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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition of
QWEST CORPORATION
for Arbitration of an Interconnection Agreement
with FIRSTDIGITAL TELECOM Pursuant to
Section 252 of the Federal Telecommunications
Act of 1996

Docket No. 09-049-__
QWEST'S PETITION FOR
ARBITRATION OF AN
INTERCONNECTION AGREEMENT
WITH FIRSTDIGITAL TELECOM

Qwest Corporation ("Qwest") petitions the Utah Public Service Commission ("Commission") for an order pursuant to 47 USC § 252(b) approving an interconnection agreement between Qwest and FirstDigital Telecom ("FirstDigital") as follows:

INTRODUCTION

1. In support of its Petition, Qwest alleges as follows: The names, addresses, and telephone numbers of the persons to whom communications should be addressed are:

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2. Pursuant to Administrative Code R 746-100-3, Qwest states that the names and addresses of the respondent, FirstDigital, and its counsel, are as follows:

Wesley McDougal
President
FirstDigital Telecom
One Gateway Tower
90 South 400 West, Suite M100
Salt Lake City, Utah 84101
801-456-1005
wmcdougal@firstdigital.com

Sharon M. Bertelsen
Ballard Spahr LLP
One Utah Center, Suite 800
201 South Main Street
Salt Lake City, UT 84111-2221
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PARTIES AND JURISDICTION

Parties

3. Qwest is a “telecommunications corporation” as defined in Utah Code Ann. § 54-8b-2 and a “public utility” as defined in Utah Code Ann. § 54-2-1, and is an “incumbent telephone corporation” as defined in Utah Code Ann. § 54-8b-2 and an “incumbent local exchange company” (“ILEC”), as defined in 47 U.S.C. § 251(h). Qwest’s principal place of business is Denver, Colorado. Qwest provides local exchange and other telecommunications services in the State of Utah. The Federal Communications Commission (“FCC”) has required

Qwest to request and enter into interconnection agreements with Competitive Local Exchange Carriers (“CLECs”) with whom Qwest exchanges traffic, and Qwest has diligently pursued such an interconnection agreement with FirstDigital, without any good faith substantive response.

4. On information and belief, FirstDigital is a Utah corporation and is registered with and classified by the Commission as a CLEC and is also a “telecommunications corporation” as defined in Utah Code Ann. § 548b-2 and a “public utility” as defined in Utah Code Ann. § 54-2-1. On information and belief, FirstDigital is authorized to provide switched and non-switched local exchange and long distance services in Utah.

Jurisdiction

5. Qwest seeks approval of the interconnection agreement (“ICA”) found on the Qwest website at <http://www.qwest.com/wholesale/clecs/sgatswireline.html>, and referenced as Exhibit A, with FirstDigital, consistent with the requirements of 47 USC § 252(b).

6. As required by Section 252(b)(2)(B) of the Act, Qwest has delivered a copy of this Petition, together with all exhibits, to FirstDigital and its counsel.

7. This Commission has jurisdiction to arbitrate and approve this agreement with FirstDigital pursuant to Section 251(b)(1) of the Act.

REQUESTS FOR NEGOTIATION AND HISTORY OF FAILURES TO RESPOND

Qwest’s Requests for Negotiation

8. Qwest invited FirstDigital to enter into negotiations to replace the existing ICA between the two carriers on May 14, 2009, as demonstrated below in paragraph 11. FirstDigital currently has an ICA with Qwest that this Commission approved by letter on August 28, 2001 after FirstDigital opted into an interconnection agreement between Qwest and Nextlink (now XO

Utah, Inc.). That ICA has long passed its expiration date and is no longer up to date with many of Qwest's current interconnection terms and conditions. FirstDigital's failure to respond substantively to Qwest's repeated invitations to negotiate an ICA, as shown below in paragraph 11 and Exhibits B through L, is a failure to negotiate in good faith under the federal Telecommunications Act of 1996 ("the Act").

Timely Filing of Petition

9. This Petition is timely filed. Qwest initiated negotiations on May 14, 2009, and thus, the original due date for a petition for arbitration was October 20, 2009 (160 days after the initial request for negotiation was sent). A copy of Qwest's first letter to negotiate on May 14, 2009 is attached as Exhibit B. However, although FirstDigital had completely refused to respond substantively to Qwest's repeated regulations for negotiation, as described more fully in paragraph 11 below, Qwest agreed to give FirstDigital, and FirstDigital accepted, one last opportunity to negotiate an ICA. Thus, the parties agreed to extend the deadline for a petition for arbitration for two weeks, until Tuesday, November 3, 2009. See Exhibits K and L, and ¶ 11.1. Accordingly, this Petition is timely.

10. Pursuant to Section 252(b)(4)(C) of the Act, this arbitration is to be concluded not later than nine months after the applicable request for negotiations was sent to the FirstDigital. Since Qwest initiated a request for negotiation on May 14, 2009, nine months later would be February 14, 2010. However, because Qwest and FirstDigital agreed to a two-week extension (see paragraph 9, above), the applicable conclusion date is now February 28, 2010.

History of Qwest's attempts to negotiate and FirstDigital's failures to negotiate

11. The history of Qwest's repeated attempts to negotiate an ICA with FirstDigital, and FirstDigital's delays and dragging of its feet and refusals to respond substantively, is made

abundantly clear in the history of Qwest's attempts to negotiate, as follows:

a. Qwest initiated negotiations with its letter to FirstDigital on May 14, 2009. See Exhibit B. FirstDigital did not respond.

b. Qwest's ICA negotiator Bryan Sanderson then called FirstDigital's president, Wesley McDougal, on June 1, 2009 and June 8, 2009. Mr. McDougal did not respond until June 8, 2009, when he called back and advised Mr. Sanderson that FirstDigital wanted to adopt a current ICA in Utah, and thus asked Mr. Sanderson to send him a list of ICAs that were available for adoption in Utah pursuant to section 252(i) of the Act.

c. On June 8, 2009, Mr. Sanderson sent to Mr. McDougal a list of adoptable ICAs on June 9, 2009. See Exhibit C.

d. On June 23, 2009, Mr. Sanderson called Mr. McDougal and left a message asking the status of FirstDigital's review of the ICAs for adoption. Mr. McDougal did not respond. Thus, on July 6, 2009, Mr. Sanderson sent Mr. McDougal an email requesting the status of FirstDigital's review of the ICAs for adoption. See Exhibit D. Mr. McDougal did not respond.

e. On July 21, 2009, Mr. Sanderson sent Mr. McDougal another letter and email asking about the status of FirstDigital's review of the ICAs for adoption. See Exhibit E. Mr. McDougal did not respond.

f. On August 10, 2009, Mr. Sanderson called Mr. McDougal and left a message asking the status of FirstDigital's review of the ICAs for adoption. Mr. McDougal did not respond. Thus, on August 31, 2009, Mr. Sanderson sent Mr. McDougal another email and notified Mr. McDougal that due to FirstDigital's failure to negotiate a new ICA with Qwest, Mr. Sanderson had turned this matter over to Qwest's legal department for further action. See Exhibit F. Mr. Sanderson advised McDougal that FirstDigital wanted to resolve this matter before the arbitration window opened on

September 25, 2009 (the 135th day after May 14, 2009), he should contact Mr. Sanderson. Mr. McDougal did not respond.

g. Finally, more than three weeks later, and only three days before the September 25, 2009 opening of the arbitration window, FirstDigital's counsel Sharon Bertelsen called Mr. Sanderson to advise him that she represented FirstDigital, and to request a list of available ICAs in Utah available for adoption. Mr. Sanderson then sent Ms. Bertelsen a copy of the June 9, 2009 email that he had previously sent to Mr. McDougal 3½ months earlier with a list of the ICAs in Utah available for adoption. See Exhibit G.

h. On September 28, 2009, Ms. Bertelsen asked for a copy of the Utah ICA with Eschelon, and Mr. Sanderson sent it to her that day. See Exhibit H.

i. Ms. Bertelsen also requested a copy of the Utah ICA with XO on September 28, 2009. Mr. Sanderson sent it to her that day, as well as the rate sheet the next day. See Exhibit I.

j. On October 7, 2009, Mr. Sanderson called Ms. Bertelsen for a status of FirstDigital's review of the ICAs for adoption. The next day, October 8, 2009, Mr. Sanderson sent an email to Ms. Bertelsen advising that he would be asking Qwest's attorneys to prepare an arbitration petition for filing on October 20, 2009. See Exhibit J. Ms. Bertelsen called back but advised that she did not have direction from her client regarding how to proceed.

k. On October 13, 2009, Qwest's Utah counsel spoke with Ms. Bertelsen about a possible two-week extension of the arbitration window, and on October 14, 2009, Qwest's counsel asked that FirstDigital agree to a November 3, 2009 deadline, and that it commit to negotiate an agreement within the two-week period. See Exhibit K.

l. The next day, October 14, 2009 FirstDigital agreed to the extension and agreement to negotiate an ICA within the two-week period ending on November 3, 2009. See

Exhibit L.

m. On October 14, 2009, Mr. Sanderson sent to Ms. Bertelsen a proposed redlined draft of the XO ICA in Utah, and summarized the changes. See Exhibit M.

n. That same day, October 14, 2009, Mr. Sanderson sent to Ms. Bertelsen another email asking whether FirstDigital wanted the one amendment (for Colorado bay procurement) associated with XO's agreement in Utah. See Exhibit N.

o. That next day, October 15, 2009, Mr. Sanderson sent to Ms. Bertelsen another email proposing to modify one additional document of the XO Utah agreement. See Exhibit O.

p. On October 21, 2009, Mr. Sanderson sent to Ms. Bertelsen another email advising that two ancillary agreements would "flow through" to a new agreement. See Exhibit P.

q. Having not heard substantively from FirstDigital, on Thursday, October 29, 2009, Mr. Sanderson called FirstDigital's counsel Ms. Bertelsen to inquire about the status of FirstDigital's review of the ICAs available for adoption. When they spoke, Ms. Bertelsen advised him that she had not met with Mr. McDougal to conduct a thorough review of the ICAs. Accordingly, on Friday, October 30, 2009, Mr. Sanderson advised that because the parties had not made much progress during the two-week extension, Qwest was going to have to file the petition unless an ICA was signed.

r. Thus, given the 5½ months of FirstDigital's absolute lack of good faith negotiations and its complete failure to either adopt an available ICA or to respond substantively, as shown above, Qwest is left with no alternative but to file this petition for arbitration.

12. Given the history of requests to FirstDigital, and its obvious failures to acknowledge its negotiation duties, it is apparent that FirstDigital has breached its duty to negotiate in good faith pursuant to section 252 (b)(5) of the Telecommunications Act of 1996.

Unresolved Issues

13. Pursuant to 47 USC § 252(a)(2)(A), a party petitioning for arbitration or approval of an interconnection agreement is ordinarily required to submit a list or matrix of unresolved issues from their negotiations. That is demonstrably impossible in this case, because FirstDigital has thus far failed to respond with any substantive issues in response to Qwest's template ICA or the ICAs in Utah that are available for adoption.

14. In this case, apart from FirstDigital's failure to respond to Qwest's repeated invitations for negotiation, there are no unresolved issues, precisely because of FirstDigital's failure to negotiate in good faith, or substantively at all. Thus, Qwest is not aware of any disputes or unresolved issues with respect to the proposed agreement.

Request for Arbitration and Approval Without Disputed Issues

15. Section 252 of the Act and 47 CFR § 51.301(b) both impose on FirstDigital a duty to negotiate in good faith in response to the several requests for negotiation described above. FirstDigital's failure to respond substantively during the negotiation window violates this duty.

16. Because of FirstDigital's violation of its duty to negotiate in good faith, Qwest asks that FirstDigital be barred from raising any disputed issues in response to this Petition. If FirstDigital is allowed to raise disputes now, the statutory duty to negotiate in good faith would be rendered meaningless, and any waiver of that duty would allow FirstDigital to subvert the entire scheme for negotiation and arbitration set up in the Act.

17. Thus, Qwest requests that the Commission approve the agreement found on the Qwest website at <http://www.qwest.com/wholesale/clecs/sgatswireline.html>, and referenced as Exhibit A, as an interconnection agreement between Qwest and FirstDigital, as written, without changes or disputed issues.

18. While Qwest asks that FirstDigital be barred from raising any disputed issues in response to this Petition, Qwest asks the Commission to review the interconnection agreement under section 252 of the Act to ensure that the agreement found on the Qwest website at <http://www.qwest.com/wholesale/clecs/sgatswireline.html>, and referenced as Exhibit A, meets the requirements of section 251 of the Act, including the FCC's regulations pursuant to section 251, or any other requirements within the Commission's state law authority that are consistent with the Act and FCC regulations, as permitted under section 252(e)(3) of the Act.

19. Qwest submits that the agreement found on the Qwest website at <http://www.qwest.com/wholesale/clecs/sgatswireline.html>, and referenced as Exhibit A, fully complies with sections 251 and 252 of the Act, applicable state laws and the orders of this Commission. This agreement is the standard template agreement that Qwest uses to initiate negotiations, and has been adopted in many cases with minor or no changes. This agreement has been reviewed and approved by regulatory commissions throughout Qwest's 14-state ILEC service territory. The agreement is not discriminatory, and is consistent with the public interest, convenience, and necessity.

WHEREFORE, Qwest respectfully requests that this Commission:

1. Conduct an arbitration pursuant to Section 252(b) of the Act;
2. Bar FirstDigital from raising disputed issues in this arbitration as a consequence of its failure to negotiate in good faith as required by the Act;
3. Find that Qwest's proposed interconnection agreement found on the Qwest website at <http://www.qwest.com/wholesale/clecs/sgatswireline.html>, and referenced as Exhibit A, is consistent with applicable law and commercially reasonable;
4. Issue an Order adopting and approving the proposed agreement found on the

Qwest website at <http://www.qwest.com/wholesale/clecs/sgatswireline.html>, and referenced as Exhibit A, as an interconnection agreement between Qwest and FirstDigital; and

5. Grant Qwest such other and further relief as may be necessary.

DATED this 2nd day of November, 2009

Respectfully submitted,

QWEST CORPORATION

By _____

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