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 "PETITION FOR ADMINISTRATIVE REVIEW" OF ORDER 06

I. INTRODUCTION and SUMMARY

1 Qwest Corporation ("Qwest") files this answer to the "petition for administrative review" filed by North County Communications Corporation of Washington ("NCC"). In response to this filing (in reality, a petition for interlocutory review under WAC 480-07-810), Qwest supports the ALJ's order denying the motion to dismiss, and will describe further why the Commission should deny interlocutory review of that order, or, if review is granted, why the Commission should affirm that order.

II. BACKGROUND

2 On April 26, 2010, pursuant to the schedule previously established in this matter, ALJ Torem issued an order denying NCC's motion to dismiss Qwest's petition for arbitration. Under the schedule established in Order 05, NCC was to file its answer to Qwest's petition on May 3, 2010. Both NCC and Qwest had previously consented to the procedural deadlines set forth in Order 05, including the requirement that NCC file an answer within five (5) business days of the order addressing the motion to dismiss, and the requirement that both parties file direct

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testimony on May 19, 2010.

3 Instead of filing an answer on May 3, NCC filed a "petition for administrative review" of the ALJ's order. NCC noted that it had determined to not file an answer in the interests of conserving judicial resources. The ALJ then entered Order 07, reminding NCC of its obligation to file an answer. NCC filed an answer on May 6, 2010, and on that same day filed a request to stay or suspend the procedural schedule pending resolution of NCC's May 3 request for review. Qwest filed an answer to the request for a stay on May 11, 2010. This answer is timely pursuant to WAC 480-07-810(3), which allows 10 days for filing an answer to a petition for interlocutory review.

III. ANSWER TO PETITION FOR ADMINISTRATIVE REVIEW

A. The petition for interlocutory review is not supported

4 NCC's May 3 filing is, in reality, a petition for interlocutory review under WAC 480-07-810(2). NCC does not specifically discuss why it believes review is warranted, but the rule provides that:

> Interlocutory review is discretionary with the commission. The commission may accept review of interim or interlocutory orders in adjudicative proceedings if it finds that:
> (a) The ruling terminates a party's participation in the proceeding and the party's inability to participate thereafter could cause it substantial and irreparable harm;
>
> (b) A review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or
>
> (c) A review could save the commission and the parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review.

5 Consistent with NCC's other arguments, the only possible basis for interlocutory review would

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be (c) – the provision addressing judicial economy. This ties in with NCC's request for a stay of the procedural schedule, but that request is also not justified.

6 Qwest does not believe that interlocutory review is warranted under the rule, or if it is, that such review should not delay the proceeding. First, because NCC does not articulate why interlocutory review should be granted at all, the Commission is left to assume that review might save substantial effort or expense. Qwest does not believe that that is the case. In fact, NCC's delay tactics to date have consumed far more resources than it would have taken to simply arbitrate the matter. Qwest is well on the way to preparing its direct testimony on a fairly limited set of issues, and the resources that would be required to resolve the issues are not so substantial as to warrant additional delay. If the Commission does wish to review the ALJ's decision, that review can be undertaken concurrently with maintaining the procedural schedule.

B. If interlocutory review is granted, the ALJ's order should be affirmed

7 If the Commission determines to grant interlocutory review of the ALJ's Order 06, the Commission should affirm that order. NCC makes only a few new arguments in its petition, and basically just reiterates that it believes the ALJ was wrong, and that arbitration of the dispute is not permitted under the Telecom Act. For all the reasons stated in Qwest's answer to the motion to dismiss, it is clear that the Commission has jurisdiction to both enforce NCC's obligation to negotiate, and to arbitrate a new agreement under Section 252 of the Act.

8 NCC's new arguments are two-fold, and can be addressed easily. First, NCC argues that Qwest's sole remedy under the ICA is to sue for breach of contract (petition at ¶¶ 2-3 and 11, 18, 20). This argument misses the point in several respects. Qwest is not yet arguing that NCC has breached the contract.[1] Absent an alleged breach, Qwest would not be able to sue under

[1] Although at this point Qwest is also not waiving any claim it might have that NCC has in fact breached the provision of the ICA requiring negotiation of a successor ICA.

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the contract. Further, the Act specifically allows a state commission to enforce the provisions of an ICA, so if Qwest were to allege a breach of the ICA, Qwest could bring an enforcement action at the Commission.[2]

9 Second, NCC argues that the ICA does not reference Section 252, that the omission of that reference is fatal to Qwest's ability to bring an arbitration action, and that the absence of that provision must be read against Qwest as "the drafting party" (petition at ¶ 3 and 19). As noted in Qwest's answer, and discussed below, the absence of a specific reference to Section 252 does not preclude a petition for arbitration – it is sufficient that Qwest be in receipt of a request for negotiations, and the ICA contains a provision that requires the parties to enter into negotiations. That is sufficient to trigger the right to request arbitration under Section 252. Further, contrary to NCC's assertion, the ICA itself contains an express provision prohibiting interpretation against either party as the drafter of the agreement.[3]

10 NCC's arguments against the ALJ's order are inconsistent with the language of the current ICA and the law. NCC argues that the language of the 1996 Act prohibits Commission arbitration of renegotiation. This argument has been considered and rejected by several state commissions, and, as discussed in Order 06 and in Qwest's answer to the motion to dismiss, the argument is not supported by the cases NCC cites.[4]

11 NCC's argument is 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

[2] WAC 480-07-650 allows for any party to an ICA to petition the Commission for enforcement of that ICA. This rule is consistent with settled principles of law that authorize state commissions to enforce, as well as arbitrate, interconnection agreements.

[3] See, Section XXXIV, O. of the ICA, Joint Work Product. "This Agreement is the joint work product of the Parties and has been negotiated by the Parties and their respective counsel and shall be fairly interpreted in accordance with its terms and, in the event of any ambiguities, no inferences shall be drawn against either Party."

[4] NCC does not reargue these cases, so Qwest will not repeat its analysis of why they are not applicable.

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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.[5] These results are not supported by the law.

12 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.

13 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.

[5] 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).

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14 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 requested negotiations (on an expired ICA that was in evergreen status) with a CLEC pursuant to Section 252(a) of the Act. The CLEC did not respond to the request, so Qwest petitioned the Commission to arbitrate terms, conditions, and prices for interconnection and related arrangements. As in this case, the CLEC 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 Oregon 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 Oregon Commission found that the following language in the ICA gave Qwest the right to commence negotiations: "The Parties 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). This decision's analysis was relied on by the ALJ in Oregon when she denied NCC's motion to dismiss Qwest's petition for arbitration in an order dated May 10, 2010, attached hereto for the Commission's reference.

15 Finally, NCC argues that an arbitration is not necessary (petition at ¶¶ 16-20). Qwest is not aware that this is a standard that should reasonably guide the decision process in this case. If what NCC is saying is that the terms of the new ICA should be the same as the terms of the existing ICA, NCC should support that argument in its answer and its testimony. However, as noted in Qwest's previous pleadings, a CLEC does not have the right to unilaterally hold Qwest to a long-expired ICA simply because the CLEC does not want to change the terms.

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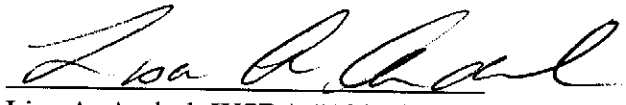
Nor is there any legal or common sense reason that would require Qwest to pursue the amendment process instead of the renegotiation process, a process that results in a Section 252 arbitration once an impasse is reached.

IV. CONCLUSION

16 In conclusion, Qwest respectfully asks the Commission to deny the petition for administrative review/petition for interlocutory review.

DATED this 13th day of May, 2010.

QWEST



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