

SERVICE DATE

FEB 19 1998

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MCIMETRO ACCESS TRANSMISSION)	
SERVICES, INC.,)	
)	DOCKET NO. UT-971158
Complainant,)	
)	
v.)	ORDER GRANTING
)	MOTION FOR
U S WEST COMMUNICATIONS, INC.,)	SUMMARY DETERMINATION
)	
Respondent.)	
)	
.....)	

MEMORANDUM

I. NATURE OF PROCEEDING AND PROCEDURAL HISTORY

On July 17, 1997, MCImetro Access Transmission Services, Inc. (MCI) filed its Formal Complaint and Request for Expedited Proceeding or, in the Alternative, Request for Emergency Interim Relief (Complaint) against U S WEST Communications, Inc. (U S WEST). In the Complaint, MCI alleges a continuing pattern and practice of anticompetitive behavior by U S WEST for failing to accept and process pre-market testing orders.

On August 6, 1997, U S WEST filed its Answer and Affirmative Defenses. U S WEST answered that its obligation to accept and process pre-market testing orders from MCI is governed by an agreement for interconnection between the parties which became effective subsequent to the alleged wrongful acts, and U S WEST requested that the Complaint be dismissed. The Staff of the Washington Utilities and Transportation Commission (Commission Staff) also entered an appearance.

On September 18, 1997, a prehearing conference was conducted before Lawrence J. Berg, Administrative Law Judge. According to an agreed schedule, formal discovery was to begin on January 7, 1998, to allow the parties an opportunity to negotiate a settlement. The parties also discussed whether the MCI Complaint should be amended, but did not reach agreement.

On November 7, 1997, U S WEST filed a Motion for Summary Determination (Motion). On December 8, 1997, MCI and Commission Staff filed responses to the Motion. U S WEST requested and was granted leave to file a reply. U S WEST filed its reply on December 29, 1997.

II. ISSUES TO BE RESOLVED

As discussed below, MCI and U S WEST entered into two successive agreements for interconnection. In this Order the first agreement shall be referred to as the Interim Agreement, and the second agreement shall be referred to as the Definitive Agreement. MCI's Complaint only states claims which arise prior to the effective date of the Definitive Agreement. Four main issues are addressed in this Order:

- Do the agreements between the parties require U S WEST to provide pre-market testing prior to the effective date of the Definitive Agreement, as claimed by MCI;
- Should the Commission require U S WEST to provide pre-market testing prior to the effective date of the Definitive Agreement, as claimed by MCI;
- Has MCI sufficiently stated claims that U S WEST has failed to provide pre-market testing subsequent to the effective date of the Definitive Agreement; and
- Has MCI stated a claim which properly raises the issue whether the Commission has authority to require U S WEST to combine network elements.

III. REVIEW OF THE MCI COMPLAINT

MCI filed its Complaint against U S WEST for its alleged failure and refusal to allow MCI to test telecommunications services in the State of Washington before MCI offered those services to the general public through a published tariff or contract. MCI claims that it properly placed testing orders with U S WEST in connection with its intended resale of certain residential services and for a combination of unbundled network elements (UNEs).

The MCI residential resale test orders were placed with U S WEST on or about June 3 and 7, 1997. The MCI combination of UNE test orders were placed with U S WEST on or about June 3, June 5, and July 2, 1997.¹ U S WEST rejected each of these MCI test orders for the stated reason that U S WEST had no obligation to provide testing services pursuant to the Interim Agreement which was in effect at the time. Based on its claims, MCI requested an order compelling U S WEST to accept and implement testing orders, and other relief.

¹ The MCI Complaint also alluded to unsatisfied demands that test orders be processed on May 9 and June 18, 1997.

IV. THE INTERIM AGREEMENT

The parties entered into an Interim Agreement dated August 26, 1996, following a request to negotiate an interconnection agreement by MCI to U S WEST pursuant to the federal Telecommunications Act of 1996 (the Telecom Act)² and in accordance with the Commission's *Interpretive and Policy Statement Regarding, Negotiation, Mediation, Arbitration, and Approval of Agreements Under the Telecommunications Act of 1996*, Docket No. UT-960269 (June 28, 1996).

The Interim Agreement affirmed that MCI and U S WEST were actively negotiating a Definitive Agreement pursuant to the Telecom Act. The parties also agreed that they did not wish to delay interconnection pending negotiation of interconnection and compensation issues pursuant to federal and state laws. The Interim Agreement's definition of "Definitive Agreement" included "an agreement of the parties or order of a State commission reached through arbitration."³ This definition applies to the Commission Order Approving Interconnection Agreement which was served on August 18, 1997, and became effective on August 20, 1997. Thus, the Interim Agreement was in effect during all of the specific acts alleged in the MCI complaint.

V. THE DEFINITIVE AGREEMENT

An Agreement for Local Wireline Network Interconnection and Service Resale (Definitive Agreement) between MCI and U S WEST was approved by the Commission, effective August 20, 1997.⁴ The Definitive Agreement contains terms and conditions which describe the range of readiness testing to be performed before MCI provides local service to new customers. The Interim Agreement does not include such terms and conditions.

Under the Definitive Agreement, the parties agreed to work jointly and cooperatively to test and implement processes for pre-ordering, ordering, maintenance, provisioning, and billing. The purpose of testing is to establish system and process readiness capabilities. The testing includes, but is not limited to: all interfaces between MCI and U S WEST work centers for service order, maintenance,

² The Federal Telecommunications Act of 1996, Public Law No. 104-104, 101 Stat. 56, codified at 47 U.S.C. § 151 et seq. (1996).

³ See Interim Agreement, Section 1, Definitions, p. 2.

⁴ In the Matter of the Petition for Arbitration of an Interconnection Agreement Between MCImetro Access Services, Inc., and U S WEST Communications, Inc., Pursuant to 47 U.S.C. Section 252, Docket No. UT-960310.

provisioning, billing, and customer usage data; the process for U S WEST to provide customer profiles; the installation scheduling process; network alarm reporting; telephone number assignment; procedures for communications and coordination between MCI and U S WEST; procedures for transmission of customer usage data; and procedures for transmitting bills to MCI for local service.

The systems, processes, and procedures described also have been referred to as Operations Support Systems (OSS). OSS is recognized as a separate network element which incumbent local exchange carriers (ILECs) are required to provide to new entrants. The Definitive Agreement provides that these functionalities are to be tested in order to determine whether U S WEST's performance meets the applicable service parity requirements and other standards.

VI. COMMISSION POLICY

The Commission's Ninth Supplemental Order in Docket No. UT-941464, et al.,⁵ establishes the Commission's policy that parties should engage in negotiations to resolve interconnection issues. That proceeding concerned the general terms and conditions under which competitors for local exchange service would interconnect their local networks. The proceeding was initiated well before the passage of the Telecom Act, and The Ninth Supplemental Order was served just subsequent to the passage of the Telecom Act. In that Order, the Commission agreed with U S WEST that it was impossible to reduce every conceivable interconnection issue between carriers to tariff language, and that it was appropriate to require a contract to memorialize matters unique to a specific interconnection:

The Commission's Interconnection Orders have emphasized negotiations. This approach is consistent with the approach of the recently passed federal Telecommunications Act of 1996. Details such as specific locations of meet points, deadlines, penalties, methods for accounting for toll and local traffic, etc., require negotiation between the two carriers, and a contract is a reasonable outcome of such negotiation. However, the Commission, as did Congress in the Telecommunications Act of 1996, recognizes that it may be difficult or impossible to resolve all issues in a timely manner through negotiation. The Commission has ordered the tariffing of terms and conditions that the parties were unable to resolve satisfactorily through negotiation and that are general in nature. Future disagreement over details shall be handled through mediation and arbitration consistent with federal law.⁶

⁵ See Ninth Supplemental Order Rejecting Tariff Filings, Washington Utilities and Transportation Commission v. U S WEST Communications, Inc., Consolidated Docket Nos. UT-941464, UT-941465, UT-950146, and UT-950265 (March 13, 1996).

⁶ Ninth Supplemental Order Rejecting Tariff Filings, p. 24.

Thus, the Commission intends that certain general terms and conditions for interconnection be established by tariff, but that the details of interconnection be resolved through mediation and arbitration consistent with Section 252 of the Telecom Act. The pre-market testing of systems and processes used to provide local service is the kind of detail the Commission intended carriers to negotiate and to establish as a contractual right and obligation.

MCI and U S WEST acted consistent with the Commission's requirement that disagreements over the details of interconnection be handled through arbitration. In fact, the details negotiated and arbitrated between the parties included terms and conditions relating to pre-market testing.

VII. STANDARD OF REVIEW

WAC 480-09-426(2) provides that a party may move for summary determination if the pleadings filed in the proceeding, together with any properly admissible evidentiary support, show that there is no genuine issue as to any material fact and the moving party is entitled to summary determination in its favor. In considering a motion made under WAC 480-09-426(2), the Commission will consider the standards applicable to a motion made under Civil Rule 56 of the Civil Rules for Superior Court. CR 56 is the summary judgment rule.

CR 56(b) provides that a party against whom a claim is asserted may move with or without supporting affidavits for summary judgment in their favor as to all or any part of a claim. Summary judgment is appropriate where, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."⁷ The Commission must view the evidence in a light most favorable to a non-moving party; however, the non-moving party may not rely upon speculation or on argumentative assertions that unresolved factual issues remain.⁸

Considering these standards the Commission discusses and determines each of the pending issues as follows:

A. MCI'S Contract Claims Arising During The Interim Agreement

U S WEST does not dispute the facts set out in MCI's Complaint. U S WEST argues that the Interim Agreement, which was entered into between the parties, and which was in effect at the time MCI's claims arose, controls the causes

⁷ CR 56(c).

⁸ White v. State, 131 Wn.2d 1, 7, 929 P.2d 396 (1997).

of action. U S WEST also argues that the Interim Agreement governed only the interconnection of the parties' respective facilities and networks and mutual compensation for completing traffic originated on each other's networks. The agreement contained no terms regarding resold local service or the provision of unbundled network elements. Nor did the agreement address or create any obligation to provide for testing of telecommunications services.

U S WEST admits that the Definitive Agreement which was approved by the Commission and became effective on August 20, 1997, contained provisions for the testing of systems and processes used to provide local service. However, U S WEST contends that the Definitive Agreement was not effective at any time material to the Complaint.

MCI does not claim that the Interim Agreement created any obligation for U S WEST to provide for testing of telecommunications services. However, MCI argues that U S WEST had a contractual obligation to perform testing because the Definitive Agreement supersedes the Interim Agreement.

Commission Staff argues that the MCI allegation that U S WEST has failed to fill testing orders is not limited to testing orders made prior to the effective date of the Definitive Agreement. Thus, if MCI can prove that U S WEST has continued to refuse to accept testing orders, the fact that the Complaint was filed prior to the effective date of the Definitive Agreement is not grounds for summary determination.

The Commission recently addressed similar contractual issues in Docket No. UT-971063.⁹ In that matter the Commission considered the enforceability of other aspects of the same two agreements at issue in this case. The Commission decided there are no grounds upon which to apply the Definitive Agreement on a retroactive basis. The Commission takes particular note that there is no express provision in the Definitive Agreement that it will be enforced retroactively.

The Commission finds in its earlier Order that the Interim Agreement controls causes of action which arise during the time period it was effective. Thus, the MCI argument that the Definitive Agreement supersedes the Interim Agreement regarding claims which arose prior to its effective date is rejected. There is no genuine dispute to the fact that the Interim Agreement does not expressly provide for the testing of telecommunications services to be resold. Accordingly, the MCI claims stated in the Complaint are denied.

⁹ MCImetro Access Services, Inc., vs. U S WEST Communications, Inc., Formal Complaint and Request for Expedited Proceeding or, in the Alternative, Request for Emergency Interim Relief, Docket No. UT-971063 (filed June 26, 1997).

B. MCI's Contract Claims Arising During The Definitive Agreement

MCI claims that U S WEST has breached the terms of the Definitive Agreement by rejecting orders subsequent to its effective date. However, this claim is asserted for the first time in MCI's Response to Motion for Summary Judgment (Response) to which MCI attached copies of additional testing requests. This presentation of a claim is defective because it does not comply with the procedures stated in WAC 480-09-400(1) or WAC 480-09-420(5)(b). Accordingly, the issue is whether this defect affects the substantial rights of the parties as provided in WAC 480-09-425(4).

Both parties acknowledge that the Definitive Agreement supersedes the Interim Agreement. The superseding Definitive Agreement establishes an entirely different set of rights and obligations between the parties than the Interim Agreement. In spite of liberally construing the MCI Complaint, the Commission concludes that the defect affects the substantial rights of the parties.

C. Statutory Basis For MCI's Claims

The MCI complaint also asserts that the Commission has jurisdiction over its claims pursuant to RCW 80.01.040 (general powers of the Commission); 80.04.110 (complaints); 80.36.080 (requiring adequate and sufficient facilities); .140 (Commission may order adequate and sufficient facilities); .170 (Commission may remedy undue preference or advantage); .186 (Commission may order access on equal terms); and .260 (Commission may order betterments). These important powers are not diminished by the Commission's policy that the respective rights and obligations of parties seeking interconnection of their networks should be controlled by a contract and that disagreements over the details of interconnection agreements be resolved through arbitration consistent with Section 252 of the Telecom Act.

Nevertheless, the Commission and the parties committed significant resources to the negotiation and arbitration of an interconnection agreement consistent with the Telecom Act. That negotiation and arbitration fulfilled the intent of the Ninth Supplemental Order as previously cited. The statutory powers of the Commission remain available in the event that additional State requirements for intrastate services are necessary to further competition in the provision of telephone exchange service or exchange access. However, the very fact that the parties negotiated terms and conditions related to readiness testing is persuasive that it is not appropriate to invoke these powers in order to establish MCI's entitlement to pre-market testing. Furthermore, the fact that the parties negotiated those terms and conditions in the context of an agreement with a specific effective date is persuasive that the rights of the parties became enforceable on that date, and not sooner.

D. ILEC Obligation To Combine UNEs

The parties argue whether State law provides an independent basis for ordering U S WEST to provide combined network elements to MCI in contrast to the October 14, 1998 decision of the U.S. Court of Appeals for the Eighth Circuit (Eighth Circuit). However, the Complaint is based on U S WEST's rejection of testing orders on the grounds that it had no obligation to provide testing services pursuant to the interconnection agreement in effect at that time. The Complaint does not state a claim that U S WEST rejected testing orders because MCI requested combined elements. Accordingly, this issue is not ripe for decision in this proceeding.

MCI also argues that a factual record is needed to determine U S WEST's testing practices and to determine how U S WEST combines network elements for itself. The Commission will not prejudge the relevance of proposed discovery; however, before any such determination can be made a legally sufficient claim must be stated. MCI's need to conduct discovery relating to combined elements does not cure the defect in the pleadings.

CONCLUSIONS OF LAW

1. The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of this proceeding and the parties.
2. The Interim Agreement which was negotiated by the parties controls causes of action which arose during the time period that it was effective.
3. The Definitive Agreement which was approved by the Commission controls causes of action which arose subsequent to its effective date.
4. The Commission should not order pre-market testing prior to the effective date of the Definitive Agreement as a matter of law.
5. MCI's claim that U S WEST breached the Definitive Agreement is procedurally defective. The procedural defect affects the substantial rights of the parties.
6. The MCI Complaint does not state a claim that U S WEST rejected MCI's test orders because of the request for combined elements; therefore, the issue of MCI's entitlement to combined elements is not ripe for decision.
7. MCI's need to conduct discovery relating to combined elements does not cure the defect in the pleadings.

ORDER

THE COMMISSION ORDERS That:

1. U S WEST Communications, Inc.'s Motion for Summary Determination is granted.

DATED at Olympia, Washington, and effective this 19th day of February 1998.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION



ANNE LEVINSON, Chair



RICHARD HEMSTAD, Commissioner



WILLIAM R. GILLIS, Commissioner

NOTICE TO 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 and WAC 480-09-820(1).