

**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 MOTION TO DISMISS
QWEST CORPORATION'S PETITION FOR
ARBITRATION

I. History of the Proceeding

As Qwest Corporation ("Qwest") admits in its Petition for Arbitration ("Qwest Petition"), Qwest and North County Communications Corporation ("North County") are already parties to an interconnection agreement that became effective on August 27, 1997 ("Existing ICA") (attached to the accompanying Affidavit of Joseph G. Dicks as Exhibit "A"). Qwest Petition, 3:10. The parties also agree that the Existing ICA between them is currently effective and, by its own terms, remains in effect until a new agreement becomes effective between the parties. *Id.*

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.

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 Telecommunications Act of 1996 ("the 1996 Act") and W.A.C. 480-07-630. Qwest Petition, 1:1, 2:4. As will be argued below, North County respectfully contends that the petition is improper on its face and respectfully submits that this Commission lacks jurisdiction to hear the petition pursuant to 47 U.S.C. §§ 251, 252.

While negotiations up to this point had not made any substantive progress, when North County replaced its prior counsel with Dicks & Workman, APC, 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.

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 and that this motion should be filed no later than March 29, 2010.

II. Statutory Framework

The 1996 Act gives state utilities commissions a federal mandate to arbitrate interconnection agreements between local exchange carriers within certain defined limits.

47 U.S.C. § 252.¹ 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).

Under the Section 252(a)(1), a LEC may 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.”² 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).

III. Argument

A. Qwest’s Petition Is Facially Insufficient To Invoke The Jurisdiction Of The Commission To Arbitrate A New Interconnection Negotiation Under Section 252.

Negotiations subject to Section 252 may only be initiated “[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title.” Section 251 imposes, inter alia, duties on all carriers to interconnect upon request and provide each other services and network elements. The problem here is that Qwest did not initiate this round of negotiations as a result of receiving a “request for interconnection, services, or network

¹ As used herein “Section” will refer to Title 47 of the United States Code unless otherwise specifically designated.

² 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.

elements.” The parties have been interconnected and providing each other services and network elements under their Existing ICA since 1997.

In its Petition, Qwest admits the existence of the interconnection agreement. Qwest Petition 3:10. While mischaracterizing the Existing ICA as “expiring,” Qwest does admit that that the Existing ICA is currently in effect, and “remains in effect until a new agreement becomes effective between the parties.” *Id.* Accordingly, Qwest does not, and cannot, anywhere in their petition claim that it has made a “request for interconnection, services, or network elements pursuant to section 251 of this title.” 47 U.S.C. 251(a)(1). Therefore, while Qwest alleges it made a negotiation request, that request was not and could not have been made “under this section” within the meaning of Section 252(b)(1) because the negotiation request was not made upon a request for interconnection or new services.

North County respectfully submits that Qwest’s Petition for Arbitration must fail where it merely alleges a request for negotiations was made, and does not allege any request for interconnection or new services was made. North County also submits that this defect cannot be cured by amendment, because it is clear from the admitted fact that the parties have been interconnected pursuant to an existing ICA since 1997 that no request for interconnection or services covered by the existing ICA can be made.

**B. North County Respectfully Submits That The Commission Lacks
Jurisdiction To Arbitrate A Re-Negotiation.**

As noted above, the 1996 Act pre-empts state authority to regulate some aspects of local intrastate communications, and also empowers state utility commissions to act in certain ways within the limits of the 1996 Act. *See, Qwest Corp. v. Ariz. Corp. Comm’n*, 496 F.Supp.2d 1069, 1077 (D. Ariz. 2007) *aff’d* 567 F.3d 1109, 1111-1112 (9th Cir. 2009). Thus, while the 1996 Act

“permits a great deal of state commission involvement,” state utility commission actions must be limited by the express scope of the 1996 Act. *Verizon North, Inc. v. Strand*, 309 F.3d 935, 944 (6th Cir. 2002); *Qwest Corp. v. Ariz. Corp. Comm’n*, 567 F.3d at 1119.

The 1996 Act expressly empowers state utility commissions to arbitrate interconnection agreements in Section 252(b). As we have seen, it also places a number of limits on that authority to arbitrate, not the least of which is that the state utilities commissions may only arbitrate disputes as a consequence of negotiations invoked “under this title.” And, as established above, negotiations “under this title” may only occur “[u]pon receiving a request for interconnection, services, or network elements.” 47 U.S.C. § 252(a), (b). Finally, as also discussed above, no such request for interconnection or services has been made, or could be made where there is an existing interconnection agreement between the parties defining their rights and responsibilities with respect to the interconnection and services.

North County, therefore, respectfully submits that nothing in the plain and unambiguous language of 47 U.S.C. § 252 purports to give state utility commissions jurisdiction to arbitrate attempted re-negotiations of existing contracts that conclusively define the rights of the parties. Congress made their intent to allow invocation of Section 252 negotiations and arbitration only upon interconnection or a request for new services when they included this plain condition in the statute. Such an explicit condition makes it exceeding transparent that Congress did not want to give carriers the right to re-negotiate new interconnection agreements and compel costly state utilities commission arbitration proceedings whenever a carrier felt like it.

Qwest here is trying to convince this Commission to allow it to do exactly this, to compel arbitration in an attempt to re-negotiate the perfectly valid Existing ICA. Qwest cites no authority in their Petition that would even hint that they have a right to compel arbitration under

these circumstances, and that Petition is facially insufficient to try to claim this is some sort of new interconnection agreement. There is no such authority. While this may be the first time a carrier has tried to invoke Commission arbitration jurisdiction under Section 252 in Washington, other state utilities commissions being presented with this issue have resoundingly found that the clear language of Section 252 does not confer such jurisdiction.

The Regulatory Commission of Alaska (“Alaska Commission”), when presented with a similar request to invoke its jurisdiction under Section 252 to renegotiate an existing agreement soundly declared:

While we recognize our obligation to arbitrate unresolved issues, we will not re-arbitrate provisions in an existing agreement if the provisions are compliant with the Act. It is not in the public interest to re-arbitrate or create new agreements to cover resolved issues.

In the Matter of the Request by GCI Communication Corp. d/b/a General Communication, Inc., and d/b/a GCI for Mediation Regarding Glacier State Study Area Interconnection Disputes with ACS Of The Northland, Inc. d/b/a Alaska Communications Systems, ACS Local Service and ACS, Case No. U-02-18, Order No. 2, p. 5 (filed Aug 29, 2002) (attached to the accompanying Affidavit of J. Dicks as Exhibit “B”).

In that case, the parties and the Commission had previously arbitrated multiple interconnection agreements and one of the parties was again petitioning for arbitration as to some unresolved issues. *Id.* at p. 1-3. The opposing party moved to dismiss the petition as to all issues that were resolved in the previous interconnection agreements. *Id.* The Alaska Commission, admitting that the issue was one of first impression, examined the limits of its jurisdiction as an arbiter under Section 252. *Id.*, at p. 3-5. The Alaska Commission found that its jurisdiction was limited to arbitrating “any open issues” or any “unresolved issues” within the meaning of Section 252(b)(4)(B). *Id.* at p. 5. The Alaska Commission also ruled that, “[t]he issues are unresolved if

the parties have not agreed to be bound by the provisions of an existing interconnection agreement.” *Id.* The Alaska Commission therefore found that the petition for arbitration could proceed, but only in regards to interconnection services and network elements that [were] not provided in the existing interconnection agreement.” *Id.* at p. 6. In the instant case, Qwest does not claim that any of its wish list of re-negotiation points is a request for new services or that they pertain to services or network elements not provided for in the existing agreement. Based upon the sound reasoning and logic of the Alaska Commissions holding, Qwest’s Petition fails to invoke Commission jurisdiction. A carrier simply cannot compel arbitration on issues settled by an existing interconnection agreement.

The Ohio Public Utilities Commission (“Ohio Commission”) essentially reached the same conclusion as the Alaska Commission while reasonably narrowing the scope of unresolved issues that could invoke Section 252 jurisdiction in, *In the Matter of the Petition of Global NAPs Ohio for Arbitration Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with the Ohio Bell Telephone Company dba AT&T Ohio*, Finding and Order, Case No. 09-195-TP-ARB (filed January 7, 2010) (attached to the accompanying Affidavit of J. Dicks as Exhibit “C”). In that case, the parties had an existing interconnection agreement, however it explicitly stated that the parties had not reached a meeting of the minds as to whether VoIP and Internet Telephony traffic constituted local traffic. *Id.* at p. 1. The interconnection agreement also explicitly reserved the right of both parties to advocate their positions on that matter before any commission or court. While this issue was left expressly unresolved and the parties reserved the right to arbitrate it, the Ohio Commission refused to do so, holding that, “arbitrations may only occur in accordance with all of the terms of the existing agreement.” *Id.* at p. 4. The Ohio Commission further opined that the party

requesting this arbitration of only one aspect of an interconnection agreement should pursue its limited desires “through the dispute resolution process in its existing interconnection agreement or through the negotiation of a successor agreement.” *Id.* In the instant case, Qwest admits that there have been many amendments to the Existing ICA here, showing that there is a robust and well understood dispute resolution process that can easily handle the mere two sections of changes Qwest identifies in its Petition. And the requests made by Qwest do not even come close to being as clearly unresolved as the issues in the case above, where they were explicitly stated to be unresolved. The ruling of the Ohio Commission shows it not only agrees with the Alaska Commission that Section 252 jurisdiction cannot be invoked to re-negotiate resolved issues or alter an existing interconnection agreement, but also that it cannot even be invoked to settle a very small number of clearly unresolved issues. In this case, the two sections Qwest presents constituting significant changes from the Existing ICA do not even present any “unresolved issues” since they are clearly covered by the Existing ICA.

Both of the above cases raised the same issue, but in an even more compelling way because they both presented issues between the parties that were truly unresolved by their existing interconnection agreements. In the first case, the Alaska Commission only found jurisdiction to deal with issues expressly left unresolved by the existing interconnection agreement, and in the second, the Ohio Commission refused to find jurisdiction to resolve explicitly unresolved issues if they were small in number and better addressed by the dispute resolution mechanism of the existing interconnection agreement. The second case also raises the specter of the Commission being asked to modify an existing interconnection agreement, which is clearly forbidden, except in the most general rulemaking proceedings. While Qwest narrowly avoids this blunder by proposing a new interconnection agreement, they do hint that mere

amendment is their goal noting only two sections of material difference between the existing ICA and their improperly proposed agreement. Regardless, it is abundantly clear that the two Commissions hearing the same sort of request to date have agreed with the plain language of Section 251 and found that there is no jurisdiction vested in state utility commissions to arbitrate matters resolved by an existing interconnection agreement like the Existing ICA in this case.

From all the foregoing, it is clear that the plain language of Section 252 requires a negotiation request to be made upon interconnection or new service request for the negotiation and any subsequent arbitration to invoke the jurisdiction and rights of that section. This explicit condition precedent is obviously not unambiguous, could not possibly be construed as waiving the very condition precedent it sets up, and there is no language in the Section indicating any right of carriers to compel renegotiation and arbitration at whim to set aside existing agreements. The state utility commissions hearing such requests have identified the clear language of Section 252 as limiting their jurisdiction to deciding only issues not resolved by existing interconnection agreements. And, those decisions tend to hint that the real effect of a request to re-negotiate like Qwest's would likely be tantamount to asking state commissions to upset and modify existing interconnection agreements, which may only be done in special circumstance not even vaguely present here. For all these reasons, North County respectfully submits that Section 252 does not confer jurisdiction on this Commission to arbitrate attempts at re-negotiating existing interconnection agreements such as the Existing ICA here.

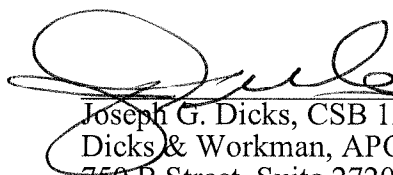
IV. Conclusion

Qwest has failed to plead the requisite condition precedent to negotiating and arbitrating a new interconnection agreement under the rights and jurisdiction conferred by 47 U.S.C. §§ 251 and 252 because it cannot allege it made any request for interconnection, service, or network

element where the parties have been interconnected pursuant to the existing ICA for over a decade. Qwest has failed to plead that the Commission has jurisdiction to arbitrate at whim re-negotiations of existing interconnection agreements. Qwest cannot make such a showing of jurisdiction where the plain language of the statute does not allow it and the Commissions hearing similar requests have never found jurisdiction to settle issues that are resolved by existing interconnection agreements. For all the foregoing reasons, North County respectfully submits that Section 252 does not confer on the Commission jurisdiction to arbitrate this matter and requests that the Commission dismiss Qwest's Petition since it cannot be amended to state a case for Section 252 jurisdiction.

Dated this 29th day of March 2010, in San Diego, California.

Respectfully submitted,




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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 29th day of March 2010, in San Diego, California.



Jessica Hartgrave