

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Complaint of AT&T
Communications of the Midwest, Inc., against
Qwest Corporation

SECOND PREHEARING ORDER

This matter is before Administrative Law Judge Steve M. Mihalchick on Qwest's Motion for the ALJ to Certify the Question of the Memorandum of Understanding's Enforceability. Qwest's Motion was filed June 22, 2001. AT&T and the Department filed responses on June 27, 2001. No hearing was held on the motion.

Based upon the argument of counsel and the record, and for the reasons set forth in the following Memorandum the Administrative Law Judge makes the following

ORDER

IT IS HEREBY ORDERED that:

1. Qwest's request for oral argument on the motion is **DENIED**.
2. Qwest's Motion to Certify is **DENIED**.
3. The hearing shall commence as scheduled on July 9, 2001.

Dated this 28th day of June, 2001.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

In the First Prehearing Order issued June 6, 2001, the Administrative Law Judge made the following findings and order, among others:

12. Later that day, counsel for the Department was contacted. The Department refused to agree to the terms of the MOU because it believed Qwest had engaged in anticompetitive behavior and would not agree to a resolution without penalties against Qwest. It had some minor disagreements with the Initial Testing Plan. At that point, counsel for Qwest announced that it was an all or nothing deal and that, therefore, the agreement was off. AT&T and the Department accepted that position.^[1]

. . .

16. Also during the May 11 conference, as confirmed on May 15,^[2] the Administrative Law Judge ruled that the Commission intended that he take evidence on the bad faith claims to report to the Commission. The Administrative Law Judge also finds that the MOU has been expressly withdrawn and abandoned by the parties, and that the bad faith claims have not been resolved. Qwest has filed a motion directly with the Commission regarding the MOU, but unless and until the Commission orders otherwise, the Administrative Law Judge will proceed with the hearing on bad faith issues. (footnotes renumbered)

Qwest now moves the Administrative Law Judge to certify the ruling on whether the MOU is enforceable to the Commission, and to delay again the hearing now scheduled to begin July 9. Qwest states that the Commission has advised it that the Commission can't consider Qwest's motion directly because Minnesota law first requires Qwest to present its motion to the ALJ.^[3] Since the ALJ ruled on the issue in the First Prehearing Order, Qwest now asks that it be certified.^[4]

Minn. Rule 1400.7600 provides in pertinent part:

No motions shall be made directly to or be decided by the agency subsequent to the assignment of a judge and prior to the completion and filing of the judge's report unless the motion is certified to the agency by the judge Any party may request that a pending motion or a motion decided adversely to that party by the judge before or during the course of the hearing . . . be certified by the judge to the agency. In deciding what motions should be certified, the judge shall consider the following:

A. whether the motion involves a controlling question of law as to which there is substantial ground for a difference of opinion; or

B. whether a final determination by the agency on the motion would materially advance the ultimate termination of the hearing; or

C. whether or not the delay between the ruling and the motion to certify would adversely affect the prevailing party; or

D. whether to wait until after the hearing would render the matter moot and impossible for the agency to reverse or for a reversal to have any meaning; or

E. whether it is necessary to promote the development of the full record and avoid remanding; or

F. whether the issues are solely within the expertise of the agency.

The issue of whether the MOU is enforceable is primarily a question of fact regarding the parties' intent, it is not a controlling question of law. The finding that the MOU had been abandoned was based upon the statements of counsel during the May 11 telephone conference and the May 15 status conference and motion hearing. It was not based upon sworn testimony. But since it was the attorneys who negotiated the MOU, it was they who could provide the information as to what happened. It should not be necessary to swear attorneys.

Finding that the MOU had been abandoned, the ALJ did not examine the question of whether it had been ever been intended as a binding final agreement in the first place.

A final determination by the Commission would not materially advance the ultimate termination of the hearing. Qwest argues that it would be a waste of time and energy to hear the bad faith issues because it is in the process of fulfilling its testing obligations under the MOU and that if it does so, the bad faith claims would be moot. But Qwest decided unilaterally and unconditionally to proceed with the testing, regardless of the enforceability of the MOU. Moreover, even if the MOU is enforceable against AT&T and that AT&T is bound to withdraw its bad faith claims if Qwest satisfactorily completes the testing, the argument also assumes that the Department has no right to seek sanctions or is willing to change its intent to do so. That is clearly not the case. Thus, even if the issue of the MOU were certified to the Commission, there would be no reason to further postpone the hearing on the bad faith claims.

Qwest will not be prejudiced if the Commission ultimately determines that the MOU is enforceable. As above, the Commission still would have to deal with the bad faith issues being asserted by the Department. Nor would waiting until after the hearing render the matter moot and impossible to reverse.

A hearing is necessary to develop a full record, at least for the Department's claims. If the Commission also concludes that the MOU is not enforceable and a hearing had not been held, the case would have to be remanded for hearing. The Commission has expressed a strong desire that this matter be resolved quickly. The Administrative Law Judge has allowed continuances requested by Qwest because the testing was proceeding, but further delay on the bad faith issues is not acceptable.

The issue of enforceability of a memorandum of understanding is not something particularly within the Commission's area of expertise.

For all the foregoing reasons, certification is not appropriate.

Minn. Rule 1400.6600 allows any party to request a hearing on a motion, but requires the judge to have a hearing only if it is necessary to the development of a full and complete record on which a proper decision can be made. The motion has been well and fully briefed and the facts and record item have been reviewed and discussed several times. A hearing on the motion is not necessary.

S.M.M.

^[1] May 15, 2001, motion hearing transcript at 24-45.

^[2] May 15, 2001, motion hearing transcript at 86.

^[3] That statement appears to be correct. Minn. Rule 1400.7600.

^[4] In preparing the First Prehearing Order, the ALJ realized that by ordering that the hearing proceed, there was an implied ruling that the MOU was not enforceable. Thus, the issue was considered more fully and addressed in the First Prehearing Order.