

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of

TSS DIGITAL SERVICES, INC.,

Petition For Enforcement of its
Interconnection Agreement with Qwest
Corporation (f/k/a U S WEST
Communications, Inc.,) Pursuant to
WAC 480-07-650

Docket No. UT-063021

ANSWER OF QWEST CORPORATION TO
TSS PETITION FOR ENFORCEMENT OF
INTERCONNECTION AGREEMENT

I. INTRODUCTION

1 Pursuant to WAC 480-07-650, Qwest Corporation (“Qwest”) hereby files its Answer to the Petition for Enforcement of its Interconnection Agreement (“Petition”) filed by TSS Digital Services, Inc. (“TSS”). Qwest denies that the Petition is properly brought for enforcement of an interconnection agreement (“ICA”). Qwest asserts that the ICA does not apply to the accounts or circuits identified in the Petition, that those circuits were purchased under retail contracts, and that there is no prohibition on Qwest pursuing relief for non-payment on those circuits in Superior Court. Qwest further asserts that even if the ICA did apply to these circuits, the Washington Utilities and Transportation Commission (“Commission”) may not require Qwest to dismiss its Superior Court action. Even if it were proper to request dismissal of the Superior Court action as to the two circuits at issue (which it is not) the relief could be sought only on motion to the Superior Court.

II. ANSWER

- 2 Qwest will respond to the allegations in the Petition by reference to the topic headings
contained in the pleading. The factual information contained in this Answer is supported by
the attached Declaration of Scott McIntyre.
- 3 Answering the allegations contained in the section entitled “I. RELIEF SOUGHT”, Qwest
denies the allegations contained therein, except as set forth herein. Qwest admits that the
circuits at issue in this case have an unpaid past due balance owed to Qwest by TSS. Qwest
admits that it has filed suit in Superior Court to recover these unpaid amounts, as well as other
amounts owing by TSS and other related entities. Qwest denies that it was bound to pursue
arbitration on these issues, and specifically denies that the ICA applies to the circuits at issue
in this case, or that the circuits were ordered pursuant to the ICA.
- 4 Answering the allegations contained in the section entitled “III. BACKGROUND”, Qwest
denies the allegations contained therein, except as set forth herein. Qwest admits that it is
party to an ICA with TSS Digital Services LLC, and that the ICA has been amended a number
of times. However, the Petitioner herein is TSS Digital Services, Inc., a different corporate
entity than the one that has entered into the ICA. Qwest denies that the ICA is applicable to
the circuits that were billed under account numbers 206-T42-3616-736 and 206-T31-7757-
564.
- 5 Although TSS Digital Services LLC is registered with the Commission as a telecommunica-
tions carrier, and has an ICA with Qwest, it is permitted to order services under tariff or
contract, outside of the ICA. In addition, to the extent that there are other TSS entities, those
entities may also purchase under tariff or contract. That is what TSS did with these two
circuits. Indeed, TSS admits as much, and attaches the relevant retail contracts to Mr. Ellis’s
Declaration as Exhibits 1 and 3. Each of those agreements contains the following provision at
section 15.2: “This is a retail end user contract.” Furthermore, services ordered under the ICA

would be ordered via either an LSR or an ASR (Local Service Request or Access Service Request). The circuits at issue here were not ordered via LSR or ASR, but rather were ordered through Qwest's agent, Pentastar, a retail sales channel for Qwest. This agent did not interface with customers who were ordering on a wholesale basis.

6 In addition, the circuits were billed in accordance with the rates set forth in the contract, not the rates in the ICA. See, Exhibit 1, representative copies of the summary billing records on each of the circuits, attached hereto. This exhibit shows that each circuit was billed in accordance with the rate set forth in the retail contract – they were not billed under the rates in the ICA, and no resale discount was applied.

7 Because TSS is not asking the Commission to resolve the substantive dispute on these circuits, Qwest generally denies allegations regarding attempts to disconnect the circuits, but does not believe that details of the underlying dispute are relevant to the issues in this proceeding.

8 Qwest further states that to the extent that TSS has or had any right to demand arbitration for these disputed circuits, TSS has waived that right. In early 2004, Qwest sent to TSS two separate arbitration demand letters. Those letters are attached hereto as Exhibit 2. (Attachments to those letters are omitted.) TSS did not agree to voluntarily submit to arbitration, and Qwest then filed suit in state court, as it had advised TSS it might do. Thereafter, TSS has participated for over two years in the state court action, including filing an answer (in which the arbitration issue was not raised) and propounding discovery.¹ Qwest would be substantially prejudiced if it were required to remove these two circuits to arbitration at this point, as the litigation is well advanced and considerable time and resources have been expended. Thus, TSS has waived any right it might have had to an arbitrated resolution.

9 Qwest denies that it was required to proceed under the dispute resolution provisions of the ICA

¹ In addition, TSS has demanded a 12 person jury, filed a motion to compel plaintiff to respond to discovery; and disclosed fact witnesses. TSS also requested and facilitated the signing of a stipulation and protective order.

and therefore denies that refusal to engage in arbitration is a violation of the ICA. Qwest admits that the disputed amounts in this case are the subject of litigation in Thurston County Superior Court.

10 Qwest further states that the Commission is without jurisdiction to order the relief requested. Even if the ICA applied and the Commission otherwise had jurisdiction to order enforcement of the ICA, Qwest has brought an action on this same dispute in Superior Court. Such an action divests the Commission of jurisdiction during the pendency of the Superior Court action. If TSS wishes to make the claim that it does in this action, it must do so through a motion to the Superior Court.²

III. CONCLUSION

11 TSS has failed to make a prima facie showing that the circuits at issue were ordered under or are governed by the ICA. Therefore, a proceeding under WAC 480-07-650 is inappropriate. Furthermore, the Commission is without authority to order the relief requested, even if the ICA were applicable. Under applicable case law, only the Superior Court has jurisdiction at this time to determine the matters raised in this Petition.

DATED this 28th day of March, 2006.

QWEST

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² When an administrative agency and the courts both have jurisdiction over a subject or controversy, the tribunal which first obtains jurisdiction over a particular proceeding does so to the exclusion of the other tribunal until it has exhausted its power over the proceeding. *Mutual of Enumclaw v. Washington State Human Rights Commission*, 39 Wn. App. 213, 216; 692 P.2d 882, 884 (1984).