

Agenda Date: **October 13, 2004**

Item Numbers: A1 and A2

Dockets: **UT-043084 and UT-960310**

Company Names: MCImetro Access Transmission Services, LLC
Qwest Corporation

Staff: Robert Shirley, Policy Analyst
Tom Wilson, Senior Telecommunications Analyst
Kristen Russell, Telecommunications Regulatory Analyst
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Recommendation:

In Docket No. UT-960310 and Docket No. UT-043084, approve the request of MCI Metro Access Transmission Services, LLC, (MCImetro) for approval of the Thirteenth Amendment to the interconnection agreement between MCImetro and Qwest, including approval of the Qwest Platform Plus - Master Services Agreement (QPP).

Background:

MCImetro and Qwest Interconnection Agreement: On July 29, 2004, MCImetro filed a request with the Commission that it approve, pursuant to Section 252 of the federal Telecommunications Act, the Thirteenth Amendment to the interconnection agreement between MCImetro and Qwest, labeled "Amendment to Interconnection Agreement for Elimination of UNE-P and Implementation of Batch Hot Cut Process and Discounts."

In addition to the amendment, MCImetro also filed copies of the Qwest Platform Plus - Master Services Agreement (QPP) and requested approval, also pursuant to Section 252, of the three documents that comprise the QPP. (The QPP is composed of the "Master Services Agreement," the "Service Exhibit 1 -Qwest Platform PlusTM Service," and the "QPP Rate Page - Washington.")

On August 4, 2004, Qwest filed a request for approval of the same Thirteenth Amendment to the interconnection agreement for which MCImetro had already requested approval, but did not request approval of the QPP. On August 11, 2004, Qwest filed comments in opposition to the request of MCImetro for approval of the QPP negotiated between MCImetro and Qwest.

On September 20, 2004, MCImetro filed a response to Qwest comments in opposition to Commission review and approval of the QPP. AT&T filed comments in support of MCImetro on September 27, 2004.

In addition to the amendment to the interconnection agreement between Qwest and MCImetro, the Commission has received three other amended interconnection agreements filed by Qwest without the QPP. Unlike MCImetro, the three parties to those agreements with Qwest have not filed copies of the QPP. See *Docket Nos. UT-013062* (United Communications Inc., d/b/a UNICOM, filed 9/1/04), *UT-033040* (Granite Telecommunications, LLC, filed 9/1/04) and *UT-043023* (Preferred Long Distance, Inc., filed 8/18/04).

Staff Analysis and Recommendations:

Commission Staff recommends the Commission approve the request of MCImetro consistent with WAC 480-07-640 and 47 U.S.C. 252(e)(1).

Commission Staff also recommends the order state an approved interconnection agreement and QPP constitute one agreement that may be adopted under 47 U.S.C. § 252(i).

Procedure and Standard of Approval for Interconnection Agreements: Pursuant to WAC 480-07-640(2)(b), the Commission considers requests for approval of fully negotiated interconnections agreements open meetings, and may hear oral argument before entering an order approving or rejecting a fully negotiated agreement.

The standard for approval of an interconnection agreement is that “the agreement (or any portion thereof) [does not] discriminate[] against a telecommunications carrier not a party to the agreement,” and that “the implementation of such agreement or portion is not [in]consistent with the public interest, convenience, and necessity.” 47 U.S.C. § 252(e)(2)(A); see also WAC 480-07-640(2)(a)(i). MCImetro and Qwest both represent the Thirteenth Amendment is a negotiated interconnection agreement; MCI represented the QPP is a negotiated agreement.

Issues

Qwest has raised two issues:

- The Commission lacks jurisdiction to review the QPP under Section 252 because the QPP is a “commercial agreement” that provides unbundled network elements no longer required to be offered by Qwest under subsection 251(d); and
- The Commission is “presumptively” preempted from reviewing the QPP under Section 252 because it offers unbundled network elements that Qwest must offer to fulfill its Section 271 obligations and that means federal rules leave no room for state regulatory actions.

QPP Should Be Filed Based on Statute and FCC Decisions: The central question is whether the QPP, which concerns network elements Qwest is no longer required to provide to other carriers, must be filed with the Commission. Following the *USTA II* decision, the FCC encouraged all carriers to engage in a period of good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements. The FCC, however, has never suggested that agreements resulting from the commercial negotiations that it encouraged following the *USTA II* decision should be regarded as anything other than interconnection agreements within the meaning of the Act.

Section 252(e)(1) requires that “[a]ny interconnection agreement adopted by negotiation or arbitration be submitted for approval to the State commission.” Under Section 252(a)(1), a binding agreement for “interconnection, services, or network elements” that is negotiated “without regard to the standards set forth in subsections (b) and (c) in section 251” is treated as an interconnection agreement. There is no exception in subsections 252(a) or (e) that eliminates the filing requirement for agreements that include network elements the incumbent is not required to provide.

In a 2002 declaratory ruling concerning Qwest’s filing requirements, the FCC stated that “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.

. . . The statute expressly contemplates that the section 252 filing process will occur with the states, and we are reluctant to interfere with their processes in this area. " The FCC went on to say that "the states should determine in the first instance which sorts of agreements fall within the scope of the statutory standard. . . ." ¹

Qwest noted in its filing in this docket, however, that in a footnote to the 2002 *Declaratory Ruling* just cited, the FCC said "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)." ²

However, the FCC stated in March 2004, that it has "historically given a broad construction to section 252(a)(1)...in the *Local Competition Order*, we found that 'requiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements . . . to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest.'" ³

With respect to Qwest's assertion that the QPP should not be reviewed and approved by the Commission because Qwest offers unbundled switching and shared transport via the QPP only to fulfill its Section 271 obligations, Commission Staff responds that Section 252(e) does not contain any exceptions for negotiated interconnection agreements because the agreement provides

¹ *In the Matter of Qwest Communications International, Inc. 's 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)*, FCC 02-276 (2002) (" *Declaratory Ruling*").

² *Declaratory Ruling*, n.26. (Italics in original.)

³ *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, File No. EB-03-IH- 0263, NAL Account No. 200432080022, FRM No. 0001-6056-25, ¶ 21 (Quoting *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) ¶ 167 (" *Local Competition Order*") (Italics in original).

network elements required under Section 271 rather than Section 251. Qwest's claim that states are "presumptively" preempted from requiring filing of agreements that offer network elements that are not "necessary" under subsection 251(d) but must be offered to fulfill Section 271 obligations is not supported by law. Qwest does not cite an FCC rule limiting state commission review of agreements like the QPP.⁴

QPP Should Be Filed Based on WAC 480-07-640: Approval of the QPP as part of the interconnection agreement is also consistent with Commission rules. WAC 480-07-640 requires that carriers file complete interconnection agreements, and states the Commission will "reject a request for approval that does not include all of the information required..."

The Thirteenth Amendment contains thirteen references to the QPP. The QPP contains general terms and conditions, service descriptions, and pricing related to interconnection using unbundled local switching and transport network elements. It is Commission Staff's position the QPP is an amendment to the existing interconnection agreement between MCImetro and Qwest which contains terms and conditions essential to understanding the agreement. This is so even if the QPP is considered an appendix or attachment rather than a separate agreement.

Rates, Terms, and Conditions are Not Discriminatory, and are Not Inconsistent with the Public Interest, Convenience, and Necessity: The QPP is posted on Qwest's wholesale website and is available to any telecommunications carrier to adopt in its entirety. However, the approval process by the Commission eliminates any uncertainty that other competing carriers may have by simply reviewing a copy on Qwest's Wholesale website. Approval of the QPP pursuant to §252 makes it so that other carriers will be able to adopt the agreement knowing the rates, term, and conditions are fair and reliable.

Staff has reviewed the Thirteenth Amendment and the QPP and determined the terms, conditions, and prices do not discriminate against any other carrier; determined that, together, they are consistent with state and federal law; and that

⁴ See *AT&T Corporation v. Iowa Utilities Board*, 366, 385 (1999) (FCC rules required to guide state-commission judgments in application of Section 252.)

together the Thirteenth Amendment and the QPP are not inconsistent with the public interest, convenience, and necessity.

The rates for local switching MCI will pay under the QPP will increase substantially over the term of the agreement (built-in sales incentive discounts notwithstanding). Unbundled Qwest local switching is not classified as a competitive service under RCW 80.36.330. However, it is Staff's conclusion that potential service improvements and slightly "better" rates for batch hot cut process in the Thirteenth Amendment represent, at least in part, the bargain which MCI receives in return. Over time, however, the wholesale rates for the combination of loops and switching will begin to equal or possibly exceed existing Qwest retail rates, resulting in potential concerns in the future about a "price squeeze." Because Qwest is no longer obligated by the Telecommunications Act of 1996 impairment standard to offer unbundled access to mass market local switching and transport at rates based upon total element long run incremental cost, it is noteworthy that the rates and services for the three-year term of the Thirteenth Amendment and the QPP represent a fully negotiated interconnection agreement, with pros and cons for each party.

Conclusion:

The filed QPP is part of the interconnection agreement between MCImetro and Qwest and should be reviewed and approved by the Commission. The Commission should conclude in its order that the approved amendment together with the QPP constitute one entire negotiated interconnection agreement that is available for adoption under Section 252(i).