

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

**QWEST CORPORATION'S MOTION
FOR SUMMARY DETERMINATION
AND DISMISSAL**

I. INTRODUCTION

- 1 Pursuant to WAC 480-07-380 and the procedural schedule established herein, Qwest Corporation (“Qwest”) files this Motion for Summary Determination, asking that the Commission dismiss the Petition of TSS Digital Services, Inc. (“TSS”). The basis for this Motion is threefold, and is generally set forth in Qwest’s Answer, filed on March 28, 2006 and incorporated herein by this reference.
- 2 First, regarding the question of whether WAC 480-07-650 properly applies to this case, Qwest

is entitled to a determination as a matter of law that the relief sought by TSS is not available for circuits that TSS purchased under a retail contract as opposed to an interconnection agreement (“ICA”). Petitioner herein is the party who entered into the retail contracts. Petitioner herein does not even have an ICA with Qwest. The ICA that Qwest has with a TSS entity is with TSS Digital Services, LLC, not TSS Digital Services, Inc. Second, Qwest is entitled to a determination as a matter of law that regardless of how the circuits were purchased, the Commission is without jurisdiction to order the relief requested because the entire dispute between the parties is now (and has been for two years) in the Thurston County Superior Court and that tribunal has jurisdiction over the subject matter of the dispute until that case comes to a close. Finally, Qwest is entitled to a determination as a matter of law that even if the Commission had jurisdiction to order Qwest to dismiss certain aspects of its Thurston County lawsuit and engage in arbitration, the Petitioner has waived any right it may have had to request arbitration.

II. ARGUMENT

A. Standard for Summary Determination

3 Summary determination should be granted if “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” WAC 480-07-380(2)(a). In considering a summary determination motion, the Commission is to “consider the standards applicable to a motion made under CR 56 of the Washington superior court’s civil rules.” *Id.* This language on summary determination is drawn virtually verbatim from state and federal summary judgment rules. CR 56(c); Fed. R. Civ. P. 56(c). A defending party may move for summary judgment with or without supporting affidavits. CR 56(b). In this case, Qwest’s motion for summary determination is supported by the declarations of Scott McIntyre (attached to Qwest’s Answer) and Florine Clark (attached hereto).

4 No material facts are in dispute for purposes of this motion, so summary determination can be entered. “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Furthermore, summary judgment must be entered against the non-moving party who fails to make a showing sufficient to establish the existence of an element, which is essential to his case and upon which he will bear the burden of proof at trial. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986).

5 To withstand a motion for summary determination, the opposing party must set forth specific evidence showing that there is a genuine issue of material fact in dispute. CR 56(e); Fed R. Civ. P. 56(e). The opposing party cannot respond with only his conclusions and allegations, but must establish the existence of a fact (“an event, an occurrence, or something that exists in reality”) that would raise a genuine issue for trial. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359 (1988). If the defendant is the moving party, and the plaintiff fails to establish the existence of a fact that would raise a genuine issue at trial, then the defendant’s motion should be granted. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 (1989).

B. Qwest is Entitled to Summary Determination and Dismissal in this Matter

6 In this case, the material facts are not in dispute – TSS candidly admits in its Petition that it could purchase circuits “either” pursuant to the ICA “or” under a retail contract. *Petition at p.* 2. TSS thus admits that only one document can govern the circuits. TSS then admits that the circuits were purchased by TSS Digital Services pursuant to retail contracts, thereby identifying that the ICA does not apply. *Declaration of Thomas Ellis, ¶ 5, and contracts attached as Exhibit 1*. Each of these contracts explicitly states that it is a “retail end user contract”. *Qwest Answer, ¶ 5*. The Petitioner has not alleged that the pricing on these circuits was pursuant to the ICA, and indeed Qwest’s evidence establishes that the circuits were priced

pursuant to the retail contract, not the ICA. *Qwest Answer*, ¶ 6. Furthermore, the only ICA Qwest has with any TSS entity is an ICA with TSS Digital Services, LLC, who is not a party to this case. See Exhibit 1, attached hereto, for a full and correct copy of that ICA, filed with the Commission under Docket No. UT-003051.

7 Other potentially relevant facts are also not disputed. TSS agrees that the circuits at issue in this case are the subject of an action by Qwest in Thurston County Superior Court.

Declaration of Thomas Ellis, ¶ 9. And TSS will be unable to dispute that Qwest has expended considerable resources on that action, that TSS has willingly and fully participated in that action for over two years, and that Qwest would be substantially prejudiced by being forced to arbitrate issues around only two circuits that are the subject of the much larger Superior Court action. *Declaration of Florine Clark*.

1. WAC 480-07-650 Does Not Apply to this Case

8 WAC 480-07-650 does not apply to this case. WAC 480-07-650 allows parties to an ICA to petition the Commission for enforcement of their agreement.¹ It does not authorize the type of complaint or the relief sought in this case. Because the rule explicitly states that the petition must be for “enforcement” of an ICA, it is apparent that the services at issue must first be governed by the ICA in order for the rule to apply.

9 There are no material facts in dispute on this issue and Qwest is entitled to a determination as a matter of law that the relief sought by TSS is not available for circuits that TSS purchased under a retail contract as opposed to an ICA. As set forth above, TSS admits that it is not the entity with an ICA with Qwest, and further admits that the circuits that are the subject of this

¹ WAC 480-07-650 provides in relevant part that “[t]he purpose of this rule is to provide a speedy and enforceable means to resolve disputes when one party to an interconnection agreement contends that the other party is violating the terms of the agreement.” The rule goes on to state that “[a] telecommunications company that is party to an interconnection agreement with another telecommunications company may petition under this rule for enforcement of the agreement.” WAC 480-07-650(1).

Petition were in fact purchased under retail contracts – contracts that TSS itself has made a part of the record. Under these undisputed facts, TSS is not entitled to bring an action under WAC 480-07-650.

2. The Commission Does Not Have Jurisdiction to Grant the Relief Requested

10 Qwest is entitled to a determination as a matter of law that the Commission is without jurisdiction to order the relief requested. This is true regardless of how the disputed circuits were purchased, either under the retail contracts or under an ICA. The entire dispute between the parties is now (and has been for two years) in the Thurston County Superior Court. That tribunal has jurisdiction over the subject matter of the dispute until that case comes to a close.²

11 TSS's answer to Qwest's complaint in that proceeding did not claim that the court lacked jurisdiction, and that issue is not pending before the court. Thus, the matter is proceeding in Superior Court at this time. Under these facts, even if the ICA did apply and the Commission otherwise had jurisdiction to order enforcement of the ICA, Qwest's action on this same dispute in Superior Court divests the Commission of jurisdiction during the pendency of the Superior Court action. The case law on this issue is clear – if TSS wishes to assert its claim for arbitration, it must do so through a motion to the Superior Court.

3. TSS Has Waived Any Claim it Might Have to Arbitration

12 Finally, Qwest is entitled to a determination as a matter of law that even if the Commission had jurisdiction to order Qwest to dismiss certain aspects of its Thurston County lawsuit and engage in arbitration, the Petitioner has waived any right it may have had to request arbitration.

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).

- 13 The Federal Arbitration Act and the Ninth Circuit recognize that a party can waive its right to arbitration. 9 U.S.C. Section 2; *Shinto Shipping Co., Ltd v. Fibrex & Shipping Co., Inc.*, 572 F.2d 1328, 1330 (9th Cir. 1978). Waiver of that right may be established if a party demonstrates: “(1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.” *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 694 (9th Cir. 1986); *Hoffman Const. v. Active Erectors & Installers*, 969 F.2d 796 798 (9th Cir. 1992).
- 14 Even if TSS had a right at one time to demand arbitration, that right has been waived by TSS’s participation in the Thurston County litigation. TSS’s assertion of a claimed right to arbitration establishes that TSS knew of that right. The declaration of Ms. Clark establishes that TSS has taken action inconsistent with that right by participating extensively and without objection in the Thurston County action. That declaration also establishes that Qwest will be prejudiced if it is now required to arbitrate a very small part of that dispute.

III. CONCLUSION

- 15 TSS admits that the circuits at issue were ordered under a retail contract. TSS therefore cannot show that they are governed by the ICA. Under these circumstances there is no basis upon which a proceeding under WAC 480-07-650 may be held and Qwest is entitled to dismissal as a matter of law. 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. Finally, even if the Commission had jurisdiction to entertain this Petition, TSS has waived any claim it may have had to arbitration. The Commission should grant Qwest summary determination and dismiss the Petition.

DATED this 19th day of April, 2006.

QWEST

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