

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 Qwest's Statement of Generally Available Terms (SGAT) Pursuant to Section 252(f) of the Telecommunications Act of 1996

PUC Docket No. P-421/CI-01-1374  
OAH Docket No. 12-2500-14489-2

**FOURTH PREHEARING ORDER**

These matters came on for prehearing conference before Administrative Law Judge Steve M. Mihalchick on November 13, 2001, in the Minnesota Public Utilities Commission's Large Hearing Room, 121 Seventh Place East, Suite 350, St. Paul, Minnesota.

The following persons noted their appearances at the prehearing conference:

John Devaney (by telephone), Jason Topp, and Robert E. Cattenach, for Qwest Corporation (Qwest).

Priti R. Patel, Ginny Zeller, Peter Marker, and Steve Alpert (by telephone), Assistant Attorneys General, for the Department of Commerce (DOC or the Department).

Jeanne M. Cochran, Assistant Attorney General, for the Office of the Attorney General, Residential Utility and Small Business Division (OAG-RUD).

Lesley Lehr and Gregory R. Merz, for MCI WorldCom, Inc., (WorldCom).

Natalie Baker, Janet Browne, and Doug Denny (all by telephone),, for ATT.

Rebecca Liethen, for Time Warner.

Joy Gullickson, for Onvoy.

Cecilia Ray (by telephone), for the CLEC Coalition.

Patrick Judge, for Covad Communications Company (Covad).

Garth Morrisette, for Eschelon.

Kathy Murphy for Global Crossing (by telephone).

Diane Wells, Marc Fournier, Ray Smith, Kevin O'Grady and John Lindell, were the Public Utilities Commission (Commission) staff members present.

### **AMENDMENT TO SCHEDULING ORDER**

1. Qwest moved to amend the scheduling order in this matter to require the initial filing in the OSS Checklist Item docket, OAH No. 12-2500-14486-2, be due on December 19, 2001. The reason for the change is to allow the data reconciliation currently being done to be included in the initial filing. That data reconciliation will not be completed in time to allow Qwest to meet the current filing date of November 21, 2001. The Department supported Qwest's motion, provided that the other filing requirements are adjusted on a "day-for-day" basis. Qwest objected to changing the other dates in the docket.

2. Qwest's motion to amend the scheduling order is GRANTED. The initial filing in the OSS Checklist Item docket is due on December 19, 2001. The other dates in the OSS Checklist Item docket have been modified slightly to reflect the most recent estimated completion date of the ROC-OSS test. The parties may move for further amendments where needed due to this deferral of the initial filing deadline. A copy of the current schedule, updated to reflect the changes in all affected dockets, is attached.

### **ORDER COMPELLING DISCOVERY**

3. The Department moved for an order compelling discovery of the following:

- All joint telemarketing and/or marketing scripts developed by or on behalf of Qwest Corporation (or any of its subsidiaries) to be used by Qwest and/or its employees, including customer service representatives, after obtaining 271 approval;
- All plans, proposals or documents relating to strategic planning with reference to marketing services to be provided by Qwest Corporation (or any of its subsidiaries) and/or its employees, including customer service representatives, to its 271 affiliate (QCC);
- All agreements between Qwest Corporation (or any of its subsidiaries) and its 271 Affiliate (QCC) that joint telemarketing and/or marketing scripts will actually be based on;
- All plans, proposals, agreements or other documents that will be used to form the basis for, contribute to or lay the foundation for joint telemarketing and/or marketing scripts to be used by Qwest Corporation (or any of its subsidiaries) and/or its employees, including customer service representatives; and
- All pricing plans or pricing proposals developed by or on behalf of Qwest Corporation (or any of its subsidiaries) that will form the basis for, contribute to or lay the foundation for joint telemarketing and/or marketing scripts to be used by Qwest Corporation (or any of its subsidiaries) and/or its employees, including customer service representatives.<sup>[1]</sup>

4. Qwest opposed the motion as irrelevant and overbroad. For the reasons discussed in the attached Memorandum, the motion to compel filed by the Department is GRANTED. The Reply filing deadline in the Separate Affiliate docket remains unchanged. Any supplemental filing related to the data above filed by December 14, 2001 will be accepted as timely.

#### **SCOPE OF SGAT**

5. After clarification by the PUC, the parties came to essential agreement as to what issues should be dealt with in the SGAT docket. The SGAT docket will deal with issues of legal obligation to provide services not found in existing interconnection agreements. Where the service is covered in an interconnection agreement and the legal obligation issue arises, that issue will be dealt with in the particular checklist item docket.

Dated: November 20, 2001

/s/ Richard C. Luis  
RICHARD C. LUIS  
STEVE M. MIHALCHICK  
Administrative Law Judges

## MEMORANDUM

Qwest correctly points out that DOC has the burden to show that the discovery being sought is relevant.<sup>[2]</sup> That is impossible, Qwest asserts, since the scripts being sought are not required by the FCC to demonstrate 271 compliance and:

Once one accepts the premise that such scripts are not required to demonstrate compliance, there can be no logical foundation for making such scripts the focus of discovery in a proceeding for which the only purpose is to determine compliance.<sup>[3]</sup>

DOC described existing PUC orders in the intralata area compelling the disclosure of such scripts to ensure that anticompetitive practices are not fostered through the marketing of services. With regard to compliance with section 272, DOC stated:

The requested marketing scripts are also relevant to a determination regarding Qwest's plans and intent to comply with sections 272(b)(3) and 272(b)(5) of the Act. Section 272(b)(3) requires that the BOC and the section 272 Affiliate "shall have separate officers, directors, and employees from the Bell Operating Company of which it is an affiliate." It is Qwest's contention that, so long as employees are on the payroll of one entity or the other, but not both, they are "separate employees" that may be shared. The marketing scripts will establish the extent of services provided by customer service representatives to QCC, and whether the Qwest BOC entity customer service representatives will be functioning as employees of the 272 Affiliate, and not the BOC, irrespective of which entity issues the employees' paychecks.<sup>[4]</sup>

The issues identified by DOC go directly to the ultimate conclusion in the Separate Affiliate docket, that is whether Qwest and QCC meet the requirements under section 272. Qwest cannot be granted 271 authority until it has established that the intralata services will be provided by a separate affiliate meeting the requirements of section 272. The information sought is therefore relevant.

Qwest cites the decisions of the FCC in *BellSouth* and *Bell Atlantic* as support for its contention that marketing scripts are not required for obtaining 271 approval. In *BellSouth*, the FCC said:

236. We take this opportunity to address the issue of whether BellSouth's proposed inbound telemarketing script is consistent with the requirements of the statute. **We do not require applicants to submit proposed marketing scripts as a precondition for section 271 approval, nor do we expect to review revised marketing scripts on an ongoing basis once section 271 authorization is granted. Applicants are free to tell us how they intend to joint market, although we do not require them to do so.** Our intention in addressing this issue here is to establish a safe harbor, so that the BOCs will have some guidance on what we view as consistent with sections 251(g) and

272. We emphasize that we are not concluding here that any other scripts are *per se* lawful or unlawful. We conclude that BellSouth's script is acceptable, and, under the analysis set forth below, we would also find that the script filed by Ameritech in its section 271 application for Michigan would be acceptable, should it file a new application.<sup>[5]</sup>

The *BellSouth* holding makes clear that the FCC is not interested in requiring a Bell Operating Company (BOC) to file marketing scripts as a means of demonstrating that the standards of section 272 are met before granting section 271 approval. But that holding cannot be extended logically to a conclusion that others cannot use the scripts to show noncompliance or that discovery for that purpose is prohibited. DOC indicates that the scripts and marketing planning material will be relevant to show that QCC is not being operated as a separate affiliate. Until discovery is undertaken, Qwest cannot demonstrate what the scripts and other material would tend to show or not show about such a relationship.

The potential for discovering relevant information, where joint marketing materials are sought, is clearly set forth in the FCC's holding in *Bell Atlantic*. In that section 271 application, the BOC (Bell Atlantic) was affiliated with three companies (BACI, NLD, and BAGNI) that would provide intralata service. With respect to section 272 compliance generally, and submission of marketing scripts specifically, the FCC stated:

*Section 272(g)(1) – Affiliate Sales of Telephone Exchange Access Services.* Based on the evidence in the record, we conclude that Bell Atlantic has demonstrated that it will comply with the joint marketing provisions of section 272(g)(1). We reject as inconsistent with Commission precedent AT&T's contention that Bell Atlantic must submit proposed marketing scripts in order to demonstrate compliance with section 272(g). **Although Bell Atlantic makes no assertions regarding the plans of one section 272 affiliate, BAGNI, to market or sell Bell Atlantic telephone exchange services, we conclude that BAGNI's evidence of a corporate compliance program and BAGNI's assertions that it plans to provide service only to BACI and NLD adequately persuade us that Bell Atlantic will operate in accordance with section 272(g)(1) for BAGNI.**<sup>[6]</sup>

In *Bell Atlantic*, the FCC received assurances that the separate affiliates would not be engaged in joint marketing with the BOC. These assurances were adequate to demonstrate future section 272(g) compliance. The fact situation presented by Qwest's application is inapposite to the situation in *Bell Atlantic*. The quoted language is ample support for the conclusion that inquiries **during discovery** into joint marketing arrangements are relevant to determining whether the BOC is in compliance with section 272, and therefore is able to obtain section 271 approval.

Qwest maintains that section 272(g) recognizes a BOC's "right" to engage in joint marketing. The actual language of that section indicates that joint marketing is not to be "considered to violate the nondiscrimination provisions" contained in subsection (c).

That language does not mean however, that anything done in the name of joint marketing is allowable under the Telecommunications Act of 1996. The mere fact of joint marketing is not discrimination. But the manner of conducting that marketing could well be. DOC is within its rights to explore the degree of coordination between a BOC and its affiliate.<sup>[7]</sup> The discovery requested is tailored to effect that exploration.

DOC has shown the contents of marketing scripts to be relevant to determining the degree of control exercised by Qwest over its affiliate. Qwest has asserted that the discovery is unduly burdensome. If the affiliate is being operated at arm's length, there should not be an undue amount of material covered in DOC's request. There may be instances where Qwest believes that information arguably within the scope of the discovery request is not relevant. Such material may be submitted to the Judge for *in camera* inspection.

R.C.L.

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<sup>[1]</sup> Department Motion, at 1-2 (November 9, 2001).

<sup>[2]</sup> Qwest Reply, at 2 (citing Minn. R. 14000.6700, Subp. 2).

<sup>[3]</sup> Qwest Supplemental Reply, at 3.

<sup>[4]</sup> Department Memorandum, at 7.

<sup>[5]</sup> *Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in South Carolina*, Memorandum Opinion and Order, CC Docket No. 97-208, FCC 97-418, 13 FCC Rcd. 539, ¶ 236 (Dec. 24, 1997)(emphasis added).

<sup>[6]</sup> *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, CC Docket No. 99-295, FCC 99-204, 15 FCC Rcd 3953, ¶ 419 (Dec. 22, 1999)(emphasis added).

<sup>[7]</sup> Qwest maintains that, "Draft documents cannot bring any useful information to a discussion of separate affiliate requirements." Qwest Reply, at 2. Draft documents can be compared to final documents to assess who has ultimate control over policy in a corporate entity. Such an inquiry is properly within this proceeding.