

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 918

In the Matter of

QWEST CORPORATION

Petition for Arbitration and Approval of an
Interconnection Agreement with
NORTH COUNTY COMMUNICATIONS
CORPORATION OF OREGON.

ORDER

DISPOSITION: RULING UPON CERTIFICATION AFFIRMED

I. INTRODUCTION

North County Communications Corporation (North County) and Qwest Corporation (Qwest) are parties to a thirteen year old interconnection agreement. On August 3, 2009, Qwest filed with the Public Utility Commission of Oregon (Commission) a petition for arbitration and approval of a new interconnection agreement with North County to address changes in technology since the parties' existing agreement was signed.

After several months of informal negotiations, North County requested the opportunity to brief the threshold question of whether the Commission has jurisdiction to address Qwest's petition. North County filed a motion to dismiss Qwest's petition, and the parties submitted response and reply briefs on the jurisdictional question. On May 10, 2010, the Administrative Law Judge (ALJ) presiding over this docket issued a ruling denying North County's motion to dismiss. North County requested, and the ALJ granted, certification of the jurisdictional question to the Commission. In this order, we affirm the ALJ's ruling and find that we do have jurisdiction to entertain Qwest's petition for arbitration.

II. DISCUSSION

A. Background

Qwest is an incumbent local exchange carrier (ILEC) that provides telecommunications services in Oregon. North County is a wireline competitive local exchange carrier (CLEC). North County and Qwest are parties to an interconnection

agreement (ICA) in Oregon that became effective on September 9, 1997. The current interconnection agreement contains the following negotiation term:

This Agreement shall be effective for a period of 2 ½ 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.¹

In its petition for arbitration filed in August of 2009, Qwest seeks a new agreement to address changes in signaling technology since the parties' agreement was signed.

B. Legal Standard

The Telecommunications Act of 1996 (the Act)² provides a framework for local exchange carriers to engage in either voluntary negotiation or compulsory arbitration before state Commissions. With regard to voluntary negotiations, Section 252 of the Act provides:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title.³

For compulsory arbitration, the Act holds:

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.⁴

¹ See North County Communications Corporation and U S West Communications, Inc. [now Qwest] Arbitrated Interconnection Agreement for the State of Oregon at § XXXIV.V, p. 73, attached as Exhibit A to Affidavit of Christopher J. Reichman in Support of North County Communications Corporation's Motion to Dismiss Qwest Corporation's Petition for Arbitration.

² Pub. L. 104-104, 110 Stat. 56.

³ 47 U.S.C. § 252(a)(1).

⁴ 47 U.S.C. § 252(b)(1).

Once the parties reach an agreement, either through negotiation or arbitration, their agreement must be submitted to the state Commission for approval.⁵ Sections 252(a) and (b) are incorporated into the Oregon Administrative Rules.⁶

C. Issues

1. *Request for Interconnection*

a. *Parties' Positions*

North County first argues that under Section 252, an ILEC may not initiate negotiations with a CLEC until the ILEC has received a request for interconnection, services, or network elements, and that since North County never made any such request to Qwest, Qwest has no basis for initiating negotiations under Section 252.⁷ North County states that Section 252 of the Act does not grant the Commission jurisdiction to compel arbitration where there was no CLEC request for interconnection. Citing case law from other jurisdictions, North County argues that the interpretation of interconnection agreements rests in state courts and is governed exclusively by the “normal state law of contracts.”⁸

Qwest responds that if North County’s argument holds, all existing ICAs would exist in perpetuity until the CLEC chose to request negotiation. Qwest notes that this interpretation would require us to conclude that numerous arbitrations we conducted in the past were invalid.⁹ Qwest argues that even if North County’s argument were correct, in this case North County must be deemed to have requested negotiations, because the parties’ current ICA provides that the parties “agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective.”¹⁰ Finally, Qwest notes that we addressed this issue in docket ARB 589, Order No. 05-088, and concluded that an ILEC could initiate negotiations under similar circumstances.

b. *Resolution*

We affirm our holding in docket ARB 589, Order No. 05-088, that terms in an existing ICA may be read to satisfy the requirements of Section 252. In ARB 589, Qwest and a CLEC, Universal Telecom Inc., were parties to an existing ICA that contained a negotiation clause stating that the parties “agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective.”¹¹ After the

⁵ 47 U.S.C. § 252(e)(1).

⁶ See OAR 860-016-0010 – 0030.

⁷ North County Request for Certification of Question re Ruling Denying Motion to Dismiss (North County Certification Request) at 6, citing 47 U.S.C. Section 252(a)(1).

⁸ North County Certification Request at 5, citing *Connect Communications Corp. v. Southwestern Bell Telephone, L.P.*, 467 F.3d 703 (8th Cir. 2006), *Southwestern Bell Telephone Co. v. Public Utility Com’n of Texas*, 208 F.3d 475 (5th Cir. 2000), *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999).

⁹ Qwest Response to NCC’s Requests for Certification and Continuance (Qwest Response) at 5.

¹⁰ *Id.* at 6-7.

¹¹ See Order No. 05-088 at 7. The Commission read the above negotiation clause into the parties’ agreement, because their “terms of agreement” provision differed from the model provision they claimed to have adopted.

CLEC failed to respond to Qwest's requests for negotiation of a new agreement, Qwest petitioned this Commission for arbitration of a new ICA. The CLEC filed a motion to dismiss Qwest's petition, making the same argument North County makes here: that neither the terms of the parties' existing ICA nor any provision of the Act authorized Qwest's request.¹²

In Order No. 05-088, we first acknowledged that by its terms, Sections 252 requires that a request for negotiation come from a CLEC, not an ILEC. However, after reviewing other state Commissions' approaches to this question, we concluded that under the parties' negotiation clause, "either party, including Qwest, may commence negotiations. Like the Tennessee and Florida commissions, we conclude that agreements that expressly permit either party to commence negotiations may supplement the Act's language which permits only the CLEC to commence negotiations."¹³

We affirm that conclusion here. By the terms of the parties' existing ICA, either Qwest or North County may commence negotiations under Section 252(a)(1) of the Act, and if negotiations fail, either party may then petition this Commission to arbitrate any open issues under Section 252(b)(1) of the Act. A negotiation clause in an existing ICA stating that both parties "agree to commence negotiations on a new agreement" will permit either the ILEC or the CLEC to initiate negotiations. Qwest was within its rights to initiate negotiations here.

We are not persuaded by North County's claim that only state courts may interpret interconnection agreements. None of the three cases cited by North County states that ICAs may only be interpreted in state *courts*. Instead, they simply state that interpretation of such agreements is a state, rather than a federal, issue. Moreover, North County's assertion is contrary to the express provisions of the Act, which authorizes state commissions to enforce the provisions of an ICA.¹⁴

2. *Need for Arbitration*

a. *Parties' Position*

North County's second claim is that there is no need for arbitration, because the parties' existing ICA has worked well for many years and contains robust amendment procedures that are more than sufficient to handle any changes the parties may need.¹⁵ North County again argues that if Qwest believes the procedures available to the parties are inadequate, Qwest may and should pursue its claims in a state court rather than before this Commission.¹⁶

¹² *Id.* at 2.

¹³ *Id.* at 7. In a subsequent order, Order 05-206, we found that the parties' negotiation clause gave Qwest the right to commence negotiations on a new agreement even after the two-year period had expired. *See* Order 05-206 at 6-7.

¹⁴ *See* 47 U.S.C. § 252(e)(1).

¹⁵ North County Request for Certification at 7.

¹⁶ *Id.*

Qwest responds that North County's arguments regarding contract claims are misplaced because Qwest is seeking a new ICA, not suing for breach of contract.¹⁷ Qwest also notes that the Act "specifically allows a state commission to enforce the provisions of an ICA, so if Qwest were to allege a breach of the [existing] ICA, Qwest could bring an interconnection enforcement complaint with the Commission."¹⁸

b. Resolution

We agree with Qwest that its Petition for Arbitration does not seek to enforce the provisions of the parties' existing ICA, but rather seeks a new ICA between the parties. Given our conclusion above that Qwest may seek a new ICA, and because only this Commission may entertain such requests under the Act, North County's motion to dismiss should be denied.

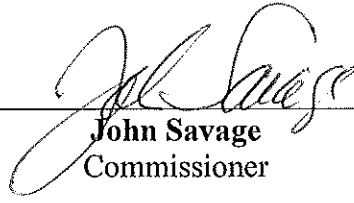
III. ORDER

IT IS ORDERED that the Administrative Law Judge's May 10, 2010 Ruling denying North County's motion to dismiss is affirmed.

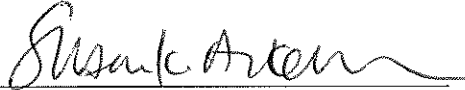
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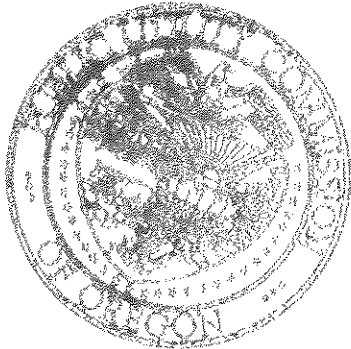
Ray Baum
Chairman



John Savage
Commissioner



Susan K. Ackerman
Commissioner



¹⁷ Qwest Response at 4.
¹⁸ *Id.*, citing OAR 860-016-0050.