ORDER NO. 02-367

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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, and Related Arrangements with Beaver Creek Cooperative Telephone Company.	)))))	ORDER

DISPOSITION: APPLICATION FOR RECONSIDERATION DENIED

On March 7, 2002, the Commission issued Order No. 02-148 adopting the Arbitrator's Decision as modified. In that order, the Commission chose Qwest Corporation's (Qwest) proposed interconnection agreement and rejected Beaver Creek Cooperative Telephone Company's (Beaver Creek) arguments.

On April 5, 2002, Beaver Creek filed a motion for reconsideration of Order No. 02-148 on the grounds that Beaver Creek has uncovered additional evidence and that the Commission made a mistake of law in the order.

Beaver Creek's Requests for Reconsideration

1. Beaver Creek requests reconsideration of two portions of Order No. 02-148. The first request involves Issue III, which in resolving the Commission agreed that the Arbitrator properly decided that the issue of Qwest's behavior in the Beavercreek exchange is not before the Commission in the arbitration proceeding. Beaver Creek contends that as it originally raised the issue, the issue had two components. The first component is Qwest's use of the EAS trunks between Qwest's Oregon City exchange and Beaver Creek's Beavercreek exchange. The second is the exchange of traffic originating from Qwest customers in the Beavercreek exchange and terminating to Beaver Creek customers in the Beavercreek exchange. Beaver Creek seeks reconsideration of the second aspect of this issue.

Beaver Creek asserts that it has additional evidence on this issue that was not available at the time the Commission issued its order. Beaver Creek also asserts that there is good cause for further examination of the issue pursuant to OAR 860-014-0095(3)(d). Finally, Beaver Creek believes that under OAR 860-014-0095(3)(c), there was an error of fact in Order No. 02-148, specifically in the sentence: "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."

Beaver Creek contends that after receiving the Arbitrator's decision in this matter, it sent Qwest a letter dated February 22, 2002, requesting that Qwest negotiate an interconnection agreement related to traffic originating from Qwest's customers in the Beavercreek exchange. Beaver Creek asserts that this was not its first attempt to have Qwest negotiate the interexchange of traffic originating from Qwest's Beavercreek exchange customers. According to Beaver Creek, Qwest refused to address the issue, by letter dated March 20, 2002, stating that under the memorandum of understanding (MOU) between the parties, it was not required to negotiate an agreement related to that traffic. Qwest responded to Beaver Creek's negotiation request and refused to discuss the interconnection of traffic originating from Qwest's customers in the Beavercreek exchange. Beaver Creek asserts that the Commission erred in stating that Beaver Creek had the ability to voluntarily negotiate an agreement with Qwest that would address its concerns about the Beavercreek exchange.

Beaver Creek also argues that Qwest's position is inconsistent with the position that the Commission has taken before the Court of Appeals. In two briefs to the Court of Appeals, the Commission has stated that we have not appointed more than one incumbent in any one service area. *See* Commission briefs in Oregon Court of Appeals Cases A112862 and A109890.

2. The second issue for which Beaver Creek requests reconsideration is the form of the interconnection agreement. There is some inconsistency between the resolution of Issues IV, V, and VI, on the one hand, and Issue II. According to Beaver Creek, in the course of resolving Issue II, the Commission ruled that absent voluntary agreement, bill and keep would not be appropriate to include in the interconnection agreement. In resolving Issue IV and V (as a result of Issue VI), the Commission modified the Arbitrator's decision to require that the interconnection agreement submitted by Qwest include its most current forms and pricing. Qwest's most current forms and pricing include an option to use bill and keep for local interconnection; hence, the inconsistency in the Commission's order.

Beaver Creek contends that because a number of interconnection agreements entered into with competitive local exchange carriers (CLECs) pursuant to 47 USC §251 include bill and keep, Qwest is obligated to offer bill and keep as an option in its agreements. *See* 47 USC §252(i). Beaver Creek asserts that Qwest verbally offered it an interconnection agreement with a bill and keep alternative. When the agreement arrived, however, it contained a reciprocal compensation agreement instead, and Qwest told Beaver Creek that the reason the bill and keep language was not submitted is that the parties had exchanged traffic in the past and Qwest felt constrained by the Federal Communications Commission (FCC) 01-131 (which Beaver Creek does not explain).

According to Beaver Creek, under the standards of OAR 860-014-0095(3), this information about Qwest's verbal offer of the bill and keep option and its rationale for withdrawing the option constitute additional evidence at the time the Commission's order was

issued and a mistake of law (the effect of the pick and choose provisions in 47 USC §251(i)). *See* OAR 860-014-0095(3)(a) and (c).

Qwest's Response to Beaver Creek's Application for Reconsideration. Qwest responded to Beaver Creek's application on April 22, 2002.

1. In response to Beaver Creek's first issue, involving the exchange of traffic originating from Qwest customers in the Beavercreek exchange and terminating to Beaver Creek customers in the same exchange, Qwest argues that there is no new evidence on this issue that was unavailable or not reasonably discoverable before the Commission's order issued. Qwest asserts that Beaver Creek has long known that Qwest takes the position that it is not acting as a competitive provider in the Beavercreek exchange. Likewise, Beaver Creek has long known of Qwest's position that the 1997 MOU addressed this isolated situation and that Qwest need not enter into an interconnection agreement with Beaver Creek for Qwest to continue serving customers in the Beavercreek exchange under the MOU.

Qwest argues that Beaver Creek's February 22, 2002, letter raising the issue is not new evidence. Nor is Qwest's response of March 20, 2002. In its letter, Qwest simply again noted that the 1997 MOU resolved the issues associated with this situation and again reminded Beaver Creek that "Qwest has not served, nor does it desire to serve, end users in the Beaver Creek territory as a CLEC."

Qwest maintains that even if its March 20, 2002, letter constituted new evidence, that evidence is not essential to the decision in this proceeding. Qwest notes that the issue to be decided in this arbitration petition was whether Beaver Creek's competitive operations in Qwest's Oregon City exchange required it to execute an interconnection agreement with Qwest. The Commission correctly answered this question in the affirmative, according to Qwest. According to Qwest, Beaver Creek has not petitioned the Commission to arbitrate or to require Qwest to enter into an interconnection agreement concerning Qwest's operations in the Beavercreek exchange.[1]

Qwest also reiterates the Arbitrator's determination, which the Commission adopted, that Beaver Creek's arguments about Qwest's activity in the Beavercreek exchange do not bear on the decision in this proceeding. The Telecommunications Act of 1996, at §252(b)(4)(A), limits consideration of any petition for arbitration and any response to the petition to the issues set forth in the petition and the response. The issue of exchange of traffic in the Beavercreek exchange was not under consideration in this arbitration.

[1] Qwest notes, however, that there is no requirement that it enter into an interconnection agreement with Beaver Creek for exchange of traffic between Qwest and Beaver Creek originating from Qwest's customers in the Beavercreek exchange. Qwest does not compete in the Beavercreek exchange, and the only reason that Qwest provides service to a few customers in the Beavercreek exchange was because of a mistake during reallocation of that territory. Beaver Creek and Qwest exchange traffic pursuant to an MOU from 1997. Qwest is maintaining the status quo ante by continuing to act as the incumbent local exchange carrier for those customers in the subject territory unless they choose to obtain service from another provider. Qwest maintains that it did not win those customers from Beaver Creek or any other provider and the traffic is not competitive traffic.

Qwest also opposes Beaver Creek's contention that the Commission's mention of Beaver Creek's "other remedies" (Order No. 02-148 at 3) somehow compels reconsideration. First, Qwest notes, Beaver Creek's remedies were not the subject of the current arbitration. Second, the Commission was correct in stating that Beaver Creek has other remedies for Qwest's alleged wrongs. Beaver Creek has advised Qwest that it intends to file a petition with the Commission or file a court action regarding Qwest's alleged improper use of Extended Area Service (EAS) trunks for the exchange of non EAS traffic. If Beaver Creek believes that Qwest has done anything unlawful, Qwest argues that Beaver Creek can bring any petition, complaint, or action that it deems appropriate.

Finally, Qwest opposes Beaver Creek's statement that Qwest's position is "inconsistent" with the position the Commission has taken before the Court of Appeals. Qwest contends that Beaver Creek simply restates an argument it made before in this proceeding. According to Qwest, there is no inconsistency and the Commission did not state that Qwest is no longer the incumbent in the Beavercreek exchange. Instead, the Commission stated that Qwest no longer has carrier of last resort obligations in the exchange. The Commission's appellate brief merely addressed Qwest's status in the Beavercreek exchange in general, not the subject territory in particular. That statement does not mean that Qwest is not continuing to act as the ILEC in the subject territory under the MOU.

2. As to the question of bill and keep, Qwest argues that there is no merit to Beaver Creek's second issue for reconsideration. Beaver Creek asserts that there is an inconsistency in the Commission's order that justifies reconsideration. The Commission required Qwest to present to Beaver Creek an interconnection agreement that included Qwest's "most current forms and pricing." Order at 4. According to Beaver Creek, Qwest's most current forms and pricing include an option to use bill and keep for the exchange of local traffic. The interconnection agreement that Qwest presented to Beaver Creek provided for reciprocal compensation. Beaver Creek asserts that this inconsistency warrants revising the order to direct Qwest to include the bill and keep provision in the interconnection agreement.

Qwest argues that there is no inconsistency in the order. Although the term "current forms and pricing" is vague and undefined, there is no reasonable way it could be interpreted to include bill and keep. The language was adopted at Beaver Creek's request. In its Comments on the Arbitrator's decision, Beaver Creek asserted that the interconnection agreement approved by the Arbitrator "includes language and price terms that are not current." Beaver Creek went on to request that "if the interconnection agreement proposed by Qwest is adopted by the Commission, it should be updated to include Qwest's latest forms and price lists." Beaver Creek raised the issue in the event that the Commission adopted reciprocal compensation, so Beaver Creek could not have meant "latest forms and price lists" to include bill and keep.

Even assuming for the sake of argument that that bill and keep is a part of Qwest's current forms and pricing, the Commission could not have meant what Beaver Creek asserts that it meant when it required Qwest to provide the most current forms and pricing. According to Beaver Creek, the general directive to provide current forms and pricing requires Qwest to offer bill and keep. According to Qwest, such a reading makes no sense, because the

Commission unambiguously rejected Beaver Creek's attempt to preserve its prior relationship with Qwest, including the exchange of competitive local traffic on a bill and keep basis. The general language cited by Beaver Creek cannot override the specific decision of the Commission.

Beaver Creek errs, Qwest asserts, when it claims that Qwest's most current forms and pricing include bill and keep as an option for the exchange of local traffic. Beaver Creek cites no authority in making that declaration. That is, according to Qwest, because there is none. Presumably, Beaver Creek refers to Qwest's Statement of Generally Available Terms (SGAT) that Qwest has filed with the Commission in Docket UM 973 and which the Commission has allowed to go into effect.

The most recent effective version of the SGAT is the Fourth Revision, which Qwest filed with the Commission on January 30, 2002, and which Qwest provided to Beaver Creek as the interconnection agreement that complied with the Commission's order in this arbitration. Section 7.3.4 of the SGAT governs the exchange of local traffic. That section provides for reciprocal compensation for the exchange of EAS/local service. Thus, Beaver Creek's argument is wrong, Qwest contends, and there are no grounds for reconsidering the order.[2]

Beaver Creek maintains that Qwest offered Beaver Creek bill and keep, then retracted the offer. According to Qwest, that conversation occurred after the Commission issued the order requiring Qwest to provide an updated agreement to Beaver Creek. Qwest asserts that its negotiator mistakenly believed that Beaver Creek was able to choose whether it wanted bill and keep or reciprocal compensation in the interconnection agreement.

Qwest points out that under the FCC's ISP Intercarrier Compensation order,[3] Qwest offers bill and keep for ISP bound and local traffic to CLECs that enter new markets or expand into markets they have not previously served. If the CLEC had exchanged Beaver Creek's competitive CLEC traffic with Qwest before April 18, 2001, the adoption date of the FCC ISP Intercarrier Compensation Order, that CLEC would not be eligible for bill and keep under the FCC's order (*see* FCC Order at ¶81). Beaver Creek and Qwest have exchanged traffic since long before April 18, 2001. Therefore, Beaver Creek is not entitled to bill and keep under the FCC's ISP Intercarrier Compensation Order. Qwest asserts that its negotiator made a mistake when she told Beaver Creek that Beaver Creek could choose between bill and keep and reciprocal compensation.

Qwest argues that its mistake in negotiations does not justify reconsideration under OAR 850-014-0095. It does not constitute new evidence essential to the decision. Qwest contends that its negotiator's offer was simply a miscommunication, not evidence of anything

[2] Qwest notes that in certain circumstances it offers bill and keep to CLECs that satisfy specific criteria. However, bill and keep is the exception and therefore the SGAT contains reciprocal compensation arrangements, not bill and keep, for local traffic.

[3] *In the Matter of Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001).

relating to this docket. The decision before the Arbitrator was which proposed agreement the Commission should adopt in toto, not the specific compensation arrangements in each agreement. As Qwest points out, Beaver Creek submitted a vague response to Qwest's petition for arbitration, failing to present the Commission with specific issues for decision. *See* Arbitrator's Decision at 8. The Arbitrator adopted Qwest's proposed interconnection agreement in its entirety. That agreement included reciprocal compensation for the exchange of competitive local traffic. Hence, evidence about the specific issue of reciprocal compensation is not relevant, let alone essential, to the decision.

Beaver Creek argues additionally that since a number of interconnection agreements entered into with CLECs pursuant to 47 USC §251 include bill and keep, Qwest is obligated to offer bill and keep as an option in its agreements. Beaver Creek argues that it is a mistake of law not to allow Beaver Creek to pick and choose bill and keep.

Qwest contends that Beaver Creek is mistaken in this argument. Beaver Creek could have addressed the specific provisions of Qwest's proposed agreement, including reciprocal compensation, in the arbitration, but chose not to. Rather than presenting evidence about other interconnection agreements, Beaver Creek chose to present its own proposed agreement and urge the Commission to adopt it in toto. Even if Beaver Creek had a right to pick and choose bill and keep (and Qwest argues, below, that it did not have that right), Qwest contends that Beaver Creek failed to exercise that right. Now is too late for Beaver Creek to claim that it should be allowed to pick and choose provisions of other interconnection agreements.

Qwest also maintains that it is illogical for Beaver Creek to claim that that the Commission's failure to allow it to pick and choose portions of other agreements is a mistake of law. Beaver Creek chose not to engage in adequate discussion of the provisions of Qwest's proposed agreement, although it had the opportunity to raise any issues in the arbitration. Qwest notes that it would be a dangerous precedent for the Commission to allow parties to arbitrations to lie in wait and see what result they achieve before raising issues that should have been raised during the proceedings.

Apart from its procedural concerns, Qwest argues that Beaver Creek had no substantive right to pick and choose bill and keep. Under §252(i), a local exchange carrier is required to "make available any interconnection, service, or network element provided in an agreement . . . to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." Qwest provides bill and keep only if the CLEC satisfies certain criteria. As Qwest explained above, Beaver Creek does not satisfy the eligibility criteria for bill and keep under the FCC ISP Intercarrier Compensation Order. Qwest argues that if it were to provide Beaver Creek with a compensation arrangement to which it is not entitled and which Qwest would not provide to other similarly situated CLECs, it could be considered discrimination against other CLECs.

Applicable Law. OAR 860-014-0095(3) sets out the criteria for granting an application for reconsideration.

> (3) The Commission may grant an application for rehearing or reconsideration if the applicant shows that there is:
>
> (a) New evidence which is essential to the decision and which was unavailable and not reasonably discoverable before issuance of the order;
>
> (b) A change in the law or agency policy since the date the order was issued, relating to a matter essential to the decision;
>
> (c) An error of law or fact in the order which is essential to the decision; or
>
> (d) Good cause for further examination of a matter essential to the decision.

Discussion and Resolution. *1*. With regard to Beaver Creek's first issue, we agree with Qwest that Beaver Creek has not met the criteria for reconsideration. Qwest's behavior in the Beavercreek exchange was not an issue in the arbitration. Thus, by definition, no evidence with respect to that behavior could be essential to the decision.

Beaver Creek asserts that it has new evidence unavailable at the time the Commission issued its order. Its new evidence is the exchange of letters with Qwest relative to traffic originating from Qwest's customers in the Beaver Creek exchange. This does not constitute new evidence. Qwest points out that the exchange of letters merely reiterates Qwest's position in the earlier MOU, available at the time of hearing.

Beaver Creek argues that a mistake of fact compels reconsideration, citing the Commission's statement that Beaver Creek has other remedies. It may be the case that Qwest will not negotiate an interconnection agreement with Beaver Creek, but Beaver Creek does have other remedies against Qwest, as Qwest points out. Furthermore, if this statement is a mistake of fact, it is not essential to the decision, which had to do with whether Beaver Creek must enter into an interconnection agreement with Qwest to govern exchange of traffic in Qwest's Oregon City exchange.

Beaver Creek again refers to the alleged inconsistency in the Commission's position before the Court of Appeals, presumably as something that constitutes good cause to reconsider our decision. As Qwest has explained, the Commission's position is that Qwest no longer has carrier of last resort obligations in the Beavercreek exchange, but continues to function as an ILEC under the MOU. There is no inconsistency in our position.

Beaver Creek has not shown that new evidence, a mistake of fact essential to the decision, or good cause exists to warrant reconsideration in this case.

2. As to Beaver Creek's second issue, we conclude that this too fails to meet the criteria for reconsideration. Beaver Creek's argument about the offer of bill and keep by Qwest's negotiator has no bearing on the Commission's order and does not constitute a ground for reconsideration. Further, we find no inconsistency in the order's mention of Qwest's "most current forms and pricing." We read that phrase in context to mean forms and pricing available to Beaver Creek. Qwest correctly notes that in context, the term could not include bill and keep, because the order rejected Beaver Creek's position on bill and keep.

As Qwest has developed in detail, Beaver Creek is not eligible for bill and keep under Qwest's most recent effective version of its SGAT. Nor is Beaver Creek eligible for bill and keep under the FCC's ISP Intercarrier Compensation Order. Therefore, it was not a mistake of law, as Beaver Creek claims, that the Commission did not allow Beaver Creek to pick and choose bill and keep. In any event, as Qwest contends, at this point in the process, it is too late for Beaver Creek to engage in pick and choose, even if eligibility for bill and keep were not precluded.

ORDER

IT IS ORDERED that Beaver Creek's application for reconsideration is denied.

Made, entered, and effective _____.

_____
Roy Hemmingway
Chairman

_____
Lee Beyer
Commissioner

_____
Joan H. Smith
Commissioner

A party may appeal this order to a court pursuant to applicable law.