

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of an Investigation Regarding Qwest's Compliance with Section 271 of the Telecommunications Act of 1996 with Respect to the Provisions of InterLATA Services Originating in Minnesota

PUC Docket No. P-421/CI-96-1114
OAH Docket No. 12-2500-14473-2

In the Matter of a Commission Investigation into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist items 3, 7, 8, 9, 10, and 12

PUC Docket No. P-421/CI-01-1370
OAH Docket No. 12-2500-14485-2

In the Matter of a Commission Investigation into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist items 1, 2, 4, 5, 6, 11, 13, and 14

PUC Docket No. P-421/CI-01-1371
OAH Docket No. 7-2500-14486-2

In the Matter of a Commission Investigation into Qwest's Compliance with Section 272 of the Telecommunications Act of 1996's Separate Affiliate Requirement

PUC Docket No. P-421/CI-01-1372
OAH Docket No. 7-2500-14487-2

In the Matter of a Commission Investigation into Qwest's Compliance with Section 271(d)(3)(C) of the Telecommunications Act of 1996 That the Requested Authorization is Consistent with the Public Interest, Convenience and Necessity

PUC Docket No. P-421/CI-01-1373
OAH Docket No. 6-2500-14488-2

In the Matter of the Commission's Review and Investigation of Qwest's Unbundled Network Element (UNE) Prices

PUC Docket No. P-421/CI-01-1375
OAH Docket No. 12-2500-14490-2

In the Matter of the Request of Covad to Define and Price a Line Sharing over DLC UNE to be offered by Qwest

PUC Docket No. P-421/CI-02-293
OAH Docket No. 12-2500-14765-2

FIFTEENTH PREHEARING ORDER

These matters came on for prehearing conference before Administrative Law Judges Richard C. Luis and Steve M. Mihalchick on April 17, 2002. The conference was conducted by telephone.

The following persons noted their appearances at the prehearing conference:

Mary Rose Hughes, Shannon Heim, and Jason Topp, for Qwest.

Letti Friesen for AT&T.

Priti Patel, Assistant Attorney General, for the Department of Commerce.

Jeanne M. Cochran Assistant Attorney General, for the OAG-RUD.

Lesley Lehr and Greg Merz for WorldCom.

Dan Lipschutz for McLeod.

Dena Alo-Colbeck, for ASCENT.

Garth Morrisette, Jeff Oxley, and David Frame for Eschelon.

Diane Wells, for the Commission Staff.

MOTION TO COMPEL

1. AT&T moved for an order compelling Qwest to provide responses to discovery requests concerning the source of information used to develop telemarketing databases, the telemarketing practices deployed toward certain classes of customers, the use of confirmation numbers to identify customer transactions, as between Qwest and third-party telemarketers, and disclosure of agreements not yet filed between Qwest and CLECs. At the telephone conference, AT&T and Qwest indicated that some of the requested discovery had been provided. The issues concerning the remaining discovery requests were discussed during the telephone conference.

2. To provision local service to an existing Qwest customer, a facilities-based CLEC (such as AT&T) must send a local service request ("LSR") to Qwest. After receipt of the LSR, Qwest transfers the customer's telephone number over to the CLEC so that the CLEC can then complete the provisioning of local service.^[1] There is some time between Qwest's receiving the LSR and porting the telephone number to the CLEC.

3. AT&T has received an affidavit ("the Tade Affidavit") from one of its employees who switched his local telephone service provider from Qwest to AT&T (through its broadband affiliate). The LSR was identified as submitted on May 18, 2001. The Tade Affidavit describes multiple calls from a telemarketer,^[2] on behalf of

Qwest, asking the employee not to switch his service. The calls were received prior to the employee's service being switched.

4. Use in marketing of a CLEC's proprietary information received by a telecommunications carrier for providing service is prohibited.^[3] AT&T asserts that the information in the Tade Affidavit is evidence that Qwest is violating that prohibition by engaging in "win-back" telemarketing, using information in the LSR. Such conduct could affect a number of issues in several dockets in the Qwest 271 Application.

5. Qwest asserted that information in the Tade Affidavit was not credible, suggesting that the contents of any telemarketing messages received were offerings of additional services in two telephone calls. The lack of any other complaints is cited by Qwest as demonstrating that no such practice occurs. Qwest described the methods by which proprietary information from CLECs is segregated from Qwest's own information.^[4] Qwest also described the manner in which information is processed by its Database Marketing Group to compile lists of telephone numbers for third-party telemarketers to call in pursuing various marketing strategies.^[5]

6. The process descriptions provided by Qwest describe the handling of CLECs' proprietary data in a fashion that does not preclude access by the Database Marketing Group.^[6] While Qwest maintains that the Database Marketing Group cannot "search globally" the information containing CLEC's proprietary data, the description of how information is handled by the Database Marketing Group indicates that significant data manipulation can be conducted.^[7]

7. There is no reason to question the credibility of any witness at this time. AT&T has indicated that the employee will be called as a witness at a hearing in the Qwest 271 Application. AT&T has evidence that "win-back" telemarketing calls were made to a Qwest customer when the only likely source of the information that the customer was switching service was CLEC proprietary information. Under this circumstance, AT&T is entitled to conduct discovery into the actual process used by Qwest to develop lists for marketing calls. Relying on a description of the process is inadequate, since the specific practice alleged is illegal and it appears Qwest had the capability to allow access to the database containing CLECs' proprietary information by Qwest's Database Marketing Group. The telephone numbers sought would allow AT&T to determine if significant numbers of customers are contacted in the period after an LSR is submitted to Qwest, but before service is transferred.

8. The absence of additional complaints is not determinative of AT&T's right to conduct discovery in this matter. There is no reason to believe that most customers are aware that: 1) win-back telemarketing might be illegal, 2) the source of the information used in any alleged telemarketing call was from the CLEC the customer is switching to, or 3) this practice can be reported to someone in a position to act on it (and who that person might be). AT&T only knows about the one instance because the customer happened to be an AT&T employee.^[8] Since AT&T has evidence of the one instance, discovery is appropriate to determine if the instance is part of some wider program.

9. Qwest has stated that it will examine its records for any customer already identified by AT&T to determine if telemarketing was conducted. To find such customers, AT&T would have to contact all its customers who cancelled service after opting for AT&T and inquire as to whether they had been Qwest customers, whether they remained with Qwest, and whether telemarketing by Qwest had influenced each customer's decision.^[9] AT&T has voluntarily limited the scope of its request to relevant time periods and calls made to customers in Minnesota. AT&T is not obliged to conduct a burdensome investigation through its own records and contact former customers in order to narrow further an appropriate discovery request.^[10]

10. Qwest maintains that no win-back program exists in Minnesota for customers prior to their terminating service with Qwest. The contents of marketing scripts are often tailored to the particular result desired. There is a difference between "please don't switch" and "please switch back." The telemarketing script information is relevant to determining if Qwest is pursuing a process different from its description of how CLEC proprietary information is handled.

11. The information sought by AT&T is highly sensitive and extremely confidential and Qwest vigorously asserts that its business interests will be harmed if the information is misused. AT&T has proposed limiting the disclosure of the information produced under this request to its counsel and one employee from AT&T Broadband who is not involved in marketing.

12. The limitations on disclosure of the data suggested by AT&T are identical to those that Qwest proposed to protect the confidentiality of the CLEC data disclosed pursuant to the Twelfth Prehearing Order issued in these matters. Those procedures are adequate to protect this information from misuse. AT&T shall identify a single individual from AT&T Broadband, with no role in marketing, to be designated as the recipient of the information. That person would be bound by the protective orders in this matter and a further confidentiality agreement to not disclose any of Qwest's marketing data to anyone other than counsel for AT&T who have executed Exhibit A to the Protective Agreement in this matter. Qwest may object to the person selected for good cause.^[11]

13. Qwest shall provide full and complete answers to questions three (for telemarketers who solicit customers in Minnesota) and five. Qwest shall provide the information sought in question 4 for the periods of May 1, 2001 through July 31, 2001 and January 1, 2002 through March 31, 2002, for telemarketing calls made to customers in Minnesota. AT&T shall handle the information provided in accordance with Finding 12 of this Order.

14. The seventh discovery item is a request by AT&T for unfiled agreements between Qwest and CLECs. Qwest has supplemented its response by providing the agreements for which waivers have been executed by CLECs. There is an ongoing docket to determine whether those agreements should have been filed with the PUC.^[12] This issue is properly addressed in that docket.

SCHEDULING CONFERENCE

15. A telephone conference will be held on Wednesday, April 24, 2002, at 10:30 a.m. CDT to address scheduling issues, primarily in the OSS docket (1371). Of particular concern is the anticipated release of the final ROC OSS report on May 20, 2002 and its impact on the OSS docket prehearing filing schedule.

MCLEOD PETITION FOR INTERVENTION

16. The Administrative Law Judge received a Petition to Intervene from McLeod USA Telecommunications Services, Inc. (McLeod) requesting admission as a party to the to the UNE Pricing docket (1375). No party had any objection to McLeod being afforded full party status. As party, McLeod has the full rights afforded to all other parties in this proceeding.^[13] Intervention is granted prospectively to avoid prejudice to the other parties who participated in earlier proceedings.

17. McLeod's Petition to Intervene is GRANTED and McLeod is named as a party in all 271 dockets in these proceedings. The parties should note that Dan Lipschultz, counsel for McLeod is already on the service list (listed under INTERESTED PERSONS). The parties are directed to remove Garth Morrisette from the email-only portion of the service list (as he requested) and add David Frame to that portion. Mr. Frame's email is dmframe@eschelon.com.

ASCENT PETITION FOR INTERVENTION

18. The Administrative Law Judge received a second Petition to Intervene from the Association of Communications Enterprises (ASCENT) requesting admission to the DLC Line Sharing docket (293). At the conference, ASCENT indicated that, after consultation with staff at OAH, the Petition was unnecessary since ASCENT was already admitted to the 293 docket. The 293 docket is administered as part of the Qwest 271 Application dockets in this proceeding. All the procedural information (such as the Notice of Appearance or executed copies of Exhibit A) applies to the 293 docket. No further copies of such documents should be filed.

Dated: April 22, 2002

/s/ Richard C. Luis
RICHARD C. LUIS
Administrative Law Judge

^[1] The number transfer is known as "porting."

^[2] AT&T described the total number as four in the telephone conference, with two on the same day.

^[3] 47 U.S.C. § 222(b). AT&T also maintains that interconnection agreements and Qwest's SGAT reflect this obligation.

[4] AT&T Motion Exhibit D. There is no prohibition against a telecommunications carrier using its own information for marketing. For example, Qwest can use its own cancellation records to implement a win-back telemarketing program.

[5] Qwest 4/16 Supplemental Responses.

[6] AT&T Motion Exhibit D, at 16-17.

[7] The protections described by Qwest apply to individuals accessing specific customer records. AT&T is inquiring into how databases are filtered for specific classes of data, not individual records. Qwest has not described what protections exist to prevent such filtering of databases to preclude access to CLECs' proprietary data.

[8] Qwest's assertion that this allegation has been "thoroughly examined and dismissed" in the other proceedings is not supported by the record. Qwest Response, footnote 1. More accurately, the allegation has not been found sufficient to reopen any proceeding. See e.g. *In the Matter of the Investigation Into US West Communications, Inc.'s Compliance With Section 271 of the Telecommunications Act of 1996*; *In the Matter of US West Communications, Inc.'s Statement of Generally Available Terms Pursuant to Section 252(f) of the Telecommunications Act of 1996*, Docket Nos. UT-003022; UT-003040 (Wash. Util. and Trans. Comm. March 2002) ("Washington 28th Supp. Order") ¶ 11.

[9] Qwest's suggestion would require AT&T to contact those customers who had selected AT&T's telephone service and then chose to stay with their existing provider. Even if AT&T undertook such an investigation, it would be incomplete because it would capture only customers who opted to stay with Qwest in the end. The alleged practice of making such telemarketing calls is illegal even if the customer rejects the telemarketing message.

[10] The ALJ also notes that Qwest has relied on there being only one alleged instance of this win-back telemarketing to demonstrate that Qwest's handling of CLEC proprietary information is proper. AT&T may choose to investigate whether the class of customers for whom LSRs were submitted contain other instances of such win-back telemarketing as corroborating evidence to AT&T's assertion. Qwest holds the information that is required for AT&T to conduct such an investigation.

[11] The parties will inform the ALJ if a person cannot be agreed to between them.

[12] In the Matter of the Complaint of the Minnesota Department of Commerce against Qwest Corporation regarding Unfiled Agreements, OAH Docket No. 6-2500-14782-2, PUC Docket No. P-421/C-02-197.

[13] See Minn. Rule 1400.6200, subp. 3.