

ATTACHMENT B

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Petition of Covad
Communications Company for Arbitration
of an Interconnection Agreement with
Qwest Corporation Pursuant to
47 U.S.C. § 252(b).

**ORDER ON MOTION
TO DISMISS**

This matter came before Administrative Law Judge Kathleen D. Sheehy on Qwest's motion to dismiss portions of Covad's petition for arbitration. The record closed upon receipt of Qwest's Reply Brief on May 28, 2004.

The following persons appeared:

Jason D. Topp, Esq., 200 South Fifth Street, Suite 2200, Minneapolis, Minnesota 55402, and John M. Devaney, Esq., and Mary Rose Hughes, Esq., Perkins Coie, LLP, 607 Fourteenth Street NW, Suite 800, Washington, DC 20005-2011, appeared on behalf of Qwest Corporation (Qwest).

Karen Shoresman Frame, Esq., Covad Communications, 7901 Lowry Boulevard, Denver, Colorado 80230, and W. Patrick Judge, Esq., Briggs and Morgan, PA, 2200 First National Bank Building, St. Paul, Minnesota 55101, appeared for Covad.

Priti R. Patel, Esq., Assistant Attorney General, Telecommunications and Energy Division, Capitol Office Building, Suite 200, 525 Park Street, St. Paul, MN 55103, appeared for the Department of Commerce (Department).

Based upon the filings submitted, and for the reasons set forth in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

Qwest's motion to dismiss portions of Covad's petition for arbitration is **DENIED**.

Dated: June 4, 2004

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

While Covad and Qwest were attempting to negotiate the terms of an interconnection agreement, the Federal Communications Commission (FCC) adopted its Triennial Review Order (TRO) revising federal rules governing the obligations of incumbent local exchange carriers (ILECs) to unbundle certain elements of their networks and to make these elements available to competitive carriers at cost-based rates.¹ In the TRO, the FCC determined that incumbent local exchange carriers (ILECs) are not required to unbundle certain network elements under 47 U.S.C. § 251 because competitive carriers are not impaired without access to these elements at cost-based rates.²

Although section 251 is the “source of [ILEC] unbundling obligations,” the FCC determined that regional Bell Operating Companies (RBOCs) have an independent obligation, under section 271, to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates.³ Section 271 contains the competitive checklist items that an RBOC must satisfy in order to obtain authority to provide long-distance service. The FCC reasoned that although checklist Item 2 specifically requires compliance with the unbundling requirements of section 251, other checklist items (4, 5, 6, and 10) separately impose access requirements to particular network elements without reference to whether they are required to be unbundled pursuant to section 251.⁴ Where there is no impairment under section 251 and a network element is no longer subject to unbundling, section 271 and other provisions of the Act determine the proper standard for evaluating the terms, conditions, and pricing under which an RBOC must provide “checklist” network elements.⁵ The appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable, and not unreasonably discriminatory basis pursuant to sections 201 and 202, not the statutorily mandated rates under section 252.⁶

In various sections of the proposed agreement, Covad has urged language referencing Qwest’s obligation to provide elements pursuant to section 271 or state law

¹ Report and Order and Order on Remand and further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (August 21, 2003) (TRO).

² The elements include but are not limited to: OCn loops (¶ 315); feeder subloops (¶ 253); DS3 loops (¶ 324); extended dedicated interoffice transport and extended dark fiber (¶ 365); OCn and DS3 dedicated interoffice transport (¶¶ 388-89); signaling (¶¶ 344-45); call-related databases (¶ 551); packet switching (¶ 537); fiber to the home loops (¶ 273); operator service and directory assistance (¶ 560); unbundled switching at DS1 capacity or above (¶ 451); and line sharing except on a grandfathered basis (¶ 255). Qwest and Covad have reached agreement on all language concerning line sharing in section 9.4 of the proposed agreement, except for a subsection concerning maintenance expenses (Issue No. 8).

³ TRO ¶¶ 649, 652.

⁴ TRO ¶ 654.

⁵ TRO ¶ 656.

⁶ *Id.*

obligations; Qwest has proposed alternate language that focuses on elements that Qwest is not required to provide under the terms of the TRO.⁷ For example, one of the provisions at issue is section 9.1.1.6 of the interconnection agreement. Qwest has proposed language providing that Qwest is no longer obligated to provide certain network elements that it had formerly been required to offer pursuant to section 251 and further providing that these network elements are not available “pursuant to this Agreement.” Covad has proposed language that reads:

Qwest will continue providing access to certain network elements as required by Section 271 or state law, regardless of whether access to such UNEs is required by Section 251 of the Act. *This Agreement sets forth the terms and conditions by which network elements not subject to Section 251 unbundling obligations are offered to CLEC.*⁸

Qwest has moved to dismiss sections of Covad’s arbitration petition relating to Issue Nos. 2, 3, and some portions of 5 on the basis that (1) Qwest did not agree to negotiate these provisions, so they are not “open” issues subject to arbitration; and (2) the Commission lacks authority to arbitrate section 271 obligations. The specific language at issue is almost entirely within section 9 of the proposed interconnection agreement.

Covad maintains that Qwest did voluntarily negotiate these provisions, that these issues are accordingly subject to arbitration, and that the Commission has authority to arbitrate section 271 obligations under state and federal law. The Department of Commerce similarly maintains that the Commission has authority to arbitrate Qwest’s obligations to provide elements under section 271, and it contends that factual issues as to whether Qwest has negotiated these issues preclude dismissal.

Procedural Posture

Qwest has not suggested any particular legal standard to be used in resolving its motion to dismiss. Both Qwest and Covad have relied on affidavits that are outside the pleadings. Under the rules governing civil and administrative motions, if matters outside the pleadings are presented in connection with a motion to dismiss, the motion shall be treated as one for summary judgment.⁹

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law.¹⁰ The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding

⁷ Covad does not contend that Qwest has engaged in “backsliding” or has otherwise failed to provide an element that Qwest is obligated to provide access to under section 271.

⁸ Draft Interconnection Agreement § 9.1.1.6, May 5, 2004 (emphasis added).

⁹ See Minn. R. Civ. P. 12.03; Minn R. 1400.5500 K.

¹⁰ *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. Rule pt. 1400.5500 K; Minn.R.Civ.P. 56.03.

contested case matters.¹¹ A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.¹²

The moving party, in this case Qwest, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.¹³ The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.¹⁴ The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.¹⁵

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party.¹⁶ All doubts and factual inferences must be resolved against the moving party.¹⁷ If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.¹⁸

Analysis

Qwest first argues that issues 2 and 3 and some part of issue 5 identified in Covad's petition for arbitration should be dismissed because "the absence of negotiation relating to these issues" establishes that they are not open issues that are subject to arbitration under section 252(b).

The Act provides that, upon receiving a request for interconnection, services, or network elements pursuant to section 251, an ILEC may negotiate and enter into a binding agreement with the requesting carrier without regard to the standards set forth in subsections (b) and (c) of section 251.¹⁹ During the period from the 135th to the 160th day (inclusive) after the date on which an ILEC receives a request for negotiation, the carrier or any other party to the negotiation may petition a state commission to arbitrate any "open issue."²⁰ A state commission is to limit its consideration of any petition to the issues set forth in the petition and in the response, if any.²¹

¹¹ See Minn. Rules, pt. 1400.6600.

¹² *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

¹³ *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

¹⁴ *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 75 (Minn. App. 1988).

¹⁵ *Carlisle*, 437 N.W.2d at 715 (citing, *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

¹⁶ *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984).

¹⁷ See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).

¹⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

¹⁹ 47 U.S.C. §252(a)(1).

²⁰ *Id.* § 252(b)(1).

²¹ *Id.* § 252(b)(4).

In *Coserv Ltd. Liability Corp. v. Southwestern Bell Telephone Corp.*,²² the court reviewed this statutory scheme and held that although an ILEC is *required* to negotiate about those duties listed in § 251(b) and (c), the parties are free during negotiations to make any agreement they want without regard to the requirements of § 251(b) and (c). To that extent, the parties are free to include interconnection issues that are not listed in § 251(b) and (c) in their negotiations. If the voluntary negotiations result in only a partial agreement, or in no agreement at all, either party can petition for compulsory arbitration of any open issue.²³ In other words, Congress contemplated that voluntary negotiations might include issues other than those listed in § 251(b) and (c) and still provided that any issue left open after unsuccessful negotiation would be subject to arbitration by a state commission.²⁴ The jurisdiction of the commission is not limited by the terms of § 251(b) and (c), but is limited by the actions of the parties in conducting voluntary negotiations.

On the other hand, *Coserv* also held that a commission may arbitrate only issues that were the subject of voluntary negotiations; a party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations.²⁵ Qwest contends, in reliance on *Coserv*, that because Qwest limited its negotiations to its duties under section 251(c) and refused to negotiate any requests for unbundling under section 271 or state law, these portions of Covad's petition do not describe "open" issues and the issues may not be arbitrated.

The facts must be viewed in the light most favorable to Covad, but there appears to be no dispute about the material facts. The record reflects that Covad originally requested negotiations with Qwest in January 2003.²⁶ Qwest agreed to negotiate, and proposed the use of its Statement of Generally Available Terms (SGAT) as a negotiations template.²⁷ In May of 2003, Qwest agreed to negotiate the terms of section 9 of the proposed agreement (concerning the identification of unbundled network elements), even though the parties anticipated that the FCC would soon issue the TRO and language changes would probably be necessary.²⁸

In August 2003, the FCC released the TRO. In December 2003, Qwest proposed changes to the interconnection agreement conforming to its reading of the TRO.²⁹ Covad responded with its counterproposals in January 2004.³⁰ The parties

²² 350 F.3d 482, 487 (5th Cir. 2003).

²³ 350 F.3d at 487.

²⁴ *Id.*

²⁵ *Id.*

²⁶ The parties later agreed, for purposes of implementing the statutory requirements concerning the timeframe for arbitration, that the "request for negotiation" date was October 29, 2003. See Qwest Response to Covad's Revised Petition for Arbitration (June 1, 2004) at 2-3.

²⁷ Zulevic Affidavit.

²⁸ *Id.*, Attachment A.

²⁹ Zulevic Affidavit.

³⁰ Miles Affidavit.

began discussing TRO-related issues in February 2004. During this time the terms of section 9 remained on the lists of open issues exchanged by the parties.³¹

On March 2, 2004, the United States Court of Appeals for the District of Columbia released its opinion, which vacated much of the TRO but specifically affirmed the FCC's construction of section 271 as creating an independent obligation to provide access to "checklist" network elements.³²

On March 9, 2004, Qwest informed Covad during a routine negotiations call, and confirmed its statements later by e-mail, that it would not negotiate any terms, conditions, or rates for elements that Qwest may provide or be required to provide pursuant to any authority other than section 251(c) of the Act. Qwest further stated that, to the extent that Qwest offers access to specific non-251 elements or services, the terms and conditions relating to such elements or services "are or will be set forth in documents outside of the interconnection agreement currently under negotiation (e.g., applicable tariffs or the forthcoming '271 Network Element Agreement.'" Qwest further stated that it did not consider Covad's language proposals concerning non-251 elements or services to be "open issues" subject to arbitration.³³

On April 6, 2004, Covad's petition for arbitration was filed with the Minnesota Public Utilities Commission.

Qwest's assertion that it refused to negotiate 271 issues goes too far. After release of the TRO on August 21, 2003, and after it became effective on October 2, 2003, the parties exchanged language proposals concerning a variety of subsections in section 9, each reflecting the party's focus on different provisions of the TRO.³⁴ Only after the *USTA II* opinion was released in early March, and shortly before the 135-day deadline for seeking arbitration, did Qwest assert that certain provisions were not open issues. That the parties did not move from their initial proposals does not mean they were not negotiating. Qwest offered contract language on these issues and sought to obtain Covad's agreement. In doing so, Qwest agreed to negotiate, and in fact did negotiate, the relevant terms of section 9 of the interconnection agreement that are presented in this arbitration petition. Because these issues were the subject of voluntary negotiations, they are open issues within the meaning of 47 U.S.C. § 252(b)(1), and they are subject to arbitration by the MPUC. Accordingly, Qwest's motion to dismiss on this ground is denied.

Qwest's next argument is that it is entitled to dismissal of these issues because state commissions do not have authority to arbitrate the scope of Qwest's obligations under section 271. If granted, this would amount to a judgment on the merits of Qwest's claim that its proposed language is appropriate. This is an arbitration proceeding intended to be heard on an expedited basis. Given the number of disputed subsections

³¹ *Id.*

³² See *United States Telecom Assoc. v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) (*USTA II*).

³³ Zulovic Affidavit; Miles Affidavit.

³⁴ Their various proposals are contained in the draft agreement Covad filed with its petition for arbitration.

within issues 2, 3, and 5, and the likelihood that the legal analysis might differ from one subsection to another, the administrative law judge is not convinced that it would conserve the resources of the Commission or the parties to address the merits of Qwest's claim at this time. Qwest's arguments as to the Commission's legal authority will be addressed in the arbitrator's report filed at the conclusion of the hearing.

K.D.S.