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Attorney for the Commission Staff

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

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

COMES NOW the Staff of the Idaho Public Utilities Commission, by and through its Attorney of record, Donovan E. Walker, Deputy Attorney General, in response to the Notice of Filing, Notice of Modified Procedure and Notice of Comment/Protest Deadline in Case No. QWE-T-04-24 issued on September 15, 2004, submits the following comments.

INTRODUCTION AND BACKGROUND

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. 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.

The Commission received comments from AT&T Communications of the Mountain States (AT&T). Staff has reviewed AT&T's comments and is in general agreement with them. Staff believes that the MSA and other similar commercial agreements must be filed with the Commission pursuant to 47 U.S.C. § 252 and 47 U.S.C. § 271.

STAFF ANALYSIS

Under the provisions of the Federal Telecommunications Act of 1996, interconnection agreements must be submitted to the Commission for approval. 47 U.S.C. § 252(e)(1). The filing obligation is broadly stated: “**Any** interconnection agreement adopted by negotiation or arbitration **shall** be submitted for approval to the State commission.” *Id.* (emphasis added). The relevant question then becomes whether the MSA is an interconnection agreement.

The FCC is currently considering the issue of whether commercial agreements, such as the MSA in this case, are subject to the requirements of Section 252. See, FCC Order 04-179. The FCC in the past has been reluctant to define exactly what type of agreements fall within the statutory standard requiring filing with and approval by the State Commission as an interconnection agreement. See, *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 (Oct. 4, 2002) at ¶ 10. As pointed out by AT&T in its comments, although the FCC has declined to adopt a definitive interpretation of the term “interconnection agreement” and has left that determination to the states to make on a case-by-case basis, the FCC has made clear that the scope of the filing requirement is exceedingly broad. The FCC has, however, offered some guidance in defining a broad class of agreements that should be filed: “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.

Staff does not dispute Qwest's claim that the unbundled network elements to be provided under the MSA are not currently required to be provided at TELRIC rates under the provisions of Section 251. However, the services concern unbundled network elements, and the agreement

creates an ongoing obligation between the parties. Staff believes these agreements (i.e., the MSA) are subject to the filing requirements of Section 252.

The Commission has an obligation under both State and Federal law to ensure that the MSA and other such agreements are not discriminatory. As the services in the MSA are provided under rates, terms, and condition that are not on file with the Commission in a tariff or price list, the Commission has no other means for determining compliance with the non-discrimination requirements unless the agreements themselves are filed.

Additionally, Staff believes that the agreement must be filed with the Commission pursuant to 47 U.S.C. § 271 and 272. Qwest, although putting forth no argument here, has argued in other jurisdictions that Section 271 requires the filing of the MSA with the FCC but not the State Commissions. However, the State Commission consultation requirements of Section 271(d)(2)(B) are not limited to the initial decision of compliance with Section 271 conditions, but also apply to the subsequent monitoring and auditing of such compliance. The Commission could not perform its role without access to all relevant agreements, and therefore Staff believes the agreement must also be filed with this Commission, as well as with the FCC.

STAFF RECOMMENDATIONS

Qwest voluntarily submitted the MSA to the commission, and has voluntarily agreed to allow other companies to adopt the entire agreement. With the FCC's establishment of the "all or nothing" requirements for 47 U.S.C. § 252(i), Qwest has voluntarily agreed to comply with the requirements that would be imposed on an interconnection agreement approved by this Commission under 47 U.S.C. § 252. As long as Qwest maintains these voluntary commitments, the eventual decision by the FCC on the applicability of Section 252 to these agreements will not impact the actual operations of Qwest or its competitors. If the FCC determines that such agreements are subject to the requirements of Section 252, then these voluntary actions become obligatory.

Staff recommends that the Commission accept for filing this Master Service Agreement between Qwest and MCImetro. Staff additionally recommends that the Commission clarify that the filing of commercial wholesale agreements, similar to this MSA, is required to enable the Commission to perform its responsibilities under State and Federal Law.

Should the Commission wish to consider approval of the MSA as an interconnection agreement, Staff would recommend approval. 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). Staff has reviewed the MSA and did not find any terms or conditions to be discriminatory or contrary to public interest. Accordingly, Staff would recommend approval of the MSA under the standards applicable to interconnection agreements.

DATED this 10th day of October, 2004, at Boise, Idaho.

A handwritten signature in black ink, appearing to read "Don Walker", written over a horizontal line.

Donovan E. Walker
Deputy Attorney General

Technical Staff: Wayne Hart
Doug Cooley

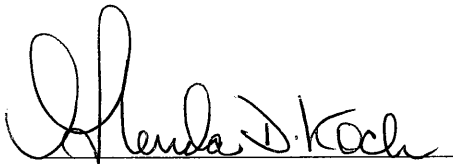
CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I HAVE THIS 6TH DAY OF OCTOBER 2004, SERVED THE FOREGOING **COMMENTS OF THE COMMISSION STAFF**, IN CASE NO. QWE-T-04-24, BY MAILING A COPY THEREOF, POSTAGE PREPAID, TO THE FOLLOWING:

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