

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

TEL WEST COMMUNICATIONS, LLC,)	
)	DOCKET NO. UT-013097
)	
Petitioner,)	
)	COMMISSION DECISION
vs.)	DENYING PETITION FOR
)	RECONSIDERATION;
QWEST CORPORATION,)	GRANTING MOTION FOR
)	CORRECTION OF OS/DA FINAL
Respondent.)	ORDER
)	
.....)	

1 **Synopsis:** *This decision denies Tel West’s petition for reconsideration of the Commission’s decision affirming in part and reversing in part a recommended decision resolving the interpretation of provisions in an interconnection agreement between Tel West and Qwest regarding operator services/directory assistance (OS/DA) and billing dispute issues.*

2 **Nature of Proceedings:** 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.

3 **Procedural History:** On October 31, 2001, Tel West 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”). Evidentiary hearing took place on March 11, 2002. The parties presented closing arguments on March 12, 2002. On April 25, 2002, the Administrative Law Judge entered a recommended decision to resolve operator services/directory assistance and billing issues.¹

4 The April 25 recommended decision found that:

- (1) Qwest did not negotiate the Interconnection Agreement with Tel West in good faith in violation of Section 251(c)(1) of the Telecom Act of 1996;

¹ The *Second Supplemental Order* in this case bifurcated the presentation of Tel West’s claims into Part A, addressing OS/DA and billing disputes and Part B, addressing provisioning parity issues. In this decision, the Commission addresses only Part A issues brought for review as a result of the April 25 Recommended Decision.

- (2) that a service purchased under the agreement should be converted to a less expensive service without imposition of charges that would otherwise apply;
- (3) that Qwest is not obligated under the Telecom Act to provide basic local exchange service upon Tel West's request unless it is accompanied by directory assistance and operator services.

5 On May 3, 2002, the parties filed comments responding to the recommended decision. On May 8, 2002, the Commission heard oral arguments from the parties.

6 On May 22, 2002, the Commission entered a Commission decision affirming in part and reversing in part recommended decision regarding OS/DA and billing dispute issues. In that decision, the Commission found that the fundamental tenets of due process require notice to the parties of the contentions they must face; that where there is no mention of a question of bad faith negotiations pursuant to section 251(c)(1) in the original petition, the first amended petition and the notices of hearing, or where the parties present no evidence intended to show bad faith negotiations, do not argue the issue of bad faith negotiations and do not brief the issue, there is not sufficient notice that bad faith negotiations are an issue; and, that evidence relevant on one issue does not "raise" another issue to which the evidence may also be relevant. In order to reach such an issue, the Commission must either give notice or the parties must explicitly or by conduct waive notice.

7 The Commission further found that a party's request for any remedies the Commission found appropriate under the evidence does not support an expansion of the issues beyond those noticed. The Commission's discretion to fashion a remedy exists only once a violation of law or rule is established. The Commission cannot find a violation not framed by the pleadings.

8 Finally, the Commission offered the parties the possibility of raising the issue of bad faith negotiations, if properly pleaded, in the second phase of this proceeding.

MEMORANDUM

9 **Background.** 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 services as a competitive local exchange company ("CLEC") pursuant to an interconnection agreement with Qwest approved by the Commission in 2001.

- 10 Tel West initially filed a petition in this docket pursuant to WAC 480-09-530, which establishes expedited procedures for resolving disputes related to enforcement of interconnection agreements approved by the Commission pursuant to Section 252 of the Federal Telecommunications Act of 1996 (“Telecom Act”).
- 11 Tel West first entered an agreement for service resale with Qwest in 1998. Tel West requested negotiation of a new agreement on May 1, 2001. On August 8, 2001, after a period of negotiations, Tel West and Qwest finalized a new agreement. The parties filed the agreement with the Commission as having been fully negotiated and the Commission approved the agreement at an open public meeting on October 31, 2001. Tel West filed its petition for enforcement of the agreement on October 31, 2001.
- 12 **Tel West’s Petition for Reconsideration.** Tel West argues that the Commission first erred in finding that there was inadequate notice to Qwest that the Commission would consider the issue of bad faith negotiations prior to the approval of the interconnection agreement in violation of Section 251(c)(1). Tel West asserts that the it filed its petition pursuant to WAC 480-09-530 which requires only “a description of facts demonstrating failure to comply with the agreement.” WAC 480-09-530(a). Furthermore, there is no requirement to state every conceivable law, rule, regulation or case authority in a pleading. In state court, Civil Rule 9 requires that only when application of laws of another jurisdiction are at stake must a party plead the law. The Administrative Procedures Act requires only a “short and plain statement of the matters asserted.” RCW 34.05.434.
- 13 Tel West points out that its pleadings fully complied with the notice requirements of WAC 480-09-530: the petition was duly verified and indicated that Tel West had experienced problems with Qwest service since 1999; that it had worked with Qwest to resolve its complaints since January 2000; that Qwest improperly required Tel West to purchase a blocking service which was more costly and less effective than other blocking products Qwest could have provided; and that Tel West requested a finding that Qwest’s actions constituted willful or intentional misconduct or intentional malicious misconduct. Furthermore, Tel West requested the Commission to issue credits to Tel West or impose fines or other relief as supported by the evidence in the proceeding.
- 14 Tel West asserts that after the opposing party has notice such as Tel West provided to Qwest, the Commission is free to fashion an appropriate remedy. Tel West uses the example of a litigant in a civil case alleging negligent misrepresentation in a pleading. At trial the defendant admits that he knowingly misled the plaintiff. On those facts, the trial court could enter a judgment of actual fraud.
- 15 Tel West asserts that the second ground for error in the Commission decision was that it focused exclusively on the finding of bad faith in the negotiations prior to the agreement and not on the bad faith performance of Qwest under agreements entered

into since 1998. Tel West points out that state law requires that parties perform their contractual obligations in good faith; that Tel West's allegations of Qwest's intentional, willful and malicious behavior during both negotiations and performance associated with both the prior and the current agreement put Qwest on notice of Tel West's claims; and that Qwest's own prefiled testimony in this case demonstrated that Qwest recommended the wrong blocking product to Tel West, something not corrected until Tel West filed its petition in this case.

16 The third error Tel West assigns to the Commission decision is that it did not address the finding in the Recommended Decision that Section 6.2.9 of the interconnection agreement should be interpreted as requiring Tel West to purchase OS/DA from Qwest in conjunction with the purchase of basic local exchange service. Tel West asserts that the issue was extensively briefed prior to the Recommended Decision and attaches a copy of the prehearing brief it submitted to the Commission addressing the issue.

17 Tel West contends that the recommended decision interpretation of section 6.2.9 renders that provision ineffective and meaningless because it fails to give each contract term meaning and effect. If the terms of the provision are given effect, than the meaning is unambiguous. Instead, the Recommended Decision creates ambiguity in the provision. In fact, while the agreement does not state that the parties can choose whether or not to accept/provide OS/DA, neither does it say there is no choice as to the whether Tel West must accept it. Tel West argues that the language of section 6.2.9 of the agreement resolves the issue rather than creating ambiguity about it.

18 Tel West also contends that even though there may be evidence that Qwest's position had not changed regarding section 6.2.9 because the template agreement provided to Tel West during negotiations contained the same language as the prior agreement as well as in the agreement eventually signed by Tel West, this does not mean there was a meeting of the minds regarding interpretation of that provision and Tel West remained in the dark about Qwest's position on the matter.

19 Finally, Tel West argues that because there is no evidence that the parties understood each other's interpretation of Section 6.2.9, Washington law requires the contract to be construed against the drafter. *Riss v. Angel*, 80 Wn. App. 553, 557 (Div. I 1996), amended, review granted, 129 Wn 2d 1019, affirmed and remanded, 131 Wn 2d 612. Since Qwest drafted the provision in question, it should be construed against Qwest to preclude Tel West having to take OS/DA for resale along with basic local exchange service.

20 **Qwest's Answer.** Qwest responds that the Commission should deny Tel West's petition for reconsideration because Tel West did not raise its objections to the recommended decision's interpretation of the contract in its comments on the

recommended decision or during oral argument at the open meeting where the Commission considered the recommended decision. Qwest asserts that the only objection Tel West made to the contract interpretation was contained in one conclusory sentence in its comments, stating that Tel West believed the Commission should reverse its finding. Qwest concurs with the analysis and conclusions on the issue contained in the recommended decision.

- 21 Qwest also asserts that due process and proper notice are not technicalities. If Tel West had raised the 251(c)(1) claim in its amended petition for enforcement, Qwest would have been able to provide evidence and make argument on the claim. Because the first time the issue was raised was in the recommended decision, Qwest had no opportunity to present its version of events related to pre-contract negotiations.
- 22 Qwest agrees that WAC 480-09-530 does not require Tel West to plead every conceivable law, rule, regulation or case authority in an amended petition for enforcement. But due process does require a party to specifically identify its causes of action so as to allow a responding party an opportunity to defend itself. Qwest cites as authority a Washington Supreme Court decision where a plaintiff who had alleged professional negligence, breach of fiduciary duty and breach of contract could not recover on a claim based on the Consumer Protection Act. *Trask v. Butler*, 122 Wn 2d 835, 845-46 (1994).
- 23 Qwest contends that Tel West's argument muddies the distinction between causes of actions or claims and legal theories or legal authorities. Proper identification of the cause of action by the petitioner allows the respondent to educate itself about the elements of the cause of action and to prepare a case to counter the petitioner's. Tel West's first amended petition for enforcement contained only claims for breach of the interconnection agreement, to which Qwest responded accordingly during the proceeding. Any reference to pre-agreement negotiations was tangential and related solely to the proper interpretation of the terms of the agreement. The Commission reversed the recommended decision because Tel West failed to allege a 251(c)(1) cause of action, not because it failed to state all conceivable legal authorities.
- 24 Qwest agrees that Section 530 requires only a statement of specific facts to commence an enforcement proceeding, but objects that the facts contained in Tel West's pleading, as well as its prayer for relief, did not put Qwest on notice that bad faith in negotiations was an issue. Qwest points out that since Section 530's purpose is to address enforcement of interconnection agreements, it is automatically limited to a that single cause of action and factual statements are limited to supporting that cause of action. Furthermore, Tel West's general prayer for relief is boiler plate, contained in almost every pleading before the Commission. It cannot be found to put Qwest on notice that Tel West sought to litigate 251(c)(1) issues.

- 25 Qwest contends that Tel West's claim of error based on the Commission's attention to pre-agreement negotiations in lieu of a more proper focus on bad faith current performance is unfounded. The recommended decision found no breach of the interconnection agreement, nor any intentional misconduct on the part of Qwest. Instead, the recommended decision based relief exclusively on pre-agreement negotiations in violation of Section 251(c)(1) without proper notice of the issue to Qwest.
- 26 Finally, Qwest asserts that it was surprised by the recommended decision findings based on 251(c)(1) when Tel West, the party with the burden of proof, had not referred to such a claim at any stage of the litigation. Tel West's position was that it was entitled to purchase basic local exchange service for resale without OS or DA, which per se does not require purchase of a blocking mechanism. There is no evidence that Tel West explored any alternative to the Dial Lock mechanism provided to it by Qwest or that Qwest withheld any information from Tel West about such mechanisms as it might have had available to accomplish the same purpose.
- 27 **Qwest Motion for Correction of OS/DA Final Order.** On June 21, 2002 Qwest filed a Motion requesting correction of the Recommended Decision. Qwest states that Paragraph 183 of the recommended decision provided that "[if] Tel West orders blocking or screening services to avoid incurring OS/DA charges, then Qwest must either remove those charges from Tel West's account or not bill them in the first instance." During oral argument on May 8, 2002, the parties agreed that the following language should be added to that paragraph: "unless Tel West is responsible for de-activating Dial Lock or otherwise permitting the service to become inoperable, ineffective or under the control of a third party." The Commission did not order the agreed upon change in the May 23, 2002 decision and Qwest requests that the Commission do so now.

DISCUSSION AND DECISION

- 28 **Notice.** The Commission affirms that there was inadequate notice to Qwest that alleged bad faith in pre-agreement negotiations, in violation of Section 251(c)(1), would be an issue in this case. Even though WAC 480-09-530 requires only a description of facts in the initial pleadings, those facts must demonstrate "a failure to comply with the agreement." Indeed, Tel West's petitions alleged only a request for enforcement of the interconnection agreement. The facts that came into the record pertaining to pre-agreement negotiations were elicited only for the purpose of proving the terms of the agreement. While the Commission does have authority to fashion a remedy based on the facts, the remedy depends on the causes of action asserted and the facts elicited, as well as the context of the regulatory provision alleged to have been violated. Tel West has advanced no argument, that demonstrates the records meet the constitutional requirement that Qwest have sufficient notice of the 251(c)(1)

contentions against it so that it would have an opportunity to respond prior to a Commission decision on the issue.

29 Tel West argues the issue of bad faith. The Commission specifically declined to rule on that issue, but gave leave to parties to raise it in an appropriate context.

30 Tel West asserts that the Commission should have focused on Qwest's bad faith performance under the agreement, rather than bad faith in negotiations prior to the agreement. The Commission disagrees. The disputed portion of the recommended decision found that Qwest violated section 251(c)(1) by engaging in bad faith negotiations prior to the agreement. That section focuses entirely on pre-agreement actions by the parties. Tel West has raised no new arguments to support a finding now that Qwest either breached the interconnection agreement or engaged in any intentional misconduct.

31 **Interpretation of Section 6.2.9.** The Commission rejects Tel West's contention that the Commission erred in not addressing and reversing the interpretation of section 6.2.9 contained in the recommended decision. Tel West failed to address the question of interpretation in its written comments on the recommended decision or in its oral argument to the Commission, except for a short conclusory statement. Tel West offered no legal analysis, no citation of legal authority and no reference to arguments in its prehearing brief. In fact, during the course of oral argument on May 8, 2002, Tel West indicated that it was satisfied with the remedy provided in the recommended decision and did not seek to address the question of interpretation, although Tel West stated it might do so if the recommended decision were reversed. In its petition for reconsideration, Tel West addresses the issue by attaching its prehearing brief to the petition. The Commission finds that the Recommended Decision fully considered those arguments and arrived at the proper decision on the matter. The Commission accepts the result of the initial order for purposes of this proceeding.

32 **Construing Provisions Against the Drafter.** The Commission finds unpersuasive Tel West's argument that the Commission should interpret the provisions of section 6.2.9 against Qwest because Qwest drafted the language. Tel West cited the *Riss* case in support of this argument. The *Riss* case is inapposite because it pertains to enforcement of a land covenant, not to the terms of an agreement negotiated between two parties.

33 **Qwest Motion for Correction of OS/DA Decision.** The Commission agrees that paragraph 183 of the recommended decision should be modified based on the agreement of the parties during oral argument on May 8, 2002.

34 **Conclusion.** The Commission denies Tel West's Petition for Reconsideration and orders that the Recommended Decision be modified in accord with the agreement of the parties.

ORDER

- 35 (1) The Commission denies Tel West’s Petition for Reconsideration.
- (2) The Commission further modifies the Recommended Decision by adding to the text of paragraph 183, after the words “in this instance”, the following language: “unless Tel West is responsible for de-activating Dial Lock or otherwise permitting the service to become inoperable, ineffective or under the control of a third party.”

Dated at Olympia, Washington and effective this _____ day of July, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner