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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.,)	ORDER
for Enforcement of an Interconnection)	
Agreement with QWEST CORPORATION)	
(fka U S WEST Communications, Inc.).)	

DISPOSITION: MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTED

On December 12, 2001, Qwest Corporation, formerly known as U S WEST Communications, Inc. (Qwest), filed a Motion for Partial Summary Judgment against the Petition for an Order Specifying a Sum Certain filed by Metro One Telecommunications, Inc. (Metro One). Qwest seeks an order in its favor against Metro One’s claim for damages incurred prior to September 20, 1999—the effective date of the parties’ interconnection agreement. Metro One filed a reply in opposition to Qwest’s motion on January 4, 2002. We find that there are no genuine issues of material fact, and that Qwest is entitled to judgment as a matter of law. Accordingly, we grant Qwest’s motion for summary determination.

Introduction

The facts are largely undisputed. In 1995, Metro One began purchasing subscriber listing information from US WEST MRG, an affiliate of Qwest. Following passage of the Telecommunications Act of 1996 (1996 Act), Metro One recognized the potential for substantial savings if it could purchase Qwest’s Directory Assistance Listing (DAL) database at non-discriminatory prices.

On June 7, 1998, Metro One requested negotiation under the 1996 Act. On November 13, 1998, Metro One petitioned this Commission for arbitration of a contract for network interconnection. The primary issue concerned the appropriate prices for the DALs. The Arbitrator concluded that, for purposes of the interconnection agreement between the parties, the prices for access to directory listings should be based on the costs contained in Qwest’s studies. On March 29, 1999, the Commission adopted the Arbitrator’s decision and required the parties to submit an agreement for Commission approval. The parties did so on August 25, 1999, and the Commission approved the

agreement on September 20, 1999. *See* Order No. 99-544. By its terms, the agreement became effective upon Commission approval.

On December 17, 1999, Metro One filed a petition for enforcement of the agreement. In Order No. 00-623, the Commission found that the agreement obligated Qwest to provide Metro One with DALs at cost based rates. Because Qwest had failed to do so, the Commission concluded that “Metro One is entitled to a refund of the amount it has been forced to pay for the DALs from other providers and the amount it should have paid Qwest under the interconnection agreement.” Order No. 00-623 at 10.

On June 4, 2001, Metro One initiated this action seeking an order specifying a sum certain to be paid by Qwest to Metro One. In its petition, Metro One divides its claim for damages into three time periods:

- (1) April 11, 1997 (the time it first requested DALs from Qwest) and September 19, 1999 (the date the Commission approved the interconnection agreement);
- (2) September 20, 1999 (the effective date of the interconnection agreement) and January 31, 2000 (the last date Metro One purchased DALs from a Qwest affiliate); and
- (3) February 1, 2000 (the date Metro One began purchasing DALs from an unnamed third-party provider) and March 1, 2001.

For the first of these three time periods, Metro One seeks to recover over \$900,000 from Qwest. This figure represents the alleged difference between what Metro One would have paid during this time period under the terms of the interconnection agreement and what it actually paid to a Qwest affiliate.

DISCUSSION

Applicable Law

Summary judgment is appropriate where there is no genuine issue as to any material fact, and based on those facts, the moving party is entitled to a judgment as a matter of law. In determining whether this standard has been met, we must review the record in the light most favorable to Metro One, the party opposing summary judgment. ORCP 47 C. *See Jones v. General Motors Corp.*, 325 Or 404 (1997); *Seeborg v. General Motors Corp.*, 284 Or 695 (1978).

Positions of the Parties

Qwest seeks an order dismissing Metro One's claims for damages during the time period from April 11, 1997 to September 19, 1999. Qwest contends that, as a matter of law, Qwest had no obligation to sell Metro One DALs at prices established in the interconnection agreement until after the agreement was finalized and approved by the Commission. Thus, Qwest maintains that Metro One has no legitimate basis for claiming that it is entitled to recover the difference between the rates it paid for DALs before the interconnection agreement was approved and the rates provided for in the parties' final agreement.

Metro One responds that summary judgment is improper, because there is a genuine issue whether Qwest negotiated in good faith under Section 251(c)(1) of the 1996 Act. Metro One contends that Qwest used several tactics to delay negotiations, such as requiring Metro One to provide a copy of its state certification. Metro One asserts that it is entitled to pursue damages for events prior to the effective date of the interconnection agreement as a remedy for Qwest's alleged breach of a duty to negotiate in good faith. Citing *Gateway Technologies, Inc. v. MCI Telecommunications Corp*, 64 F3d 993 (5th Cir 1995), Metro One contends that, when a party breaches a duty to negotiate in good faith, the law allows the injured party to recover its damages caused by the breach.

Commission Resolution

We agree that, under *Gateway*, Metro One may seek damages for Qwest's alleged breach of its duty to negotiate in good faith.¹ Metro One, however, did not include that claim when it initiated this action for relief. In its December 17, 1999 petition to enforce the interconnection agreement, Metro One argued that Qwest had failed to provide DALs at cost-based prices and, as a remedy, sought a refund of the difference between the rates ordered in ARB 100 and the rates it paid a Qwest affiliate for the DALs. It did not present the claim that Qwest had also breached its duty to negotiate in good faith.

In our earlier order, we found that Qwest had failed to abide by the terms of the interconnection agreement. As a remedy, we concluded that Metro One was entitled to a refund and kept the record open to determine the proper amount. Accordingly, at this point, the proceeding is limited to determining the amount of damages Qwest must pay for its failure to comply with the interconnection agreement. As Qwest notes, the liability portion of this proceeding is over. Metro One cannot raise a new claim for the first time in order to avoid summary judgment on a portion of its petition for damages. Any allegation about the duty to negotiate in good faith is outside the scope of this docket.

¹ Such an action may lie in a court of general jurisdiction, as it is unclear whether this Commission has the authority in this case to award any such damages.

Accordingly, we conclude that there is no genuine issue of material fact and that Qwest is entitled to partial judgment as a matter of law. Qwest's Motion for Partial Summary Judgment is granted. That portion of Metro One's petition that seeks damages incurred between April 11, 1997 and September 19, 1999 should be dismissed.

ORDER

IT IS ORDERED that the Motion for Partial Summary Judgment, filed by Qwest Corporation, is granted. That portion of Metro One's petition that seeks damages incurred between April 11, 1997 and September 19, 1999 is dismissed.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
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.