

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 918

In the Matter of

QWEST CORPORATION

Petition for Arbitration and Approval of an
Interconnection Agreement with
NORTH COUNTY COMMUNICATIONS
CORPORATION OF OREGON.

ORDER

DISPOSITION: ARBITRATOR'S DECISION ADOPTED

I. INTRODUCTION

Qwest Corporation (Qwest) is an incumbent local exchange carrier (ILEC) that provides telecommunications services in Oregon. North County Communications Corporation (North County) is a wireline competitive local exchange carrier (CLEC). North County and Qwest are parties to an interconnection agreement signed in 1997. Due to developments in telecommunications technology over the last decade, in August of 2009 Qwest filed with the Public Utility Commission of Oregon (Commission) a petition for arbitration and approval of a new interconnection agreement (ICA) with North County. After informal negotiations regarding the proposed ICA failed, an Arbitrator conducted an arbitration hearing on August 18, 2010, and issued a decision resolving the issues raised in the arbitration on January 21, 2011. On February 3, 2011, North County filed comments challenging the Arbitrator's decision on three points. In this Order, we adopt the Arbitrator's decision.

II. DISCUSSION

A. Legal Standard

Per OAR 860-016-0030, a Commission arbitration award must ensure that the requirements of sections 251 and 252 of the Telecommunications Act of 1996 (the Act)¹ and any valid applicable Federal Communications Commission regulations under

¹ Pub. L. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §§ 151-615.

those sections are met, and that any arbitration award is consistent with this Commission's policies. The award must also establish a schedule for implementation of the adopted interconnection agreement.

B. Issues

1. Signaling

The parties' primary dispute concerned North County's continued use of multifrequency (MF) signaling, instead of the more modern Signaling System No. 7 (SS7) signaling used by Qwest. Qwest argued that MF signaling was outdated and created billing and other difficulties for Qwest. To accommodate North County's continued use of MF signaling, Qwest proposed to permit North County to terminate traffic using MF signaling, but required North County to renegotiate with Qwest before terminating any traffic to Qwest. The arbitrator adopted Qwest's argument, concluding that Qwest had adequately demonstrated the billing and tracking difficulties posed by MF signaling. The arbitrator relied in part on Qwest's citation to *Western Radio v. Qwest Corp.*, 51 Comm. Reg. (P & F) 202 (Or. Dist. Ct. 2010), in which the court held that requiring an ILEC to interconnect with a CLEC using an outdated technology was contrary to the purposes of the Act.²

In its Comments, North County first notes that SS7 signaling is known as a lesser-quality service relative to Voice Over Internet Protocol (VoIP) service, and argues that Qwest discriminates against North County by prohibiting North County from using VoIP interconnection.³ We reject this argument. North County did not request interconnection with Qwest using VoIP; it requested interconnection using MF signaling. We decline to address North County's new argument that Qwest should permit interconnection using VoIP.

North County next argues that Qwest is discriminating against North County because existing Qwest agreements with other CLECs provide for MF signaling interconnection. North County states that Qwest misread North County's discovery requests, and refused to disclose information regarding other CLECs in Oregon that may be using MF trunks in addition to other signaling interconnection.⁴ As Qwest noted, however, North County is the only CLEC in Oregon attempting to interconnect with Qwest using only MF signaling.⁵ Given this difference, we do not find evidence in the record supporting North County's argument that Qwest's restriction on terminating calls to Qwest with MF technology is discriminatory.

² Arbitrator's Decision (Decision) at 4.

³ North County Comments to Arbitrator's Decision (North County Comments) at 1.

⁴ North County Comments at 2.

⁵ Qwest Post-Hearing Brief at 2.

2. *Billing Methodology*

To accommodate North County's use of MF signaling while protecting itself from arbitrage and the tracking difficulties that result from MF signaling, Qwest's proposed ICA imposes a cap on billable minutes. The arbitrator concluded that Qwest had adequately demonstrated the need for a cap.⁶

North County argues that the cap is arbitrary and capricious, and that it violates federal statutes and regulations, as well as Oregon laws and rules requiring North County to receive reciprocal compensation for the termination of traffic. To support this argument, North County does not cite any Oregon laws or rules, but instead cites *United States v. Causby*, 328 U.S. 256 (1946), a case involving the taking of property under the Fifth Amendment.⁷ We conclude that North County does not adequately support its legal argument with relevant citations to state or federal law, and we reject the argument on that basis. We also note that Qwest stated in briefs and testimony that its proposed cap was based on actual usage in Oregon and allowed for additional traffic based on past usage patterns before the cap would be reached.⁸ We conclude that Qwest's proposed cap is not arbitrary or capricious.

3. *VNXX*

In its proposed ICA, Qwest included language on VNXX traffic that Qwest stated was intended to implement this Commission's ruling on VNXX. The arbitrator concluded that North County had not demonstrated that Qwest's proposed language contradicted anything in our rulings or law, and approved of the proposed language.⁹

In its Comments, North County again argues that a specific definition of VNXX created by Qwest should not be adopted for the ICA, and that instead, the ICA should simply state that the parties agree to abide by this Commission's orders and regulations. As the Decision noted, North County does not demonstrate that anything in Qwest's definition contradicts our rules or orders. Qwest notes in its testimony that the definition of its proposed ICA is "language that was worked out with the OPUC staff and therefore can be considered entirely consistent with this Commission's definition of VNXX."¹⁰ We agree, and we see no error in Qwest's use of specific language. We adopt the Arbitrator's decision on this issue.

⁶ Decision at 5-6.

⁷ North County Comments at 2.

⁸ See, e.g., Qwest Post-Hearing Brief at 3.

⁹ Decision at 7.

¹⁰ Qwest Exhibit 10, Albersheim Rebuttal Testimony, at 14.

III. CONCLUSION


The Commission has reviewed the Arbitrator's decision and the comments filed by North County. The Arbitrator's decision complies with the requirements of the Act, applicable FCC regulations, and relevant state law and regulations and should be approved. OAR 860-016-0030(11).

ORDER

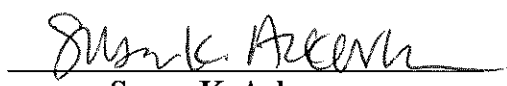
IT IS ORDERED that:

1. The Arbitrator's decision in this docket, attached to and made part of this order as Appendix A, is adopted.
2. Within 14 days after this order issues, Qwest must prepare an interconnection agreement complying with the terms of the order and serve it on North County. North County shall either sign and file the agreement, or file objections to it, within 10 days of service. OAR 860-016-0030(12).

Made, entered, and effective FEB 18 2011



John Savage
 Commissioner



Susan K. Ackerman
 Commissioner



A party may request rehearing or reconsideration of this order under 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 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order to a court pursuant to applicable law.

ISSUED: January 21, 2011

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ARBITRATOR'S DECISION

I. INTRODUCTION

North County Communications Corporation (North County) and Qwest Corporation (Qwest) are parties to an interconnection agreement signed in 1997. In August of 2009, Qwest filed with the Public Utility Commission of Oregon (Commission) a petition for arbitration and approval of a new interconnection agreement with North County, to address changes in technology since the parties' existing agreement was signed. After several months of informal negotiations, the parties moved forward with formal arbitration, culminating in an arbitration hearing. In this ruling, I resolve the issues raised in the parties' arbitration.

II. PROCEDURAL HISTORY

Qwest is an incumbent local exchange carrier (ILEC) that provides telecommunications services in Oregon. North County is a wireline competitive local exchange carrier (CLEC). North County and Qwest are parties to an interconnection agreement (ICA) in Oregon signed on November 20, 1997, that has been in "evergreen" status since 2000.¹

Qwest filed its petition for arbitration in this docket on August 3, 2009. The parties jointly requested a series of stays to pursue informal negotiations. After Qwest requested that the Commission move forward with formal arbitration proceedings, North County asked for the opportunity to brief the threshold question of whether this Commission has jurisdiction over the parties' dispute. On May 5, 2010, I issued a ruling denying North County's motion to dismiss Qwest's petition for lack of jurisdiction, and on June 21, 2010, the Commission issued an order affirming my ruling.

¹ See North County Communications Corporation and U S West Communications, Inc. [now Qwest] Arbitrated Interconnection Agreement for the State of Oregon [Existing Agreement] at § XXXIV.V p. 73.

The parties submitted issue statements, pre-filed direct testimony, and exhibits. On July 8, 2010, the Commission conducted a hearing, at which the parties presented direct and cross-examination testimony. The parties submitted simultaneous closing briefs on September 21, 2010. Qwest filed a notice of supplemental authority on October 19, 2010. North County moved to strike Qwest's notice, and on October 29, 2010, I denied North County's motion to strike.

III. DISCUSSION

A. Legal Standard

Under the Telecommunications Act of 1996 (the Act),² either party to a negotiation regarding an interconnection agreement may petition this Commission to arbitrate any open issues. *See* 47 U.S.C. § 252(b)(1). In resolving open issues, this Commission must ensure that its resolution and any conditions that it imposes on the parties meet the requirements of sections 251 and 252 of the Act and any valid applicable Federal Communications Commission (FCC) regulations under those sections, and that any arbitration award is consistent with this Commission's policies. *See* OAR 860-016-0030(9).

B. Background

Qwest argues that since the parties signed their existing agreement in 1997, significant technological advancements and changes in Qwest's processes and products have rendered the existing agreement outdated. Primarily, Qwest argues that North County's use of multifrequency (MF) signaling is archaic, and that while Qwest is willing to accommodate MF signaling for traffic terminating to North County, North County must use Signaling System No. 7 (SS7) signaling if it wishes to begin terminating traffic with or through Qwest. Qwest offers its revised standard negotiation template as the basis for its proposed interconnection agreement in this docket, with accommodations to one section of the template to allow North County to terminate traffic using MF signaling.³ Qwest notes that the accommodations in its proposed template are intended to assist North County, and that in general, Qwest is not required to accede to every CLEC demand for what is essentially an inferior method of interconnection.⁴

North County does not offer specific language to replace the language proposed by Qwest, but argues generally that Qwest's proposed interconnection agreement would force North County to scrap its existing network in favor of an unnecessary technological update and an untested agreement. North County states that nothing in any law or regulation allows Qwest to dictate North County's technology choices, and that the difficulties Qwest cites in retaining the parties' existing agreement are either false or exaggerated. North County also states that Qwest

² Pub. L. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. §§ 151-615.

³ Qwest Post-Hearing Brief at 4. Qwest notes that its current template is based on terms developed in a docket that extended over nearly six years, with revisions and input from the Administrative Law Judge, Commission, and CLECs. *See* UM 823.

⁴ Qwest Post-Hearing Brief at 4, citing *Western Radio v. Qwest Corp.*, 51 Comm. Reg. (P & F) 202 (Or. Dist. Ct., 2010); *Verizon Md. Inc. v. Core Communications, Inc.*, 631 F.Supp.2d 690, 700 (D. Md. 2009).

has not justified changing the terms of the parties' existing agreement, and advocates for keeping the existing agreement.⁵

C. Issues

1. Signaling

a. Parties' Positions

i. Qwest

Qwest argues that SS7 signaling is more efficient, more reliable, and more flexible than MF signaling, and that SS7 allows carriers to more accurately track traffic, and therefore more accurately bill for traffic, using the appropriate jurisdictional basis.⁶ Qwest states that MF signaling's limitations in its ability to record call information were causing numerous billing disputes between the parties.⁷ Qwest states that it is not practical or reasonable to expect Qwest to re-engineer its automated billing systems to deal with one customer's older technology, but that Qwest nevertheless agrees to manually generate data for North County in this case, with added protections to ensure that Qwest is not over-billed.⁸

To accommodate North County's desire to continue using MF signaling, in its proposed ICA Qwest offers language stating that the parties agree that: (1) North County currently terminates traffic from Qwest using multi-frequency (MF) signaling but does not send traffic to Qwest; and (2) should North County wish to originate traffic to Qwest, at that time the parties will negotiate an amendment to their ICA that will include requirements for use of SS7 signaling in the mutual exchange of traffic. Per the proposed agreement, unless a later amendment is mutually negotiated, North County may not send traffic to Qwest for termination or for Qwest to send to other carriers connected to Qwest.⁹

ii. North County

North County argues that it should not be prevented from using outbound MF signaling, and that forcing it to convert to SS7 would be prohibitively expensive and unreasonable. North County notes that it designed its entire network based on what was allowed in the existing agreement, and that MF signaling is in fact more reliable and less prone to widespread failure than SS7 signaling.¹⁰ North County specifically argues that section 7.2.1.1 of Qwest's proposed ICA arbitrarily restricts North County's ability to provide outbound services, and that nothing in the Act or any law or regulation limits North County's ability to provide service to outbound customers.¹¹

⁵ Hearing Transcript, Lesser – ReE, at 145.

⁶ Qwest Post-Hearing Brief at 6, citing Qwest Exhibit 8, Linse Direct Testimony, at 15.

⁷ Hearing Transcript, Albersheim – X, at 90; see also Qwest/11 Summary of Billing Issues.

⁸ Qwest Exhibit 10, Albersheim Rebuttal Testimony, at 7.

⁹ Qwest Revised List of Disputed Issues, June 16, 2010, at 1, Sections 7.1.1, 7.2.1.1.

¹⁰ Hearing Transcript, Lesser Direct, at 5-6.

¹¹ North County List of Disputed Issues, June 20, 2010, at 2.

North County cites to section 251(i) of the Act, stating that a local exchange carrier “shall make available any interconnection, service, or network element provided under an [approved] agreement to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement,” and cites to a ruling from the FCC noting that section 251(i) has been described as a “primary tool” for preventing discrimination against carriers under section 251.¹² North County states that other interconnection agreements exist that permit MF signaling, and while no other CLEC actually uses MF signaling, the fact that the agreements permit such use indicates that Qwest is discriminating against North County.¹³

b. *Resolution*

I adopt Qwest’s argument on this issue. Qwest presented exhibits and testimony regarding the billing and tracking difficulties posed by North County’s continued use of MF signaling. Qwest’s accommodation of MF signaling, by permitting North County to terminate calls from Qwest but requiring renegotiation should North County wish to originate calls, is a reasonable solution that permits the parties to continue interconnecting without exposing Qwest to undue risk.

Qwest’s citation to *Western Radio v. Qwest Corp.*, 51 Comm. Reg. (P & F) 202 (Or. Dist. Ct., 2010), is persuasive. As the court in *Western Radio* notes, “ILECs are required to provide interconnection to requesting carriers ‘that is at least equal in quality to that provided by the local exchange carrier itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection . . .’” *Western Radio* at 22, citing 47 U.S.C. § 251(c)(2)(C). Courts interpreting section 251(c)(2)(C) have concluded that the Act does not require an ILEC “to interconnect with requesting carriers through facilities that were of lesser-quality than that which it interconnected with other carriers.” *Western Radio* at 23, discussing *Verizon Md. Inc. v. Core Commc’ns, Inc.*, 631 F. Supp. 2d 690, 700 (D. Md. 2009) (emphasis added). While North County may request interconnection, it may not force Qwest to continue using MF signaling, an outdated technology, to do so.¹⁴ Qwest’s accommodation of North County’s desire to continue using MF signaling is reasonable, and fulfills Qwest’s requirements under section 251 of the Act.

I find that Qwest’s amendments to its template agreement reasonably accommodate the needs of both parties. I approve sections 7.1.1 and 7.2.1.1 of Qwest’s proposed ICA, as filed with its Petition for Arbitration.¹⁵

¹² North County Post-Hearing Brief, citing 11 F.C.C.R. 15499, 1296.

¹³ Hearing Transcript, North County Closing, at 153.

¹⁴ The court in *Western Radio* went on to note that “[r]equiring Qwest to provide interconnection through outdated technologies is contrary to the purpose of the Act because it could stifle competition, result in lower-quality services, and hinder the development of new technologies.” *Western Radio* at 25-26.

¹⁵ See Petition for Arbitration and proposed Interconnection Agreement, filed August 3, 2009.

2. *Billing Methodology*

a. *Parties' Positions*

i. *Qwest*

Qwest states that section 7.8 of its proposed agreement is intended to require North County to produce accurate bills, since Qwest is not able to verify traffic with MF signaling.¹⁶ To accommodate the use of MF signaling, Qwest proposes a cap on billable minutes. The cap, based on North County's historical traffic with an added buffer to allow for growth, is intended to protect Qwest from arbitrage, particularly from companies that choose to opt into the proposed agreement. Qwest explains that the cap is important because Qwest is blind to any North County-originated local calls that North County routes through another service provider using MF signaling; as a result, Qwest had no reasonable ability to determine if all minutes billed by North County were in fact properly compensable.¹⁷ In its closing brief, Qwest clarifies that the cap would be applied on an average basis, to avoid cutting off compensable minutes that exceeded one DS1 line's cap, when on an average basis the lines' minutes were below the cap. Qwest also notes that due to a calculation error, the cap listed in its proposed ICA as 10,000 minutes of use per in-service DS1 should have read 240,000 minutes of use per in-service DS1.

ii. *North County*

North County argues that Qwest's proposed cap unlawfully discriminates against North County by taking a deduction off of North County's invoices. North County notes that no other CLEC has a similar cap on minutes, and argues as a result that the cap is discriminatory. North County also argues that the cap is arbitrary, and that Qwest came up with the number randomly, without support or evidence. North County notes that if North County used a million minutes on one line, the proposed cap would effectively discount 76 per cent of the time that North County could bill for that line.¹⁸

b. *Resolution*

I agree with North County that Qwest's proposed cap would operate to cut off compensation if one DS1 line exceeded the cap, even if the averaged minutes for all DS1 lines were below the cap. However, with Qwest's proposed modification, that issue is removed. With modifications to Qwest's proposed language to clarify that the cap is to be applied on an averaged basis, I find that Qwest adequately demonstrated through testimony and evidence that its cap is necessary to prevent arbitrage from other CLECs and to permit North County to use MF signaling without exposing Qwest to undue risk as a result. As Qwest noted at the hearing, no other CLEC has such a cap, because no other CLEC interconnects with Qwest using MF signaling.¹⁹ I approve of Qwest's proposed language in section 7.8 of its proposed

¹⁶ Qwest Post-Hearing Brief, at 7.

¹⁷ Qwest Ex. 10, Albersheim Rebuttal Testimony, at 9; Qwest Ex. 13, Linse Rebuttal Testimony, at 10.

¹⁸ Hearing Transcript, 105, 152-153; *see also* North County List of Disputed Issues at 2.

¹⁹ Hearing Transcript, 96-97.

interconnection agreement, as filed with its Petition for Arbitration, with the following modifications:

- (1) Section 7.8.1.2 will strike out "10,000" and replace with "240,000";
- (2) Section 7.8.1.2 will clarify that the cap is to be applied on an averaged basis.

3. *Relative Use Factor*

a. *Parties' Positions*

i. *Qwest*

Qwest states that Exhibit H to its proposed ICA contains the standard language for calculation of the relative use factor (RUF). Per Exhibit H, five categories of traffic are Qwest's responsibility, while seven categories of traffic are the CLEC's responsibility. Included in minutes that are the CLEC's responsibility are all ISP-bound and VNXX minutes of use (MOU) that Qwest sends to the CLEC, and all VNXX MOU that transit Qwest's network and are terminated to the CLEC. Exhibit H further states that data used for the calculation of the RUF "will be the average of the most recent three (3) months' usage determined not to be an anomaly."

In its testimony and post-hearing brief, Qwest explains that typically, the initial sharing of costs between parties is set at 50/50 for a period of three months, after which either party may seek recalculation based on the actual relative use between the parties. In this instance, Qwest proposes assigning 99 per cent of the cost to Qwest and one per cent to North County, so long as the parties file billing percentages that give Qwest 100 per cent ownership of the transport facilities.²⁰

With regard to ISP-bound traffic, Qwest notes that this Commission has determined that such traffic should not be attributed to the originating carrier when calculating the relative use factor. Therefore, Qwest argues that language in Exhibit H attributing to the CLEC all ISP-bound and VNXX traffic is appropriate.²¹

ii. *North County*

North County states that the RUF is intended to allocate the amount of traffic flowing out to each carrier, and that under both the existing and proposed agreements, 100 percent of the flow of traffic is from Qwest to North County (indeed, Qwest's proposed agreement requires renegotiation should North County wish to originate traffic). As a result, North County argues that relative use of the companies' circuits is 100 percent Qwest and 0 percent North County, and the RUF should reflect that reality.

²⁰ Qwest Post Hearing Brief at 11.

²¹ Qwest Ex. 10, Albersheim Rebuttal Testimony, at 13-14.

b. *Resolution*

Neither party submitted data regarding the parties' historical relative use, to demonstrate what the sharing of costs should be under Qwest's proposed Exhibit H. I agree with North County that Qwest has failed to justify its proposed RUF of 99 percent costs to Qwest and one percent costs to North County. However, North County has failed to contest the RUF calculation in Exhibit H, other than to state that the parties' RUF should simply reflect the actual flow of traffic between the parties. Absent evidence from either party that the distribution of costs should be something other than 99/1, this initial sharing of costs is favorable to North County. In addition, if the actual usage between the parties is determined to be 100/0, North County may seek recalculation of the sharing of costs to reflect that usage after three months.

North County has not demonstrated that Exhibit H is contrary to Commission rulings or law. I approve of Qwest's language in sections 7.3.1.1.3.1 and 7.3.2.2.1 of its proposed interconnection agreement, as filed with its Petition for Arbitration, modified to assign 1 percent of the cost to North County and 99 percent to Qwest for the initial three month period.

4. *VNXX Traffic*

a. *Parties' Positions*

i. *Qwest*

Qwest states that its proposed language on VNXX traffic properly implements this Commission's requirements regarding VNXX traffic.²²

ii. *North County*

North County states that VNXX should be defined "exactly the same way as it is defined by the Commission," and that there is no need for Qwest to supply its own definition of VNXX in the proposed agreement.²³

b. *Resolution*

North County has not presented evidence or argument that anything in Qwest's proposed language contradicts Commission rulings or law. I approve of Qwest's proposed language in Section 7.2.1.2 of its proposed interconnection agreement, as filed with its Petition for Arbitration.

²² Qwest Post Hearing Brief at 5.

²³ North County Post Hearing Brief at 7.

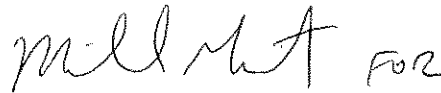
5. *Remaining Issues: AudioText, Automatic Number Identification*

North County raised the issues of audiotext and automatic number identification during the course of this proceeding, but did not address either issue in its post-hearing brief. With regard to these remaining issues, I conclude that North County did not provide sufficient briefing and argument for me to properly consider their position. North County may file comments with the Commission that more thoroughly address their objections to Qwest's proposed language. Absent more thorough comments, I find in favor of Qwest on these issues.

IV. ARBITRATOR'S DECISION

1. The proposed interconnection agreement between Qwest Corporation and North County Communications Corporation of Oregon, filed by Qwest Corporation with its Petition for Arbitration on August 3, 2009, is approved, as modified by this decision.
2. Either party may file comments regarding this decision within 10 days of service of the decision. OAR 860-016-0030(10). The Commission will accept or reject the decision within 30 days. OAR 860-016-0030(11).

Dated at Salem, Oregon, this 21st day of January, 2011.



Shani M. Pines
Arbitrator