

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

THE LUMMI NATION,)	
)	DOCKET UT-060147
Complainant,)	
)	ORDER 03
v.)	
)	REOPENING PROCEEDING;
VERIZON NORTHWEST INC., AND)	APPROVING AND ADOPTING
QWEST CORPORATION,)	SETTLEMENT AGREEMENT
)	
Respondent.)	
.....)	

Synopsis: The Commission reopens this proceeding for the purpose of accepting into the record a Settlement Agreement proposed for adoption in full resolution of this matter so as to avoid the prospect of additional litigation. The Commission, on due consideration, approves and adopts the Settlement Agreement as being in the public interest.

SUMMARY

1 **PROCEEDINGS.** On January 23, 2006, the Lummi Nation (Lummi) filed a complaint against Verizon Northwest Inc. (Verizon) and Qwest Corporation (Qwest). The complaint alleged that Verizon and/or Qwest are liable for payments the Lummi made to Verizon for Foreign Exchange (FX) Service after the service was disconnected or because the service was never provided. On February 14, 2006, Verizon and Qwest answered the complaint disputing the allegations and pleading affirmative defenses.

2 Verizon and Qwest filed their respective Motions for Summary Determination on April 6, 2006. Lummi responded on April 21, 2006. Verizon and Qwest filed replies on May 5, 2006. In an Initial Order, as defined in WAC 480-07-820, the Commission found Lummi’s complaint time-barred, granted the two motions for summary determination, and dismissed the complaint.

3 The Commission did not formally adopt the Initial Order as its Final Order, having been informed by Verizon and Lummi that they had settled their dispute, principally to avoid the risks and costs of further litigation. Verizon and Lummi filed their Settlement Agreement on July 18, 2006, and request its approval and adoption by the Commission.¹ We treat the filing, in addition, as a motion to reopen the record prior to entry of a Final Order as provided in WAC 480-07-830.

4 **PARTY REPRESENTATIVES.** Margaret M. Schaff, Boulder, Colorado, and David M. Neubeck, Office of the Reservation Attorney, Bellingham, Washington, appeared for Lummi. Judith K. Bush, Office of the Reservation Attorney, is on the pleadings for Lummi. Timothy J. O'Connell and John H. Ridge, Stoel Rives LLP, Seattle, Washington, represent Verizon. Lisa Anderl, Qwest Corporation, Seattle, Washington, represents Qwest. Neither the Public Counsel Section of the Washington Office of Attorney General nor Commission regulatory staff appeared for their respective clients.

MEMORANDUM

I. Background

5 Lummi filed its complaint against Verizon and Qwest on January 23, 2006. The principal issue is whether Verizon and/or Qwest owe Lummi compensation because Verizon billed Lummi for Foreign Exchange (FX) Service allegedly not provided to Lummi. FX Service is the provision of local service to a customer in an exchange where the customer has no physical presence. Calls to the FX Service customer placed from a specific foreign exchange for which the service is established do not incur long distance toll charges. In this case, for example, a caller located in Qwest's service territory in one area code could call a foreign

¹ Following an off-the-record conversation between the parties and the presiding officer, the parties re-filed their Settlement Agreement on July 26, 2006, asserting confidentiality only as to discrete parts that provide detail concerning the consideration exchanged instead of as to the entire document as they originally had done. The parties also revised and re-filed their Memorandum Supporting Settlement Agreement describing the essential terms of their agreement without disclosing information they regard as being within the confidentiality provisions set forth in RCW 80.04.095. The Commission, by this Order, makes no determination and expresses no opinion concerning whether RCW 80.04.095 applies to the portions of the Settlement Agreement as to which the parties assert confidential treatment is warranted.

exchange number provisioned to the Lummi by Verizon in a different area code without incurring long distance toll charges.²

- 6 Although the complaint refers to several different billing periods, the maximum period for which complainant seeks recovery is from January 1995 through September 19, 2004. Lummi attached to its complaint a summary of charges based on bills it retained for the period March 19, 1998 through September 19, 2004, showing charges for FX Service in the amount of \$67,715.18. Lummi estimates it “likely paid” another \$35,139.60 for periods prior to March 19, 1998, back to an unspecified date in 1995.
- 7 The complaint includes no allegations that Qwest billed Lummi for any service during the relevant time period. Lummi asserts Qwest may be liable to complainant for all or some part of the amounts Verizon billed Lummi for service allegedly not provided because if the questioned FX service had in fact existed, Qwest would have provided switching service for which it would have billed Verizon. Complainant asserts that Qwest may have disconnected the service at its switches sometime before 1995 and failed in its asserted duty to notify Verizon of that disconnection.
- 8 Lummi also suggests that Verizon and/or Qwest are subject to penalties under RCW 80.04.380. The complaint, however, does not include in its prayer for relief any request that the Commission impose penalties in connection with the facts alleged. Lummi asks the Commission to conduct a formal hearing and to order Verizon and Qwest to refund all the charges paid by Lummi for non-existent service, plus interest from the dates of payment, attorneys fees and such other relief as the Commission may find just and equitable.

² The typical use of FX service is predominantly or exclusively as a one-way service. For example, a retail or service company with a presence in only one location (*e.g.*, in area code 360) subscribes to FX service so that it can receive calls from customers located in another exchange territory (*e.g.*, in area code 206) without those customers incurring long distance charges. Since the FX number in this example would be assigned to equipment physically located in area code 360 but would be assigned a 206 area code for purposes of its functionality, the calling customer does not need to dial an area code and the call seems like a local call to the calling customer. It is possible, however, to call out on an FX line as well. Thus, a call made from the FX unit physically located in area code 360 in this example, to a number in area code 206, would not incur long distance charges.

9 Lummi grounds its complaint in RCW 80.04.440 and WAC 480-120-161 insofar as it seeks recovery of amounts it paid to Verizon during the relevant period.³ WAC 480-120-161 requires Verizon to provide bills to customers that only include charges for services requested by the customer and provided by the company. WAC 480-120-161 further requires that the bill include a brief, clear, not misleading, plain language description of each service. Lummi asserts Verizon's bills did not include a clear, plain language description of the services for which the Lummi was billed and included charges for services not provided. Thus, complainant argues, Verizon has acted unlawfully and is liable to the Lummi as provided under RCW 80.04.440.⁴

10 The complaint does not include any reference to RCW 80.04.220 or .230, which provide for reparations or refunds of overcharges by public service companies. In its subsequent pleading, discussed below, complainant argues adamantly that these provisions do not apply under the facts pled.

11 Verizon stated during the prehearing conference held on March 23, 2006, its intention to file a motion for summary determination based on its assertion that Lummi's complaint is time-barred under either a six-month or a two-year statute of limitations, whichever may be found to apply. Qwest stated it would consider joining Verizon's motion or filing its own motion that might include additional reasons that the complaint should be dismissed as to Qwest. Lummi said it would oppose any such motions.

12 The Commission established dates for the suggested motions for summary determination, a response by Lummi, and replies. These were filed as scheduled.

³ The statement of rules and statutes at issue included in the complaint also refers to RCW 80.01.040, RCW 80.04.140, WAC 480-120-167 and WAC 480-120-171.

⁴ RCW 80.04.440 Companies liable for damages. In case any public service company shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by any law of this state, by this title or by any order or rule of the commission, such public service company shall be liable to the persons or corporations affected thereby for all loss, damage or injury caused thereby or resulting therefrom, and in case of recovery if the court shall find that such act or omission was willful, it may, in its discretion, fix a reasonable counsel or attorney's fee, which shall be taxed and collected as part of the costs in the case. An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any person or corporation.

13 The presiding Administrative Law Judge entered an Initial Order on June 7, 2006, granting respondents' respective motions for summary determination and dismissing the complaint. The parties, in consideration of the possibility of further litigation, including the immediate prospect of a petition for administrative review and the longer-term prospect of judicial review, entered into settlement discussions. They filed their Settlement Agreement and Memorandum Supporting Settlement Agreement on July 18, 2006, and re-filed revised versions of those documents on July 26, 2006.⁵

II. Discussion.

14 The Initial Order granting respondents' respective motions for summary determination and dismissing Lummi's complaint is grounded in the Commission's conclusion that a six-month limitations period applies to the matter in dispute. Specifically, the Commission determined Lummi's claim could be properly brought as an action for reparations under RCW 80.04.220, subject to a six-month limitations period as provided by RCW 80.04.240. This determination meant that Lummi's claims were time-barred. Thus, the Commission did not reach the merits of Lummi's claim.

15 Lummi's claim, from its perspective at least, involves a significant sum of money; perhaps as much as \$100,000 in alleged overcharges over a period of nine years. Although Verizon disputed Lummi's allegations, Verizon stated in its Motion for Summary Determination that there were three reasons to grant summary determination, the first of which was:

The Lummi Nation has no legal right to a refund of charges for nearly nine years of phone service when Washington law limits its right to a refund to a maximum of two years, and Verizon has already stated that it is willing—and continues to be willing—to settle this disputed claim by refunding to the Lummi Nation two years worth of charges, plus interest.⁶

Verizon elaborated on this point later in its Motion when discussing its early efforts at alternative dispute resolution as follows:

⁵ See *supra*, fn 1.

⁶ Verizon Motion for Summary Determination at ¶1.

In May 2004, NWCRG requested a refund of the amount that Verizon had allegedly overcharged the Lummi Nation for FX Services. In September 2004, Verizon credited the Lummi Nation for all bills for FX Services back to March 29, 2004, the date NWCRG first contacted Verizon regarding the provision of those services. Verizon has also offered to refund the Lummi Nation an additional two full years of billings for FX Services, plus interest, back to March 28, 2002. The total credit would be \$18,888.40, plus interest. Verizon repeated this offer on several occasions. The Lummi Nation responded on November 8, 2005, rejecting Verizon's offer and demanding a credit of \$68,000. Nevertheless, Verizon remains willing to resolve this dispute by giving the Lummi Nation an additional two-year refund of all amounts paid for FX Services, plus interest, and will pay the Lummi Nation this amount in full resolution of all its claims in this matter.⁷

16 In its Reply to Lummi's Answer, the Company made clear its offer remained open to Lummi's acceptance. "Verizon has offered, and again renews its offer, to refund the Lummi Nation two years' worth of payments, plus interest. This is more than the Lummi Nation could hope to receive even under the most favorable circumstances."⁸

17 The parties resumed their efforts to finally resolve their dispute following entry of Order 02. The success of their good faith efforts is described in their Memorandum Supporting Settlement Agreement:

7. Lummi and Verizon have agreed to resolve all issues relating to the provision of FX Services during the time period at issue in the complaint.

8. The Settlement Agreement obviates the need for further proceedings and appeals, saving the parties both the time and expense of such proceedings. Furthermore, given that Lummi continues to receive services from Verizon, the Settlement Agreement will permit the parties to proceed with their on-going commercial relationship in a cooperative manner.

9. Under the basic terms of the Settlement Agreement, Lummi agrees to release Verizon from any and all claims relating to the past provision of FX Services. Verizon, in turn, agrees to issue to Lummi a credit for charges billed for FX Services, which it previously offered to do prior to, and during the course of, this docket.

⁷ *Id.* at ¶6 (citations to record omitted).

⁸ Verizon Reply at ¶24.

10. The Settlement Agreement will resolve the issues as to all parties.

11. Lummi and Verizon believe this settlement is in the interests of the parties and the public.

12. While Order No. 2 dismissed Lummi's claims, the Settlement Agreement resolves all issues in this docket as to all parties on a going forward basis. This will save the parties, the Commission, and the judicial system the time and expense of further prosecuting these issues. The interests of the parties are also served by instituting mediated resolutions that resolve the parties' concerns and provide certainty of resolution.

13. Furthermore, Lummi and Verizon value their on-going relationship. This Agreement will permit Lummi and Verizon to move forward in that relationship, to their mutual benefit.⁹

18 We agree with the parties that it is in the public interest to approve and adopt their Settlement Agreement. Given the relative early stage of this litigation considering the avenues open for administrative review and judicial appeal, there is at least a prospect that absent settlement there would be a continuing expenditure of the parties' and the Commission's resources. Avoiding the potential expenditure of time and money is a worthwhile goal and is in the public interest. Moreover, the settlement promotes a positive business relationship between Verizon and Lummi and, more broadly, a positive business environment in Washington. This, too, is in the public interest.

19 The Commission concludes that the Settlement Agreement should be approved and adopted as a full resolution of the issues pending in this proceeding.

ORDER

THE COMMISSION ORDERS that

- (1) The record in this Docket UT-060147 is reopened for the purpose of accepting into the record the parties' revised Settlement Agreement and revised Memorandum in Support of Settlement Agreement.

⁹ Memorandum Supporting Settlement Agreement at ¶¶7-13 (subheadings omitted).

- (2) The Settlement Agreement filed by the parties to this proceeding on July 18, 2006, as revised on July 26, 2006, is approved. The Commission adopts the Settlement Agreement as a full resolution of the issues in this proceeding.
- (3) The Commission retains jurisdiction to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective August 2, 2006.

WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

DENNIS J. MOSS
Administrative Law Judge

NOTICE TO THE PARTIES

This is an Initial Order. The action proposed in this Initial Order is not yet effective. If you disagree with this Initial Order and want the Commission to consider your comments, you must take specific action within the time limits outlined below. If you agree with this Initial Order, and you would like the order to become final before the time limits expire, you may send a letter to the Commission, waiving your right to petition for administrative review.

WAC 480-07-825(2) provides that any party to this proceeding has twenty (20) days after the entry of this Initial Order to file a *Petition for Administrative Review*. What must be included in any Petition and other requirements for a Petition are stated in WAC 480-07-825(3). WAC 480-07-825(4) states that any party may file an *Answer* to a Petition for review within (10) days after service of the Petition.

WAC 480-07-830 provides that before entry of a Final Order any party may file a Petition To Reopen a contested proceeding to permit receipt of evidence essential to a decision, but unavailable and not reasonably discoverable at the time of hearing, or for other good and

sufficient cause. No Answer to a Petition To Reopen will be accepted for filing absent express notice by the Commission calling for such answer.

RCW 80.01.060(3), as amended in the 2006 legislative session, provides that an Initial Order will become final without further Commission action if no party seeks administrative review of the Initial Order and if the Commission does not exercise administrative review on its own motion. You will be notified if this order becomes final.

One copy of any Petition or Answer filed must be served on each party of record with proof of service as required by WAC 480-07-150(8) and (9). An original and eight copies of any Petition or Answer must be filed by mail delivery to:

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