ORDER NO. 00-709

ENTERED NOV 1 2000

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 with Qwest Corporation, formerly U S WEST Communications, Inc.	)))))	ORDER DENYING REHEARING OR RECONSIDERATION

DISPOSITION: APPLICATION FOR REHEARING OR RECONSIDERATION DENIED

On October 2, 2000, Qwest Corporation (Qwest) filed an Application for Rehearing or Reconsideration of Commission Order No. 00-421. Qwest contends that the order contains an error of law and that good cause exists for further examination of the matter. On October 4, 2000, Metro One Telecommunications, Inc. (Metro One) filed a response. Metro One argues that Qwest's request simply raises the same arguments previously considered and rejected by the Commission. On October 18, 2000, Qwest filed a reply. We adhere to our prior decision and deny Qwest's application.[1]

Discussion

Qwest challenges our decision that Metro One remains entitled, under the terms of the parties' interconnection agreement, to purchase Directory Assistance Listings (DALs) at cost-based rates. In the prior proceeding, Qwest argued that the DALs terms and conditions were no longer valid following the Federal Communications Commission (FCC) UNE Remand order. In that order, the FCC reversed its prior decision and concluded that incumbent local exchange carriers (ILECs) need not provide access to DALs at cost-based rates pursuant to 47 U.S.C. 251(c)(3). We rejected that argument:

> because the FCC's [UNE Remand] decision is on appeal and not final[.] In Section 19.5 of the interconnection agreement, the parties expressly contemplated the possibility that regulatory

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[1] In this docket, we recently granted Metro One's petition for enforcement of its interconnection agreement with Qwest. *See* Order No. 00-623.

> action might materially affect the terms and conditions of the arbitrated contract. 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. Order No. 00-421 at 3.

Qwest now argues the fact that the FCC's UNE Remand order is currently on appeal does not mean it is not final. Qwest notes that, in an opinion issued just weeks ago, the Ninth Circuit Court of Appeals concluded that an FCC order is final if rights or obligations are determined by it or legal consequences flow from it, and it is not tentative or interlocutory in nature. *U S WEST Communications, Inc., v. Hamilton*, 2000 U.S. App LEXIS 22939 (9th Cir. 2000). Qwest contends that the UNE Remand Order satisfies both of these requirements, and notes that the rules resulting from the FCC's decision have not been stayed pending the appeal.

Qwest also argues that we erred in focusing solely on the renegotiation provision set forth in Section 19.5. According to Qwest, Section 19.5 is just one example among many of the parties' agreement to follow federal law. Regardless of that renegotiation provision, Qwest contends that, when interpreting and enforcing the agreement, the Commission must apply federal law as it exists at the time of the interpretation. For these reasons, Qwest argues that Order No. 00-421 contains an error of law and that good cause exists for further examination of the matter under OAR 860-014-0095(3).

Metro One responds that, contrary to Qwest's assertion, the recent Ninth Circuit decision does not impact Order No. 00-421. Metro One explains that, unlike *U S WEST v. Hamilton*, the issue presented here is one of contract law, not finality of administrative orders. Metro One argues that the recent decision has no bearing on the interpretation of the parties' interconnection agreement.

Metro One further contends that Qwest's other arguments already have been addressed and rejected by the Commission in prior decisions. It believes that Qwest is simply attempting to delay the effect of the Commission order in the hope that it will not have to comply with the approved interconnection agreement.

Commission Resolution

We are not persuaded by Qwest's arguments that the FCC's UNE Remand Order automatically eliminates its obligation under the agreement to provide Metro One DALs at cost-based rates. Generally speaking, the existing law is part and parcel of

every valid contract, and must be read into it as if expressly referred to or incorporated therein. *U.S. Fidelity & Guaranty Co. v. Long*, 214 F. Supp. 307 (D.C. Oregon 1963). For this reason, subsequent changes in the law generally have no bearing on the terms of the agreement, unless expressly contemplated by the parties. *Florida East Coast Ry. Co. v. CSX Transport, Inc.*, 42 F.3d 1125 (7th Cir. 1994).

Here, there is no dispute that, at the time Qwest and Metro One entered into the interconnection agreement, the FCC had determined that ILECs were required to provide unbundled access to DALs at cost-based rates. This obligation was incorporated into the agreement and became part of the bargained-for exchange between the parties. Although the parties contemplated that regulatory action might affect the terms of the agreement, they mutually agreed that all terms would remain in effect until any subsequent regulatory action became final and nonappealable. *See* Section 12.5. Regardless of whether the FCC's UNE Remand order is final under *U S WEST v. Hamilton*, it is not yet nonappealable. Therefore, we adhere to our prior conclusion that, until addressed by a court of final jurisdiction, the FCC's UNE Remand Order has no bearing on the interpretation of the parties' interconnection agreement.

Qwest's application for rehearing or reconsideration is denied.

Made, entered, and effective ______________________________.

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Ron Eachus
Chairman

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Roger Hamilton
Commissioner

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Joan H. Smith
Commissioner

A party may appeal this order to a court pursuant to ORS 756.580.