

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 589

| | | |
|---|---|-------|
| In the Matter of |) | |
| |) | |
| QWEST CORPORATION |) | |
| |) | ORDER |
| Petition for Arbitration of Interconnection |) | |
| Rates, Terms, Conditions and Related |) | |
| Arrangements with Universal |) | |
| Telecommunications, Inc. |) | |

**DISPOSITION: RECONSIDERATION GRANTED; ORDER NO. 05-088
ADHERED TO AS MODIFIED HEREIN**

On February 9, 2005, this Commission issued Order No. 05-088, dismissing a petition by Qwest Corporation (Qwest) for arbitration of an interconnection agreement with Universal Telecommunications, Inc. (Universal). We concluded, however, that Qwest could initiate negotiations with Universal for a new interconnection agreement. Although the parties had earlier received Commission approval to adopt, as their interconnection agreement, the agreement approved in ARB 1 between MFS Intelenet, Inc., and U S WEST Communications, Inc. (MFS Intelenet Agreement), we discovered that the existing signed interconnection agreement between Qwest and Universal varied from the MFS Intelenet Agreement approved by the Commission.¹ Accordingly, in Order No. 05-088, the Commission applied the term of agreement provision as approved in the MFS Intelenet Agreement and concluded that provision permitted either party to initiate negotiations for a new interconnection agreement.

On March 4, 2005, Universal filed an application for reconsideration and clarification of Order No. 05-088. In its application, Universal requested that the Commission specify the authority which allows the Commission to impose the terms of the MFS Intelenet Agreement on Qwest and Universal and find that the applicable

¹ The MFS Intelenet Agreement was arbitrated by an administrative law judge at the Commission, and the Commission adopted his decision as amended in Order No. 96-324. Reconsideration was granted in part in Order No. 97-125, and the Commission denied USWC's motion to compel MFS Intelenet to submit a final interconnection agreement in Order No. 97-161. Finally, a completed interconnection agreement was submitted and approved by the Commission in Order No. 97-367 on September 17, 1997. It was not amended until February 11, 2000, *see* Order No. 00-085, after the Qwest-Universal interconnection agreement was approved by the Commission on September 22, 1999, *see* Order No. 99-547. All references to the ARB 1 MFS Intelenet Agreement in this order is to the language of the agreement as adopted in Order No. 97-367 on September 17, 1997.

interconnection agreement termination provision no longer allows either party to initiate negotiations.

On March 18, 2005, Qwest filed a response to the application, questioning whether Universal's filing complied with OAR 860-014-0095. Qwest also countered Universal's interpretation of the relevant termination provision. Finally, Qwest argued that the Commission correctly imposed the terms of the contract as it was approved in ARB 157, Order No. 99-547.

On March 31, 2005, Universal filed a reply to the application. A third round of filings is not provided for in OAR 860-014-0095, and the reply was not considered. *See* Order No. 04-598 at 2.

We grant the application for reconsideration and adhere to Order No. 05-088 as modified herein.

Discussion

Either party may file an application for reconsideration under OAR 860-014-0095. The rule requires that an application for reconsideration set out which portion of the challenged order is claimed to be erroneous, the applicable laws, and the party's desired outcome. The Commission has the discretion to grant the application if there is an error of law or fact, a new policy, new evidence, or "good cause for further examination of a matter essential to the decision." OAR 860-014-0095(3) (d).

Universal's application does not strictly adhere to the form set forth in rule, but the Commission will overlook deficiencies in form "to secure just, speedy, and inexpensive determination of the issues presented." OAR 860-011-000(5). The substance of the filing appears to argue that the Commission erred in imposing the contract terms as adopted in Order No. 99-547, and that the Commission incorrectly interpreted those terms.

The Commission's decision in Order No. 05-088 is based on what at best can be characterized as a mistake in the filing of the interconnection agreement between Universal and Qwest.² Neither party briefed related issues in the initial proceeding, so the Commission finds good cause to review the matter further, in light of the arguments raised by the parties on reconsideration.

² Universal challenges the Commission's characterization of this action as a misrepresentation or subterfuge. Universal asserts on reconsideration that it requested from Qwest a contract identical to the MFS Intelenet Agreement approved by the Commission in ARB 1, Qwest presented an altered contract, and Universal signed it unaware of the alterations. Qwest states that it cannot determine how the alterations were made, and contends that only the term of agreement provision was changed. Whether or not Universal knew what was in the contract, it is responsible for the assertion it made by its signature – that, under Section 252(i) of the Telecommunications Act of 1996 (the Act), it was adopting the terms and conditions of a contract previously approved by the Commission. It is that statement which misled the Commission to expedite approval without a more careful review.

Universal challenges the Commission's authority to impose the underlying MFS Intelenet Agreement between Qwest and Universal, *see* Application at 8, and disputes the manner in which its initial interconnection agreement was submitted for approval. In ARB 157, Denny Bayers signed for Qwest on August 26, 1999, and Stephen C. Roderick signed for Universal on August 18, 1999,³ in submitting an interconnection agreement for Commission approval under Section 252(i) of the Telecommunications Act of 1996 (the Act). By their signatures, the parties represented,

This Agreement is made pursuant to Section 252(i) of the Act and is premised upon the Interconnection Agreement between MFS Intelenet, Inc. and U S WEST Communications, Inc. (the "Underlying Agreement"). The Underlying Agreement was approved by the Commission on August 21, 1997.

As noted in Order No. 05-088 at 6, the Act and then-existing Oregon Administrative Rules provided for expedited approval of a contract that "merely adopts an agreement previously approved by the Commission." *See* OAR 860-016-0020(3) (1998). The Commission approved the Qwest-Universal interconnection agreement as if it were a complete adoption of the MFS Intelenet Agreement, as evidenced by the conclusion in Order 99-547: "The agreement adopts the terms and conditions of the agreement previously approved in ARB 1."

As part of considering this petition for arbitration, the Commission discovered that the over 100-page agreement that Qwest and Universal submitted for approval in 1999 varied from the MFS Intelenet Agreement. Presented with this conflicting contractual language, the Commission applied the language in the MFS Intelenet Agreement as approved as the contract between Qwest and Universal in Order No. 99-547. We relied on the language of the order approving the contract:

According to the Agreement, Universal Telecommunications, Inc., and USWC [now Qwest] agree to adopt the terms of the arbitrated agreement between MFS Intelenet, Inc., and USWC that was approved by the Commission in docket ARB 1. (*See* Order No. 97-367.) USWC agrees to enter into this arrangement pursuant to Section 252(i) of the Telecommunications Act of 1996.

³ On March 10, 2005, Universal submitted an erratum to its application, stating that Universal signed its contract on April 7, 1999. That is not the contract that was submitted for Commission approval in ARB 157. The agreement approved by the Commission was signed by Universal on August 18, 1999.

See Order No. 99-547 at 1. The ordering clause states, “that the agreement between Universal Telecommunications, Inc., and U S WEST Communications, Inc., adopting the terms of the previously approved agreement in docket ARB 1 is approved.” *Id.* at 2. The order clearly adopted the terms of the contract previously approved in ARB 1. Based on that language, and the fact that the parties led the Commission to believe that they were adopting that agreement, the Commission interpreted the terms of the MFS Intelenet Agreement as approved in Order No. 97-367 on September 17, 1997 in determining the term of agreement provision in Order No. 05-088.

At the outset, Universal challenges Order No. 05-088 by arguing that the Commission does not have the authority to nullify the agreement between Universal and Qwest and impose in its place the MFS Intelenet Agreement. *See* Application at 8. In Universal’s view, state commissions may only resolve arbitrated issues, approve or reject pending interconnection agreements, and interpret and enforce the terms of prior approved interconnection agreements. *See id.* Qwest counters that Order No. 05-088 “merely clarified that the Commission originally approved the Universal/Qwest ICA only to the extent that its terms were consistent with the MFS/Qwest ICA. * * * That is, the Qwest/Universal ICA that the Commission actually approved on September 22, 1999 contained the identical Term of Agreement provision that was in the Qwest/MFS ICA. [Order No. 05-088] simply clarifies that fact.” Qwest response at 7-8.

Admittedly, the wording in Order No. 05-088 was imprecise.⁴ Most importantly, the order stated, “the Commission had approved an interconnection agreement between [Qwest and Universal], ‘adopting the terms of the previously approved agreement in ARB 1.’” Order No. 05-088 at 7. Qwest argues, and we agree, that the proper applicable interconnection agreement in effect was the agreement approved in ARB 1. Since the Commission approved the Qwest/Universal agreement on September 22, 1999, the effective contract has always been the language of the MFS Intelenet Agreement as approved in ARB 1.

Next, Universal makes three arguments regarding the Commission’s application of the Term of Agreement provision set forth in the MFS Intelenet Agreement. That applicable provision states,

This Agreement shall be effective for a period of 2 ½ years, and thereafter the Agreement shall continue in force and effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties. The Parties agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective.

⁴ The earlier order purported to nullify the contract between Qwest and Universal and impose the MFS Intelenet Agreement. *See* Order No. 05-088 at 8. As clarified in this order, the supposed interconnection agreement between Qwest and Universal that was signed by the parties was not approved by the Commission as far as it varied from the MFS Intelenet Agreement. The only valid interconnection agreement between the parties, since the date of Commission approval, is the MFS Intelenet Agreement.

Universal first argues that neither MFS Intelenet and its successors nor Qwest initiated negotiations within two years of the MFS Intelenet Agreement becoming effective, and that rendered the negotiation provision, the critical sentence, moot. Further, Universal argues that this happened before the Qwest/Universal contract became effective, so Universal was entitled to adopt a contract without the negotiation provision. *See* Application at 5-6. Qwest argues that the critical last sentence remained in effect under Section JJ of the contract, which states, “The failure of either Party to enforce any of the provisions in this Agreement or the waiver thereof in any instance shall not be construed as a general waiver or relinquishment on its part of any such provision, but the same shall, nevertheless, be and remain in full force and effect.”

Universal’s argument is appealing; however, we do not know what changes the parties would have made in light of evolving law and conditions. We cannot presume to rewrite the terms of the contract as we would guess that the parties would in light of changing conditions. Therefore, we will apply the precise wording of the MFS Intelenet Agreement from Order No. 97-367, as adopted and approved between Qwest and Universal in Order No. 99-547.

Universal next argues that the MFS Intelenet Agreement was later modified in such a way that the right of both parties to initiate negotiations was terminated and that the Commission ratified that amendment. Pursuant to 47 USC § 252(i), Universal argues that it is entitled to adopt the same provision in its contract. Qwest argues that the amendment to the MFS Intelenet Agreement is irrelevant in this case because no similar amendment was made in the Qwest/Universal agreement. *See* Qwest response at 5. For Universal to adopt an amendment applied in another contract, it would need to file a notice of adoption with the Commission. *See* OAR 860-016-0025. Besides, the import of the cited amendment is unclear. Universal quotes a recital from the beginning of the agreement that states that “the initial term of the MFS Agreement expired, but remains in full force and effect until a new agreement becomes effective between the parties.” *See* ARB 1(5) (June 10, 2002) (filing submitted by Qwest and MCI Communications to assume the Rhythms Communications interconnection agreement). The amendment goes on to say, “Except as modified herein, the provisions of the MFS Agreement shall remain in full force and effect.” *See id.* at 4. Therefore, the effective terms of that agreement appear to remain unchanged.

Finally, Universal argues that even under the relevant Term of Agreement provision, the window for Qwest to initiate negotiations has long since closed. The contract went into effect on September 22, 1999, and Universal argues that Qwest’s ability to initiate negotiations expired September 22, 2001. In fact, Qwest did not request negotiations until February 6, 2004. Qwest argues that the nonwaiver clause in Section JJ enables it to continue to request negotiations after the deadline has passed.

The section titled “Default,” Section JJ, states in its entirety:

If either Party defaults in the payment of any amount due hereunder, or if either Party violates any other provision of this Agreement, and such default or violation shall continue for thirty (30) days after written notice thereof, the other Party may seek legal and/or regulatory relief. The failure of either Party to enforce any of the provisions of this Agreement or the waiver thereof in any instance shall not be construed as a general waiver or relinquishment on its part of any such provision, but the same shall, be and remain in full force and effect.

Additionally, Section M states that provision headings should not be interpreted to limit or modify the provisions themselves. Section JJ appears to address situations in which one party defaults on payments due, breaches the contract, or fails to enforce the terms of the agreement.

The Term of Agreement provision required either party to initiate negotiations within two years of the effective date of the agreement. Neither party met the deadline. Under Section JJ, the “failure of either Party to enforce” the provision allowing either party to initiate negotiations does not lead to relinquishment of the right of both parties to initiate negotiations.⁵ The provision indicates an obligation by both parties to renegotiate the interconnection agreement within a reasonable period of time. Even though neither Qwest nor Universal initiated negotiations by the deadline, Qwest never expressly waived its right to initiate negotiations. *See* Order No. 99-611 at 6 (waiver is intentional relinquishment of a known right, claim, or privilege).

When presented with the precise situation at hand, the Florida Commission held, “While it does not appear that the parties commenced negotiations more than 180 days prior to the June 9, 2000, expiration date of the agreement, it is clear that for negotiations to commence, one party had to contact the other.” *In re Petition by BellSouth Telecommunications, Inc.*, Docket No. 001305-TI PSC-01-1180-FOF-TI, 2001 Fla PUC Lexis 691 at *6-7 (Fla PSC May 23, 2001).⁶ That was sufficient for the Florida Commission to state that the incumbent carrier could continue to initiate negotiations after the deadline had passed. Like the case before the Florida Commission, this contract has a Term of Agreement provision that indicates an understanding between

⁵ In the alternative, under Section JJ, the failure of both parties to initiate negotiations could be construed as a breach in which one party could seek legal or regulatory relief. In that situation, specific notice must be provided, which has not occurred here, so we decline to address that scenario.

⁶ In Order No. 05-088, a Tennessee Commission decision, *In re Petition by BellSouth Telecommunications, Inc.*, Docket No. 99-00948, 2000 Tenn PUC Lexis 572 (Tenn Reg Util Comm Feb 29, 2000), was also cited. *See* Order No. 05-088 at 5 n 10. That document is in fact a brief, but the Tennessee Commission took action consistent with the arguments made in that brief by arbitrating the interconnection agreement dispute between the parties. *See In re Petition by BellSouth Telecommunications, Inc.*, Docket No. 99-00948, 2001 Tenn PUC Lexis 383 (Tenn Reg Util Comm June 25, 2001).

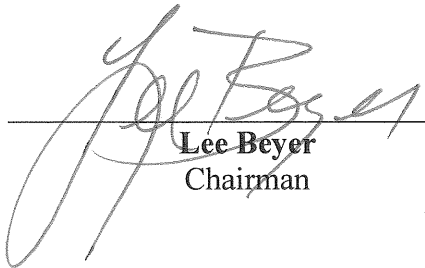
the parties that to commence negotiations, one party must contact the other. Therefore, we conclude that Qwest retains the right under the MFS Intelenet Agreement to initiate negotiations with Universal towards a new interconnection agreement.

ORDER

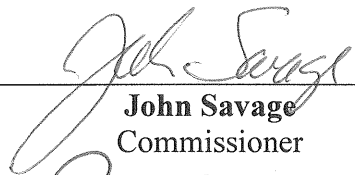
IT IS ORDERED that:

1. Reconsideration is granted.
2. Order No. 05-088 is modified and adhered to as discussed herein.

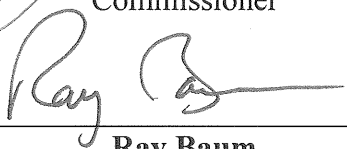
Made, entered, and effective MAY 03 2005



Lee Beyer
Chairman



John Savage
Commissioner



Ray Baum
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.