ORDER NO. 05-088

ENTERED 02/09/05

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 589

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

DISPOSITION: MOTION TO DISMISS GRANTED

Qwest Corporation (Qwest) seeks arbitration of a new interconnection agreement with Universal Telecom, Inc. (Universal). Universal moves to dismiss Qwest's petition with prejudice. Universal contends that there is no contractual or legal authority that allows Qwest to file a petition for arbitration. Qwest argues that it may initiate negotiations with Universal under the current interconnection agreement and federal law, and may file a petition for arbitration after Universal refused to negotiate.

FINDINGS

Qwest is an incumbent local exchange carrier (ILEC) that provides telecommunications services in Oregon. Universal is a competitive telecommunications carrier (CLEC) and, among other things, provides telecommunications services within Qwest's service territory.

In 1999, Universal and Qwest, then known as U S WEST Communications, Inc. (USWC), submitted an interconnection agreement to the Commission for approval pursuant to Section 252(i) of the Telecommunications Act of 1996 (Act). The Commission approved the agreement, in which the parties purportedly agreed to adopt the terms of the arbitrated agreement between MFS Intelnet, Inc., (MFS), and USWC in ARB 1 (hereafter referred to as the MFS Agreement).[1]

Both Universal and Qwest agree that the relationship between the two parties has "not been without its challenges."[2] The parties are currently engaged in civil litigation in federal court regarding several terms contained in the interconnection agreement. The subject matter of these pending disputes is not relevant to this proceeding and need not be addressed.

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[1] *See* Order No. 99-547.

[2] Universal motion at 2; Qwest Response at 2.

On February 20, 2000, the interconnection agreement expired and remains in evergreen status. On February 6, 2004, Qwest requested negotiations with Universal pursuant to Section 252(a) of the Act. Universal did not respond to the request.

On July 16, 2004, Qwest petitioned the Commission to arbitrate terms, conditions, and prices for interconnection and related arrangements. Qwest requested that the Commission order Universal to execute, as a new interconnection agreement, Qwest's Statement of Generally Available Terms (SGAT) for wireline interconnection.

On August 10, 2004, Universal filed a motion to dismiss Qwest's petition. Universal contends that neither the terms of the existing interconnection agreement, nor any provision of the Act authorize Qwest's request. On August 27, 2004, Qwest filed a response in opposition to Universal's motion.

On November 15, 2004, a preliminary legal analysis was issued and additional briefing was requested from the parties. Both parties submitted filings on November 30 and December 14, 2004.

On January 13, 2005, Oregon attorney Joel DeVore filed a motion to allow counsel for Universal, John Dodge of Washington, D.C., to appear pro hac vice. Qwest did not object to this motion.

On September 16, 2004, Universal moved to hold this docket in abeyance while it reviewed unfiled interconnection agreements entered into by Qwest in docket UM 1168. Qwest objected to the motion. Universal renewed its motion on January 19, 2005, arguing that it would have had the right to pick and choose more favorable contract terms under the original contract. Qwest replied that the issues in UM 1168 have nothing to do with the issues raised by Universal's motion to dismiss.

CONCLUSIONS

We first address the motion to allow Universal's counsel to appear pro hac vice. The motion was made late in the docket but was unopposed and is granted.

Next, we turn to Universal's motion to hold this docket in abeyance. Given our resolution that Qwest may initiate negotiations, we are unsure of the value of holding the docket in abeyance so that Universal may select other terms. The remedy for Qwest withholding certain preferential contract terms, if that is what in fact occurred, is to be determined in UM 1168. This docket will not be held in abeyance to solve an unrelated problem.

Finally, we begin with an analysis of the parties' rights under the Telecommunications Act of 1996 (Act). The Act sets out the obligation to maintain an interconnection agreement and the procedures by which an agreement may be negotiated, adopted, and arbitrated. See 47 USC §§ 251-252. Section 251(c)(1) lists a number of obligations imposed on *incumbent* local exchange carriers, including the "duty to

negotiate in good faith in accordance with Section 252 the particular terms and conditions of [interconnection] agreements." 47 USC § 251(c)(1). The Section separately states that "[t]he requesting telecommunications carrier also has the duty to negotiate in good faith." *Id.* That section clearly differentiates between the incumbent LEC and the carrier which is permitted to request negotiation of an interconnection agreement in imposing the obligation to negotiate in good faith on both parties.

Section 252 sets forth two processes to obtain an interconnection agreement. First, Section 252(a)(1) provides that parties may voluntarily negotiate an agreement:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251.

The provision goes on to state that those agreements must be submitted to the state Commission for approval. Section 252(a)(2) states that, after negotiation has begun, any party may ask the state Commission to participate in mediating differences between the parties.

If the parties are unable to reach a voluntary agreement, Section 252(b)(1) allows either party to request 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.

Both Section 252 provisions begin with a condition that must be fulfilled before a carrier may request intervention by the state Commission. Both expressly require that an ILEC receive a request for negotiation. In this case, Qwest acknowledges that "Universal * * * does not assent to a new agreement, or even to negotiate a new agreement."[3]

Although the statute clearly contemplates a CLEC requesting negotiations from an ILEC, Qwest contends that this Commission has already concluded that an ILEC can similarly request negotiations from a CLEC.[4] Qwest adds that cases from other state commissions provide additional support that an ILEC can request interconnection

[3] Qwest letter, 1 (Aug 17, 2004).
[4] *See* docket ARB 365; Order No. 02-148 and Arbitrator's Decision (February 11, 2002).

negotiations from a CLEC and, if the CLEC ignores the request, the ILEC can demand arbitration. We will discuss each case in turn.

We begin with ARB 365, our own docket establishing an interconnection agreement between Qwest and Beaver Creek Cooperative Telephone Company (Beaver Creek). In that case, the Commission adopted the Arbitrator's decision that the Commission had jurisdiction over Qwest's petition for arbitration of interconnection rates, terms, and conditions with Beaver Creek. The Arbitrator's decision hinged on the Act's requirement "that all local exchange carriers, CLECs and ILECs alike, have a duty to establish reciprocal compensation arrangements for the exchange of telecommunications."[5] Before ARB 365, the carriers had a "bill and keep" arrangement, in contravention with the Act's requirement that carriers develop a reciprocal compensation arrangement, in Section 251(b)(5).[6] That situation is not present here. First, Qwest and Universal have already established a reciprocal compensation arrangement. Second, unlike the duty to establish initial reciprocal compensation arrangements, the duty to negotiate is contained in Section 251(c), which sets out the "additional obligations of incumbent local exchange carriers." In addition, "the requesting carrier" has the duty to negotiate in good faith, but the plain language of the statute does not set forth an obligation for the CLEC to negotiate upon a request by an ILEC.

Next we address the decisions from other state commissions. These can be grouped into two categories: 1) cases in which the CLEC became involved in negotiations and the ILEC requested arbitration, and 2) cases in which the carriers had an existing interconnection agreement that allowed either party to begin negotiations. We begin with the first category. In a dispute between BellSouth, an ILEC, and NOW, a CLEC, the Alabama Commission concluded that BellSouth could seek arbitration because NOW had commenced negotiations. The Commission stated:

> The January 26, 2000, correspondence signed by representatives of both parties memorialized NOW's subsequent transition from the negotiation of a resale agreement to the negotiation of an interconnection agreement and demonstrated the mutual understanding of the parties that the arbitration window set to expire on January 27, 2000, was still applicable. Given the clarity of the January 26, 2000, correspondence and NOW's correspondence of February 22, 2000, seeking further extension of the arbitration window, it is difficult to lend credence to NOW's theory that it never intended to engage in the negotiation of a new resale agreement or the renegotiation of its existing agreement with BellSouth.[7]

[5] Order No. 02-148, Appendix A at 4.
[6] *See id.* at 5.
[7] *In re. Petition for arbitration of the interconnection agreement between BellSouth Telecommunications and NOW Communications, Inc.*, Docket 27461, 2000 Ala PUC Lexis 1052 (Ala. PSC, June 23, 2000). The Commission also said, in *dicta*, that ILECs should be able to request negotiation and to interpret the

Similarly, the California Commission found that the CLEC satisfied the Act's requirement that the ILEC receive a request for negotiation when the CLEC,

> sen[t] a reply letter to [the ILEC] expressing its willingness to engage in discussions with [the ILEC] for a new Interconnection agreement. In the same correspondence [the CLEC] furthered the process of negotiation with [the ILEC] by requesting specific documents that are relevant to an interconnection negotiation under the Telecommunications Act.[8]

Likewise, the Louisiana Commission concluded, "By participating in the negotiation process, at a minimum, [the CLEC] tacitly was seeking out the negotiation. While the language of the Act only allows a non-incumbent to commence Section 252 negotiations, the Act does not require any specific notification, and further does not eliminate the possibility of a tacit request."[9] In those cases, the condition in the Act, which requires that negotiations be in progress before a petition for arbitration can be filed with a state commission, was met. On the other hand, in this case, Universal has not requested negotiations with Qwest.

The second category of cases involves contracts that allow either carrier to commence talks. The Tennessee Commission addressed the question of whether an ILEC can submit a request for negotiation by noting that the "approved Interconnection Agreement explicitly permits *either* party to initiate interconnection negotiation."[10] (Emphasis added.) Because the contract allowed either party to initiate negotiations, the Commission found that BellSouth was permitted to start the process under the Act.

Likewise, in arbitrating an interconnection agreement between BellSouth and Supra, the Florida Commission determined the appropriate time frame for the petition for arbitration based on the contract provision that allowed either party to commence negotiations.[11] The agreement mirrored the Act, but allowed either party to initiate negotiation:

Act otherwise "would unfairly work to the detriment of ILECs. Congress surely did not intend such a result." We believe that the best indication of Congress' intent is the plain language of the statute; it is up to Congress to amend the statute if it is "unfair." *U.S. v. Daas*, 198 F3d 1167, 1174 (9th Cir 1999), *cert den*, 531 US 999 (2000).

[8] *In re Pacific Bell for arbitration of an interconnection agreement with Pac-West Telecom, Inc.* (U5266), Decision No. 99-02-014, 1999 Cal PUC Lexis 70, *8 (Cal. PUC Feb 4, 1999).

[9] *BellSouth v. NOW Comm*, Order No. U-24762, 2000 La PUC Lexis 83, * 3-4 (La. PSC May 22, 2000).

[10] *In re Petition for arbitration of the interconnection agreement between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc.*, Docket No. 99-00948, 2000 Tenn PUC Lexis 572 (Tenn Reg Util Comm Feb 29, 2000).

[11] *In re Petition by BellSouth Telecommunications, Inc. for arbitration of an interconnection agreement with Supra Telecommunications and Information Systems, Inc.*, Docket No. 001305-TI PSC-01-1180-FOF-TI, 2001 Fla PUC Lexis 691 (Fla PSC May 23, 2001).

> Section 2.2: No later than one hundred and eighty (180) days prior to the expiration of this Agreement, the Parties agree to commence negotiations with regard to the terms, conditions, and prices of * * * [an interconnection agreement.]
>
> Section 2.3: * * * if within one hundred and thirty-five days (135) of commencing the negotiation referenced to Section 2.2 above, the Parties are unable to satisfactorily negotiate new terms, conditions and prices, either Party may petition the Commission to establish an appropriate [Interconnection] Agreement pursuant to 47 USC § 252.[12]

In these cases, the agreements expressly permitted either party to commence negotiations. We next review the interconnection agreement between Qwest and Universal to determine whether it permits Qwest to initiate negotiations.

First, some background on how three kinds of interconnection agreements are approved by the Commission: a negotiated agreement is submitted under Section 252(e) of the Act; an arbitrated agreement is also submitted under Section 252(e) of the Act; and an adopted agreement is submitted under Section 252(i) of the Act. Section 252(e)(1) allows state commissions to approve or reject negotiated or arbitrated agreements, and subsection (2) specifies the grounds on which state commissions may reject such agreements. On the other hand, section 252(i) requires,

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Commission rules at the time recognized the difference in processing the agreements. A negotiated or arbitrated agreement was filed with the Commission, then the Commission served notice of the agreement on an interested party service list and provided parties 21 days to submit comments before the Commission decided whether to approve the agreement. See OAR 860-016-0020 (1998). However, that process did not apply to adopted agreements: "If the agreement merely adopts an agreement previously approved by the Commission, the Commission will process the agreement on an expedited basis, without serving notice of it." *Id.* at (3).

The interconnection agreement submitted by Universal and USWC to the Commission states, "This Agreement is made pursuant to Section 252(i) of the Act and is premised upon the Interconnection Agreement between MFS Intelnet, Inc. and U S West

[12] *Id.* at *6-7.

Communications, Inc." The Commission processed the agreement as if it were a straightforward adoption of a previously approved agreement. In ARB 157, the Commission approved the agreement and ordered, "The agreement adopts the terms and conditions of the agreement previously approved in ARB 1." Order No. 99-547 at 2.

However, the wording of the disputed "Term of Agreement" in the Universal agreement varies from the wording of the same provision in the MFS Intelnet Agreement. The "Term of Agreement" in the Universal agreement states:

> 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.[13]

The "Term of Agreement" provision in the MFS Intelnet Agreement differs in two respects. First, rather than expiring on February 20, 2000, the MFS Intelnet Agreement states it is "effective for a period of 2 ½ years." Second, and more importantly, it included a critical sentence to the end of the provision that states: "The Parties agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective."

We find that Universal and Qwest misrepresented their submitted contract as a straightforward adoption of the terms of the MFS Intelnet Agreement. Their subterfuge led to a bypass of Commission review, because the Commission could not reject an agreement submitted under Section 252(i). Instead, the submitted agreement was negotiated, in that the terms were altered. Such an agreement should have been submitted for a more thorough examination under Section 252(e). Moreover, it is highly unlikely that, if the contract had been properly reviewed, the Commission would have approved such an open-ended "Term of Agreement" provision. *See*, *e.g.*, *Council of Jewish Women v. Sisters of Charity*, 266 Or 448, 456 (1973) (perpetual agreements are disfavored); *Lund v. Arbonne International, Inc.*, 132 Or App 87, 90 (1994) (contracts that appear to be of indefinite duration may be terminable at will); *In the Matter of MCI WorldCom and Verizon Northwest Inc.*, ARB 533, Order No. 04-241 (carefully reviewing unusual termination provision never approved by the Commission).

Because of this misrepresentation, the Commission approved an interconnection agreement between the parties, "adopting the terms of the previously approved agreement in docket ARB 1." *See* Order No. 99-547. Therefore, the terms of that prior agreement bind the parties. Under the proper "Term of Agreement" provision, either party, including Qwest, may commence negotiations. Like the Tennessee and Florida commissions, we conclude that agreements which expressly permit either party to commence negotiations may supplement the Act's language which permits only the CLEC to commence negotiations.

[13] Section XXXIV.V.

Although we find that Qwest is entitled to initiate negotiations, we nonetheless grant Universal's motion to dismiss. The underlying contract giving rise to this dispute has been nullified. In its place, we have imposed the agreement the parties represented they were adopting, that is, the MFS Intelnet Agreement. Under the circumstances, we conclude that this proceeding should be abandoned in favor of giving the parties a new opportunity to negotiate a contract. If such negotiations commence, either party may seek arbitration as needed under the Act.

ORDER

IT IS ORDERED that the motion to dismiss the petition for arbitration is granted.

Made, entered, and effective FEB 0 9 2005.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

PUBLIC UTILITY COMMISSION OF OREGON

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.