ORDER NO. 99-631

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

AR 359

In the Matter of the Adoption of OAR 860-016-0050 Relating to the Enforcement of Interconnection Agreements.	)))	ORDER

DISPOSITION: ORDER OF RULEMAKING ADOPTED

On July 27, 1999, the Public Utility Commission of Oregon (Commission) opened this docket to consider a new rule that would establish a procedure for the enforcement of Commission-approved interconnection agreements.

On August 12, 1999, the Commission filed a Notice of Proposed Rulemaking with the Oregon Secretary of State. Copies of the proposed rule, Notice of Proposed Rulemaking Hearing, and Statement of Need and Fiscal Impact were sent to a list of interested parties. Interested parties were invited to and attended a workshop held on September 8, 1999, which identified concerns with the original draft of the rule. As a result, a few changes were made to the proposed rule, and copies of the workshop version of the rule were sent to the same list of interested parties. Written comments on the workshop version of the rule were filed by September 22, 1999. Thereafter a hearing was held on September 29, 1999.

The Commission considered this matter at its Public Meeting on October 18, 1999. The Commission decided to adopt the new rule as modified and set forth in Appendix A to this order.

Background

As incumbent local exchange companies (ILECs) and competitive local exchange companies (CLECs) have tried to implement interconnection agreements entered into in conjunction with the Telecommunications Act of 1996 (the Act), disputes have arisen. A number of complaints have been filed with the Commission regarding interconnection agreement disputes. The Commission also received informal requests from some CLECs for a rule that provides for an expedited process.

The proposed rule was drafted prior to the passage of SB 622, which contains a list of practices by telecommunications utilities that are prohibited. The workshop notice indicated that the proposed rule would be modified to conform to the

requirements of SB 622. However, at the workshop participants were informed that the Commission had embarked upon a separate, temporary rulemaking in Docket AR 363 to address the requirements of SB 622. Thus the present rulemaking, while covering a similar subject matter, is discrete from the rule that was promulgated in AR 363.

The Proposed New Rule

The parties agreed to certain changes to the proposed rule at the workshop held on September 8, 1999. The proposed rule was modified to reflect those changes. The final version of the proposed rule is set forth in Appendix A to this order, and includes both the workshop modifications as well as the Commission's revisions to the rule.

The proposed new rule will establish the procedures the Commission will utilize when requested to enforce an interconnection agreement. The rule sets forth the procedure for filing a petition to enforce an interconnection agreement, the procedure for responding to a petition to enforce an interconnection agreement, and the procedure that will be used by the Commission to assess and process interconnection agreement disputes. The rule also provides that an expedited procedure can be requested under certain circumstances. It also gives guidance to ILECs and CLECs regarding the type of information the Commission needs in order to reach a resolution on the merits of the dispute as expeditiously as possible.

Written comments were filed by five parties: Western States Competitive Telecommunications Coalition (the Coalition);[1] Rhythms Links Inc., (Rhythms Links); AT&T Communications of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Oregon (collectively AT&T); U S WEST Communications, Inc., (U S WEST); and GTE Northwest Incorporated (GTE). These parties, with the addition of MCI WorldCom (MCI) and the Oregon Telecommunications Association (OTA), also attended the hearing.[2] The comments of the parties are summarized below. Since the positions of many parties are similar, the comments are summarized by topic.

(1) Addition of sections dealing with procedures for "pick and choose" requests:

The Coalition proposes to add two sections to the proposed rule to provide a procedure for the adoption of interconnection rates, terms, and conditions under 47 USC § 252(i) of the Act. One section would address the modification of existing

[1] For purposes of commenting on AR 359, the Coalition consists of NEXTLINK Communications, Inc.; GST Telecom, Inc.; Electric Lightwave, Inc.; NorthPoint Communications, Inc.; Advanced Telecom Group, Inc.; Integra Telecom; Covad Communications Company; and Firstworld Communications.

[2] The following additional parties participated in the workshop: Frontier Communications, Espire, Winstar, Sprint, and Greatwest Services.

agreements, while the other section would address new interconnection agreements. The Coalition's proposal requires an ILEC to respond to a CLEC's "pick and choose" request within a certain time frame (5 days), and also provides that if the parties cannot agree, the CLEC can file a petition with the Commission, and the Commission must issue a decision within 30 days. The Coalition asserts that the Commission had determined in DR 24 that this docket was the appropriate place to address CLECs' desire for a rule describing the procedure to invoke the Act's "pick and choose" provision. Other CLECs concur with the proposal.

U S WEST asserts that the Coalition's "pick and choose" proposal is biased in favor of CLECs and violates ILECs' due process rights. Further, the Coalition's proposal is outside of the scope of the proposed rule, and therefore there has been no proper notice under ORS 183.335. If the proposed rule is intended to override contractual dispute resolution provisions, the Contracts Clause of the Constitution may also be implicated.

Disposition: The Commission finds that there are notice problems under ORS chapter 183 with the Coalition's proposed "pick and choose" additions, and thus this language should not be incorporated in the proposed rule. The Commission notes that the Coalition's proposed language was provided only to the workshop participants and not to all those on the Commission's list of interested parties. The proposed changes are also fairly substantive, and go beyond the scope of the rule as proposed.

The Commission acknowledges that it did state the following in its Order denying a petition for a declaratory ruling in DR 24, Order No. 99-492: "With regard to petitioners' second request, the Commission notes that a rulemaking is the proper venue for the establishment of Commission procedure, and that such a rulemaking is currently underway in Docket No. AR 359. While the proposed rule in that docket does not explicitly reference the modification of interconnection agreements, it does provide a procedure to address interconnection disputes. Petitioners will have an opportunity to participate in the rulemaking process and comment on the proposed rule." Order No. 99-492 at 3.

However, what the Commission intended to convey was that the relief sought by the petitioning CLECs in DR 24 needed to be addressed in a rulemaking proceeding rather than in the context of a declaratory judgment petition. The Commission further noted that there was an ongoing rulemaking proceeding that might address some of the CLECs' concerns. The Commission did not mean to indicate that AR 359 was the appropriate vehicle to address the "pick and choose" issue.

The Commission notes that the proposed rule is flexible enough to address some of the CLECs' concerns. For example, if an existing agreement contains a modification provision and one party to the agreement believes that the other party is

refusing to properly modify the agreement, the party attempting to modify the agreement could file a petition for enforcement with the Commission.[3] The Commission also notes that if the CLECs believe a separate rule is needed to address the procedure for invoking the Act's "pick and choose" provision, nothing prevents them from filing a petition for rulemaking.

(2) Addition of a "target timeline" for Commission resolution of disputes under the expedited procedure portion of the rule:

Most of the CLECs requested that the Commission add a provision in section (11) of the rule that contains target timelines for Commission resolution of disputes processed under the expedited procedure portion of the rule. The CLECs suggested 45 days, to be consistent with SB 622, or at most 60 days.

Disposition: The Commission notes first that the vast majority of interconnection agreement disputes are likely to arise under the prohibited practices provisions of SB 622, and thus will be subject to the statutory timeframes contained in the temporary rule promulgated in AR 363. The proposed rule in this docket would apply to those disputes that are not covered by the temporary rule. The expedited procedure section of the rule is designed to be flexible enough to meet the needs of a variety of situations. The party requesting that a dispute be resolved pursuant to the expedited procedure is required to file with its motion a proposed expedited procedural schedule. The rule anticipates that a ruling on the motion will be made at the earliest practicable time. If it is found that an expedited procedure is warranted, then a schedule will be developed according to the needs of the situation. The Commission therefore finds that it should not add a target timeline for resolution of disputes under section (11).

(3) Addition of language that the rule supersedes any dispute resolution provisions contained in the interconnection agreements:

Many of the CLECs requested the addition of language that the interconnection agreement dispute procedures contained in the rule would be made available to all parties to Commission-approved interconnection agreements, irrespective of the particular dispute resolution procedures set forth in any particular agreement. The Coalition specifically noted that the Washington Utilities and Transportation Commission (WUTC) recently applied a similar rule to an interconnection agreement dispute despite a dispute resolution provision in the agreement to the contrary, indicating that the WUTC retains jurisdiction to enforce the terms of an interconnection agreement even though the agreement may contain other alternative dispute resolution (ADR) procedures.

[3] Whether the Commission is able to provide the relief requested in such a petition will depend on the facts of the case.

GTE, in contrast, maintains that the rule should contain an express provision stating that the rule applies only to the extent that it does *not* contradict the dispute resolution procedures set forth in the interconnection agreement, if any. U S WEST concurs with GTE.

Disposition: The Commission declines to add the requested provision to the rule. The Commission notes that the WUTC's rule does not contain such a provision. Instead the WUTC apparently made its determination in the context of applying the rule to a specific case. The Commission further notes that nothing in the proposed rule would prevent this Commission from determining the threshold issue of whether ADR provisions in an agreement would control, or whether the Commission's enforcement procedure would be available to resolve the dispute.

(4) Deletion or modification of language in Section (11)(c)(D) that limits the expedited process to circumstances where the telecommunications provider's ability to provide telecommunications services is substantially harmed:

The CLECs maintain that the Commission should delete subsection (11)(c)(D) of the rule, which limits the expedited process to cases where the petitioner's ability to provide telecommunications services is substantially harmed. At the very least, the reference to subsection (11)(c)(D) should be changed to use the disjunctive "or" rather than the conjunctive "and."

GTE argues that deleting this section or changing the "and" to "or" would dilute the meaning of subsection (11)(c). Either change would allow virtually any interconnection agreement dispute to qualify for the expedited procedure set forth in section (11). U S WEST concurs.

Disposition: The Commission agrees that deleting or changing subsection (11)(c)(D) would have the effect of broadening the applicability of section (11) to substantially all interconnection agreement disputes. The rule as a whole is designed to attain a resolution of interconnection agreement disputes at an earlier point in time than would ordinarily be the case under normal complaint procedures, while the expedited procedure described in section (11) is designed to address emergency situations, such as a threat to the physical interconnection between two carriers. To change the "and" to "or" or to delete subsection (11)(c)(D) altogether would render the remainder of the rule meaningless.

(5) Deletion of requirement for service on all persons designated in the interconnection agreement to receive notices:

U S WEST filed written comments that requested the deletion of the requirement that service of the petition and answer be made upon all persons designated in the interconnection agreement. U S WEST contends that such service is redundant and

onerous, given that service will be made upon the parties' attorneys and the pleadings may contain multiple exhibits.

Disposition: At the hearing a compromise was proposed by U S WEST. Subsections (2)(b) and (3)(a) require the petitioner to give written notice to the respondent that petitioner intends to file a petition for enforcement of the interconnection agreement. U S WEST suggested that the petitioner be required to provide this written notice to all persons designated in the interconnection agreement to receive notices, but that subsequent pleadings need not be provided. Instead U S WEST suggested that the parties be allowed to designate in their petitions or answers one other person (aside from the parties' attorneys) to receive other pleadings and documents. The Commission finds that this compromise will meet its concerns that persons designated in interconnection agreements to receive notices be made aware of an enforcement action brought before this Commission. The parties can thereafter choose to designate an individual to receive copies of future pleadings, in addition to the copies provided to their attorneys.

(6) Addition of requirement that if service is by fax, a hard copy must follow by overnight mail:

U S WEST suggests that a provision be added to the rule to indicate that if service is by fax, the fax must be followed up with a hard copy of the document via overnight mail. U S WEST explains that faxed documents are often hard to read, and sometimes incomplete.

Disposition: The Commission finds that it is unnecessary to burden the rule with this requirement. It is impossible to anticipate every glitch that might occur in a hypothetical case. The rule instead should focus on the unique needs of interconnection agreement disputes. The Commission notes that it is the responsibility of the serving party to provide a complete and legible copy of the document served. If there is a problem with a faxed transmission, the served party can contact the serving party or the Commission. If such a problem results in a delay in the served party's receipt of a document, that party is free to request a commensurate extension of the deadline for response.

(7) Addition of a provision for liberal amendment of the pleadings:

U S WEST proposes that a section be added to the rule, indicating that liberal amendment of the pleadings will be allowed. U S WEST argues that the tight time frames contained in the rule could result in the filing of pleadings that inadvertently omit pertinent information.

Disposition: The Commission has concerns that such a provision could be used to unilaterally expand the issues in a proceeding and unnecessarily lengthen the process. In particular, the Commission is concerned that such a provision would have the opposite effect of what the rule is intended to accomplish, namely that the parties should

be prepared to support their positions up front, at a very early stage of the proceeding. Instead it might encourage parties to take less care with their initial pleadings, in the comfort that any deficiencies could be rectified through "liberal" amendment of the pleadings, which might defeat the purpose of the rule. The absence of a provision in the rule does not mean that amendments would never be allowed; instead the provisions of ORCP 23 would apply.

In summary, we conclude that the proposed new rule, along with the modifications made in the workshop and in this order, will establish a procedure that will allow the Commission to process interconnection agreement disputes more efficiently. It should be adopted.

ORDER

IT IS ORDERED that proposed new rule OAR 860-016-0050, Petitions for Enforcement of Interconnection Agreements, is adopted as set forth in Appendix A. The new rule will be effective upon filing with the Oregon Secretary of State.

Made, entered, and effective _____.

BY THE COMMISSION:

_____

Vikie Bailey-Goggins
Commission Secretary

A person may petition the Commission for the amendment or repeal of a rule pursuant to ORS 183.390. A person may petition the Court of Appeals to determine the validity of a rule pursuant to ORS 183.400.

860-016-0050

Petitions for Enforcement of Interconnection Agreements

(1) Purpose of rule. This rule specifies the procedure for a telecommunications provider, as defined in OAR 860-032-0001, to file a petition for the enforcement of an interconnection agreement that was previously approved by the Commission. For purposes of this rule, the term "interconnection agreement" encompasses agreements executed pursuant to the Telecommunications Act of 1996 (the Act). This includes interconnection agreements, resale agreements, agreements for the purchase or lease of unbundled network elements (UNEs), or statements of generally available terms and conditions (SGATs), whether those agreements were entered into through negotiation, mediation, arbitration, or adoption of a prior agreement or portions of prior agreements.

(2) The petition. A petition for enforcement of an interconnection agreement must contain the following:

(a) A statement of specific facts demonstrating that the petitioning telecommunications provider conferred with respondent in good faith to resolve the dispute, and that despite those efforts the parties failed to resolve the dispute;

(b) A copy of a written notice to the respondent telecommunications provider indicating that the petitioner intends to file a petition for enforcement of the interconnection agreement, as described in section (3)(a) below;

(c) A copy of the interconnection agreement or the portion of the interconnection agreement that the petitioner contends was or is being violated. If a copy of the entire interconnection agreement is provided, petitioner must specify which provisions are at issue and their location in the agreement. If the interconnection agreement adopted a prior agreement or portions of prior agreements, the petition must also indicate which agreements were adopted; and

(d) A statement of the facts or a statement of the law demonstrating respondent's failure to comply with the agreement and petitioner's entitlement to relief. The statement of entitlement to relief must indicate that the remedy sought is consistent with any dispute resolution provisions in the agreement, if any. Statements of facts must be supported by written testimony or one or more affidavits, made by persons competent to testify and having personal knowledge of the relevant facts. Statements of law must be supported by appropriate citations. If exhibits are attached to the affidavits, the affidavits must contain the foundation for the exhibits;

(e) The petition may designate one additional person to receive copies of other pleadings and documents;

(f) Petitioner shall also file with the petition, as a separate document, any motion petitioner wishes to file that seeks affirmative relief. Nothing in this subsection shall preclude petitioner from filing a motion subsequent to the filing of the petition if the motion is based upon facts or circumstances unknown or unavailable to petitioner at the time the petition was filed.

(3) Service of the petition. The petition for enforcement must be served as follows:

(a) At least ten days prior to filing a petition for enforcement with the Commission, petitioner must give written notice to respondent that petitioner intends to file a petition for enforcement. The notice must identify the contract provisions petitioner alleges were or are being violated and the specific acts or failure to act that caused or is causing the violation. The notice must be served in the same manner as set forth in subsections (b) and (c) below, except that petitioner must also serve the notice on all persons designated in the interconnection agreement to receive notices;

(b) Petitioner must deliver a copy of the petition for enforcement to respondent the same day the petition is filed with the Commission. Service may be by fax or overnight mail, provided the petition arrives at respondent's location on the same day the petition is filed with the Commission;

(c) Petitioner must serve a copy of the petition for enforcement on respondent's authorized representative, attorney of record, or designated agent for service of process.

(4) The answer. An answer must comply with the following:

(a) The answer must contain a statement of specific facts demonstrating that the responding telecommunications provider conferred with petitioner in good faith to resolve the dispute, and that despite those efforts the parties failed to resolve the dispute;

(b) The answer must respond to each allegation set forth in the petition and must set forth all affirmative defenses;

(c) The answer must contain a statement of the facts or a statement of the law supporting respondent's position. Statements of facts must be supported by written testimony or one or more affidavits, made by persons competent to testify and having personal knowledge of the relevant facts. Statements of law must be supported by appropriate citations. If exhibits are attached to the affidavits, the affidavits must contain the foundation for the exhibits;

(d) The answer may designate one additional person to receive copies of other pleadings and documents;

(e) Any allegations raised in the petition and not addressed in the answer are deemed admitted;

(f) Respondent shall file with the answer, as a separate document, a response to any motion filed by petitioner, and any motion respondent wishes to file that seeks affirmative relief. Nothing in this subsection shall preclude respondent from filing a motion subsequent to the filing of the answer if the motion is based upon facts or circumstances unknown or unavailable to respondent at the time the answer was filed.

(5) Service of the answer. The answer must be served as follows:

(a) Respondent must file a copy of the answer with the Commission within ten business days after service of the petition for enforcement.

(b) Respondent must deliver a copy of the answer to petitioner the same day the answer is filed with the Commission. Service may be made by fax or overnight mail, provided the answer arrives at petitioner's location on the same day the answer is filed with the Commission.

(c) Respondent must serve a copy of the answer on the petitioner's attorney, as listed in the petition, or the person who signed the petition, if petitioner has no attorney.

(6) The reply. Petitioner must file a reply to an answer that contains affirmative defenses within five business days after the answer is filed. The reply must be served in the manner set forth in sections (3)(b) and (3)(c) above. If the reply contains new facts or legal issues not raised in the petition, the reply must also comply with section (2)(d) above.

(7) Cross-complaints or counterclaims. A cross-complaint or counterclaim shall be answered within the same time frame allowed for answers to petitions.

(8) Conference. The Commission will conduct a conference regarding each petition for enforcement of an interconnection agreement.

(a) The presiding officer will schedule a conference within five business days after the answer is filed, to be held as soon thereafter as is practicable. At the discretion of the presiding officer, the conference may be scheduled at an earlier point in time, or the conference may be conducted by telephone.

(b) Based on the petition and the answer, all supporting documents filed by the parties, and the parties' oral statements at the conference, the presiding officer will determine whether the issues raised in the petition can be determined on the pleadings and submissions without further proceedings or whether further proceedings are necessary. If the presiding officer determines that further proceedings are necessary, the presiding officer will establish a procedural schedule. The procedural schedule shall include a mandatory mediation session. Either party may request that an administrative law judge other than the presiding officer preside over the mediation. Nothing in this subsection is intended to prohibit the bifurcation of issues where appropriate.

(c) In determining whether further proceedings are necessary, the presiding officer will consider, but is not limited to, the positions of the parties; the need to clarify evidence through the examination of witnesses; whether the issues are largely factual, legal, or involve mixed questions of fact and law; the complexity of the factual and legal issues; the need for speedy resolution; and the completeness of the information presented.

(d) The presiding officer may make oral rulings during the conference on interlocutory matters relevant to the conduct of the proceeding, including procedural matters, discovery matters, the submission of briefs or other documents, and so forth. Oral rulings shall be on the record or subsequently reduced to writing.

(e) The conference may include a discussion of one or more of the following matters:

(A) Whether the issues can be narrowed;

(B) The need for additional pleadings or evidentiary submissions, including further affidavits or exhibits;

(C) Whether discovery is necessary, and if so, the type, scope, and schedule for such discovery;

(D) The prospects for obtaining stipulations of fact;

(E) The prospects for settlement of some or all of the issues;

(F) The need for written legal memoranda or briefs;

(G) The establishment of a procedural schedule; and

(H) Other matters that may aid in the disposition of the case.

(9) Discovery. A party may file with the petition or answer a request for discovery, stating the matters to be inquired into and their relationship to matters directly at issue. Upon motion of a party, the presiding officer may alter the discovery time lines in OAR Chapter 860, Division 014. A discovery schedule may be established during the conference if necessary.

(10) Powers of the presiding officer. In any proceeding to enforce the provisions of an interconnection agreement, the presiding officer has broad discretion to conduct the proceeding in a manner that best suits the nature of the petition. The presiding officer may, for example:

(a) Limit the record to written submissions or schedule an evidentiary hearing;

(b) Limit the number of exhibits and witnesses and the time for their presentation;

(c) Require the parties to submit additional information appropriate for a full, fair, and expeditious resolution of the case; or

(d) Require the parties to submit at an early stage in the proceeding a joint statement listing what facts, if any, have been stipulated to, what facts remain in dispute, what legal issues are in dispute, and a brief summary of the position of the parties on each issue.

Nothing in this section is intended to supercede OAR 860-012-0035.

(11) Expedited procedure. When warranted by the facts, the petitioner or respondent may file a motion requesting that an expedited procedure be used. The movant shall file a proposed expedited procedural schedule along with its motion. The presiding officer will schedule a conference to be held as soon after the motion is filed as is practicable, to determine whether an expedited schedule is warranted, and if so, to establish an expedited procedural schedule.

(a) The presiding officer shall determine whether an expedited procedure is warranted. In making that determination, the presiding officer shall consider whether the issues raised in the petition or answer involve a risk of imminent, irrevocable harm to a telecommunications provider and to the public interest.

(b) If a determination is made that an expedited procedure is warranted, the presiding officer shall establish a procedure that ensures a prompt resolution of the merits of the dispute, consistent with due process, the need for speed, and the Commission's other obligations. The presiding officer shall consider, but is not bound by, the movant's proposed expedited procedural schedule.

(c) In general, an expedited procedure may be appropriate if the dispute involves the ability of a telecommunications provider:

(A) To interconnect with another telecommunications provider; or

(B) To provide or obtain resold services; or

(C) To provide or obtain UNEs; and

(D) The telecommunications provider's ability to provide telecommunications services is thereby substantially harmed.

(d) In general, the Commission will not entertain a motion for expedited procedure where the dispute solely involves the payment of money. The examples in section (11)(c) above are not exclusive, but are intended only to provide guidance to telecommunications providers considering a motion for expedited procedure.

Stat. Auth.: ORS Ch. 183 & 756
Stats. Implemented: ORS 756.040, 756.518, 759.030(1) & 47 USC § 252
Hist.: NEW