

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

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|---------------------|--------------|
| Gregory Scott       | Chair        |
| Edward A. Garvey    | Commissioner |
| Joel Jacobs         | Commissioner |
| Marshall Johnson    | Commissioner |
| LeRoy Koppendrayner | Commissioner |

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

ISSUE DATE: April 30, 2001

DOCKET NO. P-421/C-01-391

ORDER GRANTING TEMPORARY  
RELIEF AND NOTICE AND ORDER FOR  
HEARING

**PROCEDURAL HISTORY**

On March 22, 2001, AT&T Communications of the Midwest, Inc. (AT&T) filed a complaint against Qwest Corporation (Qwest). In the complaint AT&T alleged that Qwest has violated the terms of the AT&T/Qwest interconnection agreement as well as state and federal law by failing to participate in a cooperative test of the unbundled network element platform or UNE-P ordering and provisioning in Minnesota<sup>1</sup>. AT&T requested an expedited proceeding<sup>2</sup> and temporary relief.<sup>3</sup>

On March 29, 2001, AT&T informed the Commission by letter that it would not object to the Commission taking up both the issue of temporary relief and the issue of whether to consider

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<sup>1</sup> UNE-P is a method for a CLEC to provide competitive local exchange service. Under UNE-P, the CLEC purchases from the ILEC a specific group of unbundled network elements, including the loop, the network interface device, a switch port, switching functionality and transport. With this platform of unbundled network elements, the CLEC can provide basic local exchange service to residential and small business customers.

<sup>2</sup> Pursuant to Minn. Stat. § 237.462 subd. 6.

<sup>3</sup> Pursuant to Minn. Stat. § 237.462 subd. 7.

permanent relief on an expedited basis at one meeting within 30 days from the filing of the complaint.<sup>4</sup>

On March 30, 2001, Qwest filed two letters with the Commission. In the first letter Qwest urged the Commission to set this matter for an expedited hearing on the merits after a short opportunity for discovery. In the second letter Qwest indicated that it did not object to the Commission dealing with AT&T's request for temporary relief beyond the 20 day deadline set forth in the statute.

On April 4, 2001, Qwest submitted a letter to the Commission requesting that Commission staff convene a conference call for that week to discuss future proceedings.

On April 9, 2001, Qwest filed its response to AT&T's complaint.<sup>5</sup>

On April 11, 2001, Qwest filed information and document requests that were inadvertently omitted from Qwest's response.

On April 17, 2001, the Department of Commerce (DOC) filed its comments on AT&T's complaint and Qwest's answer.

On April 17, 2001, AT&T filed a motion for a protective order.

On April 19, 2001, Qwest filed its memorandum in opposition to AT&T's motion for a protective order.

On April 19, 2001, this matter came before the Commission.

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<sup>4</sup> Minn. Stat. § 237.462, subd. 6 (e) requires the party responding to a complaint to file an answer within 15 days after receiving the complaint and subd. 6 (f) requires a Commission determination on whether the filing warrants an expedited proceeding within 15 days of receiving the answer to the complaint. Minn. Stat. § 237.462, subd. 7 (a) requires the Commission to issue a decision on whether to grant temporary relief within 20 days of the filing of the complaint.

<sup>5</sup> Pursuant to Minn. Stat. § 237.462 subd. 6 (e), Qwest's response was due April 6, 2001.

## FINDINGS AND CONCLUSIONS

In this Order the Commission addresses two main issues. The first issue is how to proceed with the complaint and the second is the question of whether temporary relief should be granted. Each of these issues will be considered separately.

### **I. Background Summary**

#### **A. AT&T's Complaint**

In its complaint against Qwest, AT&T claimed that Qwest has violated the terms of the Qwest/AT&T interconnection agreement as well as state and federal law by failing to participate in a cooperative trial test of the unbundled network element platform (UNE-P) ordering and provisioning in Minneapolis. AT&T argued that Qwest's refusal to participate in this test hinders AT&T's ability to determine whether it is feasible for it to offer residential local exchange services in Minnesota through the combination of Qwest's unbundled network elements (UNEs). Without the testing AT&T would not be in a position to offer residential UNE-P service in Minnesota.

The purpose of the AT&T UNE-P test is for AT&T to test the Qwest-AT&T interface involved with UNE-P provisioning. AT&T's test trial is designed to test AT&T's procedures and processes needed to market local service via UNE-P and Qwest's ability to process and provision varying types of transactions and volumes of UNE-P orders.

AT&T requested an expedited proceeding under Minn. Stat. § 237.462, Subd. 6. AT&T indicated that because it has been limited in its ability to test its network, as well as its ordering, provisioning and billing systems, it has been limited in its ability to evaluate entering Minnesota's residential local exchange market on a UNE-P basis. This denies Minnesota residents the advantages of potentially increased competition including potentially lower prices and diversity of telecommunications services, contrary to public policy favoring competition.

AT&T also requested temporary relief<sup>6</sup> pending the resolution of the dispute. This will be discussed below.

AT&T also requested that Qwest be required to pay penalties.<sup>7</sup>

By letter of April 17, 2001, AT&T requested a protective order with regard to Qwest's notices of depositions. AT&T objected to Qwest's request to take depositions of five employees and one outside consultant and also objected to Qwest's document requests.

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<sup>6</sup> Pursuant to Minn. Stat. § 237.462, subd. 7.

<sup>7</sup> Pursuant to Minn. Stat. § 237.462, subd. 1-4.

## **B. Qwest's Response**

Qwest alleged that AT&T's proposed test is not a legitimate pre-market test of AT&T and Qwest's systems. Instead, Qwest alleged that AT&T's test scenario is designed to generate invalid data that AT&T intends to use against Qwest in Section 271 proceedings in other jurisdictions.

Qwest stated that it is willing to work with AT&T in good faith. Qwest indicated it has been willing to fill as many legitimate orders as AT&T can place and assist AT&T in legitimate pre-market testing.

Qwest did not object to an expedited hearing but requested an opportunity for discovery prior to such hearing.

Qwest's response to AT&T's request for temporary relief will be discussed below.

## **C. Comments of the DOC**

The DOC argued that an expedited hearing was warranted because of the seriousness of the allegations.

The DOC recommended that a decision on penalties be deferred until all the facts have been developed and presented.

The DOC's comments on AT&T's request for temporary relief will be discussed below.

## **II. Jurisdiction and Referral for a Contested Case Hearing**

The Commission has jurisdiction over this complaint under Minn. Stat. § 237.081 subd.1(a) and 2(c) and Minn. Stat. § 237.462. Further, the Commission has reasonable basis to investigate the matter.

Under its rules of practice and procedure, the Commission initiates contested case proceedings when there are contested material facts and a legal right to a hearing or when the Commission finds that all significant issues in a case have not been resolved to its satisfaction. Minn. Rules 7829.1000. Here there are contested material facts as well as unresolved significant issues.

In this case, the ordering of an expedited hearing is discretionary with the Commission. The Commission recognizes the concern expressed by the parties that this dispute be resolved as expeditiously as possible. However, the Commission also recognizes the need for a well developed evidentiary record, and in this case this is primary to ensuring a just resolution of this matter. The Commission, for this reason, will refer this case to the Office of Administrative Hearings with a request that the Administrative Law Judge (ALJ) submit his/her report by June 1, 2001.

### **III. Issues to be Addressed**

The Commission requests that the Administrative Law Judge make a determination on the following issues:

- whether it is legally appropriate and in the public interest for AT&T to proceed with its testing; and
- how the test should proceed, if warranted.

The test should be designed to evaluate the operation and interaction of both AT&T's and Qwest's systems.

The Commission further requests that the Administrative Law Judge resolve any pending discovery disputes.

### **IV. Procedural Outline**

#### **A. Administrative Law Judge**

The Administrative Law Judge assigned to this case is Steve M. Mihalchick. His address and telephone number are as follows: Office of Administrative Hearings, Suite 1700, 100 Washington Square, Minneapolis, Minnesota 55401-2138; (612) 349-2544.

#### **B. Hearing Procedure**

Hearings in this matter will be conducted in accordance with the Administrative Procedure Act, Minn. Stat. §§ 14.57-14.62; the rules of the Office of Administrative Hearings, Minn. Rules, parts 1400.5100 to 1400.8400; and, to the extent that they are not superseded by those rules, the Commission's Rules of Practice and Procedure, Minn. Rules, parts 7829.0100 to 7829.3200. Copies of these rules and statutes may be purchased from the Print Communications Division of the Department of Administration, 117 University Avenue, St. Paul, Minnesota 55155; (651) 297-3000.

Under these rules parties may be represented by counsel, may appear on their own behalf, or may be represented by another person of their choice, unless otherwise prohibited as the unauthorized practice of law. They have the right to present evidence, conduct cross-examination, and make written and oral argument. Under Minn. Rules, part 1400.7000, they may obtain subpoenas to compel the attendance of witnesses and the production of documents.

Any party intending to appear at the hearing must file a notice of appearance (Attachment A) with the Administrative Law Judge within 20 days of the date of this Notice and Order for Hearing. Failure to appear at the hearing may result in facts and issues being resolved against the party who fails to appear.

Parties should bring to the hearing all documents, records, and witnesses necessary to support their positions. They should take note that any material introduced into evidence may become public data unless a party objects and requests relief under Minn. Stat. § 14.60, subd. 2.

Any questions regarding discovery under Minn. Rules, parts 1400.6700 to 1400.6800 or informal disposition under Minn. Rules, part 1400.5900 should be directed to Karen Hammel, Assistant Attorney General, 1100 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, (651) 282-5720 or Diane Wells, Utilities Rates Analyst, Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101-2147, (651) 296-6068.

The times, dates, and places of evidentiary hearings in this matter will be set by order of the Administrative Law Judge after consultation with the Commission and intervening parties.

### **C. Intervention**

Current parties to this proceeding are AT&T, Qwest and the DOC.

Other persons wishing to become formal parties to this proceeding shall promptly file petitions to intervene with the Administrative Law Judge. They shall serve copies of such petitions on all current parties and on the Commission. Minn. Rules, part 1400.6200.

### **D. Prehearing Conference**

A prehearing conference will be held in this matter on Tuesday, May 1, 2001, at 8:00 a.m. in the Large Hearing Room, Public Utilities Commission, 121 7th Place East, Suite 350, St. Paul, Minnesota 55101. Persons participating in the prehearing conference should be prepared to discuss time frames, scheduling, discovery procedures, and similar issues. Potential parties are invited to attend the pre-hearing conference and to file their petitions to intervene as soon as possible.

### **E. Time Constraints**

The Commission seeks to issue its final order as quickly as possible, consistent with a fair process, an adequate record, and thoughtful and deliberative decision-making.

The Commission asks the Office of Administrative Hearings to conduct contested case proceedings in light of this goal and these concerns. The Commission respectfully requests that the Administrative Law Judge submit his final report by June 1, 2001, if possible, to permit the Commission to issue a final Order as soon thereafter as possible.

## **V. Application of Ethics in Government Act**

The lobbying provisions of the Ethics in Government Act, Minn. Stat. §§ 10A.01 *et seq.*, apply to cases involving rate setting. Persons appearing in this proceeding may be subject to registration, reporting, and other requirements set forth in that Act. All persons appearing in this case are urged to refer to the Act and to contact the Campaign Finance and Public Disclosure Board, telephone number (651) 296-5148, with any questions.

## **VI. Ex Parte Communications**

Restrictions on *ex parte* communications with Commissioners and reporting requirements regarding such communications with Commission staff apply to this proceeding from the date of this Order. Those restrictions and reporting requirements are set forth at Minn. Rules, parts 7845.7300-7845.7400, which all parties are urged to consult.

## **VII. Procedure After Submission of the ALJ's Report**

The Commission, in order to expedite its review, will allow 7 days for exceptions to the ALJ's report. There will be no reply exceptions.

The Commission will put the matter on its next agenda meeting within seven days after receiving exceptions, subject to variance by the Executive Secretary.<sup>8</sup>

## **VIII. Temporary Relief**

### **A. Legal Basis**

Minnesota Statute § 237.462, subd. 7 provides that the Commission may order temporary relief pending resolution of the complaint. The statute provides that:

After notice and an opportunity for comment, the commission may grant an order for temporary relief under this subdivision upon a verified factual showing that:

- (1) the party seeking the relief will likely succeed on the merits;
- (2) the order is necessary to protect the public's interest in fair and reasonable competition; and
- (3) the relief sought is technically feasible.

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<sup>8</sup> Minn. Rules, part 7829.3100 provides for the Commission to vary time periods established by these rules and to delegate authority to vary time periods to the Executive Secretary.

An order for temporary relief must include a finding that the requirements of this subdivision have been fulfilled.

Minn Stat. § 237.462, subd. 7(c).

**B. Temporary Relief Requested by AT&T**

AT&T requested in its verified complaint that the Commission order Qwest to immediately engage in cooperative testing with AT&T for the ordering and provisioning of residential UNE-P. At the hearing before the Commission, AT&T clarified its request to indicate that AT&T was not requesting that the Commission order that testing begin immediately. Rather, AT&T was requesting that all parties be ordered to take all steps that would be necessary to allow the testing to start immediately after there is a decision on the underlying issues.

AT&T indicated that it would take 5-6 weeks for Qwest to install the lines AT&T is requesting for its testing. Further, AT&T needs about one week to install risers that are part of AT&T's obligation. AT&T's concern was that if AT&T were to prevail on the merits and the testing AT&T requested was ordered, several weeks would then have to be spent on preparing to test, thus delaying AT&T's testing further. AT&T stated that it would compensate Qwest for all work it does to install these lines, whether testing goes forward or not.

AT&T specifically proposed that:

- the certification testing be completed by May 18, 2001;
- billing conductivity testing be completed;
- Qwest accept and install AT&T's order for 1000 lines- 800 retail lines to be converted to UNE-P and 200 new UNE-P orders;
- AT&T compensate Qwest for its work whether or not any testing actually takes place.

**C. Qwest's Position**

Qwest requested that the Commission deny AT&T's request for temporary relief. Qwest argued that AT&T's written request for temporary relief was an exact mirror of AT&T's request for permanent relief and that if such relief were to be ordered it would be dispositive of the proceeding. Qwest requested that before the Commission make such a decision Qwest be given an opportunity for discovery and an opportunity to present its position to the Commission.

**D. Position of the DOC**

The DOC stated that the statutory criteria for temporary relief have been met. It argued that the interconnection agreement on its face supports the conclusion that AT&T is entitled to the testing that it requests.



The DOC argued that the testing requested by AT&T is necessary for AT&T to make a decision on offering local service through the UNE-P in Qwest's territory. There may be a few CLECs competing in isolated markets using UNE-P, but the DOC does not view this as fair and reasonable competition. For this reason temporary relief is necessary to protect the public interest in such fair and reasonable competition.

The DOC further indicated that the relief sought is technically feasible.

#### **E. Commission Action**

The Commission will grant the temporary relief requested by AT&T at the hearing before the Commission. That relief includes ordering both parties to take the steps necessary to be prepared to start testing at such time that the merits of this complaint are decided. Specifically, the Commission will order that:

- the certification testing be completed by May 18, 2001;
- billing conductivity testing be completed;
- Qwest accept and install AT&T's order for 1000 lines - 800 retail lines to be converted to UNE-P and 200 new UNE-P orders;
- AT&T compensate Qwest for its work whether or not any testing actually takes place.

The Commission finds that the statutory criteria set forth above have been met. First, the evidence demonstrates that AT&T will likely succeed on the merits. The Commission relies on the DOC's review of the interconnection agreement and finding that the language of the interconnection agreement, on its face, supports the claim that AT&T is entitled to the testing it has requested. The DOC found no language suggesting otherwise. While final interpretation of the interconnection agreement must await full briefing, the DOC's findings on initial review support the conclusion that AT&T will more likely than not prevail on the merits of its claim.

Second, given that AT&T has specifically stated that this testing is a precondition to AT&T's decision to offer local service through the UNE-P in Qwest's territory, it is clearly in the public interest of promoting fair and reasonable competition that AT&T be able to resolve the issues necessary to its decision with minimal delay. The temporary relief would provide the opportunity to begin testing immediately after final resolution, if AT&T prevails. Further, Qwest would be fully compensated for any work it does.

Finally, the relief sought is technically feasible. There has been no claim by either party that the testing Qwest requests is not feasible. The temporary relief does not require the testing but only that the parties make the necessary preparations to do so.

For these reasons the Commission will grant the temporary relief as requested by AT&T.

Further, Qwest raised the issue whether it would be in violation of its tariff if it were to allow the testing of residential systems in AT&T's downtown business location. For this reason, the Commission will, to the extent necessary, waive any Qwest tariff that may limit the provisions of the temporary relief discussed herein.

#### **IX. Penalties**

The Commission will defer any decision on penalties until after receipt of the ALJ's report.

### **ORDER**

1. A contested case proceeding shall be held on the issues set forth above.
2. Exceptions to the Administrative Law Judge's report shall be filed within 7 days of its submittal to the Commission. There will be no reply exceptions.
3. The following temporary relief shall be granted:
  - certification testing shall be completed by May 18, 2001;
  - billing-conductivity testing shall be completed;
  - Qwest shall accept and install orders for 1000 residential lines, 800 of which are to be retail lines and 200 are to be wholesale lines;
  - AT&T shall compensate Qwest for its work irrespective of whether any testing actually takes place.
4. Any Qwest tariff that may limit the provisions of paragraph 3, above, is hereby waived.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION



Burl W. Haar  
Executive Secretary

(S E A L)

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ATTACHMENT A

BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS  
100 Washington Square, Suite 1700  
Minneapolis, Minnesota 55401-2138

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION  
121 Seventh Place East Suite 350  
St. Paul, Minnesota 55101-2147

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

MPUC Docket No. P-421/C-01-391

OAH Docket No.

NOTICE OF APPEARANCE

Name, Address and Telephone Number of Administrative Law Judge:

Steve M. Mihalchick, Office of Administrative Hearings, Suite, 1700, 100 Washington Square,  
Minneapolis, Minnesota 55401; (612) 349-2544

TO THE ADMINISTRATIVE LAW JUDGE:

You are advised that the party named below will appear at the above hearing.

NAME OF PARTY:

ADDRESS:

TELEPHONE NUMBER:

PARTY'S ATTORNEY OR OTHER REPRESENTATIVE:

OFFICE ADDRESS:

TELEPHONE NUMBER:

SIGNATURE OF PARTY OR ATTORNEY: \_\_\_\_\_

DATE: \_\_\_\_\_