

This is an electronic copy. Format and font may vary from the official version. Attachments may not appear.

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

IC 1

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

DISPOSITION: MOTION TO SUSPEND ORDER DENIED

On May 30, 2003, Qwest Corporation (Qwest) filed a Motion to Suspend Order No. 03-269. In that order, the Public Utility Commission of Oregon (Commission) ordered Qwest to pay damages of \$322,314 to Metro One Telecommunications, Inc. (Metro One) for breach of the interconnection agreement between the parties. We treat the request as a motion to stay Order No. 03-269 and deny it.

**DISCUSSION**

Qwest and Metro One arbitrated an interconnection agreement in docket ARB 100, and the Commission approved the agreement in Order No. 99-544. The Commission concluded that Metro One was entitled to access unbundled network elements (UNEs) at cost-based rates set forth in the interconnection agreement. The agreement includes directory assistance listings (DALs) as an UNE. Qwest subsequently violated the agreement by failing to provide DALs at cost-based rates, and the Commission ordered that Qwest pay damages to Metro One in the amount of \$322,314.<sup>1</sup>

Applicable Law

ORS 756.568 authorizes the Commission to suspend any order. In determining whether to grant a stay or postpone compliance of an order, we rely on the standards set forth in the Administrative Procedures Act.<sup>2</sup> ORS 183.482(3)(a) allows an agency to stay enforcement of an order upon a showing of:

<sup>1</sup> See Order No. 03-269 at 9.

<sup>2</sup> See Order No 01-842 at 2 and Order No. 01-140.

(A) Irreparable injury to the petitioner; and

(B) A colorable claim of error in the order.

If the agency finds in favor of the petitioner on these two issues, the agency must grant the stay unless it determines that "substantial public harm will result if the order is stayed."<sup>3</sup>

Position of the Parties

Qwest requests that the Commission suspend Order No. 03-269. First, Qwest contends that it will be irreparably injured if a stay is not granted because uncertainties in Metro One's future puts any repayment of the refund in peril, should Qwest prevail on appeal. To support this assertion, Qwest cites two recent newspaper articles that describe changes in Metro One's business strategy as evidence of Metro One's troubled financial future. The articles report that Metro One has recently commenced a new business venture described as a "high-stakes bet to avoid crumbling in its industry's collapse." Qwest also mentions a reported 71 percent drop in Metro One's stock price.

Second, Qwest contends that there is a colorable claim of error in Order No. 03-269. Qwest makes two primary assertions. First, Qwest contends that the Federal Communications Commission's (FCC) UNE Remand Order has invalidated the interconnection agreement between Qwest and Metro One. Second, Qwest contends that this Commission: (1) did not have authority to award Metro One damages; (2) erred in interpreting the interconnection agreement; and (3) erred in awarding pre-judgment interest.

In response, Metro One defends its financial stability while questioning Qwest's. Metro One points out that it currently has cash reserves of \$86.9 million<sup>4</sup> and was described in the same article that Qwest referenced as a "profitable public company with substantial revenues".<sup>5</sup> Metro One claims this financial stability compares favorably with Qwest's, who is undergoing a formal investigation of its accounting practices and has seen a 92 percent drop in its stock price. Metro One claims that if there is a stay, Qwest's own financial uncertainty may prevent Metro One from receiving the damage award.

Metro One next asserts that there is no colorable claim of error. Metro One states that while incumbent local exchange companies (ILECs) like Qwest are not required to offer DALs on an unbundled basis, the FCC did not prohibit the ILECs from doing so. Therefore, since Qwest offered unbundled DALs at cost-based rates to other

---

<sup>3</sup> ORS 183.482(3)(b).

<sup>4</sup> Petitioner's Memorandum in Opposition to Qwest's Motion to Suspend Order No. 03-269 at 8.

<sup>5</sup> Qwest's Motion to Suspend Order 03-269, exhibit 3 at 1.

competitors, Metro One asserts that Qwest had the duty to provide unbundled DALs at cost-based rates to Metro One.

Commission Resolution

Although we may consider Metro One's financial security in a claim of irreparable injury, the evidence of Metro One's new business venture and related spending does not constitute irreparable harm to Qwest. In *Arlington School Dist. No. 3 v. Arlington Education Assn*, the Court of Appeals recently clarified that to establish irreparable harm, the party "must at least demonstrate that irreparable injury *probably* would result if a stay is denied," and that an injury is irreparable if the party cannot receive reasonable or complete redress in a court of law.<sup>6</sup>

While it is conceivable that Metro One's new business venture may fail, that does not guarantee that Metro One will be unable to repay the damage award. Qwest must have the challenged order overturned on appeal and Metro One must experience such drastic financial hardship during the period of judicial review that it depletes \$86.9 million in reserves and becomes unable to repay \$322,314. While possible, Qwest has failed to establish that such an outcome is probable.

Because Qwest's failure to show irreparable injury is dispositive under ORS 182.482(3)(a), we need not address whether it has established a colorable claim of error. Accordingly, Qwest's motion to suspend Order No. 03-269 must be denied.

**ORDER**

IT IS ORDERED that the Motion to Suspend Order No. 03-269, filed by Qwest Corporation, is denied.

Made, entered, and effective \_\_\_\_\_.

\_\_\_\_\_  
**Roy Hemmingway**  
Chairman

\_\_\_\_\_  
**Lee Beyer**  
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.

<sup>6</sup> 184 Or App 97 (2002) (emphasis in original).