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IDAHO PUBLIC  
UTILITIES COMMISSION

*Attorneys for MCI*

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

IN THE MATTER OF QWEST CORPORATION AND  
MCIMETRO ACCESS TRANSMISSION SERVICES  
LLC'S MASTER SERVICE AGREEMENT FILING

Case No. QWE-T-04-24

**MCImetro ACCESS  
TRANSMISSION SERVICES,  
LLC's COMMENTS**

**INTRODUCTION**

In this Proceeding the Commission seeks comment on the question of whether a Master Service Agreement (MSA), as described in the Commission's Notice dated September 15, 2004 is subject to the filing and review requirements of 47 U.S.C. Section 252 *et. seq.*

MCImetro Access Transmission Services, LLC ("MCI") appreciates the opportunity to comment. For the reasons set forth below, the Commission should conclude the MSA is subject to the section 252 filing and review requirements.

**ARGUMENT**

**A. Federal Law requires that the Commercial Agreement be filed for Review and Approval.**

Section 252(a) (1) of the federal Act, entitled "Voluntary Negotiations" states:

(1) Upon receiving a request for interconnection, services, or network elements pursuant 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 subsections (b) and (c) of section 251. The agreement, including any interconnection agreement negotiated before the date of the Telecommunications

Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

Section 252(e) (1) and (3) provide in part:

(1) Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission

(3) Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

This section was interpreted by the Federal Communications Commission (“FCC”) in October 2002. The FCC stated:

7. . . .we believe that the state commissions should be responsible for applying, in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements. Indeed, we believe this is consistent with the structure of section 252, which vests in the states the authority to conduct fact-intensive determinations relating to interconnection agreements

8. . . . we find 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).<sup>26</sup>

10. 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.<sup>1</sup>

Footnote 26 referenced in Paragraph 8 states: “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).”

However, in March 2004, in its Notice of Apparent Liability for Forfeiture issued to Qwest, the Commission states in Paragraph 21: “We have historically given broad construction to Section 252(a) (1).” The FCC goes on to state:

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<sup>1</sup> Memorandum Opinion and Order FCC 02-276 issued in WC Docket 02-89, entitled *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)*, Paragraphs 7, 8 and 10.

any 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).

In this latter instance, the FCC does not limit its direction to only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1).<sup>2</sup>

The FCC recently issued FCC Order 04-179 in the WC Docket No. 04-3134 (Released August 20, 2004). This order makes it clear that the issue of whether to file commercial agreements that do not provide for section 251 network elements is not settled by the FCC. That order states in pertinent part at paragraph 13:

Additionally, we incorporate three petitions regarding incumbent LEC obligations to file commercial agreements, under section 252 of the Act, governing access to network elements for which there is no section 251(c)(3) unbundling obligation.<sup>3</sup> To that end, should we properly treat commercially negotiated agreements for access to network elements that are not required to be unbundled pursuant to section 251(c)(3) under section 252, section 211, or other provisions of law?

As is clear from that passage, the FCC's order does not affect this Commission's jurisdiction over the filing of the Commercial Agreement for state review and approval, since the issue of filing obligations for commercial agreements is one of the issues that the FCC's explicitly seeks comment upon in its ongoing rulemaking. Indeed, the fact that the FCC has not squarely determined this issue is reinforced by the concurring statement of FCC Commissioner Kathleen Abernathy, who lamented the fact the FCC did not clarify the status of commercial agreements:

Yet I am disappointed that the Commission did not clarify in this Order the legal status of commercial agreements that pertain to services or facilities for which no section 251 mandate exists. Because both incumbent LECs and competitors have cited lingering uncertainty on this issue as a stumbling block to further

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<sup>2</sup> *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, Paragraph 22.

<sup>3</sup> SBC Communications, Inc., Emergency Petition for Declaratory Ruling, Preemption, and Standstill, WC Docket No. 04-172 (filed May 3, 2004); BellSouth, Emergency Petition for Declaratory Ruling (filed May 27, 2004); BellSouth, Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Section 252 with Respect to Non-251 Agreements (filed May 27, 2004).

agreements, we should have removed that obstacle now. I only hope that the Commission does so in the near future.

Because this agreement creates an ongoing obligation pertaining to Qwest's provision of unbundled network elements (albeit pursuant to Section 271, not Section 251), the parties have an obligation to file the Commercial Agreement with the state so that the state can determine whether the Commercial Agreement discriminates against a telecommunications carrier not a party to the Commercial Agreement and whether approval of the Commercial Agreement is not consistent with the public interest, convenience and necessity as described in Section 252(e)(2)(A).

Section 252(e) requires that a voluntarily negotiated agreement be filed with state commissions for review and approval to ensure that such voluntarily negotiated agreements do not discriminate against other carriers not parties to the agreement and that the agreement is not contrary to the public interest.

The FCC has clearly left the first determination of what is an interconnection agreement to the states.<sup>4</sup>

The FCC emphasized the states' roles in a footnote to paragraph 7 stating:

As an example of the substantial implementation role given to the states, throughout the arbitration provisions of section 252, Congress committed to the states the fact-intensive determinations that are necessary to implement contested interconnection agreements. *See, e.g.*, 47 U.S.C. § 252(e)(5) (directing the Commission to preempt a state commission's jurisdiction only if that state commission fails to act to carry out its responsibility under section 252).<sup>5</sup>

Finally, in its Declaratory Order, the FCC did not interpret Section 252(e) directly, and therefore, did not address the filing of voluntarily negotiated agreements under the section, nor provide as to the requirements of Section 252(e). Qwest's petition for a declaratory ruling only

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<sup>4</sup> Memorandum Opinion and Order FCC 02-276 issued in WC Docket 02-89, entitled *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)*, Paragraph 7.

sought a declaratory ruling on the scope of the mandatory filing requirement set forth in section 252(a)(1) of the Communications Act of 1934, as amended.<sup>6</sup> Thus, MCI believes the Commercial Agreement must be filed with the state under federal law.

**B. The Utah and Montana Commissions Have Correctly Decided The Question.**

As the Commission is aware, the regulatory status of Master Service Agreements is an issue that is pending before many state commissions in the Qwest service region. To the knowledge of MCI, the first Commission that reached a final determination of the question is the Utah Commission. On September 30, 2004 the Utah Commission issued its Order Denying Motion to Dismiss, a copy of which is attached hereto as Exhibit A. In Utah, MCI filed a MSA (there referred to as a QPP Service Agreement) that was substantially identical to the Idaho MSA. Qwest moved to dismiss the MCI filing, arguing that review and approval was not necessary under sections 251 and 252.

After a detailed analysis of the statute and relevant FCC decisions the Utah Commission concluded:

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. (Order Denying Motion to Dismiss, pg 11).

Further, on October 5, 2004 the Montana Commission reached a similar result when it entered an Order in Montana PSC Docket No. 2004.7.119 denying Qwest's Motion to Dismiss the filing in Montana of a substantially identical MSA.

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<sup>5</sup> *Id.* at footnote 23.

<sup>6</sup> *Id.* at ¶ 1.

The Idaho Commission should reach the same conclusion, both because the analysis of the Utah and Montana Commissions is correct and in the interest of inter-jurisdictional consistency.

**C. The Staffs in Arizona, New Mexico and Oregon Have Correctly Analyzed The Issue.**

MCImetro filed the same Commercial Agreement in all of the 14 states in Qwest Corporation's ("Qwest") region. Attached hereto are Responses filed by the staff of state commissions in Arizona, New Mexico and Oregon addressing the same issue presented to this Commission that were filed in those states.

MCI supports the legal arguments contained in each of the Arizona, New Mexico and Oregon staff responses to Qwest motions to dismiss filed in those states. Those staff responses provide further legal argument and support for MCI's position on this issue. The Arizona, New Mexico and Oregon staff responses are attached as Exhibits B, C and D.

**CONCLUSION**

For the reasons set forth above, the Commission should conclude that the Master Service Agreement is subject to the requirements of 47 U.S.C. 252.

Respectfully Submitted this 17 Day of October, 2004.

**MCImetro ACCESS TRANSMISSION SERVICES, LLC**

By: 

Dean J. Miller  
*Attorneys for MCImetro*

**CERTIFICATE OF SERVICE**

I certify that the original and seven copies of the foregoing document were delivered on October 5, 2004 to:

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

and true and correct copies were forwarded on October 5, 2004, via the method(s) indicated, to the following:

Mary S. Hobson  
STOEL RIVES, LLP  
101 S. Capitol Blvd., Suite 1900  
Boise, Idaho 83702

Hand Delivered  
Federal Express  
U.S. Mail   
Telecopy



# **Exhibit A**

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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In the Matter of the Interconnection )  
Agreement Between Qwest Corporation ) DOCKET NO. 04-2245-01  
and MCImetro Access Transmission )  
Services, LLC for Approval of an ) ORDER DENYING  
Amendment for Elimination of UNE-P and ) MOTION TO DISMISS  
Implementation of Batch Hot Cut Process )  
and QPP Master Service Agreement )  
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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 Dismiss<sup>1</sup>. 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.<sup>2</sup> 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

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<sup>1</sup>ATT also sought intervention, which was granted September 17, 2004.

<sup>2</sup>The 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.<sup>3</sup> 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

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<sup>3</sup>Qwest 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.<sup>4</sup> 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.

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<sup>4</sup>However, 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 '252(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."<sup>5</sup> 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.

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<sup>5</sup> 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).<sup>6</sup> 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.

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<sup>6</sup>That 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

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 30<sup>th</sup> 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

# **Exhibit B**

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

Marc Spitzer, Chairman  
William A. Mundell  
Jeff Hatch-Miller  
Mike Gleason  
Kristin K. Mayes

IN THE MATTER OF THE APPLICATION OF  
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 SERVICES

Docket No. T-01051B-04-0540  
T-03574A-04-0540

**STAFF'S RESPONSE TO QWEST'S  
MOTION TO DISMISS APPLICATION FOR REVIEW  
OF NEGOTIATED COMMERCIAL AGREEMENT**

**I. INTRODUCTION**

On July 16, 2004, Qwest Corporation ("Qwest") and MCImetro Access Transmission Services, L.L.C. ("MCI") entered into two separate agreements. The first agreement was labeled an Amendment to their Interconnection Agreement. The second agreement was labeled the QPP Master Service Agreement. The first agreement both MCI and Qwest filed for Commission approval under 47 U.S.C. Section 252(e). The second agreement Qwest filed with the Commission for informational purposes only. However, MCI subsequently filed the second agreement with the Commission for approval under 47 U.S.C. Section 252(e). On August 6, 2004, Qwest filed a Motion to Dismiss MCI's Application for Commission review and approval of this Agreement. For the following reasons, Qwest's Motion to Dismiss should be denied.

**II. DISCUSSION**

**A. State Commission Have Broad Authority Under Section 252 Over the Review and Approval of Interconnection Agreements**

Under Section 252 of the Federal Act, State commissions are given broad authority to review and approve "interconnection agreements" between carriers. The Act encourages carriers to

1 undertake voluntary negotiations and to enter into voluntary binding agreements without regard to the  
2 standards set forth in subsections (b) and (c) of Section 251 of the Act. If disputes arise, the State  
3 commission resolves them through an arbitration which is binding on both parties. In addition, the  
4 State commissions are the designated repository for all such agreements, whether arrived at through  
5 arbitration or voluntary negotiation.

6 The FCC has addressed the types of agreements which fall within the scope of Section 252  
7 several times, the most recent being in response to a Petition for Declaratory Ruling filed by Qwest.  
8 In its Declaratory Ruling in response to Qwest's Petition, the FCC stated that if the agreement  
9 pertained to an ongoing obligation pertaining to resale, number portability, dialing parity, access to  
10 rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation,  
11 it was an interconnection agreement over which the State commission has jurisdiction.

12 The FCC also stated that the State commissions should be responsible for applying, in the first  
13 instance, the statutory interpretation to the terms and conditions of specific agreements. The FCC  
14 went on to state that "...we believe this is consistent with the structure of section 252, which vests in  
15 the states the authority to conduct fact-intensive determinations relating to interconnection  
16 agreements."

17 The importance of the Section 252 review and filing requirements was underscored by the  
18 FCC in the following passage from their *Local Competition First Report and Order*.

19 "State commissions should have the opportunity to review all agreements,  
20 including those that were negotiated before the new law was enacted, to ensure  
21 that such agreements do not discriminate...and are not contrary to the public  
22 interest...Requiring all contracts to be filed also limits an incumbent LEC's  
23 ability to discriminate among carriers, for at least two reasons. First, requiring  
24 public filing of agreements enables carriers to have information about rates,  
25 terms, and conditions that an incumbent LEC makes available to others.  
26 Second, any interconnection, service or network element provided under an  
27 agreement approved by the state commission under section 252 must be made

28 available to any other requesting telecommunications carrier upon the same  
terms and conditions, in accordance with section 252(i)...Conversely,  
excluding certain agreements from public disclosure could have  
anticompetitive consequences."

1                   **B. Section 252(e) Requires State Commission Review and Approval of "Any"**  
2                   **Interconnection Agreement**

3                   Section 252(e)(1) requires that "any" agreement for interconnection be filed with and  
4 reviewed by the State commission. Section 252(e)(1) provides:

5                   "Any interconnection agreement adopted by negotiation or arbitration shall be  
6 submitted for approval to the State commission. A State commission to which  
7 an agreement is submitted shall approve or reject the agreement, with written  
8 findings as to any deficiencies." (Emphasis added).

9                   Qwest relies upon a recent FCC Declaratory Ruling and Section 252(a)(1) of the Act to argue  
10 that the Arizona Commission has no authority to review and approve its QPP Master Service  
11 Agreement with MCI, despite the fact that the Agreement governs the provision of unbundled  
12 network elements, interconnection and access by Qwest to MCI. With regard to Section 252(a)(1),  
13 Qwest argues that the language of that section limits the Commission's authority to the provision of  
14 network elements, interconnection or services made under Section 251 of the Act. That provision of  
15 the Act states in relevant part: "Upon receiving a request for interconnection, services, or network  
16 elements **pursuant to section 251**, an incumbent local exchange carrier may negotiate and enter into  
17 a binding agreement with the requesting telecommunications carrier or carriers without regard to the  
18 standards set forth in subsections (b) and (c) of section 251."

19                   However, this language addresses only voluntary requests for interconnection, services or  
20 network elements and is not meant to limit the scope of the review authority of state commissions  
21 under the Act. The provision which governs the review authority of state commissions is actually  
22 Section 252(e) which is cited above. As already discussed, under this provision the Commission is  
23 given review and approval authority over any interconnection agreement. There is no limiting  
24 language as Qwest suggests that only interconnection agreements addressing network elements,  
25 interconnection or access under Section 251 must be filed, reviewed and approved by the  
26 Commission. Had Congress intended to limit the scope of the filing obligation or the State  
27 commission's review and approval authority in this fashion, it is presumed that Congress would  
28 merely have added the same language to Section 252(e) which it did not. The fact that Congress did  
not underscore that the Commission's review authority under Section 252 is very broad and extends

1 to any agreement which addresses an ongoing obligation relating to interconnection, network  
2 elements or access.

3 Qwest also relies upon the language of Section 251(a)(1) as the basis for its second argument  
4 that “the entire premise of the duty to file an agreement with a state commission under Section 252 is  
5 based on the fact that the service or element provided is required by Section 251(b) or (c).” Qwest  
6 also relies upon a statement in a recent FCC Declaratory Ruling that only agreements “that contain on  
7 ongoing obligation relating to section 251(b) or (c) must be filed under section 252(a)(1).” However  
8 this ignores the fact that Section 251(a)(1) itself expressly permits parties to negotiate and enter into a  
9 binding interconnection agreement **without regard** to the standards set forth in Section 251 of the  
10 Act. Still, these interconnection agreements are subject to the state filing and review process.

11  
12 **1. Network Elements Which Qwest Must Continue to Make Available Under  
Section 271 are Interconnection and Access Obligations**

13 At issue as a result of Qwest’s Motion, is whether the Commission has jurisdiction under  
14 Section 252 to review and approve the “Qwest Master Service Agreement” which Qwest calls a  
15 “commercial agreement,” in which Qwest has agreed to provide Qwest Platform Plus services to  
16 MCI. Qwest concedes on page 1 of its Motion that Qwest is required to continue to make these  
17 services available under Section 271 of the Federal Act and that the elements consist primarily of the  
18 local switching and shared transport network elements in combination with other services.

19 The services that the QPP Master Services Agreement covers are several network elements  
20 that have been affected by the D.C. Circuit’s vacatur in *USTA II*. Thus, even though Qwest may no  
21 longer have to make an element available under Section 252(d)(3), Qwest may still have to make that  
22 element available under Section 271 as part of its obligations under the Competitive Checklist. The  
23 provisions of Section 271 at issue are contained at 47 U.S.C. Section 271(c)(2)(B) and provide in  
24 relevant part that access or interconnection provided or generally offered by a Bell operating  
25 company to other telecommunications carriers meets the requirements of the 271 Competitive  
26 Checklist if it includes:

27

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- 1           (iv) Local loop transmission from the central office to the customer's  
2           premises, unbundled from local switching or other services.  
3           (v) Local transport from the trunk side of a wireline local exchange carrier  
4           switch unbundled from switching or other services.  
5           (vi) Local switching unbundled from transport, local loop transmission, or  
6           other services."

7 These provisions require Qwest to continue to provide certain network elements, irrespective of any  
8 findings of impairment under Section 251(d)(2).

9           There can be little doubt that the obligations contained in Section 271 of the Federal Act are  
10 "interconnection" and "access" obligations which are properly included in an interconnection  
11 agreement under Section 252. In fact this is supported by the plain language of Section 271. The title  
12 of the 271 section in which these specific unbundling obligations are contained is entitled "SPECIFIC  
13 INTERCONNECTION REQUIREMENTS".

14           Moreover, under sub-part (A) of Section 271(c)(2), the BOC is deemed to meet the  
15 requirements of that section if it is providing such access or interconnection in a Statement of  
16 Generally Available Terms and Conditions ("SGAT") or an Interconnection Agreement. Under  
17 Section 252, the State commission is given authority to review and approve both the SGAT and all  
18 interconnection agreements entered into between carriers operating within the State's jurisdiction.  
19 No separate review and approval process for interconnection agreements or SGAT provisions  
20 containing 271 related provisions was established in Section 271, and therefore, it must be presumed  
21 that Congress intended this review to take place in the context of the regular Section 252 review  
22 process by State commissions.

23           **2. There is no Express Federal Filing Jurisdiction Under the Federal Act.**

24           Qwest's arguments to the contrary notwithstanding, there is no express federal filing  
25 jurisdiction under the Federal Act. See Qwest Motion at p. 7. As just indicated there was no  
26 separate review and approval process established in Section 271 for interconnection agreements or  
27 SGATs containing 271 related provisions, therefore, it must be presumed that this review is to take  
28 place in the Section 252 review process by State commissions.

          Qwest also argues that there "is an independent investiture of federal jurisdiction under the  
1996 Act". Qwest goes on to argue that "[t]he offering of the switching element...is subject to

1 federal jurisdiction.” *Id.* Or, that the “filing and review (if any) of contracts entered into pursuant to  
2 Section 271(c)(2)(B) of the 1996 Act is a federal matter which has not been delegated to the states.”  
3 *Id.* What Qwest ignores is that the States’ authority pursuant to section 252 extends to both interstate  
4 and intrastate matters. Qwest makes a similarly flawed argument that “the federal nature of the  
5 service under the Federal Act automatically brings them into the ‘zone of federal jurisdiction.’ Qwest  
6 Motion at p. 8.

7 In the *Local Competition First Report and Order*, the FCC discussed its role with that of the  
8 states over local competition matters:

9 “We conclude that, in enacting sections 251, 252, and 253, Congress created a  
10 regulatory system that differs significantly from the dual regulatory system it  
11 established in the 1934 Act. (cite omitted). That Act generally gave  
12 jurisdiction over interstate matters to the FCC and over intrastate matters to  
13 the states. The 1996 Act alters this framework, and expands the applicability  
14 of both national rules to historically intrastate issues, and state rules to  
15 historically interstate issues. Indeed, many provisions of the 1996 Act are  
16 designed to open telecommunications markets to all potential service  
17 providers, without distinction between interstate and intrastate services.

18 For the reasons set forth below, we hold that section 251 authorizes the FCC  
19 to establish regulations regarding both interstate and intrastate aspects of  
20 interconnection, services and access to unbundled elements. We also hold  
21 that the regulations the Commission establishes pursuant to section 251 are  
22 binding upon states and carriers and section 2(b) does not limit the  
23 Commission’s authority to establish regulations governing intrastate matters  
24 pursuant to section 251. **Similarly, we find that the states’ authority  
25 pursuant to section 252 also extends to both interstate and intrastate  
26 matters.** Although we recognize that these sections do not contain an explicit  
27 grant of intrastate authority to the Commission or of interstate authority to the  
28 states, we nonetheless find that this interpretation is the only reasonable way  
to reconcile the various provisions of sections 251 and 252, and the statute as  
a whole. (Emphasis added).

21 Finally, Qwest is just plain wrong when it argues that State filing and review requirements are  
22 not permissible because they are inconsistent with this preemptive federal policy. Qwest Motion at p.  
23 8. Staff is not aware of a federal policy favoring market agreements for elements offered under  
24 Section 271, and that this is presumptively preemptive of inconsistent state regulations. See Qwest  
25 Motion at p. 8. In fact the FCC has gone to great lengths not to preempt state jurisdiction except  
26 where warranted based upon case by case determinations.

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In fact in its recent Declaratory Ruling, the FCC stated:

“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. Should competition-affecting inconsistencies in state decisions arise, those could be brought to our attention through, for example, petitions for declaratory ruling. The statute expressly contemplates that the section 252 filing process will occur with the states, and we are reluctant to interfere with their processes in this area. Therefore, we decline to establish an exhaustive, all-encompassing ‘interconnection agreement’ standard. The guidance we articulate today flows directly from the statute and services to define the basic class of agreements that should be filed. We encourage state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval. At the same time, nothing in this declaratory ruling precludes state enforcement action relating to these issues.

\* \* \* \* \*

Consistent with our view that the states should determine in the first instance which sorts of agreements fall within the scope of the statutory standard, we decline to address all the possible hypothetical situations presented in the record before us.”

Declaratory Ruling at paras. 10 and 11.

Accordingly, it hardly appears that the FCC has preempted the States with respect to the determinations regarding the Section 252 filing obligation, as Qwest argues.

**C. The Federal Act Does Not Carve Out Any Exception to the Section 252(e) Filing Requirement for What Qwest Calls a “Commercially Negotiated” Agreement.**

Once again, Staff is not aware, nor has Qwest identified, any provision in the Federal Act which defines “commercially negotiated” agreements and carves them out of the filing requirement of Section 252(e). This is merely a fiction created by Qwest and the RBOCs to escape their state filing obligations under the Federal Act.

Indeed, in its recent Declaratory Ruling involving 252(e) filing obligations, the FCC expressly identified only a few exceptions to the Section 252(e) filing obligation. Those included settlement agreements, order and contract forms completed by carriers to obtain service pursuant to terms and conditions set forth in an interconnection agreement and agreements with bankrupt competitors that are entered into at the direction of a bankruptcy court or trustee and do not otherwise change the

1 terms and conditions of the underlying interconnection agreement. See Declaratory Ruling at paras.  
2 12, 13 and 14.

3 The Commission should reject Qwest's fictitious carve-out for "commercially negotiated"  
4 agreements and Qwest's attempt to once again shoot a cannon ball through the Federal Act's filing  
5 requirements.

6 **D. The FCC Order Approving Qwest's 271 Application for Arizona, States that The**  
7 **FCC and Arizona Commission are to Work together to Ensure Enforcement of**  
8 **Qwest's 271 Obligations.**

9 On December 3, 2004, the FCC granted Qwest's Application for Authorization to Provide In-  
10 Region, InterLATA Services in Arizona. As part of its Memorandum Opinion and Order, the FCC  
11 specifically discussed the relationship of the FCC and the Arizona Commission in the post-271  
12 approval enforcement process. At para. 59, the FCC stated:

13 "Working in concert with the Arizona Commission, we intend to monitor  
14 closely Qwest's post-approval compliance for Arizona to ensure that Qwest  
15 does not "cease to meet any of the conditions required for [section 271]  
16 approval."

17 Qwest is required to meet the Competitive Checklist requirements through provisions in its  
18 SGAT and interconnection agreements. This hardly appears to be a situation where the FCC  
19 intended to preempt State commission involvement in the post-271 approval enforcement process, as  
20 argued by Qwest.

21 **III. CONCLUSION**

22 The Commission should reject Qwest's Motion to Dismiss MCI's Application for Review and  
23 Commission Approval of the Master Services Agreement entered into between Qwest and MCI.

24 Respectfully submitted this 10<sup>th</sup> day of September, 2004.

25 ARIZONA CORPORATION COMMISSION

26 By \_\_\_\_\_

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28 Attorney, Legal Division  
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# **Exhibit C**

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE )  
AMENDMENT TO THE )  
INTERCONNECTION AGREEMENT )  
BETWEEN MCI AND QWEST, DATED )  
JULY 16, 2004 AND THE MASTER )  
SERVICES AGREEMENT BETWEEN )  
MCI AND QWEST, DATED JULY 16, )  
2004 )

Case No. 04-00245-UT

2004 SEP -9 PM 2:55  
REGULATION  
COMMISSION

STAFF'S REPOSENSE TO QWEST'S MOTION TO DISMISS APPLICATION FOR  
REVIEW OF NEGOTIATED COMMERCIAL AGREEMENT

Telecommunications Bureau Staff ("Staff") of the New Mexico Public Regulation Commission, by Staff Counsel, pursuant to 17.1.2.12.C NMAC, responds in opposition to Qwest's ("Commission") Motion to Dismiss Application for Review of Negotiated Commercial Agreement ("Motion") filed herein on August 27, 2004. For the reasons set forth below, Qwest has not met it burden of establishing that the Master Service Agreement ("MSA") should be dismissed from this proceeding because Qwest has not established, as required by Commission Rule 17.1.2.15.B NMAC, lack of Commission jurisdiction, failure to meet burden of proof, failure to comply with the rules of the Commission or other good cause; and, therefore, Qwest's Motion should be denied. As grounds for this response, Staff further argues and responds as follows:

Qwest's Motion is based on the incorrect premises, unsupported by applicable law, that (1) the duty to file an agreement with a state commission under section 252 is based on the fact that the service or element provided is required by section 251(b) or (c) [Motion at p. 5]; and (2) that this Commission has no authority to determine what

agreements qualify as interconnection agreements subject to Section 252 and 17.11.18.17.F and 17.11.18.17.G NMAC filing requirements [Motion at pp. 7-10] in order to carry out its statutory duty of determining whether negotiated interconnection agreements are discriminatory and consistent with the public interest. 47 U.S.C. § 252(e) (requiring the filing of voluntarily negotiated interconnection agreement with state commissions for review and approval to determine non discrimination and consistency with the public interest); NMSA 1978 § 63-9A-2 (providing that the legislative intent of the New Mexico Telecommunications Act is to encourage competition); NMSA 1978 § 63-9A-8.2 (providing that the Commission shall promulgate rules that ensure the accessibility of interconnection by CLECs); 17.11.18 NMAC, Interconnection Facilities and Unbundled Network Elements; and NMSA 1978 § 63-7-7.1 (providing the Commission's broad powers to determine any matters of public interest and convenience and necessity with respect to matters subject to its regulatory authority, including rate setting for transmission companies including telephone companies).

Qwest's Motion additionally is based on the incorrect premise that the interconnection agreement ("ICA") amendment and resulting amended ICA and the MSA, that are the subject matter of this docket, are not interdependent agreements that as a practical matter cannot function without each other for the provisioning of service through network elements that Qwest is required to provide at a minimum pursuant to Section 271. 47 U.S.C. § 271(c)(2)(B) (setting forth the 14 point checklist requirements for Qwest's section 271 authority to provide InterLATA long distance telephone service). For example, as pointed out by AT&T in its response, both agreements have clauses that the other can be terminated by either party if a material provision of one agreement is

rejected or modified by the FCC, a state commission or any other governmental agency. (AT&T Response pp. 2-3.) Further, the MSA itself, at Section 1.1. of Exhibit a, clearly states that Qwest's Platform services will be purchases in combination with loops purchases out of the parties proposed amended ICA.

Moreover, Qwest's approach to Section 252 filing requirements would result in an absurd result as these interdependent agreements regarding the provisioning of services through the purchasing of network elements and collocation would be regulated pursuant to two different agreement subject to two different sets of rules- one set of rules that would provide that this Commission has review authority for a determination of discriminatory impact and consistency with the public interest and one set of rules that would provide that this Commission does not have such authority. Such a piecemeal review process for this Commission is inconsistent with applicable law, is contrary to sound regulatory policy and the public interest. Qwest's Motion therefore should be denied.

Staff addressed in detail Qwest's 3 premises and related legal arguments cited above in the Staff 's Legal Memorandum Filed in Support of Staff's Response to Qwest's and Covad's Responses to Order to Show Cause and Recommendation to Establish a Streamlined Interconnection Agreement Filing and Review Process Comments ("Staff's Brief") filed in Utility Case No. 04-00209-UT on August 19, 2004 as Exhibit A to Staff's Response filed therein. To promote administrative efficiency and economy, Staff respectfully requests that the Hearing Examiner take administrative notice in this proceeding of Staff's Brief filed in Utility Case No. 04-00209-UT as Staff will not repeat these arguments in detail herein. Moreover, many of these legal

arguments are repeated in AT&T's Objections to Qwest's Motion to Dismiss and in MCImetro's Response to Qwest's Motion to Dismiss filed herein and Staff generally supports these filings to the extent that AT&T and MCI believe that the MSA and the amendment to the amendment to the existing interconnection agreement need to be filed with the Commission for review and approval pursuant to Section 252(e)(1) of the Act.

Qwest's Response, however, raises a presumptive preemption argument that it did not address in its comments filed in Utility Case No. 04-00209-UT. This argument, as made herein, is made without any analysis of applicable state law. Further it is made without any analysis of the specific federal law that provides that state commissions are the ultimate arbitrator of what is an interconnection agreement required to be filed pursuant to Section 252. Moreover, Qwest's argument is made without specific analysis of federal law that provides that agreements that create ongoing obligations for network elements are interconnection agreements and without specific analysis of the Federal Communications Act itself that expressly provides that voluntarily negotiated agreements are required to be filed, reviewed and approved pursuant to Section 252(e) irrespective of whether that were negotiated with regard to Section 251(b) and (c). Staff therefore believes that Qwest's presumptive preemption is without merit as a basis for dismissing the MSA agreement from this proceeding because Qwest has not met its burden of establishing that the Commission has been preempted.

Qwest, MCI and AT&T do not appear to dispute that Qwest, in light of the TRO<sup>1</sup> and subsequent D.C. Circuit Court action,<sup>2</sup> is no longer required to provide MCI or any other requesting carrier unbundled access to the local switching network element or the

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<sup>1</sup> In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket 01-338, released August 21, 2003 (TRO).

<sup>2</sup> United States Telecom Association v. FCC, 359 F. 3d 544 (D.C. Cir. 2004)  
Staff's Response to Qwest's Motion to Dismiss  
Utility Case No. 04-00245-UT

shared transport network element associated with the purchase of the local switching network element pursuant to Section 251. All agree, however, that Qwest is still required to do so pursuant to Section 271.<sup>3</sup> What this means is three things. First, if access to an unbundled network element ("UNE") is not required pursuant to section 251, but still is required pursuant to section 271, the TELRIC pricing standards contained in Section 251 do not apply to that UNE that Qwest will continue to provide under market based rates filed but not set by the FCC because the FCC does establish rates in evidentiary rate making proceedings. Second, according to Qwest, if the Commission has no authority over an agreement relating to that UNE, the Commission has no authority to require the filing review and approval of a voluntarily negotiated agreements relating to that UNE, no authority to arbitrate a dispute regarding that UNE, no authority to set pricing for that UNE and presumably no authority to resolve any inter-carrier disputes regarding the provisioning of the UNE. Lastly this means that according to Qwest, two separate sets of rules apply to the same UNEs- one set of rules over which this Commission has authority and one set of rules over which this Commission does not have authority. Qwest's no authority argument is made irrespective of its Section 271 requirements to continue to provide access to these UNEs, without an analysis of relevant state law or applicable federal law that repeatedly preserves state commission authority and recognizes state commission authority to be the ultimate arbitrator of what is an interconnection agreement required to be filed under Section 252, and irrespective of the interdependent nature of its ICA and commercial agreement at issue in this docket.

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<sup>3</sup> See for example, Qwest's Motion at pp. 7-8, and footnote 23, citing the TRO for the proposition that many element removed from Section 251 unbundling requirements must still be provided pursuant to Section 271.

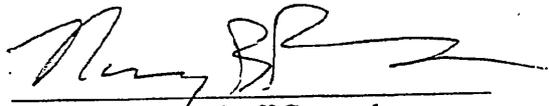
Qwest, MCI and AT&T do not dispute that the subject matter of the Qwest MSA, Qwest Platform Plus or "QPP", consists of the local switching network element and the shared transport network element. QPP is defined in Section 1.1 of Service Exhibit 1 to the MSA as consisting of the local switching element and the shared transport network element. Neither Qwest, MCI nor AT&T dispute that these two network elements, when combined with the purchase of the local loop network element off of a Commission approved interconnection agreement, constitutes the functional equivalent what is known as UNE-P. (The purchase of collocation off of the parties' interconnection agreement is also required for the actual provisioning of this service.) There also appears to be no dispute that that the ICA amendment at issue in this docket effectively eliminates the purchase of UNE-P from the parties interconnection agreements on file with the Commission (Section 4 of the Interconnection Agreement Amendment) by removing rates, terms and conditions for the purchase of the of the local switching network element and the shared transport network element to the MSA. Therefore, by purchasing QPP off of the MSA and the local loop network element and collocation off of the interconnection agreement between Qwest and MCI as proposed to be amended in this docket, Qwest for all practical purposes will continue to provision MCI with UNE-P albeit under a different name and under two agreements rather than one agreement. The only difference will be that this Commission, under Qwest's approach, will have no authority over the rates, terms and conditions of the "commercial agreement."

Qwest's approach is not consistent with sound regulatory practice and policy and is not supported by applicable law. It would result in the absurd result of having the same contractual arrangements for the provisioning of one service regulated pursuant to two

different agreement subject to two different sets of rules, one under which this Commission has no authority to assert its statutory duty of determining whether such agreements are discriminatory or consistent with the public interest. For these reasons, Qwest's Motion should be denied.

Respectfully submitted by:

**NM PUBLIC REGULATION COMMISSION  
UTILITY DIVISION**



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# **Exhibit D**



1 unbundled mass market switching and unbundled shared transport still must be filed under  
2 Section 252. The recent FCC Order, at Paragraph 16, provides:

3 Specifically, we conclude that the appropriate interim approach here is to  
4 require incumbent LECs to continue providing unbundled access to switching,  
5 enterprise market loops, and dedicated transport under the same rates, terms, and  
6 conditions that applied under their interconnection agreements as of June 15,  
7 2004. These rates, terms, and conditions shall remain in place until the earlier of  
8 the effective date of final unbundling rules promulgated by the Commission or six  
9 months after the Federal Register publication of the Order, except to the extent  
that they are or have been superceded by (1) voluntary negotiated agreements, (2)  
an intervening Commission order affecting specific unbundling obligations (e.g.  
an order addressing a pending petition for reconsideration), or (3) (with respect to  
rates only) a state public utility commission order raising the rates for network  
elements.

10 The FCC Order has required by temporary rule that "unbundled access to switching,  
11 enterprise market loops, and dedicated transport"<sup>1</sup> remain a Section 251(c) obligation and  
12 agreements (such as this one) covering these items must be filed under Section 252 for state  
13 approval. Therefore, while parties can negotiate changes to rates, terms, and conditions in place  
14 June 15, 2004, they cannot negotiate away the Section 252 filing requirement.<sup>2</sup> According to the  
15 FCC Order, the commercial agreement must be filed for state approval and, therefore, Qwest's  
16 Motion to Dismiss should be denied.

### 17 CONCLUSION

18 Qwest's Motion to Dismiss relies on *USTA II* and an October 2002 FCC decision.<sup>3</sup>  
19 However, Qwest's reliance on these two opinions is misplaced now that the FCC has issued its  
20

21 \_\_\_\_\_  
22 <sup>1</sup>Footnote 3 of the FCC's Order clarifies that "references to unbundled switching encompass mass market circuit  
switching and all elements that must be made available when such switching is made available." Shared transport is  
one of those elements.

23 <sup>2</sup>In Paragraph 22 of the FCC Order, the FCC restricts opt-ins of "frozen" unbundling obligations. However, the  
24 FCC's restriction on opt-ins of frozen unbundling obligations does not alter the fact that the FCC has "frozen"  
Section 251 obligations and that the FCC has provided that certain elements, as outlined in paragraph 16, are  
currently Section 251 obligations and must be filed for state approval.

25 <sup>3</sup>Memorandum Opinion and Order, *In the Matter of Qwest Communications International, Inc. Petition for*  
26 *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, 17 Fcc Rcd 19337 (Oct. 4, 2002).

1 most current iteration of Section 251(c) obligations for unbundled access to switching, enterprise  
2 market loops, and dedicated transport.

3 As a result of the recent FCC Order, Qwest's Motion to Dismiss should be denied.

4 Furthermore, Qwest should be required to file portions of its Qwest Platform Plus agreement  
5 with the Commission for approval.

6 DATED this 20<sup>th</sup> day of September 2004.  
7

8 Respectfully submitted,

9 HARDY MYERS  
10 Attorney General

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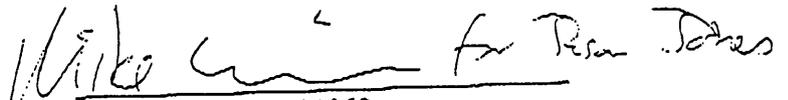
12 Jason W. Jones, #00059  
13 Assistant Attorney General  
14 Of Attorneys for the Public Utility Commission  
15 of Oregon  
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CERTIFICATE OF SERVICE

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I certify that on September 20, 2004, I served the foregoing ARB 6 STAFF'S  
RESPONSE TO QWEST'S MOTION TO DISMISS APPLICATION FOR REVIEW OF  
NEGOTIATED COMMERCIAL AGREEMENT upon the parties hereto by sending a true, exact  
and full copy by regular mail, postage prepaid to:

MICHAEL A BEACH MCI WORLDCOM COMMUNICATIONS INC 6312 S FIDDLERS GREEN CIR STE 600 EAST ENGLEWOOD CO 80111	CARLA BUTLER QWEST CORPORATION 421 SW OAK ST STE 810 PORTLAND OR 97204
THOMAS DETHLEFS QWEST CORPORATION 1801 CALIFORNIA ST - RM 4900 DENVER CO 80202-1984	ALEX M DUARTE QWEST CORPORATION 421 SW OAK ST STE 810 PORTLAND OR 97204
T D HUYNH MCI WORLDCOM NETWORK SERVICES INC 2678 BISHOP DR - STE 200 SAN RAMON CA 94583	PETER H REYNOLDS MCIMETRO ACCESS TRANSMISSION SERVICES LLC 707 17 <sup>TH</sup> STREET - STE 4200 DENVER CO 80202
MICHEL SINGER NELSON MCIMETRO ACCESS TRANSMISSION SERVICES LLC 707 17 <sup>TH</sup> STREET - STE 4200 DENVER CO 80202	STEVEN WEIGLER AT&T LAW DEPT 1875 LAWRENCE ST STE 1500 DENVER CO 80202

  
Jason W. Jones, #00059  
Assistant Attorney General  
Of Attorneys for the Public Utility Commission  
of Oregon