

Qwest

421 SW Oak Street
Room 810
Portland, OR 97204
Telephone: 503-242-5623
Facsimile: 503-242-8589
Email: Alex.Duarte@qwest.com

**Alex M. Duarte**

Corporate Counsel

VIA FACSIMILE, EMAIL AND U. S. MAIL

July 28, 2005

Honorable Allan Arlow
Administrative Law Judge
Public Utility Commission of Oregon
P. O. Box 2148
Salem, OR 97308-2148

Re: ARB 537 (Western Radio/Qwest)- Federal Court Dismissal of Western Radio Appeal

Dear Judge Arlow:

This is to advise Your Honor that on July 25, 2005, the Honorable Ann Aiken of the United States District Court for the District of Oregon issued the Court's Opinion and Order granting Qwest's and the Commission's motions to dismiss Western Radio's complaint for lack of subject matter jurisdiction, and judgment dismissing the complaint. Enclosed with this letter is a copy of the Court's Opinion and Order and judgment.

As Your Honor can see, in addition to granting the motion to dismiss the entire complaint, the Court's opinion notes that Western Radio's claim based on Qwest's alleged failure to negotiate in good faith should also be dismissed because such claims lie before the Commission, and not the Court, and because Western Radio failed to raise the issue before the Commission. Finally, the Court ruled that the steps that the Ninth Circuit outlined in a previous case (namely, Commission approval of an interconnection agreement) remain pending and must be completed prior to jurisdiction vesting with the court.

Accordingly, Qwest respectfully requests that the Commission promptly approve the interconnection agreement that Qwest submitted on November 18, 2004, but which Western Radio refused to sign. Qwest submits that the interconnection agreement it submitted complies with the Commission's Order No. 04-600 on October 18, 2004 and Your Honor's Arbitrator's Decision of September 20, 2004.

Finally, Qwest understands from very recent discussions with Western Radio that it is Western Radio's position that Qwest has not met its obligations under sections 251 and 252 in various states (presumably including Oregon) because of Western Radio's contention that Qwest's submitted agreement "does not meet the requirements of law and regulation." (This is precisely the issue that the federal court can decide if there is an approved agreement giving the court subject matter jurisdiction.) Thus, although it is a bit unclear whether this would include Oregon, Western Radio has advised Qwest that it intends to attempt to "start[] the [negotiation/arbitration] clock" anew (with a probable arbitration request thereafter) because of its alleged claims that the

submitted agreement does not comply with federal law. Western Radio has also advised Qwest that it is continuing to work on a *proposed interconnection agreement* for Oregon, despite that the parties have already gone through the arbitration in this docket, and that Qwest has submitted an agreement that complies with the Commission's decision, to which agreement Western Radio never filed any substantive objections. Enclosed with this letter is a copy of Western Radio's recent email to Qwest on this issue and Qwest's response yesterday.

Qwest believes that any attempts by Western Radio to start the negotiation process anew, after the Commission, Western Radio and Qwest have gone through the time, effort and resources of an arbitration proceeding (and a federal court appeal), simply because Western Radio does not agree with the end results, would be completely inappropriate, both from a legal standpoint and a resource standpoint. This would essentially mean that Western Radio would be rewarded with another bite of the apple by beginning the process all over again, after having forced the Commission and Qwest to go through almost a year and a half of an arbitration proceeding and subsequent federal court appeal, simply because Western Radio does not like the Commission and court orders. In other words, the year and a half-long proceedings would have been for nothing.

Qwest respectfully submits that the Commission should not countenance any such tactics. As such, Qwest respectfully submits that the Commission should soon approve the interconnection agreement that Qwest submitted on November 18, 2004, which agreement Western Radio failed to sign, but further, to which it failed to file any substantive objections. (The time for Western Radio to object to Qwest's proposed agreement or to seek reconsideration of the Commission's order has long expired.) Thereafter, if Western Radio still believes that the interconnection agreement does not comply with sections 251 and 252, it certainly retains the right to seek judicial review from the federal court at that time. This would, of course, make any request for negotiation of a "new" interconnection agreement moot because the Commission will have on file an approved agreement based on the arbitration in this docket.

If you have any questions about this matter, please feel free to call me at your convenience. Thank you for your attention to this request.

Very truly yours,



Alex M. Duarte

Encl.

cc Mr. Richard Oberdorfer
Gregory B. Monson, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WESTERN RADIO SERVICES CO., an
Oregon corporation,

Civil No. 05-159-AA
OPINION AND ORDER

Plaintiff,

vs.

QWEST CORPORATION, a Colorado
corporation; THE PUBLIC UTILITY
COMMISSION OF OREGON; LEE BEYER,
Chair; RAY BAUM, Commissioner; and
JOHN SAVAGE, Commissioner, in their
individual capacities and in their
official capacities as Commissioners
of the Public Utility Commission
of Oregon,

Defendants.

Marianne Dugan
Facaros & Dugan
485 E. 13th Avenue
Eugene, Oregon 97401
Attorney for plaintiff

Gregory B. Monson
Stoel Rives LLP
201 S. Main Street, Suite 1100
Salt Lake City, Utah 84111

Alex M. Duarte
Qwest Corporate Counsel
421 SW Oak Street, Room 810
Portland, Oregon 97204
Attorneys for defendant Qwest Corporation

Hardy Myers
Attorney General
Michael T. Weirich
Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, Oregon 97301-4096
Attorneys for defendants Public Utility Commission,
Lee Beyer, Ray Baum and John Savage

AIKEN, Judge:

Plaintiff Western Radio Services brings a complaint for declaratory and injunctive relief pursuant to § 252(e)(6) of the Telecommunications Act of 1996, Pub. Law. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §§ 151 et seq. (the "Act"); and 42 U.S.C. § 1983.

Defendants Qwest Corporation ("Qwest") and the Oregon Public Utility Commission, Lee Beyer, Ray Baum and John Savage (collectively the "PUC") move to dismiss plaintiff's third amended complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction, and pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. PUC also moves pursuant to 42 U.S.C. § 1988 to recover their reasonable attorney fees and costs. The defendants' motions to dismiss are granted and this case is dismissed. PUC's motion for attorney fees and costs is denied.

BACKGROUND

Plaintiff is a licensed Commercial Mobile Radio Service provider incorporated under the laws of Oregon with its principle place of business in Bend, Oregon. Plaintiff alleges that negotiations under the Act began between Qwest's predecessor, US West and plaintiff in August 1996. Third Amended Complaint, ¶ 16. Negotiations resolved some, but not all, of the issues between the parties and so on March 11, 2004, plaintiff filed a petition with the PUC for arbitration pursuant to § 252(b) of the Act. In its petition, plaintiff identified five issues remaining for arbitration. In its response, Qwest identified ten additional issues for arbitration. Id. at ¶ 18.

The Arbitrator issued his decision on September 20, 2004. See Ex. 1, attached to original Complaint. On October 18, 2004, the PUC adopted the Arbitrator's decision. See Ex. 2, attached to original Complaint. On November 29 and December 1, 2004, plaintiff reviewed Qwest's proposed interconnection agreement, ex. 3, attached to original Complaint, and found some areas "where that document did not comply with the Commission Order." Third Amended Complaint, ¶ 22. Plaintiff alleges that Qwest has refused to negotiate in good faith to resolve the problems raised by plaintiff concerning the Commission's Order.

Plaintiff brings the following causes of action: (1) PUC's violation of delegated authority, 47 U.S.C. §§ 251, 252; (2)

Qwest's failure to negotiate interconnection agreement in good faith, 47 U.S.C. §§ 251(C), 252(A); (3) violation of 42 U.S.C. § 1983, civil rights/due process against the Commission and individual defendants; and (4) violation of 42 U.S.C. § 1983 civil rights/equal protection against the Commission and individual defendants.

DISCUSSION

Both Qwest and the PUC move to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. See Tosco Corp. v. Communities for a Better Environment, 236 F.3d 495, 499 (9th Cir. 2001) ("when subject matter jurisdiction is challenged under [Rule 12(b)(1)], the plaintiff has the burden of proving jurisdiction in order to survive the motion."). Further, in determining a Rule 12(b)(1) motion, the court is not limited to the allegations of the complaint. See Roberts v. Corrothers, 812 F.2d 1173 (9th Cir. 1987). Extrinsic evidence may be considered, and, if disputed, may be weighed by the court. Id. In addition, where the motion is based on extrinsic evidence, no presumptive truthfulness attaches to plaintiff's allegations or any inferences drawn therefrom. Williamson v. Tucker, 645 F.2d 404 (5th Cir. 1981).

The Arbitrator's Order, adopted by the Commission, directed that "within 30 days of the date of the Commission's final order in this proceeding, Qwest and Western shall submit an

interconnection agreement consistent with the terms of this decision." Thirty days following the Order, Qwest notified the Commission that the parties were unable to submit a signed agreement because "[plaintiff] informed Qwest that it had been unable to complete its review of the agreement [signed and sent to it by Qwest], and would not likely be able to do so for a few weeks." Qwest then submitted its proposed agreement to the Commission and requested that the proposed agreement be approved if appropriate. Subsequently, plaintiff notified Qwest that it refused to sign the agreement tendered by Qwest because plaintiff believed that it failed to comply with the Arbitrator's Order. Plaintiff, however, failed to notify the Commission of this matter nor did plaintiff submit an alternate agreement to the Commission for approval. Therefore, the parties have failed to submit a final agreement to the Commission for approval as directed by the Commission.

Pursuant to § 252(e) (1) of the Act, "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies." Section 252(e) (6) holds:

In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine

whether the agreement or statement meets the requirements of section 251 of this title and this section.

Therefore, until an agreement has been "submitted for approval" to the Commission under § 252(e)(1), there cannot be any "determination under this section" pursuant to subsection (e)(6). Until there is a Commission determination under subsection (e)(6), the Commission has not yet concluded its function under the Act, and court review is premature and barred.

I have not found, nor have the parties referred this court to any judicial decisions to the contrary. Every court that has addressed this issue under the Act has held that federal courts lack subject matter jurisdiction until the state commission makes a determination approving or rejecting an interconnection agreement. See generally, GTE North v. Strand, 209 F.3d 909, 917 (6th Cir. 2000) (noting "the many . . . cases in which district judges have refused to review interlocutory orders issued by state commissions in the course of § 252 arbitrations"). See also, GTE Northwest, Inc. v. Hamilton, 971 F.Supp. 1350 (D. Or. 1997) (no subject matter jurisdiction pursuant to § 252(e)(6) prior to the Commission approving or rejecting the interconnection agreement). In Hamilton, defendant AT&T had "not yet submitted" an interconnection for plaintiff GTE's review. As here, plaintiff argued that the court had jurisdiction pursuant to 47 U.S.C. § 252(e)(6). The court disagreed and found no

jurisdiction based on an interpretation of § 252(e)(6) and the conclusion that "a fair reading of § 252(e)(6) compels the conclusion that a district court will be reviewing the Commission's determination from the arbitration proceedings by determining whether the agreement complies with the Act." Id. at 1353.

Plaintiff's reliance on the Supreme Court decision in Verizon Maryland v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002) is misplaced. There, the Court held that jurisdiction in the federal court lies when there is no particular state process identified in the Act, and to the extent state process was required, the parties had already completed it. The facts at issue concerned:

"As required by the Act, the incumbent LEC . . . negotiated an interconnection agreement with competitors[.] The [state commissioners] approved the agreement. Six months later, Verizon informed WorldCom that it would no longer pay reciprocal compensation for telephone calls made by Verizon's customers to the local access numbers of Internet Service Providers (ISPs), claiming that ISP traffic was not 'local traffic' subject to the reciprocal compensation agreement because ISPs connect customers to distant web sites. WorldCom disputed Verizon's claim and filed a complaint with the Commission.

Id. at 639-40.

Specifically, Verizon concerned jurisdiction under § 252 to review a decision interpreting a previously entered agreement (rather than arbitrating the agreement in the first instance) and held that in the absence of a legislative intent to divest

jurisdiction, whether § 252 specifically granted jurisdiction, 28 U.S.C. § 1331 remained unaffected. Id. at 641-42. Those are not the circumstances at bar where there exists a specific administrative process set out by statute. 47 U.S.C. § 252. I find no basis to circumvent § 252's state level administrative process.

Similarly, the Ninth Circuit in Pacific Bell v. Pac West Telecomm, Inc., 325 F.3d 1114 (9th Cir. 2003), reviewed a claim arising out of a state commission arbitration that was made after the California Commission made a final determination approving a completed interconnection agreement. Although the interconnection agreement at issue had not been signed when the state commission issued its final order, the final completed agreement had already been filed and approved by the commission. Unlike the situation at bar, there was no further determination for the state Commission to make approving a final agreement. Consistent with this, the Ninth Circuit stated: "After a state commission approves an arbitrated agreement, any 'aggrieved' party to the agreement may bring an action in district court 'to determine whether the agreement . . . meets the requirements of the Act[.] Once the terms are set, either by agreement or arbitration, and the state commission approves the agreement, it becomes a binding contract." Id. at 1120. See also, AT&T Communications Systems v. Pacific Bell, 203 F.3d 1183, 1186 (9th

Cir. 2000) ("a state commissions' decision can be 'a determination' [under the Act] even if it is subject to a request for rehearing as long as the decision is operational or binding on the parties in the absence of a request for rehearing."). In approving the appeal, the Ninth Circuit cited the procedural posture in AT&T as follows:

The arbitrator issued a final report on October 31, 1996, and, as required by the Act, the parties submitted the arbitrated agreement to the [state commission] for approval on November 12, 1996. See 47 U.S.C. § 252(e). The [state commission] issued a decision approving the arbitrated agreement, with certain modifications, on December 9, 1996. AT&T thereafter sought review in federal district court pursuant to section 252 of the Act[.]

203 F.3d at 1184-85.

Here, only the first step outlined by the Ninth Circuit was completed. That is, the Commission issued the Order making findings and conclusions on disputed issues and directed the parties to submit an interconnection agreement complying with the Order. The parties never submitted an agreement due to plaintiff's inability or refusal to review Qwest's proposed agreement; and thereafter, the parties were at an impasse regarding the terms of an interconnection agreement. Plaintiff, however, did not file anything with the Commission objecting to Qwest's proposed terms or otherwise allowing the Commission to address the impasse. The second and third steps outlined above by the Ninth Circuit (Commission approval of an interconnection

agreement) remain pending and must be completed prior to jurisdiction vesting with this court.

Finally, this result not only comports with a plain reading of the Act and judicial decisions, it also is supported by sound policy. This court declines to assert jurisdiction prematurely under the Act and thus entangle itself as an "overseer" of ongoing state commission proceedings. The wiser and more efficient course is to allow the Commission to accomplish its task and wait until the Commission approves or rejects the interconnection agreement thus avoiding premature judicial involvement in the administrative decision making process.

As required by statute, the administrative record which is before this court, clearly shows that Qwest and plaintiff have failed to submit to the Commission a mutually agreeable interconnection agreement that conforms to the Commission's Order. AR at Tab 33, p. 865. Until the Commission approves or rejects an interconnection agreement submitted by the parties or otherwise approves an interconnection agreement, any action before this court is premature. Without the Commission's approval of any agreement, this court lacks subject matter jurisdiction over plaintiff's claims. See 47 U.S.C. §§ 252(e) (1), (e) (6); OAR 860-016-0030(12).

Moreover, plaintiff's Second Claim for Relief (Qwest's failure to negotiate an interconnection agreement in good faith)

is barred for the reason that the Act does not permit parties to adjudicate such claims in federal court. A claim for failure to negotiate in good faith is remedied through the mediation and arbitration process before the Commission. See § 252 of the Act.

This claim is further barred because this court lacks jurisdiction to review an issue on which the parties agreed or that was otherwise not submitted to the Commission for decision. Jurisdiction lies only in cases where "a State Commission makes a determination under this section" that "any party aggrieved by such determination may bring an action in an appropriate Federal District court." § 252(e)(6). I find no evidence that the Commission made any decision or determination concerning Qwest's alleged failure to negotiate an interconnection agreement in good faith. By raising this claim for the first time in the action before this court, plaintiff is bypassing the Commission entirely and asking this court to assume the role of arbitrator. The court's role is to review the Commission's determination for compliance with Sections 251 and 252. This court lacks jurisdiction to do more.

Finally, regarding plaintiff's third and fourth claims for relief pursuant to 42 U.S.C. § 1983 for money damages, the PUC's well founded motion to dismiss is denied with leave to renew upon this court obtaining proper jurisdiction over this matter.

CONCLUSION

Defendant Qwest's motion to dismiss (doc. 16) and defendant PUC's motion to dismiss (doc. 14) are granted. The PUC's request for oral argument is denied as unnecessary. Further, the PUC's request for attorney fees and costs is denied. All pending motions are denied as moot and this case is dismissed.

IT IS SO ORDERED.

Dated this 25 day of July 2005.

/s/ Ann Aiken
Ann Aiken
United States District Judge

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON**

WESTERN RADIO SERVICES CO.,
an Oregon corporation,

Plaintiff,

v.

Civil No. 05-159-AA

QWEST CORPORATION, a Colorado
corporation; THE PUBLIC UTILITY
COMMISSION OF OREGON; LEE BEYER,
Chair; RAY BAUM, Commissioner; and
JOHN SAVAGE, Commissioner, in their
individual capacities and in their official
capacities as Commissioners of the Public
Utility Commission of Oregon,

Defendants.

JUDGMENT

This action is dismissed.

Dated: July 26, 2005.

Donald M. Cinnamond, Clerk

by: /s/ Leslie Engdall
Leslie Engdall, Deputy

JUDGMENT

DOCUMENT NO: _____

-----Original Message-----

From: Richard L. Oberdorfer [mailto:oberdorfer@earthlink.net]

Sent: Saturday, July 23, 2005 4:40 PM

To: Bryan Sanderson

Subject: Interconnection Negotiations

Bryan

I received your letter indicating Qwest's refusal to negotiate interconnection agreements for the states of Arizona, Colorado and New Mexico. I have to disagree with your logic.

Qwest has not met its obligations under 251/252 because in none of the above states does the agreement meet the requirements of law and regulation nor does the agreement even obligate Qwest to interconnect with the equipment of Autotel. We have tried to resolve matters in court but Qwest keeps saying we have to go back to the state commission because we did not do something right the first time. By requesting negotiations now I am simply starting the clock to go back to the state commission sooner than later. Also since I have become aware of the extent and methods of Qwest's bad faith in negotiating, I believe that measures can be taken that will speed up the process of obtaining compliant interconnection agreements and prevent disputes from occurring in the future.

I ask that you reconsider. But just so there is no misunderstanding, both Western and Autotel will submit petitions in all five states unless we can negotiate agreements. In any event, I am continuing to work on a proposed interconnection agreement for Utah and Oregon.

Thanks
Richard

Duarte, Alex

From: Sanderson, Bryan
Sent: Wednesday, July 27, 2005 2:06 PM
To: 'Richard L. Oberdorfer'
Cc: Nodland, Jeff; Curtright, Norm; Luckritz, Monica; McGann, David; McDaniel, Paul; Thomson, George; Taylor, Nita; 'Monson, Gregory B.'; Duarte, Alex; Mason, Don
Subject: RE: Interconnection Negotiations
Attachments: Autotel7-27-05.doc

Richard: Please see my attached response to your email. Thanks. Bryan

-----Original Message-----

From: Richard L. Oberdorfer [mailto:oberdorfer@earthlink.net]
Sent: Saturday, July 23, 2005 4:40 PM
To: Bryan Sanderson
Subject: Interconnection Negotiations

Bryan

I received your letter indicating Qwest's refusal to negotiate interconnection agreements for the states of Arizona, Colorado and New Mexico. I have to disagree with your logic.

Qwest has not met its obligations under 251/252 because in none of the above states does the agreement meet the requirements of law and regulation nor does the agreement even obligate Qwest to interconnect with the equipment of Autotel. We have tried to resolve matters in court but Qwest keeps saying we have to go back to the state commission because we did not do something right the first time. By requesting negotiations now I am simply starting the clock to go back to the state commission sooner than later. Also since I have become aware of the extent and methods of Qwest's bad faith in negotiating, I believe that measures can be taken that will speed up the process of obtaining compliant interconnection agreements and prevent disputes from occurring in the future.

I ask that you reconsider. But just so there is no misunderstanding, both Western and Autotel will submit petitions in all five states unless we can negotiate agreements. In any event, I am continuing to work on a proposed interconnection agreement for Utah and Oregon.

Thanks
Richard

Wednesday, July 27, 2005

Dear Richard:

Again, we cannot seem to find any common ground. Qwest is meeting its 251/252 obligations with Western Radio and Autotel in Oregon, Utah, Arizona, New Mexico and Colorado, as the arbitrated agreements in those states are compliant with the Act and the rules, and they obligate Qwest to interconnect with Western Radio and Autotel in a non-discriminatory manner consistent with that provided to any other wireless provider. That is the reason that Qwest declines any new negotiations requests from Western Radio or Autotel. The Act and the rules lay down specific requirements for negotiations and arbitrations. Qwest is following these requirements for its part and this process works and needs to be completed. Qwest is required to live with the original decisions by the five Commissions, unless properly overturned on appeal according to the processes of the Act and will contest any further petitions by Western Radio or Autotel in those five states opening up new arbitrations prior to those agreements expiring.

Sincerely,

Bryan Sanderson

CERTIFICATE OF SERVICE

ARB 537

I hereby certify that on the 28th day of July, 2005, I served the foregoing **QWEST CORPORATION'S LETTER TO THE HONORABLE ALLAN ARLOW** in the above entitled docket on the following person via U.S. Mail, by mailing a correct copy to him in a sealed envelope, with postage prepaid, addressed to him at his regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

Richard L. Oberdorfer
Western Radio Services Co.
114 N.E. Penn Avenue
Bend, OR 97701

DATED this 28th day of July, 2005.

QWEST CORPORATION



By: _____

ALEX M. DUARTE, OSB No. 02045
421 SW Oak Street, Suite 810
Portland, OR 97204
Telephone: 503-242-5623
Facsimile: 503-242-8589
e-mail: alex.duarte@qwest.com

Attorney for Qwest Corporation