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 Proposed Findings of Fact**
Transmission Services, LLC	**)**	**Conclusions of Law and Order**

I. PROCEDURAL HISTORY

On August 2, 2004, MCImetro Access Transmission Services LLC (MCI) filed its amendment to interconnection agreement (ICA Amendment) between MCI and Qwest Corporation (Qwest) dated July 16, 2004, and the Master Service Agreement (MSA) between MCI and Qwest, also dated July 16, 2004. The ICA Amendment was docketed as Case No. PU-04-403 and posted as a pending interconnection agreement on the Commission's website upon filing. The MSA was docketed as Case No. PU-04-402 and not posted on the Commission's website until October 4, 2004. The MSA sets forth rates, terms and conditions under which Qwest agrees to provide Qwest Platform Plus (QPP) services to MCI. MCI requested that the Commission approve the ICA Amendment and the MSA pursuant to Section 252(e) of the Federal Telecommunications Act of 1996 (the Act).[1]

On September 20, 2004, in Case No. PU-04-403, Qwest filed a Motion to Dismiss Filing for Approval of Negotiated Commercial Agreement (Qwest's Motion). The filing was docketed in both Case Nos. PU-04-402 and PU-04-403.

On October 4, 2004, in both cases, MCI filed its response to Qwest's Motion.

On October 4, 2004, the Commission issued a Notice of Opportunity for hearing. Persons desiring a hearing were to file a written request by November 1, 2004. The

[1] 47 U.S.C. Section 151 et. seq.

Commission stated that, if deemed appropriate, the Commission can determine the matter without a hearing.

On October 26, 2004, MCI filed a supplemental response to Qwest's Motion to Dismiss.

On October 29, 2004, AT&T filed a response to Qwest's Motion to Dismiss.

On November 1, 2004, Qwest filed a Reply in Support of its Motion to Dismiss and requested a hearing.

The Commission issued a Notice of Hearing on December 1, 2004, scheduling a hearing for January 27, 2005. On that date, the Commission heard oral argument from Qwest and MCI.

II. SUMMARY OF PARTY POSITIONS

Qwest argues the Commission has limited jurisdiction, as the Federal Communications Commission (FCC) has indirectly supplanted the Commission's jurisdiction to review and approve what it terms "commercial" agreements by virtue of the *USTA II*[2] decision. Qwest contends that since the MSA contains no terms and conditions related to services provided under Section 251(b) and (c), it is not required to be filed for state commission approval. Rather, the MSA is an agreement that is properly filed with the FCC under Section 211 of the Communications Act of 1934. In conjunction with the *USTA II* decision, Qwest relies on an FCC Declaratory Ruling Order[3] issued in December of 2002 for the proposition that agreements which do not create an ongoing obligation to provide services under Section 251(b) and (c) do not

[2] *United States Telephone Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (USTA II).
[3] Memorandum Opinion and Order, *In the Matter of 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, 17 FCC Rcd 19337 (October 4, 2002)("Declaratory Order").

need to be filed with state commissions for approval. Lastly, Qwest requests that if the Commission chooses not to grant Qwest's Motion, it should not find that the MSA is an "interconnection agreement," but instead wait for the FCC to rule on the following issue presented by its Interim Order:

> 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. 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.[4]

At the hearing, Qwest represented that it expected the FCC to provide guidance on this issue in its Order in the Triennial Review remand proceeding scheduled to be released February 4, 2005.

MCI responds that all state commissions that have acted upon the filing have denied Qwest's motion to dismiss.[5] MCI argues that Section 252(e) requires all voluntarily negotiated agreements to be filed and under the current state of the law, the entire Agreement with Qwest, including the MSA, should be filed for this Commission to determine, in its discretion, whether it is an "interconnection agreement" that must be filed under the Act. MCI also argues that the MSA and the ICA Amendment comprise an integrated agreement and, therefore, both must be filed. In support of this argument, MCI cites to a Texas U.S. District Court opinion[6] and the Washington Utilities and Transportation Commission decision denying Qwest's motion to dismiss the petition for

[4] *Unbundling Access to Network Elements*, WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 1-338, Order and Notice of Proposed Rulemaking (rel August 20, 2004) at para. 13.

[5] Those states include Colorado, Iowa, Minnesota, Montana, Nebraska, New Mexico, Oregon, South Dakota, Utah, Washington and Wyoming. Idaho is the only state commission that did not deny Qwest's Motion. It decided to wait for the FCC to rule on whether "commercial agreements" must be filed under Section 252(e). Arizona is the only remaining Qwest state that has not ruled on this issue as of the date of this Order.

[6] *Sage Telecom, LP v. Public Utility Commission of Texas*, Case No. A-04-CA-364-SS (October 7, 2004).

approval that MCI filed there.[7] MCI points out that if Qwest were only required to file the MSA with the FCC pursuant to Section 211, competitive local exchange carriers (CLECs) would not be granted the ability to "opt into" the MSA as provided under Section 252(i). Lastly, MCI states that the ICA Amendment and the MSA were deemed approved by this Commission by operation of law 90 days after its filing, or November 1, 2004.[8]

Although it did not appear at oral argument, in its written comments, AT&T directs the Commission to the plain language of 47 U.S.C. Section 252(e)(1), which reads "any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the state Commission." AT&T also points out that every single state that has ruled on this issue has determined that the MSA was required to be filed. AT&T further argues that Qwest's reference to footnote 26 in the Declaratory Order was a "cramped" characterization of the footnote. Simply put, the meaning of the footnote changes and is more properly understood by reviewing it in the context of the Order. AT&T argues that the FCC did not say that if the Bell Operating Companies' unbundling obligations are eliminated, the requirement to file and receive approval of the interconnection agreement also goes away. Finally, AT&T argues that public policy favors the filing of this Agreement.

III. FINDINGS AND CONCLUSIONS

[7] *In the Matter of Request of MCImetro Access Transmission Services LLC and Qwest Corporation for Approval of Negotiated Interconnection Agreement in its Entirety Under the Telecommunications Act of 1996*, Order Approving Negotiated Interconnection Agreement in its Entirety, WUTC Docket Nos. UT 960310 and 043084 (October 20, 2004)

[8] Section 252(e)(4).

The Act states "[a]ny interconnection agreement adopted by negotiation ...**shall be submitted for approval** to the State commission."[9] (Emphasis Added) State commissions are granted the authority by federal law to reject a negotiated interconnection agreement that discriminates against carriers not a party to the agreement, and to reject a negotiated interconnection agreement that is not consistent with the public interest, convenience and necessity.[10]

Qwest argues that this Commission's authority to review interconnection agreements was limited generally by the FCC's Qwest Declaratory Order. Specifically, Qwest quotes a portion of footnote 26 in the FCC's Declaratory Order where the FCC stated:

> We . . . 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 section 252(a)(1). (Emphasis supplied).[11]

However, in that same decision, the FCC found that state commissions, "based on their statutory role provided by Congress and their experience to date," 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."[12] The Commission finds that Qwest and other parties should err on the side of caution and bring agreements to the Commission for an interpretation of whether such agreement is required to be filed rather than deciding unilaterally that approval is not required.

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[9] 47 U.S.C. § 252(e)(1).
[10] 47 U.S.C. Section 252(e)(2)(A).
[11] Declaratory Order, ¶ 8, n.26.
[12] *Id.*, ¶ 10.

Amidst the issues presented to the Commission is the question of whether the MSA and the ICA Amendment should be considered as a functionally integrated agreement. We agree with the argument presented by MCI and the findings of various other state commissions that several provisions taken from the MSA and the ICA Amendment indicate that they were intended to function as an integrated agreement. We conclude herein that the MSA and the ICA Amendment comprise one integrated agreement which, in its entirety, must be filed for approval pursuant to Section 252 of the Act.

As the Washington Commission found, several provisions in both the MSA and the ICA Amendment lead to this conclusion. For example, Section 23 of the MSA provides "[i]n the event the FCC, a state commission or any other governmental authority or agency rejects or modifies any material provision in this Agreement, either Party may terminate this Agreement and any interconnection agreement amendment executed concurrently with this Agreement." (Emphasis Added). With respect to the ICA Amendment, Section 2.2 states in relevant part "If the QPP MSA is terminated . . . this Amendment shall, by its own terms and notwithstanding any requirement that subsequent modifications or amendments be in writing signed by both Parties, automatically be terminated in that state, and MCI shall be free thereafter to pursue any available means to purchase UNE-P or equivalent services from Qwest." (Emphasis Added). Section 2.6 of the ICA Amendment provides "[i]n the event the FCC, a state commission or any other governmental authority or agency rejects or modifies any material provision in this [ICA Amendment] Agreement, either party may immediately upon written notice to the other Party terminate this Amendment and the QPP MSA." (Emphasis Added). Section 4.1 provides further in relevant part, "[t]he agreement not to

order UNE-P services embodied in this Section shall remain in effect for the Term of this Amendment, and for the avoidance of doubt, shall no longer be binding on MCI or otherwise enforceable in a particular state if the QPP MSA is terminated as to that state (other than for reason of material breach by MCI)." (Emphasis Added).

Finally, sections 3.2 and 3.3 of the Exhibit to the MSA state "[t]o the extent that the monthly recurring rate for the loop element in a particular state is modified on or after the Effective Date, the QPP port rate for that state in the Rate Sheet will be adjusted (either up or down) so that the total rate applicable to the QPP service and loop combination in that state (after giving effect to the QPP Port Rate Increases as adjusted for any applicable discount pursuant to Section 3.3 of this Service Exhibit) remains constant", and "[p]rovided that Qwest had implemented the Batch hot Cut Process in a particular state pursuant to the terms and conditions of the Amendment to MCI's ICAs entered into contemporaneously with this Agreement, the monthly recurring rates for the switch port in the attached Rate Sheets shall increase incrementally by the amount of the applicable QPP..." (Emphasis Added).

We agree with the conclusion reached by the Washington Commission that the agreements must be considered together to give meaning to the pricing terms in the ICA Amendment. Likewise, in our view, the integrated pricing makes it apparent that the MSA and the ICA Amendment read together is the complete statement of the bargain reached between Qwest and MCI. There was no dispute that Commission approval is required for the ICA Amendment portion of the Agreement pursuant to Section 252 of the Act. Because we conclude that the ICA Amendment and the MSA comprise one integrated agreement, we do not reach the issue of whether Section 252(a)(1) and (e) would apply to the MSA portion alone.

The FCC released its Order on Remand in the Triennial Review proceeding as expected on February 4, 2005.[13] Nowhere in that Order does the FCC address the question posed by the Interim Order concerning the filing requirements of "commercial agreements." Accordingly, in light of the importance of this issue to the CLEC community, we will not wait for guidance from the FCC to issue our decision in this matter.

Upon consideration of the Agreement filed in this case, the Commission is of the opinion and finds that it does have jurisdiction to approve the integrated agreement filed by MCI, and the Agreement taken as a whole does not discriminate against a telecommunications carrier that is not a party thereto and the Agreement is consistent with public interest, convenience and necessity. Accordingly, the Agreement should be approved.

O R D E R

IT IS THEREFORE ORDERED by the North Dakota Public Service Commission that the Motion to Dismiss filed by Qwest be and it is hereby denied.

IT IS FURTHER ORDERED that the QPP™ Master Service Agreement and the ICA Amendment comprise a single integrated interconnection agreement which, for reasons described above, is hereby approved.

Dated this ___day of _____ 2005.

PUBLIC SERVICE COMMISSION

[13] *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket 04-313, CC Docket No. 01-338, Order on Remand (rel. February 4, 2005).

Susan E. Wefald Commissioner	Tony Clark President	Kevin Cramer Commissioner