BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION,	)	DOCKET NO. UT-990946
Complainant,	)	COMMISSION STAFF'S MOTION FOR SUMMARY JUDGMENT
1-800 RECONEX, INC.,	)	
Respondent.	)	

I. RELIEF REQUESTED

The Staff of the Washington Utilities and Transportation Commission (Staff) brings this motion for summary determination pursuant to WAC 480-09-426(2). Staff asks the Commission to find the respondent 1-800 RECONEX, Inc. (Reconex) liable for payment of $121,000, in full, into the public service revolving fund due to Reconex's admitted failure to invest sufficiently in system and service improvements as it committed to do in the settlement agreement that resolved the *Complaint* initiating this matter:

> If Reconex fails to spend the amounts which it has expressly committed to spend . . . for system and services improvements as set forth in paragraph 5 of this Agreement (a minimum of $121,000), Reconex will become liable for payment of these amounts in full. The Commission reserves the right to enforce payments of such amounts to the public service revolving fund. [emphasis added]

Amended Proposed Paragraph 5A to Parities' Stipulation for Settlement and for Entry of An Agreed Final Order, December 3, 1999.

II. STATEMENT OF THE FACTS

Reconex is a local exchange telecommunications company that furnishes local dial tone through resale to individuals who have had their phone disconnected for nonpayment of charges, or who for other reasons believe they have no option but to prepay for their local phone service at a monthly rate of $49.95 (almost four times Qwest's $12.50 and Verizon's $12.95 for local exchange service). Reconex is a public service company and a telecommunications company as defined by RCW 80.04.010, and is subject to regulation by the Commission under the provisions of Title 80 RCW and the Commission's rules adopted pursuant to that title including chapter 480-120 WAC.

Reconex's relationship with the Commission began in 1997 when the company applied for authority to offer its local exchange services in the state of Washington. See Docket No. UT-971395, *Order Granting Registration and Authorizing the Provision of Intraexchange Telecommunications Services* (October 29, 1997).

Starting with Staff's meetings with Reconex to provide technical assistance during the registration process, see *Motion for Conversion of Proceeding* at ¶ 10 (August 10, 1999), the company has had every chance come into compliance with the Commission's billing practices rules and with the terms of its Commission-approved tariff.

Staff first audited Reconex's business practices in September of 1998, nine months after Reconex commenced operating in Washington, by reviewing the accounts of nineteen Washington customers. On the basis of that first audit, Staff found, and alleged in the *Complaint* initiating this matter, the following violations of the Commission's rules, among others:

- 47 counts of failing to allow customers a minimum of 15 days from the date of issuance (mailing) of the bill by the company, in violation of WAC 480-120-081(2)(a);
- 6 counts of disconnecting or threatening to disconnect customers whose accounts were not delinquent, also in violation of WAC 480-120-081(2)(a);
- 12 counts of failing to make at least two telephone attempts to contact customers prior to disconnection in violation of WAC 480-120-180(5)(b);
- Multiple counts of billing customers earlier than allowed by the company's tariff and more frequently than on a monthly basis in violation of the terms of the company's own tariff.
- One count of selling a service not approved on the company's tariff and five counts of charging fees other than those approved in the company's tariff.

Complaint and Order to Show Cause Why Penalties Should Not Be Assessed and Why Service Remedies Should Not Be Ordered (July 23, 1999). The *Complaint* alleged a total of $372,000 in penalties based on rule and tariff violations found in the 19 customer accounts.

Reconex responded to the *Complaint* with a motion to the Commission in which it asked that the proceeding be converted from an adjudication to an informal complaint or to "technical assistance." *Motion for Conversion of Proceeding* at ¶ 9 (Aug. 10, 1999). One of the issues raised by Reconex in that motion was as follows:

> Reconex has been struggling with an outdated accounting/database system. Staff is keenly aware of the system's shortcomings as it took a great deal of time for

> Staff to decipher the entries and ultimately file this complaint. Even then, after our review, it is clear that Staff and Reconex do not interpret the entries in the same fashion. Regardless, the point is well taken that Reconex has been laboring under the constraints of a difficult and cumbersome system.
>
> The great majority of claims presented in the instant complaint can be traced to the shortcomings of our computer system which results in difficulty in the ordering, billing and provisioning of customer services.
>
> Reconex has recently begun implementation of a new workflow management system, designed specifically for the prepaid telecommunications industry. The Total Back Office system has been designed by Exceleron Software, Inc., to allow prepaid carriers to address the very issues that are at the heart of this proceeding, specifically providing service to customers under the myriad and distinct rules and regulations of each jurisdiction. It is the belief of Reconex that installation and implementation of this new system will greatly reduce the types of allegations contained in the 19 customer accounts that provide the basis for this Formal Complaint.

Id. at ¶¶ 28-30. Before the Commission made a decision on Reconex's motion, Staff and Reconex came to the Commission with a settlement agreement. *Stipulation for Settlement and for Entry of An Agreed Final Order* (October 8, 1999). Under the agreement, Staff would not pursue $186,000 (half) of the $372,000 in penalties alleged in the Commission's complaint. The remaining $186,000 in penalties was addressed as follows:

- Reconex would spend a minimum of $20,000 on a customer education program approved by Staff;
- Reconex would spend a minimum of another $121,000 on system and service improvements—an amount representing 7 percent of the amount Reconex planned to spend in total on such improvements, 7 percent being the estimated amount allocated to Washington customers;
- The remaining $45,000 was suspended pending the outcome of an audit of fifty randomly selected Washington customer accounts to be performed in September

of 2000. If the company exceeded certain compliance benchmarks it would become liable for the $45,000.

Under the agreement, Reconex did not have to pay any penalties for the violations found in the September 1998 audit—at least pending the outcome of the September 2000 audit.

The Commission approved the settlement on November 12, 1999. *Commission Decision and Order Approving Stipulation*. Reconex and Staff made a joint motion for clarification and for amendment of this *Order*. *Joint Motion of 1-800 RECONEX, Inc., and Commission Staff for Clarification and Amendment of Commission Decision and Order Approving Stipulation* (Nov. 17, 1999). The parties sought to "clarify" that the $20,000 to be spent on customer education and the $121,000 to be spent on system and service improvements were not intended to be viewed as suspended penalties but as a "negotiated commitment agreed to by Reconex in lieu of a penalty." Id. at page 1. The joint motion stated, "The parties agree, however, that Reconex should be liable to pay the amounts which it has agreed to pay for customer education and system and service improvements." Id. at page 2.

The parties also took action to amend the *Stipulation* itself. *Amended Proposed Paragraph 5A to Parties" Stipulation for Settlement and for Entry of An Agreed Final Order* (Dec. 3, 1999). The parties added a new paragraph to their *Stipulation* as follows:

> 5A. If Reconex fails to spend the amounts which it has expressly committed to spend for customer education as set forth in paragraph 4 of this Agreement (a minimum of $20,000) and for system and services improvements as set forth in paragraph 5 of this Agreement (a minimum of $121,000), Reconex will become liable for payment of these amounts in full. The Commission reserves the right to enforce payments of such amounts to the public service revolving fund. Proceedings to enforce such payments shall be instituted through the issuance of a Supplemental Order to Show Cause Why Payments Should Not Be Required, which may be brought under this docket number, and

> the parties shall retain any rights of appeal from such proceeding to which they would otherwise be entitled. Commission rules shall apply to any such proceeding conducted pursuant to this Stipulation.

On the issue of system and service improvements, the company committed, without ambiguity, to spend *a minimum of $121,000* or it would become liable for payment of that amount *in full* to the public service revolving fund.

The Commission approved the amended Stipulation and, over Chairwoman Showalter's dissent, amended the wording of its *Order* to eliminate the use of the word "penalties" in reference to the amount to be spent on customer education and service and system improvements, stating:

> . . . the Commission believes there is a valid basis to grant the parties' Motion and amend the prior *Order* by eliminating the word "penalty" in those sections which set forth RECONEX's commitment to spend $141,000.00 for customer education and systems and service improvements. The changes become one of semantics, since proposed paragraph 5A sets forth RECONEX obligation to expend the amounts to which it has agreed and, if it does not, provided that RECONEX would be liable immediately to pay such amounts into the public service revolving fund.

First Supplemental Order Amending Order and Approving Amended Stipulation In Part (Dec. 30, 1999).

Following the entry of the Supplemental Order, the company commenced making monthly status reports of its expenditures on customer education and system and service improvements. Staff also negotiated new tariff language with the company for the purpose of eliminating any ambiguity on the issue that customers could not be billed any more frequently than monthly by the company. MMT-RT6 at pages 5-8 (Taylor Rebuttal); MMT-8 (e-mail of 12/2/99); *Order Approving Tariff Revisions* (Feb. 9, 2000).

Staff was in continuous contact with Reconex in the nine months following the Supplemental Order and expressly notified Reconex as early as February 2000, and regularly thereafter, of its concern that the company needed to spend sufficient amounts on system and service improvements to meet the requirements of the Commission's order. *Staff's Answer in Opposition to Motion of 1-800 RECONEX, Inc. for Extension of Time* (Oct. 17, 2000).

On September 26, 2000, Reconex made a motion for an extension of time to make the customer service and system expenditures required of it by the settlement and the Commission's *Order* accepting the settlement and for a stay of action with regard to any failure of the company to comply with the September 2000 audit. The company's Ninth Status Report dated September 28, 2000 indicated that the company had spent only $89,574,40 on system and service improvements. The company argued it was unable to meet the required expenditures in the time required due primarily to issues surrounding Reconex's acquisition by Nova Communications, LLC. The Commission denied the motion, stating:

> The excuse RECONEX now offers merely reflects the owner's business decision not to comply with regulatory requirements for financial reasons.
>
> . . .
>
> The Commission approved the Stipulation in order to fulfill its responsibility to protect consumers and to ensure that companies subject to its jurisdiction comply with state law, Commission rules, and filed tariffs. Considering the seriousness of the alleged violations, the ample time provided to RECONEX to comply, the importance to the public interest of compliance with the law and Commission orders, and the total lack of justification for the motion, the Commission denies the motion by RECONEX. In addition, the Commission refuses to stay action for any failure by RECONEX to comply.

Order Denying Motion for An Extension of Time, at ¶¶ 14, 15 (Oct. 25, 2000).

In September 2000 Staff conducted the audit of 50 Washington customer accounts and found that the company had failed to meet six of the thirteen benchmarks based on the violations identified in audit of two years prior. MMT-2 (Staff Compliance Audit). They were as follows:

- 84 counts of allowing less than 15 days for payment of a bill;
- 6 counts of threatening to disconnect of disconnecting accounts that were not delinquent;
- 4 counts of failing to make two telephone attempts to contact customers prior to disconnection;
- 50 counts of billing customers for service earlier (and more frequently) than allowed by Reconex's tariff;
- 5 counts of charging customers for services not authorized in the company's tariff; and
- 86 counts of charging rates other than those authorized in the company's tariff (due to failure to amend tariff to reflect new FCC access charge effective July 1, 2000).

Id. Staff's September, 2000, audit showed that the company was continuing to ignore simple and straightforward Commission rules and tariff provisions concerning when customers may be billed, how many days customers must be allowed to pay those bills, and, if customers do not pay them in the time provided, when the customer may be disconnected. These were precisely the type of violations that Staff had found two years earlier in its September 1998 audit of 19 Washington Reconex customer accounts and which Reconex argued it was hobbled in addressing because of its outdated accounting

and database system. This was the kind of non-compliance that the expenditure of at least $121,000 was supposed to eliminate or to bring down to minimal levels.

At Staff's recommendation, and consistent with its December 30, 1999 *Supplemental Order*, the Commission issued a *Supplemental Order to Show Cause Why Payments Should Not Be Required*, placing at issue the company's liability for $45,000 in suspended penalties based on the findings of the September 2000 Audit, and its liability for the $121,000 at issue in this Motion.

The company admits that it failed to meet the benchmarks sufficiently to avoid paying the $45,000 in suspended penalties. *Stipulation of Parties* (May 19, 2001). Even prior to making this admission, the company did not actually contest the findings of the audit, only the significance to be attached to them. SLE-E1 at e.g., page 5-6 (Elliot Testimony). The company argued, despite extraordinarily clear tariff language to the contrary, that it should not be found to have violated benchmarks one and eight – that is, giving customers less than 15 days from the date of issuance to pay their bills, and billing more frequently than once a month in violation of the negotiated tariff. Id.

Reconex argues that it should not be required to pay the full $121,000, but only the difference between what its Status Report shows it spent (i.e., the seven percent Washington allocation of what it spent) and the minimum of $121,000 it was required to spend.

III. STATEMENT OF THE ISSUES

Should Reconex be required to pay $121,000, in full, into the public service revolving fund, or just the difference between what it actually spent and the minimum of $121,000 it was required to spend?

IV. EVIDENCE RELIED UPON

Staff relies on the pleadings and the testimony of both parties in this matter.

V. AUTHORITY

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 is to 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. 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." CR 56(c); see also Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990).

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. White v. State, 131 Wn.2d 1, 7, 929 P.2d 396 (1997). A mere scintilla of evidence is not enough to establish the existence of a material fact; rather, a party must set forth specific facts which disclose the existence of a material fact. Id. at 22-23. When there are no factual issues and the dispute can be resolved by answering questions of law, as in the present case, summary judgment is favored as an important part of the process of resolving the dispute. Id. at 6.

The Commission's rules at issue in this case are not complicated and the company's tariff, which was negotiated with Staff as a part of the settlement of the Commission's complaint, could not be clearer on these issues. These points are amply made in Ms. Taylor's rebuttal testimony at page 3, line 20, through page 11, line 3. MMT-RT6 (Taylor Rebuttal Testimony).

Moreover, in lieu of seeking penalties on the basis of the September 1998 audit findings that Staff alleged would support penalties totaling $372,000, the Commission allowed the company to invest the sum of money at issue here—$121,000 that might otherwise have gone into the public service revolving fund as a penalty—on its own systems for the purported purpose of bringing them into compliance with the Commission's rules. This was a generous settlement that was arguably tantamount to giving the company special dispensation for promising to make investments it should already have been making. Additionally, judging from the company's comments in its August 10, 1999 *Motion for Conversion of Proceeding*, it appears the company was already planning to make at least some of these investments at the time the Commission issued its Complaint in this docket.

As Chairwoman Showalter stated in her dissent to the Supplemental Order:

> The Stipulation requires that [Reconex] spend $121,000 on *itself* and another $20,000 for a customer-information program. If these expenditures do no more than bring [Reconex] into compliance with our laws and regulations, [Reconex] will do no more than it and its competitors are already required to do. There will have been no meaningful adverse consequences for multiple and serious alleged violations. [emphasis in original]

The majority acknowledged the Chairwoman's concerns when it stated:

> We acknowledge that the company has a history of apparent multiple violations. Still, we think our policy of seeking to correct deficiencies and solve problems is best served by accepting the settlement. The settlement provides benefit to the

> respondent's customers by improving the service. It provides benefit to the Commission by providing enforceable guarantees of service improvement, removing the need for considerable staff attention. It also provides benefit to the Commission in removing the need to suffer the expense, the risks and the uncertainties that any litigation involves. Finally, we believe that accepting the settlement will result in full compliance. [emphasis added]

In short, the majority trusted in the good faith of Reconex to bring itself into full compliance and expected that the expenditures would result in that full compliance. Chairwoman Showalter appears to have been troubled by the fact that the company would be getting credit for spending money which it should have spent in any case if doing so was necessary to bring the company into compliance.

Now, in its testimony, Reconex argues, despite its failure to remedy the very violations listed above:

> The good faith effort by Reconex is demonstrated by the fact that any money was spent at all on the system and service improvements, as the reality is that pursuant to the manner in which the WUTC [Staff] is interpreting the Order, Reconex would have been in a much better position to simply not make any expenditures and simply pay $121,000 into the Revolving Fund.

WEB-B1 at page 4,5 (Braun Testimony). First, this is a curious argument for a public service company to make to this Commission—that is, that it would somehow have been in a better position by "gaming" the settlement agreement in the fashion it suggests and not spending any of the money necessary for minimal compliance with Washington law. Second, the argument is based on a false premise. While the Commission has so far not chosen to exercise its right to do so, it specifically reserved its right to seek additional penalties based on whatever violations it might discover during the September 2000 audit or at any other time. *Stipulation for Settlement* at ¶ 10. Imposing new penalties along with suspended penalties on the basis of audit findings is precisely what the Commission did in docket TV-000695 with the household goods moving company Starving

Students—a repeat violator of the commission's safety and consumer rules that apply to that industry. Suspended penalties are not a shield against future penalties. Rather, they are an additional deterrent over the head of a party that is, in a manner of speaking, "on probation."

Reconex also argues that it actually spent a great deal more on system and service improvements, pointing out that the $89,574.40 it reported on it September 2000 Status Report represents only seven percent—Washington's share—of the company's total expenditures in this category that went to the benefit of customers in all the States in which the company does business. WEB-B1 at pages 4-5 (Braun Testimony). Mr. Braun's testimony implies that Reconex's commitment to this Commission was the inducement to make investments benefiting customers in all States in which the company does business. Id. at page 5, lines 4-8. This strains credibility. Surely if Reconex had proposed to focus expenditures on compliance with Washington rules at a higher per customer rate, this Commission would not have objected. Moreover, the company's poor record of compliance with Washington rules as evidenced by the September 2000 Audit casts serious doubt on Mr. Braun's implication that compliance with Washington law was the driver behind the company's company-wide investment in system and service improvements.

To the contrary, the audit shows that a substantial amount of the assumed benefits of Reconex's investment in its own system did not materialize, even setting aside the bare comparison of the $89,574.40 Washington share of the total investment to the $121,000 figure that was the target chosen as the minimum expenditure for purposes of the settlement. In short, Washington consumers did not get their foregone-penalties' worth.

Reconex's avowal of good faith did not bear out. If any special gloss need be placed on the clear language of paragraph 5A of the *Stipulation for Settlement* (requiring payment of $121,000 in full if the company does not spend a minimum of that same amount of system and service improvements), it is that the system improvements must be *effective* system improvements—that is, improvements that result in compliance with the Commission rules that were at issue in the complaint.

Reconex argues that the $121,000 should be offset by the $89,574.40 that allegedly represents the company's good faith effort to comply. This argument might be better received if that expenditure had actually obtained the full compliance that was the expectation of the Commission in approving the settlement in this matter. In such a case, the company could argue that no greater investment was required and that it would have been wasteful to spend more since the objective could be achieved for less. Such was obviously not the case here. The clear intent of the parties' *Stipulation*, which was adopted by the Commission, was that the $121,000 figure was to be a *minimum.* The objective was to spend whatever it took to achieve basic adherence to the law of this State. Reconex admittedly did not reach that level of investment, and more importantly, it did not achieve compliance with a substantial number of the important consumer rules at issue.

It is easy to conclude that the company simply does not wish to comply with the rules (or finds it disadvantageous to its bottom line) and, as long as it is not too costly, Reconex would rather "pay the ticket."

VI. CONCLUSION

The Commission should order Reconex to pay a full $121,000 for failing to failing to make a sufficient investment in customer service and billing system improvements.

DATED this 25th day of May, 2001.

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