BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for Arbitration of an Interconnection Agreement Between NORTH COUNTY COMMUNICATIONS CORPORATION OF WASHINGTON and QWEST CORPORATION Pursuant to 47 U.S.C. Section 252(b). …….	)	DOCKET UT-093035 QWEST'S ANSWER TO NCC'S MOTION TO DISMISS

I. INTRODUCTION

1 Pursuant to the schedule previously established in this matter, Qwest Corporation ("Qwest"), hereby files its answer to the motion to dismiss filed by North County Communications Corporation of Washington ("NCC") on March 30, 2010.[1]

2 NCC moves to dismiss Qwest's arbitration petition on the basis that the Washington Utilities and Transportation Commission ("Commission") lacks subject matter jurisdiction to consider the petition under 47 U.S.C. §252. NCC's motion is without merit and should be denied. NCC is obligated to negotiate a new interconnection agreement ("ICA") under the express terms of the 1997 ICA.

3 The Commission has jurisdiction to both enforce NCC's obligation to negotiate, and to arbitrate a new agreement under Section 252 of the Act. NCC's arguments to the contrary are inconsistent with the language of the current ICA and the law, would produce absurd results,

[1] NCC's motion was not timely filed and was not served electronically on Qwest as NCC committed to do. Nevertheless, Qwest understands that the Commission likely wishes to consider the motion insofar as it challenges the Commission's subject matter jurisdiction to hear the case. Consequently, Qwest does not seek any sanctions against NCC for the procedural failures.

Qwest
1600 7th Ave., Room 1506
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

and are further not supported by the cases it cites and attaches to its motion. Those cases stand for the proposition that a state commission will not arbitrate additional terms and conditions, i.e., amendments to existing ICAs under Section 252, but that in fact they will arbitrate new agreements in their entirety when, as in this case, the original term of the ICA is over. Further, other state commissions have addressed this issue and ruled squarely in favor of the proposition that Qwest may initiate negotiations for a successor agreement, and may petition for arbitration of unresolved issues. All of these holdings will be discussed in greater detail *infra*.

II. ARGUMENT

A. The Statutory Framework

4 NCC argues that the plain language of the 1996 Act prohibits Commission arbitration of renegotiation. This argument has been considered and rejected by several state commissions, and is not supported by the cases NCC cites.

5 NCC essentially argues that the Act limits arbitration proceedings to those cases where the parties do not have an ICA. This argument, carried to its logical conclusion, would produce an absurd result – that existing ICAs continue in perpetuity, and that only the CLEC may request negotiation of a new ICA, and then only after terminating its existing ICA. NCCs argument, if accepted, would further require the Commission to conclude that all the arbitrations it has conducted after the first round in 1996-1997 were invalid.[2] These results are not supported by the law.

[2] For example, the Commission has arbitrated and approved successor ICAs between Qwest and Covad (Docket No. UT-043045); Qwest and AT&T (Docket No. UT-033035); Qwest and Eschelon (Docket No. UT-063061); Qwest and Level 3 (Docket No. UT-063006); and Qwest and Charter (Docket No. UT-083041).

Qwest
1600 7th Ave., Room 1506
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

6 Further, even if NCC is correct that Qwest must first be in receipt of a request for negotiation of interconnection terms in order to initiate an arbitration, NCC must be deemed to have requested negotiations under the terms of the 1997 ICA, which provides that: "[t]his Agreement shall be effective for a period of 2 1/2 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." A provision that binds the parties to negotiate, but does not allow arbitration of any disputed terms would be meaningless. Thus, under the language of the ICA and by agreement of NCC, negotiations for a successor agreement were opened last year, and under the language of Section 252 of the Act, an arbitration may be requested after negotiations have been unsuccessful.

B. <u>The Commission Has Jurisdiction to Arbitrate a Successor ICA</u>

7 This Commission has arbitrated many successor ICAs between Qwest and various CLECs. Under NCC's theory, the Commission lacked subject matter jurisdiction to arbitrate those agreements. The Commission arbitrated successor agreements in Covad, AT&T, Eschelon (list of other carriers). If NCC is correct, these arbitrations are of no effect, and the ICAs are similarly not valid agreements. It seems unlikely that the CLEC community would agree with this outcome, or that the Commission failed to consider this possibility when it arbitrated these many agreements.

8 NCC cites two cases in support of its arguments – decisions from Alaska and Ohio. Neither decision supports NCC's position. In fact, both support Qwest's position in this case. Furthermore, the Oregon Commission has also considered this issue, and that decision also supports the proposition that Qwest may seek arbitration in a case such as this.

9 The Alaska decision, attached as Exhibit B to NCC's motion, addressed the issue of whether

Qwest
1600 7th Ave., Room 1506
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

arbitration may be sought on issues *already addressed in the ICA, during the initial term of the ICA.* The Alaska Commission held that it may not. Unlike this case, the petitioner in Alaska sought arbitration in 2002, on issues addressed in an ICA that was approved in 2000, and expired in 2003. In this case, the original agreement is long past its initial term, and Qwest is not seeking arbitration of existing terms of the ICA during its original effective period. Thus, the Alaska case is not on point.

10 The Ohio case is not on point either. In Ohio, the Commission held that GNAPs (the petitioner) was actually seeking arbitration to add terms to an existing ICA rather than to arbitrate a replacement or successor agreement. The Ohio Commission specifically acknowledged that GNAPs could pursue negotiation (and presumably arbitration) of a successor agreement. That is precisely what Qwest is seeking here. Thus, contrary to NCC's arguments, the Ohio case, to the extent that it applies, actually supports Qwest's petition.

11 This issue was also addressed in 2005 by the Oregon Commission. *See Qwest Corporation*, Order No. 05-088, 2005 WL 912100 (Or. P.U.C., Feb. 9, 2005). In that proceeding, Qwest had an ICA with Universal Telecom, Inc. that expired in 2000 and remained in evergreen status until 2004, when Qwest requested negotiations with Universal pursuant to Section 252(a) of the Act. Universal did not respond to the request, so Qwest petitioned the Commission to arbitrate terms, conditions, and prices for interconnection and related arrangements. Universal filed a motion to dismiss Qwest's petition, contending that neither the terms of the existing ICA, nor any provision of the Act authorized Qwest's request. In assessing this argument, the Commission stated that "the plain language of the statute does not set forth an obligation for the CLEC to negotiate upon a request by an ILEC," but "that [ICAs] which expressly permit either party to commence negotiations may supplement the Act's language which permits only the CLEC to commence negotiations." In that proceeding, the commission found that the following language in the ICA gave Qwest the right to commence negotiations: "The Parties

Qwest
1600 7th Ave., Room 1506
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective." In a subsequent order, the Commission found that this language gave Qwest the right to commence negotiations even after the two-year period had expired. *Re Qwest Corporation*, Order No. 05-206, 2005 WL 1287529, at *5 (Or. P.U.C. May 3, 2005).

12 Other state commission decisions support the general proposition that evergreen clauses cannot be abused by CLECs in order to extend ICAs in perpetuity. *See, e.g., In re Application by Pacific Bell Telephone Company*, 2006 WL 1069543, at 9 (Cal. P.U.C. Apr. 19, 2006) ("MCIm needs a successor ICA if it wants to continue in business. The existing evergreen provision continues the ICA, but only during negotiations or arbitrations. MCIm must either negotiate or arbitrate a successor ICA, or it will be unable to continue normal business operations.") (emphasis added); *Re MCI Metro Access Transmission Services, Inc.*, 2004 WL 3119795, at *10 (Ill.C.C. 2004) ("The Commission finds that Staff's proposal addresses both MCI's desire to maintain the terms and conditions upon expiration of the ICA, and SBC's concern about the use of sham negotiations to artificially extend an expired ICA. The expiring ICA therefore should continue in effect for a finite period during negotiations of a successor ICA.") (emphasis added).

13 Alternatively, even if the ICA did not give Qwest the right to open negotiations (*i.e.*, request interconnection), under basic principles of contract law a CLEC cannot extend the expired ICA in perpetuity simply by refusing to negotiate with Qwest unless there is strong language in the ICA giving the CLEC that right, which the law disfavors. *Sovran, LLC v. Mickelsen Dairy, Inc.*, 146 Wash.App. 1033, 2008 WL 3319816, at *7 (Wash. App. Div. 2, 2008) ("Courts will not construe a contract as providing some perpetual right or option which one side can exercise against the other at any time in the future.") (quoting 17A Am. Jur. 2d Contracts, § 466); *Oak Bay Properties, Ltd. v. Silverdale Sportsman's Center, Inc.*, 32 Wash. App. 516, 519 (1982)

Qwest
1600 7th Ave., Room 1506
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

("Although the cases stop short of announcing a presumption against perpetual leases, clearly they are disfavored," and in order to operate in perpetuity the terms must be "clearly and unequivocally consistent with the notion of perpetuity.").

14 Finally, it is worth mentioning the 9th Circuit case of *Pacific Bell v. Pac-West Telecomm, Inc.*[3] Though not cited by NCC, this is the case frequently cited in support of the proposition that interconnection agreements, once approved by the state commission, are binding between the parties and have the force and effect of law. Yet even in that case, the court only invalidated the California commission's general rulemaking order which purported to affect ICAs statewide – the court *affirmed* the commission's arbitration and approval of a successor agreement between Pacific Bell and Pac-West, the exact activity Qwest is asking the Commission to undertake here.

III. CONCLUSION

15 In conclusion, Qwest respectfully asks the Commission to deny the motion to dismiss, and allow the schedule to proceed in order to address the disputed issues in this case.

DATED this 9th day of April, 2010.

QWEST

_____

Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
1600 7th Avenue, Room 1506
Seattle, WA 98191
Phone: (206) 398-2500

[3] 325 F.3d 1114 (2003).

Qwest
1600 7th Ave., Room 1506
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040