

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 706

In the Matter of)
)
 WESTERN RADIO SERVICES CO.)
)
 Petition for Arbitration Pursuant to)
 Section 252(b) of the Telecommunications)
 Act of 1996.)

ORDER

**DISPOSITION: PETITION FOR ARBITRATION DISMISSED;
DOCKET CLOSED**

On October 14, 2005, Western Radio Services Co. (Western) filed a petition (Petition) with the Public Utility Commission of Oregon (Commission) seeking arbitration of an interconnection agreement with Qwest Corporation (Qwest). Western asserts that Qwest requested negotiation of an interconnection agreement by letter dated May 10, 2005. Western seeks Commission resolution of five issues that it claims were raised by the parties during the negotiation process.

On November 8, 2005, Qwest filed a response to Western's Petition, including a motion to dismiss. In support of the motion, Qwest asserts that the Petition is inappropriate in light of Commission Order No. 05-1075 entered October 10, 2005, in docket ARB 537 approving an interconnection agreement between Western and Qwest (Approved Agreement). Qwest also asserts that the Petition is inappropriate because Qwest's May 10, 2005, letter did not constitute a request for negotiation of an interconnection agreement. Finally, Qwest contends that the Petition fails to properly identify the disputed issues in the interconnection agreement and otherwise comply with the requirements of OAR 860-016-0030.

On November 22, 2005, Western filed a reply to Qwest's motion to dismiss. Western asserts that (a) Qwest's motion to dismiss is untimely, (b) the Commission is without jurisdiction to award the relief sought by Qwest, and (c) the Petition was filed in accordance with §252 of the Telecommunications Act of 1996 (the Act).

After reviewing the filings, the Commission concludes that Western's Petition should be dismissed for the following reasons:

1. The Petition is improper because it ignores the fact that there is already an approved interconnection agreement in effect. In addition, the Commission finds that the Petition is premised upon the incorrect assumption that Qwest requested negotiation of a new interconnection agreement on May 10, 2005.

On March 11, 2004, Western filed a petition for arbitration with the Commission, which was assigned docket ARB 537. Following extensive proceedings, the Arbitrator issued his decision on September 20, 2004. The Commission adopted the Arbitrator's Decision in Order No. 04-600, entered October 18, 2004. Order No. 04-600 directed the parties to submit an interconnection agreement consistent with the terms of the order within 30 days.

Although Qwest sent Western an interconnection agreement compliant with Order No. 04-600, Western declined to sign the agreement, but instead filed a complaint with the United States District Court for the District of Oregon alleging violation of the Act. The Court dismissed Western's complaint, agreeing with Qwest and the Commission that the federal district court lacked jurisdiction because the Commission had not yet approved an interconnection agreement between the parties.¹

On July 28, 2005, Qwest notified the Commission of the federal district court's decision and requested that the Commission approve the interconnection agreement that Qwest had submitted on November 18, 2004. On August 1, 2005, Western filed a response requesting that the Commission take no further action because Western was appealing the federal district court's dismissal of Western's complaint. Western also asserted that Qwest had requested negotiation of a new interconnection agreement on May 10, 2005. Qwest denied Western's claim that its May 10, 2005, letter was a request for negotiation.²

Just four days before Western filed the current Petition, the Commission entered Order No. 05-1075, approving the interconnection agreement submitted by Qwest on November 18, 2004 (Approved Agreement). We concluded that the Approved Agreement was in full compliance with the Arbitrator's decision and the requirements of the Act. Regarding Western's refusal to sign the Approved Agreement, we held:

¹ See *Western Radio Services Co. v. Qwest Corporation*, Civil No. 05-155-AA (D. Or. July 26, 2005).

² Qwest explained that the May 10, 2005, letter was merely a form letter to all wireless carriers indicating that it was (a) withdrawing a portion of its Oregon tariff as a result of the FCC's *T-Mobile* decision, and (b) implementing an interim tariff in place until Qwest and the wireless carriers could amend their interconnection agreements consistent with the *T-Mobile* decision.

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. . . .*

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. . . .* Order No. 05-1075 at 3. (Emphasis added.)

The Approved Agreement went into effect on October 10, 2005, and remains in effect for a period of three years.³ Just as it is inappropriate to allow Western to ignore the results of an arbitration proceeding by refusing to enter into an agreement consistent with the Commission's arbitration decision, it is likewise inappropriate for Western to attempt to commence arbitration of a new interconnection agreement only days after the Commission-arbitrated and approved interconnection agreement became effective. As Qwest points out, entertaining Western's Petition would essentially render the Commission's arbitration decisions meaningless. Both parties are expected to abide by the terms and conditions of the Approved Agreement until it expires or they voluntarily negotiate a new agreement.

2. The Petition is improper because it is premised upon the incorrect assumption that Qwest's May 10, 2005, letter was a request for negotiation.⁴ The Commission already considered and rejected this argument in Order No. 05-1075. There we held:

³ Section XXII.B.1. of the Approved Agreement provides: This Agreement shall be effective as of the *effective date of commission approval* of this Interconnection Agreement and *shall remain in effect* for a period of 3 years, and thereafter shall continue in force and effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties. The Parties agree to commence negotiations on a new agreement no later than 2 1/2 years after this Agreement becomes effective. This Agreement shall become effective pursuant to Sections 251 and 252 of the Act. (Emphasis added.)

⁴ Section 252(b)(1) of the Act requires that a petition for arbitration be filed "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." If there is no request for negotiation, no petition can be entertained.

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 [citation omitted] and putting an interim tariff in place . . . in no way constituted a 'request for negotiation.' Order No. 05-1075 at 4.

Because the May 10, 2005, letter did not constitute a request by Qwest for negotiation of a new interconnection agreement, Western's Petition is inappropriate. Moreover, in the absence of Qwest's consent to negotiate a new interconnection agreement, negotiation is not proper at this time under the terms of the Approved Agreement, and, therefore, the 135-160 day period prescribed in Section 252(b)(1) of the Act cannot even begin to run.

3. As a final matter, the Commission is not persuaded by Western's argument that Qwest's motion to dismiss should be rejected because it was filed within the 25-day time period allowed under §252(b)(3) to respond to a petition for arbitration, rather than the 20-day time period specified in OAR 860-013-0050(3)(a) to respond to a motion. Qwest's motion to dismiss is an integral part of its response to Western's Petition. In such circumstances, Commission policy is that the filing deadlines set forth in the Act govern.⁵ Thus, Qwest's motion was not untimely. Moreover, Western did not suffer any prejudice because the motion was filed together with Qwest's response.

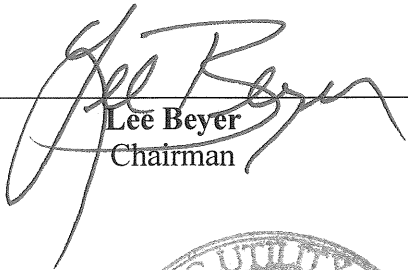
Based on the foregoing, the Commission finds that Qwest's motion to dismiss should be granted. It is unnecessary to discuss the remaining arguments advanced by the parties.

⁵ See e.g., Order No. 05-661, docket ARB 589.

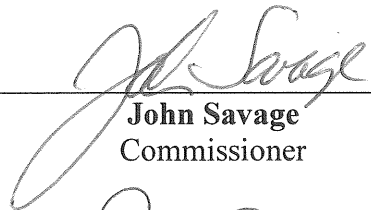
ORDER

IT IS ORDERED that the Petition for Arbitration filed by Western Radio Services Co. on October 14, 2005, is dismissed. This docket is closed.

Made, entered, and effective JAN 03 2006.



Lee Beyer
Chairman



John Savage
Commissioner



Ray Baum
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. The request must be filed with the Commission within 60 days of the date of service of this order and must comply with the requirements in OAR 860-014-0095. A copy of they 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.