ORDER NO. 03-073

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 445

In the Matter of	)	
	)	
BEAVER CREEK COOPERATIVE	)	
TELEPHONE COMPANY	)	ORDER
	)	
Petition for Arbitration of Interconnection	)	
Rates, Terms, and Conditions with QWEST	)	
CORPORATION, Pursuant to the	)	
Telecommunications Act of 1996.	)	

DISPOSITION: ARBITRATOR'S DECISION ADOPTED; UA 55 REOPENED

Introduction

On July 24, 2002, Beaver Creek Cooperative Telephone Company (Beaver Creek) filed a petition for arbitration of the terms, conditions, and prices for interconnection and related arrangements with Qwest Corporation (Qwest) pursuant to 47 U.S.C. §§ 251 and 252 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the Act).

On August 19, 2002, Qwest filed a response to Beaver Creek's petition. A prehearing conference was held on September 11, 2002, and the hearing in this matter was set for October 30, 2002, with briefs due on November 27, 2002, and the Arbitrator's Decision due on December 20, 2002. The hearing was subsequently reset to November 5, 2002, with the rest of the schedule remaining the same. A protective order issued on October 1, 2002.

The parties submitted prefiled direct and responsive testimony and the hearing was held as scheduled. They filed simultaneous briefs on November 27, 2002, and the arbitrator issued her decision on December 18, 2002. Beaver Creek filed comments on the decision on January 10, 2003. Qwest filed a response to Beaver Creek's comments on January 24, 2003. Qwest asked permission to submit a response because Beaver Creek raises new arguments and states a position on one issue that is inconsistent with its previous position. The Commission accepts Qwest's response.

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.

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 comports with the requirements of the Act, applicable Federal Communications Commission (FCC) regulations, and relevant state law and regulations. We affirm and adopt the Arbitrator's Decision.

Beaver Creek Comments

Beaver Creek raises five issues with respect to the Arbitrator's Decision. We address and resolve each in the sequel.

Issue I—Effect of Order No. 97-297 (UA 55)

Beaver Creek argues that the Arbitrator's Decision ignores the effect of the Commission's order that granted Qwest's petition to deallocate the subject territory. According to Beaver Creek, Qwest cannot therefore possibly be an ILEC in the subject territory. Beaver

Creek contends that the Memorandum of Understanding (MOU) has no legal effect and is simply an agreement between two companies as to how to handle a "mistake" created by Qwest.[1]

Qwest Response. Qwest argues that Beaver Creek failed to present this argument in its testimony or in its post hearing brief, so the Commission should not consider it now. If the Commission does consider it, Qwest notes that Order No. 97-297 allocates territory under state law. This does not necessarily confer status as an ILEC or CLEC under federal law, and nothing in the order states that there cannot be more than on ILEC in a given geographic area.

Commission Resolution. Although this is a new argument, as Qwest contends, we find that it is closely related to the issue of Qwest's status in the subject territory and will therefore discuss it. As the Arbitrator's Decision makes clear, the MOU was the resolution the Commission proposed to deal with the problem created by the inadvertent transfer of customers to the Beavercreek exchange in an attempt to avoid having a service island. While the Commission did not approve the MOU, it did facilitate the agreement. The Arbitrator's Decision gives effect both to the Commission's order transferring territory and to the subsequent history of the dealings between the parties to rectify the inadvertent transfer of Qwest customers. Beaver Creek's contention that the MOU has no legal effect is wrong. The MOU was arrived at in lieu of modifying Order No. 97-297. We agree with Qwest that there is no inconsistency between Order No. 97-297 and the MOU.

Issue II—Qwest competes with Beaver Creek for customers in the Beavercreek exchange.

Beaver Creek argues that Qwest competes with Beaver Creek for customers in the subject territory. Beaver Creek maintains that the Arbitrator's Decision incorrectly concludes that Qwest is an ILEC in the subject territory and that the arbitrator erred in interpreting the MOU to allow Qwest to serve the subject territory, not just the customers who were occupying the subject territory at the time the mistake was discovered.[2] Beaver Creek argues that only Mr. Lindstrom offered competent testimony as to the contracting parties' intent, and that under Oregon law the Commission must execute the intent of the parties in construing an agreement (*see, e.g.,* Advanced Telecom Group, Inc., v. US WEST Communications, Inc.,

[1] Beaver Creek implies that the Qwest knew about the presence of Qwest customers in the subject territory. The Arbitrator's Decision addresses this implication. We note that, although it is not presented squarely as an issue in this case, the MOU resolves the matter. The MOU recites that the adopted boundary change "inadvertently included existing customers currently receiving service from [Qwest]." According to ORS 42.300, parties to a written instrument are not to deny the facts recited in the instrument, with the exception of the term of consideration.

[2] The sentence at issue in the draft MOU read:

> So that these customers in the "subject territory" are not required to change telephone service providers from [Qwest] to Beaver Creek as a result of the approved boundary changes, [Qwest] and Beaver Creek agree as follows:

The sentence in the MOU reads:

> So that customers in the "subject territory" are not required to change telephone service providers from [Qwest] to Beaver Creek as a result of the approved boundary changes, [Qwest] and Beaver Creek agree as follows:

UC 425, Order No. 99-438). Beaver Creek contends that the Arbitrator either supplied her own intent or relied on Qwest's intent, neither of which is permissible under Oregon law.

Because, according to Beaver Creek, the MOU cannot be interpreted to allow Qwest to serve new customers in the subject territory under the MOU, Qwest's service of these customers must be deemed to be competition and because Qwest is competing with Beaver Creek for new customers in the subject territory, it is acting as a CLEC.

Commission Resolution. Beaver Creek argues that the Arbitrator should have accepted the testimony of Beaver Creek's President, Mr. Tom Linstrom, on the significance of deleting the word "these" before "customers" in the MOU. Instead, Beaver Creek argues, the Arbitrator gave credence to Qwest's testimony about the meaning of deletion or supplied her own intent to the MOU.

Beaver Creek is wrong in these assertions. The Arbitrator's Decision properly gives effect to the parties' intent in drafting the agreement (ORS 42.230) by looking at the four corners of the document and at the circumstances in which it was drafted. ORS 42.220. The earlier draft of the agreement, which was properly entered into evidence, mentioned "these customers." The final version of the MOU spoke only of "customers." By its plain meaning, "these customers" is restrictive; it limits the group of customers to be served. "Customers" without the modifier "these" is nonrestrictive. Evidence shows that the parties considered a more restrictive term and settled on the less restrictive. The Arbitrator properly read the parties' intent in interpreting the MOU. The Arbitrator properly disregarded the extrinsic evidence presented by Mr. Linstrom that runs counter to the plain meaning of the document.

Because we agree with the Arbitrator's reading of the MOU, we find that Qwest is not competing as a CLEC in the subject territory. As the Arbitrator's Decision states, Qwest's presence in the subject territory does not constitute competition in a sense that would trigger the interconnection requirements of the Act.

Issue III—Even if Qwest is an ILEC in the Beavercreek exchange, it must enter into an interconnection agreement with Beaver Creek.

Beaver Creek contends that under Section 251(c) of the Act, Qwest has a duty to negotiate under Section 252. Section 251(c)(1) reads as follows:

> In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:
>
> (1) The Duty to Negotiate—the duty to negotiate in good faith in accordance with Section 252 the particular terms and conditions of agreements . . . .

Beaver Creek argues that words used in a statute, unless otherwise defined, are to be given their plain meaning. *See State ex. rel. Kirsch v. Curnutt,* 317 or 92, 96-97 (1993) (the court "may not ignore the plain meaning of unambiguous words of a statute"). Therefore, Beaver Creek argues,

even if Qwest is an ILEC in the Beavercreek exchange, it still has a duty to negotiate an interconnection agreement.

Qwest Response. Qwest argues that Beaver Creek failed to raise this as an issue in its posthearing brief. Rather, Beaver Creek merely stated that the first issue was whether the Commission should require Qwest to enter into an interconnection agreement and that the first subissue was whether Qwest is operating as a CLEC in the Beavercreek exchange. In its reply testimony, Beaver Creek admitted that if Qwest was correct that the MOU means Qwest is serving as an ILEC, "then Qwest is correct and an interconnection agreement is not required." (Beaver Creek/9, Linstrom/2.)

Commission Resolution. This issue was raised in Beaver Creek's petition, at 12:

> If the Commission were to determine that Qwest is serving as in ILEC in the Beavercreek exchange, a second issue is presented: If two ILECs serve the same area, is an interconnection agreement required under Section 251 of the Act between two ILECs serving the same geographical area?

Beaver Creek argued that Qwest is a CLEC in the Beavercreek exchange, so this issue was not developed in Beaver Creek's case. This issue of ILEC to ILEC interconnection agreements was thus adumbrated but was not litigated as a disputed issue, as Mr. Linstrom's testimony (Beaver Creek/9, Linstrom/2, cited above) indicates. Until it is fully litigated before us, we decline to decide this issue.

Issue IV—The Arbitrator's Decision is contrary to the Act.

Beaver Creek contends that the Act does not allow for two ILECs to serve the same territory and the same customer base. Beaver Creek argues that the Act was passed to provide a procompetitive policy framework to open telecommunications markets to competition. Sections 251 and 252 of the Act are key to intraexchange competition, according to Beaver Creek.

Beaver Creek contends that the MOU may not be construed as giving Qwest the ability to compete in the Beavercreek exchange without entering into an interconnection agreement, because such construction is contrary to the Act.

Qwest Response. Qwest objects that Beaver Creek raises this argument for the first time in its comments. Thus, according to Qwest, the Commission should not consider the argument now. Even if the Commission does consider this argument, Qwest asserts that the MOU is not contrary to the Act. Beaver Creek cites no authority for the proposition that the Act prohibits two ILECs from serving in one geographic area. Further, Beaver Creek cites no authority for the proposition that the Act requires two carriers who do not engage in competition as contemplated in the relevant provisions of the Act, between an ILEC and a CLEC, as the Arbitrator's Decision states, must enter into in interconnection agreement.

Commission Resolution. This issue was not raised before Beaver Creek submitted its comments. We believe that Beaver Creek should have flagged as an issue the argument that the MOU is contrary to the Act. Because the MOU was at issue in this petition we address Beaver Creek's argument about its legality, but note that this sort of argument raises an issue that should have been developed in the petition and response.

Beaver Creek cites no statutory authority for its view of the Act. We do not read the Act to prohibit the arrangement sanctioned by the MOU. Beaver Creek's argument fails.

Issue V—Fundamental fairness requires an interconnection agreement.

Beaver Creek argues that Qwest has imposed the costs of operating as a CLEC in Qwest's Oregon City exchange on Beaver Creek, but complains that Beaver Creek now attempts to impose those costs on Qwest. Further, Beaver Creek notes that in Order No. 02-724, the Commission accepted Qwest's contention that reciprocal compensation should apply to terminating traffic. This means, according the Beaver Creek, that Beaver Creek must now pay for the traffic it sends to Qwest in Oregon City. If Qwest is not required to enter into an interconnection agreement for the Beavercreek exchange, it continues to terminate local traffic on a bill and keep basis, while Beaver Creek pays for the privilege of competing with Qwest in the Oregon City exchange. Beaver Creek argues that in fundamental fairness the Commission must treat Beaver Creek and Qwest the same when they are in the same situation.

Commission Resolution. Beaver Creek and Qwest are not in the same situation. Beaver Creek is a CLEC is Qwest's Oregon City exchange. The costs of operating as a CLEC are the costs of doing business. Qwest is not a CLEC in Beaver Creek's Beavercreek exchange. It should not bear the costs of operating as a CLEC, because it is not a CLEC. Beaver Creek's argument on this point fails.

UA 55 Reopened

The record in this case strongly suggests that Qwest would not have transferred the subject territory to Beaver Creek if Qwest had known that the subject territory contained Qwest customers. Indeed, the Commission issued Order No. 97-297 relying on the parties' mistaken representation on this very point. We believe it is time to correct this mistake. Accordingly, by this Order, we reopen the UA 55 proceeding pursuant to ORS 756.658 for the purpose of amending Order No. 97-297. We make no determinations on the merits of the issues to be resolved in UA 55 at this time. Instead, we intend that our Administrative Hearings Division will assign an administrative law judge to Docket UA 55 and that the judge will convene a prehearing conference to identify the issues and set a schedule for the proceeding. We wish to make clear that, until the reopened UA 55 is resolved by a subsequent Commission order, the current territorial allocation approved in Order No. 97-297 will continue in effect.

Based on the reasoning expressed in the Arbitrator's Decision and on our decision to reopen the UA 55 docket, we deny Beaver Creek's petition for arbitration.

ORDER

IT IS ORDERED that:

1. The petition for arbitration with Qwest Corporation filed by Beaver Creek Cooperative Telephone Company is denied.

2. Docket UA 55 is reopened for the purpose of amending Order No. 97-297, as discussed in this order.

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.