BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Request of MCImetro Access Transmission Services, LLC. and QWEST CORPORATION For Approval of Negotiated Agreement Under the Telecommunications Act of 1996 ……	)	DOCKET NO. UT-043084 **AT&T'S RESPONSE TO QWEST'S OPPOSITION TO MCI'S REQUEST FOR APPROVAL**
In the Matter of the Request of MCImetro Access Transmission Services, LLC and QWEST CORPORATION For Approval of Negotiated Agreement Under the Telecommunications Act of 1996	)	DOCKET NO. UT-960310

AT&T Communications of the Pacific Northwest, Inc. AT&T Local Services on behalf of TCG Seattle and TCG Oregon (collectively "AT&T") hereby submit this Response to Qwest's Opposition to MCI's Request for Approval of Amendment to Interconnection Agreement between MCI and Qwest Corporation ("Qwest").

INTRODUCTION

On July 20, 2004, Qwest posted a general notification[1] on its web site advising that on July 16, 2004, Qwest and MCI signed a negotiated commercial agreement and an

[1] GNRL.07.20.04.3.000460.QPP. A copy is attached as **Exhibit A** to AT&T's Response.

amendment to MCI's existing interconnection agreement ("ICA"). According to the announcement, the agreements became effective on Friday, July 16, 2004, the day the agreements were executed. The notification further asserts "[t]he commercial agreement covering Qwest Platform Plus™ ["QPP"] is not subject to Section 252 requirements and therefore does not fall under the jurisdiction of any state regulatory commission." Nevertheless, the notification states further "Qwest provided a courtesy copy of the commercial agreements to its in-region state commissions." Apparently still believing it has non-discrimination obligation, Qwest notes that it will make the QPP commercial agreement available to any interested competitive local exchange carrier ("CLEC").

Regardless of Qwest's position concerning "commercial" agreements, on July 29, 2004, MCI filed its Request for Approval of Amendment to Interconnection Agreement Between MCI and Qwest. Attached to MCI's Filing are two agreements: (1) Amendment to Interconnection Agreement for Elimination of UNE-P[2], Implementation of Batch Hot Cut Process and Discounts; and (2) Master Service Agreement for the Provision of Qwest Platform Plus Service ("Commercial Agreement"). MCI's filing describes the terms of the agreements and asks the Washington Utilities and Transportation Commission to approve both the amendments to the ICA and the QPP Commercial Agreement.

In response, Qwest filed an Opposition to Request for Approval Filed by MCI arguing that it does not amend or alter the terms and conditions of any existing ICA and that because the Commercial Agreement contains no terms and conditions related to services provided under Section 251(b) and (c), it is not an ICA or an amendment to an ICA. Consequently, Qwest concludes that this Commission has no authority under

[2] UNE-P is an unbundled platform consisting of switching, loop and transport.

Sections 251 or 252 of the Telecommunications Act of 1996 to review or approve the Commercial Agreement.[3]

Contrary to Qwest's arguments and in support of MCI's position, AT&T believes both the Commercial Agreement and the amendments to the ICA must be filed with the Commission for pursuant to 47 U.S.C. § 252(e)(1), 47 U.S.C. § 271 and state law, specifically RCW 80.36.150(1). AT&T takes no position whether the agreements meet the standards for approval contained in Section 252(e)(2)(A).

ARGUMENT

I. Section 252 of the Act and State Law Requires that Qwest file its QPP Commercial Agreement with the Washington Commission for Approval.

A. The Commercial Agreement Creates an Ongoing Obligation Between the Parties, and Thus, it is An Interconnection Agreement.

Qwest's Commercial Agreement with MCI is an "interconnection agreement adopted by negotiation" that must be filed with the state commissions for approval pursuant to Section 252(e)(1).[4] Although Qwest's notification claims that its agreement is a "commercial" agreement negotiated outside the requirements of the Telecommunications Act of 1996, the Act clearly requires the Commercial Agreement to be filed with the Washington Commission to ensure that the agreement is nondiscriminatory, consistent with the public interest, and available to others. The statutory language is clear on its face:

> ***Any*** interconnection agreement adopted by negotiation or arbitration *shall* be submitted for approval to the State commission.[5]

[3] Qwest Motion to Dismiss at 1-2 & 7.
[4] 47 U.S.C. § 252(e)(1).
[5] 47 U.S.C. § 252(e)(1) (emphasis added); *cf.* Washington's requirements for the filing and approval of interconnection agreements. RCW 80.36.150(1).

The statute does not state, as Qwest suggests, that only agreements adopted under Sections 251(b) and (c) of the Act need be filed for approval. Moreover, the FCC has declined to adopt a definitive interpretation of the term "interconnection agreement" as used in Section 252(e).[6] Rather, the FCC has left it up to the states to make those determinations on a case-by-case basis.[7]

Although the FCC has not defined the outer boundaries of the filing requirement, it has made clear that the scope of the filing requirement is exceedingly broad. The FCC held that the "basic class of agreements that should be filed" – but by no means the only ones that should be filed – are those that establish "ongoing obligations pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation."[8] The FCC recognized that certain classes of agreements need not be filed under Section 252, but those classes are extremely narrow and do not apply here; they are: (1) agreements concerning dispute resolution and escalation provisions whose terms are otherwise publicly available; (2) settlement agreements that do not affect an incumbent LEC's ongoing obligations under Section 251; (3) forms used to obtain service; and (4) certain agreements entered into during bankruptcy.[9] The Commercial Agreement does not fall within any of the exceptions.

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[6] *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, Memorandum Opinion and Order, FCC 02-276 (rel. Oct. 4, 2002) *("Qwest Declaratory Ruling")* at ¶ 10 ("We decline to establish an exhaustive, all-encompassing 'interconnection agreement' standard.").

[7] *Id.* ("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.")

[8] *Id.* at ¶ 8.

[9] *Id.* at ¶¶ 9 & 12-14.

It does, however, fall within the "basic class of agreements that should be filed." That is, the Commercial Agreement augments the amended ICA by creating ongoing obligations to,[10] among other things: (a) provide loops, transport and switching or what is newly defined as the QPP service;[11] (b) accomplish Qwest performance targets;[12] and (c) pay the recurring and nonrecurring charges for QPP.[13] As noted, QPP service consists of the "Local Switching Network Element" (including the basic switching function, port and features, functions and capabilities of the switch) and the "Shared Transport Network Element" in combination, at a minimum.[14] "As part of the QPP service, Qwest agrees to combine the Network Elements that make up QPP service with Analog/Digital Capable Loops, with such Loops (including services such as line splitting) being provided pursuant to the rates, terms and conditions of the MCI's ICAs … ."[15] Thus, the Commercial Agreement creates ongoing obligations between the parties that interoperate within both the ICA and the very same networks that are also the subject of the ICA.

In short, the result of these agreements is that the existing ICA is amended to add a batch hot cut process; provide that Qwest does not have to offer unbundled mass market switching, enterprise switching and unbundled shared transport network elements contained in the ICA; and provide that MCI will not order unbundled mass market switching, enterprise switching and unbundled shared transport network elements contained in the existing ICAs. In lieu of purchasing these network elements under the

[10] The Commercial Agreement states that it creates an ongoing obligation in its whereas clause; it says: "WHEREAS to address such uncertainty and to create a stable arrangement for the continued availability to MCI from Qwest of services technically and functionally equivalent to the June 14, 2004 UNE-P arrangements the parties have contemporaneously entered into ICA amendments …" Commercial Agreement at 1.
[11] Commercial Agreement, Service Exhibit 1.
[12] *Id. at* Attachment A to Service Exhibit 1
[13] QPP Rate Sheet for Washington.
[14] Commercial Agreement, Service Exhibit 1 at § 1.1.
[15] *Id.; see also* Service Exhibit 1 at § 1.2.

terms of its ICA, MCI can purchase their replacements out of the Commercial Agreement. The replacements parts are the same as the former unbundled network elements but the prices MCI now pays under the Commercial Agreement are different.

B. The Commercial Agreement Must Be Filed Under State and Federal Law to Ensure Non-Discriminatory Conduct.

As a practical matter, the definition of an interconnection agreement and the attendant filing requirement must be broad enough to permit state commissions to perform the reviewing function that Congress requested of them in Section 252, and, in the case of the Washington Commission, it must be broad enough to accomplish the Legislative oversight demanded in RCW 80.36.170 and RCW 80.36.180 (prohibiting unreasonable preference and rate discrimination). Without adhering to some filing requirement and approval process, these statutory provisions are effectively nullified.

For example, Congress expressly required the state commissions to ensure that incumbents do not enter into *negotiated* agreements that "discriminate against a telecommunications carrier not a party to the agreement."[16] Indeed, non-discrimination is a bedrock principle of the Communications Act in general.[17] Accordingly, Section 252 necessarily requires the filing of *all* agreements involving network elements or other similar arrangements provided to similarly situated carriers; otherwise, state commissions will have no way of ensuring that incumbents are not entering into discriminatory or preferential secret agreements with certain carriers regarding such elements. This is true regardless of whether the incumbent is offering those network elements voluntarily or pursuant to an FCC requirement.

[16] 47 U.S.C. § 252(e)(2)(A)(1).
[17] *See MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229-31 (1994).

Qwest's contrary interpretation would render Section 252(e)(2)(A)(1) meaningless. Under Qwest's view, Qwest and a willing partner could always enter into secret, preferential side agreements concerning interconnection and any network elements. They could evade Section 252 review by simply agreeing that their negotiations were commercial agreements not negotiated "pursuant to Section 251."[18]

Nevertheless, the FCC has consistently recognized that the requirement of filing *all* agreements for approval by the state commissions is the core statutory protection against discriminatory treatment. For example, in the *Local Competition Order,*[19] the FCC noted that "[r]equiring all contracts to be filed also limits an incumbent LEC's ability to discriminate," because it allows all "carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others."[20] Similarly, in the *Qwest NAL*, the FCC noted that Section 252's filing requirements "are the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors."[21] Indeed, the FCC recognized that failure to file agreements "could lead to a permanent alteration in the competitive landscape or a skewing of the market in favor of certain competitors."[22] In an environment in which the incumbent LEC is offering network elements voluntarily, rather than pursuant to nationally uniform minimum

[18] This is precisely what Qwest was doing recently in its region: it was entering into secret, preferential side deals with favored CLECs in order to remove those CLECs' objections to Qwest's Section 271 applications and to hasten Qwest's entry into the interLATA market. The FCC has since found that Qwest's conduct constituted a gross violation of the filing requirements of § 252, and the FCC recently issued a notice of apparent liability to Qwest for the largest fine in FCC history. *Qwest Corporation, Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263 (March 12, 2004) ("*Qwest NAL*").
[19] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499 (1996) ("*Local Competition Order*").
[20] *Id.* at ¶ 167; *see also, id.* at ¶ 151 (noting the anticompetitive dangers of nondisclosure agreements).
[21] *Qwest NAL* at ¶ 46.
[22] *Id.* ¶ 43.

standards, that risk of discrimination *increases*, and the vigilance of the state commission under Section 252 becomes all the more important.

Under these principles, there is no doubt that the MCI agreement must be filed with the state commission for approval under Section 252(e)(1). Qwest is providing network elements to MCI, albeit "voluntarily" and on terms and rates that are "without regard to the standards of [Sections 251 and 252]."[23] Section 252 requires that such an agreement be filed with the state commission, however, so that the state commission can fulfill its statutory mandate to ensure that the agreement is nondiscriminatory.[24]

Qwest argues that filing is not required because the elements were not provided pursuant to Sections 251 or 252.[25] This position is wrong for at least two reasons. First, there can be no serious question that the MCI agreement was in fact negotiated for network elements "pursuant to Section 251" within the meaning of Section 251(a)(1). MCI undoubtedly invoked Qwest's duty, under Section 251(c)(1), to negotiate with requesting carriers in good faith.[26] Moreover, MCI's request for network elements, even if voluntarily provided by Qwest, necessarily depends on Qwest's fulfillment of its continuing *duties* under Section 251 to provide interconnection and local number portability, dialing parity, reciprocal compensation, and even unbundled loops, which remain mandatory obligations. If Qwest had balked at providing any of these requirements, MCI could have invoked its right to arbitration under Section 252 – a fact that undoubtedly informed the parties' negotiations. Accordingly, there is no meaningful

[23] There is no question that the Local Switching Network Element and the Shared Transport Element described in, and provided under the terms of, the Commercial Agreement fall within the definition of network element contained in the Act. 47 U.S.C. § 153(45).
[24] *See e.g., Qwest NAL at* ¶ 47 ("[T]he potential for such discrimination underlies our concerns regarding Qwest's apparent violations of Section 251(a)(1)," even if there is in fact no discrimination.).
[25] Qwest Motion Dismiss at 2.
[26] *See Iowa Utils. Bd.* v. *FCC*, 219 F.3d 744, 763 (8th Cir. 2000), *rev'd on other grounds, Verizon Communications Inc.* v. *FCC*, 535 U.S. 467 (2002).

sense in which the negotiations could be said to be outside the purview of Sections 251 and 252.

Even if that were not true, however, the Commercial Agreement is still a negotiated agreement within the meaning of Section 252(a)(1). Any request for network elements, even if the element is not required by FCC rule, triggers the incumbent LEC's duty under Section 251(c)(1) to negotiate in good faith in accordance with Section 252 and its continuing duty under Section 251(c)(3) to provide such elements subject to good faith negotiations and "in accordance with the agreement."[27] Congress never intended Section 252(a)(1) to be interpreted in a manner that would allow the negotiating parties to evade the statutory nondiscrimination requirements by simply agreeing that those requirements would not apply. As long as the incumbent has agreed to provide network elements or their functional equivalent – even if the terms are "without regard to the standards in [§ 251(b) and (c)]" – the agreement must be filed with the state commission for approval.

In short, this is not a close question: the Commercial Agreement must be filed with the Commission for approval. At a minimum, if there is a question as to whether the agreement should be filed, the FCC has held that the state commissions should make those determinations on a case-by-case basis,[28] and this Commission would be wise to demand filing.

II. Section 271 of the Act Requires the Filing of Commercial Agreements

In order to prevent unlawful discrimination, 47 U.S.C. § 271 requires Qwest to file for Commission approval agreements for the provision of mass market switching,

[27] 47 U.S.C. § 251(c)(1) & (c)(3).
[28] *Qwest Declaratory Ruling* at ¶ 10.

shared transport and of other network elements. First, independent of any impairment determination pursuant to 47 U.S.C. § 251, Qwest's authority to provide in-region long distance service in Washington is expressly conditioned upon its non-discriminatory provision to its competitors of essential network elements and services contained in 47 U.S.C. § 271(c)(2)(B), including local switching and shared transport. The failure by Qwest to continue providing these elements and services risks revocation of its Section 271 authority.[29] Furthermore, Qwest must offer competitive checklist items pursuant to "binding *agreements that have been approved under section 252 … .*"[30]

Section 271(c)(2)(A) establishes the requirements by which a BOC may be authorized to offer in-region long distance service. One of the requirements is the filing and approval of interconnection agreements under Section 252.

> (A) AGREEMENT REQUIRED.—A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—
>
> (i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or
>
> (II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and
>
> (ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

Significantly, Section 271(c)(2)(A) is written in the present tense. At any given moment, Qwest is qualified to provide long-distance service only if it is complying with two essential requirements: (1) "access and interconnection" must be offered "pursuant

[29] 47 U.S.C. § 271(d)(6)(A)(iii).
[30] 47 U.S.C. § 271(c)(1)(A) (emphasis added).

to one or more agreements described in [Section 271(c)](1)(A)]"[31] and (2) such "access and interconnection" must include the checklist items specified in subparagraph (B).[32]

The agreements described in Section 271(c)(1)(A) that constitute a requirement for Qwest's authority to offer in-region long distance service are interconnection agreements approved under Section 252. Section 271(c)(1)(A) states:

> (c) Requirements for providing certain in-region interLATA services
> (1) Agreement or statement
> A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.
>
> (A) Presence of a facilities-based competitor
> A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding *agreements that have been approved under section 252* of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers.[33]

The agreements under which Qwest must offer mass market switching and transport to requesting carriers, therefore, must be agreements that are filed with the Commission and approved pursuant to Section 252.

The FCC has already addressed BOC attempts to evade the disclosure, review and opt-in protections of Section 252. Specifically, Qwest attempted to avoid its Section 252 obligations by requesting a declaratory ruling from the FCC that Section 271 network elements were not required to be provided in filed interconnection agreements. The FCC rejected Qwest's argument, determining that Section 252 creates a broad obligation to file

[31] 47 U.S.C. § 271(c)(2)(A)(i)(I). Alternatively, under (c)(2)(A)(i)(II) such "access and interconnection" can be provided pursuant to a statement of generally available terms (SGAT) where no request for access and interconnection is made.
[32] 47 U.S.C. § 271(c)(2)(A)(ii).
[33] 47 U.S.C. § 271(c)(1)(A) (emphasis added).

agreements, subject to specific narrow exceptions that do not exempt Section 271 elements. In the *Qwest Declaratory Ruling*, the FCC made clear that any agreement addressing *ongoing* obligations pertaining to unbundled network elements – and the access and unbundling obligations of Section 271 fall squarely within that definition – must be filed in interconnection agreements subject to Section 252 and also that, to the extent any question remains regarding those obligations, the state commissions are to decide the issue.

Further, the FCC also recognized that it is essential that BOCs demonstrate compliance with Section 271 through binding and lawful interconnection agreements containing specific terms and conditions implementing the competitive checklist. The FCC has made it clear that when a CLEC requests a particular checklist item, a BOC "is providing" that item and is complying with Section 271(c)(2)(A) only if it has a "concrete and specific legal obligation to furnish the item upon request *pursuant to state-approved interconnection agreements* that set forth prices and other terms and conditions for each checklist item."[34]

Accordingly, in addition to its duty to negotiate found in Section 251(c)(1), Qwest having volunteered to meet the conditions required of a BOC that seeks to provide interLATA services, is also obligated by Section 271 to negotiate and (if necessary) arbitrate the particular terms and conditions of each of the Section 271 competitive checklist items that CLECs may request, which items include mass market switching and shared transport. If Qwest refuses to do so and thus does not enter into binding interconnection agreements *under Section 252* regarding mass market switching and the

[34] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan,* CC Docket No 97-137, Memorandum Opinion and Order, FCC 97-298 (Rel. Aug. 19, 1997) at ¶ 110 (emphasis added).

other competitive checklist items, then Qwest would plainly have "cease[d] to meet" one of the essential conditions of section 271,[35] namely, an "agreement[] that has been approved under section 252… ."[36]

III. Other State Commissions Require Filing of Similar "Commercial" Agreements.

Numerous state commissions have recently considered the issue of whether "commercial agreements must be filed with the State Commission for approval." The states have uniformly found that such agreements must be filed. For example, in response to the news that SBC Communications, Inc. ("SBC") and Sage Telecom, Inc. ("Sage") recently executed "commercial agreements," the California Public Utilities Commission required SBC to file the Sage agreement with the Commission. The Commission noted: "In order for the Commission to perform this statutory duty [under Section 252(e)(2) of the Act], the interconnection agreement must be formally filed with the Commission and open to review by any interested party."[37]

Likewise, the Michigan Public Service Commission issued an Order requiring SBC and Sage to file their agreement for review. The Commission held that under the Act "interconnection agreements arrived at through negotiations must be filed with and approved by [the state Commission]."[38] The Chair of the Michigan Commission also stated that the State commission "must be able to review the terms of this agreement and any associated agreements if it is to fulfill its responsibilities under state and federal law

[35] 47 U.S.C. § 271(d)(6).
[36] *See* 47 U.S.C. § 271(c)(2)(A) ("Agreement *required*") (emphasis added).
[37] Letter from Randolph L. Wu, State of California Public Utilities Commission, to SBC (April 21, 2004).
[38] Case No. U-14121, Michigan Public Service Commission (April 28, 2004).

to ensure that the agreement is in the public interest and does not discriminate against other providers."[39]

Similarly, on May 5, 2004, the Public Utilities Commission of Ohio directed SBC and Sage to file comments and legal analysis supporting their positions that they did not have to file the new agreement with the Commission. The Chairman of the Commission stated that the action was necessary "to sort out [the Commission's] obligations under the Telecommunications Act as they apply to these agreements."[40] And on May 11, 2004, the Missouri Public Service Commission ordered SBC and Sage to make a filing to explain why the "commercial agreements" should not be filed and considered by the Commission pursuant to Sections 251 and 252 of the Act.[41]

As with the others, by order dated May 13, 2004, the Public Utilities Commission of Texas ordered SBC and Sage to file their agreement. Citing the FCC's *Qwest Declaratory Ruling*, the Texas Commission held that "the filing and review requirements are 'the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors.'" And on July 27, 2004, the Missouri Public Service Commission issued an order rejecting the amendment to the Sage existing interconnection with SBC. The Commission found that the amendment that was filed with the Commission was indivisible from the commercial agreement that had not been filed, and neither agreement is a "stand-alone" agreement.

> The amendment is clearly related to the commercial agreement. Each references the other. They were negotiated at the same time, and executed within a few days of each other. The amendment, by its terms, will be

[39] Michigan Public Service Commission, Press Release April 28, 2004 (available at http://www.michigan.gov/mpsc).
[40] Public Utilities Commission of Ohio News Release, May 5, 2004 (available at www.puc.state.oh.us).
[41] *In re Agreement Between SBC Communications, Inc. & Sage Telecom, Inc.*, Order to Show Cause, Missouri Public Service Commission Case no. TO-2004-0576 (May 11, 2004).

> void in any state in which the commercial agreement becomes inoperative. Perhaps most telling, the commercial agreement itself refers to the "indivisible nature" of the commercial agreement and the amendment. From these facts, the Commission concludes that the two are indivisible; that is, neither one is a stand-alone agreement.[42]

Finally, on August 2, 2004, the Kansas Corporation Commission approved the amendment to Sage's existing interconnection agreement with SBC. However, it withheld judgment on whether the commercial agreement must be filed for approval pursuant to Section 252 until the Federal Communications Commission rules on SBC's emergency petition. SBC has asked the FCC to determine whether the commercial agreement needs to be filed with the state commissions, pursuant to Section 252.[43] Like the individual state commissions, NARUC also stated that SBC and Sage should be required to file the agreements with the respective state commissions. Commissioner Stan Wise, NARUC President and Commissioner of the Georgia Public Service Commission, urged SBC and Sage to file the negotiated interconnection agreements for approval "pursuant to § 252(e) of the Act in the States where they are effective as required by § 252(a)(1)."[44] Mr. Wise, NARUC President, noted "Rapid filing and

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[42] *Agreement between SBC Communications, Inc. and Sage Telecom, Inc.,* Case No. To-2004-0576; *Amendment Superceding Certain 251/252 Matters between Southwest Bell Telecom, L.P., and Sage Telecom, Inc.,* Case No. TO-2004-0584, Order Consolidating Cases, Rejecting Amendment to Interconnection Agreement, and Denying Intervention (July 27, 2004) at 3. The Missouri Commission did not order SBC or Sage to file the commercial agreement, leaving the decision to management. However, based on the Order, it is unlikely the Commission will approve the amendment to the interconnection agreement without the commercial agreement also being filed for approval. The MCI ICA amendment and the Commercial Agreement are also indivisible. *See* ICA Amendment at § 2.6 and Commercial Agreement at § 23.

[43] *Application of Sage Telecom, Inc. for Approval of the K2A Interconnection Agreement Under the Telecommunications Act with Southwestern Bell Telephone Company*, Docket No. 01-SWBT-1099-IAT, Order (Aug. 2, 2004). The Kansas Staff found the amendment to the interconnection agreement and the commercial agreement to be "inextricably intertwined." Order at 6.

[44] Letter from Stan Wise, NARUC President, to Sage and SBC, April 8, 2004.

approval by the respective State commissions can only facilitate the ongoing industry negotiations."[45]

Consequently and contrary to Qwest's position, state commissions are not prohibited from reviewing and approving the Commercial Agreement. Moreover, the FCC has requested comments on this very issue. On August 20, 2004, the FCC released its *Order and Notice of Proposed Rulemaking* in response to the Court of Appeal's decision vacating the FCC's *Triennial Review Order.* The FCC "incorporate[d] 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 …" in its latest rulemaking.[46] If the issue had been resolved in Qwest's favor, the FCC would not be seeking comments on the issue.

CONCLUSION

It is clear that the Act requires Qwest to negotiate with CLECs for the provision of network elements and other services. The Act also permits Qwest and CLECs to negotiate terms outside the standards of Sections 251(b) and (c). However, the Act is clear that all negotiated agreements for network elements or other services must be filed with the state commissions for approval.

Qwest seeks to draw a legal distinction between "ICAs" and "Commercial Agreements" that does not exist in the Act. The Commercial Agreement provides for network elements as defined by the Act. In fact, Qwest calls the services network elements. It is a voluntary negotiated agreement. Qwest may argue that the elements are

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[45] *Id.*

[46] *Unbundled Access to Network Elements,* WC Docket No. 04-313; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (rel. Aug. 20, 2004) at ¶ 13.

not provided under Sections 251(b) and (c), but a plain reading of the Act requires that negotiated agreements for network elements must be filed for approval with the state commission. As a result, Qwest's Motion to Dismiss should be denied.

Respectfully submitted this 24th day of September 2004.

AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC. AND AT&T LOCAL SERVICES ON BEHALF OF TCG SEATTLE AND TCG OREGON

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