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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

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In the Matter of the Petition of METRO)
ONE TELECOMMUNICATIONS, INC., for)
Enforcement of an Interconnection Agreement) **ORDER**
with QWEST CORPORATION (formerly)
known as U S WEST COMMUNICATIONS,)
INC.))

**DISPOSITION: PETITION FOR ENFORCEMENT GRANTED;
RECORD TO REMAIN OPEN TO DETERMINE
PROPER CREDIT**

SUMMARY

In this order, the Commission grants the petition for enforcement of an interconnection agreement filed by Metro One Telecommunications, Inc. (Metro One). We conclude that the interconnection agreement requires Qwest Corporation, formerly known as U S WEST Communications, Inc. (Qwest), to provide Metro One access to directory assistance listings (DALs) for its entire 14-state operating region. We further conclude that Metro One may use the DALs to provide national directory assistance to its end-users, and that it is entitled to a refund of the difference Metro One has been forced to pay for the DALs from other providers and the amount it should have paid Qwest under the interconnection agreement. The record shall remain open to determine the proper amount of overpayment by Metro One that Qwest should credit to Metro One's account.

PROCEDURAL HISTORY

This docket has a complex procedural history. On December 17, 1999, Metro One initiated this proceeding by filing a petition for enforcement of its interconnection agreement—arbitrated in docket ARB 100—with Qwest Corporation. In ARB 100, Metro One sought access to Qwest's DALs under Sections 251(b) and

251(c) of the 1996 Telecommunications Act (Act). After a hearing, 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.

In its petition for enforcement, Metro One alleges that Qwest violated Order No. 99-544 by limiting Metro One's ability to obtain DALs at the rates, terms, and conditions set forth in the approved interconnection agreement. Metro One seeks access to DALs for all 14 states in Qwest's service territory, as well as a refund of the difference between rates that it has been required to pay for DALs under a list product agreement with a Qwest affiliate and those rates specified in the interconnection agreement.

On January 4, 2000, Qwest filed an answer to Metro One's petition. In its answer, Qwest disputes Metro One's claim that it is entitled to DALs for all 14 states, and contends that the Commission lacks jurisdiction to award the requested refund. In addition, Qwest's answer contained a counterclaim and numerous affirmative defenses claiming that Metro One is not entitled to access DALs because it is neither a telecommunications carrier providing a telecommunications service, nor a competing provider of telephone exchange service and telephone toll service.

In response to Qwest's answer and counterclaim, Metro One filed a Motion for Partial Summary Judgment. Metro One acknowledged that Qwest was entitled to dispute the interpretation of the interconnection agreement and to challenge the Commission's jurisdiction to award a refund. Metro One argued, however, that it was entitled to summary judgment on Qwest's affirmative defenses and counterclaims regarding Metro One's right to access DALs. We agreed and granted Metro One's motion in Order No. 00-213. We concluded 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.

On June 19, 2000, Qwest filed an Application for Rehearing or Reconsideration of Order No. 00-213. Qwest argued that the order contained an error of law because it conflicts with a recent order issued by the Federal Communications Commission.¹ In Order No. 00-421, we granted the application, but agreed with Metro One that, because the FCC's order was not yet final and unappealable, no substantive change in our order was required. We also affirmed that Metro One was entitled to nondiscriminatory access to DALs under Section 251(b)(3) of the Act, but noted that services provided under that section need not be provided at cost-based rates.²

¹ *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).

² On October 2, 2000, Qwest filed an application for reconsideration of Order No. 00-421. We will address that request in a separate order.

On July 10, 2000, Qwest and Metro One filed opening briefs addressing Metro One's entitlement to DALs for all 14 states and a refund. Qwest filed its opening comments as a Motion for Summary judgment, which we will treat as an opening brief. Qwest filed its reply brief on July 31, 2000, and Metro One filed its reply brief on August 1, 2000.

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

FINDINGS AND CONCLUSIONS

Both parties agree that only two issues remain for Commission resolution: (1) whether the interconnection agreement allows Metro One to purchase DALs from any state within Qwest's service territory; and (2) whether Metro One is entitled to a refund of the difference between the rates ordered in ARB 100 and the rates it has been paying for DALs. We address each issue separately.

I. Is Metro One Entitled to Access DALs for All 14 States?

Positions of the Parties

Metro One believes that this issue is one of basic contract interpretation. It notes that the Revised Attachment 1 to the interconnection agreement, which governs the purchase of DALs, provides:

ILEC shall provide an initial load of subscriber records via electronic data transfer for CLECs and independent telcos included in its Directory Assistance Database within fifteen (15) days of receipt of a written request. The NPAs [numbering plan areas] included shall represent *the entire ILEC operating region*. (Emphasis added.)

Relying on the highlighted language above, Metro One contends that the plain language of the agreement shows that parties intended to negotiate terms and conditions for DALs covering Qwest's entire 14-state territory, not just Oregon.

Metro One also contends that evidence of the parties' intent is found in the ARB 100 transcript. During a colloquy between the Arbitrator and a Qwest witness, Metro One notes the following exchange occurred:

Arbitrator: Some more background. First of all, a little more background information on how a customer of the DA [directory assistance] list product would use it. Does this give the provider a list of all listings that U S WEST has?

The Witness: My understanding of how the initial load would be, yes. I mean, first of all, they could ask like “We want all the listings for Oregon” or “We want all the listings in this area, maybe we want all 14 states.” They could determine what they want and the universe of the listings. Tr. at 126.

Metro One contends that this portion of the transcript demonstrates that Qwest not only anticipated Metro One’s desire for DALs for all the states, but also that Qwest was willing and able to provide DALs for the entire 14-state region.

Furthermore, Metro One argues that Qwest has an obligation to provide access to its entire 14-state DAL database under Section 251(b)(3), which requires incumbents to provide nondiscriminatory access to DALs. Because Qwest acknowledges that its directory assistance operators in Oregon have access to listings for all 14 states, Metro One contends that Qwest must provide Metro One with the same listings at cost-based rates; *i.e.*, equal to the access Qwest provides itself.

Qwest makes numerous arguments in support of its position that it is only obligated to provide DALs for its Oregon service territory. First, Qwest argues that, while the 1996 Act contemplates that each state will have an active role in arbitrating and approving interconnection agreements, a state commission’s jurisdiction does not extend beyond the state’s borders. Qwest maintains that nothing in the Act allows a state to set rates for interconnection or access to UNEs in other states, or to impose terms or conditions of the provision of interconnection or UNEs outside the state’s borders. Qwest argues that the cost of providing interconnection or a UNE varies from state to state depending upon numerous factors, including the pricing design and methodology used by the individual commissions. Because the cost of providing interconnection and access to UNEs is state specific, Qwest contends that each state is restricted to determining rates within its own borders.

Qwest also argues that the interconnection agreement limits Metro One’s use of the DALs to provide directory assistance to end-users in Oregon. It cites language at the beginning of the contract limiting the scope of the agreement to the extension of certain arrangements “within the State of Oregon.”³ Additionally, Qwest notes that Schedule 2 to the Agreement provides that the Oregon listings are to be provided at “Network Element Prices for Oregon.” Despite these provisions, Qwest states that Metro

³ The introductory language states, in its entirety:

Pursuant to this Agreement for Local Wireline Network Interconnection and Service Resale (“Agreement”), by and between Metro One Telecommunications, Inc., an Oregon Corporation (a Competitive Local Exchange Carrier (“CLEC” or “Reseller”, as applicable)[)], on behalf of itself and its Affiliates, and U S WEST Communications, Inc. (the Incumbent Local Exchange Carrier or (“ILEC”)[)], on behalf of itself and its Affiliates, (collectively, “the Parties”) will extend certain arrangements to one another within each LATA in which they both operate within the State of Oregon.

One seeks access to all of Qwest's DALs to provide directory assistance to all of its end-users, including those located outside Oregon. Qwest maintains that it need only provide Oregon DALs to Metro One so that Metro One may provide directory assistance service to its Oregon customers.

Finally, Qwest argues that Metro One's reliance on contract language and the colloquy during the ARB 100 hearing is misplaced. Qwest contends that the phrase "entire ILEC operating region" does not mean Qwest's entire 14-state service territory. Qwest notes that it is not the ILEC for the entire state of Oregon, as there are many exchanges in the state served by other incumbent providers. Moreover, Qwest adds that Oregon has two area codes, or NPAs. Thus, Qwest argues that the reference to the "ILEC operating region" and multiple NPAs indicates that Qwest is obligated to provide DALs only for its service territory in Oregon. With regard to the exchange with the Arbitrator at the ARB 100 hearing, QWEST explains that its witness was simply explaining that a customer of its DAL product *could* ask for listings in a particular area—even all 14 states. Qwest asserts that the witness's comments were made in the context of simply answering the Arbitrator's questions, not in the context of negotiating the interconnection agreement between Qwest and Metro One. Thus, Qwest contends that the dialogue sheds no light on what Qwest intended when it negotiated the terms of the interconnection agreement.⁴

Commission Resolution

As noted above, the parties' agreement governing the purchase of DALs is set forth in a document entitled "Revised Attachment 1, DIRECTORY ASSISTANCE LISTING INFORMATION." While most—if not all—of the other provisions of the interconnection agreement were adopted from other contracts Qwest had entered into with another carrier, the parties specifically negotiated the terms governing DALs for inclusion in the ARB 100 agreement. *See* Order No. 99-411. That Revised Attachment 1 requires Qwest to provide Metro One an "initial load of subscriber records via electronic data transfer for CLECs and independent telcoms included in its Directory Assistance Database" upon written request. The listings included in the data transfer "shall represent the entire ILEC operating region." Furthermore, the agreement provides that Metro One may use the DALs "for any lawful purpose."

We first agree with Metro One that this language demonstrates that the parties intended to negotiate the terms and conditions for DALs covering Qwest's entire 14-state territory, not just Oregon. The language is clear and specific: Qwest must provide DALs for its "entire operating area." We are not persuaded by Qwest's strained interpretation of the language to limit its obligation to provide DALs for its service territory in Oregon. While Oregon does have more than one area code and multiple local

⁴ As an initial argument, Qwest contends that Metro One is not entitled to purchase DALs at rates set forth in the agreement because the Federal Communications Commission recently concluded that DALs are not UNEs under the Act. We addressed that argument in Order No. 00-421 and need not revisit it here.

exchange carriers, we do not believe the phrase “entire ILEC operating region” can be reasonably read to cover only Oregon. The parties’ use of that language, and the omission of any language limiting the geographical scope of the DALs, such as “in Oregon” precludes doubt that the parties intended the provision to cover DALs for Qwest’s entire 14-state operating region.

Second, we conclude that the agreement allows Metro One to use the DAL data for the provision of DA service to end-users located anywhere in the country, not just Oregon. The bare language of the agreement clearly provides that Metro One may use the directory assistance information “for any lawful purpose.” While Metro One may not use the DAL data for telemarketing or soliciting purposes, nothing in the negotiated language restricts Metro One’s ability to use the DAL information to provide national DA service.

In concluding that Metro One may use the DALs to provide service in other states, we acknowledge Qwest’s argument that the opening paragraph of the contract contains language addressing the parties’ operations “within the State of Oregon.” We do not believe, however, that this generic recital—found in most of Qwest’s interconnection agreements—limits Metro One’s use of the DALs. First, we agree with Metro One that the recital addresses the parties’ agreements governing interconnection and resale, not the provision of DALs. As Metro One notes, the entire paragraph reads:

Pursuant to this Agreement *for Local Wireline Network and Service Resale* [the parties] will extend certain arrangements to one another within each LATA in which they both operate within the State of Oregon. (Emphasis added.)

Second, while this language is consistent with other portions of the agreement limiting interconnection and resale to Oregon, it does not control the more specific language governing the provision of DALs set forth in Revised Attachment 1. As previously discussed, the terms of the ARB 100 agreement were primarily adopted from other Qwest interconnection agreements with one notable exception—the provisions governing DALs. Thus, the essence of the agreement and bargaining involved the terms and conditions regarding the sale and purchase of DALs. Qwest cannot now fail to acknowledge the parties’ specific bargained terms and instead rely on a standard recital copied from another agreement. The negotiated terms specifically provide that Metro One may use the DALs for any lawful purpose, which, we conclude, includes the use of DALs in other states.

We note that these conclusions are supported by Qwest’s own filings and testimony in docket UM 823, *In the Matter of the Investigation into Qwest Corporation’s Compliance with §271 of the Telecommunications Act of 1996*. In that docket, Qwest has filed a proposed Statement of Generally Available Terms (SGAT) pursuant to §252(f) of the Act. The proposed SGAT contains the statement of the terms and conditions that

Qwest generally offers to provide access and interconnection to requesting carriers here in Oregon. We take official notice that Section 10.5.1.1.2 of Qwest's proposed SGAT defines "Directory Assistance List Service" as "the bulk transfer of Qwest's directory listings for subscribers within Qwest's fourteen (14) states under a non-exclusive, non-transferable, revocable license[.]" Moreover, in pre-filed reply testimony, Qwest witness Lori Simpson explains that, under the proposed SGAT, CLEC's may use the DALs to provide national DA service. *See* Qwest/20, Simpson/4.⁵ We recognize that the proposed SGAT did not exist at the time of the ARB 100 proceeding and contains prices for DALs that exceed those contained in the parties' interconnection agreement. There is nothing to suggest, however, that the parties' intended geographical scope and use of the DAL product negotiated in the ARB 100 contract differs in any respect from that generally available under the proposed SGAT. In fact, during the ARB 100 hearing, a Qwest witness described the DAL product in the same manner as it is defined in the SGAT. As set forth above, the Qwest witness told the Arbitrator that a user of the DAL product could "determine what [DALs] they want and the universe of the listings," which he explained could include "all 14 states." *See* ARB 100 Transcript at 126.

Finally, we conclude that the parties' inclusion of the specific language governing the provision of DALs renders Qwest's jurisdictional arguments moot. Section 252 of the Act expressly provides this Commission with the power to arbitrate and approve agreements for interconnection, services, or network elements between carriers. This express authority includes the implied authority to also interpret and enforce the provisions of agreements approved by this Commission. *See, e.g., SBC v. Public Utility Commission of Texas, et. al.*, 208 F 3d 475 (5th Circuit Court of Appeals, March 30, 2000). More importantly, the parties expressly conferred authority on this Commission to implement and enforce the terms of their interconnection agreement.⁶ Thus, while it is unclear whether we have authority to require a CLEC to provide access to directory listings for subscribers located outside of Oregon, no doubt exists as to our ability to interpret and enforce agreements made voluntarily between connecting carriers. We have found that Qwest agreed to provide Metro One access to its 14-state DAL database for any lawful purpose. Contrary to Qwest's assertion, nothing in the Act prevents this Commission from enforcing that agreement. Indeed, Qwest's own SGAT reflects this Commission's ability to implement an agreement, entered into by two carriers here in Oregon, that includes terms and conditions for the purchase of multi-state DALs for the provision of national DA service.

⁵ Pursuant to OAR 860-014-0050(2), a party may object to the fact noticed within 15 days.

⁶ Section 11.2 of the approved Interconnection Agreement provides:

The Parties recognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement. Accordingly, the Parties agree that any dispute arising out of or relating to this Agreement that the Parties themselves cannot resolve may be submitted to the Commission for resolution."

In summary, we conclude that the plain language of the interconnection agreement approved in ARB 100 allows Metro One to purchase DALs covering Qwest's entire 14-state territory, not just Oregon, and that Metro One may use those DALs to provide directory assistance to end-users located anywhere in the country.

II. Is Metro One Entitled to a Refund?

Positions of the Parties

Metro One notes that, because Qwest has refused to provide access to DALs at rates set forth in the interconnection agreement, Metro One has been required to purchase DALs at much higher rates from a Qwest affiliate. If it prevails on its motion to enforce the ARB 100 interconnection agreement, Metro One requests the Commission order Qwest to refund the difference Metro One has been forced to pay for the DALs from other providers and the amount it should have paid under the ARB 100 agreement.

Qwest contends that this Commission lacks authority to grant Metro One's request for a refund for two reasons. First, Qwest argues that the Commission does not have the power to award monetary damages. Second, Qwest notes that Metro One purchased the DALs from a Qwest affiliate, over which the Commission lacks jurisdiction.

Commission Resolution

Qwest is correct that we have limited statutory authority to grant requests for damages. *See, i.e., Pacific Parts v. Pacific Northwest Bell*, Order No. 84-042. In this case, however, Qwest and Metro One have voluntarily conferred authority on this Commission to implement and enforce the provisions of the interconnection agreement. Section 11.1 of the agreement provides that "[a]ll disputes, claims, or disagreements (collectively 'Disputes') arising under or related to this Agreement or breach hereof * * * shall be resolved according to the procedures set forth in Section 11.2[.]" As noted above, Section 11.2 provides that Qwest and Metro One:

[R]ecognize and agree that the Commission has continuing jurisdiction to implement and enforce all terms and conditions of this Agreement. Accordingly, the Parties agree that any dispute arising out of this Agreement that the Parties themselves cannot resolve, may be submitted to the Commission for resolution.

Although these provisions do not specifically address this Commission's authority to award compensatory damages, we are confident that the parties' voluntary grant of authority to this Commission to interpret and enforce the provisions of

agreements necessarily carries with it the authority to award refunds to a party harmed by the improper conduct of another. *See, e.g., Southwestern Bell Telephone Company v. Connect Communications Corporation*, No. 99- 3952 (8th Circuit Court of Appeals, September 13, 2000). Otherwise, the dispute resolution provisions of the agreement would be rendered meaningless.

Furthermore, contrary to Qwest's second argument, the exercise of such does not amount to an impermissible exercise of authority over an unregulated affiliate. Metro One requests that this Commission assess damages on Qwest, a party to the agreement, in the form of a refund of amounts Metro One had to pay to others. Contrary to Qwest's apparent assumption, Metro One does not request that the affiliate itself refund the money, but rather that overpayments be assessed on Qwest. Accordingly, the Commission is not exercising authority over an unregulated entity.

In this order, we have concluded that Qwest is obligated, under the terms of the interconnection agreement, to provide Metro One access to DALs for its 14-state service territory. Because Qwest inappropriately denied Metro One such access, Metro One was required to purchase the DALs from a Qwest affiliate at rates higher than those arbitrated in ARB 100. As a remedy for Qwest's improper conduct, we conclude that Metro One is entitled to a refund of the difference in the amount Metro One has paid the Qwest affiliate and the amount it should have paid Qwest under the terms of the interconnection agreement.

We hope that the parties will be able to resolve the amount that Qwest should credit Metro One for the overpayment. To begin that process, Metro One should submit its demand for credit to Qwest, along with its calculations and supporting information. In the event the parties are unable to resolve this matter, we will keep the record open to determine the proper amount of overpayment by Metro One and the amount that Qwest should credit to Metro One's account.

ORDER

IT IS ORDERED that:

1. Metro One's petition for enforcement of the interconnection agreement arbitrated and approved in docket ARB 100, is granted.
2. Under the terms of the interconnection agreement approved in docket ARB 100, Qwest must provide Metro One access to DALs for its entire 14-state operating region for any lawful use, including the provision of directory assistance to end-users located outside Oregon.

3. Metro One is entitled to a refund of the difference it has been forced to pay for the DALs from other providers and the amount it should have paid Qwest under the interconnection agreement. The record shall remain open to determine the proper amount of overpayment by Metro One and the amount that Qwest should credit to Metro One's account.

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 applicable law.