STATE OF NORTH DAKOTA

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of the Filing for	)	**Docket No. PU-04-402**
Approval of a Master Services	)	**Docket No. PU-04-403**
Agreement between Qwest	)	
Corporation and MCImetro Access	)	**MCI's Response to Qwest Motion to**
Transmission Services, LLC	)	**Dismiss Application for Approval**

MCImetro Access Transmission Services, LLC ("MCImetro") hereby files its Response to Qwest's Motion to Dismiss filed in Docket No. PU-04-403 and Docket No, PU-04-402 (it is MCImetro understands that its docket has been assigned Docket No. PU-04-402). For the following reasons, MCImetro opposes the motion.

INTRODUCTION

Qwest Corporation moved to dismiss any review and approval of what is known as the Qwest Master Services Agreement (the "Commercial Agreement") under which Qwest agreed to provide to MCImetro Qwest Platform Plus™ services under Section 271 of the federal Telecommunications Act of 1996 ("federal Act"). These Section 271 services consist primarily of local switching and shared transport *network elements* in combination with certain other services. (Emphasis supplied.)[1]

[1] Qwest's Motion to Dismiss, page 1.

In support of its motion, Qwest states that the Commercial Agreement expressly provides that it does not amend or alter the terms and conditions of any existing interconnection agreements ("ICA") between MCI and Qwest. Qwest also states that since the Commercial Agreement contains no terms and conditions for services that Qwest must provide under Section 251(b) and (c), it is not an ICA or an amendment to an ICA between Qwest and MCI. Accordingly, Qwest argues that this Commission has no authority under Section 251 or 252 of the federal Act to review or approve the Commercial Agreement.[2]

Relevant sections of the portion of the Commercial Agreement entitled "Qwest Master Services Agreement" provide in pertinent part:

> 4.3 The provisions in this Agreement are intended to be in compliance with and based on the existing state of the law, rules, regulations and interpretations thereof, including but not limited to Federal rules, regulations, and laws, as of the Effective Date regarding Qwest's obligation under Section 271 of the Act to continue to provide certain *Network Elements* ("Existing Rules").
>
> 4.5 To receive services under this Agreement, MCI must be a certified CLEC under applicable state rules. MCI may not purchase or utilize services or *Network Elements covered under this Agreement* for its own administrative use or for the use by an Affiliate.
>
> 4.6 Except as otherwise provided in this Agreement, the Parties agree that *Network Elements and services provided under this Agreement* are not subject to the Qwest Wholesale Change Management Process ("CMP") requirements, Qwest's Performance Indicators (PID), Performance Assurance Plan (PAP), or any other wholesale service quality standards, liquidated damages, and

[2] *Id*. at pages 1-3.

remedies. Except as otherwise provided, MCI hereby waives any rights it may have under the PID, PAP and all other wholesale service quality standards, liquidated damages, and remedies with respect to *Network Elements and services provided pursuant to this Agreement*. Notwithstanding the foregoing, MCI proposed changes to QPP attributes and process enhancements will be communicated through the standard account interfaces. Change requests common to shared systems and processes subject to CMP will continue to be addressed via the CMP procedures.

Finally, that portion of the Commercial Agreement entitled, Service Exhibit 1 - Qwest Platform Plus™ Service, provides in Section 1.1 entitled "General QPP™ Service Description:"

> QPP™ services shall consist 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.

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.

Section 252(a)(1) 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).26
>
> 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.[3]

As noted by Qwest, 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)." 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:

> 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 did reference Section 251 in general but did not cite section 251(b) or (c) specifically.[4]

Nevertheless, the FCC recently issued FCC Order 04-179 in the WC Docket No. 04-3134 (Released August 20, 2004 generally referred to as the Interim Order). This order makes it clear that the issue of whether to file commercial agreements that do not provide for section 251 network elements is

[3] 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.

[4] *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.

not, in fact, settled by the FCC or its prior rulings. 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.[5] 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 agreements, we should have removed that obstacle now. I only hope that the Commission does so in the near future.

[5] 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).

Qwest asserts that the FCC only requires interconnection agreements to be filed that have on-going obligations relating to network elements offered pursuant to Section 251. If the FCC had clearly made such a determination as asserted by Qwest, the FCC has muddied the waters with its request for comments on this very issue in FCC Order 04-179, as Commissioner Abernathy highlights. Had Qwest's assertion been fully supported by the FCC, one would think the FCC would have said so and reiterated such a ruling in FCC Order 04-179, rather than putting the issue in play by requesting comments and clearly disappointing at least one FCC commissioner.

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.[6]

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).[7]

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 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.[8] Thus, MCI believes the Commercial Agreement must be filed with the state under federal law.

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[6] 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.
[7] *Id*. at ftnt 23.
[8] *Id*. at ¶ 1.

B. Activity in Other States.

1. Responses to Qwest motions to dismiss in other Qwest states.

MCImetro filed the same Commercial Agreement in all of the 14 states in Qwest Corporation's ("Qwest") region. Attached here are Responses filed by the staff of state commissions in Arizona and New Mexico (including Staff's filing in the Qwest/Covad case before the New Mexico Public Regulation Commission) addressing the same issue contained in Qwest's motions to dismiss that were filed in those states as well as an order from the Utah Public Service Commission denying a similar motion to dismiss flied by Qwest in that state. This is the first order from a Commission in the Qwest states that MCImetro has received. These responses provide further legal argument that support MCI's position that the Commercial Agreement should be filed for review and approval by state commissions.

MCImetro supports the legal arguments contained in each of the Arizona and New Mexico staff responses to Qwest motions to dismiss filed in those states. The Utah order as well as the staff responses provide further legal argument and support for MCImetro's position on this issue as stated in its Response to Qwest's motion to dismiss filed in this docket. Their responses are attached as Exhibit A, B and C and the arguments and rulings made there are incorporated by reference here.

The Oregon staff also filed a response to the Qwest motion to dismiss that also recommends that Qwest's motion be denied.

2. Michigan – SBC/Sage Agreement

Recently, the Michigan Commission found that most of the provisions of Sage Commercial Agreement and the eighth amendment qualify for review and approval under the federal Act. Specifically, the Michigan Commission concluded that, except for the commercially sensitive information redacted from the public version of the agreement filed by SBC and Sage, the remainder of the Commercial Agreement and eighth amendment are subject to the Commission's review and approval.

The Michigan Commission also found that:

> SBC and Sage should be obligated to make the LWC Agreement pricing schedule public. The Commission finds that the LWC Agreement pricing schedule, which is an attachment to the LWC Agreement, is an integral part of the arrangement that must be disclosed. Further, any of the redacted provisions of the LWC Agreement that refer to the pricing schedule should also be disclosed. The FCC's recent decision to change its "pick and choose" rule (47 CFR 51,809) to an "all or nothing" rule provides further support for requiring the disclosure of the bulk of the LWC Agreement because there is no reason for SBC to now claim that a provider can choose to be bound by only certain provisions of the agreement and attempt to negotiate better terms regarding those provisions not chosen.

Here like the SBC/Sage LWC Agreement, the Commercial Agreement is an integral part of the arrangement and available under the FCC's recent "all or nothing" pick and choose rule.

CONCLUSION

Therefore, for the reasons stated, Qwest's motion to dismiss should be denied.

Dated this 1st day of October 2004

MCImetro ACCESS TRANSMISSION SERVICES, LLC

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I served a true and exact copy of the within Response to Qwest's Motion to Dismiss, upon the following, either by hand delivery, first class mail or e-mail, as stated below:

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And 2 originals (one for each docket) and 7 copies by overnight mail addressed to:

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Dated: October 1, 2004

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