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**

STAFF'S REPONSE 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 he 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 Stafff'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 it 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[1] and subsequent D.C. Circuit Court action,[2] is no longer required to provide MCI or any other requesting carrier unbundled access to the local switching network element or the

[1] **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**).
[2] **United States Telecom Association v. FCC**, 359 F. 3d 544 (D.C. Cir. 2004)

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.[3] 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.

[3] 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.

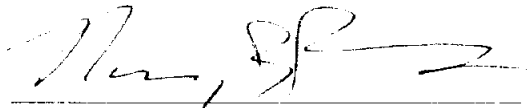
Qwest, MCI and AT&T do not dispute that the subject matter of the Qwest MSA, Qwest Platform Plus or "QPP", consists of the local switching network element and the shared transport network element. QPP is defined in Section 1.1 of Service Exhibit 1 to the MSA as consisting of the local switching element 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 of consistent with the public interest. For these reasons, Qwest's Motion should be denied.

Respectfully submitted by:

NM PUBLIC REGULATION COMMISISON
UTILITY DIVISION



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **Staff's Response To Qwest's Motion To Dismiss Application For Review of Negotiated Commercial Agreement,** filed September 9, 2004, was mailed first-class, postage prepaid, to each of the following:

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and hand-delivered to:

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Dated this 9th day of September, 2004.

NEW MEXICO PUBLIC REGULATION COMMISSION

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