

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

In the Matter of the Petition for	)	DOCKET UT-093035
Arbitration of an Interconnection	)	
Agreement Between	)	
	)	ORDER 09
NORTH COUNTY	)	
COMMUNICATIONS	)	
CORPORATION OF WASHINGTON	)	ORDER DENYING
	)	PETITION FOR
and	)	INTERLOCUTORY REVIEW
	)	
QWEST CORPORATION	)	
	)	
Pursuant to 47 U.S.C. Section 252(b).	)	
.....	)	

1 **NATURE OF PROCEEDING.** Docket UT-093035 involves a petition by Qwest Corporation (Qwest) for arbitration and approval of a successor interconnection agreement (ICA) with North County Communications Corporation of Washington (North County) pursuant to 47 U.S.C. §252(b) of the Telecommunications Act of 1996 (Act).<sup>1</sup>

2 **PROCEDURAL HISTORY.** On August 3, 2009, Qwest filed a petition for arbitration to replace its existing ICA with North County. After extensive attempts between the parties to resolve the issue informally, the Commission set the matter for hearing. On March 29, 2010, North County filed a motion to dismiss the proceeding, asserting the Commission lacks jurisdiction under the current agreement and the Act to arbitrate a replacement ICA.

3 Following a response by Qwest and a reply by North County, Administrative Law Judge Adam E. Torem, appointed as the arbitrator in this proceeding, entered Order 06, Order Denying Motion, on April, 26, 2010.

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<sup>1</sup> Public Law 104-104, 110 Stat. 56, 47 U.S.C. § 101, *et seq.*

4 On May 4, 2010, North County filed a Petition for Administrative Review of Order 06. Qwest filed its answer to North County's petition on May 14, 2010. On June 23, 2010, Qwest filed supplemental authority with the Commission concerning North County's petition for review.

5 **APPEARANCES.** Joseph G. Dicks and Christopher J. Reichman, Dicks & Workman, APC, San Diego, California, represent North County. Lisa A. Anderl, Associate General Counsel, Seattle, Washington, represents Qwest.

6 **ORDER DENYING MOTION TO DISMISS.** Order 06, which denies North County's motion to dismiss Qwest's petition for arbitration, rejects North County's argument that there has been no request for interconnection, services or network elements and that the Commission does not have jurisdiction to arbitrate a successor or replacement ICA between North County and Qwest. The order finds that the terms of the existing ICA allow for renegotiation of the agreement, and that section 252 of the Act does not limit the number of arbitrations a state commission can conduct between parties negotiating a new ICA or a successor agreement.

### MEMORANDUM

#### **A. Standard of Review.**

7 North County filed its petition for review of Order 06 pursuant to WAC 480-07-825,<sup>2</sup> which governs petitions for review of initial orders. Initial orders are defined as orders that:

dispose of the merits in a proceeding that is conducted before an administrative law judge and are entered over the signature of the administrative law judge. *Initial orders include those that grant dispositive motions (e.g., motions to dismiss and motions for summary determination) and orders that resolve contested issues on the basis of the official record in a proceeding. All initial orders are subject to further action by the commission as provided in WAC 480-07-825.*<sup>3</sup>

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<sup>2</sup> North County Petition, ¶ 1.

<sup>3</sup> WAC 480-07-820(1)(a) (emphasis added).

Orders that are “entered during the course of an adjudicative proceeding,” and not entered at the conclusion of a proceeding, are considered interlocutory orders.<sup>4</sup> Order 06 did not grant the motion for dismiss, but denied it. As such, the order is not dispositive, and by definition, is not considered an initial order.

8 The Commission has discretion to review interlocutory orders, and may accept review if it finds:

(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.<sup>5</sup>

9 Petitions for interlocutory review must be filed and served on other parties with ten days after service of the order. The petition must identify why the order is in error and should be changed, and why interlocutory review is necessary.<sup>6</sup>

#### **B. The Parties' Interconnection Agreement.**

10 The following facts are not disputed and are derived from the parties' pleadings and the existing interconnection agreement: North County and Qwest are parties to an interconnection agreement that became effective on August 27, 1997.<sup>7</sup> This agreement provides that

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 the terms of this agreement, becomes effective between the

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<sup>4</sup> WAC 480-07-810(1).

<sup>5</sup> WAC 480-70-810(2).

<sup>6</sup> WAC 480-70-810(3).

<sup>7</sup> North County Petition, ¶ 4; Hearing Exhibit B-1.

parties. The parties agree to commence negotiations on a new agreement no later than two years after this agreement becomes effective.<sup>8</sup>

The agreement also provides that “The agreement was negotiated by the parties in accordance with the terms of the Act and the laws of the state where service is provided hereunder. It will be interpreted solely in accordance with the terms of the Act and the applicable state law in which the service is provided.”<sup>9</sup>

11 Further, the agreement states that it is the joint work product of both the parties, “has been negotiated by the Parties and their respective counsel and shall be fairly interpreted according with its terms and, in the event of any ambiguities, no inference shall be drawn against either Party.”<sup>10</sup>

12 North County received a request for negotiations from Qwest regarding a new interconnection agreement on or about July 2, 2008.<sup>11</sup> North County states that it agreed with Qwest to “an extension of the arbitration window without waiving any rights or making any admissions that arbitration was appropriate.”<sup>12</sup>

### C. Applicable Law.

13 The Act governs the interconnection of local exchange carriers, as well as the negotiation and arbitration of interconnection agreements.<sup>13</sup> Carriers may either negotiate an agreement, or if they cannot reach a negotiated agreement, request that a state commission mediate or arbitrate an agreement.<sup>14</sup> Under section 252(b)(1), “[d]uring the period from the 135th to the 160th day (inclusive) after the date on

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<sup>8</sup> Exh. B-1, Section XXXIV(V) at 72.

<sup>9</sup> *Id.*, Section XXXIV(W) at 73.

<sup>10</sup> *Id.*, Section XXXIV(O), at 70.

<sup>11</sup> North County Petition, ¶ 5.

<sup>12</sup> *Id.*

<sup>13</sup> *See* 47 U.S.C. §§ 251, 252.

<sup>14</sup> 47 U.S.C. §§ 252(a)(1), (a)(2), (b)(1).

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.”

- 14 Under Section 252(b)(4)(C), a state commission must resolve the issues in the petition and response no later than nine months after the date on which the local exchange carrier received the request for negotiation.
- 15 The Commission has adopted rules governing arbitrations and consideration of negotiated and arbitrated agreements in WAC 480-07-630 and WAC 480-07-640, consistent with the Act.

**D. Party Positions.**

**1. North County.**

- 16 North County asserts that Order 06 erred in denying its motion to dismiss. It argues that neither section 252 nor the current ICA give the Commission authority to compel arbitration of a successor interconnection agreement and that the order errs in requiring the parties to arbitrate such an agreement.<sup>15</sup> North County claims that arbitration under section 252(b)(1) may only be compelled upon the precondition that an incumbent local exchange carrier receive “a request for interconnection, services, or network elements pursuant to section 251 of this title.”<sup>16</sup> North County asserts that the Commission lacks jurisdiction to hear Qwest’s petition for arbitration, as no party has requested interconnection, services or network elements: Qwest has sought to negotiate a new agreement, but has not met the precondition of having “receive[d] a request for interconnection, services or network elements pursuant to section 251.”<sup>17</sup>
- 17 Further, North County asserts that the issue is one of contract law, not federal law, and that the appropriate result in this case is not arbitration, but for Qwest to resolve

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<sup>15</sup> North County Petition, ¶¶ 20-21.

<sup>16</sup> *Id.* ¶ 10, quoting 47 U.S.C. §252(a)(1).

<sup>17</sup> *Id.* ¶ 13, quoting 47 U.S.C. §252(b)(1).

its dispute, as in any contract, by bringing an action for breach of contract.<sup>18</sup> North County claims that the current ICA does not require the parties to pursue section 252 arbitration to develop a new agreement, and, without that provision, it cannot be compelled to arbitrate an agreement. It points to language in Qwest's proposed agreement that provides that the date of a notice of a request for renegotiation "will be the starting point for the negotiation window under Section 252 of the Act."<sup>19</sup> Without similar language in the current ICA, North County claims the Commission has no jurisdiction to arbitrate an agreement under section 252. North County states that if there is any ambiguity about what the parties intended, that ambiguity is construed against the drafter – in this case, Qwest.<sup>20</sup>

## 2. Qwest.

- 18 Qwest asserts that North County's petition for administrative review is in reality a petition for interlocutory review.<sup>21</sup> Qwest claims that North County does not discuss in its petition why review is warranted under WAC 480-07-810(2), and the Commission should not undertake review. If the Commission does review the order, the only basis would be judicial economy, to "save the commission and parties substantial effort or expense."<sup>22</sup> Qwest asserts that North County's efforts to delay the proceeding have consumed more resources than it would take to arbitrate the case, and that the parties are currently preparing testimony on the issues.<sup>23</sup>
- 19 Qwest claims that the Commission has jurisdiction both to enforce North County's obligation to negotiate under its ICA, and to arbitrate a new agreement under section

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<sup>18</sup> *Id.* ¶¶ 3, 11.

<sup>19</sup> *Id.* ¶ 14, n.4.

<sup>20</sup> *Id.* ¶ 19.

<sup>21</sup> Qwest Answer, ¶ 4.

<sup>22</sup> *Id.* quoting WAC 480-07-810(2)(c).

<sup>23</sup> Qwest Answer, ¶ 6. Since North County filed its petition, the parties have filed testimony and the Commission has held a hearing on the disputed issues.

252.<sup>24</sup> Qwest asserts that the parties agreed in the current ICA to commence negotiations after 2 ½ years, and that this language should be interpreted as a request for negotiations under the Act.<sup>25</sup> Qwest states that the absence of a specific reference to section 252 does not preclude a petition for arbitration. Qwest argues that the provision in the agreement for negotiations is sufficient to trigger the right to arbitration under section 252. In addition, Qwest claims that the agreement contains a provision prohibiting interpretation of the agreement against either party.<sup>26</sup>

20 Qwest asserts that a provision in an ICA that binds the parties to negotiate, but does not allow arbitration would be meaningless. Under section 252, any party may request arbitration if negotiations are unsuccessful.<sup>27</sup>

21 Further, Qwest claims that North County's arguments in its motion to dismiss and petition that the renegotiation and arbitration of agreements are prohibited are not supported and are rejected by several state commissions.<sup>28</sup> Qwest claims that this argument would lead to an absurd result – existing ICAs must continue in perpetuity, and only competitive local exchange carriers (CLECs) may request negotiation of a new ICA. Qwest states that, if this is so, all the successor arbitrations this Commission has conducted of existing agreements would be invalid.<sup>29</sup>

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<sup>24</sup> Qwest Answer, ¶ 7.

<sup>25</sup> *Id.* ¶¶ 9, 12.

<sup>26</sup> *Id.* ¶ 9.

<sup>27</sup> *Id.* ¶ 12.

<sup>28</sup> *Id.* ¶ 10. See *In re GCI Communications Corp. and ACS of the Northland, Inc.*, Order Granting Petition for Arbitration, Appointing Arbitrator and Ordering Prehearing Conference, text accompanying nn. 25-29 (Regulatory Commission of Alaska, August 29, 2002), and *In the Matter of the Petition of Global NAPs Ohio for Arbitration with the Ohio Bell Telephone Company*, Ohio Public Utilities Commission (Jan. 7, 2010). These decisions are discussed in the Motion to Dismiss at pages 6-9, in Qwest's response to the Motion to Dismiss at paragraphs 8-10, and in Order 06 at paragraphs 10 and 11.

<sup>29</sup> Qwest Answer, ¶¶ 11, 13.

22 Qwest relies on decisions by the Oregon Public Utilities Commission to support its position on this issue. In one case, Qwest requested negotiations with a carrier of an expired ICA that was still effective. When the carrier did not respond, Qwest filed a petition for arbitration. The carrier filed a motion to dismiss, asserting that neither the terms of the ICA nor the Act authorized Qwest's request. The Oregon Commission found that agreements "which expressly permit either party to commence negotiations may supplant the Act's language which permits only the CLEC to commence negotiations."<sup>30</sup> Qwest asserts that an administrative law judge in Oregon relied on this decision in a recent order denying a similar motion by North County's to dismiss Qwest's petition for arbitration in that state.<sup>31</sup>

**E. Commission Decision.**

23 The first issue we must address is whether to accept interlocutory review of the decision in Order 06. We find that the order is appropriately considered an interlocutory order, not an initial order, as it did not dismiss Qwest's petition for arbitration, or conclude the proceeding. While North County's petition was timely, i.e., filed within the ten day period, and states why the order is in error, we find that, by relying on the standard of review for initial orders, North County did not explain why interlocutory review is necessary, as required by WAC 480-07-810(3).

24 Interlocutory review is discretionary for the Commission. The Commission may undertake review if the order would terminate a party's participation, a party would be substantially prejudiced by the order which is not remediable by post-hearing review, or review would save the parties or the Commission substantial effort or expense.<sup>32</sup> As Qwest notes, the only basis for review would be to save Commission

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<sup>30</sup> *Re: Qwest Corporation*, Order No. 05-088 2005 WL 912100, at \*5 (Or. P.U.C. Feb. 9, 2005).

<sup>31</sup> *Re: Qwest Corporation*, Ruling: Disposition: Motion to Dismiss Denied, ARB 918 (Oregon P.U.C., May 10, 2010) [Hereinafter Oregon Order Denying Motion to Dismiss]. In a supplemental authority filing, Qwest submitted the full Commission's decision affirming the Order Denying the Motion to Dismiss. *See Re: Qwest Corporation*, Order No. 10-221, ARB 918, Disposition: Ruling Upon Certification Affirmed (Oregon P.U.C., June 21, 2010) [Hereinafter Oregon Final Order].

<sup>32</sup> WAC 480-07-810(2).



or party resources. However, the procedural schedule in this case has not been stayed pending a decision in this matter: The parties have filed testimony, the Commission held an arbitration hearing, and the parties have filed post-hearing briefs. Given our discretion to undertake interlocutory review, we will do so, as the issue North County raises is one of first impression before this Commission, and merits our attention.

25 After considering Order 06 and the parties' pleadings, however, we deny North County's petition for review of Order 06, finding that this Commission has jurisdiction to require the parties to arbitrate the terms of a successor agreement.

26 The agreement in question provides that Qwest and North County "agree to commence negotiations on a new agreement no later than two years after this agreement becomes effective."<sup>33</sup> The agreement also provides that it "will be interpreted solely in accordance with the terms of the Act and the applicable state law in which the service is provided."<sup>34</sup> Where the interconnection agreement refers to "negotiations" within the meaning of the Act, that term can only be interpreted as negotiations under section 252, in which negotiations lead to a "negotiated" agreement, mediation or arbitration under the Act.

27 North County is adamant that Qwest must meet a condition precedent to be entitled to negotiation and arbitration under the Act – that Qwest receive a request from it for interconnection, service or network elements under section 251. However, we find that the parties agreed in their ICA to jointly initiate negotiations for a successor agreement without the need for Qwest to receive such a request. North County cites no provision of the Act that precludes the parties from making such an agreement, and we are not aware of any such provision. Accordingly, we enforce the ICA as written.

28 Similarly, we reject North County's position that the Commission lacks jurisdiction to hear Qwest's petition for arbitration because the parties' agreement does not require that the parties resort to arbitration to establish a successor agreement. The ICA is

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<sup>33</sup> Exh. B-1, Section XXXIV(V) at 72.

<sup>34</sup> *Id.* Section XXXIV(W) at 73.

entirely silent on that point and does not establish or otherwise address the applicable procedure if the parties' negotiations are unsuccessful. Section 252 of the Act, however, permits either party to the negotiations to initiate arbitration to establish an ICA. The parties agreed to modify the requirements of section 251 only with respect to the procedure for initiating negotiations, leaving the procedures in section 252 untouched. Far from depriving the Commission of jurisdiction, the ICA's silence on the issue of arbitration confirms the continuing applicability of section 252 and the Commission's authority to arbitrate an agreement under the Act.

- 29 We note that the Oregon Public Utilities Commission recently reached a similar conclusion, namely that the request requirement under section 252(a)(1) is met when parties mutually agree to initiate negotiations, in addressing a similar motion to dismiss brought by North County in that state.<sup>35</sup> The cases on which North County relies do not support its arguments. As noted in Order 06, the regulatory commission of Alaska decision involved a request to renegotiate provisions of an ICA that had not yet reached its full term. In this case, the agreement expired after 2 ½ years, and is ripe for negotiation. The Public Utilities Commission of Ohio decision concern that commission's refusal to arbitrate a single issue, rather than a successor agreement which are facts which are not present here. Neither case supports North County's argument that the Commission lacks jurisdiction to compel arbitration.
- 30 Congress delegated to state commissions authority under the Act to arbitrate interconnection agreements. State commissions also retain the authority to enforce the terms of agreements.<sup>36</sup> Under section 252(b)(1), any party may petition for arbitration if negotiation is not successful. The parties' agreement in their ICA to mutually begin negotiations on a successful agreement triggered the process established in section 252. Qwest has the right under that section to petition for arbitration if negotiations are unsuccessful, and this Commission has the authority under the Act to require the parties to arbitrate in response to that petition. Thus, this

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<sup>35</sup> Oregon Final Order, at 3-4.

<sup>36</sup> The Commission's rules, WAC 480-07-650, govern enforcement of interconnection agreements.

Commission has jurisdiction under the Act to compel arbitration, and nothing in the parties' ICA alters that authority.

31 For these reasons, we deny North County's petition for review of Order 06, and affirm the decision in that order denying North County's motion to dismiss.

**ORDER**

**THE COMMISSION ORDERS:**

- 32 (1) Interlocutory review of Order 06, Order Denying Motion to Dismiss, is granted.
- 33 (2) The Petition for Administrative Review of Order 06 filed by North County Communications Corporation of Washington is denied.

Dated at Olympia, Washington, and effective September 30, 2010.

**WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION**

**JEFFREY D. GOLTZ, Chairman**

**PATRICK J. OSHIE, Commissioner**

**PHILIP B. JONES, Commissioner**