

**BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION**

**IN THE MATTER OF THE APPLICATION )**  
**OF QWEST CORPORATION AND ) CASE NO. QWE-T-04-24**  
**MCIMETRO ACCESS TRANSMISSION )**  
**SERVICES LLC'S MASTER SERVICE )**  
**AGREEMENT FILING ) ORDER NO. 29633**  
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On August 2, 2004, MCImetro Access Transmission Services, LLC (MCImetro) filed a Master Services Agreement (MSA) as well as a related Amendment to Interconnection Agreement between MCImetro and Qwest Corporation (Qwest) with the Commission seeking its review and approval pursuant to 47 U.S.C. § 252. The MSA is a commercial agreement where Qwest provides MCImetro with its Qwest Platform Plus (QPP) services, and covers the purchase and use of certain combinations of network elements: local switching; shared transport; loop; etc. that were commonly known as Unbundled Network Element Platform (UNE-P) and the subject of previous interconnection agreements. The MSA states, given the “regulatory uncertainty in light of the DC Circuit Court’s decision in *USTA v. FCC*, 359 F.3d 554 (March 2, 2004) . . . with respect to the future existence, scope, and nature of Qwest’s obligation to provide such UNE-P arrangements under the Communications Act,” that the MSA is being filed with corresponding interconnection agreement amendments “to create a stable arrangement for the continued availability to MCI from Qwest of services. . .” Master Services Agreement at 2.

The Commission approved the parties’ Amendment to their Interconnection Agreement in Order No. 29580. The Commission issued a Notice of Filing, Notice of Modified Procedure, and Notice of Comment/Protest Deadline regarding the MSA in Order No. 29596. Comments were sought from any interested party regarding whether such an agreement, the MSA, is subject to the requirements of 47 U.S.C. §§ 251, 252, *et. seq.* The Commission received comments from Qwest, MCImetro, AT&T Communications of the Mountain States (AT&T), and the Commission Staff. Based upon the comments received, the applicable law, and the unique facts and circumstances comprising the record in this case, the Commission by this Order accepts the MSA for filing, and will await a ruling and direction from the FCC regarding whether such agreements are subject to the requirements of 47 U.S.C. §§ 251, 252, *et. seq.*

## LEGAL BACKGROUND

In an effort to promote the development of competitive markets in the telecommunications industry, Congress passed the federal Telecommunications Act of 1996 (the Act). Among the many specific duties imposed upon the incumbent local exchange carriers (ILECs) by the Act are the duties to provide for interconnection with any requesting competitive local exchange carrier's (CLECs) network and to provide nondiscriminatory access to network elements on an unbundled basis. 47 U.S.C. § 251(2), (3). Under the Act, interconnection agreements must be submitted to State Commissions for approval. 47 U.S.C. § 252(e)(1). The Commission may reject an agreement adopted by negotiations only if it finds that the agreement: (1) discriminates against a telecommunications carrier not a party to the agreement; or (2) implementation of the agreement is not consistent with the public interest, convenience and necessity. 47 U.S.C. § 252(e)(2)(A).

The Act left to the FCC the choice of elements to be "unbundled" pursuant to an "impairment" determination as to the CLEC. Federal Courts have invalidated certain impairment and unbundling determinations by the FCC. On August 21, 2003, the FCC issued its Triennial Review Order (TRO), in which it declined to require the high frequency portion of the loop be made available as an unbundled network element. *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338. The United States Court of Appeals for the District of Columbia Circuit in an appeal from the FCC's TRO, vacated the FCC's determination that CLECs were impaired without interconnection access to mass market switches and high-capacity dedicated transport facilities, while upholding the elimination of mandatory line sharing. *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C.Cir. 2004) ("USTA II").<sup>1</sup>

On April 23, 2002, Qwest filed a petition for a declaratory ruling on the scope of the mandatory filing requirement set forth in Section 252(a)(1) of the Act. *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)*, Memorandum Opinion and Order, FCC 02-276, WC Docket 02-89, ¶ 1. (*Qwest Declaratory Ruling*). The FCC declined to establish an exhaustive, all-encompassing "interconnection agreement" standard. *Id.* at ¶ 10. The FCC stated that the determination as to whether a

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<sup>1</sup> Petitions for a grant of writ of certiorari from the United States Supreme Court are pending.

particular agreement is required to be filed as an “interconnection agreement” is left to the states to make on a case-by-case basis. *Id.* The FCC further stated:

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).

*Qwest Declaratory Ruling* at ¶ 8. Footnote 26 to that passage further states:

We therefore disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier. 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 with competitive LEC’s entered into as “settlements of disputes” and publish those terms as “generally available” terms for all competitive LECs.

*Id.* at n. 26 (citations omitted).

On August 20, 2004, the FCC requested comments on this issue in 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 access to network elements for which there is no section 251(c)(3) unbundling obligation . . .” in its latest rulemaking. *Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of 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; *AT&T Comments* at 13-14.

#### **SUMMARY OF COMMENTS**

The Commission received comments from Qwest, MCImetro, AT&T Communications of the Mountain States (AT&T), and the Commission Staff. Qwest’s comments opposed the Commission’s review and approval of the MSA contending it was not an interconnection agreement and was beyond the jurisdiction of the Commission. AT&T, MCI, and the Commission Staff filed comments advocating the position that the MSA is subject to the filing and approval requirements of the Act pursuant to 47 U.S.C. §§ 252 and 271.

### **A. Qwest Corporation**

Qwest opposes the Commission's review and approval of the MSA on the basis that it is not an interconnection agreement, but a commercial agreement beyond the jurisdiction of the Commission. Qwest also contends the Commission is preempted from reviewing the MSA.

Qwest argues that as a result of the D.C. Circuit Court's decision in *USTA II*, it is no longer required to provide the network elements (switching and shared transport) that are the subject of the QPP MSA under 47 U.S.C. § 251. Qwest argues that it is therefore not required to file such an agreement with State Commissions and the State Commissions lack authority under Section 252 to review and approve the agreement. Qwest argues that *USTA II* when read together with the language from the *Qwest Declaratory Ruling* establishes that the MSA is not subject to either Section 251 or 252 and is therefore not subject to review and approval by the Commission because the MSA does not create any terms or conditions for services that Qwest must provide under Sections 251(b) and (c), and therefore is not an interconnection agreement.

Qwest further argues that, because the MSA is not subject to the provisions of Section 251 or 252, it falls within exclusive federal jurisdiction that preempts State Commission action. *Qwest Comments* at ¶¶ 14-21. Qwest argues that the statutory federal filing requirements relating to the filing of contracts for interconnection services not covered by Sections 251(b) or (c) [i.e., 47 U.S.C. § 271] create a "federal regulatory regime" that would preempt State Commission action.

### **B. AT&T, MCI, and Commission Staff**

AT&T, MCI, and the Commission Staff each filed comments advocating that the MSA must be filed with the State Commission for approval pursuant to 47 U.S.C. § 252 and 47 U.S.C. § 271 because: 1) it is an interconnection agreement pursuant to Section 252; 2) the State Commission is obligated to ensure that the agreement is not discriminatory; and 3) the state must ensure that Qwest continues to meet the essential conditions of Section 271. Commission Staff was able to review the comments filed by AT&T prior to filing its own comments and stated general agreement with AT&T's comments.

AT&T argues that the MSA falls squarely within the plain language of the statute as well as the FCC's direction from the *Qwest Declaratory Ruling*. Section 252(e)(1) is clear on its face requiring filing with and approval by the State Commission of *any* interconnection agreement, and the MSA along with the Amended Interconnection Agreement establishes

“ongoing obligations pertaining to . . . interconnection.” *Qwest Declaratory Ruling* at ¶ 10; *AT&T Comments* at 3.

MCI refers to a more recent FCC Order that reiterates the “ongoing obligation” language from the *Qwest Declaratory Ruling* without limiting this direction to only those agreements that contain an ongoing obligation relating to Section 251(b) or (c) as Qwest argues it did in footnote 26 to the *Qwest Declaratory Ruling*. *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, ¶ 22; *MCImetro Comments* at 2-3. MCI also cites to the FCC’s August 20, 2004 Order requesting comments upon this issue in its ongoing rulemaking, (as did AT&T) and a concurring statement by FCC Commissioner Abernathy, for the proposition that the FCC has not settled the issue of whether commercially negotiated agreements for access to network elements that are not required to be unbundled under Section 251(c)(3) should fall within Section 252. *Id.* at 3-4.

Lastly, AT&T argues that under Section 271, Qwest’s authority to provide in-region long distance service in Idaho is conditioned on Qwest offering competitive checklist items pursuant to “binding agreements that have been approved under section 252 . . .” *Id.* AT&T cites language from a Section 271 application case in which the FCC stated that a Bell Operating Company is only “providing” a checklist item if it has a “concrete 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.” *Id.* at 9-10. Commission Staff agreed that the MSA must be filed with the Commission pursuant to 47 U.S.C. § 271 and 272 as the State Commissions are charged not only with an initial decision regarding compliance but also the subsequent monitoring and auditing of such compliance in order for Qwest to remain in the long distance market.

Additionally, Staff stated that should the Commission wish to consider approval of the MSA as an interconnection agreement, Staff would recommend approval as they reviewed the MSA and did not find any terms or conditions to be discriminatory or contrary to public interest.

## DISCUSSION

Based upon the comments received, the applicable law, and the unique facts and circumstances comprising the record in this case, the Commission by this Order accepts the

MSA for filing, and will await a ruling and direction from the FCC regarding whether such agreements are subject to the requirements of 47 U.S.C. §§ 251, 252, *et. seq.*

Although the Commission appreciates the depth of the comments, under the facts of this particular case it is not necessary for us to determine whether approval of the MSA as an interconnection agreement is required under the Act. Qwest has published this agreement on its website, and has made the terms and conditions of the agreement available to any telecommunications carrier assuming the same obligations as MCI. *Qwest Comments* at 3. In fact, the Commission has received two additional filings of this particular agreement since the commencement of this action: Case No. QWE-T-04-25, Northstar Telecommunications, Inc. and Case No. QWE-T-04-29, Z-Tel Communications, Inc. Additionally, Commission Staff has reviewed the MSA and did not find any terms or conditions to be discriminatory or contrary to public interest, which is the extent of the Commission's review of interconnection agreements under the Act. Qwest has, for all practical purposes, done all that would be required of it with regard to the MSA if considered an interconnection agreement under the Act.

The FCC has taken up this issue in its latest rulemaking. Guidance from the FCC should be forthcoming regarding an incumbent LEC's obligation to file commercial agreements under Section 252 of the Act and addressing access to network elements for which there is no Section 251(c)(3) unbundling obligation. *Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of 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; *AT&T Comments* at 13-14. The Commission finds it to be prudent to await further guidance from the FCC, while accepting this MSA for filing.

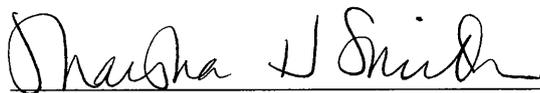
#### **ORDER**

IT IS HEREBY ORDERED that the Qwest Platform Plus Master Services Agreement between MCImetro Access Transmission Services, LLC and Qwest Corporation is acknowledged and accepted by the Commission for filing.

THIS IS A FINAL ORDER. Any person interested in this Order (or in issues finally decided by this Order) may petition for reconsideration within twenty-one (21) days of the service date of this Order. Within seven (7) days after any person has petitioned for reconsideration, any other person may cross-petition for reconsideration. See *Idaho Code* §§ 61-626 and 62-619.

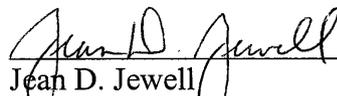
DONE by Order of the Idaho Public Utilities Commission at Boise, Idaho this 19<sup>th</sup>  
day of November 2004.

  
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PAUL KJELLANDER, PRESIDENT

  
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MARSHA H. SMITH, COMMISSIONER

  
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DENNIS S. HANSEN, COMMISSIONER

ATTEST:

  
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Jean D. Jewell  
Commission Secretary

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