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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

ARB 365

In the Matter of the Petition of Qwest)
Corporation for Arbitration of)
Interconnection Rates, Terms, Conditions,) ORDER
and Related Arrangements with Beaver)
Creek Cooperative Telephone Company.)

DISPOSITION: ARBITRATOR'S DECISION
ADOPTED AS MODIFIED

Introduction

On August 10, 2001, Qwest Corporation (Qwest) filed a petition for arbitration of interconnection rates, terms, conditions, and related arrangements with Beaver Creek Cooperative Telephone Company (Beaver Creek). Qwest filed the petition pursuant to 47 U.S.C. sections 251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act).

On September 4, 2001, Beaver Creek filed a response to Qwest's petition. On September 21, 2001, Beaver Creek filed a motion to strike Qwest's petition on the ground that the petition is procedurally flawed. Qwest responded on September 27, 2001, with a request that the motion to strike be suspended and a procedural conference be scheduled as soon as possible.

On September 28, 2001, the Arbitrator ruled that the petition and the motion to strike addressed the same issues and suspended Qwest's obligation to respond to the motion until further determination at a prehearing conference. A conference was held in this matter on October 26, 2001. On November 2, 2001, the Arbitrator issued a prehearing conference memorandum adopting a schedule for the remainder of the docket and deferring a decision on Beaver Creek's motion to strike until fact finding could occur in this case.

The parties submitted prefiled direct and responsive testimony and determined that a hearing was not necessary. They filed simultaneous briefs on January 11, 2002. The arbitrator issued her decision on February 11, 2002. Beaver Creek filed comments on the decision on February 21, 2002.

Standards for Arbitration

This proceeding is being conducted under 47 U.S.C. section 252, the arbitration provision of the 1996 Act. The Commission has also adopted rules governing arbitration procedures under the Act. *See* OAR 860-016-0000 *et seq.* Subsection (c) of Section 252 of the Act provides:

Standards for Arbitration—In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement a State commission shall—

- (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251;
- (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
- (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Commission Review

Section 252(e)(1) of the Act requires that any interconnection agreement adopted by arbitration be submitted for approval to the state commission. Section 252(e)(2)(B) provides that the state commission may reject an agreement (or any portion thereof) adopted by arbitration only “if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.” Section 252(e)(3) further provides:

Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Summary of Commission Decision

Beaver Creek filed comments taking issue with portions of the Arbitrator’s Decision. The Commission has reviewed the Arbitrator’s Decision and the comments in accordance with the standards set out above. We conclude that the Arbitrator’s Decision, as modified herein, comports with the requirements of the Act, applicable Federal Communications Commission (FCC) regulations, and relevant state law and regulations.

Beaver Creek Comments

Beaver Creek raises six issues with respect to the Arbitrator's Decision. Three issues are procedural and are considered together.

Issue I—Commission Jurisdiction

Beaver Creek again raises the issue that this matter is not properly before the Commission because the arbitration provisions of section 252(b) of the Telecommunications Act of 1996 (the Act) cannot be triggered by an incumbent local exchange carrier. The Arbitrator's Decision deals with this issue and we subscribe to the resolution in that Decision.

Issue II—Qwest's Interconnection Agreement is Inappropriate Because It Includes Provisions Inapplicable to Beaver Creek's Operations

Qwest submitted an interconnection agreement with its petition. Beaver Creek refused to enter into negotiations with Qwest about the agreement and did not address Qwest's proposed agreement with sufficient specificity to allow the Arbitrator to modify the agreement. In other arbitrations before this Commission, parties have gone paragraph by paragraph through the proposed interconnection agreement to allow the Arbitrator to choose between their positions. Beaver Creek did not engage in adequate discussion of provisions in Qwest's proposed agreement to allow such choice. The Arbitrator therefore correctly adopted Qwest's proposed agreement in toto.

Beaver Creek urges that the Commission should adopt its agreement rather than Qwest's. Beaver Creek's agreement is based on bill and keep rather than providing for reciprocal compensation for exchange of competitive traffic. The Arbitrator's Decision explains that bill and keep may substitute for the obligation on all carriers to establish reciprocal compensation arrangements under section 251(b)(5) if both carriers agree. Qwest does not agree to such a regime or it would not have filed a petition for arbitration. For this reason alone, Beaver Creek's proposed interconnection agreement is inadequate.

Issue III—The Arbitrator's Decision Failed to Address the Outstanding Issue of Qwest's Routing Traffic Improperly Through the Oregon City/Beaver Creek EAS Trunk

Beaver Creek raised the issue of Qwest's behavior in the Beaver Creek exchange, where Beaver Creek is the incumbent. The Arbitrator properly decided that this issue is not before the Commission in an arbitration proceeding filed by Qwest for the purpose of establishing an interconnection relationship to deal with competitive traffic in the Oregon City exchange. Beaver Creek has other remedies for Qwest's alleged wrongs against it. For one thing, Beaver Creek could have voluntarily negotiated an agreement with Qwest that would address its concerns about its own exchange.

Issues IV and V—The Time Lines in the Ordering Paragraphs Do Not Accord with Commission Rules

Beaver Creek correctly points out that the time lines in the ordering paragraphs of the Arbitrator's Decision do not accord with Commission rules. The Commission has modified the ordering paragraphs to read as follows:

ARBITRATOR'S DECISION

1. Within 14 days after the Commission issues its arbitration decision, Qwest shall prepare an interconnection agreement complying with the terms of the arbitration decision and serve it on Beaver Creek. Beaver Creek shall either sign and file the agreement or file objections to it within 10 days of service of it. If objections are filed, they shall state how the agreement fails to comply with the arbitration decision, and offer substitute language complying with the decision. The Commission will approve or reject a filed interconnection agreement within 30 days of its filing, or the agreement will be deemed approved. The contract shall include Qwest's most current forms and pricing.
2. The contract is effective upon final approval by the Commission.

Issue VI—The Interconnection Agreement Should Be Updated to Include Qwest's Most Current Forms and Pricing

The Commission agrees with Beaver Creek on this issue and has included this requirement at the end of Paragraph 1 (*noted above*).

ORDER

IT IS ORDERED that the Arbitrator's Decision in this case, attached to and made part of this order as Appendix A, is adopted as modified herein.

Made, entered, and effective _____.

Roy Hemmingway
Chairman

Lee Beyer
Commissioner

Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

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Procedural History

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On September 4, 2001, Beaver Creek filed a response to Qwest's petition. On September 21, 2001, Beaver Creek filed a motion to strike Qwest's petition on the ground that the petition is procedurally flawed. Qwest responded on September 27, 2001, with a request that the motion to strike be suspended and a procedural conference be scheduled as soon as possible.

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The parties submitted prefiled direct and responsive testimony and determined that a hearing was not necessary. They filed simultaneous briefs on January 11, 2002.

Applicable Law

This proceeding is being conducted under 47 U.S.C. § 252(b), the arbitration provision of the 1996 Act. The Commission has also adopted rules governing arbitration procedures under the Act. *See* OAR 860-016-0000 *et seq.*

Findings of Fact

Qwest is an incumbent local exchange carrier (ILEC) in the Oregon City exchange. Beaver Creek, a cooperative and a completely facilities based carrier, is the ILEC for the adjacent Beaver Creek exchange. As ILECs that serve neighboring exchanges, Qwest and Beaver Creek have exchanged Extended Area Service (EAS) traffic between end users in each exchange since 1979. EAS permits a Beaver Creek end user in the Beaver Creek exchange to originate a call that terminates to a Qwest end user in the Oregon City exchange without having to incur interexchange, intraLATA toll charges. The same principle applies for calls made by Qwest end users in the Oregon City exchange to Beaver Creek end users in the Beaver Creek exchange. EAS traffic is noncompetitive; that is, the carriers who exchange EAS traffic are not competing for the same end users in the same exchange.

Beaver Creek was certified as a competitive provider in Oregon by Order No. 96-248.¹ Beaver Creek offers and provides local exchange service and carrier access service to end users in the Oregon City exchange, in direct competition with Qwest. Beaver Creek routes calls originated by its Oregon City end users to Qwest end users in the same Oregon City exchange through its central office in the Beaver Creek exchange and then across the EAS trunk groups to Qwest's central office in the Oregon City exchange, for termination to the Qwest end user. Qwest and Beaver Creek do not have an interconnection agreement that governs their exchange of traffic in the Oregon City exchange. Beaver Creek is using the EAS trunk groups, which were designed for the transfer of noncompetitive, interexchange traffic, to transfer competitive traffic.

On March 5, 2001, Qwest sent Beaver Creek a formal request to negotiate an interconnection agreement. Beaver Creek responded that it did not accept the letter as a request to negotiate under 252(a) because Qwest is an ILEC and Beaver Creek is a CLEC. Beaver Creek asserted that the Act allows only a CLEC to request negotiation with an ILEC. Qwest filed its petition in the present matter on August 10, 2001, pursuant to 252(b) of the Act and OAR 860-016-0000 *et seq.*

All other CLECs in Oregon that exchange competitive traffic with Qwest have entered into interconnection agreements with Qwest.

¹ Although Beaver Creek agrees that it is a CLEC for purposes of federal law (and hence of this proceeding), Beaver Creek contests that it is a CLEC for state law purposes. Two cases are currently pending before the Oregon Court of Appeals in which Beaver Creek argues that it should not be classified as a CLEC for purposes of state certification under ORS 759.020.

Issue

In its petition for arbitration, Qwest identified the following issue: Is Beaver Creek, a CLEC that operates in Qwest's ILEC exchange, required to execute an interconnection agreement with Qwest to establish the terms, conditions, and prices of interconnection between the two companies?

Beaver Creek's response consists of four points. First, Beaver Creek asserts that under the terms of the Act, Qwest as an ILEC may not invoke the negotiation that triggers the arbitration provisions of the Act. Second, Beaver Creek argues that since it is operating in the Oregon City exchange as an ILEC, specifically as a cooperative simply expanding the boundaries of the cooperative, the provisions of §252 of the Act do not apply. Third, Beaver Creek maintains that Qwest's petition is factually incorrect in alleging that Beaver Creek has refused to negotiate. Beaver Creek asserts that after the Commission issued Order No. 00-711, Beaver Creek requested that Qwest negotiate an agreement that would cover only local number portability (LNP), and Qwest refused to do so. Fourth, Beaver Creek argues that it should not be forced into an agreement with Qwest that contains numerous provisions that are inapplicable to Beaver Creek's operations.

Beaver Creek's Motion to Strike. The threshold issue in this proceeding is Beaver Creek's first point, which is also the subject of its motion to strike. Section 252(b) of the Act provides:

(1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on 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.

Beaver Creek reads this subsection to preclude Qwest, as an ILEC, filing a petition to arbitrate. Because Qwest has not *received a request* for negotiation, Beaver Creek reasons, the arbitration provisions of the Act have not been triggered and Qwest's petition must be dismissed. Beaver Creek argues, in other words, that only CLECs can trigger the clock for arbitration.

Beaver Creek contends that the rules of statutory construction support this conclusion. Beaver Creek notes that Congress passed the Act in order to foster competition in local telephone service. The intended beneficiaries of the Act, according to Beaver Creek, are new entrants, the CLECs. Beaver Creek argues that Qwest, the ILEC, is trying to avail itself of the benefits of §252 of the Act, but it does not have the right to do so. Beaver Creek maintains that Qwest has recently argued to the Federal District Court of Oregon that "The goals of Sections 251 and 252 are very different than Section 253. Sections 251 and 252 are clearly designed to aid new entrants and impose requirements on incumbents." *Qwest Corporation v. City of Portland*, Oregon Federal

District Court No. 01-1005-JE, Qwest Brief in Opposition to Motion to Dismiss or for Summary Judgment.

Resolution. Beaver Creek's interpretation of 252(b)(1) is overly restrictive. To understand the meaning of the subsection in question, it is necessary to consider the purpose of the Act as a whole. Beaver Creek correctly identifies the purpose as fostering competition in local telephone service.

In the usual case, incumbents have telephone networks in place with which CLECs want to connect. The language of §252(b)(1) assumes this state of affairs. However, the factual situation in this proceeding is not the usual case. Beaver Creek is an established ILEC in its own exchange and for purposes of the Act is a CLEC in Qwest's Oregon City exchange. Beaver Creek is using existing EAS facilities, designed for ILEC to ILEC exchange of traffic, for competitive traffic. Beaver Creek is physically able to exchange competitive traffic without further interconnection with Qwest's network.

Beaver Creek contends that Sections 251 and 252 of the Act are for the benefit of CLECs.² However, Section 251(b)(5) of the Act states that all local exchange carriers, CLECs and ILECs alike, have a *duty* to establish reciprocal compensation arrangements for the exchange of telecommunications. Beaver Creek has refused to negotiate the terms of such arrangements with Qwest.³ Given this situation, Qwest's recourse to Section 252 furthers competition by giving the incumbent a means of requesting the competitive provider to come to terms on the exchange of traffic, as all other CLECs in Oregon that interconnect with Qwest have done. Allowing Qwest to invoke the arbitration procedures in this case levels the playing field for all other CLECs and allows the Commission to exercise the jurisdiction over interconnection arrangements given it in the Act. In this situation, allowing the incumbent to send a request for arbitration furthers the goals of the Act.

Other state commissions have allowed incumbents to send requests for arbitration under Section 252(b) as well. *See, e.g., Re BellSouth Telecommunications, Inc.*, Docket No. 001305-TI PSC-01-1180-FOF-TI (Fla. PSC May 23, 2001) (*BellSouth*); *Re Pacific Bell (U 1001 C) for arbitration of an interconnection agreement with Pac-West Telecomm, Inc. (U5266)*, Decision No. 99-02-014, 1000 Cal PUC LEXIS 70 (Cal. PUC February 4, 1999) (*Pac-West*).

² Qwest has explained that its arguments before the Oregon District Court in the City of Portland case were not interpretations of Sections 251 and 252 but addressed the meaning of Section 253. In any event, we do not take Qwest's statement about Sections 251 and 252 as dispositive here. Section 251 clearly imposes duties on all local exchange carriers, for example.

³ Beaver Creek argues that it has not refused to negotiate with Qwest, asserting that it has not refused to negotiate with Qwest but rather that it has tried to negotiate a LNP only agreement for some time. In the context of the present proceeding, however, Beaver Creek's response to Qwest's March 5, 2001 request for negotiation qualifies as a refusal to negotiate for purposes of the arbitration sections of the Act.

For the above reasons, Beaver Creek's motion to strike is denied. The Commission has jurisdiction to process Qwest's petition for arbitration.

Is Beaver Creek Required to Execute an Interconnection Agreement with Qwest? In its response to Qwest's arbitration petition, Beaver Creek asserts that since it operates in the Oregon City exchange as an ILEC, as a cooperative expanding its boundaries as a cooperative, the provisions of Section 252 of the Act do not apply to it. Beaver Creek appears to have dropped this argument and admits that for purposes of this proceeding it is a CLEC in the Oregon City exchange. Beaver Creek also argues in its response that Qwest's petition is factually incorrect in alleging that Beaver Creek has refused to negotiate. This argument is addressed above; Beaver Creek refused, in its response to Qwest's March 5, 2001 letter, to enter into negotiations on the interconnection agreement that Qwest requested.

The remaining issue is whether Beaver Creek must execute an interconnection agreement with Qwest. Beaver Creek makes a number of arguments in opposition to Qwest's position that it must do so.

First, Beaver Creek contends that Qwest is wrong in arguing that an interconnection agreement is required as a matter of law. Beaver Creek maintains that courts have determined that Sections 251 and 252 of the Act are intended to benefit CLECs, not ILECs. Beaver Creek cites to *Verizon North, Inc. v. Strand*, 140 F.Supp.2d 803, 812 (W.D.Mich 2000). This case is not on point. It deals with the criteria for determining whether a statute creates an individual federal right enforceable under Section 1983 of the Civil Rights Act, a very different issue from the one presented in this arbitration. Beaver Creek also cites to *GTE Northwest Inc. v. Hamilton*, 971 F.Supp. 1350, 1352 (D.Or. 1997), with no further elucidation of that case's relevance.

It is clear that in the present context, CLECs and ILECs both have obligations under Section 251, as noted above. The fact that in the usual situation the Act was intended to benefit CLECs does not excuse Beaver Creek in the instant case from its obligation to negotiate terms and conditions of interconnection under Section 251(b).

Beaver Creek next argues that the Commission's orders in docket IC 3, a case brought by Beaver Creek against Qwest, does not decide the issue of whether a written interconnection agreement is necessary in the present case. Beaver Creek characterizes the decision in docket IC 3 as narrow, holding only that if Beaver Creek wished to avail itself of one of the services available under Section 251 (in that case, LNP), it must do so through an interconnection agreement. Order No. 00-440 as amended by Order No. 00-711 at 4.⁴

⁴ The relevant passage reads:

We conclude that the Act mandates carrier to carrier interconnection agreements for services in subsections (1) through (5) of Section 251(b). Read together with §251(c) and §252, we conclude that those agreements must take the form of written interconnection agreements. Subsection 251(c)(1) imposes on an incumbent carrier the duty to negotiate in good faith to reach agreement on how to provide the services mandated in Sections (b) (1)-(5). Section 252 requires that agreements be filed with and approved by the

Beaver Creek maintains that contrary to the Commission's language in Order No. 00-711, the Act does not require a Section 252 interconnection agreement for any service provided under Section 251. Section 251(f) exempts rural carriers from certain obligations, specifically Section 251(c) obligations including the responsibility to execute an interconnection agreement. However, rural carriers are still responsible for meeting their obligations under Section 251(b); for instance, they must provide LNP and do not need an interconnection agreement to do so. Also, Beaver Creek asserts, most state commissions have set ground rules for providing dialing parity (required by Section 251(b)(3)) without an interconnection agreement.

Beaver Creek argues that it does not wish to avail itself of any of the services available under Section 251, having determined that at present LNP is not a necessary service. Beaver Creek also contends that it does not need unbundled elements under Section 253(c)(3), because it is a completely facilities based carrier. Nor does it need resale at a discount under Section 251(c)(4) or collocation under Section 251(c)(6).

Beaver Creek argues, finally, that it does not need an interconnection agreement for reciprocal compensation, because it has established a bill and keep relationship with Qwest for the exchange of traffic in Oregon City. Beaver Creek argues that its routing traffic over EAS trunks exactly mirrors Qwest's routing traffic in the Beavercreek exchange. This, according to Beaver Creek, reflects a bill and keep arrangement between Beaver Creek and Qwest. Beaver Creek also argues that Qwest has allowed Hood Canal Communications to route competitive local traffic over an EAS trunk in the State of Washington. Beaver Creek believes that the Hood Canal situation belies Qwest's assertion of burden because Qwest allows Hood Canal to route competitive traffic over EAS trunks.

Resolution. Beaver Creek competes with us in Qwest's Oregon City exchange, routing calls over EAS trunks to Qwest end users. Beaver Creek wishes to maintain this arrangement without an interconnection agreement, on the basis of bill and keep.

Bill and keep is an acceptable substitute for reciprocal compensation if both parties agree to it. Here it is clear that Qwest does not agree to bill and keep; otherwise Qwest would not have filed its arbitration petition. The obligation to establish reciprocal compensation arrangements under Section 251(b)(5) is a duty for CLECs and ILECs alike; therefore it is a duty for Beaver Creek.

relevant state commission. Section 252 also prohibits preferential treatment of any carrier and mandates that the terms of agreements be made available to all carriers. These requirements clearly contemplate a written interconnection agreement for the provision of services pursuant to §251(b). In requiring a written interconnection agreement for provision of LNP, Qwest has not violated the Act.

Beaver Creek's arguments about how Qwest behaves in the Beaver Creek exchange do not bear on the decision in this proceeding. According to Section 252(b)(4)(A) of the Act:

The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

Neither Qwest's petition nor Beaver Creek's response, set out above, raises the issue of Qwest's behavior in the Beaver Creek exchange. That question is not relevant to this proceeding.

The Hood Canal situation does not argue against Qwest's position that it should have an interconnection agreement for competitive local traffic. Qwest points out that it has an interconnection agreement with Hood Canal, under which the parties have a separate local competitive trunk group within the same facility as the EAS trunks to carry the local competitive traffic. Beaver Creek contends that the separate trunk group makes no difference to the burden on the network. However, the issue in this proceeding is not the amount of burden on Qwest's network but Beaver Creek's obligation to arrange with Qwest for reciprocal compensation for local competitive traffic.

Beaver Creek contends that the Act does not require interconnection agreements for the services listed at Section 251(b)(1)-(5) of the Act. I disagree. Although the issue the Commission addressed in docket IC 3 was limited to LNP, the reasoning the commission used is applicable here as well (*see* Footnote 4 above). The rural carrier exemption is not relevant here, precisely because it is an *exemption* from the requirements otherwise imposed on incumbents, and neither Qwest nor Beaver Creek claims rural carrier status. Where state commissions have intervened and established ground rules, as for dialing parity, those rules govern the relationship between carriers and preempt the need for an interconnection agreement. But for a matter such as reciprocal compensation, the parties must have a written interconnection agreement.

I conclude that Beaver Creek must, as a matter of law, have an interconnection agreement with Qwest to establish reciprocal compensation for competitive local traffic. This requirement puts Beaver Creek on equal footing with the other CLECs in Oregon that interconnect with Qwest and allows the Commission to exercise the oversight over carrier to carrier agreements that the Act gives us.

Which interconnection agreement should the Commission order the parties to adopt? OAR 860-016-0030(4) provides in relevant part:

After the oral hearing or other procedures (for example, rounds of comments), each party will submit its "final offer" proposed agreement. The arbitrator will choose between the two final offers.

Beaver Creek's proposed agreement addresses only the interexchange of local traffic on a bill and keep basis. In support of Commission adoption of its agreement, Beaver Creek simply states "that is all that is being done in this case and that is all that is needed."

Beaver Creek argues that it does not need many of the provisions of the interconnection agreement Qwest submitted. However, its objections to Qwest's proposed agreement are not specific. Beaver Creek lists a number of provisions that it considers unnecessary, but asserts that the list is not exhaustive. The vague nature of Beaver Creek's response means that Beaver Creek does not present the Commission with specific issues for decision. Beaver Creek could also have negotiated with Qwest to design a more appropriate agreement but chose not to do so.

Given the evidence presented, I choose Qwest's proposed agreement as the interconnection agreement between Beaver Creek and Qwest for competitive traffic.

Arbitrator's Decision

1. Within 30 days of the Commission's final order in this matter, Qwest Corporation shall submit to Beaver Creek a contract incorporating terms that reflect the Commission's final decision. The contract shall bear the signature of a person authorized by Qwest to sign the contract.
2. Within 5 days of receipt of the contract from Qwest, Beaver Creek shall return the contract to Qwest with the signature of a person authorized by Beaver Creek to sign the contract. Beaver Creek shall also file a copy of the contract with the Commission.
3. The contract is effective immediately upon delivery of the signed agreement to Beaver Creek.
4. As provided in OAR 860-016-0030(10), any person may file written comments within 10 days of the date this decision is served.

Dated this 11th day of February, 2002, in Salem, Oregon.

Ruth Crowley
Arbitrator