

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

ARB 589

In the Matter of )  
 )  
QWEST CORPORATION )  
 )  
Petition for Arbitration of Interconnection )  
Rates, Terms, Conditions and Related )  
Arrangements with Universal )  
Telecom, Inc. )

ALJ  
MEMORANDUM

**DISPOSITION: BRIEFING REQUESTED**

Qwest Corporation (Qwest) and Universal Telecom, Inc. (Universal) have an interconnection agreement that expired on February 20, 2000, but which continues in effect until a new agreement is approved. In February 2004, Qwest requested negotiations for a new interconnection agreement with Universal; Universal declined. In July 2004, Qwest petitioned the Commission to arbitrate the terms, conditions, and prices for a new interconnection agreement. Universal moved to dismiss on the basis that an incumbent local exchange carrier (ILEC) may not initiate negotiations, and the parties have each submitted filings.

The analysis appears to have two parts: whether a party may unilaterally commence negotiations under provisions of either the contract, or the Telecommunications Act of 1996 (Act). Universal focused its analysis on the contract; Qwest addressed the Act through the perspective of other state commission decisions. To aid in a final decision, the parties are requested to submit additional briefing addressing both issues, particularly in light of the following analysis.

Regarding the contract, the disputed "Term of Agreement" provision is ambiguous as to how the parties initiate negotiations for a new contract. The disputed provision reads:

This Agreement shall become effective upon Commission approval and shall expire February 20, 2000. Thereafter, the Agreement shall continue in force and effect until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties.<sup>1</sup>

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<sup>1</sup> Section XXXIV.V.

The lack of a provision allowing either party to initiate negotiations is even more baffling because Qwest, or at the time, US West Communications, Inc., signed other agreements that did contain such provisions, and even the contract between Qwest and Universal allows both parties to initiate negotiations under the "Severability" provision.

Under both Oregon and federal law, agreements with an indefinite duration may be terminated at will when reasonable notice is given.<sup>2</sup> However, courts look to the intentions of the parties that signed the agreement, and may find in certain circumstances that the parties intended the contract to be of extended duration.<sup>3</sup> The parties are requested to submit additional briefing to clarify the seemingly ambiguous "Term of Agreement" provision and the related court cases.

Regarding the Act, the plain language of Section 251(c)(1) appears to place the duty to negotiate on ILECs and a separate obligation on the requesting carrier to also negotiate. The statute appears to allow only for non-ILECs to request negotiations. Section 252 allows either carrier to petition for the intervention of the state commission, after the non-ILEC has requested negotiations, and negotiations may or may not take place. Several state commissions have resolved cases in which the non-ILEC raised the issue of whether an ILEC could request negotiations and some expressed opinions on the real meaning of the Act. But, in making their decisions, the state commissions did not contravene the plain language of the Act. Instead, they based their conclusions on either a contract provision that allowed either party to request negotiations,<sup>4</sup> or a finding that the non-ILEC initiated negotiations.<sup>5</sup> It is unclear whether other state commissions have made a decision that allowed the ILEC to request negotiations based on the language of the Act, and the parties are requested to further brief that question as well.

Two round of briefs on these issues are requested: the first round is due "in hand" on Tuesday, November 30; the second round is due Tuesday, December 14, 2004.

Dated at Salem, Oregon, this 15th day of November 2004.

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Christina M. Smith  
Administrative Law Judge

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<sup>2</sup> See *Delta Services & Equipment, Inc. v. Ryko Mfg. Co.*, 908 F.2d 7 (5<sup>th</sup> Cir 1990); *Lund v. Arbonne International, Inc.*, 132 Or App 87 (1994).

<sup>3</sup> See *Paul Gabrilis, Inc. v. Dahl*, 154 Or App 388 (1997), *rev den* 327 Or 553 (1998).

<sup>4</sup> *In re Petition for arbitration of the interconnection agreement between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc.*, 2000 Tenn PUC Lexis 572 (Feb 29, 2000); *In re Petition by BellSouth Telecommunications, Inc. for arbitration of an interconnection agreement with Supra Telecommunications and Information Systems, Inc.*, 2001 Fla PUC Lexis 691 (May 23, 2001).

<sup>5</sup> *In re Petition for arbitration of the interconnection agreement between BellSouth Telecommunications and NOW Communications, Inc.*, 2000 Ala PUC Lexis 1052 (June 23, 2000); *In re Pacific Bell for arbitration of an interconnection agreement with Pac-West Telecom, Inc.*, 1999 Cal PUC Lexis 70 (Feb 4, 1999).