

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

**EIGHTEENTH PREHEARING ORDER**

Several Motions were heard at a prehearing conference before Administrative Law Judge Allan W. Klein on May 22, 2002. The prehearing conference was held in the Large Hearing Room of the Public Utilities Commission. Several counsel participated by telephone.

The following persons noted their appearances at the prehearing conference:

Robert Cattanach, Jason Topp and Douglas Nazarian for Qwest

Priti Patel, Ginny Zeller and Steven Alpert, Assistant Attorneys General,  
for the Department of Commerce.

Peter Marker for OAG/RUD.

Sandra Hofstetter for AT&T.

Lesley Lehr for WorldCom.

Megan Dobernack for Covad.

Dennis Ahlers for Eschelon.

Diane Wells for the PUC staff.

## **MOTION TO BIFURCATE**

The Department of Commerce moved to bifurcate the public interest hearing to allow more time for discovery and testimony on two pieces of newly-discovered evidence. One was an additional unfilled agreement, and the second was an allegation of illegal in-region interLATA long distance service. Both were just discovered earlier this week, and both require additional discovery and analysis before they could be presented as evidence. AT&T, WorldCom and the Office of the Attorney General supported the motion to bifurcate. Qwest opposed the motion because it views the issues as irrelevant to the public interest docket.

The two new pieces of evidence just discovered by the Department of Commerce are not necessarily irrelevant to this proceeding. However, it is just too late to upset the schedule to allow them to be included and reviewed. The Department concedes that it would need more time for discovery and analysis, and then more time to prepare testimony. Qwest would no doubt want to respond, perhaps with discovery and certainly with testimony of its own. The only practical way to deal with the new material would be to bifurcate the hearing. But in light of the other portions of the overall 271 proceeding that must still be considered, there is just not enough time to accommodate the bifurcation.

## **MOTIONS TO STRIKE**

Qwest moved for an order striking the Highly Sensitive CLEC-specific Trade Secret version (pink copy) of the affidavit of Lee Selwyn, on the ground that this information was not made available to Qwest. The Department of Commerce responded that most of the information was already in Qwest's possession, although not in the form contained in the Selwyn affidavit, and that the small part not known to Qwest was protected data. Qwest acknowledged that most of the information might indeed be available somewhere within Qwest, but that as a practical matter, it was not available for the upcoming hearing. Qwest insisted that due process required that it be allowed to see the evidence if it was to be used during the hearing and included in the record. Qwest then pointed out that dissemination within Qwest could be restricted to David Teitzel (Qwest) and Jonathan Frankel (Wilmer, Cutler & Pickering), both being bound by the Protective Order and the Supplemental Protective Order.

The testimony at issue goes to one of the most critical issues in the Public Interest docket. It is important that the parties are able to focus on the appropriate numbers, and attempt to resolve their differences with each other, or at least highlight the differences so that the ALJ and the Commission can resolve them. Based on Qwest's representations that the information will not go beyond Messrs. Teitzel and Frankel, the ALJ finds that, on balance, the information must be disclosed if it is going to become part of the record. Therefore, the Department of Commerce shall immediately provide to Qwest the pink copy of the Selwyn affidavit. Qwest shall handle that information in accordance with the Protective Orders issued in these proceedings and the assurances offered by Mr. Cattanaach.

The Department of Commerce moved to strike portions of the testimony of Larry Brotherson, or in the alternative, to cross-examine four individuals named in those portions of his testimony. This all deals with unfiled agreements. The Administrative Law Judge GRANTS the Motion to the extent that a party requests the opportunity to cross-examine a person covered by Mr. Brotherson's testimony, and Qwest does not make that person available for cross-examination. However, to the extent that no party desires to cross-examine one of the persons, then Mr. Brotherson's testimony may remain in the record. The right of cross-examination is limited to those issues not already litigated in the Unfiled Agreements hearing.

The Brotherson testimony highlights the problem of overlap that exists between the Unfiled Agreements docket (P-421/C-02-197; 6-2500-14782-2) and this docket. The best way to deal with that problem is to make the hearing record from that proceeding a part of the record in this proceeding. This will avoid the problem of relitigating the matters already litigated in that hearing. The Department, and perhaps others, claim that there are issues arising from the evidence in the Unfiled Agreements record that go beyond the issues in that proceeding, and are properly issues in this proceeding. For example, the Department has raised the issue of anticompetitive behavior, asserting that it is separate and apart from the issue of whether some agreement ought to have been filed. The Administrative Law Judge agrees, and will allow evidence from the Unfiled Agreements record to be used in this proceeding, but limited to issues which were not litigated in that earlier proceeding.<sup>[1]</sup>

Qwest moved to strike the filing by Eschelon as improper, insofar as Eschelon is not a party to this proceeding and the filing came at a time that prevented Qwest from replying in its last scheduled filing. Eschelon acknowledged that it was not a party, and had not previously filed testimony in this proceeding. Eschelon indicated that it had only recently become aware of Mr. Deanhardt's testimony and that Eschelon was concerned because it feared that testimony could be read to suggest that Eschelon may have done something improper or illegal, and Eschelon wanted to respond to that suggestion to demonstrate it had not done anything wrong. The Administrative Law Judge acknowledges Eschelon's concern, but concludes that Eschelon's limited status as an interested person and the need to stick to the schedule does not allow Eschelon to file testimony and offer witnesses. Finally, the evidence proffered is only tangential to the issues in this docket. Therefore, Qwest's Motion to Strike is GRANTED.

### **MOTION TO COMPEL**

The Department of Commerce filed a Motion to Compel answers to a number of discovery requests. Most of these requests relate to the OSS Checklist docket and those issues will be dealt with in that docket. Regarding the remaining requests, Qwest indicated that its failure to respond was inadvertent and that the information was being provided as soon as possible. The Department's Motion to Compel is GRANTED with

respect to information requests 18066 to 18073. Qwest shall provide those answers to the Department no later than 2:00 p.m. on Friday, May 24, 2002.

### **MOTION TO SUBSTITUTE COUNSEL**

Qwest moved to substitute Jonathan Frankel of Wilmer, Cutler and Pickering for John Munn as counsel for Qwest in the Public Interest docket. No party objected to the substitution. Qwest's Motion to Substitute Counsel is GRANTED.

Dated: May 23, 2002

/s/ Allan W. Klein  
ALLAN W. KLEIN  
Administrative Law Judge

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<sup>[1]</sup> Some of the evidence in the Unfiled Agreements hearing record is non-public data, and is subject to a Protective Order. The status of that evidence is not changed by its use in this Public Interest proceeding, so persons desiring to use it will have to abide by the terms of the Protective Order in that proceeding.