ORDER NO. 00-711

ENTERED NOV. 06 2002

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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BEAVER CREEK COOPERATIVE TELEPHONE COMPANY, Complainant, VS. QWEST CORPORATION, formerly U S WEST COMMUNICATIONS, INC., Defendant.	)	ORDER

DISPOSITION: APPLICATION FOR RECONSIDERATION GRANTED; ORDER NO. 00-440 MODIFIED

On August 10, 2000, the Commission issued Order No. 00-440 in this docket, dismissing Beaver Creek Cooperative Telephone Company's (Beaver Creek) complaint against Qwest Corporation (Qwest, formerly U S WEST Communications, Inc.). On October 6, 2000, Qwest filed for reconsideration or clarification of the order. Beaver Creek did not file a response, and the time for response is past.

Qwest argues that reconsideration or clarification is justified because a discrete portion of Order No. 00-440 is inconsistent with the plain language and intent of the federal Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* (the Act). Therefore, Qwest contends, the order contains an error of law that materially affects the decision, and good cause exists to clarify or reconsider that portion of the order. Qwest requests the Commission to issue an order clarifying that a written interconnection agreement is necessary

The portion of the order that Qwest takes issue with begins on p. 5:

> We conclude that the Act mandates carrier to carrier agreements for services in subsections (1) through (5) of Section 251(b), but those agreements need not take the form of written interconnection agreements. For more complex transactions, a written agreement is appropriate. We take the gist of subsection 251(c)(1) to be the incumbent carrier's duty to

> negotiate in good faith to reach agreement on how to provide the services mandated in Sections (b) (1)-(5), regardless of the kind of agreement the parties negotiate. While [Qwest's] requirement of a written interconnection agreement is consistent with the Act, we do not believe it is required as a matter of law. Because a written interconnection agreement is not required by the Act as a matter of law, [Qwest's] argument is not dispositive of the case. On the other hand, [Qwest's] requirement of a written interconnection agreement is not inconsistent with the Act, and consequently does not violate the Act.

Qwest's Argument. Qwest contends that the plain language of the Act requires a written interconnection agreement for the provision of services pursuant to §251(b) of the Act. Qwest points out that Section 251, entitled "Interconnection," establishes certain rights and obligations of telecommunications carriers. The subject of the underlying complaint was local number portability (LNP). Section 251(b)(2) of the Act imposes on all local exchange carriers (LECs) the duty to provide LNP. Section 251 does not, however, state how this or the other obligations arising under that section are to be satisfied.

Sections 251(c) and 252 of the Act answer that question. According to Qwest, those sections constitute the mechanism for implementing the obligations of § 251(b). Section 251(c) requires all incumbent LECs, including Qwest, to negotiate agreements with all requesting telecommunications carriers to "fulfill the duties described in paragraphs 9(1) through (5) of subsection (b) and this subsection." 47 U.S.C. § 251(c)(1). Section 251(c) does not state what type of agreement is necessary but does provide that any agreement for the provision of §251(b) services must be negotiated "in accordance with section 252."

Section 252 is entitled "Procedures for Negotiation, Arbitration, and Approval of Agreements" and among other things describes how agreements between telecommunications carriers may be reached, establishes standards for pricing, and requires approval of agreements by the appropriate state commission. Qwest argues that the plain language of this section reveals the requirement that §251(b) services such as LNP be provided pursuant to a *written* interconnection agreement. For instance, Qwest points out that §252(a)(1) allows carriers to voluntarily negotiate an agreement for the provision of services under §251(b). Section 252(a)(1) provides: "The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement." Qwest maintains that an oral agreement can neither contain a detailed schedule of itemized charges nor be submitted to the Commission for approval.

Moreover, Qwest notes that any agreement, whether negotiated or arbitrated, must be submitted to the appropriate state commission for approval. The state commission "shall make a copy of each agreement . . . available for public inspection and copying within 10 days after the agreement or statement is approved." 47 U.S.C. §252(e)(1), (h); *see* also 47 U.S.C. §252(a)(1) (voluntarily negotiated agreements must be submitted to state commission for approval).

Qwest maintains that it would be impossible to submit or file an oral agreement with a state commission. Furthermore, Qwest argues that if an agreement was oral rather than

written, the commission could not make a copy available to the public and would thus be unable to fulfill its obligations under the Act. Qwest concludes that the plain language of the Act requires that an agreement for the provision of services pursuant to §251 (b) be in writing.

According to Qwest, one purpose of the requirement that agreements for provision of services under §251 (b) be in writing is to avoid discrimination. The Act prohibits preferential treatment of one carrier over another in the provision of services. By requiring that carriers reduce their interconnection agreements to writing and file them with the appropriate state commission, the Act ensures that no carrier receives preferential treatment. Further, §252(i) requires LECs to make the terms of approved agreements available to other carriers. Absent a written interconnection agreement filed with the state commission, it would be impossible for a competing carrier to have notice of or access to the terms of an oral interconnection agreement, thus creating the potential for discrimination. No matter how simple an interconnection agreement may be, an oral interconnection agreement cannot, according to Qwest, comply with the terms of §252.

Qwest concludes that the Act requires a written agreement for services provided pursuant to §251(b). Qwest further concludes that the written agreement required is an interconnection agreement. Section 252 contemplates that parties will execute an interconnection agreement for services required to be provided under §251(b). For instance, Qwest notes that the appropriate state commission must approve any arbitrated or negotiated "interconnection agreement." 47 U.S.C. §252(e)(1). Moreover, Qwest points out that in the Federal Communication Commission's (FCC) order on number portability, the FCC stated: "In addition to the duties imposed by section 251 (b) on all LECs, section 251(c)(1) imposes upon incumbent LECs, inter alia, the `duty to negotiate in good faith . . . the terms and conditions of agreements to fulfill' the section 251 (b) obligations, including the duty to provide number portability." *In the Matter of Telephone Number Portability,* First Report and Order, T9, CC Docket No, 95-116, FCC 96-286, 11 FCC Rcd 8352, 1996 FCC LEXIS 3430 (rel. July 2, 1996). Finally, Qwest notes that in the context of an incumbent LEC's obligation to resell services at a wholesale discount, Commission Staff has stated: Section 252 of the Act provides that competitive carriers are to obtain wholesale discounts for purposes of resale through interconnection agreements." Staff Report, Public Meeting Date December 14, 1999, attached to Order No. 00-007, Docket UM 962 (entered January 6, 2000). According to Qwest, it is clear that an incumbent LEC's obligations are fulfilled through an interconnection agreement pursuant to §252.

Resolution. We are convinced by the argument that Qwest has set out with respect to the Act's requirement of a written interconnection agreement. The Act mandates filing and state commission approval of the agreements; that could not be done with a verbal agreement. The Act's caveat against discrimination would also be unenforceable without recourse to written agreements. The clear implication of the §252 requirements is that agreements for provision of services under §251 (b) must be in writing.

Qwest has also presented argument that the written agreement for provision of services pursuant to §251 (b) must be an interconnection agreement. Although we do not believe that this was at issue in the order, we subscribe to Qwest's position.

Consequently, we have recast the paragraph set out above from Order No. 00-440 (see ordering paragraph). The replacement paragraph states that the Act requires written interconnection agreements for provision of services pursuant to §251(b). This change in language does not change the outcome of Order No. 00-440.

ORDER

IT IS ORDERED that the paragraph in Order No. 00-440, at 5, beginning "We conclude that the Act mandates carrier to carrier agreements" be replaced with the following paragraph:

> We conclude that the Act mandates carrier to carrier interconnection agreements for services in subsections (1) through (5) of Section 251(b). Read together with §251(c) and §252, we conclude that those agreements must take the form of written interconnection agreements. Subsection 251(c)(1) imposes on an incumbent carrier the duty to negotiate in good faith to reach agreement on how to provide the services mandated in Sections (b) (1)-(5). Section 252 requires that agreements be filed with and approved by the relevant state commission. Section 252 also prohibits preferential treatment of any carrier and mandates that the terms of agreements be made available to all carriers. These requirements clearly contemplate a written interconnection agreement for the provision of services pursuant to §251(b). In requiring a written interconnection agreement for provision of LNP, Qwest has not violated the Act.

Made, entered, and effective NOV 06 2000 .

Ron Eachus
Chairman

Commissioner was unavailable for signature
Roger Hamilton
Commissioner

Joan H. Smith
Commissioner

A party may appeal this order to a court pursuant to applicable law.