

**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,

with

QWEST CORPORATION

Pursuant to 47 U.S.C. Section 252(b).

Docket UT-093035

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

I. PROCEDURAL HISTORY AND INTRODUCTION

- 1 This motion to dismiss has been moved for and briefed by North County Communications Corporation (“North County”) and opposed by Qwest Corporation (“Qwest”) in what it styles it’s “Answer”. North County assumes this is meant to be a “Response” within the meaning of WAC 480-07-380(c) and addresses it as such. North County has petitioned the Washington Utilities and Transportation Commission (the “Commission”) to accept this brief to point out issues Qwest has failed to address and to dispel any confusion created by irrelevant facts or arguments raised by Qwest in its response.¹
- 2 North County will first point out the major issues which Qwest has admitted by failing to argue, paramount among which is Qwest’s failure to argue any need for their desired re-negotiation,

¹ See, WAC 480-07-390, and Scheduling Order (allowing North County to petition to reply).

when there is a robust amendment procedure in the longstanding Existing ICA, and where Qwest claims there are only minor differences between the new and the old ICA. Secondly, North County will point out that nowhere in its response does Qwest contend that its Petition for Arbitration was premised on “receiving a request for interconnection, services, or network elements pursuant to section 251 of this title”. Third, North County will dispel Qwest’s baseless contention that language in the Existing ICA, which Qwest drafted, invokes Section 251, without mentioning it, by simply pointing to the language in Qwest’s proposed ICA which does invoke Section 251. Furthermore, North County cites to the age-old rule that contracts must be read to effectuate their plain meaning and construed against the drafter. Finally, North County will show how literally not a single one of Qwest’s cited authority is on point and that Qwest’s arguments that an ILEC can invoke Section 251, if done properly, are nothing but a straw-man, since North County never made any argument to that issue.

II. ARGUMENT

A. What Qwest Admits Is As Interesting As What It Argues.

3 North County, in its motion to dismiss, points out, “the two sections Qwest presents constituting significant changes from the Existing ICA [to the new proposed ICA] do not even present any ‘unresolved issues’ since they are clearly covered by the Existing ICA.” MTD page 8. Qwest admits these facts, as they must since they are true, by failing to dispute them in any way. North County similarly pointed out that Qwest “hint[s] that mere amendment is their goal noting only two sections of material difference between the existing ICA and their improperly proposed agreement.” MTD page 8-9. Qwest also admits this clear fact by failing to dispute it. Qwest, nowhere in its lengthy response even attempts to argue the simple fact that there is no need for this proceeding because the non-issues raised in Qwest’s petition are easily “resolved by an

existing interconnection agreement like the existing ICA in this case” especially where the Existing ICA has a well used change of law provision and robust amendment procedure. MTD page 9.

4 Indeed, Qwest does not even try to contend that there is any logical reason at all for it to propose a new ICA where the Existing ICA works perfectly well and has a robust amendment procedure more than capable of addressing their non-issue concerns. Qwest can only be heard to say they want it, because they want it. While the Commission might indulge Qwest to some degree if Qwest could show an undeniable right to the relief requested, no such forbearance is required where Qwest cannot even come close to showing it has met the conditions precedent to request arbitration. And, even if it could, Qwest should not be humored where it is either attempting to “game the system” to either essentially use the Commission as leverage to make mere amendments to the existing ICA, or is being deceptive in its claim in the Petition that the new proposed ICA is only materially different from the old in to subsections.

B. Qwest Fails To Allege That It Actually Received A Request For Interconnection, Services, Or Network Elements.

5 As clearly explained in North County’s motion to dismiss, a right to arbitration before the Commission under Section 252 is expressly predicated upon “[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title”. 47 U.S.C. § 252(a)(1). Qwest does not even come close to alleging this condition precedent, and tries to confuse the issue by playing hide the ball with the term “negotiate” and the condition precedent to negotiating or arbitrating under Section 251, above.

6 This is apparent from Qwest’s response: “Further, even if [North County] is correct that Qwest must first be in receipt of a request for negotiation of interconnection terms in order to initiate arbitration...” North County never made any claim about the condition precedent being a “request for negotiation”. North County has always clearly hewed to the actual law, which clearly states that the request to negotiate is not legally binding under Section 252 unless it is made, “[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title”. 47 U.S.C. § 252(a)(1). Qwest deeply and dearly wants to confuse this Commission into believing that the only condition precedent to invoking arbitration is a request for negotiation, but it nevertheless keeps running smack into the wall of the law that Section 252 can only be invoked upon a *service* request.

7 Where Qwest wholly fails to claim that its request for Section 252 negotiations was ever predicated upon a service request, Qwest must be found to have admitted it did not meet the express condition precedent for Section 252 negotiations. The right to invoke Section 252 arbitration and confer the commission with jurisdiction to arbitrate is only be found where the “carrier receives a request for negotiation under this section”.² Where Qwest admits they failed to meet the condition precedent to starting negotiations “under this section”, they surely cannot be heard to petition for arbitration, no matter how they try to confuse the requirements of Section 252.

C. Qwest’s Proposed ICA Gives Reveals Its Self-Serving Interpretation Of The Existing ICA.

² 47 U.S.C. 252(b)(1) [emphasis added].

8 Qwest wants to argue that the following text in the Existing ICA invokes Section 252 rights to negotiation and arbitration:

“This 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.”

The most striking problem with Qwest’s desire to read this clause as invoking Section 252 is that it does not anywhere, nor in any way, refer to Section 252. Qwest drafted the Existing ICA and was free to make explicit reference to Section 252, if they had wanted it. There is no ambiguity here. The Existing ICA provision does not mention Section 252 or use language that clearly invokes it.

9 The fact that Qwest could have decided to invoke Section 252 explicitly had it desired to claim the rights of that section is the fact that Qwest chose to do so in other agreements including the new, proposed ICA:

“5.2.2 Upon expiration of the term of this Agreement, this Agreement shall continue in full force and effect until superseded by a successor agreement in accordance with this Section 5.2.2. Any Party may request negotiation of a successor 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]

10 Qwest cannot be heard to claim that this new language is mere updating of that in the Existing ICA because it creates a wholly new basic term, is written in separated subsections, does not compel negotiations, changes the timeline for negotiations, and explicitly invokes the procedures of Section 252. The fact that numerous other agreements, including the new proposed ICA,

come up with different terms of negotiation and explicitly invoke Section 252 clearly shows that Qwest had the ability to invoke Section 252 in the Existing ICA and simply chose not to do so for their own reasons.

11 Qwest, undeterred by the clear language of their own contract template in the Existing ICA, seems to claim that there is some sort of unwritten inference here that even though it chose not to mention Section 252, it is implied because of their belief that negotiations are meaningless without arbitration. North County first notes that most agreements to negotiate are not tied to arbitration, and that the trial courts of every jurisdiction in the United States disagree with Qwest's contention that binding parties to negotiate without binding them to arbitrate "would be meaningless". Every jurisdiction North County is aware of has alternative dispute procedures to compel non-binding negotiations and settlement conferences, and literally millions of contracts have negotiation clauses without containing arbitration clauses, presumably because the drafters desired it this way.

12 Furthermore, it is age-old horn book law that ambiguity in a contract must be construed against the drafter.³ Qwest merely wants the Commission to infer, out of thin air, that its desire to invoke Section 252 proceedings today is somehow implicit in a contract that Qwest decided to draft without creating a right to invoke such proceedings in the past. Even if they could somehow persuade the Commission to buy into such a fallacy, though, such an inference could only be an ambiguity at best and would have to be construed against Qwest anyway.

13 The explicit terms of the Existing ICA make no mention of Section 252, and do not even vaguely

³ See, i.e., *V. Van Dyke Trucking, Inc. v. 'The Seven Provinces' Ins. Ltd.*, 67 Wash.2d 122, 406 P.2d 584, 588 (1965).

purport or imply any right to arbitration thereunder. Any such implication is exposed as baseless when it is perfectly clear from other agreements, including the very agreement proposed here, that Qwest, being the savvy carrier it is, could have easily referred to Section 252 explicitly and has done so elsewhere. Qwest's contention that binding parties to negotiate without binding them to arbitrate is insincere, where this is an everyday occurrence in both the business and legal world because drafters of contracts often do not want to bind parties to arbitrate. And, it does not even matter if such an ambiguous inference could be made, because ambiguity in a contract must always be construed against the drafter. There is simply no line of legal reasoning that Qwest can follow to support their confused notion that their self-serving inference of words not actually in a contract somehow bind the parties to Section 252 procedures, when the contract does not mention it and cannot be read to imply such an effect under longstanding rules of contract interpretation.

D. Qwest's Supposed "Authority" And Slippery Slope Arguments Only Prop Up Straw Men And Do Not Address Any Issue In This Motion.

14 Qwest tries to divert the Commission away from the clear, unambiguous law in Section 252 by arguing that any successor agreements that the Commission may have arbitrated in the past would be invalidated. This slippery slope argument is unpersuasive. It is long settled law that a current decision does not unravel past decisions on any retroactive basis. The law would be a curious thing indeed, if it worked as Qwest purports to fear. If the issue was not raised in prior arbitrations where it was available, the parties thereto waived their right to raise it and cannot overturn agreements based on arguments they did not make. It is further likely that the issue was not in dispute in most of those arbitrations anyway since most contracts that want to invoke

Section 252 would mention it by name, just like the proposed new ICA in this case does.

15 Qwest's next straw man also involves arguments never made. Qwest cites to a 2005 Oregon PUC decision on a motion to dismiss where the contract language was similar to that in the Existing ICA.⁴ The problem is that the case is wildly off point here. The entire decision has to do with whether or not an ILEC can request negotiations from a CLEC. North County never even vaguely raised that issue. North County never questioned whether Qwest, the ILEC, could request negotiations with North County, the CLEC. What North County does question is whether Qwest met the condition precedent for requesting negotiations under Section 252; that they be made upon a new service request. This issue of whether Section 252 negotiations can be invoked without the express condition precedent, central to the instant motion to dismiss, is never once raised in the Oregon PUC case, or adjudicated in any way. It is telling to note that, before dismissing the case, the Oregon PUC only approvingly quoted language from one agreement the Florida Commission found to have given both parties the right to invoke Section 252 procedures, and that this agreement included an explicit reference to Section 252 rights.⁵ This citation to "authority" is utterly off point to the issue raised in the motion to dismiss, and actually supports North County by inference because it quotes contract language giving rise to Section 252 rights as explicitly referring to Section 252, which the Existing ICA here does not.

⁴ *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, 2005 WL 912100 (Or. PUC, Feb 9, 2005).

⁵ *Id.* at pages 5-6, quoting the agreement language:

"Section 2.3: * * * if within one hundred and thirty-five days (135) of commencing the negotiation referenced to Section 2.2 above, the Parties are unable to satisfactorily negotiate new terms, conditions and prices, either Party may petition the Commission to establish an appropriate [Interconnection] Agreement **pursuant to 47 USC § 252.**" [emphasis added]

In re Petition by BellSouth Telecommunications, Inc. for arbitration of an interconnection agreement with Supra Telecommunications and Information Systems, Inc., Docket No. 001305-TI PSC-01-1180-FOFTI, 2001 Fla PUC Lexis 691 (Fla PSC May 23, 2001).

16 The rest of Qwest’s “authorities” are similarly off point to the issues raised here. Qwest’s California PUC case, deals with a negotiation clause that apparently specifically includes statutory rights unlike the Existing ICA here.⁶ Furthermore, the case is hardly profitable to Qwest where it expressly repudiates the issue they raised it to address, the danger of “gaming the system” or using ICA contracts perpetually.

“Absent SBC-CA’s proposed severability clauses, SBC-CA is concerned that MCIIm will ‘attempt to ‘game the system.’ (SBC-CA Opening Brief, page 16.) No example is given of such action having occurred, and no compelling evidence is presented supporting this concern.”⁷

Just like Qwest’s arguments about the slippery slope, this supposed concern about “gaming the system” is equally without merit for the exact same reason as above, that there is no evidence whatsoever to support this concern in this case. It is Qwest’s Petition for Arbitration that appears to be in dubious faith here, not North County’s preference for the Existing ICA, which is time tested and well understood, like the language approved by the California PUC in its case.

“Nothing could be clearer than for parties to continue operating under terms and conditions of the existing ICA, which parties have been successfully using the last several years. On the other hand, new requirements and provisions offer the opportunity, and are likely, to create more uncertainty, confusion and conflict than they avoid.”⁸

This is the simple point of the case insofar as it applies here, not Qwest’s attempt to quote a couple sentences out of context to say that a case that dismissed concerns of perpetual contracts somehow supports giving those speculative concerns some credence.⁹ The entire case, insofar as

⁶ In re Application of Pacific Bell Telephone Company d/b/a SBC California (U 1001 C) for Arbitration. *of an Interconnection Agreement with MCImetro Access Transmission Services LLC (U 5253 C)*, Final Arbitrator’s Report and Order, Application No. 05-05-027, 2006 WL 1069543, internal page 14 (filed April, 19, 2006) (“SBC-CA is also concerned that MCIIm may withdraw its statutory request to negotiate”) [emphasis added].

⁷ *Id.* at internal page 13.

⁸ *Id.*

⁹ *Id.* at internal page 14:

it applies to Qwest's straw man arguments, repudiates them as straw men, holding the argument about carriers misusing private negotiations to be not worthy of consideration because standard business incentives put the possibility beyond the pale of possibility.¹⁰

17 Similarly, Qwest's citation to Illinois Commerce Commission "authority" is equally damaging to their speculative concern about manipulation of negotiations.¹¹ The concern in that decision is that the ILEC, like Qwest, would use a longer term contract to push negotiations around at its whim.¹² Furthermore, the case is no help to Qwest where the Commission there is ruling that there be no evergreen clause whatsoever, and Qwest here is continuing to ask for an evergreen clauses which are in good favor in Washington state.¹³ This case does not support Qwest's straw man argument about abuse of an ICA's term, except by the ILEC, and it does not stand for limiting evergreen clauses as Qwest would have it, but the more radical proposition of abolishing them in favor of time certain expirations, which is not what Qwest has requested, and is certainly not the law or practice here.

"For example, SBC-CA asserts § 7.7 provides a mechanism for SBC-CA to force MCIIm to decide whether or not MCIIm wants to pursue a successor ICA. This is not a compelling argument. MCIIm already has adequate incentive to decide whether or not it wants a successor ICA. That is, MCIIm needs a successor ICA if it wants to continue in business. The existing evergreen provision continues the ICA, but only during negotiations or arbitrations. MCIIm must either negotiate or arbitrate a successor ICA, or it will be unable to continue normal business operations." [emphasis added]; Qwest quotes only the two non-underlined sentences for the proposition that Commissions have ruled against possible perpetuities in ICA's, however the Commission is doing exactly the opposite here, dismissing the concern of a perpetual contract by noting that the desire to do business normally and negotiate contracts to do so greatly outweighs unsupported speculative concerns about supposedly perpetual contracts.

¹⁰ *Id.* at internal page 15 ("Without its proposed clauses, SBC-CA argues that MCIIm might delay action to avoid an undesirable change of law otherwise in SBC-CA's favor. This is not convincing. Other ICA provisions adequately deal with change in law and dispute resolution.") ("Finally, SBC-CA is concerned that without its proposed language SBC-CA could be placed "in a situation of theoretically having to comply with the old ICA forever, no matter how the law may have changed, without any means arguably of triggering a §§ 251/252 arbitration to replace it." [] Even if theoretically possible in some extreme case, it is not a plausible concern for the reasons stated above.)

¹¹ [*MCI Metro Access Transmission Services, Inc.*] *Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company*, Proposed Arbitration Decision [approved], Docket No. 04-0469, 2004 WL 3119795 at *10 (Ill. C.C. 2004).

¹² *Id.* ("The Commission also finds that SBC's month-to-month proposal could provide an ILEC with unfair bargaining power with respect to negotiations on the successor ICA.) [emphasis added].

¹³ See, Qwest's new proposed ICA, section 5.2.1 & 5.2.2, providing no finite deadline and in infinite evergreen period conditioned only on starting new Section 252 negotiations.

18 Qwest’s also cites authority for the proposition that, “[c]ourts 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.”¹⁴ This authority is facially off point. No part of the Existing ICA gives either party a unilateral perpetual right or option to use against the other. As we noted above, the right to negotiate privately is mutual in the Existing ICA. A mutual right and responsibility can hardly be said to be “one sided”. This is just another attempt by Qwest to convince the Commission to accept Qwest’s radical position that every clause binding parties to private negotiation is utterly worthless without arbitration.

19 North County is puzzled by Qwest’s inclusion of *Pacific Bell v. Pac-West Telecom, Inc.*, 325 F.3d 1114 (2003). North County can only assume it is being used to support the notion that arbitrated successor agreements have been approved before. North County has no doubt that they have—where there were grounds to invoke Section 251, or the parties mutually agreed to arbitrate their differences.

20 In this last pass, Qwest seems to be trying to embroider its slippery slope argument about supposedly having to invalidate prior arbitration decisions. North County dispensed with this argument as a legal fallacy, above. Qwest appears now to be claiming that any arbitration of any successor agreement must be allowed regardless of whether the statutory conditions precedent are met, or contractual authority granted. This is just more of the same obfuscation to avoid the bright line, explicit words of the statute which Qwest cannot and does not allege they met.

¹⁴ Qwest Answer, ¶ 13, *quoting, Savran, LLC v. Mickelson Dairy, Inc.*, 146 Wash. App. 1033, 2008 WL 3319816, at *7 (Wash. App. Div. 2, 2008).

21 None of Qwest's authority is on point except to the straw man arguments they conjure up. Even then, almost every authority directly dispels those illusory concerns, like the California PUC case, or points out that the more present and less speculative danger is ILEC manipulation, like the Illinois PUC case. On the other hand, North County cited two cases in its moving papers that are directly on point. Both speak to the limits of the jurisdiction of a state utilities commission to arbitrate where an existing ICA is in force. Both make clear and lucid arguments on the law that commissions lack jurisdiction to disturb the terms of an existing ICA, and further should forgo exercising jurisdiction when the changes requested are limited, as Qwest claims its changes are in its Petition, to the extent they are mere amendments to the existing ICA or are better handled as such.

III. CONCLUSION

22 Qwest admits they have no good reason for demanding a new ICA, and does not deny the robust amendment procedure or the change of law clause of the old ICA is more than sufficient to handle the minor changes they say are "needed". Qwest admits they failed to meet the condition precedent for Section 251 negotiations and arbitration. However, Qwest wants the Commission to pass over this fact and interpret the Existing ICA as giving them rights to Section 251 proceedings, even though it makes no mention of them. And Qwest ignores the fact that many ICA's like those mentioned here, and including Qwest's new proposed ICA, mention Section 251 explicitly when they want to have recourse to it. Qwest also tries to raise a slippery slope argument, but their view of precedent as inherently retroactive is bemusing at best, and wholly irrelevant where other parties did not raise the issue or other agreements actually explicitly invoked Section 252, unlike the one here. For all the foregoing reasons, North County

respectfully submits that Qwest's answer is almost wholly non-responsive to the issue raised in the motion to dismiss, and requests that the Commission accordingly finds that Section 252 does not confer on the Commission jurisdiction to arbitrate this matter and that the Commission dismiss Qwest's Petition without leave to amend.

Dated this 16th day of April, 2010, in San Diego, California.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the foregoing document this day upon all parties of record (listed below) in these proceedings by mailing a copy properly addressed with first class postage prepaid.

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Dated this 16th day of April 2010, in San Diego, California.



Jessica Hartgrave