ORDER NO. 07-033

ENTERED 01/29/07

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 780

In the Matter of BEAVER CREEK COOPERATIVE TELEPHONE COMPANY Notice of Adoption of the Interconnection Agreement between Ymax Communications Corp. and Qwest Corporation.	))))))))	ORDER

DISPOSITION: ADOPTION OF INTERCONNECTION AGREEMENT DENIED

Background

Although docketed as ARB 780, the subject matter of this proceeding overlaps entirely the subject matter of ARB 747, which was resolved by Commission Order No. 06-637. The procedural history, up to the time of the filing of this matter, is as described in that Order.

On May 3, 2006, Beaver Creek Cooperative Telephone Company (Beaver Creek) 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," 47 U.S.C. § 101, *et seq.*).

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.

In his proposed decision the Arbitrator ruled in favor of Qwest on all material issues. In Order No. 06-637 the Commission adopted the Arbitrator's decision, as modified by the Erratum.

Meanwhile, by letter dated November 14, 2006, counsel for Beaver Creek advised the Commission that further proceedings in Docket ARB 747 were "unnecessary," because Beaver Creek had decided to exercise its "rights" to opt into the ICA between Qwest and Ymax that had been filed in ARB 756 and approved by Order No. 06-523, dated September 11, 2006. On November 16, 2006, Beaver Creek submitted its notice of adoption of the Qwest/Ymax agreement. That notice was perfected on November 27, 2006, and this docket was established.

On December 18, 2006, Qwest filed its objections to Beaver Creek's notice of adoption. Qwest objects on the grounds that Beaver Creek's notice is unlawful under federal law, contrary to Commission precedent, objectionable on account of greater costs, and contrary to public policy. On December 29, 2006, Beaver Creek filed its response to Qwest's objections.

Legal Authority

This Commission's authority is derived from the Act, which requires incumbent local exchange carriers ("ILECs") to share their networks with competing local exchange carriers ("CLECs") upon request, and to negotiate ICAs in good faith. An entering CLEC can choose to opt into an existing agreement between an ILEC and a CLEC, or it can negotiate its own agreement with the ILEC. Where the negotiation is not successful, either party may request that a state commission arbitrate the disputed terms. The negotiated or arbitrated agreement must then be submitted to the state commission for approval.

This Commission's role under the Act is codified in Chapter 860, Division 016, of the Oregon Administrative Rules. As stated in OAR 860-016-0010, it is the Commission's policy "to facilitate the execution of interconnection agreements among telecommunications carriers." To that end, the Commission encourages parties to reach agreement on access to the telecommunications network, as well as the routing of and payment for interconnected calls. When the parties are not able to agree, the Commission "will arbitrate disputes so that interconnection agreements will be fair and will comply with the provisions of the Act."

Qwest and Beaver Creek were not able to negotiate an agreement. Pursuant to the Act, Beaver Creek either could have opted into an existing agreement or requested arbitration. As noted above, by petition dated May 3, 2006, Beaver Creek requested arbitration by the Commission. In Order No. 06-637 the Commission exercised its authority under the Act and applied its policy as stated in OAR 860-016-0010.

In this docket Beaver Creek invokes OAR 860-016-0025, which provides for the right of the carrier to adopt an agreement between the ILEC and another carrier, as an alternative to negotiation or arbitration. Because Beaver Creek filed its notice unilaterally, Qwest had the right to file objections within 21 days. (OAR 860-016-0025(4).) Qwest filed its objections on December 19, 2006. Beaver Creek filed a reply to Qwest's objections on December 28, 2006.

Discussion

Where the carriers have filed an objection and reply, OAR 860-016-0025(6) provides for an Administrative Law Judge to schedule a conference within five business days, to determine whether the issues raised by the objection can be resolved based on the pleadings and all supporting documentation, or whether further proceedings are necessary. In this Order we dispose of Beaver Creek's notice of adoption without first convening the conference.[1]

As discussed below, we deny Beaver Creek's notice. We find that Beaver Creek's notice was not filed in good faith.

Beaver Creek's notice is a collateral attack on the arbitration decision rendered by the Commission in ARB 747. Beaver Creek waited until after the ALJ's arbitration decision was issued to file its notice to adopt the Ymax agreement. Beaver Creek does not deserve the full consideration contemplated by OAR 860-016-0025(6). There is no issue regarding whether further proceedings are necessary.

The Qwest/Ymax agreement was submitted to the Commission on June 23, 2006, and approved on September 11, 2006. If Beaver Creek had made a timely election to adopt the Ymax agreement, that would have been considered on its merits. We cannot permit a party to invoke binding arbitration as a remedy and then avoid its effects when the party is not satisfied with the outcome. The public policy implications of entertaining Beaver Creek's notice on its merits would be resoundingly negative.

[1] Because we deny the notice on procedural grounds we did not convene the conference contemplated by OAR 860-016-0025(6). Our decision to forgo the conference is based on the unique facts of this case and does not signal any change to the rule.

Section 252(b)(5) of the Act provides: "refusal . . . to cooperate with the State Commission in carrying out its function as an arbitrator . . . shall be considered a failure to negotiate in good faith." By filing its notice after the arbitrator's decision was issued, Beaver Creek was refusing to cooperate with the Commission.

As noted by Qwest in its objections and conceded by Beaver Creek in its reply, an analogous situation was addressed by the Federal District Court of the District of Massachusetts (U.S. District Court). In *Global NAPs, Inc. v. Verizon New England, Inc.* (2004 WL 1059792, D. Mass., May 12, 2004) the CLEC attempted to adopt a contract *after* the Massachusetts Commission had rendered its arbitration decision in favor of the ILEC. The U.S. District Court held that the arbitration decision was binding on the CLEC, extinguishing its right to adopt another agreement. The U.S. District Court's decision was affirmed by the United States Court of Appeals (in *Global NAPs v. VerizonNew England, Inc.,* 396 F.3d 16) (1st Cir. 2005) (First Circuit). The First Circuit held that "(i)n attempting to void the terms of a valid arbitration order, it is clear that Global NAPS is refusing to cooperate with (the commission), in violation of its duty to negotiate in good faith." 396 F.3d 25.

Beaver Creek gamely tries to distinguish its case from *Global NAPs.* It frames the issue as: At what point in time does a CLEC lose its ability to make an opt-in election? The best it can muster in reply to its own question is that the *Global NAPs* courts did not "definitively answer the question. The First Circuit decision only points out that Global NAPs' determination to wait to make the election until weeks after it had filed for review of the agency's decision in court was not timely."

In this case Beaver Creek attempted to make its election *after* the Arbitrator's decision was rendered, but before it was adopted by the Commission. Beaver Creek offers no meaningful distinction between these facts and the *Global NAPs* facts. In both cases the binding arbitration process would be illusory.

By its own actions Beaver Creek has conceded that the Arbitrator's decision is indistinguishable from the Commission's decision for purposes of this analysis. If Beaver Creek believed in good faith that the Arbitrator's decision was deficient in any respect, then Beaver Creek knew that it still had the remedy of filing Comments pursuant to OAR 860-016-0030(10) to persuade the Commission to modify the decision. Although Beaver Creek did file Comments, it also filed its notice. By attempting to adopt the Ymax agreement before the Commission acted on the arbitration decision, Beaver Creek implicitly acknowledged that the decision was consistent with Commission policies.

Of course, if Beaver Creek believes that the decision is not consistent with Commission policies, Beaver Creek is free to file the Motion for Reconsideration that it said it was preparing at the time it filed its reply.

Because we have denied Beaver Creek's notice on procedural grounds, we do not address the issue raised by Qwest regarding the relative costs of serving Beaver Creek and Ymax.

FINDINGS OF FACT

1. Beaver Creek and Qwest were not able to negotiate an interconnection agreement.

2. On May 3, 2006, Beaver Creek petitioned the Commission for arbitration of the agreement.

3. Beaver Creek's petition was docketed as ARB 747.

4. The parties went through discovery and filed rounds of testimony before agreeing to waive hearings and submit the matter on post-hearing briefs.

5. On October 20, 2006, the Arbitrator issued his decision, finding for Qwest on all material issues.

6. On November 14, 2006, Beaver Creek advised the Commission that further proceedings in ARB 747 were unnecessary, because Beaver Creek intended to exercise its right to adopt the Qwest/Ymax agreement by notice.

7. On November 16, 2006, Beaver Creek filed its notice of adoption of the Qwest/Ymax agreement.

8. On November 20, 2006, the Commission adopted the Arbitrator's decision.

9. On November 27, 2006, Beaver Creek perfected its filing of its notice to adopt the Qwest/Ymax agreement. Its notice was docketed as ARB 780.

CONCLUSIONS OF LAW

1. Beaver Creek's notice of adoption of the Qwest/Ymax agreement was not filed in good faith.

2. Beaver Creek's notice of adoption of the Qwest/Ymax agreement should be denied.

ORDER

IT IS ORDERED that Beaver Creek Cooperative Telephone Company's Notice of Adoption of the Interconnection Agreement between Ymax Communications Corp. and Qwest Corporation is denied.

Made, entered, and effective JAN 2 9 2007.

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