

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

DOCKET NO. 04-2277-02

In the Matter of the Petition of DIECA)
Communications, Inc., D/B/A Covad)
Communications Company, for Arbitration to)
Resolve Issues Relating to an Interconnection)
Agreement with Qwest Corporation)
)
)

ORDER DENYING MOTION TO DISMISS OR,
ALTERNATIVELY, FOR SUMMARY JUDGMENT
RELATING TO PORTIONS OF ISSUES SUBMITTED BY
COVAD COMMUNICATIONS COMPANY FOR
ARBITRATION

ISSUED: November 12, 2004

SYNOPSIS

The Commission denies Qwest Corporation's Motion to Dismiss or, Alternatively, for Summary Judgment.

By The Commission:

On April 27, 2004, DIECA Communications D/B/A Covad Communications (Covad) filed a Petition pursuant to section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act), seeking arbitration of a proposed interconnection agreement (ICA) between Covad and Qwest Corporation (Qwest). On May 24, 2004, Qwest filed a Motion to dismiss those portions of Issues 2 and 4 of the Covad Petition that seek to arbitrate "(1) the availability of network elements under section 271 of the Act, and (2) access under state law to network elements that, per the FCC's rulings in the *Triennial Review Order*, incumbent local exchange carriers ("ILECs") are not required to unbundle under section 251 of the Act." Qwest argued that, because the parties did not negotiate items relating to section 271 unbundling and state law unbundling, these items are not "open issues" within the meaning of section 252(b)(1) and are therefore not arbitrable under section 252(b). In support of its position, Qwest submitted the affidavit of Ms. Linda Miles, Qwest's principal representative in these negotiations.

Covad submitted its Response on June 3, 2004, arguing that Qwest's motion fails as a matter of law because the Commission has the authority under section 252(e)(3) to impose state law requirements in section 252 arbitrations, regardless of whether the parties agreed to negotiate those state law items, and that the Commission is not preempted from addressing state law and section 271 issues in a section 252 arbitration. Covad then argued that the parties have in fact negotiated the disputed unbundling issues, rendering them "open issues" subject to section 252 arbitration. In support of this position, Covad submitted the affidavits of Michael Zulevic, Covad's lead negotiator, and Charles Watkins, one of Covad's attorneys involved in the negotiations.

By Reply filed June 17, 2004, Qwest reiterated its central contention that because Covad's proposed unbundling language relates to section 271 and state law requirements, and not to Qwest's obligations under sections 251(b) and ©), and because the parties never mutually agreed to negotiate this language, these items are not a proper subject of section 252 arbitration. Qwest also submitted a supplemental affidavit of Linda Miles. However, on June 28, 2004, prior to Commission decision, Qwest withdrew its Motion, reserving its right to re-file.

On September 17, 2004, Qwest filed a new Motion to Dismiss, or, Alternatively, for Summary Judgment Relating to Portions of Issues Submitted by Covad Communications Company for Arbitration requesting that the Commission "dismiss all portions of Issue 2 relating to Covad's demands for section 271 unbundling and pricing, unbundling under Utah law that conflicts with the *TRO*, *USTA II*, or the *Interim Rules*, and unbundling that conflicts with the *Interim Rules*." Qwest's Motion also seeks dismissal of that portion of Issue 4 relating to commingling.

Covad submitted its Response on October 4, 2004, generally re-iterating the arguments presented in its Response to Qwest's previous Motion; specifically, that the provisions for which Qwest seeks dismissal were the subject of negotiation between the parties and are therefore "open issues" subject to arbitration, and that the Commission has the authority to enforce Qwest's section 271 and state law obligations in this section 252 arbitration.

On October 14, 2004, Qwest filed its Reply Brief in Support of Motion to Dismiss, repeating its position that the Commission has no jurisdiction in section 252 arbitrations to require unbundled access to network elements pursuant to section 271, to set rates for any network elements provided under section 271, or to require Qwest to provide unbundled access to network elements under state law that conflicts with FCC determinations or controlling judicial precedent.

PROCEDURAL POSTURE

Qwest's Motion is based upon its assertion that the Commission lacks jurisdiction to arbitrate certain issues in a section 252 proceeding. We therefore review this Motion as one seeking dismissal for lack of jurisdiction over the subject matter. In support of their positions relative to Qwest's Motion of May 24, 2004, the parties submitted affidavits addressing whether the parties had negotiated the items in question. We therefore look to these affidavits which are now part of the record in this docket to supplement the facts alleged in the parties' pleadings. Although we consider evidence contained in affidavits which are outside of the

pleadings, such consideration does not change the nature of this Motion as one seeking dismissal for lack of subject matter jurisdiction. In deciding upon a motion to dismiss for lack of subject matter jurisdiction, the party supporting jurisdiction, in this case Covad, bears the burden of proving its existence. Any reasonable doubt must be resolved against the exercise of jurisdiction.

DISCUSSION AND CONCLUSION

In deciding this Motion, the only fact at issue is whether the parties negotiated the challenged unbundling and commingling terms, thereby creating “open issues” subject to section 252 arbitration. The following findings culled from the parties’ affidavits and pleadings provides a straightforward chronology of the parties’ actions with respect to this dispute:

1. Covad initiated ICA negotiations with Qwest by letter dated January 31, 2003. By mutual agreement, the parties extended the effective negotiation request date several times, ultimately agreeing that for the purpose of compliance with the requirements of the Act said date shall be November 18, 2003.
2. Upon receipt of Covad’s request, Qwest suggested the parties use its Statement of Generally Available Terms (SGAT) as a negotiation template.
3. Qwest’s SGAT contains terms and conditions for interconnection and access to unbundled network elements, including unbundled switching, line splitting, loop splitting, subloops and interoffice transport.
4. On May 16, 2003, Qwest agreed to negotiate the terms of “Section 9 (UNEs)”.
5. On December 1, 2003, Qwest presented Covad with a written proposal containing numerous changes based upon the FCC’s Triennial Review Order (*TRO*) , including elimination of several network elements.
6. On January 22, 2004, Covad responded to Qwest’s *TRO* proposals with its own counterproposal which included references to requirements under state law and section 271.
7. Throughout the period of negotiation, from July 2003 through January 2004, Qwest maintained for the parties an “Issues List” which identified by ICA section each unresolved issue still subject to negotiation. This list was the primary means by which parties kept track of such issues. As late as January 12, 2004, this Issues List contained the *TRO* issues presented by Qwest, listing them as open issues.

8. On March 11, 2004, Qwest re-iterated via email its position stated on March 9, 2004, that it did not consider Covad's proposed state law and section 271 counter proposals to be "open issues" subject to section 252 arbitration.

It is not difficult to conclude for purposes of this Motion that the parties negotiated those items which Qwest now seeks to have dismissed from this proceeding. In May 2003, Qwest agreed to negotiate ICA Section 9 issues. This section of the ICA contains the unbundled network element provisions at which Qwest directs its Motion. Not only did these Section 9 items variously appear on Qwest's own "Issues List", but the state law and section 271 language to which Qwest now objects resulted from Qwest's own "TRO" proposals during negotiations aimed at removing network elements from the ICA following release of the TRO. The fact that Qwest did not agree to Covad's counterproposal language and apparently chose not to respond to it can not reasonably be interpreted as removing the issues from the parties' negotiations. Where there are proposals and counter proposals, there is negotiation. It is also clear that the parties negotiated the issue of commingling by including competing commingling provisions in their proposed ICA drafts. As stated by the Fifth Circuit in *Coserv*, those negotiated issues on which no agreement is reached remain "open" and properly within the scope of section 252 arbitration.

Qwest alternatively argues that the FCC's *Interim Rules* prohibit the Commission from ordering any change to the unbundled access to switching, enterprise market loops, and dedicated transport provided for in the parties' ICA as of June 15, 2004. Qwest notes, for example, that the parties' current ICA contains no requirement for Qwest to commingle these elements so the *Interim Rules* prohibit the Commission from ordering commingling pursuant to arbitration. We disagree. The *Interim Rules* seek only to avoid unilateral alteration or cancellation of unbundled access by ILECs, such as Qwest, by requiring the ILECs to continue providing unbundled access in accordance with the terms of their ICAs in effect on June 15, 2004. If the FCC had sought to completely freeze unbundled access arrangements as of June 15, 2004, it could have easily and clearly so ordered. Instead, the *Interim Rules* permit changes to an ILEC's unbundled network element obligations arrived at by, among other things, "voluntarily negotiated agreement." Therefore, far from prohibiting changes to Qwest's obligations, the *Interim Rules* explicitly recognize and permit such changes so long as they are the product of negotiation between the parties, as is the case in the Motion before us.

Because we conclude that the challenged issues are properly before us as "open issues", we deny Qwest's Motion. We note that Qwest also challenges Covad's proposed pricing mechanism for some of the elements which it seeks to have included in the ICA. However, we defer the matter of appropriate pricing to such future proceedings as may determine whether and which

unbundled network elements remain to be priced.

Wherefore, based upon the foregoing information, and for good cause appearing, the Administrative Law Judge enters this proposed ORDER denying Qwest's Motion to Dismiss, or, Alternatively, for Summary Judgment.

DATED at Salt Lake City, Utah, this 12th day of November, 2004.

/s/ Steven F. Goodwill
Administrative Law Judge

Approved and Confirmed this 12th day of November, 2004, as the Order of the Public Service Commission of Utah.

/s/ Ric Campbell, Chairman

/s/ Constance B. White, Commissioner

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

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