

**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 PETITION FOR
ADMINISTRATIVE REVIEW OF ORDER
DENYING MOTION TO DISMISS
(ORDER 06)**

1 Pursuant to WAC 480-07-825, North County Communications Corporation ("North County") respectfully submits the following Petition for Administrative Review of the Order Denying Motion to Dismiss (Order 06), filed April 26, 2010 by Administrative Law Judge ("ALJ") Adam E. Torem (the "Order").

I. INTRODUCTION

2 Qwest characterized this dispute as one with dire consequences, predicting catastrophe if North County's Motion to Dismiss was granted. Qwest argued that if the Commission did not resolve this contract dispute then "existing ICAs would be forced to exist in perpetuity without modification until and unless the parties terminate the agreement and negotiated a replacement." Order at 2. The ALJ fell into Qwest's trap and in doing so ignored the obvious answer to Qwest's apocalyptic dilemma: sue for breach of contract.

3 It's that simple. The parties have a contract (the ICA). That contract does not contain an

arbitration provision. If Qwest (the drafting party) had wished to compel arbitration, then it should have done so as part of the contract. It did not. But all is not lost. If Qwest believes North County is violating the terms of the contract, Qwest has the same remedies as every other party to a contract: it can sue to enforce the terms of the agreement. Nothing in the Telecom Act, or any other law, grants the Commission authority to impose an arbitration provision in a negotiated agreement. As such, the Commission should review and overturn the Order, and dismiss Qwest's Petition for Arbitration.

II. PROCEDURAL HISTORY

4 As Qwest admits in its Petition for Arbitration ("Petition"), Qwest and North County are already parties to an interconnection agreement that became effective on August 27, 1997 ("ICA"). Qwest Petition at 3; *see also* Dicks Affidavit, Ex. A.¹ The parties also agree that the ICA is currently effective and, by its own terms, remains in effect until a new agreement becomes effective between the parties. *Id.*

5 On or about July 2, 2008, North County received a request for negotiations from Qwest regarding a new interconnection agreement. The parties agreed to an extension of the arbitration window without waiving any rights or making any admissions that arbitration was appropriate such that the window to file a petition for arbitration would commence on July 9, 2009 and end on August 3, 2009, inclusive.

6 On July 31, 2009, Qwest initiated this proceeding to compel arbitration of a new interconnection agreement with North County before the Washington Utilities and Transportation Commission ("Commission") claiming such petition was filed pursuant to 47 U.S.C. § 252(b) of the

¹ Previously filed with North County's Motion to Dismiss.

Telecommunications Act of 1996 ("the 1996 Act") and W.A.C. 480-07-630. Qwest Petition at 1:1, 2:4. As set forth below, the Commission lacks jurisdiction to hear the petition pursuant to 47 U.S.C. §§ 251, 252.

7 While negotiations up to this point had not made any substantive progress, when North County replaced its prior counsel with Dicks & Workman, shortly after the Petition was filed, substantive negotiations began in earnest. Thereafter, both parties agreed to multiple stays of the arbitration proceeding to allow the parties, who had worked amicably under the old agreement for more than a decade, to try to negotiate a new agreement amongst themselves.

8 In Status Reports filed with the Commission on February 19, 2010, the parties indicated to the Commission that Qwest felt an impasse had been reached and had begun to prefer formal arbitration as to continuing private negotiation. In its Status Report, North County indicated it would defer to Qwest's desire to resort to formal arbitration, and gave Qwest and the Commission clear indication of North County's intent to raise the issue of Commission jurisdiction once the stays ran out. In the subsequent scheduling conference, it was decided that North County's announced Motion to Dismiss should be resolved before the regular arbitration schedule. After briefing by the parties, the ALJ issued the Order.

III. STATUTORY FRAMEWORK

9 The 1996 Act gives state utilities commissions a federal mandate to arbitrate interconnection agreements between local exchange carriers within certain important limits. 47 U.S.C. § 252.²

² As used herein "Section" will refer to Title 47 of the United States Code unless otherwise specifically designated.

This authority and its limitations are implemented and incorporated by reference in Washington state law by W.A.C. 480-07-630. Section 252 of the 1996 Act establishes a specific pathway whereby carriers requesting interconnection or services may request negotiations subject to federal obligations and duties in subsection (a), and may petition for said arbitration if the negotiations fail subject to the limitations of subsection (b).

10 Under the Section 252(a)(1), a LEC can only initiate Section 252 negotiations or arbitration, “[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title.” Under Section 252(b)(1), an express conditions precedent to petitioning for arbitration is that the “carrier receives a request for negotiation under this section.”³ Washington incorporates these requirements by expressly referencing Section 252(b)(1) in describing when arbitration is allowed. W.A.C. 480-07-630(4)(a).

IV. ARGUMENT

11 The law is clear. Section 252 compelled arbitration is preconditioned upon “receiving a request for interconnection, services, or network elements pursuant to section 251 of this title.” Section 252 of the Act does not grant the Commission jurisdiction to compel arbitration where, as here, there was no request for interconnection. Without statutory authority to compel arbitration, the parties must resolve any disputes (including disputes related to a party’s *contractual* obligation to negotiate) just like any other parties to a contract: by bringing and action for breach of contract.

³ The other primary condition precedent is that the petition be filed no earlier than 135 days, and no later than 160 days, after such negotiations have been initiated, which is not disputed or admitted in this motion.

12 Indeed, not only is the law clear in relation to Section 252's inapplicability, the law is also clear that the interpretation of the ICA is governed exclusively by the normal state law of contracts. *Connect Communications Corp. v. Southwestern Bell Telephone, L.P.*, 467 F.3d 703, 708 (8th Cir. 2006) ("Although federal law plays a large role in this dispute, the ultimate issue in this case—interpretation of the Interconnection Agreement—is a state law issue."); *Southwestern Bell Telephone Co. v. Public Utility Com'n of Texas*, 208 F.3d 475, 485 (5th Cir. 2000) ("[W]e hold that the agreements themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions. We therefore decline Southwestern Bell's invitation to determine the contractual issues as a facet of federal law."); *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566, 573 (7th Cir. 1999) ("A decision 'interpreting' an agreement contrary to its terms creates a different kind of problem—one under the law of contracts, and therefore one for which a state forum can supply a remedy").

A. There Was No Request for Interconnection.

13 A right to arbitration before the Commission under Section 252 is expressly predicated "[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, and could not, allege this condition precedent has occurred. Again, Qwest tried to confuse the issue by discussing its request to negotiate. There was no "request for interconnection, services, or network elements pursuant to section 251." It is that simple. The statutory language is clear and the Commission has no ability to ignore this unambiguous condition precedent to its jurisdiction to compel arbitration under Section 252.

14 With no ability to possibly refute this simple fact, Qwest essentially argued “well, the Commission has done it before.” The ALJ agreed with this “argument.” Order at 3. That prior parties have either failed to point out this unambiguous condition to the Commission’s authority, or simply have agreed to Section 252 arbitration, is irrelevant. Parties to a contract can mutually agree to do anything they want. Moreover, it is clear from the proposed ICA that Qwest (and other carriers) have contractually bound themselves to the provisions of Section 252.⁴ Again, parties may contractually agree to do anything they want. They can agree to arbitrate before the American Arbitration Association, or before a specific named arbitrator. They can agree to resolve their disputes by a coin toss. If the contracting parties agree to a Section 252 arbitration, and the Commission is willing to oversee that arbitration, great. Here, the parties did not agree to Section 252 arbitration, or any other type of arbitration.

15 Dismissing Qwest’s petition would not, as the ALJ found, “divest state commissions of their long-established role as arbiters of local disputes that need not rise to the FCC for resolution.” Order at 3. State commissions will continue to arbitrate disputes that are actually subject to Section 252, and disputes where the parties contractually agree to arbitrations before the state commission. However, without the statutory authority under Section 252, or an agreement by the parties, the Commission has no jurisdiction to force arbitration.

⁴ The *proposed ICA* contains the following provision: “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]

B. There Is Not Even a Need for Arbitration

16 As Qwest is very aware, a Section 252 arbitration is an expensive and arduous process. Indeed, it is clear that Qwest hoped that the threat of Section 252 arbitration will force North County to give in to Qwest's demands. But in addition to the fact that there is no authority to force a Section 252 arbitration upon North County, a Section 252 arbitration is completely unnecessary. The ALJ, however, apparently believed Qwest's prediction of dire consequences. That prediction, however, is absurd.

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

18 Finally, if Qwest believes that, despite the robust procedures available to the parties under the ICA, North County has failed to negotiate as contractually required, Qwest can pursue its claims in court. And almost every court in the country has alternative dispute procedures to compel non-binding negotiations and settlement conferences, all of which are much less costly and arduous than a Section 252 arbitration. If those alternative dispute procedures do not work, then Qwest gets what every other plaintiff in a breach of contract case gets: its day in court.⁵ See e.g. *Connect Communications*, 467 F.3d at 708 ("Although federal law plays a large role in this

⁵ Qwest argued, and the ALJ agreed, that North County cannot extend the ICA in perpetuity. Of course North County cannot, unilaterally, extend the ICA in perpetuity by simply refusing to negotiate. Similarly, Qwest cannot simply compel arbitration because it "wants to." If Qwest believes North County is not complying with the ICA, then it can seek enforce the ICA in court. Qwest has an open avenue to resolve its complaint.

dispute, the ultimate issue in this case—interpretation of the Interconnection Agreement—is a state law issue.”); *Southwestern Bell*, 208 F.3d at 485 (“[W]e hold that the agreements themselves and state law principles govern the questions of interpretation of the contracts and enforcement of their provisions. We therefore decline Southwestern Bell's invitation to determine the contractual issues as a facet of federal law.”); *Illinois Bell*, 179 F.3d at 573 (7th Cir. 1999) (“A decision ‘interpreting’ an agreement contrary to its terms creates a different kind of problem—one under the law of contracts, and therefore one for which a state forum can supply a remedy”).

19 If Qwest had wanted compelled arbitration, then it should have negotiated for that term. Compelled arbitration is not simply read into every contract. Millions of contracts have negotiation clauses without compelled arbitration clauses. Moreover, even if there were some ambiguity on whether the parties “meant” to include an arbitration clause, any ambiguity is construed against the drafter: Qwest. See e.g. *V. Van Dyke Trucking, Inc. v. 'The Seven Provinces' Ins. Ltd.*, 67 Wash.2d 122, 406 P.2d 584, 588 (1965).

20 Though Qwest has no statutory or contractual authority to compel arbitration, it has a myriad of other avenues to enforce its contractual rights. Qwest is free to pursue those other avenues, but neither Qwest nor the Commission is free to force an arbitration clause upon North County were none exists in the agreement of the parties.

V. CONCLUSION

21 Neither the statute nor the terms of the ICA grant the Commission jurisdiction to compel Section 252 arbitration to force North County to renegotiate the current ICA. The Order ignores the

law and the negotiated contractual terms. As such the, the Commission should review and overturn the Order, and dismiss Qwest's petition without leave to amend.

Dated this 3rd day of May, 2010, in San Diego, California.

Respectfully submitted,



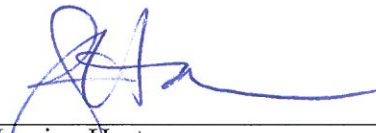
Joseph G. Dicks, CSB 127362
Dicks & Workman, APC
750 B Street, Suite 2720
San Diego, CA 92101
Telephone: (619) 685-6800
Facsimile: (619) 557-2735
Email: jdicks@dicks-workmanlaw.com

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.

<p>Lisa A. Anderl Qwest Corporation 1600 7th Avenue, Room 1506 Seattle, WA 98191 (206) 345-1574 Lisa.anderl@qwest.com</p>	
<p>David W. Danner, Executive Director and Secretary Washington Utilities & Transportation Commission 1300 S. Evergreen Park Drive, SW P.O. Box 47250 Olympia, WA 98504-7250</p>	
<p>Adam E. Torem, Arbitrator Washington Utilities & Transportation Commission 1300 S. Evergreen Park Drive, SW P.O. Box 47250 Olympia, WA 98504-7250 atorem@utc.wa.gov</p>	

Dated this 3rd day of May 2010, in San Diego, California.



Jessica Hartgrave