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BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In The Matter Of
TEL WEST COMMUNICATIONS, LLC
Petition For Enforcement Of Its Interconnection
Agreement With Qwest Communications Pursuant
To WAC 480-09-530

Docket No. UT-013097
PETITION FOR RECONSIDERATION
OF COMMISSION DECISION
AFFIRMING IN PART AND
REVERSING IN PART
RECOMMENDED DECISION
REGARDING OS/DA ISSUES

INTRODUCTION

Tel West Communications, LLC ("Tel West") hereby petitions for reconsideration of the Commission Decision Affirming In Part And Reversing In Part Recommended Decision Regarding OS/DA And Billing Dispute Issues served on May 23, 2002 ("OS/DA Final Order"). This petition is brought on two grounds.¹ First, the Commission erred in concluding that the Recommended Decision needed to be reversed as to its findings of bad faith by Qwest to avoid denial of due process of law. Qwest received more than adequate notice for purposes of constitutional due process protections. Second, the Commission erred in upholding the Recommended Decision's finding that the Interconnection Agreement between Qwest and Tel West ("ICA") requires Tel West to take and pay for OS and DA services from Qwest whether it wants them or not.²

¹ But without waiver of other errors that might exist.

² The OS/DA Final Order contained no analysis whatsoever of the correctness of the Recommended Decision on this contract claim, which was the main claim raised by Tel West in Part I. The Commission may have believed that Tel West did not seek Commission review of the breach of contract claim. However, Tel West made it clear that it disagreed with the Recommended Decision on the breach of contract issue. Tel West's Comments On Recommended Decision Re OS/DA And Billing Dispute Issues,

1 has a great deal of flexibility at the close of the evidence to fashion an appropriate remedy after
2 applying applicable law to the fact adduced at the hearing. For example, suppose a litigant in a
3 civil case alleges negligent misrepresentation in its pleading, but at trial, on cross-examination,
4 an employee of the defendant admits that he knowingly misled the plaintiff. The trial court
5 would be fully justified in entering a judgment making findings of actual fraud. Yet, under the
6 rationale of the Commission's OS/DA Final Order, the Commission would have the plaintiff
7 have to start all over. The plaintiff would have to file a new complaint and have another trial on
8 the theory that otherwise defendant would be denied due process because the plaintiff did not
9 plead fraud.

10 The Commission's OS/DA Final Order is an unwarranted and unnecessary
11 extension of the principles of due process. Tel West's petition complied with the Commission's
12 requirements in Rule 530. The amended petition was verified by Mr. Swickard. Tel West
13 alleged that it "has experienced problems with Qwest's service since 1999." Amended Petition,
14 ¶ 4. Tel West alleged that despite its effort at "good faith negotiations with Qwest over many
15 months" it had been unable to resolve its complaints. Id. Tel West described its first formal
16 meeting with Qwest in January, 2000, before the commencement of formal negotiations of the
17 ICA. Id., ¶ 5. Tel West alleged that it "worked diligently with Qwest to resolve its complaints,
18 but Qwest has refused to fully address them." Id., ¶ 12. Tel West noted how "Qwest improperly
19 requires Tel West to order" Dial Lock blocking service. Id., ¶ 27. Tel West requested that the
20 Commission enter a finding that Qwest's actions "constituted 'willful or intentional misconduct'
21 and 'intentional, malicious misconduct.'" Id., ¶ 33.

22 Furthermore, Tel West requested the specific relief granted by the Recommended
23 Decision with regard to the bad faith findings:

24 Tel West requests entry of initial and final orders. . . directing Qwest to issue such
25 credits or make such payments to Tel West or pay such fines as are within the
26 jurisdiction of the Commission and supported by the evidence presented in this
proceeding.

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Directing Qwest to credit or refund to Tel West all charges Qwest has imposed for blocking OS and DA plus all charges billed to Tel West for Qwest's OS and DA service. . . .

...

[And the] Commission should also impose any other relief justified by the evidence produced in this proceeding.

Id., ¶ 33(d). Thus, Qwest was fully apprised of the breadth of the proceeding and the relief Tel West was seeking.

In addition to the pleadings, Qwest was put on notice by Tel West's pre-filed testimony that the ICA negotiation process was at issue:

Q. DID QWEST RESPOND TO YOUR OS/DA ISSUES?

A. Other than providing us with the contract, no. Qwest never informed Tel West during the negotiation of the current agreement that it intended to require Tel West to take and pay for OS/DA, or that residential access line service and OS/DA were bundled.

Exhibit 1 at 5. The bad faith nature of Qwest's omissions that kept Tel West in the dark until well after the ICA was signed are clearly covered by Mr. Swickard's testimony supporting Tel West's pleadings requesting findings of willful intentional violations:

Q. ARE QWEST'S VIOLATIONS OF THE INTERCONNECTION AGREEMENT WILLFUL AND INTENTIONAL?

A. Yes. Tel West has repeatedly informed Qwest that it does not want OS/DA, and Qwest ignored Tel West's claims and the Current Agreement. Qwest continues to cram OS/DA services and bill Tel West for them, as well as for Dial Lock.

Id. at 10. In summary, Tel West repeatedly expressed its frustration with its inability to get any action by Qwest, including Qwest's failure to even tell Tel West how the new ICA was going to be applied to OS and DA issues.

Qwest's omissions during both the negotiation process and the performance of the contract were quite evident from the pleadings, pre-filed testimony, and even Qwest's own responsive case. For example, Qwest introduced Mr. Taylor's notes of the parties' May 21st

1 meeting which, according to the Recommended Decision's findings, was after Qwest had
2 presented two contract templates to Tel West. Compare Exhibit 19, 60 and 64. At that time,
3 Mr. Taylor listed the status of the OS/DA issue as "no answer." Exhibit 19 at 5.³ Everything
4 about this dispute, including the extensive record, reflects that whatever Qwest's subjective
5 knowledge and intentions were regarding the OS and DA issue, Qwest failed to convey its
6 position to Tel West. Qwest could easily have sent a written response to Tel West's written
7 request (Exhibit 2) to clear up the confusion that obviously existed, but Qwest failed to do so.

8 The second error in the OS/DA Final Order's analysis is that it focuses exclusively
9 on the finding of bad faith in the negotiations and ignores bad faith performance. As Tel West
10 argued strenuously (e.g. Transcript at 461-466), Qwest's good faith obligation is not limited to
11 the negotiations under the provisions of the federal Telecommunications Act. State law requires
12 that the parties perform their contractual obligations in good faith. *Badgett v. Security State*
13 *Bank*, 116 Wash.2d 563, 569 (1991). Qwest was put on notice by Tel West's allegations of
14 "intentional, willful, and malicious" behavior at both its negotiation and performance under the
15 ICA and the prior interconnection agreement that Qwest fell substantially short of the
16 requirement of "good faith." Not only was Qwest silent on the OS/DA issues, the evidence in
17 the proceeding established that Qwest actually recommended the wrong blocking product to Tel
18 West. This fact did not come as a surprise to Qwest, as Qwest itself brought the salient facts to
19 light in its own pre-filed testimony:

20 In fact, Qwest has notified resellers (including Tel West) in late 2001 that dial
21 lock is designed for use by the end-user to control/limit charges on their local
22 service line, including charges for long distance calls and that dial lock is not
designed to function as a toll blocking tool for resellers.

23 Exhibit 41 (Qwest Pre-Filed Response Testimony Of Kathryn Malone). Of course, Qwest did
24 not provide this notice to resellers until after Tel West filed its complaint. Exhibit 43.

25 ³ The exhibit is designated as confidential. However, because the information was supplied by Tel West,
26 Tel West is free to disclose the information as a limited waiver of confidentiality to the extent of the
quoted language.

1 It took a lengthy, hard fought, and very expensive path of litigation for Tel West
2 to finally get the appropriate recommendations and solutions to its OS/DA problems. Inherently,
3 this is not performance of a contract in "good faith," as the ALJ so eloquently noted in his
4 discussion in the Recommended Decision. Qwest cannot claim to have been unfairly surprised
5 or denied due process of law when, by its own admission, it steered and then allowed Tel West to
6 remain with the wrong blocking product to address a problem that Tel West had been
7 complaining about since 1999.

8 Even if the Commission should uphold its final order as to the violation of
9 Section 251 of the Telecommunications Act, at a minimum the Commission should reinstate the
10 remedy ordered by the Administrative Law Judge based on the finding of bad faith performance
11 of the contract by Qwest in violation of state common law regarding interpretation enforcement
12 of contracts.

13 **II. The Commission Should Have Reversed The Recommended Decision's Finding To The**
14 **Extent That It Interpreted The ICA As Requiring Tel West To Purchase OS and DA Services**
From Qwest.

15 The Commission did not address one way or the other the finding of the
16 Recommended Decision that rejected Tel West's arguments regarding proper interpretation of the
17 ICA as it applied to the question of whether or not Qwest could force Tel West to accept and pay
18 for OS and DA services. That issue was extensively briefed by the parties and Tel West will not
19 repeat its arguments here. For convenience of the Commission, Tel West has attached its pre-
20 hearing brief on the issues and requests that the Commission review the ALJ's Recommended
21 Decision on the contract issue and reverse the ALJ, unless the Commission grants Tel West's
22 petition to reconsider as to the finding of bad faith as discussed above.

23 Briefly, the Recommended Decision suffers from several flaws in its contract
24 interpretation. First, the Recommended Decision effectively renders ineffective and meaningless
25 Section 6.2.9 of the ICA. It is a basic principle of contract interpretation that every one of the
26 terms of the contract should be given meaning and effect. *Public Util. Dist. No. 1 v. Wash.*

1 *Public Power*, 104 Wn.2d 353, 373 (1985). If Section 6.2.9 is given effect, then the contract is
2 unambiguous. Under Section 6.2.9 it is clear that OS and DA services are optional at the
3 instance of Tel West.

4 A second flaw in the Recommended Decision is that it creates an ambiguity in
5 spite of Section 6.2.9 by stating that:

6 Before Qwest can choose whether or not to provide access to OS/DA services and
7 Tel West can choose whether or not to accept access to OS/DA services for its
8 resold local exchange service lines, the parties must agree to that arrangement.
No terms or conditions constituting such an agreement are stated within the four
corners of the agreement.

9 Recommended Decision, ¶ 55. The flaw in this analysis is that while it is true that the agreement
10 contains no provisions that specifically state that the parties can choose whether or not to accept
11 or provide OS/DA services, likewise it is true and undisputed that *nowhere in the agreement*
12 *does it specifically provide that Tel West has no choice* whether or not to accept OS/DA services.
13 Thus, the only direct indication one way or another in the ICA as to whether OS/DA is required
14 or optional is the provision of Section 6.2.9. By interpreting the contract as being ambiguous,
15 the Recommended Decision fails to give effect to its unambiguous provisions.

16 Assuming for the sake of argument the agreement is ambiguous, the next flaw in
17 the Recommended Decision is its narrow focus on merely one of Tel West's arguments regarding
18 how to interpret an ambiguous contract. True, there is some scant evidence to support the
19 conclusion that at the time of Exhibit 2, Tel West already had received a copy of Qwest's
20 template. Likewise, there is no dispute that the provisions of Section 6.2.9 did not change
21 between the template (Exhibit 60) and the final ICA. But that does not prove that there was any
22 negotiation or meeting of the minds on interpretation of Section 6.2.9. Indeed, after the
23 purported transmission of both templates (Exhibits 60 and 64), the only evidence in the record
24 reflects that Tel West continued to be in the dark regarding Qwest's position on the "OS and DA
25 issue." Exhibit 19 at 5.

1 to reconsidering the findings on bad faith, the Commission should reconsider its affirmance of
2 the Recommended Decision regarding the interpretation of the contract and grant the relief that
3 Tel West requested in its petition on the OS/DA contract interpretation issue.

4 Respectfully submitted this 31st day of May, 2002.

5 MILLER NASH LLP

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