

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 1469

In the Matter of

WESTERN RADIO SERVICES CO.

Request for Ruling on Good Faith Claim  
against Qwest Corporation.

ORDER

DISPOSITION: MOTION TO DISMISS GRANTED

**I. SUMMARY**

In this order, we dismiss a complaint filed by Western Radio Services Co. (Western) against Qwest Corporation (Qwest). We make this decision based on findings that Western has failed to state facts sufficient to constitute a claim.

**II. PROCEDURAL HISTORY**

This complaint is the latest matter in an ongoing dispute between Western and Qwest before this Commission and the courts. On March 11, 2004, Western filed a petition for arbitration with Qwest, which we assigned as docket ARB 537. Following extensive proceedings, we adopted the Arbitrator's decision in Order No. 04-600, entered October 18, 2004. The order directed the parties to submit an interconnection agreement (ICA) consistent with the terms of the order within 30 days. Qwest prepared a conforming ICA which Western refused to sign. Qwest submitted the ICA without Western's signature.

In February 2005, Western filed a complaint against Qwest in the Federal District Court of the District of Oregon (U.S. District Court). Among other things, Western alleged that Qwest had failed to negotiate the interconnection agreement in good faith as required by 47 U.S.C. §§ 251 and 252 of the Federal Telecommunications Act and the regulations of the Federal Communications Commission (FCC). In a July 25, 2005, Opinion and Order, Judge Ann Aiken granted motions filed by both this Commission and Qwest and dismissed the complaint. Western appealed Judge Aiken's decision to the United States Court of Appeals for the Ninth Circuit (Ninth Circuit).

Shortly after Judge Aiken's Opinion and Order, Qwest notified the Commission of the U.S. District Court's dismissal and again requested that we approve

the ICA that Qwest had submitted in November 2004. Western objected and argued in part that Qwest had made a new request for negotiation of a new ICA in a May 10, 2005, letter that it had sent to wireless carriers following a recent FCC decision.

On October 10, 2005, we issued Order No. 05-1075 and approved the ICA Qwest had submitted without Western's signature. In that order, we found that the submitted ICA complied with our prior order and added that:

[t]he parties subject to the 252(b) process are plainly required to go through the steps set forth and are not free to walk away from the arbitrated interconnection agreement if they are displeased with the outcome of the arbitration process before the state commission. Indeed, if they were free to do so, it would render the concept of compulsory arbitration meaningless \* \* \*.

An arbitrated interconnection agreement, with the disputed terms as decided by the Arbitrator and adopted by the commission, has the same legal power to bind the parties as if the agreement had been freely entered into by both parties prior to its submission to the Commission. One party cannot simply refuse to execute and honor the agreement because of disappointment with the outcome of the arbitration proceeding \* \* \*.<sup>1</sup>

We also rejected Western's claim that the May 2005 form letter Qwest sent to wireless carriers constituted a request for negotiation:

We also find that the Qwest letter of May 10, 2005, notifying radio carriers that it was withdrawing Section 20 of Oregon Tariff 29 as a result of the Federal Communications Commission's *T-Mobile* decision (citation omitted) and putting an interim tariff in place \* \* \* in no way constituted a 'request for negotiation.'<sup>2</sup>

On October 14, 2005, four days after we issued Order No. 05-1075, Western filed a second petition for arbitration, reasserting that Qwest's May 10, 2005, form letter sent to wireless carriers was a request for negotiation of a new ICA. We docketed that petition as ARB 706. As part of its petition, Western alleged that Qwest had failed to negotiate in good faith.

In Order No. 06-001, we granted Qwest's request and dismissed Western's petition. We concluded that the petition was improper for two reasons. First, we held the petition to be "improper because it is premised upon the incorrect assumption that

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<sup>1</sup> Order No. 05-1075 at 3.

<sup>2</sup> Order No. 05-1075 at 4.

Qwest's May 10, 2005, letter was a request for negotiation. The Commission already considered and rejected this argument in Order No. 05-1075."<sup>3</sup>

Second, we concluded that the petition was improper because it ignored the fact that there is already an approved interconnection agreement in effect:

The Approved Agreement went into effect on October 10, 2005, and remains in effect for a period of three years. Just as it is inappropriate to allow Western to ignore the results of an arbitration proceeding by refusing to enter into an agreement consistent with the Commission's arbitration decision, it is likewise inappropriate for Western to attempt to commence arbitration of a new interconnection agreement only days after the Commission-arbitrated and approved interconnection agreement became effective. As Qwest points out, entertaining Western's Petition would essentially render the Commission's arbitration decisions meaningless. Both parties are expected to abide by the terms and conditions of the Approved Agreement until it expires or they voluntarily negotiate a new agreement.<sup>4</sup>

In July 2008, the Ninth Circuit ruled on Western's appeal of Judge Aiken's order dismissing its complaint. In *Western Radio Services Co. v. Qwest Corp.*, 530 F.3d 1186 (9<sup>th</sup> Cir. 2008) (*Western Radio*), the Ninth Circuit vacated Judge Aiken's order regarding Qwest's alleged failure to negotiate in good faith. The Ninth Circuit concluded that the District Court had jurisdiction to address that issue and noted that, although the issue had not been raised before this Commission, the District Court should determine if the Commission had essentially decided the good faith claim in its Order No. 05-1075.

In response to the Ninth Circuit's decision, Judge Aiken ruled that Order No. 05-1075 had not addressed the claim whether Qwest failed to negotiate in good faith, but added that "Western's efforts have been insufficient to comply with the prudential concerns discussed in the Ninth Circuit's mandate, because it must first seek relief with the PUC before it brings its good faith claim to this forum."<sup>5</sup>

Western filed this complaint, docketed as UM 1469, on February 2, 2010. On March 11, 2010, Qwest filed a motion to dismiss, or, in the alternative, a motion to strike. On March 26, 2010, Western filed a response to the motion to dismiss, and on April 1, 2010, Qwest filed a reply to Western's response.

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<sup>3</sup> Order No. 06-001 at 3 (footnote omitted).

<sup>4</sup> *Id.* (footnote omitted).

<sup>5</sup> *Western Radio Services Co. v. Qwest Corporation*, 2009 WL 1312425 (D.Or.), May 5, 2009.

### III. DISCUSSION

#### A. Western's Complaint

In its complaint, Western alleges that Qwest has failed to negotiate in good faith. Western cites 47 U.S.C. §252(b)(5), which states in pertinent part that if during arbitration, a party refuses “to participate further in the negotiations, to cooperate with the State commission \* \* \*,” such action “shall be considered a failure to negotiate in good faith.” Western asks the Commission to award damages and attorneys’ fees as well as a declaration that Qwest had violated the Telecommunications Act.

Although Western spends considerable time discussing events dating back to 2004, Western clarifies that “this proceeding is brought to seek declaratory relief and damages for Qwest’s bad faith actions *in the two years preceding the filing of this petition.*”<sup>6</sup> Western adds that “the prior arbitrations before this Commission and the litigation in the district court and Ninth Circuit” are “not the subject of this proceeding.”<sup>7</sup>

Western claims that Qwest “has done much in the last two years to demonstrate bad faith in negotiating a new ICA agreement, in imposing provisions in conflict with the existing ICA, and in shutting off Western’s service.”<sup>8</sup> The first event identified during that time period by Western concerns a billing dispute that began in early March 2009:

[O]n March 30, 2009, Qwest sent Western a shutoff notice based upon supposed unpaid bills. Qwest ultimately acknowledged that it had in fact been billing Western the wrong amount (based upon the ‘standard’ percentage rate rather than the PUC-approved Western/Qwest IA). On April 17, 2009, Qwest finally credited Western regarding that part of the error. However, several concerns remained, and Western was unsuccessful dealing directly with Qwest regarding these issues.<sup>9</sup>

Western explains that these still unresolved billing disputes relate to a “connectivity” charge which appears in the standard CDC Interconnection Agreement, but not in the approved ARB 537 agreement between the parties. According to Western, this demonstrates that Qwest was ignoring the approved ICA and, in effect, was seeking to negotiate a new agreement with Western.

Western cites additional correspondence from Qwest in August 2009 which Western contends demonstrates that Qwest:

at no time fully honored that interconnection agreement; has persistently stated it is seeking to negotiate a new agreement

<sup>6</sup> Western Radio’s Response to Qwest’s Motion to Dismiss at 5 (Mar 26, 2010) (emphasis added).

<sup>7</sup> *Id.*

<sup>8</sup> Western Radio’s Complaint at 11 (Feb 1, 2010).

<sup>9</sup> *Id.*

and then failed to do so; and has failed to bring any of these matters before the PUC. Qwest imposed its generic CDC agreement on Western without first seeking arbitration or PUC approval.<sup>10</sup>

Western further notes that the ICA approved by this Commission in October 2005 had a three-year effective period. Because the ICA has since expired, Western implies that Qwest is under an obligation to negotiate a new agreement and has failed to do so.

## **B. Qwest Motion to Dismiss**

Qwest contends Western's complaint should be dismissed under ORCP 21A(8) because it fails to state ultimate facts sufficient to constitute a claim.<sup>11</sup> Qwest contends that it has not made a Section 252 "request for negotiation" of an ICA that could rise to a claim for lack of good faith. The ICA approved by the Commission in ARB 537 is still in effect on evergreen status and, while either party is free to request renegotiation, neither party has an obligation to do so.

Qwest further asserts that Western's complaint is not really related to the negotiation of an ICA, but rather to "garden-variety billing disputes."<sup>12</sup> Qwest contends that the only events within the prior two-year period have been billing disputes or alleged breaches of contract, not with the negotiation of an ICA.<sup>13</sup> Qwest acknowledges Western's right to bring a complaint on a billing dispute, but states that any such claims are not properly raised within the context of a complaint that Qwest did not negotiate in good faith.

With regard to Western's request for damages and attorney fees, Qwest notes that this Commission has repeatedly stated it lacks authority to award damages or attorneys' fees.<sup>14</sup> Qwest adds that claims for damages under §§206 and 207 of the Telecommunications Act must be made to the FCC or in federal court.

## **C. Western's Response**

Western opposes Qwest's motion and characterizes its complaint as merely complying with the Ninth Circuit's clarification in *Western Radio* for a carrier seeking damages under a good faith claim. Western explains:

As Qwest knows, it was only in July 2008 that the Ninth Circuit (through Western's efforts) had the opportunity to

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<sup>10</sup> *Id.* at 11-13.

<sup>11</sup> Qwest also argued that Western's claim was partially barred under the two-year statute of limitations under 47 U.S.C. §415(b). *See* Qwest's Motion to Dismiss at 15 (Mar 11, 2010). Given Western's subsequent clarification that this proceeding is limited to events occurring during the two-year period preceding the filing of the complaint, we do not reach the question whether 47 U.S.C. §415(b) applies to state commission proceedings.

<sup>12</sup> Qwest Motion to Dismiss at 19 (Mar 11, 2010).

<sup>13</sup> *Id.* at 3-5.

<sup>14</sup> *Id.* at 15-17.

clarify the procedure for seeking damages for the violation of the good faith requirements of the Telecommunications Act. This PUC filing is simply Western's dutiful compliance with the direction of the Ninth Circuit in that case.<sup>15</sup>

Western further states that its filing is not simply a billing dispute. Western again notes the parties' ICA has expired more than a year ago, and that Qwest has persistently stated it is seeking to negotiate a new agreement and then failed to do so. Rather, according to Western, Qwest has imposed its generic CDC agreement on Western without first seeking arbitration or Commission approval.

Finally, Western contends that Qwest's assertion that this Commission lacks authority to impose damages or attorney fees is irrelevant. Relying on the Ninth Circuit's decision in *Western Radio*, Western maintains that "such a claim must first be presented to the Commission."<sup>16</sup>

#### IV. COMMISSION FINDINGS AND RESOLUTION

The Oregon Rules of Civil Procedure (ORCP) apply to Commission proceedings except as modified by rule.<sup>17</sup> Qwest seeks dismissal of Western's complaint under ORCP 21A(8), which provides:

Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss:  
\* \* \* (8) failure to state ultimate facts sufficient to constitute a claim \* \* \*."

In considering Qwest's motion to dismiss for failure to state a claim under ORCP 21A(8), we must accept as true all allegations of fact in Western's complaint.<sup>18</sup> We must also give Western the benefit of all favorable inferences that may be drawn from the facts alleged.<sup>19</sup>

As noted, Western bases its complaint on 47 U.S.C. §252(b)(5). That provision, which governs conduct during the negotiation and arbitration of an ICA between carriers under the Telecommunications Act, provides:

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an

<sup>15</sup> Western Radio's Response to Qwest's Motion to Dismiss at 2 (Mar 26, 2010).

<sup>16</sup> *Id.* at 7 (emphasis in original).

<sup>17</sup> See OAR 860-011-0000(3).

<sup>18</sup> *Huang v. Claussen*, 147 Or App 330, 332, 936 P2d 394, *rev den* 325 Or 438 (1997).

<sup>19</sup> *Boise Cascade v. Board of Forestry*, 325 Or 195, 196, 935 P2d 411 (1997).

arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

Western fails, however, to cite any fact that either it or Qwest has made a request for negotiation of an ICA under the Telecommunications Act during the past two years that would give rise to a claim for lack of good faith negotiation. Western appears to be under the impression that Qwest has a duty to negotiate a new ICA because the agreement approved in ARB 537 has “expired.” At the outset, we clarify that the ARB 537 ICA has not expired, and is currently in effect on evergreen status.<sup>20</sup> Furthermore, although either party has had the right to seek a new ICA since the last year of the ICA’s term, Qwest does not have the obligation to do so.

We are not persuaded by Western’s claims that Qwest has “persistently stated it is seeking to negotiate a new [ICA] and then failed to do so.” We agree with Qwest that all matters raised by Western within the past two years are not questions of negotiation of an ICA, but rather relate to billing disputes under the existing ICA in evergreen status. For example, Western cites correspondence from Qwest in August 2009 as evidence of Qwest’s intention to seek a new ICA. By Western’s own admission, however, that correspondence was a “form letter”<sup>21</sup> that was sent to all wireless carriers informing them of billing changes due to a change in law. Like the May 2005 form letter Qwest sent to wireless carriers in response to the FCC’s *T-Mobile* decision, the August 2009 form letter did not constitute a request for negotiations of an ICA under §252 of the Telecommunications Act.

We acknowledge Western’s objection to Qwest’s imposition of a “connectivity” charge that Western claims is not allowed under the parties’ approved ICA. Western may, if it so chooses, file a separate complaint with respect to that billing dispute, seeking Commission interpretation of the ICA adopted in ARB 537 and now in evergreen status. Western is also free to seek negotiation of a new ICA at any time. We will not, however, permit Western to pursue these claims under a complaint alleging that Qwest failed to negotiate in good faith.

Finally, for purposes of clarification, we agree with Western’s assertion that a claim of failing to negotiate in good faith under §252 of the Telecommunications Act should first be brought before a state Commission. Nonetheless, any such claim must be based on events that relate to a pending negotiation or arbitration of an ICA agreement. Moreover, such a claim must also seek relief which this Commission can provide.

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<sup>20</sup> Section XXII.B.1 of the ICA provides:

This Agreement shall be effective as of the effective date of commission approval of this Interconnection Agreement and shall remain in effect for a period of 3 years, and thereafter 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.

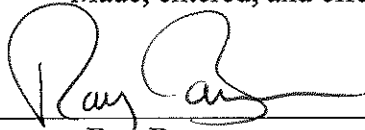
<sup>21</sup> Western Radio’s Response to Qwest’s Motion to Dismiss at 10 (Mar 26, 2010).

Accepting as true all allegations of fact in the complaint and giving Western the benefit of favorable inferences drawn from those facts, we find that Western has failed to state ultimate facts sufficient to state a claim. Qwest's motion to dismiss is granted.

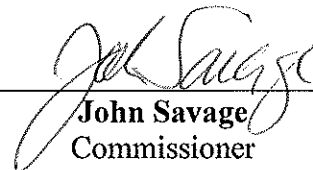
**ORDER**

IT IS ORDERED that the complaint filed by Western Radio Services Co. against Qwest Corporation is dismissed. This docket is closed.

Made, entered, and effective AUG 12 2010.



**Ray Baum**  
Chairman



**John Savage**  
Commissioner



**Susan K. Ackerman**  
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. The request must be filed with the Commission within 60 days of the date of service of this order and must comply with the requirements in OAR 860-014-0095. A copy of any 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.