

Law Office of  
Richard A. Finnigan  
2112 Black Lake Blvd. SW  
Olympia, Washington 98512  
Fax (360) 753-6862

Richard A. Finnigan  
(360) 956-7001  
rickfinn@localaccess.com

Kathy McCrary, Paralegal  
(360) 753-7012  
kathym@localaccess.com

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December 28, 2006

**VIA E-MAIL AND U.S. MAIL**

Frances Nichols-Anglin  
Oregon Public Utility Commission  
PO Box 2148  
Salem, OR 97308

Re: ARB 747

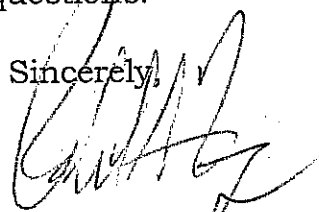
Dear Ms. Nichols-Anglin:

Enclosed for filing please find the original and five (5) copies of the analysis made in response to Qwest Corporation's (Qwest) Response to Petition of Beaver Creek Cooperative Telephone Company for Extension of Date to Comply with Order No. 06-637, along with a Certificate of Service.

Essentially, Qwest's Response consisted of the same analysis that they submitted in ARB 780 as part of their Objections to Beaver Creek Cooperative Telephone Company's (BCT) opt-in to the Ymax agreement. In order that the record is complete for this docket, BCT's response to said Objections is included so that the record in ARB 747 has BCT's response to those legal arguments.

Please let me know if you have any questions.

Sincerely,



RICHARD A. FINNIGAN

RAF/km  
Enclosures

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

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**BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON**

ARB 747

In the Matter of the Petition for Arbitration of an Interconnection Agreement Pursuant to Sections 251 and 252 of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 (47 U.S.C. §251 and 252) Between Beaver Creek Cooperative Telephone Company and Qwest Corporation

BEAVER CREEK COOPERATIVE  
TELEPHONE COMPANY'S REPLY

Beaver Creek Cooperative Telephone Company ("BCT") hereby incorporates the attached analysis submitted in response to Qwest Corporation's Objections in ARB 780 as BCT's Reply to Qwest Corporation's Response to Petition of Beaver Creek Cooperative Telephone Company for Extension of Date to Comply with Order No. 06-637.

Respectfully submitted this 28th day of December, 2006.

By: 

RICHARD A. FINNIGAN, OSB No. 96535  
Attorney for Beaver Creek Cooperative  
Telephone Company

BEAVER CREEK COOPERATIVE TELEPHONE  
COMPANY'S REPLY

Law Office of  
Richard A. Finnigan  
2112 Black Lake Blvd. SW  
Olympia, WA 98512  
(360) 956-7001

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7 **BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON**

8 ARB 780

9 In the Matter of

10 BEAVER CREEK COOPERATIVE  
11 TELEPHONE COMPANY

BEAVER CREEK COOPERATIVE  
TELEPHONE COMPANY'S RESPONSE TO  
QWEST CORPORATION'S OBJECTIONS

12 Notice of Adoption, Adopting the Terms of  
13 the Interconnection Agreement between  
14 Ymax Communications Corp. and Qwest  
15 Corporation which was previously approved  
16 in ARB 756

17 Pursuant to OAR 860-016-0025(5), Qwest Corporation ("Qwest") filed objections to the  
18 Notice of Adoption, Adopting the Terms of the Interconnection Agreement between Ymax  
19 Communications Corp. ("Ymax") and Qwest Corporation that was filed by Beaver Creek  
20 Cooperative Telephone Company ("BCT"). Pursuant to OAR 860-016-0025(6), BCT is filing this  
21 reply to said objections (the "Reply").  
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26 BEAVER CREEK COOPERATIVE  
TELEPHONE COMPANY'S RESPONSE TO  
QWEST CORPORATION'S OBJECTIONS - 1

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Richard A. Finnigan  
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Olympia, WA 98512  
(360) 956-7001

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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.

- 1 • On November 16, 2006, BCT advised the Commission that it would agree to waive the  
2 deadline. Qwest did not file a letter stating its position one way or the other, thus  
3 apparently not agreeing to waive the deadline.  
4 • On November 16, 2006, BCT filed its formal notice of election of the Ymax agreement  
5 under Electronic Filing Number 4058.  
6 • Commission Staff asked BCT to make some relatively minor modifications to the  
7 document as filed and requested guidance as to whether the filing should be docketed as  
8 part of ARB 365, ARB 747 or under a new docket number. Commission Staff made this  
9 request on November 22, 2006, bearing an electronic date stamp of 4:09 p.m. and was  
10 received after the offices of BCT's counsel had closed for the Thanksgiving holiday.  
11 • The Commission issued its Order in ARB 747 on November 20, 2006.  
12 • The information requested by Commission Staff was completed on November 27, 2006,  
13 the first day following the Thanksgiving holiday.  
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15  
16 With this timeline in place, BCT will turn to Qwest's argument.

17 Qwest's argument that BCT's decision to opt-into the Ymax agreement would constitute an  
18 unlawful adoption of the Ymax agreement is premised entirely upon the analysis of the First Circuit  
19 in the case of Global NAPs, Inc. v. Verizon New England, Inc., 396 F.3d 16 (1st Cir. 2005). At  
20 issue there was a decision of the Massachusetts Department of Telecommunications and Energy  
21 ("DTE") stating that Global NAPs was not allowed to opt-into an agreement different than the one  
22 approved by DTE in its order closing the arbitration. Factually, Global NAPs did not make any  
23 effort to opt-into the interconnection agreement until several weeks after DTE had issued its final  
24

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

3 This issue is discussed in the district court decision which first affirmed DTE's decision.  
4 The district court decision is found at 2004 WL 1059792 (D. Mass., May 12, 2004) and is attached  
5 to Qwest's Objections as Exhibit 1. The district court, in the same passage that Qwest cites for its  
6 position, contains the following analysis:  
7

8 [The] DTE clearly held that Global's [the CLEC] choice was curtailed not by the  
9 expiration of time, but by its decision to arbitrate: As Verizon points out, *the Sprint*  
10 *Agreement was available to [Global] for adoption before [Global] filed its petition*  
11 *for arbitration and, at any point prior to the issuance of our final Arbitration*  
12 *Order, [Global] could have chosen to adopt the Sprint Agreement. But once our*  
13 *final Arbitration Order was issued, the adoption process under § 252(i) was not a*  
14 *lawful option in order to comply with the arbitrated decision. [Citation to record*  
15 *omitted, emphasis added.] That is a reasonable and correct interpretation of the*  
16 *statute. See Southern New England Telephone Co. v. Conn. Dept. of Public Utility*  
17 *Co., 285 F.Supp.2d 252, 254 (D.Conn.2003) ("An entering CLEC can either opt*  
18 *into an existing interconnection agreement between the [incumbent] LEC and*  
19 *another CLEC, or it can negotiate [and arbitrate] its own interconnection*  
20 *agreement" (emphasis added).) Global NAPs, Inc. v. Verizon New England, Inc.,*  
21 *2004 WL 1059792, \*2.*

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

26 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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<sup>1</sup> 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.

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

10 In this case, BCT notified the Commission on November 14, in advance of the  
11 Commission's decision, and, in fact, filed to adopt the Ymax agreement on November 16, 2006,  
12 again in advance of the Commission's decision.<sup>3</sup>

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

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

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

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23 <sup>2</sup> 396 F.3d 16 as set forth on page 6 of Exhibit 2 to Qwest's Objections.

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

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

8  
9 Again, BCT's actions are in a much different timeframe than those of Western Radio. BCT  
10 informed the Commission of its decision and filed to opt into the Ymax agreement prior to the  
11 Commission issuing its November 20, 2006 decision.

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

18  
19 2. Qwest's Argument Related to Greater Costs are Unavailing.

20 Qwest attempts to argue that Qwest would incur greater costs in providing interconnection  
21 services to BCT than it would to Ymax. However, the only material that Qwest cites to in its  
22 Objections is the testimony from Qwest witnesses about the costs that would be incurred by Qwest  
23 if BCT's position that ILEC traffic and CLEC traffic should be commingled on the same trunk  
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1 group were to be adopted. That is not what is allowed under the Ymax agreement. Therefore, that  
2 testimony is mixing apples and oranges.

3 If the provisions related to interconnection in Section 7 of the Ymax agreement are  
4 reviewed, they are nearly identical to the provisions that Qwest wants BCT to adopt in ARB 747.  
5 The only difference is that the compensation is on a bill and keep basis rather than reciprocal  
6 compensation. That is the difference between ARB 747 and the Ymax agreement. There is no  
7 additional cost imposed on Qwest by BCT when BCT opts into the Ymax agreement.  
8

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

11 To the extent that Qwest is arguing that Ymax is a new carrier without a history in the State  
12 of Oregon, that argument is a poorly constructed effort to distinguish one apple from another. The  
13 type of trunk groups that Ymax would use are the type trunk groups that BCT would use in terms of  
14 technical ability and the cost of those trunks. The trunk groups would not be used for ILEC traffic  
15 by Ymax. The trunk groups would not be used for ILEC traffic by BCT. There is no additional  
16 cost imposed on Qwest by BCT opting into the Ymax agreement.  
17

#### 18 CONCLUSION

19 Qwest's Protest filed under OAR 860-016-0025(5)(a) as to additional costs that might be  
20 imposed on Qwest by BCT opting into the Ymax agreement (that is, above and beyond those costs  
21 that Ymax might impose for the same services) are unfounded and unavailing.  
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1 Qwest's Protest under OAR 860-016-0025(5)(e) that the proposed adoption is unlawful  
2 presents a question of first impression, but in a markedly different factual setting than that presented  
3 by the First Circuit decision in Global NAPs and the Western Radio dockets. BCT respectfully  
4 requests that the Protest be denied.

5 Respectfully submitted this 28th day of December, 2006.

6  
7  
8 By:   
9 RICHARD A. FINNIGAN, OSB No. 96535  
10 Attorney for Beaver Creek Cooperative  
11 Telephone Company

CERTIFICATE OF SERVICE  
ARB 747

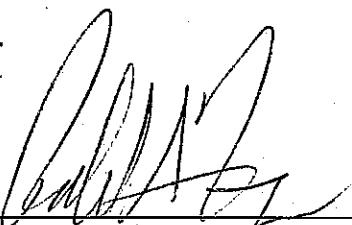
I hereby certify that I have served the attached Beaver Creek Cooperative Telephone Company's Reply upon all parties of record in this proceeding by U.S. mail and electronic mail, pursuant to OAR 860-013-0070, to the following parties or attorneys of parties:

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 Reply by e-mail and U.S. mail 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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Richard A. Finnigan, OSB No. 96535  
Attorney for Beaver Creek  
Cooperative Telephone Company