shall not be included as part of the contested case proceedings herein.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), or 1-800-627-3529 (MN relay service).

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
100 Washington Square, Suite 1700
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 Seventh Place East Suite 350
St. Paul, Minnesota 55101-2147

In the Matter of a Complaint by the Minnesota Telecom Alliance Against Qwest Communications, Inc. Regarding Traffic Terminating from Qwest Communications, Inc. Tandem Switches MPUC Docket No. P-421/C-04-200
OAH Docket No.

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Steve M. Mihalchick, Office of Administrative Hearings, Suite, 1700, 100 Washington Square, Minneapolis, Minnesota 55401; (612) 349-2544.

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: _____

DATE: _____