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

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

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

The FCC also stated that the State commissions should be responsible for applying, in the first instance, the statutory interpretation to the terms and conditions of specific agreements. The FCC went on to state that "…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."

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

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

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

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

> "**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." (Emphasis added).

Qwest relies upon a recent FCC Declaratory Ruling and Section 252(a)(1) of the Act to argue that the Arizona Commission has no authority to review and approve its QPP Master Service Agreement with MCI, despite the fact that the Agreement governs the provision of unbundled network elements, interconnection and access by Qwest to MCI. With regard to Section 252(a)(1), Qwest argues that the language of that section limits the Commission's authority to the provision of network elements, interconnection or services made under Section 251 of the Act. That provision of the Act states in relevant part: "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."

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

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

Qwest also relies upon the language of Section 251(a)(1) as the basis for its second argument that "the entire premise of 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)." Qwest also relies upon a statement in a recent FCC Declaratory Ruling that only agreements "that contain on ongoing obligation relating to section 251(b) or (c) must be filed under section 252(a)(1)." However this ignores the fact that Section 251(a)(1) itself expressly permits parties to negotiate and enter into a binding interconnection agreement **without regard to** the standards set forth in Section 251 of the Act. Still, these interconnection agreements are subject to the state filing and review process.

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

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

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

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

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

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

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

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

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

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

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

> "We conclude that, in enacting sections 251, 252, and 253, Congress created a regulatory system that differs significantly from the dual regulatory system it established in the 1934 Act. (cite omitted). That Act generally gave jurisdiction over interstate matters to the FCC and over intrastate matters to the states. The 1996 Act alters this framework, and expands the applicability of both national rules to historically intrastate issues, and state rules to historically interstate issues. Indeed, many provisions of the 1996 Act are designed to open telecommunications markets to all potential service providers, without distinction between interstate and intrastate services.
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> For the reasons set forth below, we hold that section 251 authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection, services and access to unbundled elements. We also hold that the regulations the Commission establishes pursuant to section 251 are binding upon states and carriers and section 2(b) does not limit the Commission's authority to establish regulations governing intrastate matters pursuant to section 251. **Similarly, we find that the states' authority pursuant to section 252 also extends to both interstate and intrastate matters**. Although we recognize that these sections do not contain an explicit grant of intrastate authority to the Commission or of interstate authority to the 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).

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

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-b6-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.
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> 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

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

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

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

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

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

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

III. CONCLUSION

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

Respectfully submitted this 10th day of September, 2004.

ARIZONA CORPORATION COMMISSION

By_____

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