

This is an electronic copy. Attachments may not appear.

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

IC 1

In the Matter of the Petition of Metro)	
One Telecommunications, Inc., for)	ORDER
Enforcement of an Interconnection Agreement)	ON RECONSIDERATION
with U S WEST Communications, Inc.)	

DISPOSITION: APPLICATION FOR REHEARING OR RECONSIDERATION GRANTED

On June 19, 2000, U S WEST Communications, Inc. (US WEST) filed an Application for Rehearing or Reconsideration of Commission Order No. 00-213. US WEST contends that the order conflicts with a recent decision by the Federal Communications Commission (FCC). On July 5, 2000, Metro One Telecommunications, Inc. (Metro One) filed a response. Metro One contends that no change in the order is required. In the alternative, it requests the Commission clarify the order to affirm the company's entitlement to directory access listings (DALs) under 47 USC §251(b)(3). On July 18, 2000, Qwest Corporation (Qwest), formerly known as U S WEST, filed a reply.¹

We grant Qwest's application, but agree with Metro One that, because the FCC's decision is not yet final, no substantive change in the order is required. We take this opportunity, however, to make one minor modification to the order to avoid, as best we can, future disputes between the parties. We also affirm that Metro One is entitled to nondiscriminatory access to DALs under Section 251(b)(3), but conclude that services provided pursuant to that section need not be provided at cost-based rates.

Based on the record in this matter, the Commission enters the following:

FINDINGS AND CONCLUSIONS

Metro One and Qwest arbitrated an interconnection agreement in docket ARB 100. In its petition for arbitration, Metro One sought access to Qwest's DALs under Sections 251(b) and 251(c) of the 1996 Telecommunications Act (Act). After a hearing,

¹ On June 30, 2000, Qwest completed its merger with U S WEST. Accordingly, we refer to the company as Qwest in our discussion.

the Commission resolved open issues relating to DAL costs and prices, and subsequently approved an interconnection agreement between the parties in Order No. 99-544.

On December 17, 1999, Metro One filed a petition for enforcement of the interconnection agreement with Qwest. Metro One alleged that U S WEST failed to comply Order No. 99-544 by attempting to limit Metro One's ability to obtain DALs at the rates, terms, and conditions set forth in the interconnection agreement. Qwest refused to provide Metro One access to its DALs based on its belief that Metro One was neither a telecommunications carrier providing a telecommunications service, nor a competing provider of telephone exchange service and telephone toll service.

In Order No. 00-213, we found that Metro One is a "telecommunications carrier" that offers "telecommunications service," as those terms are defined in Section 153(49) and (51) of the Act. Based on those findings, we concluded that Metro One was entitled to access unbundled network elements at cost-based rates set forth in the interconnection agreement approved in Order No. 99-544. That agreement lists directory assistance listings (DALs) as an unbundled network element.

Qwest now seeks rehearing or reconsideration of Order No. 00-213. It argues that the order contains an error of law because it conflicts with a recent decision by the FCC.² Metro One maintains that no change in the order is necessary. Alternatively, it requests the Commission clarify the order to affirm the company's entitlement to DALs at cost-based rates under Section 251(b)(3). We address each parties' request separately.

I. *UNE Remand Order*

Positions of the Parties

In its application for rehearing or reconsideration, Qwest contends that the portions of Order No. 00-213 discussing Metro One's entitlement to DALs is erroneous. It notes that the FCC recently held that DALs are no longer network elements that must be unbundled pursuant to Section 251(c)(3). In the *UNE Remand Order*, the FCC stated:

[I]ncumbent LECs need not provide access to its OS/DA [operator services and directory assistance] as an unbundled network element. All LECs, however, must continue to provide their competitors with nondiscriminatory access to their OS/DA, pursuant to Section 251(b), as implemented by the Commission.³

² *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98 (Released November 5, 1999) (hereafter, *UNE Remand Order*).

³ *UNE Remand Order*, ¶442.

Because DALs are no longer considered as UNEs pursuant to Section 251(c), Qwest argues that Metro One is not entitled to access them at the cost-based rates contained in the interconnection agreement.

Metro One acknowledges that the FCC recently eliminated DALs as an unbundled network element. It points out, however, that the *UNE Remand Order* is on appeal and is not final. Because the parties' approved interconnection agreement requires that the terms and conditions remain in full force and effect unless changed by a *final* order, Metro One contends that the FCC's decision does not change Qwest's obligations under the interconnection agreement.

Commission Resolution

We agree with Metro One that, because the FCC's decision is on appeal and not final, no change in Order No. 00-213 is necessary. In Section 19.5 of the interconnection agreement, the parties expressly contemplated the possibility that regulatory action might materially affect the terms and conditions of the arbitrated contract.⁴ In the event of such action, the parties agreed that either could request that the affected language be renegotiated. A party may request renegotiation, however, only after the regulatory decision becomes final and nonappealable. In other words, the parties agreed that the contract language would remain in place until there is a decision by a court of final jurisdiction.

In refusing to allow Metro One to purchase DALs at terms and conditions set forth in the approved interconnection agreement, Qwest is, in essence, seeking to unilaterally terminate its contractual obligations. Qwest apparently believes that the FCC's *UNE Remand Order* requires that the parties renegotiate the terms and conditions governing the sale of DALs. Qwest's actions, however, are premature. As explained above, the FCC's decision has been appealed. Thus, by operation of Section 19.5, the challenged terms and conditions continue to remain in effect.

⁴ Section 19.5 provides, in its entirety:

In the event that any final and nonappealable legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of CLEC or ILEC to perform any material terms of this Agreement, CLEC or ILEC may, on thirty (30) day's written notice (delivered not later than thirty (30) days following the date on which such action has become legally binding and otherwise become final and nonappealable) require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable news terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Alternative Dispute Resolution procedures set forth in Section 11 above.

We are not persuaded by Qwest's attempt to avoid application of Section 19.5 by arguing that the FCC's rules arising out of the *UNE Remand Order* have not been stayed pending appeal. Any remand or other adverse appellate action, however, would result in new FCC rules governing the provision of DALs. Thus, like the *UNE Remand Order* itself, the underlying rules are also not final and nonappealable for purposes of Section 19.5.

Qwest also attempts to distinguish the parties' ability to renegotiate a particular term on the interconnection agreement under Section 19.5 and the Commission's obligation to reconsider an order enforcing the agreement. Because the interconnection agreement is inconsistent with federal law, Qwest argues that the order enforcing the agreement also contains an error of law that must be addressed by the Commission. Again, we disagree. Metro One initiated this action to force Qwest to comply with the terms and conditions of the interconnection agreement approved in docket ARB 100. In Order No. 00-213, we found that, contrary to Qwest's assertions, Metro One was a telecommunications carrier providing telecommunications services. Thus, based on the terms of the approved agreement, we concluded that Metro One was entitled to purchase UNEs, including DALs, at cost based rates. Because that contract language remains in effect for reasons discussed above, no change to Order No. 00-213 is required.

In reaching these decisions, we acknowledge that the FCC's *UNE Remand Order* will, at some point in time, become final and nonappealable. In the event that the FCC's decision is upheld, and to avoid as best we can future disputes between the parties, we make one minor modification to Order No. 00-213. The last sentence of the first full paragraph of page six is modified to read:

Thus, contrary to U S WEST's assertion, Metro One is entitled to purchase [UNEs] at the terms and conditions set forth in the agreement approved in ARB 100.

We clarify, however, that this modification does not affect our conclusion that Metro One continues to be entitled to purchase DALs at cost-based rates at least until the FCC's *UNE Remand Order* becomes final and nonappealable and the parties successfully renegotiate the terms of the agreement.

Metro One's Entitlement under Section 251(b)(3)

Positions of the Parties

As an alternative argument in opposition to Qwest's application for rehearing or reconsideration, Metro One states that it would not object to the Commission's

clarification of Order No. 00-213 to reflect an analysis under Section 251(b)(3). Because the order addressed Metro One's status as a telecommunications carrier, Metro One contends that the conclusion that it is entitled to access DALs at cost-based rates remains valid under Section 251(b)(3).⁵ Metro One explains:

To comply with 251(b)(3), USWC must provide Metro One with the same access to DALs it provides other carriers, including itself. To provide nondiscriminatory access to DALs, the prices charged must also be nondiscriminatory. Any suggestion by USWC that it can price DALs for Metro One's use above USWC's own cost would violate this nondiscrimination requirement.⁶

In its request for reconsideration, Qwest first maintains that Metro One is not entitled to obtain DALs under Section 251(b) because it does not offer telephone exchange service or telephone toll service. Later, in its reply, Qwest contends that neither the FCC nor the 1996 Act require it to provide DALs under Section 251(b)(3) at cost-based rates. It acknowledges that, under that section, it may not discriminatorily charge one requesting carrier more than another requesting carrier. Qwest maintains, however, that such an obligation does not require it to provide DALs at cost-based rates.

Commission Resolution

At the outset, we conclude that, contrary to Qwest's argument, Metro One is entitled to nondiscriminatory access to DALs under Section 251(b). On two separate occasions, first in Order No. 99-544 and again in Order No. 00-213, we found, as fact, that Metro One provides intra- and interLATA telecommunications services. We specifically found that Metro One resells toll services of its interexchange carrier clients. Because Metro One provides "telephone exchange service" or "telephone toll service," it fits the definition of a "competing provider" under Section 251(b).⁷

We further conclude, however, that Qwest is not obligated by Section 251(b)(3) to provide DALs at cost-based rates. Section 252(d)(1) governs the provision of elements and services at cost-based rates. That section applies only to interconnection and access to UNEs under Section 251(c) of the Act. In contrast, Section 251(b) requires only that local exchange carriers provide competing carriers with nondiscriminatory access to, among other things, DALs. To comply with that

⁵ 47 USC §251(b)(3) establishes a duty, among other things, for local exchange carriers to permit all "competing providers of telephone exchange service and telephone toll service" to have nondiscriminatory access to directory assistance and directory listings.

⁶ Reply of Metro One at 3.

⁷ Compare *INFONXX, Inc., v. NYNEX*, 13 FCC Rcd 10288; 1998 FCC LEXIS 2514 (released May 27, 1998).

requirement, Qwest must provide Metro One access to DALs at the same terms and conditions that it provides other competing carriers, including itself. There is no requirement, however, that the prices for DALs provided under Section 251(b)(3) be based on Qwest's costs.

ORDER

IT IS ORDERED that the Application for Rehearing or Reconsideration, filed by Qwest Corporation, is granted. The last sentence of the first full paragraph on page six of Order No. 00-213 is modified as indicated above. The remainder of the order remains unchanged.

Made, entered, and effective _____.

Ron Eachus
Chairman

Roger Hamilton
Commissioner

Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to ORS 756.580.