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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

DR 29

In the Matter of WorldCom, Inc., and AT&T's)
Petition for a Declaratory Ruling That Posting)
WorldCom and AT&T's Service Quality)
Reports on the Commission's Web Site Would) **ORDER**
Violate the Oregon Trade Secret Act, the)
Oregon Public Records Act, and Section 253(a))
of the Telecommunications Act of 1996.)

DISPOSITION: APPLICATION FOR RECONSIDERATION DENIED

On October 30, 2001, Verizon Northwest, Inc. (Verizon), filed for reconsideration of Order No. 01-855, issued on October 9, 2001. The order denies a petition for a declaratory ruling filed by AT&T of the Pacific Northwest, Inc., and AT&T Local Services on behalf of TCG Oregon and WorldCom, Inc. (AT&T/WorldCom). AT&T/WorldCom petitioned for an exemption from posting their service quality reports on the Commission web site. The order further opens a new docket (UM 1038) to investigate the issues raised by AT&T/WorldCom's petition. AT&T/WorldCom and Commission Staff responded to Verizon's petition.

Background. On August 13, 2001, AT&T/WorldCom filed a petition for declaratory judgment, asking the Commission to declare it a violation of state and federal law for Commission Staff to post AT&T/WorldCom's service quality reports on the Commission web site. Staff had announced that it would begin posting CLEC service quality reports on the Commission web site beginning in August 2001. Staff later changed the date of the planned first posting to October 2001. AT&T/WorldCom had requested a hearing on its petition and understood that the proceedings could not be completed before October 1. Therefore, AT&T/WorldCom asked the Commission to refrain from posting their service quality reports until the Commission had completed review of the petition.

On September 25, 2001, AT&T/WorldCom's petition was considered at a regularly scheduled Commission public meeting. Staff recommended opening an investigation into the issues rather than granting the petition. A Verizon representative at the meeting urged the Commission not to refrain from posting CLEC service quality reports on the web site pending outcome of the case.

After hearing Staff's and the companies' arguments at the public meeting, the Commission adopted Staff's recommendation and opened an investigation into the issues raised

in the petition. The Commission also ordered Staff not to post CLEC service quality reports pending the outcome of the case. Order No. 01-855 memorializes these decisions.

Verizon's Arguments. Verizon argues that the order effectively grants AT&T/WorldCom all the relief they requested by ruling that all competitive local exchange carrier (CLEC) service quality reports shall not be posted on the Commission web site until the conclusion of UM 1038. According to Verizon, this relief contravenes a number of laws and unlawfully discriminates against incumbent local exchange carriers (ILECs). Verizon urges the Commission to reconsider and rescind its order not to post CLEC service quality results. Instead, Verizon argues, the Commission should require these results to be posted pending completion of its investigation, or immediately cease posting any service quality reports, whether from CLECs or ILECs.

Verizon argues that the order violates the requirement that the Commission's service quality rules apply equally to all telecommunications carriers; that the order violates 253(b) of the Telecommunications Act of 1996; that the order is not supported by findings of fact and conclusions of law; and that the order violates due process and the Commission's own procedures and practices for granting temporary relief.

1. *The order violates the requirement that the Commission's service quality rules apply equally to all telecommunications carriers.* Verizon contends that the Commission's order excusing CLECs from the posting requirement runs counter to the explicit direction of the Oregon Legislature and the Commission's own rules. ORS 759.450(2) states that the Commission's service quality standards "shall apply to all telecommunications carriers." In addition, OAR 860-023-0055 states that the service quality rules shall apply to "every telecommunications carrier." Further, in its order adopting the current retail service quality rules, the Commission responded to CLECs' requests for exemption from the rules by stating that "[we] conclude that the rules shall apply to all telecommunications carriers in Oregon. The Legislature has made its language unambiguous." Order No. 00-303 at 13. Accordingly, Verizon maintains, the Commission must treat all telecommunications carriers the same, both ILECs and CLECs, when it comes to service quality reporting requirements. Verizon contends that the Commission's favored treatment of CLECs does not square with the Legislature's intent that the Commission apply its service quality rules and policy in a competitively neutral manner.

2. *The order violates §253(b) of the Telecommunications Act of 1996 (the Act).* 47 USC §253(b) requires that states impose requirements "on a competitively neutral basis." The Commission's order violates this provision, according to Verizon, by applying more lenient service quality reporting policies to CLECs than it does to ILECs. ILECs compete directly with CLECs for customers, and Verizon argues that the Commission's order unlawfully provides CLECs an unfair competitive advantage over ILECs. A CLEC may, for instance, seek to use an ILEC's posted service quality results in marketing its services, and an ILEC would not be able to counter the CLEC's efforts because the CLEC's service quality reports would not be available to the ILEC.

Verizon argues that it is irrelevant that the exemption from the posting requirement will last only until UM 1038 is completed. Section 253(b) does not allow a discriminatory policy to be in place for a temporary period or during pendency of Commission

proceedings. The Commission's actions may damage ILECs and consumers for the foreseeable future, Verizon asserts. Moreover, given the length of Commission proceedings, Verizon maintains that the Commission's relief in the order cannot fairly be characterized as temporary. Just as the presence of an end date or sunset provision does not make an unlawful statute more lawful, Verizon argues, the Commission's order does not escape the scrutiny of 253(b) because the relief it affords CLECs will end at the conclusion of UM 1038.

3. *The order is not supported by findings of fact and conclusions of law.* Verizon notes that neither the order nor the Staff report adopted by the Commission in the order contains an explanation of the Commission's decision making process when it granted the CLECs an exemption from the posting requirement. There is no presentation of the facts or the law supporting the Commission's decision to exempt the CLECs from the posting requirement. According to Verizon, this violates ORS 756.558, requiring that "findings of fact and conclusions of law" must support administrative orders. *See also Drew v. PSRB*, 322 Or 491, 499-500(1996) ("in addition to the statutory requirement that findings be supported by substantial evidence, agencies also are required to demonstrate in their opinions the reasoning that leads the agency from the facts it has found to the conclusions that it draws from those facts").

Further, Verizon argues that the order does not suggest that AT&T/WorldCom are likely to succeed on the merits of their claims. It does the opposite, in fact, by adopting Staff's report stating that Staff is skeptical of AT&T/WorldCom's claims. Granting petitioners the relief they seek while openly stating skepticism about their claims is inconsistent, irrational, and represents unlawful administrative action, Verizon asserts.

Verizon contends that the Commission has also failed to explain and reconcile additional adverse Staff arguments about AT&T/WorldCom's petition. AT&T/WorldCom's petition had as an attachment a letter dated April 26, 2001, from Mr. Phil Nyegaard of Commission Staff, rejecting AT&T/WorldCom's request. On page 3 of that letter, Mr. Nyegaard wrote:

You argue your companies' ability to compete would be impeded in the circumstances where the Reports contained unfavorable information. You view this as being against the public interest. If your companies are providing inferior service, the public is entitled to know this fact so it can make an informed choice to move to a different provider, or pursue other lawful remedies. Competition, and the public interest, is enhanced in this circumstance—disclosure of the reports would allow informed choice, and perhaps would improve the quality of service being offered to the public by all providers.

Verizon argues that the standard articulated here is imposed on ILECs and should be imposed on CLECs as well. Verizon contends that if the standard is discarded for CLECs, even temporarily, it should not be applied to ILECs at the same time.

4. *The Commission's order violates due process and the Commission's own procedures and practices for granting temporary relief.* Verizon argues that the Commission has, in effect, granted the CLECs a preliminary injunction excusing them from web posting of service quality results, while continuing to impose the posting requirement on the CLECs' principal competitors, the ILECs. The Commission, according to Verizon, has violated due process in granting this relief, first by failing to provide sufficient notice that it would grant temporary relief and second by failing to apply the substantive rules necessary for injunctive relief.

To grant temporary injunctive relief, Verizon maintains, the Commission must meet the due process requirements of a showing of irreparable harm and the likelihood of the requesting party prevailing on the merits. ORCP Rule 79. Verizon argues that the Commission has failed to meet these requirements in this case.

Additionally, Verizon contends that the Commission's treatment of AT&T/WorldCom's petition is directly opposite to its treatment of U S WEST's (now Qwest Corporation) similar petition regarding the posting requirement. In Order No. 00-002, the Commission reviewed U S WEST's showing relating to trade secrets in detail before ultimately denying relief. In Order No. 01-855, however, the Commission gives no review of the merits of AT&T/WorldCom's trade secret claims before granting the relief. Verizon contends that the order contains no explanation regarding its inconsistency with Order No. 00-002 and as such represents an irrational, arbitrary, and discriminatory administrative action.

Finally, Verizon argues that the Commission's action violates OAR 860-023-0055(15). This provision sets forth procedures for granting exemptions from the rules and requires notice and opportunity to be heard by affected parties before an exemption is granted. Equally significant, it provides for the exemption of all carriers in a competitively neutral manner if certain criteria are met. The Commission should have followed the procedures of OAR 860-023-0055(15) in this case and did not do so.

Verizon urges the Commission to reform the order to eliminate the disparate treatment between CLECs and ILECs. This approach is consistent with due process requirements, according to Verizon.

AT&T/WorldCom Response. AT&T/WorldCom responded to Verizon's application for reconsideration on November 19, 2001. AT&T/WorldCom contend that Verizon's arguments are illogical and lack legal merit. According to AT&T/WorldCom, the Commission temporarily delayed the web posting of CLEC service quality reports precisely because it found that AT&T/WorldCom had raised valid legal issues that needed to be addressed before the Commission published the CLECs' service quality reports. By arguing that the Commission should first publish CLEC service quality reports and then investigate whether such action was legal, and by further arguing that the Commission should issue findings of fact and conclusions of law before it opens its investigation, Verizon is asking the Commission to put the cart before the horse, according to AT&T/WorldCom.

1. *The order violates the requirement that the Commission's service quality rules apply equally to all telecommunications carriers.* AT&T/WorldCom maintain that the Commission's decision not to post CLEC service quality reports pending the outcome of UM 1038 does not violate state or federal law. According to AT&T/WorldCom, Verizon misrepresents the contents of Oregon service quality rules and statutes. ORS 759.450(2) does require that the Commission's service quality standards shall apply to all carriers. The Legislature ordered the Commission to adopt identical standards that ILECs and CLECs must meet or be subject to penalties. Moreover, in adopting rules for reporting service quality performance, the Commission went beyond the Legislature's requirement and also required that all carriers, except carriers with fewer than 1,000 access lines, must report their performance to the Commission. OAR 860-023-0055.

However, neither the statutes nor the rules require that any carrier's service quality reports be posted on the web. Verizon implies, according to AT&T/WorldCom, that the statutes and rules require that all carriers' reports be posted.

2. *The order violates §253(b) of the Telecommunications Act of 1996 (the Act).* AT&T/WorldCom contend that the Commission's order does not violate §253(b) of the Act. That section dictates that state requirements for telecommunications carriers be imposed on a competitively neutral basis. Verizon concludes that the Commission's order violates the Act because it imposes different requirements on ILECs and CLECs. The assumption seems to be that any law that treats ILECs and CLECs differently cannot be competitively neutral. AT&T/WorldCom argue that this is contrary to the Act and case law interpreting it.

The Act, for instance, imposes different obligations on ILECs and CLECs. In recognition of the fact that ILECs and CLECs are not similarly situated with respect to facilities or market share, ILECs are required to unbundle their networks and make them available to the CLECs at cost based prices. 47 USC §251(c)(3). CLECs have no reciprocal obligation. Courts have found that ILECs must make their poles, ducts, and conduit available to CLECs, again with no reciprocal obligation. Thus, AT&T/WorldCom argue, states may treat ILECs and CLECs differently if the result is competitively neutral.

3. *The order is not supported by findings of fact and conclusions of law.* AT&T/WorldCom argue that the Commission's decision to refrain from posting CLEC service quality reports until after its investigation is concluded is procedurally correct. The Commission was not obliged to make findings of fact or conclusions of law before ordering Staff to refrain from posting CLEC service quality reports on the web pending the outcome of UM 1038, according to AT&T/WorldCom. AT&T/WorldCom notes that the Commission has broad powers to "supervise and regulate every public utility and telecommunications utility in this state, and to do all things necessary and convenient in the exercise of such power and jurisdiction." ORS 756.040. The Commission may initiate investigations and hearings on its own motion whenever it believes that such an investigation should be made and may also investigate issues on its own motion, with or without notice. ORS 756.515(1). Under ORS 756.528, the Commission has authority to issue interim orders on any issue subject to investigation. There is no requirement that the Commission issue findings of fact or conclusions of law to support such interim orders.

AT&T/WorldCom argue that it was within the Commission's authority to continue the status quo and refrain from posting CLEC service quality reports until it had considered the facts and the legal arguments presented by AT&T/WorldCom in their petition. AT&T/WorldCom argue that this was also the sensible thing to do. At the time of the public meeting, neither Staff nor the Commission had fully analyzed the petitioners' arguments. Because they could not be sure that publication of the service quality reports would not violate petitioners' rights, the Commission acted prudently in delaying publication temporarily.

AT&T/WorldCom also argue that it would have made no sense for the Commission to issue findings of fact and conclusions of law before opening its investigation into the issues. At the time of the public meeting, AT&T/WorldCom point out that the Commission had no evidence or legal argument except what was contained in AT&T/WorldCom's petition.

AT&T/WorldCom discuss Verizon's position that the Commission was bound by Staff's original rejection of the petition. Verizon seems to imply that the Commission could not issue an order delaying the publication of service quality reports without some special findings supporting its decision. According to AT&T/WorldCom, Verizon appears to suggest that the Commission would not have been required to make findings of fact and conclusions of law before deciding to order Staff to post CLEC service quality reports. AT&T/WorldCom argue that this position is unsupportable. At the time of the public meeting, the Commission was in no position to determine the issues raised in AT&T/WorldCom's petition. The Commission had never made any findings on the legitimacy or wisdom of publishing CLEC service quality reports and had never issued any order instructing Staff to post CLEC service quality reports. Thus at the time of the public meeting, AT&T/WorldCom contend, it was within the Commission's discretion to maintain the status quo or not, pending the outcome of UM 1038.

4. *The Commission's order violates due process and the Commission's own procedures and practices for granting temporary relief.* AT&T/WorldCom identify two problems with Verizon's argument. First, the Commission's decision to delay publication pending the outcome of its investigation was in the nature of an interim order, not the granting of an injunction. AT&T/WorldCom did not request a temporary injunction because it would have been inappropriate to do so. AT&T/WorldCom point out that adjudicative bodies grant injunctions against a third party (ORCP 79). In this case, the Commission's own policy was at issue. The Commission had not yet made a formal decision on posting CLEC service quality reports. Therefore, petitioners did not have available to them the formal procedures of asking a court for an injunction. Instead, AT&T/WorldCom requested that the Commission continue the status quo pending the outcome of the investigation. AT&T/WorldCom also contend that Verizon has not made the most rudimentary arguments in support of its due process claim.

AT&T/WorldCom contend that Verizon's claim that the Commission is not following its own policies and procedures in this case is mere sophistry. Verizon argues that the Commission reviewed U S WEST's trade secret showing in detail before denying the requested relief, then argues that in this case the Commission has granted AT&T/WorldCom's petition without offering a review of the merits. AT&T/WorldCom note that their petition has not been granted but has been set for investigation. The Commission has decided to maintain the status quo in the interim. This cannot be compared with the Commission's final decision in the case involving U S WEST.

AT&T/WorldCom also take issue with Verizon's contention that the Commission's action violates OAR 860-023-0055(15). There is no rule in place requiring web posting of CLEC service quality reports. Therefore, there is nothing from which AT&T/WorldCom could be exempted.

AT&T/WorldCom state that Verizon has listed the harms it believes will ensue if the Commission refrains from posting CLEC service quality reports even temporarily. AT&T/WorldCom note that Verizon has provided no evidence to support its claims, however. AT&T/WorldCom argue that their petition and its attached affidavits and exhibits provide evidence to counter Verizon's contentions about the competitive effect of the Commission's order.

Staff's Response. Commission Staff also opposes Verizon's application for reconsideration. Staff points out first that Verizon has failed to specifically identify which provisions of OAR 860-014-0095 support its application for reconsideration and argues that the Commission could deny Verizon's application for that reason. Staff also addresses each of Verizon's allegations of error, but maintains first that three errors or misperceptions run throughout Verizon's application.

First, according to Staff, Verizon fails to appreciate that the order does no more than maintain the status quo while a new docket (UM 1038) proceeds. Staff argues that UM 1038 is the appropriate forum to hear any of Verizon's claims of error. Verizon, Staff notes, has intervened in that docket. Second, Staff notes that maintaining the status quo means that the Commission was not posting the CLECs' service quality reports to its web site before it issued its order. Thus, the order merely continues the status quo of not posting service quality data for CLECs while the CLECs' various claims of confidentiality and policy are explored in UM 1038.

Third, in Staff's view, Verizon repeatedly states that the order fails to apply the ORS 759.450 service quality reporting standards to CLECs. That is incorrect. All carriers report to the Commission under ORS 759.450. Staff asserts that Verizon is actually challenging the order's decision to maintain the status quo and not post CLEC service quality reports to the web site while UM 1038 proceeds. The Commission's web site, Staff argues, is constructed pursuant to Commission policy determinations. ORS 759.450 does not dictate how the Commission structures its service quality data on the web site.

1. *The order violates the requirement that the Commission's service quality rules apply equally to all telecommunications carriers.* Verizon claims that the service quality standards under ORS 759.450(2) must apply to all carriers. Staff responds that the Commission does apply the service quality reporting requirements under ORS 759.450 to all carriers.

2. *The order violates §253(b) of the Telecommunications Act of 1996 (the Act).* Verizon also claims that the Commission's order applies more lenient reporting requirements for CLECs than for ILECs, in violation of §253(b) of the Act. According to Staff, Verizon fails to understand that how the Commission constructs its web site is distinct from the statutory reporting requirements of ORS 759.450. The web site matter involves the Commission's discretion about how to inform the public of pertinent service quality data that is not otherwise protected by law.

Finally, Staff asserts that Verizon raises unsubstantiated factual assertions in support of its §253(b) claim. Verizon argues that its web site data may help a CLEC with the CLEC's marketing efforts, resulting in an unfair advantage for the CLEC. The existing record in DR 29 does not allow the Commission to make a determination about Verizon's marketing claim. However, Staff notes that Verizon may raise this issue in UM 1038.

3. *The order is not supported by findings of fact and conclusions of law.* Staff contends that the order contains adequate factual and legal findings, as opposed to Verizon's claims. Verizon asserts that the order fails to explain why it is exempting the CLECs from the web site posting requirement. Staff points out that the order does not constitute an exemption; it merely maintains the status quo while all issues are explored in a new generic docket. Staff notes Verizon's claim that if the Commission fully explored the facts and law, it would not have maintained the "exemption" for CLECs. According to Staff, that is exactly the point. The Commission created UM 1038 to fully explore the facts and law surrounding AT&T/WorldCom's petition. The Commission's choice in opening UM 1038, Staff contends, is rational and lawful in the face of the legal and policy challenges against posting raised by AT&T/WorldCom.

4. *The Commission's order violates due process and the Commission's own procedures and practices for granting temporary relief.* Finally, Staff answers Verizon's claim that the order violates due process or Commission procedures. Verizon asserts that the order grants a kind of temporary injunction without following due process or Commission procedures. Staff again notes that the order maintains the status quo. The Commission was not posting CLEC service quality reports to its web site before the order; the order continues the policy of not posting CLEC data while the CLECs' legal and policy claims are fully explored in UM 1038. Staff argues that this approach does not constitute a temporary injunction or an exemption from Commission rules without notice to other parties. Moreover, Staff contends that Verizon, an active participant in UM 1038, will be given full and complete due process in that docket as it was in DR 29.

Verizon also asserts that the order's decision to maintain the status quo is an unfair exemption from the posting requirement. However, Staff notes that Verizon's use of the term "exemption" does not capture the current situation. As stated, the order merely maintains the status quo.

Verizon expresses doubt that UM 1038 will be completed in a reasonable time. At the public meeting underlying the order, Staff notes, the Commission pledged to expedite UM 1038 to the extent possible.

Verizon argues that the order is inconsistent with the Commission's treatment of U S WEST in Order No. 00-002 (UM 960). According to Staff, Verizon is mistaken. In Order No. 00-002, the Commission did not post U S WEST's service quality reports to its web site until after Order No. 00-002 was issued. Further, the Commission stayed Order No. 00-002 to allow U S WEST the opportunity to request a hearing, which it did. *See* Order No. 00-297. The Commission's procedures in the order for which Verizon asks reconsideration are substantially the same as those used in the UM 960 proceeding, according to Staff.

Staff also responds to Verizon's claim that equal treatment requires that the Commission either post data for all carriers or for none. Verizon may raise this claim in UM 1038. Staff also contends that the Commission may lawfully choose to maintain the status quo in UM 1038 while it considers the legal and policy challenges against posting originally raised in DR 29.

Discussion and Decision. In general, we agree with AT&T/WorldCom and Staff that the Commission's decision in Order No. 01-855 simply maintains the status quo as to posting service quality results, violates no state or federal law or Commission policy, and addresses a matter of Commission discretion, the contents of the Commission's web site.

1. *The order violates the requirement that the Commission's service quality rules apply equally to all telecommunications carriers.* As Staff points out, Verizon's assumption that ORS 759.450(2) applies to posting data on the Commission's web site is mistaken. That statute, which indeed applies to all telecommunications carriers, enunciates standards for service, not the fact of web site posting. OAR 860-023-0055 likewise addresses the standards that all telecommunications carriers must meet, not posting the results of carriers' reported service quality results. Verizon confuses service quality standards and web site posting. These are two separate issues, and once they are separated, Verizon's argument on this issue cannot be maintained.

2. *The order violates §253(b) of the Telecommunications Act of 1996 (the Act).* Verizon believes that the Commission's decision in Order No. 01-855 applies more lenient service quality reporting policies on CLECs than on ILECs. This is not the case. The reporting requirements are the same for CLECs and ILECs. At issue is whether the results of the reporting are posted on the Commission's web site. As with Verizon's first point, once the reporting and the posting issues are disentangled, Verizon's argument fails.

3. *The order is not supported by findings of fact and conclusions of law.* Verizon's argument that the order at issue lacks findings of fact and conclusions of law is ill taken. The order is legally sufficient. The statute Verizon cites for support, ORS 756.558(2), addresses orders written after evidence has been taken. Here, the Commission has opened an investigation in which evidence *will be* taken. Obviously, the statute does not apply in this case. The *Drew* case that Verizon cites also refers to the evidentiary basis necessary for fact finding. Again, Order No. 01-855 opens an investigation in the course of which facts will be found. As AT&T/WorldCom argue, Verizon's argument puts the cart before the horse.

Verizon also asserts that the order exempts the CLECs from the posting requirement. This mischaracterizes the Commission's decision. The Commission has deferred its decision on web site posting of service quality data until the close of UM 1038, maintaining the status quo in the meantime. No exemption has been granted.

Verizon also finds fault with the Commission's order because it does not reconcile its decision to maintain the status quo as to web site posting with Staff's position. The task of UM 1038 is to weigh the parties' positions and develop a record on the basis of which the Commission can reach a reasoned decision. The order is not faulty in this respect.

4. *The Commission's order violates due process and the Commission's own procedures and practices for granting temporary relief.* Verizon characterizes the Commission's action in Order No. 01-855 as a temporary injunction. The characterization fails. As AT&T/WorldCom point out, this characterization is inaccurate from a procedural point of view. Parties seek injunctions against a third party from an adjudicative body; here the Commission would be both the adjudicative body and the party against whom an injunction is sought.

Verizon also asserts that the Commission's order violates OAR 860-023-0055(15), which sets forth the provisions for granting exemption from rules. There is no rule in place on web site posting; therefore, no procedure for granting exemption from a rule has been violated.

Verizon argues that the Commission treated U S WEST's petition differently in Order No. 00-002. We agree with Staff that the procedures in Order No. 01-855 are substantially the same as those used in the proceeding culminating in Order No. 00-002, and conclude that Verizon is wrong.

Verizon raises the argument that the Commission must post data for all carriers or none. This issue will be addressed in UM 1038.

We conclude that Verizon has not presented grounds for reconsideration of Order No. 01-855.

ORDER

IT IS ORDERED that Verizon's application for reconsideration of Order No. 01-855 is denied.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

Joan H. Smith
Commissioner

A party may appeal this order to a court pursuant to applicable law.