

BEFORE THE
WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION,

Complainant,

v.

ADVANCED TELECOM GROUP, INC.;
ALLEGIANCE TELECOM, INC.; *et al.*,

Respondents.

Docket No. UT-033011

**TIME WARNER TELECOM OF
WASHINGTON LLC'S MOTION TO
COMPEL DISCOVERY RESPONSES
FROM QWEST**

1. Time Warner Telecom of Washington LLP ("TWTC"), an intervenor in this proceeding, brings this motion to compel discovery from Qwest pursuant to WAC 480-07-425. As required by the rule, counsel for TWTC and Qwest have conferred and been unable to resolve their disagreements.

2. After the proposed settlement between Qwest, Staff and Public Counsel was announced, TWTC served certain data requests on Qwest seeking information about the meaning of certain provisions of the proposed settlement and information relevant to the question about whether the size of the penalty was appropriate. Qwest answered the questions about its interpretation of the meaning of the various settlement provisions, which were also supplemented by the oral testimony of its witness Mark Reynolds when the proposed settlement was presented to the Commission on November 29, 2004. However, Qwest objected to and did not answer the

questions that were relevant to whether the proposed penalty is too small. This motion seeks to compel the answers to those questions.

3. Specifically, TWTC asked the following questions:

TWTC Data Request No. 02-008:

Please provide the dollar amount of all purchases of Section 251(b) and (c) services, including interstate and intrastate access charges, by month, made by TWTC from Qwest in Washington for:

- (a) The period of November 15, 2000, through November 15, 2002,
- (b) The period of January 1, 2001, through June 30, 2002, and
- (c) The period of January 1, 2002, through December 31, 2003.

TWTC Data Request No. 02-009:

Please provide a description of the services provided to TWTC that coincide with each of the dollar amounts identified in TWTC Data Request 8 above. By this request, TWTC is asking that Qwest identify each service provided and the total dollar amount for each service, on a month basis for the periods identified in TWTC Data Request 2 above.

TWTC Data Request No. 02-010:

Please provide the dollar amount of all purchases of Section 251(b) and (c) services, including interstate and intrastate access charges, by month, made by all CLECs from Qwest in Washington for:

- (a) The period of November 15, 2000, through November 15, 2002,
- (b) The period of January 1, 2001, through June 30, 2002, and
- (c) The period of January 1, 2002, through December 31, 2003.

TWTC Data Request No. 02-011:

Please provide a description of the services provided to all CLECs that coincide with each of the dollar amounts identified in TWTC Data Request 10 above. By this request, TWTC is asking that Qwest identify each service provided and the total dollar amount for each service, on a month basis for the periods identified in TWTC Data Request 10 above.

4. Qwest objected to the TWTC requests. It responded to TWTC Request No. 02-008 as follows:

Qwest objects to this data request as overly broad and unduly burdensome and as vague by its reference to interstate Section 251(b) and (c) services. Qwest also objects to this data request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. The dollar amount of purchase by TWTC from Qwest in Washington does not relate in any respect to the sufficiency of the settlement agreement. This data request appears to be seeking data to support a claim for CLEC credits. TWTC's testimony (on page 17) proposes the evaluation of the data sought in this data request to calculate CLEC credits. However, in Order No. 15, the ALJ granted Qwest's motion to strike page 17 and other portions of TWTC's testimony regarding CLEC credits. At paragraph 75 of that Order, the ALJ held, with reference to Mr. Gates' testimony proposing CLEC credits as a remedy, "[t]his portion of the testimony, while responsive to Staff's direct testimony concerning remedies and possible harm, proposes remedies that are not within the scope of the Amended Complaint, and raises claims that have not been properly pleaded or raised in the proceeding." TWTC did not seek reconsideration of Order No. 15, and, in fact, TWTC's opposition to the settlement agreement acknowledges that CLEC credits are no longer an issue in this proceeding. *TWTC Opposition to Proposed Settlement*, ¶ 21. Finally, Qwest objects to this data request on the basis that TWTC has access to the information being sought and need not seek it through the use of a burdensome data request to Qwest.

Qwest responded to TWTC Data Request Nos. 02-009, 010, and 011 by simply referring to its response to Data Request 02-008.

5. Qwest's objections to the TWTC data requests are not well taken. First, there is no vagueness about the reference to Section 251(b) and (c) services. 47 U.S.C. 251(b) and (c) address the general obligations of all local exchange carriers and to provide interconnection services and unbundled access to network elements for the transmission and routing of exchange and exchange access service that is nondiscriminatory. The data requests ask for information

about those services. The periods of time specified relate to the time periods the discounts were made available to Eschelon.¹

6. Second, the requested information is directly relevant to the issue of whether the size of the penalty in the proposed settlement is too small. It is TWTC's contention that the proposed penalty does not begin to address the economic benefit Qwest obtained by violating the law's requirement that it file all interconnection agreements and make them available to other CLECs. From TWTC's perspective, the failure to file the discounts that were offered to Eschelon and McLeodUSA was the most egregious violation. If the penalty imposed upon Qwest is to have any deterrent effect, it must be at least sufficiently large to offset the benefit Qwest gained by violating the law. Particularly given the fact that the remedies in this case will do nothing to correct the harm caused by Qwest's violations, it is important that Qwest not be rewarded by its failure to comply with the law's requirements.

7. In *Qwest Corp. v. Minn. Pub. Utils. Comm'n*, Civil No. 03-3476 ADM/JSM, 2004 WL 1920970 (D. Minn., Aug. 25, 2004), the U.S. District Court discussed the standards for an appropriate regulatory penalty in Minnesota's unfiled agreements case. In that case, the Minnesota Public Utilities Commission ("MPUC") had ordered Qwest to pay a fine of \$25.95 million and also to pay restitutional remedies to CLECs. The District Court, however, concluded that the MPUC lacked the statutory authority, under the statutory scheme cited in that case, to impose equitable relief and; therefore, vacated the restitutional remedies from the MPUC's penalty order. The Court, however, upheld the penalty. In doing so, it noted that, in determining the amount of a penalty, the MPUC must consider the following nine factors:

- (1) The willfulness or intent of the violation;
- (2) The gravity of the violation, including the harm to customers or competitors;

¹ Qwest provided this information to TWTC's affiliate in New Mexico in that state's unfiled agreements case, as it did for all of the other participating CLECs.

- (3) The history of past violations;
- (4) The number of violations;
- (5) The economic benefit gained by the person committing the violation;
- (6) Any corrective action taken or planned by the person committing the violation;
- (7) The annual revenue and assets of the company committing the violation;
- (8) The financial ability of the company to pay the penalty; and
- (9) Any other factors that justice may require.

The Court then concluded that the MPUC properly penalized Qwest under these factors and its findings were not arbitrary and capricious. Importantly from the standpoint of this case, the MPUC specifically determined that Qwest intentionally and willfully violated the law and its actions impeded fair competition and harmed customers and non-party CLECs, and that Qwest benefited economically from its actions.

8. TWTC submits that these same factors relied upon by the MPUC and the application of which that was upheld by the U.S. District Court in Minnesota should be considered by this Commission in setting any penalty in this case. The information requested in the data requests that are the subject of this motion is directly relevant to factors 2 and 5 listed by the Court in the Minnesota case, the economic benefit gained by Qwest by violating its legal obligation to file the Eschelon and McLeodUSA secret interconnection agreements and make their provisions available to other CLECs to opt-into.

9. As stated in TWTC's Opposition to the Proposed Settlement, TWTC will urge this Commission to admit supporting evidence and to enter findings of fact and conclusions of law that:

- (a) The agreements identified in paragraphs 12 (Eschelon) and 13 (McLeodUSA) of Order No. 12 are interconnection agreements that should have been filed by Qwest;

- (b) Qwest willfully and intentionally violated Section 252, RCW 80.36.170, .180, and .186 by not filing, in a timely manner, its transactions with Eschelon and McLeodUSA relating to discounts off rates for Section 251(b) and (c) services, including intrastate and interstate services;
- (c) The essence of the Eschelon and McLeodUSA agreements was that Qwest would provide a discount to Eschelon and McLeodUSA on whatever purchases they made; other provisions of the agreements, such as volume commitments, were simply part of the implementation of the agreements and not essential parts of them; and
- (d) Qwest's failure to file the Eschelon and McLeodUSA agreements harmed competition, the CLECs that were deprived of the opportunity to opt-in to the 10 percent discounts offered to Eschelon and McLeodUSA, and consumers who were deprived of the lower prices that could have been offered if CLECs had the benefit of the lower costs that were made available to Eschelon and McLeodUSA.

10. These findings and conclusions would be directly responsive to the factors identified by the Minnesota court as relevant to deciding the appropriateness of any penalty to be imposed, specifically factors 1, 2, 4 and 5. As stated above, the information sought by TWTC's data requests would be directly relevant to factors 2 and 5. Therefore, Qwest should be ordered to provide that information.

11. Qwest keeps trying to deflect attention away from its intentional violations of the law and the harm it has caused. While it is certainly true that TWTC is concerned about remedying that harm to the extent possible, that apparently must await another day. TWTC, as one of the disfavored CLECs that were harmed by Qwest's violations, is also interested in ensuring that a sufficient penalty be imposed in this case to ensure that Qwest will be deterred from future violations, not rewarded by being allowed to retain a substantial economic benefit from violating its legal duties. That is what is at stake in this case and the reason TWTC seeks the requested information.

12. Finally, Qwest's objection that TWTC has access to the information being sought should also be disregarded. Obviously, TWTC does not have access to information about the purchases of services by other CLECs. While TWTC might be able to develop information about its own purchases, Qwest's position about what those purchases were is relevant, and only Qwest can provide that information. Also, since Qwest will be collecting the information about all CLECs, there is no additional burden in separately identifying TWTC's purchases. In any case, TWTC's purchases would simply set the lower bound on the economic benefit Qwest enjoyed by violating the law; it is the information about all CLECs that is most important in assessing the size of Qwest's ill-gotten economic benefit.

II. CONCLUSION

13. WHEREFORE, TWTC respectfully requests that the Commission order Qwest to produce the information sought in TWTC's Data Request Nos. 02-008, 02-009, 02-010 and 02-011.

RESPECTFULLY SUBMITTED this 9th day of December, 2004.

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I hereby certify that I have this 9th day of December, 2004, served the true and correct original, along with the correct number of copies, of the foregoing document upon the WUTC, via the method(s) noted below, properly addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9th day of December, 2004, at Seattle, Washington.


