

**STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION**

LeRoy Koppendraye	Chair
Gregory Scott	Commissioner
R. Marshall Johnson	Commissioner
Phyllis Reha	Commissioner
Ellen Gavin	Commissioner

**In the Matter of the Complaint of the
Minnesota Department of Commerce
Against Qwest Corporation Regarding
Unfiled Agreements**

Docket No. P-421/C-02-197

COMMENTS OF TIME WARNER TELECOM

Time Warner Telecom of Minnesota, LLC ("TWTC") respectfully submits these Comments pursuant to the Commission's Order Requiring Plan and Authorizing Comments, dated December 18, 2002, in the above-entitled action, requiring Qwest to propose a remedies plan and authorizing comments on that plan.

I. Introduction.

Qwest's discriminatory behavior has created barriers to entry and has thwarted competition in the Minnesota telecommunications market. As part of the Commission's consideration of appropriate remedies, the Commission by order dated December 18, 2002 required Qwest to file a plan to further competition in order to redress the harm to competition

and competitors that have been disadvantaged by this behavior.¹ Qwest's proposed plan falls grossly short of the Commission's December 18th Order and will only further perpetuate the discrimination that Qwest put in place.

II. To Avoid the Discrimination that Qwest Put in Place, the 10% Discount Must be Available for the Entire Term of the Secret Agreements and for All Purchased Services.

A. The State of Minnesota has an obligation to enforce the intent of the Telecommunications Act. A large and broad base of CLECs to which the discount is available is necessary in order to encourage competition.

The intent of the local competition provisions in the Telecommunications Act of 1996 is to decrease barriers to entry by providing competitive carriers access to the incumbent's infrastructure. As Qwest has demonstrated, incumbent carriers have little economic incentive to assist new entrants in their efforts to secure a greater portion of market share.² In an attempt to prevent the discriminatory behavior that Qwest knowingly and intentionally committed, Congress created a regulatory structure whereby state agencies would join with the FCC to enforce the Telecommunications Act. In the FCC's First Report and Order on Local Competition, the FCC stated that it "expect[s] the states will implement the general nondiscrimination rules set forth herein by adopting, *inter alia*, specific rules...and any other specific conditions they deem necessary to provide new entrants...with a meaningful opportunity to compete in the local exchange markets."³

¹ See In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Docket No. P-421/C-02-197, Order Requiring Plan and Authorizing Comments (issued Dec. 18, 2002) [hereinafter Dec. 18th Order].

² See In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, ¶ 10 (rel. Aug. 8, 1996).

³ See id., ¶ 310.

Under the local competition rules, incumbent carriers are required to publicly file all of their interconnection agreements with state agencies and competitive carriers are permitted to opt into provisions from those previously negotiated agreements. The FCC's pick and choose rule, which the Supreme Court considered the most reasonable provision of the Telecom Act,⁴ provides that:

an incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.⁵

An incumbent carrier is provided a very limited set of instances for which it may deny competitive carriers such terms. In order to deny previously negotiated interconnection terms to a requesting telecommunications carrier, the incumbent must demonstrate that the requesting carrier is not similarly situated to the other competitive carrier. The LEC must prove to a state commission that:

(1) the costs of providing a particular interconnection, service or element to a requesting carrier are greater than the costs of providing it to the telecommunications carriers that originally negotiated the agreement, or (2) the provision of a particular interconnection, service, or element to the requesting telecommunications carrier is not technically feasible.⁶

These are the only instances in which an incumbent can provide an interconnection term to one carrier, but deny it to another. Nowhere do the FCC or PUC rules permit an incumbent carrier to limit the availability of an interconnection term to only its largest, or preferred, competitors in

⁴ See AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 396 (1999).

⁵ 47 CFR § 51.809 (emphasis added).

⁶ Id.

order to secure their assistance in a merger proposal or in order to secure their silence on a Section 271 application before a regulatory body. By limiting the circumstances under which an interconnection term could be denied, Congress and the FCC intended that interconnection terms be available to a very broad base of competitive carriers—because only with a plethora of CLECs actively participating in the local telecommunications market can we hope for a competitive environment. In this proceeding, the Minnesota Public Utilities Commission has an obligation to ensure that competition in the local telecommunications market is furthered, that anti-competitive behavior not be rewarded or excused and in establishing remedies should meaningfully sanction those that have attempted to impede that competition.

- B. A broad discount is necessary to assure non-discrimination. Failure to apply the discount during the full term of the secret agreements and for all ordered services will perpetuate discrimination that Qwest put in place and will result in new discrimination.**

Qwest states in its proposal that applying the discount going forward will result in discrimination; however, Qwest cites to no legal authority or other argument for arriving at this conclusion.⁷ Qwest entered into secret agreements to provide two CLECs with a 10% discount on “the aggregate billed charges for all purchases made...from Qwest from November 15, 2000 through December 31, 2005.”⁸ If Qwest had filed those agreements with the Commission, competitive carriers would have been permitted under Section 252(i) to opt into those agreements and continue to operate under those agreements for the full five year period. Instead, Qwest knowingly and intentionally discriminated against TWTC and a multitude of other CLECs

⁷ See In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Docket No. P-421/C-02-197, Qwest Corporation's Proposed Remedies, at note 4 (filed Dec. 19, 2002) [hereinafter Qwest Corporation's Proposed Remedies].

⁸ Eschelon Contract IV, § 3.

operating in the state when it denied those CLECs the essential information that the ALJ⁹, PUC¹⁰ and FCC¹¹ have determined Qwest is legally required to file with state commissions. CLECs formulated business plans based on anticipation, or lack, of such discount for all ordered services through 2005. Unless the Commission orders Qwest to provide the 10% discount during the full five year term of the secret agreements and for all services a CLEC orders or ordered during that period, the Commission will only perpetuate the discrimination. Direct or indirect action by the Commission which has the effect of perpetuating Qwest's discriminatory behavior must be avoided.¹²

As one of the nation's largest CLECs, TWTC provides competitive telecommunications in 44 markets. TWTC did not fully enter the Minnesota telecommunications market until the middle of 2001. Under Qwest's proposal, the discount would only be available to CLECs that ordered services between January 1, 2001 and June 30, 2002, and only for that time period.

⁹ See In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Docket No. P-421/C-02-197, ALJ's Finding of Fact, Conclusions, Recommendation and Memorandum, at 53 (issued Sept. 20, 2002) [hereinafter ALJ Report].

¹⁰ See In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Docket No. P-421/C-02-197, Order Adopting ALJ's Report and Establishing Comment Period Regarding Remedies (issued Nov. 1, 2002).

¹¹ See In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), Memorandum Opinion and Order, FCC 02-276 (rel. Oct. 4, 2002).

¹² See *City of Bristol v. Earley*, 145 F. Supp. 2d 741, 748 (W.D. Va. 2001) ("Finally, the language of § 253(a) does indicate that Congress, in its prohibition of barriers to entry into the telecommunications field, anticipated that a state may stifle competition without a direct prohibition. The federal statute, therefore, not only mandates that no state statute 'may prohibit' telecommunications competition, but also that no state statute 'may have the effect of prohibiting' telecommunications competition.")

Presumably, the 18 month timeframe was set because that is the amount of time that Qwest and the selected CLECs operated under the secret agreements. It is highly inappropriate and ineffective to merely sanction Qwest by applying the discount retroactively for the period afforded the two competitors. The remedy does not sufficiently match the nature of the violation. Although key business planning and marketplace advantage accrued to Qwest and the selected CLECs directly for approximately 18 months, such advantage and the effects thereof were not limited to that amount of time, and the appropriate duration of the discount should run through 2005.

At a minimum, the 18 month period must run, at a CLEC's option, at least 18 months prospectively from the date of the forthcoming Commission order, so that such a CLEC could have the opportunities generated from a full 18 month discount window. Business decisions made back in 2001 and early 2002 without the benefit of the knowledge of the 10% discount will only be remedied by, at least, a full 18 month fully informed decision making window. Qwest should not be allowed to rewrite or escape the terms of its agreements once its devious efforts have become public and it has been found to be in violation of the law. Accordingly, at a minimum Qwest must be required to (1) file a list of all the specific services to which the discount applied for the two preferred carriers and (2) provide a discount on all future services ordered by new entrants, like TWTC, commencing as of the forthcoming order.

Qwest discriminated against TWTC when it provided a substantial discount to certain CLECs but did not make that discount available to TWTC. If the Commission fails to apply the discount for the full term of the secret agreements or based on services ordered in the future, the discrimination would be further perpetuated. TWTC's competitors would have the benefit of a discount based on 18 months of services; however, TWTC, which did not fully enter the local

market and begin ordering services from Qwest until the middle of 2001, would be substantially deprived of that same discount.

- C. Even if the Commission decides not to provide competitors the full discount, it cannot disregard that the discount proposal in Qwest's remedy proposal ignores the Commission's December 18th Order.

At its hearing on November 19, 2002, the Minnesota Public Utilities Commission ordered Qwest to develop a plan that would "further competition in Minnesota."¹³ Specifically, in its December 18th Order, the Commission required Qwest to present at least two identified approaches. Under each approach, among other things, Qwest was required to include the comparatively modest proposal set forth by the Residential and Small Business Utilities Division of the Office of Attorney General ("OAG-RUD") on November 8, 2002.¹⁴

The OAG-RUD's modest proposal simply modified a previous proposal by Qwest to provide discounts to other CLECs for a time period much shorter and for fewer services than what Qwest previously provided Eschelon and McLeod. The OAG-RUD plan did not propose offering competitive carriers the same 10% discount for the same five year period that Qwest initially agreed to provide to Eschelon. Rather, the OAG-RUD merely proposed that CLECs receive either a credit against future purchases in an amount of 10% of their purchases of Section 251(b) or (c) items in Minnesota under any interconnection agreement or SGAT during the time period from January 1, 2001 through June 30, 2002, and as an alternative the going forward

¹³ See December 18th Order, at 2.

¹⁴ See id., 2-3. Instead of filing comments on November 8, 2002, the OAG-RUD filed a letter stating that it would not file comments until the reply comments on November 15, 2002. For the purposes of this filing, TWTC assumes that the Commission intended to refer to the reply comments of OAG-RUD filed on November 15, 2002. See In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Docket No. P-421/C-02-197, Reply Comments of the OAG-RUD (filed Nov. 15, 2002) [hereinafter Reply Comments of OAG-RUD].

alternative that CLECs be entitled to opt to receive the 10% discount on a going forward basis for 18 months from the date of the Commission's final order in this proceeding.¹⁵

Despite the comparatively modest requirement to include the OAG-RUD proposal in its December 19th filing, Qwest defied the Commission's December 18th Order. In its proposal dated December 19, 2002, Qwest merely reiterated its previous proposal to have the discount apply only to services ordered during the time period from January 1, 2001 through June 30, 2002.¹⁶ Qwest specifically excluded the forward going alternative proposed by the OAG-RUD, thus flatly ignoring the Commission's clear requirement to offer the discount on a prospective basis. It should not surprise the Commission that even when given the gift of drafting its own remedies, Qwest would ignore Commission orders. In order to further competition in the state of Minnesota, Qwest's disdain for the regulatory process must be stopped. The first step that the Commission should make to stop such behavior is to require Qwest to provide the same discount to all requesting competitive carriers.

III. Qwest Must Comply With the Commission's Special Access Measurement Order.

The Commission also ordered Qwest to comply with the wholesale service quality standards proposed by the OAG-RUD.¹⁷ The OAG-RUD's proposal requires Qwest to withdraw

¹⁵ See Reply Comments of OAG-RUD, at 3. Although the OAG-RUD proposal states that the going forward alternative would be available for 16 months, TWTC assumes that this is a typo and that OAG-RUD meant for the going forward alternative to be available for 18 months (the same length of time as January 1, 2001 through June 30, 2002).

¹⁶ See Qwest Corporation's Proposed Remedies, at 6.

¹⁷ See December 18th Order, at 2.

its objections in the wholesale service quality standards proceeding regarding the Commission's authority.¹⁸

On March 4, 2002, the Commission ordered Qwest to provide special access measurements in the wholesale service quality standards docket.¹⁹ Objecting to the Commission's authority over special access services, Qwest has refused to comply with the Commission's March 4, 2002 Order. In order to avoid the most severe penalties that could be imposed upon it in this unfilled agreements proceeding, Qwest should also be required to refrain from further objection to the Commission's authority over special access services and not oppose any appeal of the federal court's recent Memorandum Opinion and Order²⁰ regarding the Commission's March 4, 2002 Order or at the very least stipulate to voluntarily providing special access measurements to the applicable CLECs.

IV. A Meaningful Liaison With Clear Corporate Authority to Make Decisions Must be Made Available to CLECs.

In its December 18th Order, the Commission also ordered Qwest to establish a locally-based contact person with corporate authority to make decisions regarding matters affecting CLECs in Minnesota.²¹ However, once again in its remedy proposal Qwest ignored the Commission's December 18th Order. Under Qwest's proposal, it will not establish the CLEC

¹⁸ See Reply Comments of OAG-RUD, at 3.

¹⁹ See In the Matter of Qwest Wholesale Service Quality Standards, Docket No. P-421/M-00-849, Order Setting Reporting Requirements and Future Procedures (issued Mar. 4, 2002).

²⁰ See Qwest v. Scott, Ct. File No. 0:02cv03563 (D. Minn. Jan. 8, 2003).

²¹ See December 18th Order, at 3 (Approach B, Item 4).

liaison at the outset or possibly ever. Qwest proposes to make a CLEC contact person available to CLECs *only if* "the normal reporting hierarchy is not successful in resolving their disputes."²² Therefore, under Qwest's proposal, before the CLEC liaison is ever available to CLECs, CLECs would need to encounter a dispute with Qwest and then demonstrate that the normal reporting hierarchy within Qwest has been unsuccessful in resolving that dispute. Qwest's proposal does nothing to prevent disputes between itself and CLECs and Qwest's proposal does nothing to make a Qwest decision maker available to resolve CLEC concerns.

Even if the CLEC liaison is made available to CLECs, Qwest has demonstrated throughout this proceeding that is highly unlikely that one of its internal executives will exercise unbiased judgment in favor of competition. In order to be effective, Qwest must demonstrate that the selected individual will have the interests of fair and meaningful CLEC competition in mind. The individual must have proven experience that he or she has actively furthered competition in the Minnesota telecommunications market or similar market.

Additionally, TWTC fears that if not closely monitored, the CLEC liaison will just be another phone call that a CLEC must make before it is allowed to receive service from Qwest. In order to be meaningful, at a minimum, the designated CLEC liaison must have clear and established authority to make decisions that bind the company. For example, the CLEC liaison must at least be a corporate vice president who is able to make decisions that bind Qwest without having to seek the approval of other executives or if it does require the approval of other executives, it must do so within a very short time period (i.e., three business days). Without these safeguards, the CLEC liaison will merely be another barrier to effective competition.

²² Qwest Corporation's Proposed Remedies, at 9.

V. Qwest Must be Required to Automatically Provide Each Requesting CLEC with the Terms of the Secret Agreements without Requiring the CLEC to Undergo the Full Section 252(i) Process.

The Commission ordered Qwest to propose how CLECs would pick and choose provisions in the unfiled interconnection agreements.²³ Qwest's proposal only permits CLECs to opt into 21 of the 26 provisions from the unfiled agreements.²⁴ For five of the provisions, Qwest would require a requesting telecommunications carrier to undergo the full Section 252(i) process in order to receive the benefit of that provision.

By requiring requesting telecommunications carriers to undergo the full Section 252(i) process to receive the benefit of certain provisions from the secret agreements, Qwest attempts to hide behind the same local competition rules that it knowingly and intentionally violated only several months ago. Qwest cannot be allowed to violate the local competition rules and then use those same rules to shield it from compliance with the Commission's order.

We will never fully know the full extent to which Qwest impeded competition in the state of Minnesota. Although there are numerous examples, for demonstrative purposes, a consideration of termination liability assessments (TLAs) is helpful. We will never know how many customers a CLEC could have acquired if Qwest had also suspended TLAs for that CLEC prior to the Commission's TLA order like Qwest did for Eschelon. In light of this inability to quantify the full harm caused by Qwest's illegal behavior, we suggest that Qwest must be required to provide each requesting telecommunications carrier with the same terms as those in the secret agreements without requiring the CLECs to undergo the full blown Section 252(i) process. For example, if a competitive carrier demonstrates that TLAs were imposed upon its

²³ See December 18th Order, at 2-3 (Approach A, Item 1; Approach B, Item 1).

²⁴ See Qwest Corporation's Proposed Remedies, at 12.

customers prior to the Commission's October 2, 2001 order on TLAs, Qwest must refund those assessments to the competitive carrier so that the carrier can pass those savings onto its customers. A competitive carrier which was discriminated against by Qwest should not be required to bear the burden of undergoing the Section 252(i) process in order to receive only the smallest benefit that its competitors have already received.

VI. The Release Must Not Foreclose CLECs From Pursuing Any Remedies or Relief for a Violation or Claim Beyond the Violations Established Under This Docket.

The Commission additionally ordered Qwest to include a release that would preclude CLECs from seeking further damages.²⁵ The release that Qwest proposes is too broad and would potentially preclude CLECs from pursuing remedies or relief for claims outside the scope of the current docket.²⁶ As an alternative, TWTC proposes that the release language should be edited and read as follows:

To receive the discount the CLEC would agree to release any claim against Qwest and its affiliates ~~related to Qwest's operations in Minnesota arising from or related to~~ for the violations found by the Commission here ~~and the agreements associated with these violations~~, including any such claim arising under any provision of federal or state law, including without limitation, 47 U.S.C. §§ 251(b), 251(c) and, 252(i), and Minn. Stat. §§ 237.09, 237.121, subd. 5, and 237.60, subd. 3.

In order to receive the discount, Qwest should not be permitted to require CLECs to surrender legal remedies beyond those arising from the issues at hand. Qwest's unacceptably broad language in its proposal would do just that. Qwest must learn that requiring CLECs to surrender

²⁵ See December 18th Order, at 3 (Approach B, Item 2).

²⁶ See Qwest Corporation's Remedies Proposal, at 6.

legal remedies or entitlements in disregard of the regulatory process (whether overtly or covertly) is exactly what caused Qwest to be in this mess in the first place.

VII. Qwest's Actions Must be Subject to Meaningful Sanctions.

Qwest's remedy proposal demonstrates that Qwest willfully disregards the regulatory process and will continue to ignore Commission orders. The Commission ordered Qwest to include a fine in its remedy proposal.²⁷ In its most recent proposal, Qwest argued once again that it would prefer to make financial investments instead of paying a penalty.²⁸ The Commission has heard this argument before,²⁹ and was well aware that financial investments would be required when it nonetheless ordered Qwest to also include a fine in its remedy proposal.

The Commission has clear authority to impose a very substantial monetary penalty upon Qwest for impeding competition in Minnesota's telecommunications market.³⁰ Qwest knowingly and intentionally violated Sections 251 and 252 of the Telecommunications Act of 1996 in Minnesota by providing favorable treatment to a limited number of CLECs.³¹ The ALJ

²⁷ See December 18th Order, at 2-3 (Approaches A and B).

²⁸ See Qwest Corporation's Proposed Remedies, at 28. Unfortunately, Qwest would prefer to entrench itself as the monopoly provider of local telephone services in Minnesota rather than pay a fine for its knowing and intentional violations of Commission rules.

²⁹ See In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements, Docket No. P-421/C-02-197, Qwest Corporation's Opening Brief Regarding Penalties, at 56-59 (filed Nov. 8, 2002).

³⁰ Minn. Stat. § 237.462 authorizes the Commission to assess monetary penalties for knowing and intentional violations of: (1) sections 237.09, 237.121, and 237.16; or (2) any duty of a telephone company imposed on it by section 251, paragraphs (a), (b) or (c) of the Telecommunications Act of 1996 that relates to service provided in Minnesota.

³¹ See ALJ Report, at 53.

and Commission have established that a penalty is justified under Minn. Stat. 462, Subds. 2 and 3.³² As the Commission recently articulated when examining anticompetitive behavior of Qwest: "The serious nature of this occurrence, combined with the harm to consumers and considering the serious effect Qwest's behavior could have on competition, compel the Commission to assess a penalty designed to have an impact on Qwest."³³ Only a fine in excess of \$50 million will have a real impact on Qwest. After all, Qwest's witnesses have testified that \$50 million is unsubstantial in regards to its yearly capital expense budget.³⁴

VIII. TWTC Concurrs With the Comments of the Coalition Addressing Qwest's Wholesale Service Quality Standards.

Although TWTC has chosen to file its own comments in response to the Commission's December 18th request for comments, the Company also joins in and concurs with the concurrently filed comments of the CLEC/Agency Coalition which address Qwest's proposal of inadequate wholesale service quality standards. TWTC filed separately to address specifically the egregious favoritism Qwest afforded to certain TWTC competitors.

IX. Conclusion.

Qwest's proposal fails to provide redress or remedy for new competitors that delayed or limited entry into the Minnesota telecommunications market as a result of Qwest's failure to

³² See id.

³³ In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation, Docket No. P-421/C-01-391, Order Assessing Penalties at 12 (issued June 18, 2002).

³⁴ See Transcript Vol. 5 117:24-118:13.

meet its obligations to make all competitors aware of the prices or terms provided by Qwest to their competitors. Furthermore, Qwest's proposal requires CLECs to purchase additional services from Qwest before they can take advantage of even a small portion of the discount offered to other competitors. In order to fully avoid the discrimination put in place by Qwest, and set the stage for meaningful competition in the state, the Minnesota Commission is obligated to extend the full discount to all competitive carriers that have been competitively disadvantaged, and certainly, at the very least, should ensure that Qwest's proposal complies with the Commission's December 18th Order.

Respectfully submitted,

TIME WARNER TELECOM OF MINNESOTA, LLC



John F. Gibbs (Atty. Reg. No. 140193)
Rebecca M. Liethen (Atty. Reg. No. 0304219)
Robins, Kaplan, Miller & Ciresi L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
Phone: (612) 349-8500
Fax: (612) 343-4181

Dated: January 21, 2003