

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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IN THE MATTER OF QWEST)
CORPORATION AND MCIMETRO)
ACCESS TRANSMISSION SERVICES) CASE NO. QWE-T-04-24
LLC'S MASTER SERVICE)
AGREEMENT FILING)
)

IDAHO PUBLIC
UTILITIES COMMISSION

AT&T'S COMMENTS

Pursuant to Order No. 29596, AT&T Communications of the Mountain States ("AT&T") hereby submits comments on Master Services Agreement dated July 16, 2004 between MCI metro Access Transmission Services, L.L.C. ("MCI") and Qwest Corporation ("Qwest").

INTRODUCTION

On July 20, 2004, Qwest posted a general notification¹ on its web site advising that on July 16, 2004, Qwest and MCI signed a negotiated commercial agreement and an amendment to MCI's existing interconnection agreement ("ICA"). According to the announcement, the agreements became effective on Friday, July 16, 2004, the day the agreements were executed. The notification further asserts "[t]he commercial agreement covering Qwest Platform Plus™ ["QPP"] is not subject to Section 252 requirements and therefore does not fall under the jurisdiction of any state regulatory commission." Nevertheless, the notification states further "Qwest provided a courtesy copy of the commercial agreements to its in-region state commissions." Apparently still believing it

¹ GNRL.07.20.04.3.000460.QPP. A copy is attached as **Exhibit A** to AT&T's Response.

has non-discrimination obligation, Qwest notes that it will make the QPP commercial agreement available to any interested competitive local exchange carrier (“CLEC”).

Regardless of Qwest’s position concerning “commercial” agreements, on August 2, 2004, MCI filed two agreements: (1) Amendment to Interconnection Agreement for Elimination of UNE-P², Implementation of Batch Hot Cut Process and Discounts; and (2) Master Service Agreement for the Provision of Qwest Platform Plus Service (“Commercial Agreement”). MCI’s filing describes the terms of the agreements and asks the Idaho Public Utilities Commission to approve both the amendments to the ICA and the QPP Commercial Agreement.

AT&T believes both the Commercial Agreement and the amendments to the ICA must be filed with the Commission for approval pursuant to 47 U.S.C. § 252(e)(1), 47 U.S.C. § 271. AT&T takes no position whether the agreements meet the standards for approval contained in Section 252(e)(2)(A).

ARGUMENT

- I. Section 252 of the Act Requires that Qwest file its QPP Commercial Agreement with the Idaho Commission for Approval.**
 - A. The Commercial Agreement Creates an Ongoing Obligation Between the Parties, and Thus, it is An Interconnection Agreement.**

Qwest’s Commercial Agreement with MCI is an “interconnection agreement adopted by negotiation” that must be filed with the state commissions for approval pursuant to Section 252(e)(1).³ Although Qwest’s notification claims that its agreement is a “commercial” agreement negotiated outside the requirements of the Telecommunications Act of 1996, the Act clearly requires the Commercial Agreement to

² UNE-P is an unbundled platform consisting of switching, loop and transport.

³ 47 U.S.C. § 252(e)(1).

be filed with the Idaho Commission to ensure that the agreement is nondiscriminatory, consistent with the public interest, and available to others.

The statutory language is clear on its face:

Any interconnection agreement adopted by negotiation or arbitration *shall* be submitted for approval to the State commission.⁴

The statute does not state that only agreements adopted under Sections 251(b) and (c) of the Act need be filed for approval. Moreover, the FCC has declined to adopt a definitive interpretation of the term “interconnection agreement” as used in Section 252(e).⁵

Rather, the FCC has left it up to the states to make those determinations on a case-by-case basis.⁶

Although the FCC has not defined the outer boundaries of the filing requirement, it has made clear that the scope of the filing requirement is exceedingly broad. The FCC held that the “basic class of agreements that should be filed” – but by no means the only ones that should be filed – are those that establish “ongoing obligations pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation.”⁷ The FCC recognized that certain classes of agreements need not be filed under Section 252, but those classes are extremely narrow and do not apply here; they are: (1) agreements concerning dispute resolution and escalation provisions whose terms are otherwise

⁴ 47 U.S.C. § 252(e)(1) (emphasis added).

⁵ *Qwest Communications International Inc Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276 (rel. Oct. 4, 2002) (“*Qwest Declaratory Ruling*”) at ¶ 10 (“We decline to establish an exhaustive, all-encompassing ‘interconnection agreement’ standard.”).

⁶ *Id.* (“Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an ‘interconnection agreement’ and, if so, whether it should be approved or rejected.”)

⁷ *Id.* at ¶ 8.

publicly available; (2) settlement agreements that do not affect an incumbent LEC's ongoing obligations under Section 251; (3) forms used to obtain service; and (4) certain agreements entered into during bankruptcy.⁸ The Commercial Agreement does not fall within any of the exceptions.

It does, however, fall within the “basic class of agreements that should be filed.” That is, the Commercial Agreement augments the amended ICA by creating ongoing obligations to,⁹ among other things: (a) provide loops, transport and switching or what is newly defined as the QPP service;¹⁰ (b) accomplish Qwest performance targets;¹¹ and (c) pay the recurring and nonrecurring charges for QPP.¹² As noted, QPP service consists of the “Local Switching Network Element” (including the basic switching function, port and features, functions and capabilities of the switch) and the “Shared Transport Network Element” in combination, at a minimum.¹³ “As part of the QPP service, Qwest agrees to combine the Network Elements that make up QPP service with Analog/Digital Capable Loops, with such Loops (including services such as line splitting) being provided pursuant to the rates, terms and conditions of the MCI’s ICAs”¹⁴ Thus, the Commercial Agreement creates ongoing obligations between the parties that interoperate within both the ICA and the very same networks that are also the subject of the ICA.

⁸ *Id.* at ¶¶ 9 & 12-14.

⁹ The Commercial Agreement states that it creates an ongoing obligation in its whereas clause; it says: “WHEREAS to address such uncertainty and to create a stable arrangement for the continued availability to MCI from Qwest of services technically and functionally equivalent to the June 14, 2004 UNE-P arrangements the parties have contemporaneously entered into ICA amendments ...” Commercial Agreement at 1.

¹⁰ Commercial Agreement, Service Exhibit 1.

¹¹ *Id.* at Attachment A to Service Exhibit 1

¹² QPP Rate Sheet for Idaho.

¹³ Commercial Agreement, Service Exhibit 1 at § 1.1.

¹⁴ *Id.*; *see also* Service Exhibit 1 at § 1.2.

In short, the result of these agreements is that the existing ICA is amended to add a batch hot cut process; provide that Qwest does not have to offer unbundled mass market switching, enterprise switching and unbundled shared transport network elements contained in the ICA; and provide that MCI will not order unbundled mass market switching, enterprise switching and unbundled shared transport network elements contained in the existing ICAs. In lieu of purchasing these network elements under the terms of its ICA, MCI can purchase their replacements out of the Commercial Agreement. The replacements parts are the same as the former unbundled network elements but the prices MCI now pays under the Commercial Agreement are different.

B. The Commercial Agreement Must Be Filed Under Federal Law to Ensure Non-Discriminatory Conduct.

As a practical matter, the definition of an interconnection agreement and the attendant filing requirement must be broad enough to permit state commissions to perform the reviewing function that Congress requested of them in Section 252, and, in the case of the Idaho Commission, it must be broad enough to accomplish the Legislative oversight demanded in I.C. § 62-609 (prohibiting preferences as to “any” prices or charges). Without adhering to some filing requirement and approval process, these statutory provisions are effectively nullified.

For example, Congress expressly required the state commissions to ensure that incumbents do not enter into *negotiated* agreements that “discriminate against a telecommunications carrier not a party to the agreement.”¹⁵ Indeed, non-discrimination is a bedrock principle of the Communications Act in general.¹⁶ Accordingly, Section 252 necessarily requires the filing of *all* agreements involving network elements or other

¹⁵ 47 U.S.C. § 252(e)(2)(A)(1).

¹⁶ See *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229-31 (1994).

similar arrangements provided to similarly situated carriers; otherwise, state commissions will have no way of ensuring that incumbents are not entering into discriminatory or preferential secret agreements with certain carriers regarding such elements. This is true regardless of whether the incumbent is offering those network elements voluntarily or pursuant to an FCC requirement.

The FCC has consistently recognized that the requirement of filing *all* agreements for approval by the state commissions is the core statutory protection against discriminatory treatment. For example, in the *Local Competition Order*,¹⁷ the FCC noted that “[r]equiring all contracts to be filed also limits an incumbent LEC’s ability to discriminate,” because it allows all “carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others.”¹⁸ Similarly, in the *Qwest NAL*, the FCC noted that Section 252’s filing requirements “are the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors.”¹⁹ Indeed, the FCC recognized that failure to file agreements “could lead to a permanent alteration in the competitive landscape or a skewing of the market in favor of certain competitors.”²⁰ In an environment in which the incumbent LEC is offering network elements voluntarily, rather than pursuant to nationally uniform minimum standards, that risk of discrimination *increases*, and the vigilance of the state commission under Section 252 becomes all the more important.

Under these principles, there is no doubt that the MCI agreement must be filed with the state commission for approval under Section 252(e)(1). Qwest is providing

¹⁷ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499 (1996) (“*Local Competition Order*”).

¹⁸ *Id.* at ¶ 167; *see also, id.* at ¶ 151 (noting the anticompetitive dangers of nondisclosure agreements).

¹⁹ *Qwest NAL* at ¶ 46.

²⁰ *Id.* ¶ 43.

network elements to MCI, albeit “voluntarily” and on terms and rates that are “without regard to the standards of [Sections 251 and 252].”²¹ Section 252 requires that such an agreement be filed with the state commission, however, so that the state commission can fulfill its statutory mandate to ensure that the agreement is nondiscriminatory.²²

In short, the Commercial Agreement must be filed with the Commission for approval. At a minimum, if there is a question as to whether the agreement should be filed, the FCC has held that the state commissions should make those determinations on a case-by-case basis,²³ and this Commission would be wise to demand filing.

II. Section 271 of the Act Requires the Filing of Commercial Agreements

In order to prevent unlawful discrimination, 47 U.S.C. § 271 requires Qwest to file for Commission approval agreements for the provision of mass market switching, shared transport and of other network elements. First, independent of any impairment determination pursuant to 47 U.S.C. § 251, Qwest’s authority to provide in-region long distance service in Idaho is expressly conditioned upon its non-discriminatory provision to its competitors of essential network elements and services contained in 47 U.S.C. § 271(c)(2)(B), including local switching and shared transport. The failure by Qwest to continue providing these elements and services risks revocation of its Section 271 authority.²⁴ Furthermore, Qwest must offer competitive checklist items pursuant to “binding agreements that have been approved under section 252”²⁵

²¹ There is no question that the Local Switching Network Element and the Shared Transport Element described in, and provided under the terms of, the Commercial Agreement fall within the definition of network element contained in the Act. 47 U.S.C. § 153(45).

²² See e.g., *Qwest NAL* at ¶ 47 (“[T]he potential for such discrimination underlies our concerns regarding Qwest’s apparent violations of Section 251(a)(1),” even if there is in fact no discrimination.).

²³ *Qwest Declaratory Ruling* at ¶ 10.

²⁴ 47 U.S.C. § 271(d)(6)(A)(iii).

²⁵ 47 U.S.C. § 271(c)(1)(A) (emphasis added).

Section 271(c)(2)(A) establishes the requirements by which a BOC may be authorized to offer in-region long distance service. One of the requirements is the filing and approval of interconnection agreements under Section 252.

(A) AGREEMENT REQUIRED.—A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

Significantly, Section 271(c)(2)(A) is written in the present tense. At any given moment, Qwest is qualified to provide long-distance service only if it is complying with two essential requirements: (1) “access and interconnection” must be offered “pursuant to one or more agreements described in [Section 271(c)](1)(A)”²⁶ and (2) such “access and interconnection” must include the checklist items specified in subparagraph (B).²⁷

The agreements described in Section 271(c)(1)(A) that constitute a requirement for Qwest’s authority to offer in-region long distance service are interconnection agreements approved under Section 252. Section 271(c)(1)(A) states:

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) Presence of a facilities-based competitor

A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding *agreements that have been approved under section 252* of this title specifying the terms and

²⁶ 47 U.S.C. § 271(c)(2)(A)(i)(I). Alternatively, under (c)(2)(A)(i)(II) such “access and interconnection” can be provided pursuant to a statement of generally available terms (SGAT) where no request for access and interconnection is made.

²⁷ 47 U.S.C. § 271(c)(2)(A)(ii).

conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers.²⁸

The agreements under which Qwest must offer mass market switching and transport to requesting carriers, therefore, must be agreements that are filed with the Commission and approved pursuant to Section 252.

The FCC has already addressed BOC attempts to evade the disclosure, review and opt-in protections of Section 252. Specifically, Qwest attempted to avoid its Section 252 obligations by requesting a declaratory ruling from the FCC that Section 271 network elements were not required to be provided in filed interconnection agreements. The FCC rejected Qwest's argument, determining that Section 252 creates a broad obligation to file agreements, subject to specific narrow exceptions that do not exempt Section 271 elements. In the *Qwest Declaratory Ruling*, the FCC made clear that any agreement addressing *ongoing* obligations pertaining to unbundled network elements – and the access and unbundling obligations of Section 271 fall squarely within that definition – must be filed in interconnection agreements subject to Section 252 and also that, to the extent any question remains regarding those obligations, the state commissions are to decide the issue.

Further, the FCC also recognized that it is essential that BOCs demonstrate compliance with Section 271 through binding and lawful interconnection agreements containing specific terms and conditions implementing the competitive checklist. The FCC has made it clear that when a CLEC requests a particular checklist item, a BOC “is providing” that item and is complying with Section 271(c)(2)(A) only if it has a “concrete

²⁸ 47 U.S.C. § 271(c)(1)(A) (emphasis added).

and specific legal obligation to furnish the item upon request *pursuant to state-approved interconnection agreements* that set forth prices and other terms and conditions for each checklist item.”²⁹

Accordingly, in addition to its duty to negotiate found in Section 251(c)(1), Qwest having volunteered to meet the conditions required of a BOC that seeks to provide interLATA services, is also obligated by Section 271 to negotiate and (if necessary) arbitrate the particular terms and conditions of each of the Section 271 competitive checklist items that CLECs may request, which items include mass market switching and shared transport. If Qwest refuses to do so and thus does not enter into binding interconnection agreements *under Section 252* regarding mass market switching and the other competitive checklist items, then Qwest would plainly have “cease[d] to meet” one of the essential conditions of section 271,³⁰ namely, an “agreement[] that has been approved under section 252... .”³¹

III. Other State Commissions Require Filing of Similar “Commercial” Agreements.

Numerous state commissions have recently considered the issue of whether “commercial agreements must be filed with the State Commission for approval.” The states have uniformly found that such agreements must be filed. For example, in response to the news that SBC Communications, Inc. (“SBC”) and Sage Telecom, Inc. (“Sage”) recently executed “commercial agreements,” the California Public Utilities Commission required SBC to file the Sage agreement with the Commission. The

²⁹ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No 97-137, Memorandum Opinion and Order, FCC 97-298 (Rel. Aug. 19, 1997) at ¶ 110 (emphasis added).

³⁰ 47 U.S.C. § 271(d)(6).

³¹ See 47 U.S.C. § 271(c)(2)(A) (“Agreement *required*”) (emphasis added).

Commission noted: “In order for the Commission to perform this statutory duty [under Section 252(e)(2) of the Act], the interconnection agreement must be formally filed with the Commission and open to review by any interested party.”³²

Likewise, the Michigan Public Service Commission issued an Order requiring SBC and Sage to file their agreement for review. The Commission held that under the Act “interconnection agreements arrived at through negotiations must be filed with and approved by [the state Commission].”³³ The Chair of the Michigan Commission also stated that the State commission “must be able to review the terms of this agreement and any associated agreements if it is to fulfill its responsibilities under state and federal law to ensure that the agreement is in the public interest and does not discriminate against other providers.”³⁴

Similarly, on May 5, 2004, the Public Utilities Commission of Ohio directed SBC and Sage to file comments and legal analysis supporting their positions that they did not have to file the new agreement with the Commission. The Chairman of the Commission stated that the action was necessary “to sort out [the Commission’s] obligations under the Telecommunications Act as they apply to these agreements.”³⁵ And on May 11, 2004, the Missouri Public Service Commission ordered SBC and Sage to make a filing to explain why the “commercial agreements” should not be filed and considered by the Commission pursuant to Sections 251 and 252 of the Act.³⁶

³² Letter from Randolph L. Wu, State of California Public Utilities Commission, to SBC (April 21, 2004).

³³ Case No. U-14121, Michigan Public Service Commission (April 28, 2004).

³⁴ Michigan Public Service Commission, Press Release April 28, 2004 (available at <http://www.michigan.gov/mpsc>).

³⁵ Public Utilities Commission of Ohio News Release, May 5, 2004 (available at www.puc.state.oh.us).

³⁶ *In re Agreement Between SBC Communications, Inc. & Sage Telecom, Inc.*, Order to Show Cause, Mo. P.S.C. Case no. TO-2004-0576 (May 11, 2004).

As with the others, by order dated May 13, 2004, the Public Utilities Commission of Texas ordered SBC and Sage to file their agreement. Citing the FCC's *Qwest Declaratory Ruling*, the Texas Commission held that "the filing and review requirements are 'the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors.'" And on July 27, 2004, the Missouri Public Service issued an order rejecting the amendment to the Sage existing interconnection with SBC. The Commission found that the amendment that was filed with the Commission was indivisible from the commercial agreement that had not been filed, and neither agreement is a "stand-alone" agreement.

The amendment is clearly related to the commercial agreement. Each references the other. They were negotiated at the same time, and executed within a few days of each other. The amendment, by its terms, will be void in any state in which the commercial agreement becomes inoperative. Perhaps most telling, the commercial agreement itself refers to the "indivisible nature" of the commercial agreement and the amendment. From these facts, the Commission concludes that the two are indivisible; that is, neither one is a stand-alone agreement.³⁷

Also, on August 2, 2004, the Kansas Corporation Commission approved the amendment to Sage's existing interconnection agreement with SBC. However, it withheld judgment on whether the commercial agreement must be filed for approval pursuant to Section 252 until the Federal Communications Commission rules on SBC's

³⁷ *Agreement between SBC Communications, Inc. and Sage Telecom, Inc.*, Case No. To-2004-0576; *Amendment Superceding Certain 251/252 Matters between Southwest Bell Telecom, L.P., and Sage Telecom, Inc.*, Case No. TO-2004-0584, Order Consolidating Cases, Rejecting Amendment to Interconnection Agreement, and Denying Intervention (July 27, 2004) at 3. The Missouri Commission did not order SBC or Sage to file the commercial agreement, leaving the decision to management. However, based on the Order, it is unlikely the Commission will approve the amendment to the interconnection agreement without the commercial agreement also being filed for approval. The MCI ICA amendment and the Commercial Agreement are also indivisible. See ICA Amendment at § 2.6 and Commercial Agreement at § 23.

emergency petition. SBC has asked the FCC to determine whether the commercial agreement needs to be filed with the state commissions, pursuant to Section 252.³⁸ Like the individual state commissions, NARUC also stated that SBC and Sage should be required to file the agreements with the respective state commissions. Commissioner Stan Wise, NARUC President and Commissioner of the Georgia Public Service Commission, urged SBC and Sage to file the negotiated interconnection agreements for approval “pursuant to § 252(e) of the Act in the States where they are effective as required by § 252(a)(1).”³⁹ Mr. Wise, NARUC President, noted “Rapid filing and approval by the respective State commissions can only facilitate the ongoing industry negotiations.”⁴⁰

Finally, the Public Service Commission of Utah recently issued an order finding that the Commercial Agreement should be filed and that the Commission does have authority to review and approve the Commercial Agreement. The Order is attached hereto as **Exhibit B**.

Consequently, state commissions are not prohibited from reviewing and approving the Commercial Agreement. Moreover, the FCC has requested comments on this very issue. On August 20, 2004 the FCC released its *Order and Notice of Proposed Rulemaking* in response to the Court of Appeal’s decision vacating the FCC’s *Triennial Review Order*. The FCC “incorporate[d] three petitions regarding incumbent LEC obligations to file commercial agreements, under section 252 of the Act, governing

³⁸ *Application of Sage Telecom, Inc. for Approval of the K2A Interconnection Agreement Under the Telecommunications Act with Southwestern Bell Telephone Company*, Docket No. 01-SWBT-1099-IAT, Order (Aug. 2, 2004). The Kansas Staff found the amendment to the interconnection agreement and the commercial agreement to be “inextricably intertwined.” Order at 6.

³⁹ Letter from Stan Wise, NARUC President, to Sage and SBC, April 8, 2004.

⁴⁰ *Id.*

access to network elements for which there is no section 251(c)(3) unbundling obligation ...” in its latest rulemaking.⁴¹ If the issue had been resolved, the FCC would not be seeking comments on the issue.

CONCLUSION

It is clear that the Act requires Qwest to negotiate with CLECs for the provision of network elements and other services. The Act also permits Qwest and CLECs to negotiate terms outside the standards of Sections 251(b) and (c). However, the Act is clear that all negotiated agreements for network elements or other services must be filed with the state commissions for approval.

RESPECTFULLY SUBMITTED this 4th day of October 2004.

AT&T COMMUNICATIONS OF THE MOUNTAIN STATES, INC.

By: Setty Friesen / AW
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⁴¹ *Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. Aug. 20, 2004) at ¶ 13.



Announcement Date:	July 20, 2004
Effective Date:	Immediately
Document Number:	GNRL.07.20.04.B.000460.QPP
Notification Category:	General Notification
Target Audience:	CLECs
Subject:	Qwest Platform Plus™ Terms Available to all Interested CLECs

By now you are aware of the ground breaking commercial agreement between Qwest and MCI concerning Qwest Platform Plus™ (QPP™).

On June 1, 2004, Qwest and MCI announced a commercially negotiated agreement governing the pricing and availability of wholesale services that Qwest would provide to MCI once the D.C. Circuit Court of Appeals' decision took effect vacating the FCC's wholesale unbundling rules. It was the first commercially negotiated agreement between an RBOC and a major CLEC. It followed on the heels of the FCC's March 3, 2004, letter urging telecommunications carriers to "engage in a period of good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements."

Qwest engaged in good faith negotiations with many individual CLEC customers as well as mediated multilateral sessions with a CLEC consortium. While Qwest and the CLEC consortium didn't ultimately reach agreement, the customer input that was garnered from those sessions was critical to the development of the final QPP™ offering. Individual customer negotiations with respect to QPP™ and other TRO-impacted products continue.

On July 16, 2004, Qwest and MCI signed the definitive agreements that will govern the pricing and availability of wholesale services from Qwest to MCI through July 31, 2008, now that the D.C. Circuit Court of Appeals' decision vacating the FCC's wholesale unbundling rules has taken effect. Qwest is making the terms of the Qwest/MCI deal available to all interested CLECs. Qwest and MCI have proven that business-to-business negotiations can result in significant commercial agreements without government intervention. Qwest hopes that other CLEC customers will take advantage of these terms.

The QPP™ commercial agreement provides wholesale pricing continuity and certainty about the availability of services. Qwest Platform Plus™, a new offering, is the functionally equivalent replacement for UNE-P and is priced equivalent to UNE-P service through Dec. 31, 2004:

- During the transition period of Jan. 1, 2005-Jan. 1, 2007, there will be incremental rate adjustments at scheduled points.
- Rates will increase an average of less than \$5 (across both residential and business lines) by the end of the transition period.
- The agreement recognizes the inherent differences in residential and business service markets and includes a split schedule for wholesale service rates in these markets.
- Like UNE-P, QPP™ rates are geographically sensitive.

Note: In cases of conflict between the changes implemented through this notification and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement.

The Qwest Wholesale Web Site provides a comprehensive catalog of detailed information on Qwest products and services including specific descriptions on doing business with Qwest. All information provided on the site describes current activities and process.

Prior to any modifications to existing activities or processes described on the web site, wholesale customers will receive written notification announcing the upcoming change.

If you would like to unsubscribe to mailouts please go to the "Subscribe/Unsubscribe" web site and follow the unsubscribe instructions. The site is located at: <http://www.qwest.com/wholesale/notices/cnla/maillist.html>

- QPP™ services may also be purchased with Qwest DSL services, Advanced Intelligent Network (AIN) Services and Qwest Voice Messaging.
- Finally, QPP™ includes commercially negotiated quality assurance measures designed to assure that CLECs receive quality wholesale service.

An interconnection agreement amendment includes new rates and features for Batch Hot Cuts, the batch process of moving customer lines from a Qwest switch to a CLEC switch. The deal also includes new electronic scheduling and online status tools to make the Batch Hot Cut process more efficient and cost effective for both parties.

The Qwest/MCI agreements became effective on Friday, July 16, 2004, the day the definitive agreements were executed. The commercial agreement covering Qwest Platform Plus™ is not subject to Section 252 requirements and therefore does not fall under the jurisdiction of any state regulatory commission. However, Qwest provided a courtesy copy of the commercial agreements to its in-region state commissions.

Shortly, both the Interconnection Agreement Amendment and the QPP™ Commercial Agreement will be posted to Qwest Web sites. Qwest will make QPP™ available to any interested CLEC:

- The Interconnection Agreement Amendment will be located here:
<http://www.qwest.com/wholesale/clecs/amendments.html>
- The QPP Commercial Agreement will be located here:
<http://www.qwest.com/wholesale/clecs/commercialagreements.html>

Qwest will host a conference call that is open to all interested CLECs to acquaint the industry with the details of the QPP™ service offering. During the call, Qwest will discuss the QPP™ service offering and answer your questions:

- Conference Call Date: 07/22/04
- Conference Call Time: 3:30pm Mountain
- Conference Bridge Information: Domestic Participants - 800-862-9098
International Participants - 785-424-1051
Conference ID - QW722

If you have questions or concerns in advance of this discussion, please feel free to contact:

Cliff Dinwiddie
Wholesale Business Management
Qwest Services Corporation
303-896-7846
cdinwid@qwest.com

Sincerely,

Sincerely,

Qwest

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Interconnection)
Agreement Between Qwest Corporation)
and MCImetro Access Transmission)
Services, LLC for Approval of an)
Amendment for Elimination of UNE-P and)
Implementation of Batch Hot Cut Process)
and QPP Master Service Agreement)
)

DOCKET NO. 04-2245-01

ORDER DENYING
MOTION TO DISMISS

ISSUED: September 30, 2004

By The Commission:

On July 27, 2004, MCImetro Access Transmission Services, LLC (MCI) filed with the Commission two documents B 1. An Amendment to Interconnection Agreement for Elimination of UNE-P and Implementation of Batch Hot Cut Process and Discounts (Interconnection Agreement Amendment), and 2. A Master Service Agreement for the Provision of Qwest Platform Plus Service (QPP Service Agreement). The Interconnection Agreement Amendment essentially makes three changes to an existing interconnection agreement between MCI and Qwest Corporation (Qwest). They are - 1. Adding the terms and conditions for hot cut batches, 2. An agreement that Qwest will not offer, nor will MCI order, unbundled mass market switching, unbundled enterprise switching or unbundled shared transport as part of the unbundled network element platform (UNE-P) out of the existing interconnection agreement or other agreement governed by 47 U.S.C. "251 and 252, and 3. The availability of line splitting for loops provided pursuant to the existing interconnection agreement. The QPP Service Agreement is a voluntarily negotiated agreement between MCI and

Qwest by which Qwest will provide services (QPP services) consisting of “the Local Switching Network Element (including the basic switching function, the port, plus the features, functions, and capabilities of the Switch including all compatible and available vertical features, such as hunting and anonymous call rejection, provided by the Qwest switch) and the Shared Transport Network Element in combination, at a minimum to the extent available on UNE-P under the applicable interconnection agreement or SGAT where MCI has opted into an SGAT as its interconnection agreement (collectively, “ICAs”) as the same existed on June 14, 2004.” The QPP Service Agreement also provides that Qwest will combine the QPP services with loops which MCI may have obtained through other interconnection agreements. The QPP Service Agreement further provides for the performance targets and the recurring and nonrecurring charges for QPP services. Through its filing, MCI requested Commission review and approval of the Interconnection Agreement Amendment and the QPP Service Agreement.

On August 13, 2004, Qwest filed a Motion to Dismiss Application for Approval of Negotiated Commercial Agreement (Dismissal Motion). Qwest agrees that the Interconnection Agreement Amendment is subject to filing and Commission review and approval, but argues that is not the case for the QPP Service Agreement. Qwest argues that the QPP Service Agreement does not need to be submitted to the Commission pursuant to 47 U.S.C.'252. Qwest argues that the QPP services are not required to be provided pursuant to 47 U.S.C.'251 (b) and (c). Qwest therefore concludes that the QPP Service Agreement is not an interconnection agreement which is subject to the Commission’s review and approval under '252. Qwest argues that the Commission has no authority under federal or state law to review or approve the QPP Services Agreement. Multiple

parties filed opposition to the Dismissal Motion. On August 23, 2004, MCI filed its Response to Qwest's Motion to Dismiss. On August 27, 2004, the Division of Public Utilities (Division) filed its Response in Opposition to the Motion of Qwest to Dismiss and Application for Approval of an Interconnection Agreement. On August 25, 2004, AT&T Communications of the Mountain States, Inc., and TCG Utah (ATT) filed ATT's Response to MCI's Agreement Filing and Qwest's Motion to Dismiss¹. On August 31, 2004, and again on September 9, 2004, Qwest replied to the opposing arguments of MCI, the Division and ATT. We conclude that Qwest's argument is in error. We conclude that the QPP Service Agreement should be filed and that the Commission does have authority to review and approve the QPP Service Agreement.

DISCUSSION

Much of the parties' argument is based upon the application of 47 U.S.C. " 251 and 252 provisions and two FCC decisions.² With respect to agreement submission to state commissions, 47 U.S.C. '252 provides, in relevant part:

(a) Agreements Arrived At Through Negotiation. B (1) Voluntary Negotiations. -
Upon receiving a request for interconnection, services, or network elements pursuant

¹ATT also sought intervention, which was granted September 17, 2004.

²The parties also make argument on statutory provisions beyond what is address in this order. Our resolution made herein is not intended to be any determination based on those arguments.

to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsection (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

...

(e) Approval By State Commission. - (1) Approval Required. B Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State Commission. A State Commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies. (2) Grounds for Rejection. B The State Commission may only reject B (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that B (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement, or (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or (B) an agreement (or portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

Although this language gives an unambiguous directive that an agreement “shall be submitted to the State commission”, Qwest argues that a decision of the Federal Communications Commission (FCC) requires a different result.

In *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-98, 17 FCC Rcd 19337, 2002 FCC Lexis 4929 (October 4, 2002) (Declaratory Order) the FCC responded to a request for guidance about the types of negotiated contractual arrangements that should be subject to the filing requirement of '252(a)(1). Before the FCC, Qwest argued that agreements subject to the filing

requirement are those that “include (i) a description of the service or network element being offered; (ii) the various options available to the requesting carrier (e.g., loop capacities) and any binding contractual commitments regarding the quality or performance of the service or network element; and (iii) the rate structures and rate levels associated with each such option (e.g., recurring and non-recurring charges, volume or term commitments).” *Id.*, at & 2. As part of Qwest’s argument, Qwest maintained that only limited portions of an agreement (a schedule of itemized charges and associated descriptions of the services to which the charges apply) should be filed. Qwest also argued that agreements concerning network elements that have been removed from the national list of elements subject to mandatory unbundling need not be filed. *Id.*, at && 3, 5 and 8. Commenters opposed the narrow reading of the filing statute proposed by Qwest. Some sought a filing requirement for all types of agreements, hoping to avoid any question of what types of agreements should be filed. *Id.*, at & 5 and fn. 26.

In reaching its resolution, the FCC first noted that it is the state commissions who will determine what agreements are subject to the filing requirement. *Id.*, at & 7. “Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an ‘interconnection agreement’ and, if so, whether it should be approved or rejected.” *Id.*, at & 10. The FCC’s conclusion on the issue presented was that “an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).” *Id.*, at & 8. The QPP Service Agreement

is subject to the filing requirement required by the statute and under the Declaratory Order's conclusion. Its terms fall within '252's rubric of "interconnection, services, or network elements," its terms deal with network elements and the compensation to be paid for them. QPP services are unavoidably network elements under 47 U.S.C.'153 (45)'s definition. The QPP Service Agreement addresses ongoing obligations for matters within the list give by the FCC in the Declaratory Order decision.

Qwest's argument before us, for a contrary conclusion, is similar to its argument before the FCC - *vis*, only agreements dealing with network elements which a carrier does not voluntarily agree to provide, but is compelled to provide through the FCC's determination under '251(d)'s "necessary" and "impair" analysis, trigger '252 (a)(1)'s filing requirement. Qwest's position is based on language contained in footnote 26 of the Declaratory Order.³ There, the FCC states:

We therefore disagree with the parties that advocate the filing of all agreements between an incumbent LEC and a requesting carrier. See Office of the New Mexico Attorney General and the Iowa Office of Consumer Advocate Comments at 5. Instead, we find that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1). Similarly, we decline Touch America's suggestion to require Qwest to file with us, under section 211, all agreements to competitive LECs entered into as "settlements of disputes" and publish

³Qwest argues that the FCC followed Qwest's position in *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, NAL Account No. 200432080022, FRM No. 0001-6056-25.

those terms as 'generally available' terms for all competitive LECs. Touch America Comments at 10, citing 47 U.S.C. '211.

We do not apply this language in as limiting a fashion as advocated by Qwest. We consider the FCC's footnote 26 language as addressing the contentions made by the comments identified therein. These comments had advocated that the '252(a)(1) filing requirement should be applied to every agreement between an incumbent LEC and another carrier. It was also suggested that '252 included settlement agreements that resolved past disputes. The FCC rejected these comments, concluding that agreements that should be filed are not every type of agreement between carriers, but interconnection agreements - those that deal with ongoing obligations dealing with resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation. *Id.*, at & 8.⁴ The language from the footnote must be considered in conjunction with the language used in the body of the Declaratory Order and the statutory language. The operative consideration is whether the agreement's terms address or create an ongoing obligation dealing with interconnection, services or network elements.

⁴However, when an agreement deals with these matters, not on a going basis, but on an after-the-fact, settlement of past conduct basis, the FCC concluded that it is not subject to the '2552(a)(1) filing requirement. *Id.*, at & 12.

Reading '252's filing requirement, and state commission approval or rejection, to apply only to an agreement whose terms address a compelled '251 matter, rather than to all interconnection agreements dealing with such matters (whether included by voluntary negotiation or by compulsion), completely ignores the specific language of the statute. Congress did task the FCC with responsibility to determine what minimal access to network elements, required under '251(c)(3), would be compelled through '252(d)'s "necessary" and "impair" standards. But in wording '252, Congress did not restrict the need to file agreements with state commissions to only those agreements whose terms address interconnection, services, or network element matters by compulsory mandate related to '251(b) or (c). Congress created a wider ambit. Congress required filing and state commission approval or rejection of agreements where the incumbent local exchange carrier "negotiate[s] and enter[s] into a binding agreement with a requesting telecommunications carrier or carriers without regard to the standards set forth in subsection (b) or (c) of section 251. . . . The agreement shall be submitted to the State commission under subsection (e) of this section."⁵ 47 U.S.C. '252(a)(1). Congress clearly anticipated agreements that would not be driven by '251(b) or (c). It required these agreements to be filed with and reviewed by state commissions. To do otherwise fails to give any attention to the specific language Congress used in enacting '252.

⁵ In the same section (part of the ellipsis in the quoted portion), Congress also required that interconnection agreements negotiated prior to enactment of the 1996 Federal Telecommunications Act (which necessarily could not have been negotiated with regard to or had terms intended to address then nonexistent ' 252(b) or (c) standards) be submitted to state commissions under ' 252(e). *See, ' 252(a)(1)*. This is further evidence of Congress= intent that all interconnection agreements, not just those attempting to comply with compelled provision related to ' 251(b) and (c), pass under state commission review.

That Congress includes all interconnection agreements for state commission filing and review, and not just those that address compelled interconnection terms, is not unwarranted. Qwest's limitation, to include only agreements whose terms address network elements whose provision is compelled, fails to recognize the differing concerns contemplated by Congress. The criteria by which the FCC is to base compelled provision are not coterminous with the criteria by which a state commission is to approve or reject an agreement. Mandatory provision is minimally based upon '251(d)(2)'s test that access to a proprietary network element is necessary and that lack of access to a network element impairs a carrier's ability to provide services. 47 U.S.C. '252(d)(2)(A) and (B). State commission review of an agreement is based on entirely different criteria. A state commission can only reject a voluntarily negotiated agreement if the state commission finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement is not consistent with the public interest, convenience and necessity. 47 U.S.C.'252(e)(2)(A). A state commission can reject an arbitrated agreement if it finds the agreement does not meet the requirements of '251 or '252(d).⁶ 47 U.S.C. '252(e)(2)(B). Compelled aspects are driven by concerns for the interests of the requesting carrier. Filing and state commission review are driven by concerns for interests of other entities and public interests. These concerns go beyond those relating to the incumbent carrier and the interconnecting carrier whose agreement is at issue.

⁶That Congress directs state commission review to consider ' 251 requirements in a separate subsection part dealing with review of arbitrated agreements, and makes no such reference in the subsection part dealing with review of voluntarily negotiated agreements, is further evidence of Congress= view that state review of voluntarily negotiated interconnection agreements is not limited by ' 251(b) or (c) directive.

We address Qwest's argument based on the U.S. Court of Appeals decision found in *United States Telephone Association v FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*), only to note that Qwest's argument is based on Qwest's flawed view that '252 filing and review is limited to agreements dealing with network elements whose provision is compelled under the "necessary" and "impair" standards of '251(d). In *USTA II*, the court vacated the FCC's determinations identifying which network elements fell within the impairment analysis of '251(d) and the FCC's delegation to state commissions to make further, limited impairment determinations. As argued by Qwest, "Qwest is no longer obligated to provide unbundled access to local switching or shared transport pursuant to section 251 of the federal Act. . . . [A]n agreement relating to these elements is not required to be filed for approval pursuant to section 252 " Qwest Corporation's Joint Reply to MCIMetro, AT&T and the Division of Public Utilities in Support of Its Motion to Dismiss, at 3.

As discussed above, our conclusion is not based on any notion that the network elements covered by the QPP Services Agreement are provided under '251 impairment compulsion (whether the impairment determination is made by the FCC or a state commission pursuant to a purported FCC delegation). Our conclusion is based upon Congress' unambiguous statutory language that voluntarily negotiated agreements made "without regard to the standards set forth in subsections (b) or (c) of section 251 . . . shall be submitted to the State commission under subsection (e) of this section [252]." 47 U.S.C. '252(a)(1). Congress' '252 wording makes Qwest's argument based on '251 compulsion standards for network elements irrelevant. Indeed Congress' language can easily be viewed as directly contradicting the position advocated by Qwest. Section 252 filing and

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review is not limited by 251 compulsory provision determinations, it is required in spite of such determinations.

Based upon our discussion and conclusion made herein, we direct that any interconnection agreement which creates or addresses an ongoing obligation of an incumbent local exchange carrier for interconnection, services or network elements must be filed with us and is subject to our review for approval or rejection pursuant to 47 U.S.C. 252. Wherefore, both the Interconnection Agreement Amendment and the QPP Services Agreement, submitted by MCImetro on July 27, 2004, are properly filed with the Commission and can be reviewed by the Commission for approval or rejection. We therefore enter this ORDER denying Qwest's Motion to Dismiss.

DATED at Salt Lake City, Utah, this 30th day of September, 2004.

/s/ Ric Campbell, Chairman

/s/ Constance B. White, Commissioner

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
GW#40491

CERTIFICATE OF SERVICE

I certify that the original and seven copies of AT&T's Comments in Docket No. QWE-T-04-24 were sent by overnight delivery on October 4, 2004 to:

Jean Jewell, Secretary
Idaho Public Utilities Commission
472 West Washington Street
Boise, ID 83702-5983

and a true and correct copy was sent by U. S. Mail, postage prepaid, on October 4, 2004 to:

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