

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
David C. Boyd	Commissioner
Marshall Johnson	Commissioner
Thomas Pugh	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of Velocity Telephone, Inc.,
Complaint Against Qwest Corporation for
Improper Billing for Dark Fiber

ISSUE DATE: October 5, 2007

DOCKET NO. P-421/C-07-1020

ORDER OPENING INVESTIGATION AND
NOTICE AND ORDER FOR HEARING

PROCEDURAL HISTORY

On July 27, 2007, Velocity Telephone, Inc. (Velocity) filed a complaint against Qwest Corporation (Qwest) for improper billing for dark fiber facilities.

On August 17, 2007, Qwest filed its answer to Velocity's complaint and moved to have the complaint dismissed.

On September 7, 2007, Velocity filed its opposition to Qwest's motion to dismiss.

On September 20, 2007, the Commission met to consider the matter.

FINDINGS AND CONCLUSIONS

I. Background

Velocity's complaint arises from a commercial agreement that Qwest and Velocity entered into after the Federal Communications Commission (FCC) issued its Triennial Review Remand Order (TRRO).¹ The TRRO removed dark fiber as a network element that had previously been subject to

¹ Order on Remand, In the Matter of Review of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, WC Docket No. 04-313 (FCC rel February 4, 2005) ("Triennial Review Remand Order").

the unbundling obligations under Section 251 of the Telecommunications Act of 1996.

II. Positions of the Parties

A. Velocity

Velocity alleges that Qwest has breached their contract regarding a commercial agreement -- a Master Services Agreement for the provision of dark fiber. Velocity states that it is seeking to require Qwest to charge the agreed-upon rates as provided for under the contract. Velocity argues that it is relying on state law to enforce the terms and conditions of a duly executed commercial agreement, which pertains to intrastate telecommunications services.

Velocity requested the Commission to refer the matter to the Office of Administrative Services for investigation and to grant remedies due to the incorrect billing of dark fiber by Qwest.

Velocity asked that the Commission:

- 1) Refer the matter to the Office of Administrative Hearing to determine all issues of fact;
- 2) Find that Qwest has breached its Dark Fiber Master Services Agreement due to its incorrect billing for two dark fiber facilities;
- 3) Direct Qwest to correct billing for the dark fiber facilities and credit Velocity for the improper billing;
- 4) Find that Qwest has breached its Dark Fiber Master Services Agreement due to its incorrect billing for fiber terminations and cross connects related to four fiber circuits;
- 5) Direct Qwest to bill Velocity for one office termination, one pre-termination and one cross connect for each of four fiber circuits and credit Velocity for improper billing;
- 6) Direct Qwest to compensate Velocity for damages suffered as a consequence of the breach, including staff and administrative time and expenses for attorney's fees incurred due to the billing dispute; and
- 7) Grant Velocity such other relief as the Commission may deem appropriate.

B. Qwest

Qwest filed a motion to dismiss the complaint, arguing that the Commission does not have subject matter jurisdiction over the action. Qwest argues that the governing provisions of federal law establish that a state commission is without authority to engage in substantive decision-making with respect to the terms and conditions for non-251 network elements in a commercial agreement.

Qwest argues that the Commission has no authority to address disputes arising from the commercial agreement or to otherwise enforce the agreement. Qwest further asserts that Velocity

can pursue an action in court or file for private arbitration as contemplated by the dispute resolution provision in the parties' agreement.

Qwest finally argues that the complaint is baseless on the merits, asserting that it has properly billed Velocity for the dark fiber facilities provided.

III. Commission Action

A. Jurisdiction and Referral for Contested Case Proceedings

Velocity alleges that the Commission has jurisdiction over the provision of intrastate telecommunications services in Minnesota pursuant to Minnesota Statutes Chapter 237, including in particular Minnesota Statutes § 237.081, subd. 1a (Complaint investigations) and § 237.121(a)(4) (prohibited practices include a telephone company's refusal "to provide a service, product or facility to a telephone company or telecommunications carrier in accordance with its applicable ... contracts [.]").

Qwest asserts that the Commission lacks jurisdiction over this matter, claiming that "courts and state commissions have ruled, [that] state commissions do not have substantive decision-making authority over the terms and conditions under which incumbent local exchange carriers like Qwest provide network elements and services that the FCC has removed from Section 251 based on findings of non-impairment."

The Commission finds that it cannot resolve the jurisdictional or other issues raised by the parties on the basis of the record before it. The Commission is persuaded that certain issues turn on specific facts that are best developed in formal evidentiary hearings. In the interest of administrative efficiency, the Commission will refer the matter to the OAH for a contested case proceeding.

B. Issues to be Addressed

The first issue is whether the Commission has jurisdiction over the dark fiber commercial agreement at issue herein. Assuming jurisdiction, other issues include whether Qwest has breached the Dark Fiber Master Services Agreement due to incorrect billing for dark fiber facilities, fiber terminations and cross connects.

The parties may also raise and address other issues relevant to this matter.

C. Procedural Outline

1. Administrative Law Judge

The Administrative Law Judge assigned to this case is Kathleen Sheehy. Her address and telephone number are as follows: Office of Administrative Hearings, 600 North Robert Street, St.

Paul, MN 55101; 651-361-7848. The mailing address is: Office of Administrative Hearings, P.O. Box 64620, St. Paul, MN 55164-0620.

2. Hearing Procedure

- *Controlling Statutes and Rules*

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minnesota Statutes §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minnesota 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, Minnesota 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 site on the World Wide Web 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 Minnesota 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 Minnesota Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minnesota Rules, part 1400.5900 should be directed to Kari Zipco, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 296-1408 or John Lindell, Public Utilities Financial Analyst, Minnesota Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 201-2216.

- *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 Minnesota Statutes § 14.60, subdivision 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 evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and the parties.

- *Notice of Appearance*

Any party intending to appear at the hearing must file a notice of appearance (Exhibit 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.

3. Parties and Intervention

The current parties to this case are Velocity and Qwest. 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.

4. Prehearing Conference

A prehearing conference will be held on Wednesday, October 17, 2007, at 9:30 a.m. at the office of the Minnesota Public Utilities Commission, 121 7th Place East, St. Paul, Minnesota, 55101, in the Small Hearing Room.

Parties and persons intending to intervene in the matter should attend the conference prepared to discuss time frames and scheduling. Other matters which may be discussed include the locations and dates of hearings, discovery procedures, settlement prospects, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

D. Application of Ethics in Government Act

The lobbying provisions of the Ethics in Government Act, Minnesota Statutes §§ 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.

E. *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 Minnesota Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

ORDER

1. The Commission hereby refers this matter to the Office of Administrative Hearings for a determination of whether the Commission has jurisdiction over this matter, and for contested case proceedings, as set forth above.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street
St. Paul, Minnesota 55101

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

In the Matter of the Complaint by Velocity
Telephone, Inc. Against Qwest Corporation for
Improper Billing for Dark Fiber

MPUC Docket No. P-421/C-07-1020
OAH Docket No.

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Kathleen Sheehy, Office of Administrative Hearings, 600 North Robert Street, St. Paul,
Minnesota, 55101; (651) 361-7848. Mailing address: P.O. 64620, St. Paul, Minnesota 55164-0620

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 AND E-MAIL ADDRESS:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER AND E-MAIL ADDRESS:

SIGNATURE OF PARTY OR ATTORNEY: _____

DATE: _____