

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

WASHINGTON UTILITIES AND)	
TRANSPORTATION COMMISSION,)	DOCKET UT-990946
)	
Complainant,)	ORDER ENFORCING SETTLEMENT
)	AGREEMENT
v.)	
)	
1-800-RECONEX, Inc.,)	
)	
Respondent.)	
.....)	

1 **Synopsis.** The Commission orders 1-800-RECONEX (“Reconex” or “Company”) to pay \$166,000 into the Public Service Revolving Fund for violating a Commission order and a settlement agreement between Reconex and the Commission’s staff (“Staff”) to resolve violations of law, rules, and the Company’s tariff.

2 **Parties.** William E. Braun, General Counsel, Hubbard, Oregon, represents 1-800-RECONEX, Inc. Gregory J. Trautman, Assistant Attorney General, Olympia, represents the Washington Utilities & Transportation and its staff.

3 **Proceedings.** On July 23, 1999, the Commission on its own motion filed a Complaint and Order to Show Cause Why Penalties Should Not Be Assessed and Why Service Remedies Should Not Be Ordered and Notice of Prehearing Conference. In that complaint, the Commission alleged that RECONEX’s service and billing practices violated chapter 480-120 WAC, RCW 80.36.130, and the terms of the Company’s filed tariff.

4 On October 8, 1999, the Staff and Reconex filed a Stipulation for Settlement and For Entry of An Agreed Final Order. On November 12, 1999, the Commission entered a Commission Decision and Order Approving Stipulation. On December 30, 1999, the Commission entered an Order Amending and Approving Stipulation, in Part.

5 On October 31, 2000, the Commission denied a motion by Reconex for an extension of time to comply with the First Supplemental Order. The Commission convened a prehearing conference in this matter in Olympia, Washington, on February 21, 2001. On May 18, 2001, the parties stipulated to the admission of a paper record, including testimony and exhibits, and agreed to resolve the remaining issues by submitting cross-motions for summary judgment.

I. BACKGROUND

6 Reconex furnishes prepaid local dial tone. According to the Company, it primarily serves customers who have poor credit histories and are unable to obtain service from traditional telephone companies. Staff first audited Reconex's business practices in September 1998. In that audit, Staff discovered numerous asserted violations of law, Commission rules, and the Company's tariffs. The Commission, on July 26, 1999, served a Complaint and Order to Show Cause Why Penalties Should Not Be Assessed and Why Service Remedies Should Not Be Ordered ("Complaint") against Reconex. The Complaint alleged 372 violations of 13 different regulatory requirements and sought \$372,000 in penalties.

7 **Stipulation and Order.** Reconex responded to the Complaint with a motion asking the Commission to convert the proceeding from an adjudication to an informal complaint or to "technical assistance." Staff and Reconex submitted a Stipulation for Settlement and for Entry of An Agreed Final Order ("Settlement") to the Commission before the Commission ruled on the motion. Under the Settlement, the Commission would not pursue \$186,000 of the \$372,000 in penalties sought in the complaint. The Settlement addressed the remaining \$186,000 in penalties by requiring Reconex to spend a minimum of \$20,000 on a customer education program and a minimum of \$121,000 on system and service improvements.¹ The remaining \$45,000 was suspended pending the outcome of an audit of fifty randomly selected Washington customer accounts, to be performed in September 2000. The Settlement provided that Reconex would pay the \$45,000 if the Company exceeded certain compliance benchmarks.

8 **Amended Stipulation and Order.** Reconex and Staff made a joint motion for clarification and for amendment of the order adopting the Settlement. The parties asked the Commission to clarify that the \$20,000 to be spent on customer education and the \$121,000 to be spent on system and service improvements were not intended to be viewed as suspended penalties, but as "a negotiated commitment agreed to by Reconex in lieu of a penalty rather than an amount as a suspended penalty." *Joint Motion for Clarification and Amendment, at p. 1-2.* The joint motion stated, "The parties agree, however, that Reconex should be liable to pay the amounts which it has agreed to pay for customer education and system and service improvements." *Id, at 2.* The parties asked to amend the settlement agreement as follows:

5A. If Reconex fails to spend the amounts which it has expressly committed to spend for customer education as set forth in paragraph 4 of this Agreement (a minimum of \$20,000) and for system and services

¹ The \$121,000 payment and \$45,000 suspended penalty are at issue in this proceeding, not the \$20,000 the Commission ordered the Company to spend on customer education.

improvements as set forth in paragraph 5 of this Agreement (a minimum of \$121,000), Reconex will become liable for payment of these amounts in full. The Commission reserves the right to enforce payments of such amounts to the public service revolving fund. Proceedings to enforce such payments shall be instituted through the issuance of a Supplemental Order to Show Cause Why Payments Should Not Be Required, which may be brought under this docket number, and the parties shall retain any rights of appeal from such proceeding to which they would otherwise be entitled. Commission rules shall apply to any such proceeding conducted pursuant to this Stipulation.

- 9 The Commission approved the Amended Stipulation noting that it did so based on the Commission's long-standing policy of encouraging negotiated settlements. *First Supplemental Order Amending Order and Approving Amended Stipulation in Part, Docket No. UT-990946 (December 30, 1999), at p. 3* ("First Supplemental Order"). Chairwoman Showalter dissented, stating:

In my view, a straight forward sequencing of our rules and statutes makes more sense in this case: complaint, fact-finding, penalties (if warranted), which could be suspended (if warranted) subject to conditions, and imposition of penalties for failure to perform conditions.

Given the nature of the allegations, I think the public interest requires swift adjudication and, if violations are found, swift penalties. (*Chairwoman Showalter, dissenting*).

- 10 The First Supplemental Order did not modify the requirement that Reconex expend \$121,000 on system or service improvements or pay that amount into the Public Service Revolving Fund ("PSRF"). The language change that the Commission approved in the First Supplemental Order was, as the Commission explained, "one of semantics, since proposed Paragraph 5A sets forth Reconex's obligation to expend the amounts to which it has agreed and, if it does not, provides that Reconex would be liable immediately to pay such amounts into the public service revolving fund." *Id., at p. 3*.

- 11 **Order to Show Cause.** The Amended Stipulation provided that Staff would audit the Company's compliance with Commission rules in September 2000 ("September 2000 Audit"). On September 27, 2000, Reconex sought an extension of time to make the required customer service and system expenditures. Reconex also asked for a stay of Commission action resulting from any failure to comply with the First Supplemental Order discovered in the September 2000 Audit. Reconex at that time had spent \$89,574.40 on system and service improvements. The Company argued it was unable to meet the required expenditures in the time required primarily because of Reconex's acquisition by Nova Communications, LLC, and the new owners reluctance to

support the Company's commitment and obligation. The Commission denied the motion on October 31, 2001.

- 12 In September 2000, Staff conducted an audit of 50 of Reconex's Washington customer accounts. The audit found that the Company failed to meet six of the thirteen benchmarks set in the Amended Stipulation. On February 7, 2001, consistent with the provisions of Paragraph 5a of the Amended Stipulation, the Commission entered a Supplemental Order to Show Cause Why Payments Should Not Be Required. The Commission ordered that:

1-800-RECONEX, Inc. be required to show cause why the Commission should not require it to pay \$45,000.00 in suspended penalties for failure to satisfactorily meet the benchmarks set forth in the Stipulation entered into between Reconex and Commission Staff, as alleged in the September 2000 compliance audit conducted by Commission Staff; and why the Commission should not require Reconex to pay \$121,000.00 to the public service revolving fund for failure to spend a minimum of \$121,000.00 on system and service improvements by the date of the September 2000 audit, as required by the Commission.

- 13 **Stipulated Record.** On May 18, 2001, the parties asked the Commission to proceed on a stipulated written record ("Stipulation"). Reconex agreed to the admission of the direct and rebuttal testimony of Staff witness Mary M. Taylor and accompanying exhibits. Staff agreed to the admission of the direct testimony and accompanying exhibits of Sandra L. Elliot, Manager of the Special Services Department, and William E. Braun, Reconex's Vice-President and General Counsel.

- 14 The parties ask the Commission to resolve this matter on cross-motions for summary judgment, and agree to limit arguments to two substantive issues. The parties pose the following two contested substantive issues: (1) Whether the Commission should require Reconex to pay \$121,000 into the PSRF or allow Reconex to spend on further system improvements the difference between the \$89,574.40 it actually spent and the \$121,000 the Commission ordered it to spend, as opposed to paying the difference into the PSRF; and (2) whether the Commission should allow Reconex to pay the \$45,000 in uncontested penalties, in addition to payment of any other amounts, in installments rather than in a lump sum.

- 15 Reconex admits in the Stipulation that it failed to meet the benchmarks in the First Supplemental Order, and is therefore responsible to pay \$45,000 in penalties to the PSRF. Reconex also admits that, as of the date of the September 2000 Audit, it had spent only \$89,574.40 of the required \$121,000 in system and service improvements.

II. DISCUSSION

16 The Commission's rules encourage parties to enter stipulations of fact and authorize the Commission to approve stipulations. *WAC 480-09-470*. The Stipulation sets out sufficient facts for the Commission to make a decision that is consistent with the public interest. The Commission therefore approves the Stipulation to the extent it resolves factual issues and will address the substantive issues that the parties present.

A. To what extent should the Commission require Reconex to pay \$166,000 into the public service revolving fund?

17 **Commission Staff's arguments.** Staff argues that the Commission should require Reconex to pay the full \$121,000 into the PSRF because Reconex failed to comply with the First Supplemental Order. *Staff's Motion for Summary Judgment, at p. 1, 15*. Staff contends that requiring Reconex to remit the full \$121,000 into the PSRF is justified for the following reasons: (1) The system and service improvements the Commission ordered were improvements Reconex would have had to make in any event; (2) the Settlement was tantamount to giving the company special dispensation for making those improvements; (3) Reconex was already planning to make at least some of the improvements; (4) Reconex's commitment to the Commission was not an inducement to make investments benefiting customers in all states in which the Company does business, as argued in Mr. Braun's testimony; and (5) full compliance with the Commission's rules, which was the intent of First Supplemental Order, was not achieved as a result of the expenditures by Reconex. *Id, at p. 11-15*.

18 **Reconex's arguments.** Reconex maintains in its Response that Staff's interpretation of the Amended Stipulation is "tortured" because it would require that Reconex pay the full \$121,000 into the PSRF even if Reconex had spent \$120,999. *Reconex's Response, at p. 3*. Reconex argues that the language providing for enforcement via a Supplemental Order to Show Cause would be superfluous if the Amended Stipulation is read to require payment of \$121,000 into the PSRF. *Id, at p. 3-4*. Reconex explains that the findings of non-compliance in the September 2000 Audit should be mitigated by the reality that the Commission's rules, applied to the prepaid local dial-tone product, are not simple and straightforward. *Id, at p. 6*.

19 Reconex argues that to require it to pay \$121,000 into the PSRF would be unfair and punitive. *Id, at p. 5*. According to Reconex, requiring it to pay the full \$121,000 into the PSRF would frustrate the intent of the original Stipulation and Order, which the Company argues was not to assess penalties.² *Id*. Reconex argues that it has made a good faith effort to comply with the Settlement and the Commission's Order by spending a total of \$1,166,121.50 on system and service improvements (\$89,574.40 in Washington state). *Id*. Reconex states that it has been ready, willing, and able to

² Reconex admits that it must pay the \$45,000 suspended penalty into the PSRF.

spend the full amount on all system and service improvements. *Id.* It explains that it could not comply because of the transfer of ownership of the company and the fact that the Commission denied its motion for an extension of time to make the required improvements. *Id.*

20 Reconex asserts that the amount it should be required to remit to the Commission, or expend on further system and service improvements, is \$20,956 and not \$31,425.60, the numerical difference between \$121,000 and \$89,574.40. *Id.*, at p. 6. It argues that payment of the lesser amount is appropriate because one of its commitments, Monthly Ongoing Software Maintenance, varies depending on the size of the Reconex account base at the end of each month. *Id.* Reconex maintains that its account base has diminished each month since the Stipulation and Order. *Id.*

21 **Commission Staff's Response.** Staff responds noting that, pursuant to the parties' agreement, the Commission suspended \$121,000 so long as Reconex spent \$121,000 on system and service improvements. *Staff's Response*, at p. 4-5. Staff argues that Reconex's failure to meet the requirement and its own commitment demonstrated lack of good faith. *Id.* Staff argues that, therefore, Reconex should receive the punishment it avoided the possibility of facing in litigation. *Id.*

22 **Discussion and Decision.** Reconex argues that payments should be mitigated because the Commission's rules, applied to the prepaid local dial-tone product, are not simple and straightforward. This argument is not persuasive. According to the stipulated testimony of Staff's witness, Staff worked extensively with Reconex during the Company's attempts to satisfy its obligations, including work to develop the language in the Company's tariff. *Rebuttal Testimony of Mary M. Taylor*, at p. 5. Even if there had been no such communication ensuring that Reconex understood the Commission's rules, if Reconex was confused by the rules it was incumbent on the Company to come to the Commission for an explanation.

23 Reconex argues that it would be "unfair and punitive" to require it pay into the PSRF more than the difference between its commitment and the amount it actually spent. To the contrary, it would be unfair to Reconex's customers and inconsistent with the public interest to allow Reconex to avoid its own commitments and the terms of the First Supplemental Order.

24 The First Supplemental Order is clear on its face. The Commission ordered that if Reconex failed "to spend \$121,000 . . . by the date of the September, 2000 audit, it shall become liable immediately for payment of \$121,000 into the public service revolving fund." See *First Supplemental Order*, at p. 5. The consequence of spending anything less than \$121,000 is that Reconex must pay \$121,000 into the PSRF. The terms of the First Supplemental Order are what binds the parties, not Reconex's interpretation of the Amended Stipulation or the label assigned to the payments. Moreover, if the Commission had intended that Reconex would only be

responsible to pay the difference into the PSRF, it would have explicitly said so in the First Supplemental Order.

25 The Commission provided Reconex with ample time – a period to which Reconex fully agreed – to make the required system and service improvements. Despite that, the Company did not meet its commitment. Reconex has not shown good cause why it should not pay the \$121,000 into the PSRF. In accordance with the First Supplemental Order, the Commission orders Reconex to pay \$121,000 into the PSRF.

26 Reconex also failed, by its own admission, to meet its commitment to comply with the thirteen benchmarks in the Amended Stipulation. *See Stipulation to the Record, at p. 2.* The Commission accepts the parties' stipulation that Reconex failed to meet six of the 13 benchmarks in the First Supplemental Order and is responsible to pay the \$45,000 suspended penalty into the PSRF. The Commission orders Reconex to pay the \$45,000 suspended penalty into the PSRF.³

27 The Commission filed a complaint and order to show cause why Reconex should not be found to have violated Commission rules and its filed tariff, and why it should not pay penalties in the amount of \$372,000 for such violations. If proven the Commission could have ordered payment of \$372,000 into the PSRF in accordance with RCW 84.04.405. Reconex pursued an informal resolution of the Complaint and Order to Show Cause with the Staff. An informal resolution of a proceeding under the Administrative Procedures Act is authorized and strongly encouraged by RCW 34.05.060. The APA provides that agencies may establish by rule specific procedures for attempting and executing informal settlement of matters. The Commission has adopted WAC 480-09-466 regarding stipulations and settlements. The parties in this matter entered into a stipulation, as contemplated in WAC 480-09-466; the Commission exercised its discretion in approving that stipulation. The stipulation and order resolved the potential \$372,000 in penalties by requiring Reconex: (1) to spend \$121,000 in making system improvements by September 2000 as a condition precedent to not paying \$121,000 into the public service revolving fund; (2) to spend \$20,000 providing customer education; and to pay \$45,000 in suspended penalties if it did not meet certain benchmarks in the September 2000 audit. The Commission's First Supplemental Order is a final order that was not appealed. Reconex spent \$20,000 on customer education. Reconex admits that it must pay \$45,000 to the public service revolving fund for its failure to meet the benchmarks in the September audit. Reconex does not argue that it met the condition precedent of spending \$121,000 on system improvements in Washington. It argues instead for some kind of equitable offset to its obligation to pay \$121,000 into the public service revolving fund. It does not seek to negotiate a new settlement with the Staff, or to submit a new

³ The Commission does not address in this Order whether additional penalties are warranted for Reconex's apparent continuing tariff and rule violations, but reserves the right to do so.

Stipulation, but rather to amend the clear provisions of the order. Nor does Reconex argue that the Commission's final order is not conclusive. The Commission will not reopen the proceeding for a renegotiation of the settlement of this issue. In this proceeding for enforcement of the First Supplemental Order, that Order is conclusive. RCW 80.04.410. The Order with its enforcement provisions is a Commission Order, the violation of which may subject Reconex to further penalties under RCW 80.04.380 if it fails to comply.

B. Should the Commission allow Reconex to pay in installments rather than in a lump sum?

- 28 Reconex argues in its Motion that it should not be required to make a lump sum payment because it would be a hardship on the company. *Reconex's Response*, at p. 7. According to Reconex, like other CLECs it faces substantial barriers to earning profits, including competition with monopoly, incumbent providers. *Id.* The Company asks the Commission to allow it to make 12 equal monthly payments if the Commission decides it must pay \$65,956 into the PSRF, or 8 equal monthly payments if the Commission decides it must only pay the \$45,000 penalty in the PSRF. *Id.*, at p. 8.
- 29 Staff addresses this issue in its Response, stating that Reconex has not presented any real evidence of hardship. *Staff's Response*, at p. 2. Staff maintains that Reconex's assertions that it is at a competitive disadvantage are suspect. Staff argues that because Reconex is not competitively classified in Washington and does not serve the same customers that traditional CLECs serve, the Company is in a different competitive position, relative to the incumbents, than traditional CLECs. *Id.*, at 2-4.
- 30 Staff contends that a lump sum payment would not be a hardship to Reconex.⁴ *Id.* According to Staff, if the Commission entertains Reconex's request, it should first require Reconex to open its books to prove specific evidence of hardship. *Id.* Staff argues that deterring future violations and ensuring the company's non-compliance does not go unpunished justify requiring the Company to make payments in a lump sum. *Id.*, at p. 4.
- 31 Reconex has not presented any evidence in this proceeding that paying the \$166,000 would be a hardship. In fact, Reconex states in its motion that it had the resources to live up to its commitments. *Reconex's Response*, at p. 5. Absent evidence showing

⁴ Staff cites a trade press article and revenue reports for the Company in Washington and Oregon presented as an attachment to Staff's brief. The parties did not stipulate to the inclusion of the article into the record and Staff has not asked that it be admitted. Reconex relies on a similar article in its Motion, which is also not a part of the record at this time. The Commission does not consider these documents in this decision.

hardship to Reconex, the Commission orders that Reconex pay \$166,000 into the PSRF within 30 days of the date of this Order.

III. FINDINGS OF FACT

- 32 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, and practices of public service companies, including telecommunications companies.
- 33 (2) Reconex provides telecommunication services to customers in the state of Washington.
- 34 (3) Staff and Reconex stipulated to a written record and resolution of the remaining issues in the case on cross-motions for summary judgment.
- 35 (4) Reconex spent \$89,574.40, by the date of September 2000 Audit, of the \$121,000 the Commission required it to spend on system and service improvements. Reconex's failure to spend \$121,000 on system and service improvements by this date means that Reconex did not fulfill a condition precedent it agreed to include in paragraph 5a of its stipulation with Staff, and means that Reconex must now pay \$121,000 into the Public Service Revolving Fund ("PSRF").
- 36 (5) Reconex failed to satisfy six of the 13 benchmarks set out in the First Supplemental Order. Reconex agrees that this means that it must pay \$45,000 into the PSRF.
- 37 (6) There is no evidence in the record that demonstrates Reconex would suffer any hardship from paying in a lump sum \$166,000 into the Public Service Revolving Fund.

IV. CONCLUSIONS OF LAW

- 38 (1) The Commission has jurisdiction over the parties to and the subject matter of this proceeding.
- 39 (2) The Commission approves the Stipulation to the Record in this proceeding.
- 40 (3) The Commission may impose penalties for violations of its rules, pursuant to RCW 80.04.380, .385, .387, and .390.
- 41 (4) The Commission reserved the right to enforce the payments of the amounts set out in the First Supplemental Order. The First Supplemental Order provided

that if Reconex did not spend \$121,000 on system and improvements by the date of the September 2000 Audit, it would be immediately liable to pay \$121,000 into the PSRF. The First Supplemental Order provided that if Reconex did not meet the benchmarks established in that order it would be immediately liable to pay \$45,000 into the PSRF.

- 42 (5) Reconex should be required to pay \$161,000 into the PSRF.
- 43 (6) Reconex failed to show any cause why it should be allowed to pay \$166,000 into the PSRF in installments. Reconex should pay \$161,000 into the PSRF within 30 days of the entry of this order.

V. ORDER

44 THE COMMISSION ORDERS That 1-800-RECONEX, Inc., pay \$166,000 into the Public Service Revolving Fund on or before the 30th day after the entry of this Order.

DATED at Olympia, Washington, and effective this day of September, 2001.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commission

NOTICE TO ALL PARTIES:

This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-09-810, or a petition for rehearing pursuant to RCW 80.04.200 or RCW 81.04.200 and WAC 480-09-820(1).