

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Marshall Johnson
Ken Nickolai
Thomas Pugh
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of the Complaint of Desktop
Media, Inc. Against Qwest Corporation
Regarding Disputed Charges

ISSUE DATE: August 29, 2005

DOCKET NO. P-421/C-05-1209

ORDER ASSERTING JURISDICTION,
GRANTING REQUEST FOR TEMPORARY
RELIEF, AND REFERRING MATTER TO
OFFICE OF ADMINISTRATIVE HEARINGS

PROCEDURAL HISTORY

On July 21, 2005, Desktop Media, Inc. (Desktop) filed a complaint with the Commission against Qwest Corporation (Qwest). Desktop requested an expedited proceeding on its complaint, which sought temporary and permanent relief.

On July 29, 2005, Desktop and Qwest filed a stipulation waiving the 20-day statutory deadline for deciding the merits of Desktop's request for temporary relief imposed by Minn. Stat. § 237.462, subd. 7. As part of this agreement, Qwest stated that it would not disconnect service to Desktop and continue to accept Desktop's orders unless and until the earlier of 1) the Commission addresses Desktop's complaint, including the request for temporary relief, 2) the parties resolve their disputes, or 3) August 19, 2005.

On August 10, 2005, Qwest filed its answer to Desktop's complaint. Qwest asked that the Commission deny Desktop's claims for relief and order Desktop to pay its bill related to unbundled switching.

The Commission met to consider this matter on August 18, 2005.

FINDINGS AND CONCLUSIONS

I. Desktop's Complaint

Desktop sought relief from Qwest's demand that Desktop pay the disputed charges or face interruption of its service and what it asserted were Qwest's unlawful charges for primary interexchange carrier changes and for nonpublished/nonlisted numbers.

Desktop asserted that Qwest has continued to charge Desktop for unbundled switching services relating to numbers that were ported off Qwest's switches a year ago. Desktop also disputed Qwest charges for Primary Interexchange Carrier (PIC) changes and for non-published and non-listed numbers on the grounds that the charges are unreasonable and not cost based.

Finally, Desktop stated that on July 20, 2005, at 2:00 p.m., Qwest informed Desktop that, unless Desktop paid Qwest \$116,000.00 by July 22, Qwest would cease accepting Desktop's orders for service. Desktop stated that Qwest's threats to interrupt Desktop's service unless Desktop pays disputed charges violate the parties' interconnection agreement (ICA) and Minnesota law.

For temporary relief, Desktop asked the Commission to immediately enjoin Qwest from preventing Desktop from placing orders for service and require that Qwest continue to accept Desktop's orders pending the conclusion of this proceeding.

For permanent relief, Desktop asked the Commission to

- award damages suffered due to any discontinuance of Desktop's access to its ordering systems - Count 1;
- declare that Qwest's charges for unbundled switching services no longer received are unlawful - Count 1; and
- declare that Qwest's charges for PIC changes (Count 2) and for non-published and non-listed numbers are unlawful (Count 3).

Desktop requested an expedited proceeding on its claims, arguing that if Qwest terminates Desktop's ability to place orders, Desktop will be unable to compete and will suffer irreparable harm.

II. Qwest's Answer

Qwest asserted that it has been trying to collect valid bills that Desktop has refused to pay. Qwest stated that its ICA with Desktop provides a specific process for resolving billing disputes of this type and that Desktop has failed to use that process.

Qwest denied that Desktop need face any of the potential harms it raises since all it needs to do is

pay its bill. Qwest asked the Commission to order Desktop to demonstrate that it filed information to properly dispute charges consistent with Part A, Section 2.1 of the ICA or pay its bills.

Qwest also disputed that the Commission had jurisdiction to grant the relief requested by Desktop in Count 2 (regarding Primary Interexchange Carrier Change Charges) and Count 3 (regarding charges for nonpublished/nonlisted numbers). Qwest characterized Desktop's requests as asking the Commission to alter state tariffed rates and to modify rates contained in federally filed tariffs.

Finally, Qwest counterclaimed, asserting that Desktop owed Qwest for unbundled switching facilities that it has purchased but not paid for.

III. The Department's Recommendations

The Department stated that the Commission had jurisdiction over each count of the complaint, totally with respect to the subject of Count 1 and, regarding Counts 2 and 3, at least to investigate to determine whether the prices Qwest is charging Desktop for these services are, in fact, authorized and controlled by state and federal tariffs as Qwest has alleged.

The Department also recommended that the Commission grant the temporary relief requested by Desktop to preserve the status quo until the merits of the complaint could be fully addressed. The Department argued that the record supported the three findings necessary under Minn. Stat. § 237.462, Subd. 7(c) to grant temporary relief.

IV. The Commission's Analysis and Action

A. Jurisdiction and Reasonable Basis to Investigate

Minnesota Rules part 7829.1800, subpart 1, states that:

The commission shall review a formal complaint as soon as practicable to determine whether the commission has jurisdiction over the matter and to determine whether there are reasonable grounds to investigate the allegation. On concluding that it lacks jurisdiction or that there is no reasonable basis to investigate the matter, the commission shall dismiss the complaint.

The complaint and counterclaim were filed pursuant to Minnesota Statutes §§ 237.081 and 237.462, and address local service issues involving intrastate tariffs and interconnection agreements. The Commission has jurisdiction to interpret and enforce the terms of interconnection agreements pursuant to 47 U.S.C. § 252(e), which "vests in the state commissions the power to enforce the interconnection agreements they approve."¹ The Commission also has jurisdiction

¹ *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 803 (8th Cir. 1997), aff'd in part, rev'd in part on other grounds, *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1997); see also *Southwestern Bell*

under Minn. Stat. § 237.462, the statute which gives the Commission authority to assess monetary penalties for knowing and intentional material violations of, among other things, Commission-approved interconnection agreements. This order does not reach the issue of whether Qwest has in fact knowingly and intentionally and materially violated its Commission-approved interconnection agreement with Desktop, but Desktop's verified complaint raises issues in that general area that warrant examination by the Commission.

At the heart of Count 1 and Qwest's counterclaim for payment of the charges billed are provisions of the parties' ICA and their conflicting views about how those provisions apply to the facts of this case.

As to Counts 2 and 3, the Commission agrees with the Department that the Commission has jurisdiction at least to investigate this matter further to determine whether the prices Qwest is charging Desktop for these services are, in fact, authorized and controlled by state and federal tariffs as Qwest has alleged.

The Commission concludes that the complaint and counterclaim fall within the Commission's jurisdiction. In addition, based on a review of the pleadings and arguments by the parties at hearing, the Commission concludes that there is a reasonable basis for investigation.

B. Temporary Relief

For temporary relief, Desktop requested that the Commission enjoin Qwest from preventing Desktop from placing orders for service and requiring that Qwest continue to accept Desktop's orders pending the conclusion of this proceeding.

Minn. Stat. § 237.462, Subd. 7(c) states the legal standard for temporary relief:

After notice and an opportunity for comment, the commission may grant an order for temporary relief under this subdivision upon a verified factual showing that:

- (1) the party seeking relief will likely succeed on the merits;
- (2) the order is necessary to protect the public's interest in fair and reasonable competition; and
- (3) the relief sought is technically feasible.

Tel. Co. v. Connect Communications Corp., 225 F.3d 942, 946 (8th Cir. 2000).

The Commission finds that there has been a verified, factual showing that the three prerequisites for granting temporary relief² have been met in this case. The Commission will therefore grant Desktop's request for temporary relief.

First, there is no dispute that the relief requested, that Qwest desist from an action that it has announced it intends to take, i.e., to cease accepting Desktop's orders for service, is technically feasible. There is no technical impediment to Qwest continuing to accept and fill Desktop's service orders.

Second, the Commission concludes that the order is necessary to protect the public's interest in fair and reasonable competition. Desktop is an alternative provider of local service in areas where Qwest is the incumbent local exchange company. Desktop has asserted in its verified Complaint that if Qwest terminates Desktop's access to Qwest's electronic ordering system (IMA) and does not accept and fill Desktop's service orders as announced, Desktop will be unable to meet the needs of new or current customers for feature changes or other changes in their service. Desktop asserted that this action by Qwest would severely interfere with Desktop's ability to compete and would cause it irreparable harm.

Desktop's assertions are credible. The capacity that Qwest threatens to terminate (access to Qwest's electronic ordering system or IMA) would end Desktop's ability in areas where it competes with Qwest to serve customers (new or current) by installing or discontinuing Qwest's unbundled switching products.

Third, based on the record to date, the Commission concludes that the record is clear enough that Desktop is likely to succeed on the merits to warrant an Order maintaining the status quo. Aside from the fact that Desktop's verified assertions are not countered by verified denials and counter-assertions by Qwest³, Desktop's verified case appears strong and was not clearly rebutted on key points.

For example, Desktop's verified Complaint provides specific information regarding communications between Desktop's President Corey Hauer and Qwest's customer service representative Joshua Neilson confirming when and how Desktop terminated the switched access service for which Qwest continues to seek to collect.⁴ Desktop has presented a prima facie case that Qwest led it to believe that when Desktop's customer numbers were ported to

² See Minn. Stat. § 237.462(c).

³ Minn. Stat. § 237.462, subd. 6(g) requires that all pleadings under this statute must be verified and Minn. Stat. § 462, subd. 7(c) requires that orders for temporary relief be granted "upon a verified factual showing" of the three criteria cited above. At the very least, therefore, the factual assertions in Qwest's unverified Answer cannot be given the same weight as the verified assertions in Desktop's Complaint.

⁴ See Desktop's verified Complaint, paragraph 5.

Onvoy

(July 2004) Qwest's switched access service for those numbers service would be disconnected automatically, that Desktop need not submit an order for disconnection in order to disconnect switched access service for those numbers, and that Qwest would forthwith discontinue billing Desktop for that disconnected (i.e., no longer received) service. Qwest's Answer does not deny Desktop's account.⁵ In addition, at the hearing Qwest acknowledged that a conversation between Mr. Hauer and the Qwest service representative took place in August 2004 regarding disconnection and simply stated that Mr. Neilson cannot remember the content of that conversation.

In addition, based on the record to date, Desktop has a strong case that Qwest has no proper claim to collect charges for access services that all appear to agree Desktop has not used since porting all its numbers to Onvoy in July 2004.⁶ Qwest's claim to be entitled to payment for those services after July 2004 is not based on a claim that Desktop received from Qwest the switched access services for which it has billed Desktop. Instead, Qwest's claim is based on its assertion that it is entitled to payment because Desktop did not properly dispute being billed for those non-received services in a timely manner under the ICA.

It appears on the record to date, however, that Qwest repeatedly refused to acknowledge Desktop's timely attempts to dispute the post-July 2004 charges, rejecting them and citing Desktop's failure to provide a trunk disconnection order number as the reason for its action. Qwest claimed that without this piece of information it could not acknowledge and process the dispute. Qwest's reliance on that ground to reject Desktop's dispute appears untenable for three reasons.

First, the information filing requirements imposed by Qwest before it would even acknowledge the existence of a billing dispute are not a part of the ICA, but appear to have been unilaterally adopted by Qwest.

Part A, Section 2.1 states:

Amounts payable under this Agreement are due and payable within thirty (30) days after receipt of USWC's invoice unless properly disputed under this Agreement or applicable Tariff. [Emphasis added.]

The ICA does not incorporate by reference Qwest's bill dispute system and the requirements that Qwest has imposed therein as prerequisites for initiating a billing dispute. Nor does the ICA authorize Qwest to unilaterally impose such prerequisites. If the parties had intended to authorize Qwest to screen potential disputes by imposing preconditions as Qwest has done in this case, they would have used language to accomplish that goal.

⁵ See Qwest's Answer, Paragraphs 13 and 14.

⁶ Once Desktop ported these numbers to Onvoy, of course, the switched access service for these numbers was provided by Onvoy.

Second, the record to date indicates that Desktop reasonably relied on directions from a Qwest customer service representative that disconnection would happen automatically when the last telephone number was ported. As a result of that direction and Desktop's reliance on it, Desktop did not send a disconnection order to Qwest and did not, as a consequence, receive a disconnection order number. At the point Desktop learned that its dispute was being rejected for lack of a disconnection order number, Desktop could not obtain such a number because after its telephone numbers were ported to Onvoy, Desktop no longer had any trunks in Qwest's system to disconnect.⁷ In these circumstances, Qwest's insistence that no billing dispute existed because Desktop did not provide a trunk disconnection order number appears unreasonable.

Third, the existence of a billing dispute does not depend upon Qwest's affirmative acknowledgment that it exists and agreement to process it, but on the totality of the circumstances. In this case to date, the totality of the circumstances supports the Commission's preliminary finding that a billing dispute existed as of August 2004.

On the basis of the record established in this matter to date, therefore, the Commission is justified in maintaining the status quo by granting Desktop's request for temporary relief. The Commission will enjoin Qwest from preventing Desktop from placing orders for service and will require that Qwest continue to accept Desktop's orders pending the conclusion of this proceeding.

C. Next Steps

The Commission has the option of referring the matter to the Office of Administrative Hearings (OAH) for record development by an Administrative Law Judge (ALJ) or to open an expedited proceeding before a quorum of Commissioners pursuant to Minn. Stat. § 237.462, subd. 6(a). In its Complaint, Desktop requested an expedited proceeding but at the hearing suggested a mediation approach. After discussion, both Desktop and Qwest endorsed referring the matter to the OAH, initially for mediation and, if mediation is not successful, for a contested case proceeding.

To process this matter efficiently, expeditiously, and with an eye towards potentially minimizing costs while at the same time compiling an ordered record as soon as that becomes necessary, the Commission will adopt the approach agreed to by the parties, referring the matter to the Office of Administrative Hearings for mediation with the understanding that the matter will be addressed in a contested case proceeding for record development, report and recommendations if the ALJ assigned to do the mediation determines that mediation is not achieving results.

Upon the ALJ's determination that the mediation is not achieving results, the ALJ assigned to the mediation will inform the Commission of that fact and a NOTICE AND ORDER FOR HEARING initiating a contested case proceeding will be issued.

ORDER

⁷ See Desktop's verified Complaint, paragraphs 9- 16.

1. The Commission finds that the complaint lies within the Commission's jurisdiction and that there is a reasonable basis for investigation.
2. The temporary relief requested by Desktop is granted:
 - a. Qwest is hereby enjoined from preventing Desktop from placing orders for service; and
 - b. Qwest shall continue to accept Desktop's orders pending the conclusion of this proceeding.
3. The matter is hereby referred to the Office of Administrative Hearings for mediation. If the ALJ assigned to the mediation determines that the mediation is not achieving results, it is requested that the ALJ promptly inform the Commission of that fact and a NOTICE AND ORDER FOR HEARING commencing a contested case proceeding will issue.
4. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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