

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION
COMMISSION

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)	
TEL WEST COMMUNICATIONS, LLC,)	DOCKET NO. UT-013097
)	
Petitioner,)	
)	
v.)	COMMISSION DECISION
)	AFFIRMING IN PART AND
QWEST CORPORATION, INC.,)	REVERSING IN PART
)	RECOMMENDED DECISION
Respondent.)	REGARDING OS/DA AND
)	BILLING DISPUTE ISSUES
.....)	

Synopsis: This Commission order affirms in part and reverses in part a recommended order interpreting provisions in an interconnection agreement between the parties. The Commission reverses the recommended order’s rulings relating to pre-agreement negotiations, and affirms the remainder of the order.

- 1 **Nature of the Proceeding.** This is a proceeding for enforcement of an interconnection agreement between Tel West Communications, LLP (“Tel West”) and Qwest Corporation (“Qwest”) pursuant to WAC 480-09-530.

- 2 **Procedural History.** Tel West on October 31, 2001, filed a Complaint and Petition for Enforcement (“Initial Complaint”) pursuant to WAC 480-09-530. Tel West subsequently filed a First Amended Petition for Enforcement on January 11, 2002 (“Amended Complaint”). The Washington Utilities and Transportation Commission (“Commission”) convened an evidentiary hearing on March 11, 2002. Parties presented closing arguments on March 12, 2002.

- 3 **Recommended Decision.** The presiding administrative law judge entered a recommended order on April 25, 2002, to resolve operator services/directory assistance and billing issues. As relevant here,¹ the recommended order would find that Qwest did not negotiate the Interconnection Agreement with Tel West in good faith, and that a service purchased under the agreement should be converted to a less expensive service without imposition of charges that would otherwise apply. The recommended order also found that Qwest is not obligated under the Telecom Act to strip operator services and directory assistance (OS/DA) access features upon Tel West’s request from lines provided to Tel West under the interconnection agreement.

¹ In this order, we focus on the elements of the recommended order that the parties contest.

Finally, the order refused to impose a 45-day deadline for “expedited” reports related to billing disputes between the two companies.

4 **Written objections to portions of the recommended decision:** Qwest objected to the portions of the recommended order that found bad faith in the negotiation process and attached consequences to that finding. Qwest argued that the issue of good faith in negotiations exceeds the scope of matters authorized for expedited hearing in WAC 480-09-530, and that lack of prior notice to parties that the issue would be addressed and resolved in the proceeding violated Qwest’s Constitutional rights to due process of law. Tel West supported the result of the recommended order, while objecting to the failure to order refunds, to the assessment of credibility of Tel West’s principal, and to the order’s refusal to establish a 45-day standard for expedited investigations and reports.

5 **Oral Arguments.** The Commission heard arguments on the issues raised in the order on May 8, 2002, pursuant to the process established in WAC 480-09-530. Qwest and Tel West both appeared at the appointed time and place, presented arguments, and responded to questions from the Commission.

6 **Commission Decision:** The Commission reverses the portions of the recommended decision that address negotiations leading up to the signing of the interconnection agreement, finding that consideration of those issues would violate parties’ due process rights. The Commission affirms and adopts all other portions of the order.

7 **Appearances.** Brooks Harlow, Miller Nash, LLP, Seattle, Washington, appeared on behalf of Petitioner Tel West. Adam Sherr and Lisa Anderl, attorneys, Qwest Corporation, Seattle, Washington, appeared on behalf of Respondent Qwest.

I. MEMORANDUM

A. BACKGROUND

8 Tel West is a small telecommunications company that provides local exchange service using Qwest facilities. It serves customers who may not qualify for service by the incumbent local exchange company (“ILEC”) by virtue of credit history or other problems. It uses Qwest facilities and provides service as a competitive local exchange company (“CLEC”) pursuant to an interconnection agreement with Qwest that this Commission approved in 2001.

9 Docket No. UT-013097 considers a petition by Tel West under WAC 480-09-530² for enforcement of an interconnection agreement between Tel West and Qwest. Tel

² WAC 480-09-530 establishes expedited procedures for resolving disputes relating to enforcement of interconnection agreements approved by the Commission pursuant to Section 252 of the Federal

West first entered an agreement for service resale with Qwest in 1998. Tel West asked to negotiate a new agreement on May 1, 2001. After engaging in negotiations with Qwest, Tel West signed the new agreement on August 8, 2001. The parties filed the agreement as having been fully negotiated, and the Commission approved the Agreement at an open public meeting on October 31, 2001.

- 10 Tel West filed a petition for enforcement of the agreement pursuant to WAC 480-09-530 on October 31, 2001, the day the agreement was approved. Tel West filed a First Amended Petition on January 11, 2002. The amended petition at page 1 identifies the following issues:

Qwest has violated these agreements by: (1) not provisioning services for Tel West in the same time as it provisions service to itself, (2) not provisioning services for Tel West in the same manner as it provisions service to itself, (3) forcing Tel West to purchase operator service ("OS") and directory assistance service ("DA") even though Tel West never requested them, and (4) providing resale services to Tel West that are inferior in quality to those it provides to itself.

- 11 The Second Supplemental Order bifurcated presentation of Tel West's claims, consistent with the parties' requests. This order arises from the first phase, which addresses the third numbered assertion of the first amended petition, i.e., that Qwest is requiring Tel West to purchase OS/DA with lines that Qwest provides for service to Tel West's customers, in violation of the Telecommunications Act of 1996. Provision of OS/DA services is a significant concern to Tel West, because these services may allow the customer to incur charges for which Tel West may not recover payment.

- 12 Qwest refuses to sell Tel West local exchange service for resale that does not have access to OS/DA. To prevent consumer access to those services, Qwest then sells Tel West an additional blocking service, called Dial Lock, which removes the access, for which Qwest imposes a nonrecurring charge of \$7.00 and a recurring monthly charge of \$3.95.

- 13 The issue raised in the petition for enforcement is whether Qwest's refusal to strip the OS/DA access from lines for Tel West's customers violates the Telecommunication Act of 1996 or other provision of federal law.

- 14 The recommended order presented a studied analysis and came to the conclusion that the federal Act did not identify access to operator services and directory assistance as elements that must be available independently and therefore does not require that

access to the services be stripped from an interconnection line at the CLEC's request. No party here challenges that conclusion.³

15 The recommended order, however, did not stop at that juncture. Instead, it went on to review evidence of record about the negotiations leading up to the current interconnection agreement and about Qwest's service to its own customers.

16 Qwest offers its own customers a service that blocks access to OS/DA under the name of Custom Net. It imposes no nonrecurring charge if the feature is ordered at the time service is ordered, and it imposes a recurring charge of \$2.⁴ The service is considerably less costly than the feature Qwest offered and sells to Tel West.

17 The recommended order noted that although Tel West did not specifically ask Qwest whether it offered another service at lower cost, Tel West objected to buying lines with the OS/DA access and it objected to the requirement that it then buy an additional product to disable that access.

18 The recommended order finds that Qwest's failure to offer Tel West the lower-priced service that it offers to its own customers constituted negotiation in bad faith, and recommends that the Commission find this to be a violation of federal law and the mandate of the parties' interconnection agreement to deal with each other in good faith. The recommended order proposes that the Commission order Qwest to substitute the lower-priced feature and to rebill for the service provided as though the lower-priced service had been provided through the life of the interconnection agreement.

19 The parties did not frame the issue of bad faith in negotiations in the pleadings, did not address the issue with specific evidence or argument, did not address the issue in their arguments relating to remedies, and learned of the analysis for the first time in the recommended order.

20 Qwest offers strenuous objections to the proposal, contending principally that the recommended order, if adopted would constitute a violation of its right to due process of law and that it is beyond the scope of the rule under which relief is sought. Qwest poses other arguments in response to the order's requirements if the Commission rejects its principal contention.

21 Tel West supports the result of the order. Tel West responded during argument that the parsing of the issues should not be done too finely, and that the result of the order

³ Counsel for Tel West noted that the result of the recommended order satisfied its interests, and stated that if that result were reversed, Tel West would consider filing a petition for reconsideration of the final order.

⁴ Qwest imposes a nonrecurring charge of \$24 if the Custom Net feature is ordered after the line providing service is ordered.

is within the broad scope of issues raised in the amended petition's contention that the provisions of the interconnection agreement violate the Telecommunications Act.

22 Tel West contends that the Telecommunications Act is founded upon good faith negotiations, that the evidence put parties on notice of the issue. It argues that because Washington State law as well as clauses in the carriers' own agreements mandated good faith dealings, the order's result was within the scope of the rule. It also contends that the issue is proper under Tel West's plea at the conclusion of its amended petition that the Commission "impose any other relief justified by the evidence."

II. COMMISSION DISCUSSION AND DECISION

23 The Commission reverses the recommended order insofar as it considers whether negotiations were conducted in good faith and insofar as it recommends consequences based on the characterization of the negotiations.

24 It is a fundamental tenet of due process of law that the parties to an administrative proceeding must have notice of the contentions that they must face. *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1101 (1970).

25 Washington Administrative Procedure Act requires notice to parties of the issues in an administrative adjudication. *RCW 34.05.434*. An order based on a hearing in which there was not adequate notice of opportunity to be heard is void. *Esmieu v. Schrag*, 88 Wn.2d 490, 563 P.2d 203 (1977). Notice is required as to each issue. *McDaniel v. DSHS*, 51 Wn. App. 893, 756 P.2d 143 (1988).

26 Where there is sufficient notice and an issue is fully litigated, even though not specified in the pleadings, an administrative law judge's decision may be withheld. *NLRB v. H. Shway & Local Motor Freight Employees, Local 667*, 654 F.2d 254 (6th Cir. 1981). Here, however, it is clear that the original complaint and petition, the first amended petition, and the Commission's notices of hearing made no mention of a question of bad faith negotiations, of the source or sources of the law prohibiting bad faith negotiations, or the potential consequences for negotiation in bad faith. While the parties presented evidence about the negotiation process in conjunction with other claims, the parties did not present evidence intended to demonstrate bad faith negotiations, did not argue the issue of bad faith negotiations, and did not brief the issue of bad faith negotiations.

27 We cannot accept Tel West's argument that bringing forth evidence on one issue entitles the trier of fact to resolve an issue that is not noticed and that the parties have not argued. Evidence that is relevant on one issue does not "raise" another issue. The same evidence may support findings and conclusions relating to several matters. In order to reach each of those matters, however, a tribunal must provide notice and

opportunity to respond to those affected, or the parties must explicitly or by their conduct tacitly waive that notice. The application of the Constitutional provisions are clear.

28 Tel West's contention that the issue is permissible because the Tel West petition asked for any remedies as the Commission finds appropriate under the evidence similarly offers no means to expand the issues. The Commission may have discretion to choose among remedies once a violation of law or rule is established, but that discretion does not extend to the ability to address violations not framed by the pleadings and as to which the parties had no opportunity to present evidence or argument.

29 We reverse the recommended order to the extent that it proposed a finding of bad faith in negotiations and to the extent that it proposed consequences – re-provisioning and repricing – based on the finding.

30 This ruling does not resolve the underlying question. It merely points out that the most fundamental provision of due process under the Constitution and of the State APA – prior notice of the matters at issue – is lacking and that it therefore would violate a fundamental provision of law for us to consider the merits of the matter.

31 It is clear that the parties understand both the need for amended pleadings and how to effect them, as an amended pleading has been filed in this docket. It is also true that the second phase of this proceeding, relating to the remainder of Tel West's petition, may provide an opportunity if parties wish to consider the issue. We need not further address process.

32 **Scope of the Commission Rule, WAC 480-09-530.** Because we rule that our consideration of the issue of good faith negotiations is barred by mandates of due process of law, we need not reach the issue of whether the issue is within the scope of WAC 480-09-530. We make two observations, however, about the matter.

33 First, as Qwest pointed out, the rule was promulgated in an effort to provide a simple and speedy venue for the resolution of simple issues, so parties to an interconnection agreement may get a speedy resolution of issues between them. The further parties seek to take a dispute from the narrow parameters of enforcement defined in the rule itself, the more difficult it is to make the fluid of the litigation fit within the vessel provided for it.

34 The second observation is that the parties by agreement have already taken their dispute beyond the simple scope of the enforcement of interconnection agreement provisions. Looking only at the third claim underlying the amended petition, which has been addressed in this phase of the litigation – the legality of Qwest's refusal to sell a line stripped of the OS/DA access – it seems clear that it is more than a simple

question of whether parties are abiding by the terms of the agreement, but a challenge to the legal basis of the agreement itself.

35 The purpose of the rule is to afford parties a swift and uncomplicated means to resolve uncomplicated issues. While the parties should have some latitude to waive provisions of process (*see, RCW 34.05.050*), recognizing that the rule is to facilitate and not to frustrate dispute resolution, the further the parties take their disputes from the scope of the rule, the more difficult it is for the parties to receive the process their issues deserve and the more difficult it is for the Commission to allocate resources and accomplish the promises of the rule for swift resolution.

36 **Compliance with the Telecommunications Act of 1996.** The recommended order meticulously analyzes the pertinent provisions of law and recommends that the Commission find no violation of federal requirements in Qwest's refusal to sell Tel West lines without OS/DA. No party now challenges that ruling, and Qwest supports it. For purposes of this order, the Commission accepts the result of the recommended order.

37 **Expedited Investigations.** Tel West purchases a screening service from Qwest that blocks access to toll and other services. Qwest concedes that if a relevant charge is incurred by a line subject to the screening service, it is not entitled to payment of the charge. The concern raised here is that when Tel West identifies such charges as improper, Qwest takes what Tel West considers an excessive time to determine whether or not the charge is proper.

38 The recommended order rejected Tel West's arguments that a 45-day limitation should be established under the terms of the parties' interconnection agreement for defining an "expedited" investigation of billing disputes, which have been a recurring concern for the parties. The order rejected the proposal, finding that because investigations vary in scope, the proposed period of time could be excessive for some investigations and inadequate for others.

39 Tel West filed comments opposing the recommended order. It argues that the failure to impose a time limit harms it and puts it at the mercy of a much larger organization with whom it has little bargaining power.

40 We reject Tel West's arguments. We agree with the recommended order that expedition must vary with the scope and nature of the issues under consideration. A simple matter may be investigated within a few days, while a complex matter may require longer than 45 days. In any event, Qwest appears to be reducing the backlog of investigations and the matter may be of lesser concern going forward.

41 **Other matters.** In all other regards, we accept the result of the recommended order, which is affirmed and adopted for the purposes of resolving the issues between the

parties except as modified herein. We identify paragraphs of the recommended order that must be deleted as a result of this decision.⁵

42 **Conclusion.** The Commission reverses the recommended order insofar as it finds and would impose consequences for bad faith in negotiations on the part of Qwest.⁶ In making this decision, the Commission does not rule upon the substance of the contentions.

III. ORDER

43 (1) The Commission affirms and adopts the recommended order of April 25, 2002, in this docket, except insofar as the order found and concluded that Qwest conducted negotiations in bad faith and insofar as the order directed consequences based upon those findings and conclusions.

44 (2) In so doing, the Commission affirms the recommended order with the deletion of the following text:

- Heading "G"
- Paragraphs 101 through 118
- Paragraph 165
- Paragraphs 176 through 178
- Paragraph 182

Dated at Olympia, Washington and effective this ____ day of May, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

⁵ The Commission does not consider an initial or recommended order to be of precedential nature, even if adopted by the Commission, except to the extent that the Commission has specifically in its own order discussed and resolved issues between the parties.

⁶ The Commission does not affirm or reverse the appendix to the recommended order, which is merely an administrative matter.