

1 BEFORE THE ARIZONA CORPORATION COMMISSION

2 COMMISSIONERS

3 Marc Spitzer, Chairman
4 William A. Mundell
5 Jeff Hatch-Miller
6 Mike Gleason
7 Kristin K. Mayes

SEP 13 2004

6 IN THE MATTER OF THE APPLICATION OF
7 MCImetro ACCESS TRANSMISSION SERVICES,
8 LLC, FOR APPROVAL OF AN AMENDMENT
9 FOR ELIMINATION OF UNE-P AND
IMPLEMENTATION OF BATCH HOT CUT
PROCESS AND QPP MASTER SERVICES

Docket No. T-01051B-04-0540
T-03574A-04-0540

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11 **STAFF'S RESPONSE TO QWEST'S**
12 **MOTION TO DISMISS APPLICATION FOR REVIEW**
13 **OF NEGOTIATED COMMERCIAL AGREEMENT**

14 **I. INTRODUCTION**

15 On July 16, 2004, Qwest Corporation ("Qwest") and MCImetro Access Transmission
16 Services, L.L.C. ("MCI") entered into two separate agreements. The first agreement was labeled an
17 Amendment to their Interconnection Agreement. The second agreement was labeled the QPP Master
18 Service Agreement. The first agreement both MCI and Qwest filed for Commission approval under
19 47 U.S.C. Section 252(e). The second agreement Qwest filed with the Commission for informational
20 purposes only. However, MCI subsequently filed the second agreement with the Commission for
21 approval under 47 U.S.C. Section 252(e). On August 6, 2004, Qwest filed a Motion to Dismiss
22 MCI's Application for Commission review and approval of this Agreement. For the following
23 reasons, Qwest's Motion to Dismiss should be denied.

24 **II. DISCUSSION**

25 **A. State Commission Have Broad Authority Under Section 252 Over the Review and**
26 **Approval of Interconnection Agreements**

27 Under Section 252 of the Federal Act, State commissions are given broad authority to review
28 and approve "interconnection agreements" between carriers. The Act encourages carriers to

1 | undertake voluntary negotiations and to enter into voluntary binding agreements without regard to the
2 | standards set forth in subsections (b) and (c) of Section 251 of the Act. If disputes arise, the State
3 | commission resolves them through an arbitration which is binding on both parties. In addition, the
4 | State commissions are the designated repository for all such agreements, whether arrived at through
5 | arbitration or voluntary negotiation.

6 | The FCC has addressed the types of agreements which fall within the scope of Section 252
7 | several times, the most recent being in response to a Petition for Declaratory Ruling filed by Qwest.
8 | In its Declaratory Ruling in response to Qwest's Petition, the FCC stated that if the agreement
9 | pertained to an ongoing obligation pertaining to resale, number portability, dialing parity, access to
10 | rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation,
11 | it was an interconnection agreement over which the State commission has jurisdiction.

12 | The FCC also stated that the State commissions should be responsible for applying, in the first
13 | instance, the statutory interpretation to the terms and conditions of specific agreements. The FCC
14 | went on to state that " we believe this is consistent with the structure of section 252, which vests in
15 | the states the authority to conduct fact-intensive determinations relating to interconnection
16 | agreements."

17 | The importance of the Section 252 review and filing requirements was underscored by the
18 | FCC in the following passage from their *Local Competition First Report and Order*.

19 | "State commissions should have the opportunity to review all agreements,
20 | including those that were negotiated before the new law was enacted, to ensure
21 | that such agreements do not discriminate...and are not contrary to the public
22 | interest...Requiring all contracts to be filed also limits an incumbent LEC's
23 | ability to discriminate among carriers, for at least two reasons. First, requiring
24 | public filing of agreements enables carriers to have information about rates,
25 | terms, and conditions that an incumbent LEC makes available to others.
26 | Second, any interconnection, service or network element provided under an
27 | agreement approved by the state commission under section 252 must be made

28 | available to any other requesting telecommunications carrier upon the same
29 | terms and conditions, in accordance with section 252(i)...Conversely,
30 | excluding certain agreements from public disclosure could have
31 | anticompetitive consequences."

1 **B. Section 252(e) Requires State Commission Review and Approval of “Any”**
2 **Interconnection Agreement**

3 Section 252(e)(1) requires that “any” agreement for interconnection be filed with and
4 reviewed by the State commission. Section 252(e)(1) provides:

5 “Any interconnection agreement adopted by negotiation or arbitration shall be
6 submitted for approval to the State commission. A State commission to which
7 an agreement is submitted shall approve or reject the agreement, with written
8 findings as to any deficiencies.” (Emphasis added).

9 Qwest relies upon a recent FCC Declaratory Ruling and Section 252(a)(1) of the Act to argue
10 that the Arizona Commission has no authority to review and approve its QPP Master Service
11 Agreement with MCI, despite the fact that the Agreement governs the provision of unbundled
12 network elements, interconnection and access by Qwest to MCI. With regard to Section 252(a)(1),
13 Qwest argues that the language of that section limits the Commission’s authority to the provision of
14 network elements, interconnection or services made under Section 251 of the Act. That provision of
15 the Act states in relevant part: “Upon receiving a request for interconnection, services, or network
16 elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into
17 a binding agreement with the requesting telecommunications carrier or carriers without regard to the
18 standards set forth in subsections (b) and (c) of section 251.”

19 However, this language addresses only voluntary requests for interconnection, services or
20 network elements and is not meant to limit the scope of the review authority of state commissions
21 under the Act. The provision which governs the review authority of state commissions is actually
22 Section 252(e) which is cited above. As already discussed, under this provision the Commission is
23 given review and approval authority over any interconnection agreement. There is no limiting
24 language as Qwest suggests that only interconnection agreements addressing network elements,
25 interconnection or access under Section 251 must be filed, reviewed and approved by the
26 Commission. Had Congress intended to limit the scope of the filing obligation or the State
27 commission’s review and approval authority in this fashion, it is presumed that Congress would
28 merely have added the same language to Section 252(e) which it did not. The fact that Congress did
not underscore that the Commission’s review authority under Section 252 is very broad and extends

1 to any agreement which addresses an ongoing obligation relating to interconnection, network
2 || elements or access.

3 Qwest also relies upon the language of Section 251(a)(1) as the basis for its second argument
4 that “the entire premise of the duty to file an agreement with a state commission under Section 252 is
5 based on the fact that the service or element provided is required by Section 251(b) or (c).” Qwest
6 also relies upon a statement in a recent FCC Declaratory Ruling that only agreements “that contain on
7 ongoing obligation relating to section 251(b) or (c) must be filed under section 252(a)(1).” However
8 this ignores the fact that Section 251(a)(1) itself expressly permits parties to negotiate and enter into a
9 binding interconnection agreement **without regard to** the standards set forth in Section 251 of the
10 Act. Still, these interconnection agreements are subject to the state filing and review process.

11

12 **1. Network Elements Which Qwest Must Continue to Make Available Under
Section 271 are Interconnection and Access Obligations**

13 At issue as a result of Qwest’s Motion, is whether the Commission has jurisdiction under
14 || Section 252 to review and approve the “Qwest Master Service Agreement” which Qwest calls a
15 “commercial agreement,” in which Qwest has agreed to provide Qwest Platform Plus services to
16 MCI. Qwest concedes on page of its Motion that Qwest is required to continue to make these
17 || services available under Section 271 of the Federal Act and that the elements consist primarily of the
18 local switching and shared transport network elements in combination with other services.

19 The services that the QPP Master Services Agreement covers are several network elements
20 that have been affected by the D.C. Circuit’s vacatur in *USTA II*. Thus, even though Qwest may no
21 longer have to make an element available under Section 252(d)(3), Qwest may still have to make that
22 || element available under Section 271 as part of its obligations under the Competitive Checklist. The
23 || provisions of Section 271 at issue are contained at 47 U.S.C. Section 271(c)(2)(B) and provide
24 || relevant part that access or interconnection provided or generally offered by a Bell operating
25 || company to other telecommunications carriers meets the requirements of the 271 Competitive
26 || Checklist if it includes

27

28

- 1 “(iv) Local loop transmission from the central office to the customer’s
- 2 (v) Local transport from the trunk side of a wireline local exchange carrier
- 3 (vi) Local switching unbundled from transport, local loop transmission, or
- 4 other services.”

5 These provisions require Qwest to continue to provide certain network elements, irrespective of any
6 findings of impairment under Section 251(d)(2).

7 There can be little doubt that the obligations contained in Section 271 of the Federal Act are
8 “interconnection” and “access” obligations which are properly included in an interconnection
9 agreement under Section 252. In fact this is supported by the plain language of Section 271. The title
10 of the 271 section in which these specific unbundling obligations are contained is entitled “SPECIFIC
11 INTERCONNECTION REQUIREMENTS”.

12 Moreover, under sub-part (A) of Section 271(c)(2), the BOC is deemed to meet the
13 requirements of that section if it is providing such access or interconnection in a Statement of
14 Generally Available Terms and Conditions (“SGAT”) or an Interconnection Agreement. Under
15 Section 252, the State commission is given authority to review and approve both the SGAT and all
16 interconnection agreements entered into between carriers operating within the State’s jurisdiction.
17 No separate review and approval process for interconnection agreements or SGAT provisions
18 containing 271 related provisions was established in Section 271, and therefore, it must be presumed
19 that Congress intended this review to take place in the context of the regular Section 252 review
20 process by State commissions.

21 **2. There is no Express Federal Filing Jurisdiction Under the Federal Act.**

22 Qwest’s arguments to the contrary notwithstanding, there is no express federal filing
23 jurisdiction under the Federal Act. See Qwest Motion at p. 7. As just indicated there was no
24 separate review and approval process established in Section 271 for interconnection agreements or
25 SGATs containing 271 related provisions, therefore, it must be presumed that this review is to take
26 place in the Section 252 review process by State commissions.

27 Qwest also argues that there “is an independent investiture of federal jurisdiction under the
28 1996 Act”. Qwest goes on to argue that “[t]he offering of the switching element...is subject to

1 | federal jurisdiction.” *Id.* Or, that the “filing and review (if any) of contracts entered into pursuant to
2 | Section 271(c)(2)(B) of the 1996 Act is a federal matter which has not been delegated to the states.”
3 | *Id.* What Qwest ignores is that the States’ authority pursuant to section 252 extends to both interstate
4 | and intrastate matters. Qwest makes a similarly flawed argument that “the federal nature of the
5 | service under the Federal Act automatically brings them into the ‘zone of federal jurisdiction.’ Qwest
6 | Motion at p. 8.

7 | In the *Local Competition First Report and Order*, the FCC discussed its role with that of the
8 | states over local competition matters:

9 | “We conclude that, in enacting sections 251, 252, and 253, Congress created a
10 | regulatory system that differs significantly from the dual regulatory system it
11 | established in the 1934 Act. (cite omitted). That Act generally gave
12 | jurisdiction over interstate matters to the FCC and over intrastate matters to
13 | the states. The 1996 Act alters this framework, and expands the applicability
14 | of both national rules to historically intrastate issues, and state rules to
15 | historically interstate issues. Indeed, many provisions of the 1996 Act are
16 | designed to open telecommunications markets to all potential service
17 | providers, without distinction between interstate and intrastate services.

14 | For the reasons set forth below, we hold that section 251 authorizes the FCC
15 | to establish regulations regarding both interstate and intrastate aspects of
16 | interconnection, services and access to unbundled elements. We also hold
17 | that the regulations the Commission establishes pursuant to section 251 are
18 | binding upon states and carriers and section 2(b) does not limit the
19 | Commission’s authority to establish regulations governing intrastate matters
20 | pursuant to section 251. **Similarly, we find that the states’ authority
21 | pursuant to section 252 also extends to both interstate and intrastate
22 | matters.** Although we recognize that these sections do not contain an explicit
23 | grant of intrastate authority to the Commission or of interstate authority to the
24 | states, we nonetheless find that this interpretation is the only reasonable way
25 | to reconcile the various provisions of sections 251 and 252, and the statute as
26 | a whole. (Emphasis added).

21 | Finally, Qwest is just plain wrong when it argues that State filing and review requirements are
22 | not permissible because they are inconsistent with this preemptive federal policy. Qwest Motion at p.
23 | 8. Staff is not aware of a federal policy favoring market agreements for elements offered under
24 | Section 271, and that this is presumptively preemptive of inconsistent state regulations. See Qwest
25 | Motion at p. 8. In fact the FCC has gone to great lengths not to preempt state jurisdiction except
26 | where warranted based upon case by case determinations.

1 In fact in its recent Declaratory Ruling, the FCC stated:

2 “Based on their statutory role provided by Congress and their experience to
3 date, state commissions are well positioned to decide on a case-by-case basis
4 whether a particular agreement is required to be filed as an ‘interconnection
5 agreement’ and, if so, whether it should be approved or rejected. Should
6 competition-affecting inconsistencies in state decisions arise, those could be
7 brought to our attention through, for example, petitions for declaratory ruling.
8 The statute expressly contemplates that the section 252 filing process will
9 occur with the states, and we are reluctant to interfere with their processes in
10 this area. Therefore, we decline to establish an exhaustive, all-encompassing
11 ‘interconnection agreement’ standard. The guidance we articulate today flows
12 directly from the statute and services to define the basic class of agreements
13 that should be filed. We encourage state commissions to take action to
14 provide further clarity to incumbent LECs and requesting carriers concerning
15 which agreements should be filed for their approval. At the same time,
16 nothing in this declaratory ruling precludes state enforcement action relating
17 to these issues.

18 * * * * *

19 Consistent with our view that the states should determine in the first instance
20 which sorts of agreements fall within the scope of the statutory standard, we
21 decline to address all the possible hypothetical situations presented in the
22 record before us.”

23 14 || Declaratory Ruling at paras. 10 and 11

24 15 Accordingly, it hardly appears that the FCC has preempted the States with respect to the
25 16 | determinations regarding the Section 252 filing obligation, as Qwest argues.
26 17

27 18 **C. The Federal Act Does Not Carve Out Any Exception to the Section 252(e)**
28 19 **Filing Requirement for What Qwest Calls a “Commercially Negotiated”**
29 **Agreement.**

30 20 Once again, Staff is not aware, nor has Qwest identified, any provision in the Federal Act
31 21 which defines “commercially negotiated” agreements and carves them out of the filing requirement
32 22 || of Section 252(e). This is merely a fiction created by Qwest and the RBOCs to escape their state
33 23 filing obligations under the Federal Act.

34 24 Indeed, in its recent Declaratory Ruling involving 252(e) filing obligations, the FCC expressly
35 25 || identified only a few exceptions to the Section 252(e) filing obligation. Those included settlement
36 26 || agreements, order and contract forms completed by carriers to obtain service pursuant to terms and
37 27 || conditions set forth in an interconnection agreement and agreements with bankrupt competitors that
38 28 || are entered into at the direction of a bankruptcy court or trustee and do not otherwise change the

1 | terms and conditions of the underlying interconnection agreement. See Declaratory Ruling at paras.
2 | 12, 13 and 14

3 | The Commission should reject Qwest's fictitious carve-out for "commercially negotiated"
4 | agreements and Qwest's attempt to once again shoot a cannon ball through the Federal Act's filing
5 | requirements.

6 | **D. The FCC Order Approving Qwest's 271 Application for Arizona, States that The**
7 | **FCC and Arizona Commission are to Work together to Ensure Enforcement of**
8 | **Qwest's 271 Obligations.**

8 | On December 3, 2004, the FCC granted Qwest's Application for Authorization to Provide In-
9 | Region, InterLATA Services in Arizona. As part of its Memorandum Opinion and Order, the FCC
10 | specifically discussed the relationship of the FCC and the Arizona Commission in the post-271
11 | approval enforcement process. At para. 59, the FCC stated:

12 | "Working in concert with the Arizona Commission, we intend to monitor
13 | closely Qwest's post-approval compliance for Arizona to ensure that Qwest
14 | does not "cease to meet any of the conditions required for [section 271]
15 | approval."

15 | Qwest is required to meet the Competitive Checklist requirements through provisions in its
16 | SGAT and interconnection agreements. This hardly appears to be a situation where the FCC
17 | intended to preempt State commission involvement in the post-271 approval enforcement process, as
18 | argued by Qwest.

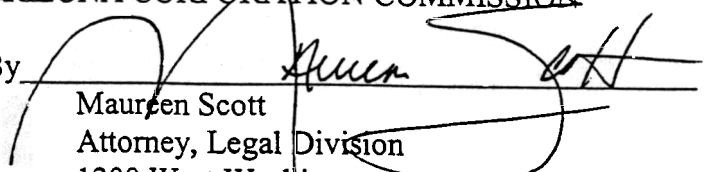
19 | **III. CONCLUSION**

20 | The Commission should reject Qwest's Motion to Dismiss MCI's Application for Review and
21 | Commission Approval of the Master Services Agreement entered into between Qwest and MCI.

22 | Respectfully submitted this 10th day of September, 2004.

23 | ARIZONA CORPORATION COMMISSION

24 | By

25 | 
26 | Maurcen Scott
27 | Attorney, Legal Division
28 | 1200 West Washington
Phoenix, AZ 85007
Telephone (602) 542-3402

1 | Original and 13 copies of the foregoing
2 | filed this 10th day of September, 2004,
3 | With:

4 | Docket Control
5 | Arizona Corporation Commission
6 | 1200 West Washington
7 | Phoenix, AZ 85007

8 | Copy of the foregoing mailed this 10th
9 | day of September, 2004, to:

10 | Thomas H. Campbell
11 | Michael T. Hallam
12 | Lewis and Roca, LLP
13 | 40 North Central Avenue
14 | Phoenix, AZ 85004
15 | Attorneys for MCImetro

16 | Thomas F. Dixon
17 | 707 17th Street, Suite 4200
18 | Denver, CO 80202
19 | Attorneys for MCImetro

20 | Timothy Berg
21 | Theresa Dwyer
22 | 3003 N. Central, Suite 2600
23 | Phoenix, AZ 85012

24 | Norman G. Curtright
25 | Qwest Corporation
26 | 4041 North Central, Suite 1100
27 | Phoenix, AZ 85012

28 | Todd Lundy
29 | Qwest Corporation
30 | 1801 California Street, Suite 4900
31 | Denver, CO 80202

32 | Richard Wolters
33 | AT&T
34 | 1875 Lawrence Street, 15th Floor
35 | Denver, CO 80202

36

37

38

1 | Joan S. Burke
2 | Osborn Maledon, P.A.
3 | 2929 N. Central, Suite 2100
4 | P. O. Box 36379
5 | Phoenix, AZ 85067-6379

6 | Christopher Kempley
7 | Chief Counsel, Legal Division
8 | Arizona Corporation Commission
9 | 1200 West Washington
10 | Phoenix, AZ 85007

11 | Ernest Johnson
12 | Director, Utilities Division
13 | Arizona Corporation Commission
14 | 1200 West Washington
15 | Phoenix, AZ 85007

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18 |
19 |
20 |
21 |
22 |
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