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**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

IC 1

In the Matter of the Petition of Metro)
One Telecommunications, Inc., for) ORDER
Enforcement of an Interconnection Agreement)
with U S WEST Communications, Inc.)

**DISPOSITION: MOTION FOR PARTIAL SUMMARY JUDGMENT
GRANTED**

On February 14, 2000, Metro One Telecommunications, Inc. (Metro One) filed a Motion for Partial Summary Judgment pursuant to OAR 860-011-0000 and ORCP 47. Metro One seeks an order dismissing certain affirmative defenses and a counterclaim raised by U S WEST Communications, Inc. (U S WEST) in response to Metro One's petition to enforce an agreement approved by the Commission in ARB 100. U S WEST filed a reply in opposition to Metro One's motion on February 29, 2000.

For the reasons that follow, we grant Metro One's motion. We conclude that Metro One is a telecommunications carrier that is entitled to purchase unbundled network elements pursuant to the terms and conditions set forth in the agreement arbitrated in ARB 100. Because there are no genuine issues of material fact, and because Metro One is entitled to judgment as a matter of law, we strike the challenged affirmative defenses and counterclaim contained in U S WEST's Answer and Counterclaim.

Based on the record contained in this matter and ARB 100, we make the following:

FINDINGS OF FACT

Metro One provides operator-assisted telecommunications services in several states. It is certified to provide directory assistance and toll services in Oregon, has been assigned a Carrier Identification Code (CIC) by Bellcore, and has obtained an Operating Company Number (OCN) by the National Exchange Carrier Association. Metro One primarily provides enhanced directory assistance service, with interLATA and intraLATA call completion, to end-users of local and interexchange telecommunications

carriers. It also provides Short Messaging Service (SMS), which allows a caller to transmit a short digital message to another caller or telephone.

Metro One's clients are primarily wireless and landline carriers, such as Sprint and AT&T. Customers of these carriers contact Metro One by dialing 411. Incoming calls are routed from the public network to a Metro One call center via leased circuits and terminated at Metro One's switch. The switch then directs the call to an available operator, who locates the requested listing and, in most cases, completes the call. For its services, Metro One bills the end-user for the directory assistance and the applicable communications charge. When providing toll services, Metro One resells the services of its interexchange carrier clients.

In docket ARB 100, Metro One sought unbundled access to U S WEST's Directory Assistance Listings (DALs). As a threshold issue, U S WEST argued that it was not required to negotiate because Metro One did not seek to provide local exchange service. Relying on *INFONXX, Inc. v. NYNEX*, 13 FCC Rcd 10288; 1998 FCC LEXIS 2514 (released May 27, 1998), U S WEST argued that Metro One, as a directory assistance provider, was not entitled access to DALs under Sections 251(b) or (c) of the Act.

The threshold dispute continued up to the arbitration hearing. During the hearing, however, a Metro One witness testified that his company was seeking an interconnection agreement for the transmission and routing of telephone exchange service and exchange access. Based on that representation, U S WEST withdrew its objection to negotiating an interconnection agreement. Consequently, the Commission arbitrated a remaining issue on DAL costs and prices, and subsequently approved an agreement between the parties in Order No. 99-544.

On December 17, 1999, Metro One filed a petition for enforcement of the interconnection agreement with U S WEST. Metro One alleges that U S WEST has failed to comply with the terms of the agreement by attempting to limit Metro One's ability to obtain DALs at the rates, terms, and conditions set forth in the interconnection agreement. Metro One also seeks a refund of the difference between the rates for DALs that it has been required to pay U S WEST Marketing Resources Group and those contained in the interconnection agreement.

On January 4, 2000, U S WEST filed an answer and counterclaim to Metro One's petition. In its answer, U S WEST disputes Metro One's interpretation of the agreement and contends that the Commission lacks jurisdiction to award the requested refund. It also raises the following affirmative defenses:

10. Metro One is not entitled to obtain DALs at cost-based rates under the Agreement because Metro One is not offering the transmission and routing of telephone exchange service and exchange access.

11. Metro One is not entitled to obtain DALs at cost-based rates under the Agreement because Metro One is not a telecommunications carrier providing a telecommunications service.

12. Metro One is not entitled to obtain DALs because Metro One is not a competing provider of telephone exchange service and telephone toll service.

13. Metro One fraudulently induced U S WEST into waiving its objection and entering into an interconnection agreement with Metro One. Absent this fraud, U S WEST would have prevailed on its objection that Metro One was not entitled to an interconnection agreement because it did not offer or intend to offer the telecommunications services required under the Act to obtain an interconnection agreement. Accordingly, Metro One is not entitled to enforce the Agreement to obtain DALs. (citations omitted). U S WEST Answer and Counterclaim at 4.

In addition, U S WEST raises the following counterclaim:

Metro One fraudulently induced U S WEST into waiving its objection and entering into an interconnection agreement with Metro One. Absent this fraud, U S WEST would have prevailed on its objection that Metro One was not entitled to an interconnection agreement because it did not offer or intend to offer the telecommunications services required under the Act to obtain an interconnection agreement. Accordingly, U S WEST is entitled to rescind the interconnection agreement between Metro One and U S WEST. U S WEST Answer and Counterclaim at 4.

In response to U S WEST's answer and counterclaim, Metro One filed a Motion for Partial Summary Judgment. Metro One acknowledges U S WEST's right to dispute the interpretation of the agreement and to challenge the Commission's jurisdiction to award a refund of monies paid for DALs. It contends, however, that it is entitled to summary judgment on U S WEST's affirmative defenses numbered 10 through 13 and its counterclaim.

DISCUSSION

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 U S WEST, 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).

U S WEST contends that summary judgment is improper, because the question of whether Metro One intentionally misrepresented the purpose for which it sought an interconnection agreement creates a disputed issue of material fact. U S WEST argues that, during the ARB 100 hearing, Metro One fraudulently induced U S WEST to waive its challenge to Metro One's entitlement to negotiate an interconnection agreement.

U S WEST is correct that issues of subjective intent and motivation are generally not susceptible to summary judgment. *See, e.g., Zeigler v. Bostwick*, 106 Or App 666 (1991). Metro One's intent, however, is a secondary element of U S WEST's fraud allegation. To succeed on its claim, U S WEST must first establish that, absent the alleged fraud, it would have prevailed on its objection that Metro One, as an enhanced directory assistance provider, is not a telecommunications carrier entitled to an interconnection agreement. That requires an examination of Metro One's operations and the relevant provisions set forth in the 1996 Act. Because the nature of Metro One's operations were established during the ARB 100 proceeding and are not contested here, we conclude that there are no genuine issues as to material fact presented.

U S WEST next contends that summary disposition is inappropriate because Metro One has failed to establish that it is entitled to judgment as a matter of law. It argues that Metro One is not entitled to unbundled access to network elements under Section 251(c)(3), because Metro One—as a directory assistance provider—does not qualify as a “telecommunications carrier.” It relies on the FCC's decision in *INFONXX v. NYNEX, supra*, where a directory assistance provider sought access to an incumbent carrier's directory assistance database. The FCC denied INFONXX's request, holding that:

Section 251(c)(3) establishes a [] duty for [incumbent local exchange carriers (ILECs)] to provide to “any requesting telecommunications carrier for the provision of a telecommunications service” nondiscriminatory access to network elements on an unbundled basis. A “telecommunications carrier” is any provider of telecommunications service, which is defined in relevant part as “the offering of telecommunications for a fee directly to the public.” “Telecommunications” is further defined by the Act as “the transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.” INFONXX does not provide the transmission of information; it merely uses the transmission services of others to provide information to its customers. Thus, INFONXX's argument that it is a telecommunications carrier because its DA service is a telecommunications service is untenable. Because

INFONXX is not a telecommunications carrier, it is not entitled to nondiscriminatory access to NYNEX's DA facilities under Section 251(c)(3).

We agree that only telecommunications carriers are entitled access to network elements under Sections 251(c)(3). We do not agree, however, with U S WEST's apparent conclusion that Metro One is not a telecommunications carrier simply because it is primarily engaged in the provision of directory assistance. The FCC's conclusion that INFONXX was not a telecommunications carrier was a factual determination based on the record in that proceeding. That record contained, among other things, an admission by INFONXX that "it is not a 'telecommunications carrier' per se." Other evidence established that INFONXX did not provide telephone exchange or toll service, but rather provided only information to its customers. Based on those facts, the FCC properly concluded that INFONXX was not a telecommunications carrier.

In this case, however, Metro One distinguishes itself from INFONXX. Metro One notes that INFONXX did not have a Certificate of Authority, CIC code, or OCN number. More importantly, Metro One provided undisputed evidence that, unlike INFONXX, Metro One provides interLATA and intraLATA call completion and Short Messaging Service. In doing so, it provides "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §153(48). Because it charges a fee to the public for those services, we conclude that Metro One is a "telecommunications carrier" as that term is defined in 47 U.S.C. §153(49).

U S WEST next argues that, even assuming that Metro One is entitled to negotiate an interconnection agreement, it cannot purchase DALs at cost-based rates until it takes action consistent with the provision of local exchange service or exchange access. U S WEST notes that Section 251(c)(2)(A) limits an ILEC's obligation to provide interconnection "for the transmission and routing of telephone exchange service and exchange access." Due to that limitation, U S WEST contends that it is not required to provide access until Metro One takes action to provide telephone exchange service or exchange access. Such action, according to U S WEST, would include the purchase of local interconnection service trunks, 911 CAMA trunks, or of other services for resale.

U S WEST's argument is based on its apparent assumption that a requesting telecommunications carrier's ability to access unbundled network elements is dependent upon interconnection with an ILEC's network. However, while many requesting carriers seek interconnection when requesting network elements, nothing in the Act requires both. As clarified in Section 252(a)(1), a requesting carrier may seek "interconnection,

services, *or* network elements pursuant to Section 251.” (Emphasis supplied.)¹ Such a situation might occur, for example, where a competing carrier leases all of the unbundled network elements necessary to purchase local exchange service from the ILEC. In that case, the competing carrier does not have any equipment and facilities and is therefore not required to interconnect with the incumbent carrier.²

Accordingly, an ILEC’s duty to provide unbundled access to network elements is governed solely by the provisions of Section 251(c)(3). That provision requires an ILEC, like U S WEST, to provide nondiscriminatory access to network elements “to any requesting telecommunications carrier for the provision of a telecommunications service.” We have concluded that Metro One is a “telecommunications carrier” providing “telecommunications services.” Thus, contrary to U S WEST’s assertion, Metro One is entitled to purchase DALs at the terms and conditions set forth in the agreement approved in ARB 100.

CONCLUSION

Accordingly, we conclude that, when the evidence in this case is viewed in the light most favorable to U S WEST, there is no genuine issue of material fact. We further conclude that, after our review of those facts, Metro One is entitled to judgment as a matter of law. Metro One’s Motion for Partial Summary Judgment is granted. The affirmative defenses contained in paragraphs 10, 11, 12, and 13 of U S WEST’s Answer and Counterclaim, as well as its counterclaim, should be stricken. Given our resolution of these issues, we need not address Metro One’s assertion that certain claims made by U S WEST are barred by issue and claim preclusion.

¹ See discussion in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, FCC 96-325 ¶ 270 (1996), aff’d in part and vacated in part sub nom, *Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), aff’d in part and remanded, *AT&T v. Iowa Utilities Bd.*, 119 S. Ct. 721 (1999).

² We note that U S WEST acknowledges the difference between interconnection and access to unbundled network elements (UNEs) in a response to a motion in docket IC 2. There, U S WEST explains:

Some UNEs, such as unbundled loops, require collocation for delivery. That is, U S WEST must know where to drop the unbundled loop in order to allow the CLEC to access the ordered UNE. Other UNEs, such as directory assistance listings, do not require collocation for delivery. It is wrong, however, to conclude that U S WEST requires collocation for access to UNEs. Rather, collocation is a necessary prerequisite for delivery of some UNEs.

U S WEST’s Response to Rio’s Motion for Temporary Relief and Expedited Consideration, Affidavit of Robert Kennedy, at 2.

ORDER

IT IS ORDERED that the Motion for Partial Summary Judgment, filed by Metro One Telecommunications, Inc., is granted. The counterclaim, as well as the affirmative defenses set forth in paragraphs 10, 11, 12, and 13 of the Answer and Counterclaim filed by U S WEST Communications, Inc., are stricken.

Made, entered, and effective _____.

Ron Eachus
Chairman

Roger Hamilton
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.