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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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2 **KRISTEN K. MAYES**
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5 **Commissioner**
6 **PAUL NEWMAN**
7 **Commissioner**
8 **SANDRA D. KENNEDY**
9 **Commissioner**
10 **BOB STUMP**

DOCKET NO.: T-01051B-09-0383
T-03335A-09-0383

11 IN THE MATTER OF QWEST
12 CORPORATION'S PETITION FOR
13 ARBITRATION AND APPROVAL OF
14 INTERCONNECTION AGREEMENT WITH
15 NORTH COUNTY COMMUNICATIONS
16 CORPORATION OF ARIZONA PURSUANT TO
17 SECTION 252(b) OF THE COMMUNICATIONS
18 ACT OF 1934, AS AMENDED BY THE
19 TELECOMMUNICATIONS ACT OF 1996 AND
20 APPLICABLE STATE LAWS

**NORTH COUNTY COMMUNICATIONS
CORPORATION'S REPLY IN SUPPORT OF
MOTION TO DISMISS QWEST
CORPORATION'S PETITION FOR
ARBITRATION**

INTRODUCTION

21 Instead of addressing the actual dispute, Qwest spends much of its opposition reconstituting
22 North County's position, misrepresenting relevant law, and complicating the real issue. Because the
23 statutory language is unambiguous, Qwest obviously believes that it can only prevail by utterly
24 confusing the Commission. The Commission should not be fooled by such tactics. The statute is
25 clear. Section 252 of the Act does not grant the Commission jurisdiction to compel arbitration where,
26 as here, there is an existing and active ICA. Without statutory authority to compel arbitration, the
27 parties must resolve any disputes (including disputes related to a party's contractual obligation to
28 negotiate) just like any other parties to a contract: by bringing an action for breach of contract.

Despite Qwest's apocalyptic predictions of what will occur if the Commission fails to act (where they have no jurisdiction to act), if Qwest believes that North County is failing to perform

1 under the terms of the ICA, Qwest may pursue an action in court to enforce the terms of the ICA. If
2 Qwest had wanted an arbitration provision in the ICA, whether governed by Section 252 or pursuant to
3 some other arbitration rules, it should have negotiated for the inclusion of such a provision, as most
4 others have done. It did not, and Qwest was the drafting party. Qwest cannot now, when it sues its
5 purpose, add an arbitration provision to ICA.
6

7 ARGUMENT

8 **I. Qwest and North County Are Already Interconnected.**

9 A right to arbitration before the Commission under Section 252 is expressly predicated “[u]pon
10 receiving a request for interconnection, services, or network elements pursuant to section 251 of this
11 title.” 47 U.S.C. § 252(a)(1). Qwest does not, and could not, allege this condition precedent has
12 occurred. Again, Qwest tries to confuse the issue by discussing its request to negotiate. There was
13 no “request for interconnection, services, or network elements pursuant to section 251.” A request for
14 interconnection is impossible because Qwest and North County are already interconnected. The
15 statutory language is clear and the Commission should not ignore this unambiguous condition
16 precedent to its jurisdiction to compel arbitration under Section 252.
17

18 With no ability to possibly refute this simple fact, Qwest essentially argues “well, the
19 Commission has done it before.” That prior parties have either failed to point out this unambiguous
20 condition to the Commission’s authority, or simply have agreed to Section 252 arbitration, is
21 irrelevant. Parties to a contract can mutually agree to do anything they want. ICA’s may explicitly
22 invoke Commission arbitration when they desire, and many do. In fact, almost all of the cases cited in
23 this motion involve ICA’s which had arbitration clauses or language.¹ *See, In re Application by*
24
25

26 ¹ Qwest cites five of its own cases where successor ICA’s were negotiated, but tellingly does not state
27 if the original ICA’s in those cases explicitly invoked 252 arbitration as a remedy or whether the issue
28 of Commission authority to negotiate a successor ICA was even raised in any of those cases. Since
Qwest avoided the issue, we can only assume that either this issue was never raised or the original
ICA’s there contained arbitration clauses specifically invoking 252 authority.

1 *Pacific Bell Telephone Company*, 2006 WL 1069543, at 9 (Cal. P.U.C., April 19, 2006) (“The existing
2 evergreen provision continues the ICA, but only during negotiations or arbitrations” [explicitly
3 referencing arbitration]); *In the Matter of the Petition of Global NAPs Ohio for Arbitration Pursuant*
4 *to Sections 251 and 252 of the Telecommunications Act of 1996 to Establish an Interconnection*
5 *Agreement with the Ohio Bell Telephone Company dba AT&T Ohio*, Finding and Order, Case No. 09-
6 195-TP-ARB (filed January 7, 2010) (attached to the Affidavit In Support of Motion To Dismiss of J.
7 Dicks as Exhibit “E”) (The contract explicitly reserved rights to arbitration under Section 252: “By
8 entering into the Appendix, both Parties reserve the right to advocate their respective positions before
9 state or federal commissions whether in bilateral complaint dockets, arbitrations under Section 252 of
10 the Act, commission established rulemaking dockets, or in any legal challenges stemming from such
11 proceedings.”); *Universal Telecom Order*, Order No. 05-206, Docket ARB 589 (the negotiations
12 clause similar to the one at issue here only gives rise to the thr right to negotiate: “Therefore, we
13 conclude that Qwest retains the right under the MFS Intelenet Agreement to initiate negotiations with
14 Universal towards a new interconnection agreement.”); *Pacific Bell v. Pac West Telecomm, Inc.*, 325
15 F.3d 1114 (2003) (there is no indication that the issue of Commission jurisdiction to arbitrate was
16 raised, and we presume the original ICA had an arbitration clause). Where the ICA only gives the
17 parties a negotiation clause, it cannot be expanded by mere whim to include an arbitration clause when
18 West was free to negotiate for this when drafting the ICA.
19
20
21

22 Moreover, the proposed ICA makes clear that if Qwest wishes to be bound to Section 252
23 arbitration, it can expressly do so in the agreement.² Again, parties may contractually agree to do
24

25 ² The proposed ICA contains the following provision: “5.2.2 Upon expiration of the term of this
26 Agreement, this Agreement shall continue in full force and effect until superseded by a successor
27 agreement in accordance with this Section 5.2.2. Any Party may request negotiation of a successor
28 agreement by written notice to the other Party no earlier than one hundred sixty (160) Days prior to the
expiration of the term, or the Agreement shall renew on a month to month basis. **The date of this
notice will be the starting point for the negotiation window under Section 252 of the Act.**”
[emphasis added]

1 anything they want. They can agree to arbitrate before the American Arbitration Association, or
2 before a specific named arbitrator. They can agree to resolve their disputes by a coin toss. If the
3 contracting parties agree to a Section 252 arbitration, and the Commission is willing to oversee that
4 arbitration, great. Here, the parties did not agree to Section 252 arbitration, or any other type of
5 arbitration. Without the statutory authority under Section 252, or an agreement by the parties, the
6 Commission has no jurisdiction to force arbitration.
7

8 **II. There Is Not Even a Need for Arbitration.**

9 As Qwest is well aware, a Section 252 arbitration is an expensive and arduous process.
10 Indeed, it is clear that Qwest hopes that the threat of a Section 252 arbitration will force North County
11 to give in to Qwest's demands. But in addition to the fact that there is no authority to force a Section
12 252 arbitration upon North County, a Section 252 arbitration is completely unnecessary. Qwest
13 predicts a catastrophic collapse of the telecommunication industry if North County is not forced into a
14 Section 252 arbitration. That prediction is, at best, utterly ridiculous.
15

16 First, the current ICA works perfectly fine, and has worked perfectly fine for fourteen years.
17 Even if the parties continued under the current ICA, nothing catastrophic would occur (or has occurred
18 in the last fourteen years). Second, Qwest does not, and could not, deny the robust amendment
19 procedure or the change of law clause contained in the current ICA are more than sufficient to handle
20 the minor changes they say are "needed."
21

22 Finally, if Qwest believes that, despite the robust procedures available to the parties under the
23 ICA, North County has failed to negotiate as contractually required, Qwest can pursue its claims in
24 court. And almost every court in the country has alternative dispute procedures to compel non-
25 binding negotiations and settlement conferences, all of which are much less costly and arduous than a
26

27 ///

28 ///

1 Section 252 arbitration. If those alternative dispute procedures do not work, then Qwest gets what
2 every other plaintiff in a breach of contract case gets: its day in court.³

3 If Qwest had wanted compelled arbitration, then it should have negotiated for that term.
4 Compelled arbitration is not simply read into every contract. Millions of contracts have negotiation
5 clauses without compelled arbitration clauses. Moreover, even if there were some ambiguity on
6 whether the parties “meant” to include an arbitration clause, any ambiguity is construed against the
7 drafter: Qwest. *See e.g. Harris v. Harris*, 195 Ariz. 559, 562 (1999).

8
9 Though Qwest has no statutory or contractual authority to compel arbitration, it has a myriad of
10 other avenues to enforce its contractual rights. Qwest is free to pursue those other avenues, but it is
11 not free to force an arbitration clause upon North County were no clause exists in the law or the
12 agreement of the parties.⁴

13
14 Importantly, the only looming “dire consequence” would be the consequence of allowing
15 Qwest to force arbitration to negotiate a new ICA when the parties are already interconnected. By
16 doing so, the Commission would open up the floodgates. Where the language of the statute and the
17 explicit clauses of the ICA do not bar one carrier from invoking arbitration willy nilly, nothing would
18 prevent North County (or any other carrier) from instituting a Section 252 arbitration the day after the
19 prior Section 252 arbitration was decided. Carriers could literally continue instituting Section 252
20 arbitrations ad nauseum under this system where a right to renegotiate at whim is automatically read
21

22
23 ³ Qwest argues that North County cannot extend the ICA in perpetuity. Of course North County
24 cannot, unilaterally, extend the ICA in perpetuity by simply refusing to negotiate. Similarly, Qwest
25 cannot simply compel arbitration because it “wants to.” If Qwest believes North County is not
26 complying with the ICA, then it can seek enforce the ICA in court. Qwest has an open avenue to
27 resolve its complaint.

28 ⁴ Qwest also argues that North County somehow waived its rights and defenses by granting Qwest an
extension to file its petition while the parties negotiated under the ICA. Qwest cites no authority for
this proposition. The parties agreed to an extension of the arbitration window without waiving any
rights or making any admissions that arbitration was appropriate. Granting a party an extension to file
a claim (in whatever forum) does not constitute an admission that there is any validity to that claim.
As has been the case since Qwest’s initial overture, North County has and will continue to comply
with its contractual obligation to negotiate.

1 into every ICA regardless of what is actually written in it. Obviously the Commission does not want
2 to have to constantly, and continuously, arbitrate complex 300 page ICAs every year or two between
3 all carriers.
4

5 **III. Qwest Is Seeking to Amend the ICA.**

6 When you have an agreement, and then you change some of the terms of that agreement, but
7 leave the rest of the terms in place, that is called an amendment. While Qwest argues that it wants a
8 completely new ICA, the “new ICA” is just the old ICA with some changes to some of the terms.
9 That is an amendment. Putting a new cover page on it does not change that fact.
10

11 Qwest admits that the Commission has no authority to compel arbitration to amend an ICA.
12 *See also In the Matter of the Request by GCI Communication Corp. d/b/a General Communication,*
13 *Inc., and d/b/a GCI for Mediation Regarding Glacier State Study Area Interconnection Disputes with*
14 *ACS Of The Northland, Inc. d/b/a Alaska Communications Systems, ACS Local Service and ACS,*
15 *Case No. U-02-18, Order No. 2, p. 5 (filed Aug 29, 2002); In the Matter of the Petition of Global*
16 *NAPs Ohio for Arbitration Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*
17 *to Establish an Interconnection Agreement with the Ohio Bell Telephone Company dba AT&T Ohio,*
18 *Finding and Order, Case No. 09-195-TP-ARB (filed January 7, 2010) (attached as Exhibits D and E to*
19 *the Dicks Declaration).*
20

21 Moreover, the *Universal Telecom Order* Qwest so heavily relies upon is inapposite. In that
22 matter, the parties contractually agreed to negotiation. As noted by Qwest, the Order simply held that
23 Qwest had the right to commence negotiations. Qwest Response at 6. North County does not dispute
24 that, under the terms of the ICA, Qwest has a right to commence negotiations. North County contends
25 that Qwest has no right to arbitration under the Existing ICA, and the *Universal Telecom Order* does
26 only orders negotiations, not arbitration, where the agreement only orders negotiations. Again, if
27 Qwest does not believe North County is complying with its contractual obligation to negotiate, it can
28

1 pursue a breach of contract claim under the agreement. It cannot, however, invoke Section 252 and
2 move the Commission to force arbitration upon North County, where no part of the agreement allows
3 for such arbitration. Similarly, Qwest cannot invoke the jurisdiction of the American Arbitration
4 Association to force AAA arbitration upon North County.

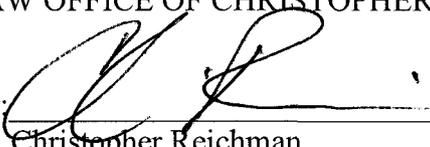
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6 Qwest's reliance on the *Qwest Arizona Dialtone Arbitration* is similarly misplaced. *See In the*
7 *Matter of Qwest Corporation Petition for Arbitration and Approval of Amendment to Interconnection*
8 *Agreement with Arizona Dialtone*, Docket Nos. T-01051B-07-0693 and T-03602A-07-0693. This
9 case is not about a unilateral provision. North County does not argue that it has the right to force
10 arbitration upon Qwest, but Qwest does not have that same right. Neither party has the right to force a
11 arbitration of a new ICA without an arbitration clause or a new request for interconnection as required
12 by the plain terms of the statute. ILECs and CLECs are both treated exactly the same, because this is a
13 matter of contract. The parties have a contractual obligation to negotiate. If one party believes the
14 other party is in breach of that contractual obligation, that party may pursue its remedies for breach of
15 contract.
16

17
18 **CONCLUSION**

19 Neither the statute nor the terms of the ICA grant the Commission jurisdiction to compel
20 Section 252 arbitration to force North County to renegotiate the current ICA. If Qwest believes North
21 County has failed to comply with its contractual obligation to negotiate, Qwest may pursue its claim in
22 court. As such, Qwest's Petition for Arbitration should be dismissed without leave to amend.
23

24 Dated: June 14, 2010

LAW OFFICE OF CHRISTOPHER J. REICHMAN

25
26 By: 

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