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BEFORE THE ARIZONA CORPORATION COMMISSION

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JUN 28 2010

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DOCKETED BY

IN THE MATTER OF QWEST CORPORATION'S PETITION FOR ARBITRATION AND APPROVAL OF INTECONNECTION AGREEMENT WITH NORTH COUNTY COMMUNICATIONS CORPORATION OF ARIZONA PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996 AND APPLICABLE STATE LAWS

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

**NOTICE OF FILING
SUPPLEMENTAL AUTHORITY**

Qwest Corporation ("Qwest") files the following decisions from the Oregon Public Utilities Commission as supplemental authorities in support of Qwest's Response to North County Communications Corporation's Motion to Dismiss:

(1) Administrative Law Judge Ruling of on Motion to Dismiss, *In the Matter of Qwest Corporation Petition for Arbitration*, Oregon Public Utilities Commission ARB 918, issued May 10, 2010 (copy attached, marked as Attachment 1);

and

(2) Commission Order Affirming Ruling, *In the Matter of Qwest Corporation Petition for Arbitration*, Oregon Public Utilities Commission ARB 918, entered June 21, 2010 (copy attached, marked as Attachment 2).

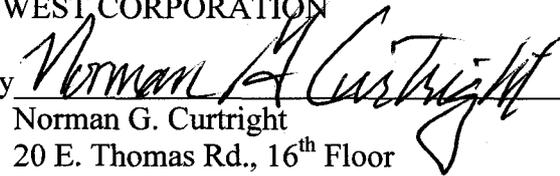
By the aforementioned Ruling of the Oregon Administrative Law Judge and the affirming Order of the Oregon Public Utilities Commission, North County Communications Corporation's motion to dismiss the arbitration petition of Qwest in Oregon was denied. The Qwest petition

1 for arbitration in Oregon and North County's motion to dismiss in Oregon are nearly identical to
2 the matters in this docket.

3 Respectfully submitted, this 23rd day of June, 2010.

4 QWEST CORPORATION

5 By



Norman G. Curtright
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8 ORIGINAL and 13 copies hand-delivered
9 for filing this 23rd day of June, 2010 to:

10 Docket Control
11 Arizona Corporation Commission
12 1200 West Washington Street
13 Phoenix, AZ 85007

14 Copy of the foregoing emailed
15 this 23rd day of June, 2010 to:

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17 Administrative Law Judge
18 Arizona Corporation Commission
19 1200 W. Washington
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1 Copy of the foregoing mailed
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ATTACHMENT 1

ISSUED: May 10, 2010

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 918

In the Matter of

QWEST CORPORATION

Petition for Arbitration and Approval of an
Interconnection Agreement with NORTH
COUNTY COMMUNICATIONS
CORPORATION OF OREGON.

RULING

DISPOSITION: MOTION TO DISMISS DENIED

I. INTRODUCTION

Qwest Corporation (Qwest) first petitioned the Public Utility Commission of Oregon (Commission) for arbitration of its interconnection agreement with North County Communications Corporation of Oregon (North County) in August of 2009. The parties spent several months in informal negotiations. At a telephone conference held on March 16, 2010, counsel for North County requested the opportunity to brief the threshold question of this Commission's jurisdiction to address Qwest's petition. North County subsequently filed a motion to dismiss. In this ruling, I deny North County's motion to dismiss Qwest's petition for arbitration.

II. PROCEDURAL HISTORY

North County filed its motion to dismiss Qwest's petition for arbitration on April 5, 2010. Qwest filed a response to the motion on April 19, 2010, and filed a letter with an attachment to the response on April 20, 2010. North County submitted a reply in support of its motion to dismiss and Qwest filed a notice of supplemental authority on April 26, 2010.

III. DISCUSSION

A. Background

Qwest is an incumbent local exchange carrier (ILEC) that provides telecommunications services in Oregon. North County is a wireline competitive local exchange carrier (CLEC). North County and Qwest are parties to an interconnection agreement in Oregon (existing agreement) that became effective on November 29, 1997, and,

under its terms, remains in effect until a new agreement becomes effective between the parties. In the existing agreement, the parties agreed "to commence negotiations on a new agreement no later than two years after this Agreement becomes effective."¹ Qwest seeks a new agreement to address changes in signaling technology since the parties' agreement was signed.²

B. Position of the Parties

1. *North County*

North County contends that this Commission lacks jurisdiction to hear Qwest's petition for arbitration because there is an existing and active interconnection agreement in place between the parties. North County argues that under the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (the Act), ILECs may not initiate compulsory arbitration until a CLEC first requests interconnection, services, or network elements, and that since North County did not request interconnection here, Qwest may not force arbitration.³ In support of its Motion, North County cites orders from the Regulatory Commission of Alaska and the Ohio Public Utilities Commission.⁴

2. *Qwest*

Qwest states that this Commission and other Commissions have arbitrated successor ICAs under Section 252 without first requiring a request for negotiation from a CLEC. Qwest cites to several orders from this and other Commissions regarding arbitration of successor ICAs, and places particular emphasis on this Commission's Order No. 05-088. Qwest argues that under the terms of the parties' ICA, North County should be deemed to have requested interconnection and negotiation. Finally, Qwest reviews the course of the parties' negotiations to argue that North County has acknowledged Qwest's right to seek arbitration before this Commission.

C. Resolution

Under Section 252(b)(1) of the Act, after an ILEC "receives a request for negotiation," either party to the negotiation may petition a State commission to arbitrate open issues. In Order No. 05-088, this Commission noted two ways that the requirements of Section 252(b)(1) could be met even when an ILEC did not receive a request for negotiation. First, the Commission cited decisions from other state Commissions holding that a CLEC's

¹ North County Communications Corporation Motion to Dismiss Petition for Arbitration (Motion to Dismiss), Exhibit A, at 73.

² *In the Matter of Qwest Corporation's Petition for Arbitration and Approval of Interconnection Agreement with North County Communications Corporation of Oregon* (Qwest Petition for Arbitration) at 4.

³ Motion to Dismiss at 3-4, citing 47 U.S.C. Sections 252(a)(1) (ILEC may initiate negotiations "[u]pon receiving a request for interconnection, services, or network elements"), 252(b)(1) (after an ILEC "receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues").

⁴ Motion to Dismiss at 7-9, citing Regulatory Commission of Alaska Case No. U-02-18, Order No. 2; Ohio Public Utility Commission Case No. 09-195-TP-ARB.

participation in the negotiation process satisfied the negotiation requirement of Section 252(b)(1).⁵ Second, the Commission held that the negotiation requirement was met if language in an existing ICA permitted either party to initiate negotiations.⁶

Both of the Commission's bases for permitting an ILEC to petition for arbitration without receiving a request for negotiation apply here. North County's letters to the Commission requesting stays in this proceeding state that North County "opened negotiations with" Qwest, and that both parties believed they may "amicably negotiate an interconnection agreement."⁷ In addition, the ICA language the Commission relied on in Order No. 05-088 to find either party could initiate negotiations under the Act is virtually identical to the language in the North County – Qwest ICA.⁸ As Qwest notes, this Commission has arbitrated and approved ICAs in arbitration proceedings initiated by ILECs in the past.⁹ North County has not demonstrated that Qwest's petition should be treated differently in this case.

Finally, neither of the out-of-state cases cited in North County's briefs supports the company's position. The Alaska decision addressed arbitration on issues addressed in an ICA during the initial term of the ICA, and the Ohio order involved an arbitration to add terms to an existing ICA, not to arbitrate a new agreement.

North County has not provided persuasive authority for its claim that this Commission lacks jurisdiction to consider Qwest's petition for arbitration. After failing to resolve their dispute through negotiation, either Qwest or North County may petition this Commission to arbitrate open issues. Qwest properly did so, and this Commission may now resolve the parties' dispute.

D. Schedule

I received Qwest's letter requesting changes to the procedural schedule in this docket and North County's reply to Qwest's request. I will issue a ruling addressing Qwest's request. Until then, the parties should comply with the current procedural schedule.

⁵ *In the Matter of Qwest Corporation, Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Universal Telecommunications, Inc.*, Order No. 05-088 at 4-5 (February 9, 2005).

⁶ *Id.* at 5-6.

⁷ NCC and Qwest's Joint Motion Requesting Stay (September 1, 2009).

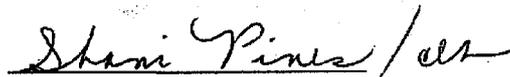
⁸ See Order No. 05-088 at 7; Motion to Dismiss, Exhibit A, at 73.

⁹ See, e.g., Oregon Commission Orders No. 06-190 (April 19, 2006), No. 04-699 (December 2, 2004).

IV. ORDER

North County Communications Corporation's Motion to Dismiss Qwest Corporation's Petition for Arbitration is denied. The parties are directed to comply with the revised procedural schedule adopted on April 14, 2010.

Dated at Salem, Oregon, this 10th day of May, 2010.



Shani Pines
Administrative Law Judge

ATTACHMENT 2

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 918

In the Matter of

QWEST CORPORATION

Petition for Arbitration and Approval of an
Interconnection Agreement with
NORTH COUNTY COMMUNICATIONS
CORPORATION OF OREGON.

ORDER

DISPOSITION: RULING UPON CERTIFICATION AFFIRMED

I. INTRODUCTION

North County Communications Corporation (North County) and Qwest Corporation (Qwest) are parties to a thirteen year old interconnection agreement. On August 3, 2009, Qwest filed with the Public Utility Commission of Oregon (Commission) a petition for arbitration and approval of a new interconnection agreement with North County to address changes in technology since the parties' existing agreement was signed.

After several months of informal negotiations, North County requested the opportunity to brief the threshold question of whether the Commission has jurisdiction to address Qwest's petition. North County filed a motion to dismiss Qwest's petition, and the parties submitted response and reply briefs on the jurisdictional question. On May 10, 2010, the Administrative Law Judge (ALJ) presiding over this docket issued a ruling denying North County's motion to dismiss. North County requested, and the ALJ granted, certification of the jurisdictional question to the Commission. In this order, we affirm the ALJ's ruling and find that we do have jurisdiction to entertain Qwest's petition for arbitration.

II. DISCUSSION

A. Background

Qwest is an incumbent local exchange carrier (ILEC) that provides telecommunications services in Oregon. North County is a wireline competitive local exchange carrier (CLEC). North County and Qwest are parties to an interconnection

agreement (ICA) in Oregon that became effective on September 9, 1997. The current interconnection agreement contains the following negotiation term:

This Agreement shall be effective for a period of 2 ½ years, and thereafter the Agreement shall continue in force and effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties. The Parties agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective.¹

In its petition for arbitration filed in August of 2009, Qwest seeks a new agreement to address changes in signaling technology since the parties' agreement was signed.

B. Legal Standard

The Telecommunications Act of 1996 (the Act)² provides a framework for local exchange carriers to engage in either voluntary negotiation or compulsory arbitration before state Commissions. With regard to voluntary negotiations, Section 252 of the Act provides:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title.³

For compulsory arbitration, the Act holds:

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.⁴

¹ See North County Communications Corporation and U S West Communications, Inc. [now Qwest] Arbitrated Interconnection Agreement for the State of Oregon at § XXXIV.V, p. 73, attached as Exhibit A to Affidavit of Christopher J. Reichman in Support of North County Communications Corporation's Motion to Dismiss Qwest Corporation's Petition for Arbitration.

² Pub. L. 104-104, 110 Stat. 56.

³ 47 U.S.C. § 252(a)(1).

⁴ 47 U.S.C. § 252(b)(1).

Once the parties reach an agreement, either through negotiation or arbitration, their agreement must be submitted to the state Commission for approval.⁵ Sections 252(a) and (b) are incorporated into the Oregon Administrative Rules.⁶

C. Issues

1. *Request for Interconnection*

a. *Parties' Positions*

North County first argues that under Section 252, an ILEC may not initiate negotiations with a CLEC until the ILEC has received a request for interconnection, services, or network elements, and that since North County never made any such request to Qwest, Qwest has no basis for initiating negotiations under Section 252.⁷ North County states that Section 252 of the Act does not grant the Commission jurisdiction to compel arbitration where there was no CLEC request for interconnection. Citing case law from other jurisdictions, North County argues that the interpretation of interconnection agreements rests in state courts and is governed exclusively by the "normal state law of contracts."⁸

Qwest responds that if North County's argument holds, all existing ICAs would exist in perpetuity until the CLEC chose to request negotiation. Qwest notes that this interpretation would require us to conclude that numerous arbitrations we conducted in the past were invalid.⁹ Qwest argues that even if North County's argument were correct, in this case North County must be deemed to have requested negotiations, because the parties' current ICA provides that the parties "agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective."¹⁰ Finally, Qwest notes that we addressed this issue in docket ARB 589, Order No. 05-088, and concluded that an ILEC could initiate negotiations under similar circumstances.

b. *Resolution*

We affirm our holding in docket ARB 589, Order No. 05-088, that terms in an existing ICA may be read to satisfy the requirements of Section 252. In ARB 589, Qwest and a CLEC, Universal Telecom Inc., were parties to an existing ICA that contained a negotiation clause stating that the parties "agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective."¹¹ After the

⁵ 47 U.S.C. § 252(e)(1).

⁶ See OAR 860-016-0010 – 0030.

⁷ North County Request for Certification of Question re Ruling Denying Motion to Dismiss (North County Certification Request) at 6, citing 47 U.S.C. Section 252(a)(1).

⁸ North County Certification Request at 5, citing *Connect Communications Corp. v. Southwestern Bell Telephone, L.P.*, 467 F.3d 703 (8th Cir. 2006), *Southwestern Bell Telephone Co. v. Public Utility Com'n of Texas*, 208 F.3d 475 (5th Cir. 2000), *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999).

⁹ Qwest Response to NCC's Requests for Certification and Continuance (Qwest Response) at 5.

¹⁰ *Id.* at 6-7.

¹¹ See Order No. 05-088 at 7. The Commission read the above negotiation clause into the parties' agreement, because their "terms of agreement" provision differed from the model provision they claimed to have adopted.

CLEC failed to respond to Qwest's requests for negotiation of a new agreement, Qwest petitioned this Commission for arbitration of a new ICA. The CLEC filed a motion to dismiss Qwest's petition, making the same argument North County makes here: that neither the terms of the parties' existing ICA nor any provision of the Act authorized Qwest's request.¹²

In Order No. 05-088, we first acknowledged that by its terms, Sections 252 requires that a request for negotiation come from a CLEC, not an ILEC. However, after reviewing other state Commissions' approaches to this question, we concluded that under the parties' negotiation clause, "either party, including Qwest, may commence negotiations. Like the Tennessee and Florida commissions, we conclude that agreements that expressly permit either party to commence negotiations may supplement the Act's language which permits only the CLEC to commence negotiations."¹³

We affirm that conclusion here. By the terms of the parties' existing ICA, either Qwest or North County may commence negotiations under Section 252(a)(1) of the Act, and if negotiations fail, either party may then petition this Commission to arbitrate any open issues under Section 252(b)(1) of the Act. A negotiation clause in an existing ICA stating that both parties "agree to commence negotiations on a new agreement" will permit either the ILEC or the CLEC to initiate negotiations. Qwest was within its rights to initiate negotiations here.

We are not persuaded by North County's claim that only state courts may interpret interconnection agreements. None of the three cases cited by North County states that ICAs may only be interpreted in state *courts*. Instead, they simply state that interpretation of such agreements is a state, rather than a federal, issue. Moreover, North County's assertion is contrary to the express provisions of the Act, which authorizes state commissions to enforce the provisions of an ICA.¹⁴

2. *Need for Arbitration*

a. *Parties' Position*

North County's second claim is that there is no need for arbitration, because the parties' existing ICA has worked well for many years and contains robust amendment procedures that are more than sufficient to handle any changes the parties may need.¹⁵ North County again argues that if Qwest believes the procedures available to the parties are inadequate, Qwest may and should pursue its claims in a state court rather than before this Commission.¹⁶

¹² *Id.* at 2.

¹³ *Id.* at 7. In a subsequent order, Order 05-206, we found that the parties' negotiation clause gave Qwest the right to commence negotiations on a new agreement even after the two-year period had expired. *See* Order 05-206 at 6-7.

¹⁴ *See* 47 U.S.C. § 252(e)(1).

¹⁵ North County Request for Certification at 7.

¹⁶ *Id.*

Qwest responds that North County's arguments regarding contract claims are misplaced because Qwest is seeking a new ICA, not suing for breach of contract.¹⁷ Qwest also notes that the Act "specifically allows a state commission to enforce the provisions of an ICA, so if Qwest were to allege a breach of the [existing] ICA, Qwest could bring an interconnection enforcement complaint with the Commission."¹⁸

b. Resolution

We agree with Qwest that its Petition for Arbitration does not seek to enforce the provisions of the parties' existing ICA, but rather seeks a new ICA between the parties. Given our conclusion above that Qwest may seek a new ICA, and because only this Commission may entertain such requests under the Act, North County's motion to dismiss should be denied.

III. ORDER

IT IS ORDERED that the Administrative Law Judge's May 10, 2010 Ruling denying North County's motion to dismiss is affirmed.

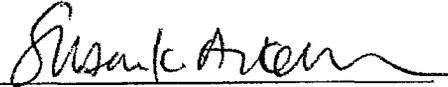
Made, entered, and effective JUN 21 2010



Ray Baum
Chairman



John Savage
Commissioner



Susan K. Ackerman
Commissioner



¹⁷ Qwest Response at 4.

¹⁸ *Id.*, citing OAR 860-016-0050.