

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 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 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 Complaint of the Minnesota Department of Commerce against Qwest Corporation regarding Unfiled Agreements

PUC Docket No. P-421/C-02-197
OAH Docket No. 6-2500-14782-2

TWENTY-FOURTH PREHEARING ORDER

A number of motions came on for prehearing conference before Administrative Law Judges Richard C. Luis and Allan W. Klein on August 2, 2002. The conference was conducted by telephone.

The following persons noted their appearances at the prehearing conference:

Douglas Nazarian, Peter Spivack, and Kelly Cameron for Qwest.

Letty Friesen and Sandra Hofstetter for AT&T.

Steve Alpert and Ginny Zeller, Assistant Attorneys General, for the Department of Commerce.

Megan Dobernack for Covad.

Eric Swanson and Dan Lipschultz for McLeod.

David Frame for Eschelon.

Kevin O'Grady for the Commission Staff.

COMMERCE APPLICATION FOR USE OF DEPOSITION

1. Blake Fisher was a Vice President of McLeod beginning in 1996 (he has recently retired). He now resides in Utah. In that position he was responsible for negotiating a number of agreements between McLeod and Qwest. Mr. Fisher participated in the negotiations resulting in a series of agreements in October 2000 that are at issue in this proceeding. He prepared an affidavit and was listed as a witness for the Department of Commerce. Mr. Fisher's deposition was taken on June 27, 2002 at the behest of Qwest.

2. Commerce has recently been told that there is a substantial likelihood that Mr. Fisher will not appear at the hearing scheduled for August 6 and 7, 2002. Mr. Fisher's personal counsel advised Commerce that, due to ongoing criminal investigations by the U.S. Department of Justice into corporate misconduct, Mr. Fisher would not appear to testify. Subpoenas were served upon Mr. Fisher and McLeod (for which Mr. Fisher was formerly a corporate officer) to attempt to compel his attendance. Commerce filed an application for permission to use the deposition in lieu of live testimony in this matter.

3. Qwest objected to the use of the deposition. Qwest characterizes the issues as a "he said - she said" dispute, and argues that the demeanor of the witness can be critical to resolution of the issues in this proceeding. The deposition was not taken pursuant to Minn. Rule 1400.6900, and Qwest asserts that the manner of deposing Mr. Fisher would have been different had the questioning been noticed as being in lieu of his appearance for cross-examination at the hearing. Commerce asserts that Minn.R.Civ.P. 32.01(c) authorizes the use of the deposition, regardless of whether it was taken for discovery purposes only.

4. Commerce has attempted to procure the attendance of Mr. Fisher by service of a subpoena upon him and the service of a subpoena on his former employer. Commerce has been told that he will not appear. The absence of Mr. Fisher meets the standards of Minn.R.Civ.P. 32.01(c). Mr. Fisher's stated reasons for not appearing at the hearing arose after the deposition had been taken. But more importantly, extensive pretrial discovery has yielded significant numbers of documents that reflect on various aspects of the agreements at issue. These documents significantly reduce the

importance of having live testimony, rather than a deposition. Qwest has not shown that use of the deposition constitutes a denial of due process. The application for use of his deposition in lieu of live testimony is GRANTED.

MCLEOD MOTION REGARDING SUBPOENA

5. McLeod responded to the subpoena obtained by Commerce requiring McLeod to produce Mr. Fisher. McLeod has contacted Mr. Fisher's counsel and urged that Mr. Fisher attend the hearing. McLeod asserts that it has no other means to compel his attendance. McLeod requested that the subpoena be quashed or that the Judge find that McLeod's efforts to compel Mr. Fisher's attendance are reasonable. The Judge finds that McLeod has made all reasonable efforts to compel the attendance of Mr. Fisher. McLeod is relieved of any further obligation under that subpoena.

QWEST MOTION TO EXCLUDE

6. Qwest moved to exclude the supplemental testimony of W. Clay Deanhardt, filed by Commerce. Qwest asserts that the testimony is not based on any special learning, skill, or experience, and therefore does not properly constitute expert testimony. Further, Qwest asserts that the testimony consists of opinions and conclusions regarding the materials produced and that allowing the testimony would usurp the role of the trier of fact in this proceeding. Qwest cited an earlier order of Judge Klein that precluded Mr. Deanhardt from offering opinions regarding ultimate legal issues as support for its position. Qwest characterized Mr. Deanhardt's actions as providing legal counsel, not testimony.

7. Commerce supported the role of Mr. Deanhardt with a description of the areas of business and types of transactions that he explains in his testimony. The role of two witnesses, Margaret Bumgarner and Lori Simpson, presented by Qwest (who carry the position titles " Director in Policy and Law" and "Director of Legal Issues") is cited by Commerce as demonstrating the propriety of testimony on non-legal matters, even though it is presented by legally trained witnesses.

8. Qwest suggests that the ALJs and the Commission are as capable of reading documents as Mr. Deanhardt. While that is true, the nature of the documents at issue is sufficiently arcane as to make the meaning of the words and figures used in them a matter of doubt and dispute. Mr. Deanhardt has both the skill and experience to render an expert opinion as to the contents of the documents being offered as evidence in this proceeding. He definitely will assist the triers of fact in understanding the evidence. Qwest's motion to exclude his supplemental testimony is DENIED.

MOTION TO COMPEL

9. AT&T moved for an order compelling Qwest to provide responses to five separate sets of discovery requests. At the telephone conference, AT&T and Qwest indicated that some of the requested discovery had been provided. AT&T withdrew another of the requests. The issues concerning the remaining discovery requests were discussed during the telephone conference.

10. Information request (IR) 31 asks Qwest to describe the format of the solicitation lists actually provided to Qwest's third-party telemarketers. Qwest responded with, among other things, the "Qwest Customer Daily Contact Management/Disposition File." AT&T noted that outbound calling was at issue, and requested documents specifically related to outbound calling. Qwest indicated that the documents provided were the available documents on third-party telemarketers.

11. AT&T's concerns have merit. The document provided by Qwest is clearly focused on inbound calls, not calls initiated by third-party telemarketers. If any similar document exists for outbound calls, Qwest is under the obligation to provide it in response to AT&T's request.

12. IR 32 requests clarification as to whether what Qwest provided to AT&T in response to the 15th Prehearing Order is in fact what Qwest provides to its third-party telemarketers. Qwest clarified that the information provided is not the same as provided to those telemarketers. Qwest also acquiesced to AT&T's request that the clarification would be put in writing.

13. IR 39 requests the name, telephone number, and win-back offer of each customer "won-back" from a CLEC between June 1, 2001 and June 30, 2002. Qwest objected to this request as, among other things, outside the scope of the issues in the proceeding. Qwest described the request as relating only to customers who had their number ported from Qwest to a CLEC, since only such customers can be won-back. AT&T strenuously objected to Qwest's characterization of the win-back inquiry, noting that the earlier discussions of the issue had included customers for whom a local service request (LSR) from a change of a provider had been received, but not yet completed, by Qwest.

14. The information requested under IR 39 is closely akin to the information required to be provided to AT&T through the 15th Prehearing Order. Footnote 10 of that order states in part, "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's interpretation of the term "win-back" to mean only customers whose number has been ported is incorrect. AT&T has evidence that offers were made to some customers for whom an LSR has been submitted, but whose numbers had not yet been ported. The pre-porting offers include the same sort of special pricing that are in the legitimate (post-porting) win-back program. Identification of all customers who have received such special pricing offers would include the class of customer which is the subject of AT&T's inquiry. Qwest asserts that there is no means of sorting its records to identify only the class of customers contacted before the numbers are ported. Therefore, AT&T is entitled to the names and telephone numbers of customers who were convinced to cancel an order of service with a CLEC. AT&T can use that information to conduct its investigation. IT IS ORDERED THAT Qwest shall provide full and complete answers to IR 39.

15. IRs 41 through 43 were withdrawn by AT&T. IR 44 requested that Qwest produce all documents showing that Qwest "has not misused AT&T's wholesale

information.” As worded, the request is overbroad. AT&T clarified that the documents sought are those that Qwest is relying upon to show that such information is not misused. As modified, IR 44 is reasonable. IT IS ORDERED THAT Qwest provide full and complete answers to IR 44, as modified, by producing all documents that Qwest is relying upon to show that it does not misuse AT&T’s wholesale information.

16. IR 45 asks Qwest to identify each customer contacted by Qwest in regard to AT&T’s win-back allegation, with any documents relating to the contact. Qwest maintains that there have been no contacts with customers on this issue. AT&T indicates that it has information that Qwest has sent a letter to some customers regarding the win-back investigation. Qwest is under an ongoing obligation to provide full and complete answers to IR 45. Evidence that contradicts Qwest’s position may be used in the hearing (as Qwest itself notes).

17. IRs 46 and 47 seek the names and titles of all persons responsible for developing “selective solicitation lists” for Qwest. Qwest objected to the inquiry as overbroad, interpreting the request to identify those persons as requiring that Qwest providing the addresses and telephone numbers of those employees. Qwest did state that its Consumer Database Marketing, National Business Account, Business Winback, and Wireless Divisions and individual account managers develop solicitation lists. The IR clearly states that the name and title is the information to be provided. AT&T acknowledges that any contact with these employees will be in accordance with the Minnesota Rules of Professional Responsibility 4.2. IRs 46 and 47 apply to any persons who provide information to Qwest’s Consumer Database Marketing Division and to any solicitation list. IT IS HEREBY ORDERED THAT Qwest provide full and complete answers to IRs 46 and 47.

18. IR 48 asks Qwest to identify any CLECs in its 14-state region with whom Qwest has had any contact regarding improper use of wholesale information and all documents relating to that contact. Qwest objected to the request as overbroad and “any contact” as being unclear. AT&T clarified that the information sought is any contact from a CLEC regarding Qwest’s conduct that is similar to that complained of by AT&T regarding win-back efforts using the information in LSRs prior to the number being ported. Since the inquiry is focused on the CLEC contact level, the inquiry is sufficiently limited so as not to be unduly burdensome. IT IS HEREBY ORDERED THAT Qwest provide full and complete answers to IR 48.

Dated: August 7, 2002

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