

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 747

In the Matter of BEAVER CREEK)
COOPERATIVE TELEPHONE)
COMPANY's Petition for Arbitration) ORDER
of the terms, conditions, and prices for)
interconnection and related arrangements)
with QWEST CORPORATION.)

DISPOSITION: ARBITRATOR'S DECISION ADOPTED AS MODIFIED

On May 3, 2006, Beaver Creek Cooperative Telephone Company (Beaver Creek or BCT) filed a petition with the Public Utility Commission of Oregon (Commission) requesting arbitration of an interconnection agreement (ICA) with Qwest Corporation (Qwest) pursuant to the Telecommunications Act of 1996 (the Act). A proposed interconnection agreement was affixed to the petition as Appendix A.

Qwest responded to the petition on May 30, 2006. A prehearing conference was held on June 20, 2006. At the conference, a procedural schedule was adopted, which was later modified by a Ruling of the Arbitrator on July 13, 2006. The Arbitrator issued a Protective Order on July 31, 2006. By joint letter of August 8, 2006, the parties waived their right to hearing. By Ruling of August 9, 2006, the Arbitrator granted the joint motion by the parties to waive the hearing, accept certain testimony and evidentiary material into the record and adopt a schedule for the submission of briefs. The parties filed Opening Briefs on September 8, 2006, and Reply Briefs on September 22, 2006.

The Arbitrator's Decision was issued on October 20, 2006, and an Erratum thereto, solely to correct the name of one of the parties, was issued on, November 6, 2006. On November 6, 2006, Beaver Creek filed Comments on the Arbitrator's Decision (Comments), while Qwest did not. Thus, the Commission addresses only the Comments of BCT.

Statutory Authority

The standards for arbitration are set forth in 47 U.S.C. §252(c):

In resolving by arbitration under subsection (b) of this section 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 of this title, including the

- regulations prescribed by the [Federal Communications] Commission (FCC) pursuant to section 251 of this title;
- (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
 - (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Legal and Regulatory Background

The interpretation of Sections 251 and 252 of the Act, which concern how parties negotiate an ICA, and their application via the rules promulgated by the FCC have been the subject of virtually continuous litigation since the legislation was passed almost a decade ago. With each Appellate and Supreme Court decision, prior FCC rules and their interpretations have been struck down or modified in whole or in part and new rules adopted in an attempt to satisfactorily comply with the later Court rulings. The most significant rulings affecting the current state of federal law and regulation, which the Commission is required to utilize in fulfilling its statutory obligations under the Act, are the *Triennial Review Order (TRO)*¹ and the *Triennial Review Remand Order (TRRO)*.² As a former Bell Operating Company (BOC), Qwest is also bound by the requirements of Section 271 of the Act, and the Arbitrator is obliged to be cognizant of federal rules and regulations and judicial opinions related thereto in the arbitration process.

Factual Background

The Oregon City and Beavercreek exchanges are contiguous and are both within the Portland Extended Area Service (EAS) area. Qwest is the incumbent local exchange carrier (ILEC) in the Oregon City exchange and in contiguous and non-contiguous exchanges throughout the Portland Metropolitan Area.

Within the Beavercreek telephone exchange, BCT is an ILEC pursuant to Section 251(h) of the Act and is authorized to provide local exchange service as a cooperative within the meaning of ORS 759.025(2).³ BCT is also a competitive local exchange carrier (CLEC) in Qwest's Oregon City exchange and has had an ICA with Qwest and its predecessor entity since 1996. The subject matter of this Arbitration proceeding is the negotiation of a new ICA between Qwest and BCT *in its capacity as a CLEC in the Oregon City exchange*.

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003, affirmed in part and reversed and vacated in part, *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”).

² Order on Remand, *In the Matter of Review of Unbundled Access to Network Elements, Review of Section 251, Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313 (FCC rel. February 4, 2005).

³ See generally ORS Chapter 62. Although the Public Utility Commission of Oregon (Commission) lacks full regulatory authority over cooperatives, several statutes subject cooperatives to the Commission's authority for specific purposes. Among these statutes are ORS 759.225 and ORS 759.220, which, together, treat cooperatives like telecommunications utilities subject to Commission authority for purposes of regulating the terms and conditions of “through services.”

ILEC-to-ILEC and ILEC-to-CLEC intercarrier compensation and interconnection arrangements are governed by markedly different historical practices, statutes and rules.⁴ Nevertheless, the structure and operations of BCT are purposely integrated to the greatest possible level.⁵ Only the Commission's rules, which BCT has consistently opposed, continue to prevent it from integrating the operations entirely.⁶

1. BCT's Allegations of Bias on the Part of the Arbitrator Presiding in the Case.

BCT asserts that the Arbitrator did not give fair and unbiased consideration to the issues raised by BCT. In support of this assertion, BCT cites the following passage from page 10 of the Decision in the following manner:

In this instance, Qwest asserts, and BCT does not deny, that for whatever reason, it is not observing the terms of its current agreement with respect to the transport of BCC-originated traffic over its LIS trunks. BCT has asked the Commission to reward this behavior by assuming that traffic is in balance with Qwest, even as the BCC traffic, by being routed as BCI traffic, gets treatment that is better than that available to other CLEC traffic for purposes of compensation...BCT's proposed contract language is another attempt to circumvent requirements that the Commission has previously established. (Emphasis provided by BCT.)

BCT then states that the above language shows bias against BCT that "is obvious and unwarranted."⁷ However, in its quote, BCT omits by ellipsis the following passage which explains the Arbitrator's basis for giving less weight to the credibility of BCT's proffered testimony and explanation:

If BCC traffic were routed over its LIS trunks, it would be easy to determine whether or not the traffic was in balance, but BCT refuses to do so. Qwest has expressed a willingness to adopt a

⁴ The exchange of local/EAS traffic between ILECs is generally governed by state commission rules, while ILEC-CLEC arrangements for this type of traffic are pursuant to ICAs established, enforced and interpreted under the Telecommunications Act of 1996 (the Act) and the federal and state rules related to the Act. In Oregon, exchange of local/EAS traffic between ILECs is generally bill and keep. See Order No. 89-815.

⁵ BCT/1, Linstrom/5-6. "Q: Why did BCT choose to have its operations in Oregon City be part of its cooperative activities? A: The founding members of BCT wanted BCT to serve all members of the cooperative fairly and equitably. The management today still believes that BCT shall provide all services as a cooperative. It is almost like asking why the sky is blue or why does it rain in Oregon. That is just the way it is." *Id.*, p. 5, lines 1-6.

⁶ *In the Matter of Amendments to Division 032 Rules relating to Telecommunications*. Docket No. AR 365, Order No. 00-068, entered February 8, 2000, appeals denied. Subsequent litigation on issues arising out of the extent to which BCT sought to integrate its CLEC operations and its ILEC operations are summarized in Qwest's Opening Brief, p. 6, line 25 - p. 7, line 23.

⁷ Comments, p. 2.

bill-and-keep compensation scheme if such rough balance is found.

Next, BCT claims that “[t]he issue of BCT’s use of the LIS trunks under the existing interconnection agreement (“ICA”) was not before the Arbitrator,”⁸ is untrue. BCT Witness Linstrom raised and directly acknowledged (while seeking to excuse) BCT’s non-compliance with the Commission’s Rules and the existing ICA when he testified as follows:

BCT sends traffic to Qwest over the non-LIS trunks. BCT is not willing to use the LIS trunks because they have proven to be unreliable. On several occasions, those trunks have gone out of service.

I suppose that the fact that there is traffic on LIS trunks that should not be on those trunks and traffic on the non-LIS trunks that should not be on those trunks underscores Ms. Cederberg’s Testimony that it is difficult to separate traffic. On the other hand, it undercuts Qwest’s argument that it is absolutely necessary to separate Oregon City related traffic onto LIS trunks, since Qwest cannot do that itself.⁹

The Arbitrator observed that BCT had stated that it knowingly refused to send traffic over LIS trunks, even though its existing agreement clearly required it and that the proposed ICA language would perpetuate that non-compliance with standard interconnection practices.

Next, BCT states: “the Arbitrator’s conclusion that the use of bill and keep would produce ‘treatment that is better than that available to other CLEC traffic for purposes of compensation’ ignores the many, many ICAs that exist between Qwest and CLECs that use bill and keep.” BCT claims that is yet another indication of bias.¹⁰

However, BCT again omits the key part of the sentence preceding its quote: “BCT has asked the Commission to reward this behavior by assuming that traffic is in balance with Qwest, even as the BCC traffic, by being routed as BCI traffic, gets....”¹¹ The sentence does not mention a preference for any billing formula, but focuses on the unique

⁸ *Id.* p. 2. BCT also claims to show Arbitrator bias by referencing Footnote 42 of the Decision: “It almost seems like the Arbitrator is disappointed that he cannot sanction BCT over an issue that is not even before the Arbitrator.” (*Id.*, p. 3.) The footnote reads in its entirety as follows: “Findings and conclusions leading to Commission action relating to allegations that BCT may be acting in violation of its existing ICA are beyond the scope of this arbitration; such allegations are properly raised in the context of a complaint proceeding.” Clearly, its purpose is to explain, for the purposes of appellate review, the legal bases for the apparent inefficiency of the administrative process to deal with all matters between litigants in a single proceeding as is often done in judicial proceedings.

⁹ BCT/8, Linstrom/2, ll. 5-8, Linstrom/2, l. 22-Linstrom/3, l.4.

¹⁰ Comments, p. 4.

¹¹ Decision, p. 10.

circumstances of BCT's purposeful routing of BCI traffic over BCC trunks. BCT thus distorts the Arbitrator's actual conclusions.

Next, BCT cites the Arbitrator's statement "Only the Commission's rules, which BCT has consistently opposed, continue to prevent it from integrating the operations entirely." BCT asserts that "This language has the connotation that somehow BCT's actions are improper."¹² We disagree. The Arbitrator's Decision summarized statements made by BCT that were already in the record.

Decision. The Arbitrator's findings and conclusions are based on the record and are adopted. BCT's allegations of unfairness and bias on the part of the Arbitrator are without merit and are rejected.

2. BCT's Assertion that the Arbitrator erred in failure to adopt "bill and keep" as a permissible form of reciprocal compensation.

BCT states as follows:

The Arbitrator describes BCT's proposal of the use of bill and keep as affording BCT's competitive traffic of obtaining 'treatment that is better than that available to other CLECs' traffic for the purpose of compensation.' That is a statement entirely without fact. In the record in this case are [sic] a list of interconnection agreements between Qwest and other CLECs that use bill and keep. BCT's proposal would do no more than what Qwest has entered into with other CLECs.¹³

As noted above, the Arbitrator did not state that bill and keep was an inappropriate means of compensation. The Decision notes that, unlike other CLECs, BCT has the opportunity to route all of its originating CLEC traffic over ILEC trunks, which arrangement provides benefits including the avoidance of the measurement of the relative balance of traffic that forms the basis of bill-and-keep. The Arbitrator found that Qwest "is willing to adopt a bill-and-keep arrangement if it can be verified that BCC is originating approximately the same volume of non-transit local/EAS traffic."¹⁴ The Arbitrator made no findings that bill and keep is an inappropriate compensation arrangement.

Decision. The Arbitrator did not assert that bill and keep is an inappropriate means of compensation. The Arbitrator's findings on this issue are adopted.

¹² Comments, p. 4.

¹³ *Id.*, p. 5.

¹⁴ Decision, p. 9.

3. BCT's Assertion of Arbitrator Error in Analysis of the Issue of Routing of Traffic

BCT asserts that there are two sets of issues regarding the routing of traffic that the Arbitrator combined and discriminated against BCT by doing so.¹⁵

First, BCT notes that it originally proposed the separation of EAS/local traffic from access traffic by the use of unique trunk numbers and, in noting BCT's withdrawal of its proposal, the Arbitrator used a tone that was somehow improper.

However, after doing diligent review of this issue, BCT felt that the [proposal] would be more expensive than was warranted. BCT notes that the Arbitrator characterizes BCT's diligent work on this issue in a sarcastic mode: 'Late in the game, BCT finally acknowledges this reality.' (Arbitrator's Decision, p. 7.) BCT points this out as yet another example of the evidence of bias in the Arbitrator's Decision. The fact that BCT was diligently pursuing issues should not be characterized with sarcasm.¹⁶

The Arbitrator's observations were neither sarcastic, nor biased. BCT offered no independent "diligent review" of the issue in the record. Testimony was given by Qwest Witness Cederberg analyzing the BCT proposal and explaining its burdens.¹⁷ In its Opening Brief, after the closing of the record, BCT stated "In an ideal world, Qwest would put local/EAS traffic over one trunk group and toll/access over a separate trunk group. BCT believes this can be done."¹⁸ Two weeks later, BCT acknowledged in its Reply Brief that "it would not be reasonable to demand that Qwest implement those solutions at the present time."¹⁹

Discussion. There is no inference of bias in the Arbitrator's Decision that may be drawn by his description of the timing of BCT's acknowledgement.

The second issue BCT describes as "the interplay between BCT and Qwest in how they deliver traffic between each other."²⁰ BCT claims an inequity in treatment because Qwest delivers both its own ILEC traffic and transits CLEC traffic to the Oregon City exchange on one trunk group, while it opposes BCT sending both its CLEC and ILEC traffic on one trunk group. While Qwest's asserted reason—the difficulty in measuring CLEC traffic for the purposes of reciprocal compensation—was accepted by the Arbitrator, "the whole issue about the difficulty of measuring traffic goes away if bill and keep is used."²¹

¹⁵ Comments, p. 7.

¹⁶ *Id.*, pp. 7-8.

¹⁷ Qwest/2, Cederberg/10-13, filed July 14, 2006.

¹⁸ Opening Brief of Beaver Creek Cooperative Telephone Company, p. 13, filed September 8, 2006.

¹⁹ Reply Brief of Beaver Creek Cooperative Telephone Company, p. 13, filed September 22, 2006.

²⁰ Comments, p. 8.

²¹ *Id.*, pp. 8-9.

BCT disagrees with the Arbitrator's assessment that its proposals are "wasteful and burdensome," or at least no more so than Qwest's, and claims that the Arbitrator's Decision is discriminatory because it requires BCT to separate traffic while Qwest is free to commingle traffic. The Arbitrator's conclusion is "factually wrong, inconsistent with the record and inconsistent with past Commission decisions allowing bill and keep....In addition, the Arbitrator's Decision on this issue places BCT in an unwarranted straightjacket." By moving the point of interconnection (POI) to Portland so that BCT may exchange traffic at Qwest's tandem, LIS trunks will not be needed. Requiring the use of LIS trunks prevents the relocation of the POI to Portland.²²

Discussion. We find the Arbitrator's findings and conclusions both reasonable and supported by the record. BCT cites no cases reaching conclusions different from those found in this case. Neither has it demonstrated legal error. The Arbitrator's findings and conclusions on this issue are adopted.

4. BCT's Assertion of Arbitrator Error in his Findings on Transiting Issues.

Finally, BCT claims that Qwest requires BCT to serve the same geographic area that Qwest serves in order to be treated as a transiting carrier, but opines that Qwest opposes BCT's efforts to move its switch's POI to the Pittock Building in Portland. Qwest does not oppose BCT's desire to have its CLEC operations interconnect in Portland; it opposes the move for BCT's ILEC operations. BCT states:

The Arbitrator resolves this issue by making the following statement: 'Qwest cannot make the changes BCT proposes without disrupting the agreements and the relationships they embody [relationships with third party carriers].' [Footnote omitted.] The Arbitrator is completely mistaken. There is nothing about third party traffic that affects the treatment of BCT's switch as a tandem switch.²³

Discussion. As noted above in the discussion of prior issues, the Arbitrator's Decision contains statements critical to the findings and conclusions that BCT omits in its quotation:

As described by Qwest,²⁴ and not refuted by BCT, there exists a complex web of regulations, tariffs and agreements that govern the numerous relationships among carriers—other than BCT—with whom Qwest interconnects and from whom Qwest obtains transport compensation. Qwest cannot make the

²² *Id.*, pp. 9-10.

²³ *Id.*, pp. 11-12.

²⁴ Qwest/1, Freeberg/27-30.

changes BCT proposes without disrupting the agreements and the relationships they embody.²⁵

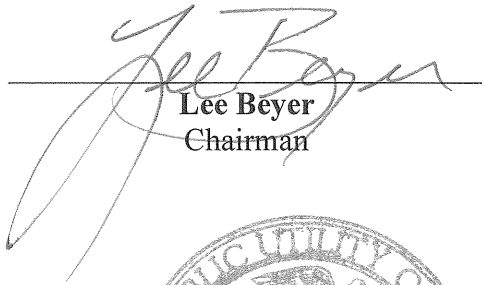
Thus, it is not merely the question of whether “there is nothing about third party traffic that affects the treatment of BCT’s switch as a tandem switch,” but whether the arrangement BCT proposes violates regulations and tariffs and disrupts agreements and relationships. Qwest has offered unrefuted testimony that this is indeed the case. The Arbitrator’s findings and conclusions are supported by the record and are adopted.

ORDER

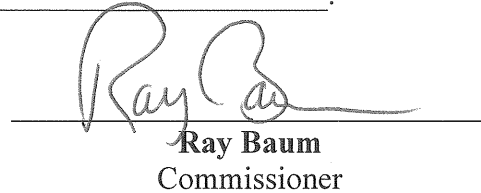
IT IS ORDERED that:

1. The Arbitrator's Decision in this case, attached to and made part of this Order as Appendix A, is adopted as modified by the Erratum.
2. Within 30 days of the date of this Order, Qwest and BCT shall, in accordance with the provisions of OAR 860-016-0030(12), file an interconnection agreement complying with the terms of the Arbitrator’s Decision.

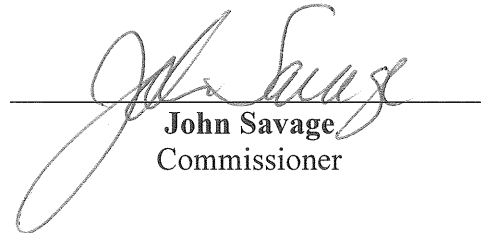
Made, entered and effective NOV 20 2006.



Lee Beyer
 Chairman



Ray Baum
 Commissioner



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 by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

²⁵ Arbitrator’s Decision, p. 12.

ISSUED: October 20, 2006

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Procedural History

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Statutory Authority

The standards for arbitration are set forth in 47 U.S.C. §252I:

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- (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission (FCC) pursuant to section 251;

- (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
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Factual Background

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Within the Beavercreek telephone exchange, BCT is an ILEC pursuant to Section 251(h) of the Act and is authorized to provide local exchange service as a cooperative within the meaning of ORS 759.025(2).³ BCT is also a competitive local exchange carrier (CLEC) in Qwest's Oregon City exchange and has had an ICA with Qwest and its predecessor entity since 1996. The subject matter of this Arbitration proceeding is the negotiation of a new ICA between Qwest and BCT *in its capacity as a CLEC in the Oregon City exchange*.

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ILEC-to-ILEC and ILEC-to-CLEC intercarrier compensation and interconnection arrangements are governed by markedly different historical practices, statutes and rules.⁴ Nevertheless, the structure and operations of BCT are purposely integrated to the greatest possible level.⁵ Only the Commission's rules, which BCT has consistently opposed, continue to prevent it from integrating the operations entirely.⁶

Issue 1: Change of Law (Section 2.2)

BCT's proposed revisions (deletions noted by strikethrough; additions noted by underlining) to the Qwest-offered ICA language are as follows:

- 2.2 The provisions in this Agreement are intended to be in compliance with and based on the existing state of the law, rules, regulations and interpretations thereof, including but not limited to state rules, regulations, and laws, as of March 11, 2005 (the Existing Rules). Nothing in this Agreement shall be deemed an admission by Qwest or CLEC concerning the interpretation or effect of the Existing Rules or an admission by Qwest or CLEC that the Existing Rules should not be changed, vacated, dismissed, stayed or modified. Nothing in this Agreement shall preclude or estop Qwest or CLEC from taking any position in any forum concerning the proper interpretation or effect of the Existing Rules or concerning whether the Existing Rules should be changed, vacated, dismissed, stayed or modified. To the extent that the Existing Rules are vacated, dismissed, stayed or materially changed or modified, then this Agreement shall be deemed amended to reflect such legally binding modification or change of the Existing Rules, effective with the date of such change. ~~Where the Parties~~ Any failure to agree upon the terms of such an amendment within sixty (60) Days after notification from a Party seeking amendment due to a modification or change of the Existing Rules or if any time during such sixty (60) day period or if the Parties shall have ceased to

⁴ The exchange of local/EAS traffic between ILECs is generally governed by state commission rules, while ILEC-CLEC arrangements for this type of traffic are pursuant to ICAs established, enforced and interpreted under the Telecommunications Act of 1996 (the Act) and the federal and state rules related to the Act. In Oregon, exchange of local/EAS traffic between ILECs is generally bill-and-keep. See Order No. 89-815.

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⁶ *In the Matter of Amendments to Division 032 Rules relating to Telecommunications*. Docket No. AR 365, Order No. 00-068, entered February 8, 2000, appeals denied. Subsequent litigation on issues arising out of the extent to which BCT sought to integrate its CLEC operations and its ILEC operations are summarized in Qwest's Opening Brief, p. 6, line 25 - p. 7, line 23.

negotiate such new terms for a continuous period of fifteen (15) Days, it shall be resolved in accordance with the Dispute Resolution provision of this Agreement. It is expressly understood that this Agreement will be corrected, or if requested by CLEC, amended as set forth in this Section 2.2, to reflect the outcome of generic proceedings by the Commission for pricing, service standards, or other matters covered by this Agreement. Rates in Exhibit A will reflect legally binding decisions of the Commission and shall be applied on a prospective basis from the effective date of the legally binding Commission decision, unless otherwise ordered by the Commission. ~~Where a Party provides notice to the other Party within thirty (30) Days of the effective date of an order issuing a legally binding change, any resulting amendment shall be deemed effective on the effective date of the legally binding change or modification of the Existing Rules for rates, and to the extent practicable for other terms and conditions, unless otherwise ordered. In the event neither Party provides notice within thirty (30) Days, the effective date of the legally binding change shall be the Effective Date of the amendment unless the Parties agree to a different date. During the pendency of any negotiation for an amendment pursuant to this Section 2.2 the Parties shall continue to perform their obligations in accordance with the terms and conditions of this Agreement, for up to sixty (60) Days. If the Parties fail to agree on an amendment during the sixty (60) Day negotiation period, the Parties agree that the first matter to be resolved during Dispute Resolution will be the implementation of an interim operating agreement between the Parties regarding the disputed issues, to be effective during the pendency of Dispute Resolution. The Parties agree that the interim operating agreement shall be determined and implemented within the first fifteen (15) Days of Dispute Resolution and the Parties will continue to perform their obligations in accordance with the terms and conditions of this Agreement, until the interim operating agreement is implemented. For the purposes of this section, "legally binding" means that the legal ruling has not been stayed, no request for a stay is pending, and any deadline for requesting a stay designated by statute or regulation, has passed.~~

Positions of the Parties. BCT asserts that “this is a minor issue,” and it would prefer that changes of law be self-executing. “BCT believes that Qwest’s proposal is slow, inefficient and could lead to regulatory disputes... both sides have merit. BCT does not have a very strong position on this issue, but believes that its position is slightly preferable to Qwest’s position.”⁷ BCT “believes its proposed language is somewhat preferable by incorporating the concept that the change of law occurs on the effective date of the change of law, not some later date through an amended agreement.”⁸

Qwest believes that the BCT proposal is inferior because it does not allow parties to decide to live out an existing agreement without having it reflect a change in law and because “each party would implement its view immediately and later attempt to reach agreement. This approach makes disputes likely and could affect the continuity of service provided to end-users.”⁹ “Since both parties agree that written amendments should be agreed to for changes in law, Qwest believes that it would promote certainty and limit disputes if such amendments are agreed to *before* the parties independently implement changes in law.”¹⁰

Discussion. The Qwest-proposed language will be adopted. It minimizes the impact of any delay in negotiating contract amendments by promoting certainty and providing prompt time frames for the negotiating process. At the same time, Qwest’s language also provides the parties with the flexibility to agree to leave the language of the contract intact for the remainder of its term, if they so choose.

Issue 2: Routing and Trunking (Sections 7.2.2.1.2, 7.2.2.2.1, 7.2.2.3.1, 7.2.2.9.3.1, 7.2.2.9.3.2, 7.2.2.9.6, 7.2.2.9.6.1¹¹ and 7.3.1¹²)

BCT uses one entity to provide both ILEC (BCI) and CLEC (BCC) telecommunications services, as well as cable TV service, broadband and dial-up internet services and other computer services to its members in both the Beavercreek and Oregon City exchanges.¹³ BCT is aware of the requirement to keep the financial accounting between its operations in Oregon City and its operations in the Beavercreek exchange separate, but maintains that “BCT’s goal is to eliminate the artificial distinctions between its operations as an ILEC and a CLEC to the greatest extent possible.”¹⁴

Carriers other than BCT use separate Operating Company Numbers (OCNs) in the Local Exchange Routing Guide (LERG) to separately identify their ILEC and CLEC operations, for both the origination and termination of traffic. BCT, however, identifies both its CLEC and ILEC operations with a single OCN. Thus, in providing telecommunications services, BCT makes no distinctions between the exchanges in the LERG when identifying

⁷ BCT Opening Brief, p. 13.

⁸ BCT Reply Brief, p. 26.

⁹ Qwest Opening Brief, p. 11.

¹⁰ Qwest Reply Brief, p. 16.

¹¹ BCT’s proposed changes are set forth in BCT/2, Linstrom/1-2.

¹² BCT Petition, Appendix A, p. 69 of proposed modified ICA.

¹³ BCT/1, Linstrom/4.

¹⁴ *Id.*, Linstrom/5-6.

the BCC and BCI operations as both the originating source of traffic and its destination. Consequently, to separately identify BCI and BCC traffic, Qwest put in place “unique translations to route traffic to BCT by NPA/NXX instead of OCN.”¹⁵

Qwest routes traffic to BCT over several different trunk groups. There are direct trunk groups from Qwest’s Milwaukie switch to BCT’s switch and from Qwest’s Oregon City switch to BCT’s switch. The traffic flowing over those trunks may include some CLEC-originated traffic, but the volume is relatively low, in BCT’s words “fairly clean.” These trunks do not appear to be a matter of concern for BCT in the instant proceeding.¹⁶

All discussion of traffic routing and trunking issues discussed below relate to the remaining routing and trunking of traffic: first, between BCT’s switch and Qwest’s Local/EAS Tandem in downtown Portland, and, second, between BCT’s switch and the Qwest Access Tandem, also in downtown Portland. There are two different sets of trunks between BCT’s switch and the Qwest Local/EAS Tandem, regular and Local Interconnection Service (LIS). The regular trunks were established for BCI (ILEC-to-ILEC) traffic, and the LIS trunks were set up pursuant to the existing ICA to separate BCC traffic from BCI traffic. “Qwest sends all traffic destined for BCC on the trunk groups that are for Beaver Creek’s CLEC operation, provisioned with appropriate modifiers to identify this trunk group as ‘CLEC’.” Those modifiers facilitate Qwest’s ability to monitor traffic so that appropriate billing records can be generated for the CLEC in accordance with the existing ICA.¹⁷ In the reverse direction, BCT sends its BCC as well as its BCI traffic to the Qwest Local/EAS Tandem over the regular trunks only, asserting that the LIS trunks are unreliable.¹⁸

When routing calls to BCC, Qwest combines a variety of traffic types, including Qwest-originated local and toll traffic and third-party originated local and toll traffic for which Qwest serves only as a transit carrier.¹⁹ This Jointly Provided Switched Access (JPSA) traffic comes to Qwest from the interexchange carriers (IXCs) on “Feature Group D” (FGD) facilities that the IXCs have purchased to Qwest’s Access Tandems according to the Qwest Access Tariffs. FGD billing systems generate JPSA records. Other carriers’ local and intraLATA traffic come to Qwest in an intermingled manner, coming to the local tandems, end offices, and access tandems with certain CLECs or Cellular Mobile Radio Service (CMRS) carriers using a Single Point of Presence (SPOP) while also securing ILEC access at any technically feasible point in the LATA.²⁰

Positions of the Parties. BCT asserts that toll traffic should not be delivered over local/EAS trunks, that local/EAS traffic should not be delivered over toll trunks and that CLEC (and, presumably, CMRS) traffic should be delivered over separate trunk groups. In

¹⁵ Qwest/5, Cederberg/7-8.

¹⁶ BCT/8, Linstrom/1.

¹⁷ Qwest/5, Cederberg/9.

¹⁸ BCT/8, Linstrom/2. According to Qwest (Qwest/5, Cederberg/7), there was a computer logic error, corrected in early 2006, which had previously caused BCI traffic to be sent over the BCC LIS trunks. The problem was due in large part to BCT’s use of a common OCN in the LERG guide as described above.

¹⁹ Qwest/2, Cederberg/6, ll. 14-17.

²⁰ Qwest/2, Cederberg/20.

the alternative, BCT proposes that both parties deliver their own and third party traffic to the other party over a single set of trunks.²¹ BCT contends that “there is no good reason to distinguish the competitive and incumbent operations for the purposes of routing and exchange of traffic.” Thus, if Qwest can commingle CLEC and ILEC traffic, BCT should be able to do likewise.²²

According to Qwest, it is extremely difficult for Qwest to separately trunk FGD traffic and technically infeasible for the Qwest Access Tandem switch to instantly and absolutely separate traffic viewed by BCT as local from that which it views as toll.²³ Qwest has no objections to BCT’s commingling of traffic by providing a separate trunk group for Jointly Provided Switched Access (JPSA) if BCT wants to combine all of its traffic; however, it must do so by combining its BCI traffic into its BCC operations. What BCT really wants to do is to have its CLEC operations obtain all of the advantages of being an ILEC, a situation it has sought previously in many proceedings. CLEC and ILEC traffic have different compensation terms, and BCT should be required to send its BCC traffic over the LIS trunks.²⁴

In its Reply Brief, BCT finally agreed that “there are some difficulties with the trunking solution and [BCT] is no longer proposing the trunking solution concept.... Instead, BCT is proposing that Qwest provide call detail records without charge. The rationale for this approach is that Qwest is, at the very least, contributing to the problem of unidentified or phantom traffic²⁵ through its Single Point of Presence (SPOP) product under which CLECs and others compensate Qwest for the delivery of traffic. Under the SPOP, a CLEC can deliver all of its traffic—access and local—to the same switch for termination. This Qwest product substantially increases the chances for phantom traffic.”²⁶

Discussion. Qwest has amply demonstrated that its routing of traffic is in compliance with the Commission’s rules and preexisting arrangements, agreements and mutual obligations with other carriers and follows common and accepted practices with respect to the transport of local, toll, CLEC and CMRS traffic. I find that the separation of traffic proposed by BCT without adequate justification is wasteful, burdensome to Qwest and to carriers beyond the two parties in this case and technically difficult.²⁷ Late in the game, BCT finally acknowledges this reality.

²¹ BCT Petition, p. 3.

²² BCT/1, Linstrom/6-10.

²³ Qwest/2, Cederberg/20. An SPOP is a LIS interconnection trunking option that allows a CLEC (including the one assigned to BCT for its BCC operations) to establish one physical point of presence within a LATA in Qwest’s territory and exchange traffic with Qwest at that single point.

²⁴ Qwest Opening Brief, pp. 12-13.

²⁵ The issue of “phantom traffic” has been the subject of previous litigation between the parties before the Commission. A description of phantom traffic and how it applies to the network architecture connecting BCT and Qwest in particular appears in *Beaver Creek Cooperative Telephone Company v. Qwest Corporation*, Docket UCB 18, Ruling of the Administrative Law Judge issued May 13, 2005, pp. 2-3.

²⁶ Beaver Creek Reply Brief, p. 15.

²⁷ Qwest/2, Cederberg/8, 10-13; Qwest Opening Brief, p. 18, and testimony cited therein.

Although BCT refers to the SPOP as a Qwest “product,” it is a method of interconnection that Qwest is, by law, required to offer interconnecting carriers.²⁸ Even if CLECs are misrouting toll traffic through the local tandem when they use SPOP, it is still a simple matter for BCT to bill IXCs when the calls do not carry adequate identifying information.²⁹ Beaver Creek has previously made the argument that Qwest bears some responsibility for phantom traffic generated by such carriers that transit its facilities and is therefore somehow obligated to give billing records to BCT at no charge while others pay for them. However, as the Administrative Law Judge ruled in Docket UCB 18, *Beaver Creek Cooperative Telephone Company v. Qwest Corporation*, with respect to BCT’s ILEC operations, “[f]or the purposes of this Ruling, it is assumed that the problem [of phantom traffic] does indeed exist. It is therefore also assumed that BCT is not receiving all of the revenues that should be due at the rate of \$.08948 per minute for terminating calls in the Beaver Creek exchange. Although someone is liable to BCT for those charges, ... I find that Qwest is not the responsible party....”³⁰ Therefore, Qwest is now, as then, under no obligation to provide billing data at no cost.

Qwest offers to make accommodations on related BCT issues. Qwest has offered to allow Beaver Creek to request that JPSA traffic be provided on a separate trunk group and proposes that the ICA include language indicating that neither party will intentionally route JPSA traffic through local tandems. Qwest also agrees to deliver intraLATA toll traffic originated by its customers to the access tandem.³¹

I concur with Qwest’s assertion that Sections 7.2.2.9.6 and 7.2.2.9.6.1 provide BCT with more options for interconnection, which BCT is not required to utilize.³² Since this language is part of the standard offering made available to other carriers and BCT is not adversely affected by its inclusion, the language should be part of the ICA for administrative convenience and to avoid any ambiguity of effect. I also find that Qwest has demonstrated that direct trunking of traffic to a local tandem or end office makes for a more efficient use of network resources when traffic has achieved certain levels.³³

The asserted reason for BCT’s failure to use the LIS trunks for its BCC operations because they are “unreliable” will be accorded no weight. Qwest has been sending traffic for termination to BCC customers over those trunks and has received no indication that the BCC customers have not been receiving calls.³⁴ The Commission previously rejected Beaver Creek’s request to treat BCC traffic as BCI traffic, requiring BCC’s operations to be treated the same as other CLECs.³⁵ The combining of BCC and BCI traffic over BCI trunks and treating all such traffic *as BCI traffic* would give BCT’s BCC operations preferential treatment through a reduction in charges unavailable to other

²⁸ 47 U.S.C. §251(c)(2)(B).

²⁹ Qwest/2, Cederberg/19; Qwest/5, Cederberg/12-13.

³⁰ Ruling of May 13, 2005, p. 10.

³¹ Qwest Opening Brief, pp. 17-18, citing Qwest/2, Cederberg/21-22.

³² Qwest Opening Brief, p. 19.

³³ Qwest/2, Cederberg/24.

³⁴ Qwest/5, Cederberg/9.

³⁵ See Order No. 02-148, Appendix A, p. 7, in which BCT was required to operate pursuant to an ICA in order to provide service in Oregon City.

CLECs. Qwest's offer to treat all traffic *as BCC traffic* and utilize either BCI or BCC LIS facilities for the transport of traffic is the only non-discriminatory alternative offered by the parties.

The Qwest proposed language for Sections 7.2.2.1.2, 7.2.2.2.1, 7.2.2.3.1, 7.2.2.9.3.1, 7.2.2.9.3.2, 7.2.2.9.6 and 7.2.2.9.6.1 will be adopted. BCT must select language that will reflect its choice to either route all BCC traffic over the LIS trunks or to designate all BCT traffic as BCC traffic and utilize either the BCI or LIS trunks.

Issue 3: Form of Reciprocal Compensation: Sections 7.3.1.1.3.1, 7.3.2.2.1, 7.3.4.1.1, 7.3.4.1.4, 7.3.6.1 and 7.3.6.2

Section 251(b)(5) of the Telecommunications Act of 1996 provides that each telecommunications carrier has "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." 47 C.F.R. §51.711 provides rules for the establishment of rates for transport and termination of telecommunications traffic. Subsection 51.711(c) provides as follows:

Nothing in this section precludes a state commission from presuming that the amount of telecommunications traffic from one network to the other is roughly balanced with the amount of telecommunications traffic flowing in the opposite direction and is expected to remain so, unless a party rebuts such a presumption.

As discussed above, BCT does not send BCC traffic over the LIS trunks connecting with Qwest's facilities as specified in the current ICA. Instead, BCT combines that traffic with BCI traffic and sends it over the regular (ILEC-to-ILEC) trunks. Due to the combining of the traffic, Qwest is unable to determine what the relative traffic balance is between Qwest and BCT's BCC operations.³⁶

Positions of the Parties. BCT asserts that bill-and-keep is the FCC-preferred method of compensation and is the one that Qwest has supported in the past, even when traffic is not in balance.³⁷

Qwest notes that it sends approximately 35,000 minutes of non-transit local calls to BCC customers and is willing to adopt a bill-and-keep arrangement if it can be verified that BCC is originating approximately the same volume of non-transit local/EAS traffic. BCT continues to route BCC traffic over BCI trunks but claims that it is not able to tell how many minutes of BCC local/EAS traffic are destined for Qwest retail customers or how many minutes of local/EAS traffic are designated for the retail customers of other ILECs, CLECs and CMRS carriers in the Portland local calling area because "BCT does not

³⁶ Qwest/1, Freeberg/20.

³⁷ BCT/8, Linstrom/12-14.

track ported numbers.”³⁸ BCT treats BCC traffic as if it were ILEC traffic, but BCC’s operations are not ILEC operations and should not get ILEC treatment.³⁹

Discussion. The Qwest language options will be adopted.⁴⁰ The plain language of the federal rules permits but does not require state commissions to order bill-and-keep as the presumptively used form of reciprocal compensation.

In this instance, Qwest asserts, and BCT does not deny, that for whatever reason, it is not observing the terms of its current agreement with respect to the transport of BCC-originated traffic over its LIS trunks. BCT has asked the Commission to reward this behavior by assuming that traffic is in balance with Qwest, even as the BCC traffic, by being routed as BCI traffic, gets treatment that is better than that available to other CLECs’ traffic for purposes of compensation. If BCC traffic were routed over its LIS trunks, it would be easy to determine whether or not the traffic was in balance, but BCT refuses to do so. Qwest has expressed a willingness to adopt a bill-and-keep compensation scheme if such rough balance is found.

BCT’s proposed contract language is another attempt to circumvent requirements that the Commission has previously established.⁴¹ Furthermore, the proposed language has a discriminatory effect upon other CLECs and must be rejected on those grounds as well.⁴²

Issue 4: Transport of Third-Party Traffic: Sections 7.2.1.2.4, 7.3.2.1.2 and 7.3.1

Section 7.2.1.2.4, with BCT’s proposed deletion shown in strikethrough, reads in pertinent part as follows:

Transit service is provided by Qwest, as a local and Access Tandem Switch provider, to CLEC to enable the completion of calls originated by or terminated to another Telecommunications Carrier (such as another CLEC, an existing LEC, or a wireless Carrier), which is connected to Qwest’s local or Access Tandem Switches. ~~To the extent that CLEC’s Switch functions as a local or Access Tandem Switch, as defined in this Agreement, CLEC may also provide transit service to Qwest.~~

³⁸ Qwest/4, Freeberg/3, BCT response to Qwest data request.

³⁹ Qwest/3, Freeberg/11-12.

⁴⁰ BCT’s proposed ICA (Appendix A) submitted with its Petition contained Sections 7.3.6.1 and 7.3.6.2, which Qwest asserts accurately reflected the parties’ negotiations and were acceptable. The proposed language was changed by BCT’s testimony and is rejected for the same reasons discussed below with respect to the other bill-and-keep language proposals.

⁴¹ See AR 365, Order No. 00-068 at 8-9; ARB 365, Order No. 02-148, Appendix A (Arbitrator’s Decision), p. 7.

⁴² Findings and conclusions leading to Commission action relating to allegations that BCT may be acting in violation of its existing ICA are beyond the scope of this arbitration; such allegations are properly raised in the context of a complaint proceeding.

Section 7.3.2.1.2, with BCT's proposed deletion shown in strikethrough, reads as follows:

When DTT is provided to a local ~~or Access Tandem Switch~~ for Exchange Service traffic or to an Access Tandem Switch for Exchange Access or Jointly Provided Switched Access traffic, the applicable DTT rate elements apply between the Serving Wire Center and the Tandem Switch. Additional rate elements for delivery of traffic to the terminating End Office Switch are tandem switching and tandem transmission. These rates are described below.

The original Qwest language in Sections 7.2.1.2.4 and 7.3.2.1.2 permits charges for direct trunked transport (DTT) provided to either local or access tandems at total element long run incremental cost (TELRIC) based rates. BCT proposes to delete the reference to DTT associated with an Access Tandem switched call. DTT exists between Qwest's Oregon City Serving Wire Center and Qwest's tandem switch in downtown Portland.⁴³

Section 7.3.1, with BCT's proposed deletion shown in strikethrough, reads in pertinent part, as follows:

Where either Party interconnects and delivers traffic to the other from third parties, each Party shall bill such third parties the appropriate charges pursuant to its respective tariffs, price lists or contractual offerings for such third party terminations. ~~Absent a separately negotiated agreement to the contrary, the Parties will directly exchange traffic between their respective networks without the use of third party transit providers.~~

Positions of the Parties. With respect to ICA Sections 7.2.1.2.4 and 7.3.2.1.2, BCT asserts that it and Qwest differ in their interpretations of the intent of Qwest's language, making BCT's changes necessary. BCT objects to Qwest's requirement that the BCT switch cover the same geographic area as its tandem switch in order to be accorded tandem status. This and associated requirements "effectively prevent BCT from engaging in the transit business...."⁴⁴ BCT wants to move its switch (presumably for both BCC and BCI traffic) to downtown Portland so that it can serve the same geographic area as Qwest.⁴⁵

Qwest responds that the net result of BCT's proposed change would be to place Qwest in the dubious position of having no opportunity to recover from either the interexchange carrier or from BCC any cost for the transport necessary to move JPSA calls from Qwest's Access Tandem switch to the network interface with BCC, a distance of over

⁴³ Qwest/1, Freeberg/27.

⁴⁴ BCT Opening Brief, p. 11.

⁴⁵ *Id.*, p. 12.

15 miles.⁴⁶ Furthermore, pursuant to agreements between Qwest and other CLECs, some calls are destined for BCC subscribers, and a path between the Qwest Access Tandem and the BCT switch is needed to carry these calls. Not all of this traffic is toll, and DTT charges properly apply in this instance.⁴⁷

Qwest's 7.2.1.2.4 language does not inhibit BCT's ability to enter the competitive market for the provision of transit services and applies only to BCT's provision of transit service to Qwest and then may still provide transit service to Qwest if BCT's switch physically functions as a tandem regardless of its geographic reach. It merely wishes to confirm that the BCT switch functions as a tandem before BCT may provide transit service to Qwest.⁴⁸

With respect to ICA Section 7.3.1, Qwest asserts that BCT misreads the ICA language it proposes. A separate agreement to provide transit service is not required and BCT fails to cite any language that would have that effect.⁴⁹ A separate agreement is only required under proposed Section 7.3.1 if BCT intends to exchange traffic with Qwest via a third-party provider.⁵⁰

Discussion. As described by Qwest,⁵¹ and not refuted by BCT, there exists a complex web of regulations, tariffs and agreements that govern the numerous relationships among carriers—other than BCT—with whom Qwest interconnects and from whom Qwest obtains transport compensation. Qwest cannot make the changes BCT proposes without disrupting the agreements and the relationships they embody. Furthermore, Qwest has clarified and affirmatively represented its interpretation of the ICA language in response to many of BCT's concerns. I find that the Qwest language is the most reasonable means to resolve the issues presented, and it is adopted.

Issue 5: Phantom Traffic

This issue and the positions of the parties have been discussed above under Issue 2, Routing and Trunking, where I concluded that Qwest's handling of other carriers' traffic as a transiting carrier has been pursuant to its obligations under and in compliance with state and federal statutes, rules and regulations.

I noted in the Issue 2 discussion, above, that Qwest had no obligation to provide billing records to BCT without charge. Qwest has indicated that "the cost to Beaver Creek for obtaining these records would not be large, while the impact on Qwest of being required to provide such records for free to all other carriers would be significant." Qwest

⁴⁶ Qwest/1, Freeberg/27-29. The issues arising out of BCT's asserted desire to move its switch to downtown Portland are beyond the scope of this proceeding. Furthermore, contrary to BCT's assertions, Qwest claims that it does not oppose the move of the BCT CLEC POI to downtown Portland. Qwest Reply Brief, p. 15.

⁴⁷ Qwest/1, Freeberg/30.

⁴⁸ Qwest Reply Brief, pp. 14-15, citing Qwest/3, Freeberg/19.

⁴⁹ Qwest Reply Brief, p. 13.

⁵⁰ *Id.*, p. 14.

⁵¹ Qwest/1, Freeberg/27-30.

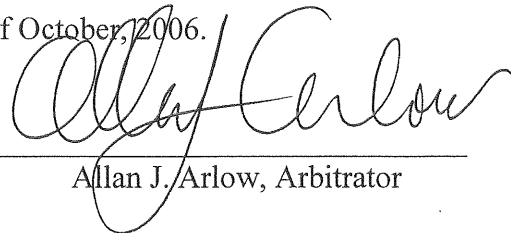
has also indicated its willingness to pay BCT a comparable rate should Qwest request such records from BCT.⁵²

The BCT proposal that Qwest provide detail call records without charge is rejected.

ARBITRATOR'S DECISION

1. The interconnection agreement between BCT and Qwest shall utilize the language proposed by Qwest with respect to Section 2.2. BCT's proposed language is rejected.
2. The interconnection agreement between BCT and Qwest shall utilize the language proposed by Qwest with respect to Sections 7.2.2.1.2, 7.2.2.2.1, 7.2.2.3.1, 7.2.2.9.3.1, 7.2.2.9.3.2, 7.2.2.9.6, 7.2.2.9.6.1 and 7.3.1, including the alternatives and modifications offered by Qwest to BCT as noted in this decision. BCT's proposed language is rejected.
3. The interconnection agreement between BCT and Qwest shall utilize the language proposed by Qwest with respect to Sections 7.3.1.1.3.1, 7.3.2.2.1, 7.3.4.1.1, 7.3.4.1.4, 7.3.6.1 and 7.3.6.2. BCT's proposed language is rejected.
4. The interconnection agreement between BCT and Qwest shall utilize the language proposed by Qwest with respect to Sections 7.2.1.2.4, 7.3.2.1.2 and 7.3.1, with such clarifying language and affirmative representations as provided by Qwest during the course of this proceeding. BCT's proposed language is rejected.
5. Within 30 days of the date of the Commission's final order in this proceeding, Qwest and Universal shall submit an interconnection agreement consistent with the terms of this decision.
6. As provided in OAR 860-016-0030(10), any person may file written comments within 10 days of the date this decision is served.

Dated at Salem, Oregon, this 20th day of October, 2006.



Allan J. Arlow, Arbitrator

ARB 747 Arbitrator's Decision

⁵² Qwest Opening Brief, pp. 29-30, and Reply Brief, pp. 15-16.