BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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IN THE MATTER OF THE INVESTIGATION INTO U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH § 271(C) OF THE TELECOMMUNICATIONS ACT OF 1996	)	DOCKET NO. 97I-198T
IN THE MATTER OF THE COLORADO PUBLIC UTILITIES COMMISSION'S RECOMMENDATION TO THE FEDERAL COMMUNICATIONS COMMISSION REGARDING QWEST CORPORATION'S PROVISION OF IN-REGION, INTERLATA SERVICES IN COLORADO.	)	DOCKET NO. 02M-260T

AT&T'S MOTION TO REOPEN PROCEEDINGS

AT&T Communications of the Mountain States, Inc. and AT&T Local Services on behalf of TCG Colorado (collectively "AT&T") hereby submit the following Motion to Reopen Proceedings in the above-referenced dockets. By this Motion, AT&T seeks an order from this Commission reopening the record in these 271 proceedings in order to allow admission of additional evidence relating to certain unfiled, secret agreements between Qwest and some new entrants. These agreements relate directly to the provision of interconnection services by Qwest, but were not filed as they should have been in accordance with 47 U.S.C. §§251 and 252. As grounds for this Motion, AT&T states as follows:

BACKGROUND

In February, 2002, the Minnesota Department of Commerce ("DOC") filed a complaint against Qwest Corporation before the Minnesota Public Utilities Commission ("MPUC").[1] The DOC's complaint alleges that between July 14, 1999, and July 3, 2001, Qwest Corporation and its predecessor USWest (collectively and separately "Qwest") entered into a series of confidential agreements with competitive local exchange carriers ("CLECs") that Qwest was required to file with the MPUC under 47 U.S.C. §252. The complaint identifies eleven (11) such agreements containing twenty-four (24) independent provisions that Qwest was required to file, but failed or refused to file. The complaint alleges that by making the terms and conditions set forth in these agreements available only to the party CLEC and not to other CLECs, Qwest violated the nondiscrimination provisions of the federal Telecommunications Act (the "Act") found at 47 U.S.C. §251(b) and 47 U.S.C. §251(c).

The complaint further alleges that Qwest's violations of 47 U.S.C. §§251 and 252 were knowing and intentional. Accordingly, the complaint asks for a finding that Qwest engaged in anticompetitive conduct, and for penalties and other remedies.

At present, none of the agreements which are the subject matter of the DOC's complaint are currently on the record here. However, AT&T submits here that such agreements should be considered in these instant proceedings, because they directly relate and refer to: a) Qwest's inability and lack of willingness to provide interconnection on

[1] *See In the Matter of the Complaint of the Minnesota Department of Commerce against Qwest Corporation Regarding Unfiled Agreements*, Before the Minnesota Public Utilities Commission, MPUC Docket No. P-421/C-02-197, OAH Docket No. 6-2500-14782-2.

a nondiscriminatory basis; b) violations of federal law by Qwest, which carry public interest implications affecting Qwest's application for authority to provide interLATA services under 47 U.S.C. 271; and c) the silencing of Qwest's opponents in these and other section 271 proceedings, which Qwest specifically bargained for and sought, and which now impugns the completeness and integrity of the record in this case.

AT&T's Motion seeks to reopen these proceedings so that the Commission may take further evidence and decide whether and to what extent these agreements may have hindered or otherwise adversely affected the Commission's decision-making on various checklist items, and the public interest determination.

ARGUMENT

A. The agreements at issue here directly reflect upon Qwest's unwillingness and inability to provide interconnection on a nondiscriminatory basis.

AT&T's review of the agreements at issue here reveals that each of them directly reflects upon Qwest's unwillingness and inability to provide interconnection to CLECs on a nondiscriminatory basis. More specifically, AT&T finds the following terms and conditions, while not by any means an exhaustive list, to be among the best examples of preferential treatment of some CLECs by Qwest:

1. Qwest offered Eschelon a dedicated on-site provisioning team, while offering AT&T only a single individual representative, with off-site presence, multiple additional responsibilities, and limited availability.

2. Qwest also offered Eschelon the opportunity to "consult" with Qwest in exchange for a ten percent reduction in "aggregate billed charges for all purchases made by Eschelon from Qwest," while at the same time denying AT&T's request for UNE-P testing accommodation in Minnesota.

3. Qwest provided Eschelon a $13.00 per-line per-month credit (which it later increased to $16.00) ostensibly as compensation for Qwest's failure to

provide accurate recording of access minutes through its daily usage files ("DUF"), while AT&T and other carriers struggled in vain to obtain accurate recording in order to properly bill access usage.[2]

4. Qwest provided a similar $2.00 per-line per-month credit to Eschelon for intraLATA toll traffic terminating to Eschelon's switch, where Qwest knowingly provided inaccurate access records to Eschelon for this type of traffic, while forcing other carriers to negotiate each such instance from the ground up.

5. Qwest agreed to provide Covad with more favorable service interval terms than any other carrier, including AT&T.

6. Qwest offered the so-called "small CLEC coalition" in Minnesota the ability to adopt the terms of any effective interconnection agreements that were voluntarily negotiated throughout Qwest's service territory, while requiring AT&T and other carriers to negotiate such adoption on a state-by-state basis only.

In each of these instances, Qwest provided important and useful interconnection services to one CLEC without making the same services available to others. Thus it is clear that Qwest has engaged in discrimination and preferential treatment of one group of CLECs over another. What remains unclear is the extent to which other acts of discrimination have also occurred. Without a thorough investigation into the agreements at issue here, any Commission decision on Qwest's application for 271 authority will be based on an incomplete record. AT&T therefore motions to the Commission to reopen the record in this matter, and conduct the necessary investigation to determine the extent to which these agreements have resulted in harm to competitors, and to competition within the state.

[2] AT&T is informed, and believes, that Eschelon disputes Qwest's characterization of this payment, and maintains instead that the additional $3.00 payment per line is compensation for poor service quality.

B. These agreements show Qwest's willingness to violate federal law, and that in turn carries public interest implications.

Aside from the discrimination inherent in these agreements, there is also the matter of Qwest's failure and refusal to file and seek Commission approval of the agreements, in violation of 47 U.S.C. 252(e). This in turn carries important implications for the public interest analysis of Qwest's 271 application. To quote the FCC directly in this regard:

> Furthermore, we would be interested in evidence that a BOC applicant has engaged in discriminatory or other anti-competitive conduct, or failed to comply with state and federal telecommunications regulations. Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.[3]

As the FCC has noted, the very success of the federal Act depends on BOC compliance; however, that compliance is absent here. The negotiation and implementation of these special agreements, in secret and away from the prying eyes of competitors and regulators alike, not only undermines the potential for the Act to be successful, but also undermines the authority of this Commission, and the integrity of the record in this case.

Qwest has repeatedly asserted on the record that it is providing nondiscriminatory interconnection throughout the state. Indeed, that is one of the fundamental elements of its 271 application.[4] Yet, the evidence here is suddenly to the contrary. Interconnection is

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[3] *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region InterLATA Services in Michigan*, 12 FCC Rcd. 20543 (1997), at para. 397.

[4] For example, the testimony of David L. Teitzel purports to provide totals of the various interconnection agreements entered into between Qwest and new entrants. Then, relying upon these totals, Qwest claims to have fulfilled the public interest and track A requirements of the Act.

in fact not being provided in a nondiscriminatory manner. Moreover, other carriers—unaware of the existence of these special agreements—were unable to contradict the assertions of Qwest in this regard. As a result, the record here misrepresents the true state of competition. Furthermore Qwest is responsible for that misrepresentation, because Qwest has the burden, under the Act, to file these agreements and seek Commission approval for them. By failing to do so, and then representing itself as being in compliance with the federal Act, Qwest is attempting to deceive not only this Commission, but its competitors and the public at large as well.

In addition, the simple fact is that by failing and refusing to file these agreements and seek approval for them, Qwest has also flaunted the authority of the Commission, and undermined the Commission's ability to properly regulate a monopoly carrier, in accordance with the public interest.

At the very least, the discovery of these special agreements warrants further investigation. The question of whether these proceedings have been tainted by misrepresentations by the applicant Qwest is of vital importance to maintaining the Commission's integrity, and a proper respect for the truth.

C. The attempt by Qwest to silence its opponents in these and other proceedings impugns the integrity and completeness of the record in this case.

In at least one instance, Qwest bargained for and received a promise from one of its competitors—Eschelon—to be silent and refrain from opposing Qwest's 271 application in all fourteen states. Thus, by giving preferential treatment to one of its competitors, Qwest not only discriminated against its other competitors, but silenced an

important critic in the very proceedings intended to open the local market to all competitors.

This is yet another reason for concern over the integrity and completeness of the record in this case. Qwest's actions here have actively precluded the Commission from hearing evidence from a potential witness or group of witnesses.

Now that these agreements have been made public in Minnesota—in other words, now that it is no longer subject to Qwest's gag order—Eschelon has come forward with evidence of Qwest's anticompetitive conduct, including:

- The continuing failure of Qwest over a period spanning a year and a half to convert resale lines to UNE-E, in violation of its interconnection agreement;
- A lack of proper support and training for Qwest personnel handling orders for UNE-E service;
- A failure by Qwest to provide accurate daily usage files ("DUF") from which Eschelon can bill interexchange carriers access charges;
- Qwest's reporting of Eschelon's UNE-E lines as UNE-P lines for purposes of the Regional Oversight Committee ("ROC") Performance Indicator Definition ("PID") data, even though the conversion from UNE-E to UNE-P has not yet occurred.
- Qwest's reporting of nearly perfect billing accuracy rate in the PID data, despite the fact that all of the UNE-E rates billed to Eschelon from Qwest are inaccurate.
- Harm to Eschelon and to end-users resulting from Qwest's misrepresentation of UNE-P's availability.

- Harm to consumers and competitors as a result of Qwest's refusal to provide adequate and timely testing.[5]

AT&T believes that the inclusion of evidence from Eschelon and other similar carriers is vital to maintaining the integrity of the record in this case. So long as that record is flawed as the result of Qwest's actions, a proper decision concerning Qwest's 271 application simply will not be possible.

Indeed, the credibility of this Commission is at stake here as well. It is up to the Commission to correct the situation which has developed here.

CONCLUSION

For all of the foregoing reasons, AT&T seeks an order from this Commission reopening these proceedings so that the Commission may take further evidence and decide whether and to what extent these referenced agreements may have hindered or otherwise adversely affected the Commission's decision-making on various checklist items, and the public interest determination.

Respectfully submitted this 13th day of May, 2002.

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC. AND AT&T LOCAL SERVICES ON BEHALF OF TCG COLORADO

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[5] *See* Affidavit of J. Jeffery Oxley, attached here as Exhibit A.