

**BEFORE THE PUBLIC UTILITY COMMISSION**

**OF OREGON**

ARB 537

In the Matter of	)	
	)	
WESTERN RADIO SERVICES CO.	)	
	)	ORDER
Petition for Arbitration of an Interconnection	)	
Agreement with QWEST CORPORATION,	)	
Pursuant to Section 252(b) of the Telecom-	)	
munications Act of 1996.	)	

**DISPOSITION: INTERCONNECTION AGREEMENT APPROVED**

**Background.** On March 11, 2004, Western Radio Services Co. (Western) filed a Petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement with Qwest Corporation (Qwest), pursuant to the Telecommunications Act of 1996<sup>1</sup> (the Act). Western identified five issues for arbitration. Qwest responded to the Petition on April 6, 2004, identifying ten additional issues for arbitration.

The Commission assigned Administrative Law Judge Allan J. Arlow to act as arbitrator in this case. Telephone conferences were held on April 9, May 11 and June 11, 2004, for the purposes of establishing a procedural schedule, clarifying the issues and resolving factual disputes so that an evidentiary hearing could be avoided. The parties filed direct testimony on May 14, 2004, and rebuttal testimony on June 2, 2004. At the June 11, 2004, conference, the parties agreed that Issue Nos. 9, 13 and 14 had been resolved in their entirety and Issue No. 15 had been resolved in part.

The parties waived statutory deadlines in order to arrive at a revised briefing and decision schedule and, by Ruling of June 24, 2004, the Arbitrator granted the extension of time requested by the parties. On June 30, 2004, the parties submitted a Stipulation Regarding Facts on Issue Nos. 4 and 5 (Stipulation), and waived an evidentiary hearing and the right to cross-examine opposing witnesses on all of the outstanding issues. The parties filed their opening briefs on July 2, 2004, and reply briefs on July 23, 2004. Qwest filed a Request for the Commission to Consider Supplemental Filing (Supplement) on August 27, 2004. A Reply of Western Radio Services Co. to Qwest's Supplemental Filing (Reply to Supplement) was filed on September 1, 2004.

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<sup>1</sup> Western and Qwest do not have any pre-existing interconnection agreement in Oregon.

The Arbitrator issued his decision in this proceeding on September 20, 2004. Western timely filed exceptions to the decision in its Comments of Western Radio Services Co. on Arbitration Decision (Comments) on October 1, 2004.

By Order No. 04-600, entered October 18, 2004, the Commission adopted the Arbitrator's Decision, including the following ordering clause:

14. Within 30 days of the date of the Commission's final order in this proceeding, Qwest and Western shall submit an interconnection agreement consistent with the terms of this decision.

On November 18, 2004, Qwest filed a letter with the Commission indicating that it was unable to comply with the foregoing ordering clause because, although Qwest had sent an interconnection agreement compliant with the Commission's Order to Western, it had not received a copy of the agreement executed by Western. Qwest included a copy of the proffered agreement with its letter.

Western did not file any response. Instead, Western filed a Complaint for Violation of the Telecommunications Act of 1996, seeking declaratory and injunctive relief and naming the Commission and its members as defendants. On February 3, 2005, the Commission received a summons from the U.S. District Court for the District of Oregon, Case No. 05-00159-AA.

On July 28, 2005, Qwest filed a letter with the Commission appending a copy of the Opinion and Order of the Honorable Ann Aiken, U.S. District Judge, granting the Commission's and Qwest's motions to dismiss. The Opinion and Order state at pages 10-11 the following:

As required by statute, the administrative record which is before this court, clearly shows that Qwest and plaintiff have failed to submit to the Commission a mutually agreeable interconnection agreement that conforms to the Commission's Order. AR at Tab 33, p. 865. Until the Commission approves or rejects an interconnection agreement submitted by the parties or otherwise approves an interconnection agreement, any action before the court is premature. Without the Commission's approval of any agreement, this court lacks subject matter jurisdiction over plaintiff's case (citations omitted). Moreover, plaintiff's Second Claim for Relief (Qwest's failure to negotiate an interconnection agreement in good faith) is barred for the reason that the Act does not permit parties to adjudicate such claims in federal court. A claim for failure to negotiate in good faith is remedied through the mediation and arbitration process before the Commission.

Referencing the Opinion and Order, Qwest asked the Commission to:

. . . promptly approve the interconnection agreement that Qwest submitted on November 18, 2004, but which Western Radio refused to sign. Qwest submits that the interconnection agreement it submitted complies with the Commission's Order No. 04-600 on October 18, 2004 and...[the] Arbitrator's Decision of September 20, 2004.

Qwest indicated its belief that Western would attempt to reinstate the negotiation process and asked that the Commission reject such efforts.

By letter of August 1, 2005, Western advised the Commission that it was appealing Judge Aiken's Opinion and Order and that "[a]ny further action by the Commission on ARB 537 would be premature and a waste of the party's and Commission resources." Western further claimed that Qwest had sent Western a request for negotiation of two new interconnection agreements on May 10, 2005, and was asking the Commission to approve an agreement before the window for filing for arbitration opened.

Qwest filed a letter in reply dated August 3, 2005, noting that its May 10, 2005, letter was not a request for negotiation, but a form letter indicating that interim tariff provisions were being put in place to replace a withdrawn tariff section so that Qwest could continue to provide existing services.

**Discussion.** Section 252(b) of the Act sets forth the portion of the federal statute associated with "Agreements Arrived at Through *Compulsory* Arbitration." (Emphasis supplied.) Section 252(c) provides the standards that the state commission shall use in resolving an arbitration and specifically grants the state commission with authority for "*imposing* conditions upon the parties to the agreement..." (Emphasis supplied.) The parties subject to the 252(b) process are plainly required to go through the steps set forth and are not free to walk away from the arbitrated interconnection agreement if they are displeased with the outcome of the arbitration process before the state commission. Indeed, if they were free to do so, it would render the concept of compulsory arbitration meaningless. Section 252(e)(1) provides that "Any interconnection agreement adopted by negotiation *or arbitration shall* be submitted for approval to the State commission."

An arbitrated interconnection agreement, with the disputed terms as decided by the Arbitrator and adopted by the commission, has the same legal power to bind the parties as if the agreement had been freely entered into by both parties prior to its submission to the Commission. One party cannot simply refuse to execute and honor the agreement because of disappointment with the outcome of the arbitration proceeding. The only avenue open to the party by federal statute is the Section 252(e)(6) appeal process which states: "In any case in which a State commission makes a determination

under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.”

In accordance with the requirements of Section 252(e), Order No. 04-600, entered October 18, 2004, clearly stated that the parties “*shall* submit an interconnection agreement consistent with the terms of this decision.” (Emphasis supplied.) The Federal district court to which Western appealed did not stay our Order, or any of its terms, pending appeal. A compliant interconnection agreement should therefore have been filed within 30 days subsequent to the entry of our Order. As Judge Aiken noted, “Until the Commission approves or rejects an interconnection agreement submitted by the parties *or otherwise approves an interconnection agreement*, any action before the court is premature. Without the Commission’s approval of any agreement, this court lacks subject matter jurisdiction over plaintiff’s case.” (Emphasis supplied.) As Judge Aiken’s ruling makes plain, submission of an interconnection agreement containing the signatures of both parties is not the exclusive means by which the Commission may obtain an agreement which it may approve.

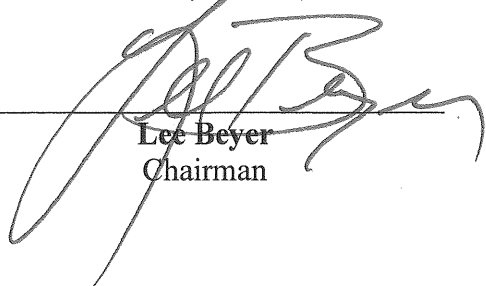
We have reviewed the interconnection agreement submitted by Qwest and find that it complies with Order No. 04-600, entered October 18, 2004, and the Arbitrator’s Decision appended thereto.


We also find that the Qwest letter of May 10, 2005, notifying radio carriers that it was withdrawing Section 20 of Oregon Tariff 29 as a result of the Federal Communications Commission’s *T-Mobile* decision (CC Docket No. 01-92, FCC 05-42, February 24, 2005) and putting an interim tariff in place, is wholly irrelevant to this proceeding. The May 10 letter, cited by Western as a basis for rejecting Qwest’s request to approve its proffered interconnection agreement, in no way constituted a “request for negotiation.”

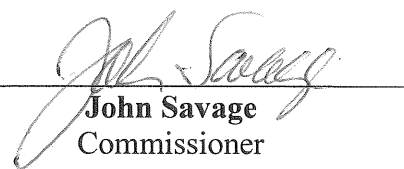
**ORDER**

IT IS ORDERED that the Wireless Interconnection Agreement between Qwest Corporation and Western Radio Services Co. submitted by Qwest Corporation on November 18, 2004, is approved.

Made, entered, and effective OCT 10 2005.

  
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**Lee Beyer**  
Chairman

  
\_\_\_\_\_  
**Ray Baum**  
Commissioner

  
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**John Savage**  
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.

ARB 537 Agreement Order 9-26-05