BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 780

In the Matter of BEAVER CREEK COOPERATIVE TELEPHONE COMPANY Notice of Adoption, Adopting the Terms of the Interconnection Agreement between Ymax Communications Corp. and Qwest Corporation which was previously approved in ARB 756	BEAVER CREEK COOPERATIVE TELEPHONE COMPANY'S RESPONSE TO QWEST CORPORATION'S OBJECTIONS

Pursuant to OAR 860-016-0025(5), Qwest Corporation ("Qwest") filed objections to the Notice of Adoption, Adopting the Terms of the Interconnection Agreement between Ymax Communications Corp. ("Ymax") and Qwest Corporation that was filed by Beaver Creek Cooperative Telephone Company ("BCT"). Pursuant to OAR 860-016-0025(6), BCT is filing this reply to said objections (the "Reply").

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REPLY TO OBJECTIONS

Under the Commission's rules in OAR 860-016-0025(5), there are five bases upon which an objection may be filed. Qwest is filing its objections based upon Subsections (a) and (e). Under these two subsections, Qwest is arguing that the proposed adoption is unlawful and Qwest is arguing that if the proposed adoption is not unlawful, the cost to Qwest of providing a particular interconnection service or element to BCT is greater than the cost of providing that telecommunications service or element to Ymax. BCT shall address those two arguments as follows.

1. BCT Acted in a Timely Manner to Adopt the Ymax Agreement.

Essentially, Qwest's argument related to whether the adoption is unlawful is that BCT was too late in making its opt-in decision. In order to examine that objection, a brief recitation of the relevant timeline is appropriate:

- The parties in ARB 747 waived the evidentiary hearing and the Arbitrator's Decision was issued on October 20, 2006.
- On November 2, 2006, BCT filed Comments concerning the Arbitrator's Decision.
- On November 14, 2006, BCT wrote to the Commission in ARB 747 stating that no further proceedings in ARB 747 were necessary because BCT had determined to opt-into the Ymax agreement filed in ARB 756 and approved by the Commission.
- On November 14, 2006, the arbitrator issued a memorandum which, in part, asked the parties to advise the Commission whether they would agree to waive the November 20, 2006, statutory deadline for issuance of a final decision.

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- On November 16, 2006, BCT advised the Commission that it would agree to waive the deadline. Qwest did not file a letter stating its position one way or the other, thus apparently not agreeing to waive the deadline.
- On November 16, 2006, BCT filed its formal notice of election of the Ymax agreement under Electronic Filing Number 4058.
- Commission Staff asked BCT to make some relatively minor modifications to the document as filed and requested guidance as to whether the filing should be docketed as part of ARB 365, ARB 747 or under a new docket number. Commission Staff made this request on November 22, 2006, bearing an electronic date stamp of 4:09 p.m. and was received after the offices of BCT's counsel had closed for the Thanksgiving holiday.
- The Commission issued its Order in ARB 747 on November 20, 2006.
- The information requested by Commission Staff was completed on November 27, 2006, the first day following the Thanksgiving holiday.

With this timeline in place, BCT will turn to Qwest's argument.

Qwest's argument that BCT's decision to opt-into the Ymax agreement would constitute an unlawful adoption of the Ymax agreement is premised entirely upon the analysis of the First Circuit in the case of Global NAPs, Inc. v. Verizon New England, Inc., 396 F.3d 16 (1st Cir. 2005). At issue there was a decision of the Massachusetts Department of Telecommunications and Energy ("DTE") stating that Global NAPs was not allowed to opt-into an agreement different than the one approved by DTE in its order closing the arbitration. Factually, Global NAPs did not make any effort to opt-into the interconnection agreement until several weeks after DTE had issued its final

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decision and a few weeks after Global NAPs had already filed suit in federal court challenging DTE's final order.

This issue is discussed in the district court decision which first affirmed DTE's decision. The district court decision is found at 2004 WL 1059792 (D. Mass., May 12, 2004) and is attached to Qwest's Objections as Exhibit 1. The district court, in the same passage that Qwest cites for its position, contains the following analysis:

> [The] DTE clearly held that Global's [the CLEC] choice was curtailed not by the expiration of time, but by its decision to arbitrate: As Verizon points out, *the Sprint Agreement was available to [Global] for adoption before [Global] filed its petition for arbitration and, at any point prior to the issuance of our final Arbitration Order*, [Global] could have chosen to adopt the Sprint Agreement. But once our final Arbitration Order was issued, the adoption process under § 252(i) was not a lawful option in order to comply with the arbitrated decision. [Citation to record omitted, emphasis added.] That is a reasonable and correct interpretation of the statute. See Southern New England Telephone Co. v. Conn. Dept. of Public Utility Co., 285 F.Supp.2d 252, 254 (D.Conn.2003) ("An entering CLEC can either opt into an existing interconnection agreement between the [incumbent] LEC and another CLEC, or it can negotiate [and arbitrate] its own interconnection agreement" (emphasis added).) Global NAPs, Inc. v. Verizon New England, Inc., 2004 WL 1059792, *2.

The district court characterized this description of the rights to opt in under Section 252(i) as "a reasonable and correct interpretation of the statute."[1] Thus, both DTE and the district court agreed that use of the "opt-in" provision of Section 252(i) of the Telecommunications Act of 1996 was available to the CLEC up to the time the final decision in the arbitration was entered.

The First Circuit then described the legal question before it as both narrow and of first impression and formulated the question as follows: "Does a competing carrier have an

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[1] See, page 2 of the district court decision. Please note that the district court decision is not reported in F.Supp.2d. The Commission has available to it a copy as provided by Qwest.

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unconditional right, under §252(i) of the TCA [Telecommunications Act of 1996], to avoid the terms of a final arbitration order from a state telecommunications commission, adjudicating a dispute between the CLEC and ILEC, by seeking to opt into the terms of a previous interconnection agreement that the ILEC has with another CLEC?"[2] The First Circuit decision held that there was not an unconditional right to opt-in to another agreement. However, the First Circuit did not define at what point in time the right is removed. In the case before it, Global NAPs had waited until several weeks after the decision had been entered and, in fact, after Global NAPs had filed a challenge to that decision in court, to make its opt in election.

In this case, BCT notified the Commission on November 14, in advance of the Commission's decision, and, in fact, filed to adopt the Ymax agreement on November 16, 2006, again in advance of the Commission's decision.[3]

If, as suggested by the district court decision quoted above, the cutoff point is the issuance of the final arbitration order, BCT exercised its option prior to that point in time.

In addition, BCT will point out that from a statutory standpoint, even today the Commission's Arbitration Order is not yet final. The statutory time period for seeking reconsideration of the Order has not expired. See, ORS 756.561.

In fact, BCT is in the process of formulating a Motion for Reconsideration. That Motion and the Commission's consideration of such Motion will not be needed if the Ymax election stands.

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[2] 396 F.3d 16 as set forth on page 6 of Exhibit 2 to Qwest's Objections.

[3] As noted in the timeline above, BCT was notified, effectively, on November 27, 2006, that it needed to make some minor modifications to the filing that had been made on November 16, 2006. Those modifications were made the same day.

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Qwest also cites to the Commission's dockets involving Western Radio Services Co. and certain decisions related to an arbitration process between Western Radio and Qwest. In the Western Radio circumstance, Western Radio waited until after an appeal to the federal court was dismissed to attempt to initiate a new arbitration proceeding. The Commission ruled that essentially "pancaking" arbitration proceedings was an inappropriate effort to attempt to avoid the first arbitration decision which had been unsuccessfully appealed. See, Order No. 06-001 (issued January 3, 2006).

Again, BCT's actions are in a much different timeframe than those of Western Radio. BCT informed the Commission of its decision and filed to opt into the Ymax agreement prior to the Commission issuing its November 20, 2006 decision.

The issue here is a new issue. The question is to determine at what point in time a CLEC loses its ability to make an opt-in election under Section 252(i). As Qwest admitted in its Protest, that issue is one of first impression in the Ninth Circuit. Further, the First Circuit decision relied upon by Qwest does not definitively answer the question. The First Circuit decision only points out that Global NAPs' determination to wait to make the election until weeks after it had filed for review of the agency's decision in court was not timely.

2. Qwest's Argument Related to Greater Costs are Unavailing.

Qwest attempts to argue that Qwest would incur greater costs in providing interconnection services to BCT than it would to Ymax. However, the only material that Qwest cites to in its Objections is the testimony from Qwest witnesses about the costs that would be incurred by Qwest if BCT's position that ILEC traffic and CLEC traffic should be commingled on the same trunk

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group were to be adopted. That is not what is allowed under the Ymax agreement. Therefore, that testimony is mixing apples and oranges.

If the provisions related to interconnection in Section 7 of the Ymax agreement are reviewed, they are nearly identical to the provisions that Qwest wants BCT to adopt in ARB 747. The only difference is that the compensation is on a bill and keep basis rather than reciprocal compensation. That is the difference between ARB 747 and the Ymax agreement. There is no additional cost imposed on Qwest by BCT when BCT opts into the Ymax agreement.

The costs for providing interconnection to BCT under the Ymax agreement are identical to Qwest's costs for Ymax. The trunking is the same. The costs are the same.

To the extent that Qwest is arguing that Ymax is a new carrier without a history in the State of Oregon, that argument is a poorly constructed effort to distinguish one apple from another. The type of trunk groups that Ymax would use are the type trunk groups that BCT would use in terms of technical ability and the cost of those trunks. The trunk groups would not be used for ILEC traffic by Ymax. The trunk groups would not be used for ILEC traffic by BCT. There is no additional cost imposed on Qwest by BCT opting into the Ymax agreement.

CONCLUSION

Qwest's Protest filed under OAR 860-016-0025(5)(a) as to additional costs that might be imposed on Qwest by BCT opting into the Ymax agreement (that is, above and beyond those costs that Ymax might impose for the same services) are unfounded and unavailing.

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Qwest's Protest under OAR 860-016-0025(5)(e) that the proposed adoption is unlawful presents a question of first impression, but in a markedly different factual setting than that presented by the First Circuit decision in Global NAPs and the Western Radio dockets. BCT respectfully requests that the Protest be denied.

Respectfully submitted this 28th day of December, 2006.

By: _____
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CERTIFICATE OF SERVICE
ARB 780

I hereby certify that I have served the attached Beaver Creek Cooperative Telephone Company's Response to Qwest Corporation's Objections upon all parties of record in this proceeding by U.S. mail on December 28, 2006, and by electronic mail on December 29, 2006, pursuant to OAR 860-013-0070, to the following parties or attorneys of parties:

ALEX DUARTE
QWEST CORPORATION
421 SW OAK STREET, ROOM 810
PORTLAND, OR 97204
alex.duarte@qwest.com

I further certify that I have sent the attached Beaver Creek Cooperative Telephone Company's Response to Qwest Corporation's Objections by overnight delivery on December 28, 2006, and by e-mail on December 29, 2006, to the following:

FILING CENTER
OREGON PUBLIC UTILITY
COMMISSION
550 CAPITOL STREET NE, STE 215
SALEM, OR 97301
puc.filingcenter@state.or.us

Dated this 28th day of December, 2006.

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December 28, 2006

VIA OVERNIGHT DELIVERY AND E-MAIL

Filing Center
Oregon Public Utility Commission
550 Capitol Street NE, Ste 215
Salem, OR 97301-2551

Re: ARB 780 – Beaver Creek Cooperative Telephone Company's Response to Qwest Corporation's Objections

Dear Sir/Madam:

Enclosed are Beaver Creek Cooperative Telephone Company's Response to Qwest Corporation's Objections and Certificate of Service.

Sincerely,

RICHARD A. FINNIGAN

RAF/km
Enclosures

cc: Alex Duarte (via U.S. mail and e-mail)
Tom Linstrom (via e-mail)