- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Interconnection Agreement Between Qwest Corporation and 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 Service Agreement	)))))))	DOCKET NO. 04-2245-01 ORDER DENYING MOTION TO DISMISS

ISSUED: September 30, 2004

By The Commission:

On July 27, 2004, MCImetro Access Transmission Services, LLC (MCI) filed with the Commission two documents – 1. An Amendment to Interconnection Agreement for Elimination of UNE-P and Implementation of Batch Hot Cut Process and Discounts (Interconnection Agreement Amendment), and 2. A Master Service Agreement for the Provision of Qwest Platform Plus Service (QPP Service Agreement). The Interconnection Agreement Amendment essentially makes three changes to an existing interconnection agreement between MCI and Qwest Corporation (Qwest). They are – 1. Adding the terms and conditions for hot cut batches, 2. An agreement that Qwest will not offer, nor will MCI order, unbundled mass market switching, unbundled enterprise switching or unbundled shared transport as part of the unbundled network element platform (UNE-P) out of the existing interconnection agreement or other agreement governed by 47 U.S.C. §§ 251 and 252, and 3. The availability of line splitting for loops provided pursuant to the existing interconnection agreement. The QPP Service Agreement is a voluntarily negotiated agreement between MCI and Qwest by which Qwest will provide services (QPP services) consisting 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." The QPP Service Agreement also provides that Qwest will combine the QPP services with loops which MCI may have obtained through other interconnection agreements. The QPP Service Agreement further provides for the performance targets and the recurring and nonrecurring charges for QPP services. Through its filing, MCI requested Commission review and approval of the Interconnection Agreement Amendment and the QPP Service Agreement.

On August 13, 2004, Qwest filed a Motion to Dismiss Application for Approval of Negotiated Commercial Agreement (Dismissal Motion). Qwest agrees that the Interconnection Agreement Amendment is subject to filing and Commission review and approval, but argues that is not the case for the QPP Service Agreement. Qwest argues that the QPP Service Agreement does not need to be submitted to the Commission pursuant to 47 U.S.C.§252. Qwest argues that the QPP services are not required to be provided pursuant to 47 U.S.C.§251 (b) and (c). Qwest therefore concludes that the QPP Service Agreement is not an interconnection agreement which is subject to the Commission's review and approval under §252. Qwest argues that the Commission has no authority under federal or state law to review or approve the QPP Services Agreement. Multiple parties filed opposition to the Dismissal Motion. On August 23, 2004, MCI filed its Response to Qwest's Motion to Dismiss. On August 27, 2004, the Division of Public Utilities (Division) filed its Response in Opposition to the Motion of Qwest to Dismiss and Application for Approval of an Interconnection Agreement. On August 25, 2004, AT&T Communications of the Mountain States, Inc., and TCG Utah (ATT) filed ATT's Response to MCI's Agreement Filing and Qwest's Motion to Dismiss . On August 31, 2004, and again on September 9, 2004, Qwest replied to the opposing arguments of MCI, the Division and ATT. We conclude that Qwest's argument is in error. We conclude that the QPP Service Agreement should be filed and that the Commission does have authority to review and approve the QPP Service Agreement.

DISCUSSION

Much of the parties' argument is based upon the application of 47 U.S.C. §§ 251 and 252 provisions and two FCC decisions. With respect to agreement submission to state commissions, 47 U.S.C. §252 provides, in

relevant part:

> (a) Agreements Arrived At Through Negotiation. – (1) Voluntary Negotiations. – Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and inter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsection (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.
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> (e) Approval By State Commission. – (1) Approval Required. – 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. (2) Grounds for Rejection. – The State Commission may only reject – (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that – (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement, or (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or (B) an agreement (or portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

Although this language gives an unambiguous directive that an agreement "shall be submitted to the State commission", Qwest argues that a decision of the Federal Communications Commission (FCC) requires a different result.

In *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. 02-98, 17 FCC Rcd 19337, 2002 FCC Lexis 4929 (October 4, 2002) (Declaratory Order) the FCC responded to a request for guidance about the types of negotiated contractual arrangements that should be subject to the filing requirement of §252(a)(1). Before the FCC, Qwest argued that agreements subject to the filing requirement are those that "include (i) a description of the service or network element being offered; (ii) the various options available to the requesting carrier (e.g., loop capacities) and any binding contractual commitments regarding the quality or performance of the service or network element; and (iii) the rate structures and rate levels associated with each such option (e.g., recurring and non-recurring charges, volume or term commitments)." *Id.*, at ¶ 2. As part of Qwest's

argument, Qwest maintained that only limited portions of an agreement (a schedule of itemized charges and associated descriptions of the services to which the charges apply) should be filed. Qwest also argued that agreements concerning network elements that have been removed from the national list of elements subject to mandatory unbundling need not be filed. *Id.*, at ¶¶ 3, 5 and 8. Commenters opposed the narrow reading of the filing statute proposed by Qwest. Some sought a filing requirement for all types of agreements, hoping to avoid any question of what types of agreements should be filed. *Id.*, at ¶ 5 and fn. 26.

In reaching its resolution, the FCC first noted that it is the state commissions who will determine what agreements are subject to the filing requirement. *Id.*, at ¶ 7. "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." *Id.*, at ¶ 10. The FCC's conclusion on the issue presented was 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)." *Id.*, at ¶ 8. The QPP Service Agreement is subject to the filing requirement required by the statute and under the Declaratory Order's conclusion. Its terms fall within §252's rubric of "interconnection, services, or network elements," its terms deal with network elements and the compensation to be paid for them. QPP services are unavoidably network elements under 47 U.S.C.§153 (45)'s definition. The QPP Service Agreement addresses ongoing obligations for matters within the list give by the FCC in the Declaratory Order decision.

Qwest's argument before us, for a contrary conclusion, is similar to its argument before the FCC – *vis*, only agreements dealing with network elements which a carrier does not voluntarily agree to provide, but is compelled to provide through the FCC's determination under §251(d)'s "necessary" and "impair" analysis, trigger §252 (a)(1)'s filing requirement. Qwest's position is based on language contained in footnote 26 of the Declaratory Order. There, the FCC states:

> We therefore disagree with the parties that advocate the filing of all agreements between an incumbent LEC and a requesting carrier. See Office of the New Mexico Attorney General and the Iowa Office of Consumer Advocate Comments at 5. Instead, 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). Similarly, we decline Touch America's suggestion to require Qwest to file with us, under section 211, all agreements to competitive LECs entered into as "settlements of disputes" and publish those terms as 'generally available" terms for all competitive LECs. Touch America Comments at 10, citing 47 U.S.C. §211.

We do not apply this language in as limiting a fashion as advocated by Qwest. We consider the FCC's footnote 26 language as addressing the contentions made by the comments identified therein. These comments had advocated that the §252(a)(1) filing requirement should be applied to every agreement between an incumbent LEC and another carrier. It was also suggested that §252 included settlement agreements that resolved past disputes. The FCC rejected these comments, concluding that agreements that should be filed are not every type of agreement between carriers, but interconnection agreements – those that deal with ongoing obligations dealing with resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation. *Id.,* at ¶ 8. The language from the footnote must be considered in conjunction with the language used in the body of the Declaratory Order and the statutory language. The operative consideration is whether the agreement's terms address or create an ongoing obligation dealing with interconnection, services or network elements.

Reading §252's filling requirement, and state commission approval or rejection, to apply only to an agreement whose terms address a compelled §251 matter, rather than to all interconnection agreements dealing with such matters (whether included by voluntary negotiation or by compulsion), completely ignores the specific language of the statute. Congress did task the FCC with responsibility to determine what minimal access to network elements, required under §251(c)(3), would be compelled through §252(d)'s "necessary" and "impair" standards. But in wording §252, Congress did not restrict the need to file agreements with state commissions to only those agreements whose terms address interconnection, services, or network element matters by compulsory mandate related to §251(b) or (c). Congress created a wider ambit. Congress required filing and state commission approval or rejection of agreements where the incumbent local exchange carrier "negotiate[s] and enter[s] into a binding agreement with a requesting telecommunications carrier or carriers without regard to the standards set forth in subsection (b) or (c) of section 251. . .

. The agreement shall be submitted to the State commission under subsection (e) of this section." 47 U.S.C. §252(a)(1). Congress clearly anticipated agreements that would not be driven by §251(b) or (c). It required these agreements to be filed with and reviewed by state commissions. To do otherwise fails to give any attention to the specific language Congress used in enacting §252.

That Congress includes all interconnection agreements for state commission filing and review, and not just those that address compelled interconnection terms, is not unwarranted. Qwest's limitation, to include only agreements whose terms address network elements whose provision is compelled, fails to recognize the differing concerns contemplated by Congress. The criteria by which the FCC is to base compelled provision are not coterminous with the criteria by which a state commission is to approve or reject an agreement. Mandatory provision is minimally based upon §251(d)(2)'s test that access to a proprietary network element is necessary and that lack of access to a network element impairs a carrier's ability to provide services. 47 U.S.C. §252(d)(2)(A) and (B). State commission review of an agreement is based on entirely different criteria. A state commission can only reject a voluntarily negotiated agreement if the state commission finds that the agreement discriminates against a telecommunications carrier not a party to the agreement, or that implementation of the agreement is not consistent with the public interest, convenience and necessity. 47 U.S.C.§252(e)(2)(A). A state commission can reject an arbitrated agreement if it finds the agreement does not meet the requirements of §251 or §252(d). 47 U.S.C. §252(e)(2)(B). Compelled aspects are driven by concerns for the interests of the requesting carrier. Filing and state commission review are driven by concerns for interests of other entities and public interests. These concerns go beyond those relating to the incumbent carrier and the interconnecting carrier whose agreement is at issue.

We address Qwest's argument based on the U.S. Court of Appeals decision found in *United States Telephone Association v FCC,* 359 F.3d 554 (D,C, Cir. 2004) (*USTA II*), only to note that Qwest's argument is based on Qwest's flawed view that §252 filing and review is limited to agreements dealing with network elements whose provision is compelled under the "necessary" and "impair" standards of §251(d). In *USTA II*, the court vacated the FCC's determinations identifying which network elements fell within the impairment analysis of §251(d) and the FCC's

delegation to state commissions to make further, limited impairment determinations. As argued by Qwest, "Qwest is no longer obligated to provide unbundled access to local switching or shared transport pursuant to section 251 of the federal Act. . . . [A]n agreement relating to these elements is not required to be filed for approval pursuant to section 252 " Qwest Corporation's Joint Reply to MCIMetro, AT&T and the Division of Public Utilities in Support of Its Motion to Dismiss, at 3.

As discussed above, our conclusion is not based on any notion that the network elements covered by the QPP Services Agreement are provided under §251 impairment compulsion (whether the impairment determination is made by the FCC or a state commission pursuant to a purported FCC delegation). Our conclusion is based upon Congress' unambiguous statutory language that voluntarily negotiated agreements made "without regard to the standards set forth in subsections (b) or (c) of section 251 . . . shall be submitted to the State commission under subsection (e) of this section [252]." 47 U.S.C. §252(a)(1). Congress' §252 wording makes Qwest's argument based on §251 compulsion standards for network elements irrelevant. Indeed Congress' language can easily be viewed as directly contradicting the position advocated by Qwest. Section 252 filing and review is not limited by §251 compulsory provision determinations, it is required in spite of such determinations.

Based upon our discussion and conclusion made herein, we direct that any interconnection agreement which creates or addresses an ongoing obligation of an incumbent local exchange carrier for interconnection, services or network elements must be filed with us and is subject to our review for approval or rejection pursuant to 47 U.S.C. §252. Wherefore, both the Interconnection Agreement Amendment and the QPP Services Agreement, submitted by MCImetro on July 27, 2004, are properly filed with the Commission and can be reviewed by the Commission for approval or rejection. We therefore enter this ORDER denying Qwest's Motion to Dismiss.

DATED at Salt Lake City, Utah, this 30th day of September, 2004.

/s/ Ric Campbell, Chairman

/s/ Constance B. White, Commissioner

/s/ Ted Boyer, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

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