



BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
Chairman
WILLIAM MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN MAYES
Commissioner

Arizona Corporation Commission

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IN THE MATTER OF THE
APPLICATION OF 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 Nos. T-01051B-04-0540
T-03574A-04-0540

**QWEST CORPORATION'S JOINT
REPLY TO MCI, AT&T AND STAFF IN
SUPPORT OF ITS MOTION TO DISMISS**

In support of its Motion to Dismiss, Qwest Corporation ("Qwest") submits this Reply to the responses filed by MCImetro Access Transmission Services, L.L.C. ("MCI"), AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively "AT&T") and the Arizona Corporation Commission Staff ("Staff"). In support, Qwest states:

I. INTRODUCTION

The agreement that is the subject of Qwest's motion is the "Qwest Master Service Agreement" (the "Commercial Agreement"), under which Qwest agreed to provide to MCI Qwest Platform Plus™ services under section 271 of the federal Telecommunications Act of 1996 ("federal Act").¹ In their various responses to Qwest's Motion to Dismiss, MCI, AT&T and Staff do not dispute that under the Commercial Agreement, Qwest is providing section 271 services consisting primarily of local switching and shared transport, in combination with other services. Instead, they argue

¹ MCI Response at 1-2.

1 that the Commercial Agreement must be filed with and approved by the Arizona
2 Corporation Commission (“Commission”) pursuant to section 252 of the federal Act (1) in
3 order to preserve the status quo; (2) to prevent the possibility of discrimination; and (3)
4 because it is required under sections 252 and 271.²

5 However, each of these Respondents has failed to address the plain (and critical)
6 findings in two controlling opinions that govern this matter, one from the FCC and the
7 other from the United States Court of Appeals for the District of Columbia.³ These
8 critical findings definitively establish that the Commercial Agreement is not subject to
9 either section 251 or 252 and is therefore not subject to review and approval by this
10 Commission. First, as unequivocally stated by the FCC, “we find that *only those*
11 *agreements* that contain an ongoing obligation *relating to section 251(b) or (c) must be*
12 *filed under 252(a)(1).*”⁴ This finding by the FCC could not be clearer. Second, as stated
13 by the Court in *USTA II*, “[w]e vacate the Commission’s subdelegation to state
14 commissions of decision-making authority over impairment determinations . . . for mass
15 market switching and certain dedicated transport elements (DS1, DS3 and dark fiber). We

16 ² Though Qwest is including AT&T in this combined Reply, Qwest does not concede, and does
17 not believe, that AT&T should be allowed to intervene in this docket. Given its recent decision
18 and public announcement that it is turning away from “wireline residential telephone services,” it
19 is difficult, at best, to determine what direct and substantial interest AT&T has in this proceeding.
20 AT&T publicly stated, “[a]s a result of recent changes in regulatory policy governing local
21 telephone service, AT&T will no longer be competing for residential local and standalone long
22 distance (LD) customers.” A copy of AT&T’s public statement is attached to this Reply as
23 Exhibit A. Further, although AT&T admits in its brief that Qwest has made the Commercial
24 Agreement available to each of its in-region state commissions, and that Qwest has offered the
25 Commercial Agreement to any interested CLEC assuming the same obligations as MCI, to date,
26 AT&T has consistently refused to adopt the Commercial Agreement. Thus, AT&T’s arguments
concerning the potential for this Commercial Agreement to be used to discriminate against
telecommunications carriers who are not parties to the agreement is both confusing and
unfounded. Simply put, at this point in time, AT&T has no direct and substantial interest in the
Commercial Agreement, or in this docket.

³ See 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, 2002 FCC Lexis 4929 (October 4, 2002) (“*Declaratory Order*”) and *United States Telephone Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”).

⁴ *Declaratory Order*, at ¶ 8 & 26 (emphasis added).

1 also vacate and remand the Commission's nationwide impairment determinations with
2 respect to these elements."⁵ Consequently, Qwest is no longer obligated to provide
3 unbundled access to local switching or shared transport pursuant to section 251 of the
4 federal Act. Since these elements are not governed by section 251, the *Declaratory Order*
5 is clear that an agreement relating to them is not required to be filed for approval pursuant
6 to section 252.

7 **II. ARGUMENT**

8 Because the Commercial Agreement does not pertain to the provisioning of
9 network elements Qwest is required to provide pursuant to sections 251(b) and (c) of the
10 federal Act, the Commercial Agreement is not an "interconnection agreement" that must
11 be filed under section 252(a)(1).

12 **A. The FCC's Orders Both Stand For The Proposition That Only** 13 **Agreements Pertaining To The Provisioning Of Network** 14 **Elements Pursuant To Sections 251 (B) And (C) Of The Federal** 15 **Act Must Be Filed With State Commission Pursuant To** 16 **252(a)(1).**

17 The cornerstone of MCI's and Staff's argument appears to be that any agreement
18 that concerns the provisioning of "network elements" must be filed with the Commission
19 for approval. To support this assertion, MCI relies on the following quote from the FCC's
20 *Notice of Apparent Liability for Forfeiture*.⁶ The quote is set forth below in the context in
21 which it appears in MCI's Response:

22 However, in March 2004, in its Notice of Apparent Liability for Forfeiture
23 issued to Qwest, the FCC stated in Paragraph 21: "We have historically
24 given broad construction to Section 252(a)(1)." The FCC further stated:

any agreement that creates an ongoing obligation pertaining to resale,

25 ⁵ *USTA II*, 359 F.3d at 594.

26 ⁶ *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, at ¶ 22 ("*Notice of Apparent
Liability for Forfeiture*").

1 number portability, dialing parity, access to rights-of-way, reciprocal
2 compensation, interconnection, unbundled network elements, or
3 collocation is an interconnection agreement that must be filed
pursuant to section 252(a) (1).

4 In this latter instance, the FCC did not limit its direction to only those
5 agreements that contain an ongoing obligation relating to section 251(b) or
6 (c).⁷

7 MCI's claim -- that the FCC does not limit the agreements to be submitted for
8 review to those that contain an ongoing obligation relating to sections 251 (b) and (c) -- is
9 *directly* refuted by the footnote that MCI and Staff inexplicably omitted from the
10 quotations in their briefs but which appears at the end of the above passage from the
11 *Notice of Apparent Liability*:

12 ⁷⁰ ... *The sentence quoted in the text is a summary of the interconnection*
13 *obligations listed in section 251 of the Act. 47 U.S.C. § 251....*⁸

14 Contrary to MCI's assertion, even in the *Notice of Apparent Liability for Forfeiture*
15 the FCC was careful to limit the section 252(a)(1) filing requirement to only those
16 agreements that contain an ongoing obligation relating to network elements offered
17 pursuant to Section 251.

18 AT&T also relies on the FCC's decision in the *Notice of Apparent Liability for*
19 *Forfeiture* for its central argument. In its Response, AT&T argues "[s]ection 252 requires
20 that such an agreement be filed with the state commission, however, so that the state
21 commission can fulfill its statutory mandate to ensure that the agreement is
22 nondiscriminatory."⁹ Yet, the *Notice of Apparent Liability for Forfeiture* was based on,
23 and specifically referred to, the FCC's earlier *Declaratory Order* in which the FCC

24 _____
25 ⁷ MCI Response at 4-5 (footnotes omitted) quoting *Notice of Apparent Liability for Forfeiture*,
Paragraph 22.

26 ⁸ *Notice of Apparent Liability for Forfeiture*, at 13, n. 70 (emphasis added).

⁹ AT&T Response at 9 citing *Notice of Apparent Liability for Forfeiture* ¶ 47.

1 specifically rejected the contention that all agreements between an ILEC and a CLEC
2 must be filed with a state commission for its approval. In the *Declaratory Order*, the FCC
3 stated:

4 We therefore disagree with the parties that advocate the filing of *all*
5 agreements between an incumbent LEC and a requesting carrier. See Office
6 of the New Mexico Attorney General and the Iowa Office of Consumer
7 Advocate Comments at 5. Instead, *we find that only those agreements that*
8 *contain an ongoing obligation relating to section 251(b) or (c) must be filed*
9 *under 252(a)(1)....*¹⁰

10 Because the Commercial Agreement includes what MCI characterizes as “network
11 elements,” and because Qwest was previously required to provide these “network
12 elements” pursuant to Section 251 (b) and (c) of the federal Act, MCI, AT&T, and Staff
13 erroneously conclude that the Commission must approve the agreement pursuant to
14 section 252(a)(1) of the federal Act. The critical distinction that these Respondents fail to
15 draw is the distinction between network elements that must be provided pursuant to
16 section 251(b) and (c) of the federal Act, and network elements that are being provided
17 pursuant to section 271.¹¹

18 Only agreements pertaining to the provisioning of network elements pursuant to
19 sections 251(b) and (c) of the federal Act must be filed with state Commissions pursuant
20 to section 252(a)(1).¹² Agreements pertaining to the provisioning of network elements

21 ¹⁰ *Declaratory Order*, at ¶ 8 & 26 (emphasis added). At pages 7-8 of its response, Staff asserts
22 that the *Declaratory Order* does not include a filing "carve-out" or exemption for commercial
23 agreements. However, there was no need for the FCC to state in the Order that these agreements
24 are excluded since they do not meet the threshold requirement for filing - - *i.e.*, they do not relate
25 to an "ongoing obligation under section 251(b) or (c)."

26 ¹¹ Qwest notes that as part of its recent Order and Notice of Proposed Rulemaking, the FCC has
sought comment on carriers' obligations under section 252 to file commercial agreements with
state commissions for approval, where the agreements govern access to network elements for
which there is no section 251(c)(3) unbundling obligation. Order and Notice of Proposed
Rulemaking, *In the Matter of Unbundled Access to Network Elements and Review of the Section*
251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313 and
CC Docket No. 01-338, FCC No. 04-179, ¶ 13 (F.C.C. August 20, 2004).

¹² *Declaratory Order*, at ¶ 8 & 26.

1 pursuant to sections 271 do not need to be filed with state commissions pursuant to
2 section 252(a)(1).

3 **B. Section 271 Does Not Require BOCs To File Non-251 Agreements With State**
4 **Commissions And Does Not Give State Commissions Authority To Approve**
5 **Such Agreements.**

6 AT&T also argues that section 271 itself requires Bell Operating Companies
7 ("BOCs") to file non-251 agreements with state commissions and gives state commissions
8 authority to approve agreements containing terms and conditions for access to network
9 elements provided under section 271. For several reasons, this argument is wrong.

10 A state administrative agency has no role in the administration of federal law,
11 absent express authorization by Congress. That is so even if the federal agency charged
12 by Congress with the law's administration attempts to delegate its responsibility to the
13 state agency.¹³ Here, no provision of the Act authorizes state commissions to impose or
14 enforce obligations under section 271.¹⁴ Section 271(d)(3) expressly confers upon the
15 FCC, not state commissions, the authority to determine whether BOCs have complied
16 with the substantive provisions of section 271, including the "checklist" provisions upon
17 which AT&T bases its argument. 47 U.S.C. § 271(d)(3). State commissions have only a
18 non-substantive, "consulting" role in that determination. 47 U.S.C. § 271(d)(2)(B).¹⁵ As

19 ¹³ *USTA II*, 359 F.3d at 565-68.

20 ¹⁴ *See Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13
21 (S.D. Ind. 2003) (state commission not authorized by section 271 to impose binding obligations),
aff'd, 359 F.3d 493 (7th Cir. 2004). *See also TRO* at ¶¶ 186-87 ("states do not have plenary
22 authority under federal law to create, modify or eliminate unbundling obligations").

23 ¹⁵ *See also Indiana Bell Tel. Co.*, 2003 WL 1903363 at 13 ("section 271 clearly contemplates an
24 advisory role for the [state commission], not a substantive role"). Sections 201 and 202, which
25 govern the rates, terms and conditions applicable to the unbundling requirements imposed by
26 section 271, likewise provide no role for state commissions. That authority has been conferred by
Congress upon the FCC and federal courts. See 47 U.S.C. § 201(b) (authorizing the FCC to
prescribe rules and regulations to carry out the Act's provisions); § 205 (authorizing FCC
investigation of rates for services, etc. required by the Act); § 207 (authorizing FCC and federal
courts to adjudicate complaints seeking damages for violations of the Act); § 208(a) (authorizing
FCC to adjudicate complaints alleging violations of the Act). The FCC has thus confirmed that
"[w]hether a particular [section 271] checklist element's rate satisfies the just and reasonable

1 explained by the court in *Indiana Bell Telephone Co. v. Indiana Utility Regulatory*
2 *Commission*, a state commission has a fundamentally different role in implementing
3 section 271 than it does in implementing sections 251 and 252:

4 Sections 251 and 252 contemplate state commissions may take affirmative
5 action towards the goals of those Sections, *while Section 271 does not*
6 *contemplate substantive conduct on the part of state commissions*. Thus, a
7 "savings clause" is not necessary for Section 271 because the state
8 commissions' role is investigatory and consulting, not substantive, in
9 nature.¹⁶

10 In recognizing the different roles that Congress assigned states under these distinct
11 provisions of the Act, the court in *Indiana Bell* observed that the Act does not include a
12 "savings clause" that preserves the application of state law in the administration of section
13 271.¹⁷ By contrast, Congress included a savings clause – section 261(b) – that preserves
14 the application of "consistent" state regulations in the administration of section 251.¹⁸ As
15 the court found, this contrast confirms further that Congress did not intend a substantive
16 role for states in the administration of section 271.¹⁹ Indeed, if Congress had intended a
17 substantive role for states in administering section 271, it would have included a reference
18 to section 271 in the section 261(b) savings clause. The absence of such a reference
19 demonstrates very clearly that Congress did not confer any decision-making authority on
20 state commissions under section 271.

21 Moreover, section 271 does not provide even for a consulting role for state
22 commissions with respect to the interpretation and enforcement of non-251 obligations

23 pricing standard is a fact specific inquiry that *the Commission* [*i.e.*, the FCC] will undertake in the
24 context of a BOC's application for section 271 authority or in an enforcement proceeding brought
25 pursuant to section 271(d)(6)." *TRO* at ¶ 664.

26 ¹⁶ *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 11
(emphasis added).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

1 following the BOC's receipt of authorization to provide InterLATA service in the state.
2 See 47 U.S.C. § 271(d)(6). Even if it were lawful for the FCC to delegate to state
3 commissions its responsibilities – which it is not – the FCC has not even attempted such
4 delegation. To the contrary, the FCC has stated that it will make any determinations
5 under section 271 that should thereafter be necessary.²⁰

6 Without citing to any language in the Act that confers section 271 decision-making
7 authority on state commissions, AT&T presents a convoluted analysis that it claims
8 inferentially shows that states have authority to approve non-251 agreements. An
9 inferential argument that states have authority cannot substitute for the express grant of
10 authority that is required for states to be able to administer provisions of federal law.
11 Moreover, the statute is not reasonably susceptible to the inference that AT&T seeks to
12 draw.

13 AT&T's argument relies on section 271(c)(2)(B), which according to AT&T,
14 establishes access requirements for all network elements a BOC provides, including
15 elements required by section 271 ("section 271 network elements"). According to AT&T,
16 section 271(c)(2)(A) requires that access to section 271 network elements be provided
17 pursuant to "binding agreements that have been approved under section 252." Thus, the
18 argument goes, state commissions have authority to approve terms and conditions relating
19 to section 271 elements.

20 The first flaw in this argument is AT&T's contention that the "binding agreements"
21 required under section 271(c)(1)(A) include agreements addressing access to section 271
22 elements. Section 271(c)(1)(A) refers expressly to "agreements that have been approved
23 *under section 252*," making it clear that the agreements referred to in that section are those

24 _____
25 ²⁰ TRO at ¶ 665 ("[S]ection 271(d)(6) grants *the Commission* enforcement authority to ensure that
26 the BOC continues to comply with the market opening requirements of section 271. In particular,
this section provides *the Commission* with enforcement authority where a BOC 'has ceased to
meet any of the conditions required for such approval.'" (emphasis added) (footnote omitted).

1 that relate to section 252 – not section 271 – obligations. As discussed above, the FCC
2 established in its *Declaratory Ruling* that the scope of section 252 agreements is limited to
3 terms and conditions relating to the obligations imposed by sections 251(b) and (c).
4 Accordingly, the reference in section 271(c)(1)(A) to agreements "approved under section
5 252" is limited to agreements that address section 251(b) and (c) obligations and does not
6 include commercial agreements that address issues unrelated to those sections.²¹ That
7 section therefore does not give states authority to review agreements containing terms and
8 conditions for access to section 271 elements.²²

9 AT&T's argument also is contradicted by the provisions of the Act that define the
10 authority of state commissions to approve interconnection agreements. Section 252(e)(1)
11 authorizes state commissions to approve interconnection agreements "adopted by
12 negotiation," and the negotiations to which the section refers are those addressed in
13 section 251(c)(1), which expressly relate only to the obligations imposed by sections
14 251(b) and (c).²³ There is no mention anywhere in either section 251 or 252 of
15 negotiations relating to section 271 obligations or of state authority to approve negotiated
16 agreements addressing section 271 obligations. The section 252(e)(1) authority of state
17 commissions to approve negotiated interconnection agreements is limited, therefore, to
18 agreements relating to section 251(b) and (c) obligations. For this reason, Staff's
19

20 ²¹ Staff also cites the SGAT approval process as evidence that state commissions have authority
21 to impose and approve section 271 obligations. Staff Br. at 5. However, the same analysis set
22 forth above applies to the SGATs addressed in section 271(c)(1)(B). That section permits BOCs
23 seeking entry into long distance markets to rely on SGATs setting forth the terms and conditions
24 of the "access and interconnection described in subparagraph [271(c)(1)(A)]" As noted, the
25 access and interconnection described in subparagraph 271(c)(1)(A) is limited to that which is
26 required under section 252 and does not include obligations under section 271.

²² Section 271(c)(1)(A) also does not impose any filing requirements for agreements. Instead, it
only establishes as a requirement for obtaining long distance relief under Track A that there be a
"facilities-based competitor" with whom the BOC has a binding agreement approved under
section 252.

²³ Section 251(c)(1) imposes on ILECs "[t]he duty to negotiate in good faith . . . the particular
terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of
[section 251(b)] and this subsection."

1 argument that also relies on section 252(e) does not support imposition of a filing
2 requirement for agreements containing section 271 terms and conditions.

3 The absence of state approval authority for section 271 agreements is further
4 supported by section 252(e)(6) of the Act, which grants parties the right to seek judicial
5 review of state commission determinations relating to interconnection agreements. That
6 section limits judicial review to "whether the agreement . . . meets the requirements of
7 section 251 and this section." Significantly, Congress did not authorize courts to review
8 agreements for compliance with section 271, demonstrating again that Congress did not
9 intend that state commissions would make any determinations relating to agreements that
10 address section 271 obligations. If Congress had intended otherwise, it could have easily
11 stated as much.

12 For these reasons, there is no merit to AT&T's and Staff's contention that section
13 271 requires BOCs to file non-251 agreements with state commissions and gives state
14 commissions authority to approve agreements containing terms and conditions for access
15 to network elements provided under section 271.

16 **C. Staff's Additional Arguments For Imposition Of A Filing**
17 **Requirement Are Meritless.**

18 To support its contention that state commissions have authority to approve
19 commercial agreements, Staff asserts that the FCC has expressly conferred authority on
20 state commissions to approve any and all agreements that include terms relating to
21 interconnection or access to network elements. However, a review of the complete FCC
22 statements that Staff relies upon demonstrates that the FCC has not conferred the
23 unbridled approval authority that Staff suggests.

24 Specifically, citing paragraph 167 of the FCC's *Local Interconnection Order*, Staff
25 asserts that the FCC has ruled that state commissions shall review "all agreements."²⁴

26 ²⁴ Staff Br. at 2-3.

1 However, a complete reading of that section reveals that the FCC was specifically and
2 narrowly focused on whether state commissions have authority to review agreements that
3 carriers entered into before passage of the 1996 Act. While ruling that states do have such
4 authority, the FCC did not rule, as Staff implies, that states are authorized to approve all
5 agreements regardless whether they arise under section 252(a). On the contrary, nowhere
6 in the discussion that Staff cites – or anywhere else in the *Local Competition Order* – does
7 the FCC state that state commissions have authority to approve section 271 agreements.
8 If the FCC had intended for states to have that authority, it surely would have said so in its
9 detailed discussion of state approval authority in the *Local Competition Order*.

10 Staff also cites a portion of the *Declaratory Order* in which the FCC stated that
11 states should conduct "case-by-case" inquiries to determine whether interconnection
12 agreements should be filed as evidence that the FCC intended to confer upon states
13 authority to review and approve all agreements.²⁵ However, a complete reading of that
14 portion of the *Declaratory Order* demonstrates that the FCC was instructing only that
15 state commissions should inquire into whether an agreement "fall[s] within the scope of
16 the statutory standard."²⁶ That standard, as stated, is that the agreement must involve an
17 ongoing obligation relating to section 251(b) or (c). Nowhere in the portion of the
18 *Declaratory Order* that Staff cites or anywhere else in that Order does the FCC state that
19 state commissions have authority to approve section 271 agreements. Again, if the FCC
20 had intended for states to have that authority, it would have said so as part of its detailed
21 description in *Declaratory Order* of the types of agreements that must be filed with state
22 commissions.

23 As Qwest demonstrated in its motion, carriers are required to file with the FCC
24 commercial agreements containing terms and conditions for access to network elements

25 ²⁵ Staff Br. at 7.

26 ²⁶ *Declaratory Order* at ¶ 11.

1 that do not meet the "necessary" and "impair" standard of section 251, and the FCC has
2 exclusive authority of those agreements.²⁷ Despite the FCC's plainly established authority
3 over these agreements, Staff argues that it must be "presumed" under the Act that states
4 have authority over these agreements even if the agreements relate to interstate services.²⁸
5 This argument is flawed on several different levels.

6 As the Supreme Court made clear in *Iowa Utilities Board*, the Act decreased state
7 authority over the regulation of telephone competition. Thus, the Court emphasized that
8 "the Federal Government has taken the regulation of local competition away from the
9 states," and it is clear that the FCC must "draw the lines to which [the states] must hew,"
10 lest the industry fall into the "surpassing strange" incoherence of "a federal program
11 administered by 50 independent state agencies" without adequate federal oversight.²⁹ The
12 authority that remains with the states, as *USTA II* emphatically held, is only that which
13 Congress expressly delegated to them.

14 Under this statutory framework, it cannot be "presumed," as Staff claims, that
15 states have reviewing authority when Congress did not expressly - - or even implicitly - -
16 confer such authority. When Congress intended to delegate authority to the states, under
17 the Act, it did so clearly and specifically, as demonstrated by the authority it gave states to
18 establish rates for UNEs and interconnection and to approve agreements under section 252
19 (not under section 271). Given these clear delegations of authority, it would be wrong to
20 "presume" any state power that is not apparent from the Act's express language. This is
21 particularly true given that, as the Supreme Court stated, the Act did not increase, but
22 decreased, the role of states in regulating telephone competition.

23 The absence of state authority to review commercial agreements containing section
24 271 terms and conditions does not mean that there are no regulatory obligations pertaining

25 ²⁷ Qwest Motion at 7-8.

26 ²⁸ Staff Br. at 5.

²⁹ *Iowa Utilities Board*, 525 U.S. at 391-92.

1 to those agreements. As Qwest discussed in its motion, these agreements must be filed
2 with the FCC and are subject to the FCC's enforcement powers under section 202(a) of the
3 Communications Act.³⁰ Accordingly, Qwest has filed the Qwest/MCI Commercial
4 Agreement with the FCC.

5 Finally, Staff erroneously contends that a statement by the FCC in its section 271
6 order granting Qwest long distance approval in Arizona shows that the FCC intended that
7 this Commission would have section 271 decision-making authority.³¹ However, as
8 *USTA II* confirms, only Congress - - not the FCC - - can confer decision-making authority
9 on states, and Congress has not done so here. Moreover, the FCC statement that Staff
10 cites - - that the FCC intends to "[w]ork[] in concert with the Arizona Commission . . . to
11 monitor closely Qwest's post-approval compliance" - - is hardly an attempt to grant
12 decision-making authority or authority to approve section 271 agreements. At most, the
13 statement shows that in carrying out its authority to enforce compliance with section 271,
14 the FCC may consult with this Commission.

15 **D. The Commission's Rules Do Not and May Not Impose**
16 **Unbundling Obligations That Are Inconsistent With Section 251**
17 **And The FCC's Implementation Of That Section.**

18 Respondents also assert that the Commission's rules governing interconnection
19 agreements require that the Commercial Agreement be filed with the Commission for its
20 review and approval. Respondents have misread the law.

21 MCI asserts that the Commercial Agreement at issue here falls within the ambit of
22 A.A.C. R14-2-1502(D) and A.A.C. R14-2-1302(8) and (11) and that it must be filed with
23 the Commission for its review and approval because the Commission must determine
24 "whether the negotiated amendments discriminate against nonparty telecommunications

25 _____
26 ³⁰ Qwest Motion at 8.

³¹ Staff Br. at 8.

1 carriers, or lack consistency with applicable state law requirements.”³² In other words,
2 MCI contends that the Commercial Agreement must be filed with the Commission for its
3 review and approval because to do otherwise would be a departure from the status quo.
4 But that is exactly the point -- the status quo has changed. Qwest is no longer required to
5 unbundle local switching and shared transport pursuant to section 251 (c) of the federal
6 Act. The *USTA II* decision is clear on that point. Absent any obligation to unbundle these
7 network elements pursuant to section 251 of the federal Act, this Commission has no
8 authority to review and approve, or review and reject the Commercial Agreement. The
9 Commission’s only express authority to previously do so sprang from section 252(e)(1) of
10 the federal Act, not from its own rules. Indeed, it would change the status quo under the
11 law to require an ILEC to file elements that are not within 251(b) or (c).

12 AT&T attempts to make this same argument in a more subtle way, though in doing
13 so it reads requirements into Arizona law that simply don’t exist.³³ AT&T claims in
14 footnote three of its Response that “Arizona also has substantive requirements for the
15 filing *and approval* of interconnection agreements. Ariz. Adm. Code, Title 14, Ch.2, Art.
16 15, § § 1506-1509.”³⁴ Though these rules require that prices, terms and conditions of
17 interconnection agreements shall be filed with and approved by the Commission, they do
18 so pursuant to the express authority and within the parameters of section 252, and not
19 under color of state law. In fact, A.A.C. R15-2-1502 expressly states that “[t]hese rules
20 govern procedures mandated by the Telecommunications Act of 1996, 47 U.S.C. 252,
21 regarding the mediation, arbitration, review, and approval of interconnection agreements.”

22 Even if state law were somehow applicable to the Commercial Agreement, an
23 argument that Qwest denies, the rules clearly do not provide the Commission with
24 authority to review and approve the Commercial Agreement. For example, A.A.C.

25 ³² MCI Response at 6.

26 ³³ AT&T Response at 5, n. 3.

³⁴ *Id.* (emphasis added).

1 R14-2-1506 provides, in relevant part, that “[a]n interconnection agreement shall be
2 submitted to the Commission for approval under 47 U.S.C. § 252(e)” Nowhere in
3 this passage does the law confer any authority on the Commission to review and approve,
4 or review and reject, the terms of the Commercial Agreement. Indeed, such language can
5 only be found in section 252(e)(1) of the federal Act, which is now inapplicable to local
6 switching and shared transport. The Commercial Agreement is not an interconnection
7 agreement under which Qwest is providing services or facilities pursuant to sections 251
8 of the federal Act, or under which this Commission has any jurisdiction pursuant to
9 section 252 of the federal Act. Thus, this Commission has no legal authority to enforce
10 the Commercial Agreement pursuant to the terms of the federal Act, or pursuant to its own
11 rules.

12 As Qwest explained in its original motion to dismiss, whether the Commission has
13 the power to review and approve the Commercial Agreement is a question of federal law
14 governed by the provisions of the federal Act and the controlling federal authorities
15 construing the federal Act.³⁵ And, as explained in the original motion to dismiss, and
16 again in this Reply, there are two primary controlling authorities in this docket. The first
17 is the decision of the United States Court of Appeals for the District of Columbia in *USTA*
18 *II*, and the second is the FCC's *Declaratory Order*. Read together, these authorities
19 definitively establish that the Commercial Agreement is not subject to either section 251
20 or 252 and is, therefore, not subject to review and approval by the Commission.

21 Finally, Respondents cite to various decisions from other states including the
22 Michigan Public Service Commission (“Michigan Commission”) in which the Michigan
23 Commission ordered SBC Michigan (“SBC”) and Sage Telecom, Inc. (“Sage”) to file
24 their Local Wholesale Complete agreement (“LWC”) for approval, and then approved the
25

26 ³⁵ Qwest Motion to Dismiss at 3.

1 agreement.³⁶ The *Michigan Commission Decision* and those from the other states that
2 reviewed the SBC Sage LWC are inapposite for several reasons.

3 The Michigan Commission cited the FCC's *Declaratory Order* and determined that
4 the federal Act required that the LWC be reviewed under section 251(a)(1).³⁷ In reaching
5 its conclusion, the Michigan Commission quoted the language that MCI quotes to this
6 Commission in its Response:

7 an agreement that creates an ongoing obligation pertaining to resale, number
8 portability, dialing parity, access to rights-of-way, reciprocal compensation,
9 interconnection, unbundled network elements, or collocation is an
interconnection agreement that must be filed pursuant to section 252(a) (1).³⁸

10 Ironically, the Michigan Commission also made the same inexplicable mistake that
11 MCI and AT&T made in their Responses before this Commission; it failed to include the
12 explanatory footnote that appears at the end of the passage it quoted from the *Declaratory*
13 *Order*:

14 We therefore disagree with the parties that advocate the filing of all
15 agreements between an incumbent LEC and a requesting carrier. See Office
16 of the New Mexico Attorney General and the Iowa Office of Consumer
17 Advocate Comments at 5. Instead, we find that only those agreements that
18 contain an ongoing obligation relating to section 251(b) or (c) must be filed
19 under 252(a)(1)....³⁹

20 If one reads the entirety of the FCC's *Declaratory Order* and *Notice of Apparent Liability*

21 ³⁶ Order, *In The Matter, On The Commission's Own Motion, To Require SBC MICHIGAN And*
22 *SAGE TELECOM, INC., To Submit Their Interconnection Agreement For Review And Approval*,
23 Case Nos. U-13513 and U-14121 (Mi. P.S. Co. April 28, 2004); and Order, *In The Matter Of The*
24 *Request For Commission Approval Of An Interconnection Agreement Between SBC MICHIGAN*
25 *And SAGE TELECOM, INC. And In The Matter, On The Commission's Own Motion, To Require*
26 *SBC MICHIGAN And SAGE TELECOM, INC., To Submit Their Interconnection Agreement For*
Review And Approval, Case Nos. U-13513 and U-14121 (Mi. P.S. Co. (August 3,
2004))("Michigan Commission Decision").

³⁷ *Michigan Commission Decision*, at 15 quoting *Declaratory Order*, ¶ 8.

³⁸ MCI Response at 8. Qwest notes that the critical footnote that appears at the end of the passage
the Commission quoted from the *Declaratory Order* is also not contained in the Commission's
decision. [This footnote appears to refer to another state.]

³⁹ *Declaratory Order*, ¶ 8, n. 26 (emphasis added).

1 *For Forfeiture* -- including the footnotes MCI, AT&T and the Michigan Commission
2 omitted from their analyses of these FCC's orders -- one can only conclude that the
3 obligation to file an agreement with a state commission does not extend beyond those
4 agreements that pertain to the provisioning of network elements pursuant to sections 251
5 (b) and (c). It appears that because the Michigan Commission misread the *Declaratory*
6 *Order*, it did not analyze whether the LWC pertained to network elements provided
7 pursuant to section 251(b) and (c) of the federal Act. The same flawed analysis appears to
8 have been used by the other state commissions, as cited by AT&T in its Response.
9 Because these state commissions did not engage in the required fundamental analysis of
10 whether the LWC pertained to network elements provided pursuant to section 251(b) and
11 (c) of the federal Act, they are of no value in terms of the issue to be decided here;
12 namely, whether the federal Act requires the Commercial Agreement to be filed with this
13 Commission for approval.

14 Finally, the Michigan Commission went on to find that the LWC should be filed
15 pursuant to state law. Whether the Michigan Commission's decision on this issue is in
16 fact lawful need not be addressed in this case because, as Qwest has already demonstrated,
17 Arizona rules merely require that agreements be filed, not that they be reviewed and
18 approved.

19 Unlike the LWC, Qwest has previously provided the Commercial Agreement to the
20 Commission for informational purposes and is offering its terms and conditions to any
21 carrier assuming the same obligations as MCI. As a result, many of the concerns
22 expressed by the Respondents here regarding the potential for discrimination are simply
23 inapplicable with respect to the Commercial Agreement.

24 ///

25 ///

26 ///

1 **III. CONCLUSION**

2 For the reasons set forth herein, Qwest respectfully moves that the Commission
3 dismiss the application for approval filed by MCI to the extent it seeks review and
4 approval of the Qwest Master Services Agreement.

5 DATED this 20th day of September, 2004.

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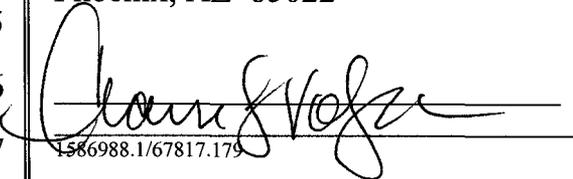
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EXHIBIT

A



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News Release

Editor's note: Note to Financial Media: AT&T executives will discuss the company's performance in a two-way conference call for financial analysts at 8:15 a.m. ET today. Reporters are invited to listen to the call. U.S. callers should dial 888-428-4473 to access the call. Callers outside the U.S. should dial + 1-651-291-0561.

In addition, Internet rebroadcasts of the call will be available on the AT&T web site beginning later today. The web site address is www.att.com/ir. An audio rebroadcast of the conference call will also be available beginning at 12:30PM on Thursday, July 22 through 12:00AM on Tuesday, July 27. To access the audio rebroadcast, U.S. callers can dial 800-475-6701, access code 696623. Callers outside the U.S. should dial +1-320-365-3844, access code 696623.

FOR RELEASE THURSDAY, JULY 22, 2004

AT&T Announces Second-Quarter 2004 Earnings, Company to Stop Investing in Traditional Consumer Services; Concentrate Efforts on Business Markets

- **Second-quarter earnings per diluted share of \$0.14**
- **Consolidated revenue of \$7.6 billion**
- **Operating income of \$348 million**
- **Second-quarter cash from operating activities of \$1.1 billion**

BEDMINSTER, N.J. -- AT&T (NYSE: T) today reported net income of \$108 million, or earnings per diluted share of \$0.14, for the second quarter of 2004. This compares to net income of \$536 million, or earnings per diluted share of \$0.68, in the second quarter of 2003.

The company also announced that it is shifting its focus away from traditional consumer services such as wireline residential telephone services, and concentrating its growth efforts going forward on business markets and emerging technologies, such as Voice over Internet Protocol (VoIP), that can serve businesses as well as consumers. The shift plays to AT&T's strength as an innovator in communications and a leader in serving the complex networking and technology needs of businesses.

"AT&T is the leading provider of communications services to business customers, offering a full range of leading-edge networking and communications solutions on a global basis," said David W. Dorman, AT&T's Chairman and CEO, who noted that nearly 75% of AT&T's revenue is now generated by AT&T Business. "We intend to widen the gap between AT&T and our competitors in the business market, while also improving our industry-leading cost structure and financial strength."

As a result of recent changes in regulatory policy governing local telephone service, AT&T will no longer be competing for residential local and standalone long distance (LD) customers. The company stressed that existing residential customers will continue to receive the quality service they expect from AT&T; however, the company will no longer be investing to acquire new customers in this segment.

"This decision means that AT&T will focus on lines of business where we are a clear leader, where we control our own destiny and where we have distinct competitive advantages," said Dorman. "Despite the near-term challenges associated with a difficult industry environment, we are confident that AT&T's cost structure, customer base, strong balance sheet and cash flow give us the flexibility to continue investing for success in the

long run."

AT&T reported second-quarter 2004 consolidated revenue of \$7.6 billion, which included \$5.6 billion from AT&T Business and \$2.0 billion from AT&T Consumer. Consolidated revenue declined 13.2 percent versus the second quarter of 2003, primarily due to continued declines in LD voice revenue.

AT&T's second-quarter 2004 operating income totaled \$348 million, resulting in a consolidated operating margin of 4.6 percent. Operating income included \$54 million of net restructuring and other charges taken during the quarter primarily related to employee separations. This quarter the company also reported that it generated \$1.1 billion in cash from operations while spending \$0.5 billion on capital expenditures.

AT&T UNIT HIGHLIGHTS

AT&T Business

- Revenue was \$5.6 billion, a decline of 12.7 percent from the prior-year second quarter. Pricing pressure and mix shift from retail to wholesale negatively affected the unit's revenue performance.
- Long distance voice revenue decreased 17.6 percent from the prior-year second quarter, driven by continued pricing pressure as well as a continued mix shift in volume from retail to wholesale. Volumes were flat on a quarter-over-quarter basis, with growth in wholesale volumes offset by a decline in retail volumes.
- Local voice revenue grew 5.0 percent from the prior-year second quarter. Local access lines totaled more than 4.6 million at the end of the current period, representing an increase of over 85,000 lines from the end of the first quarter of 2004.
- Data revenue declined 10.4 percent from the prior-year second quarter. Revenue was negatively affected by pricing pressure, weak demand and technology migration.
- IP&E-services revenue grew 2.3 percent over the prior-year second quarter. The quarter-over-quarter growth was primarily driven by strength in advanced services, including Enhanced Virtual Private Network and IP-enabled frame.
- Outsourcing, professional services and other revenue declined 18.9 percent from the prior-year second quarter, due to customers reducing scope and terminating outsourcing contracts.
- Operating income totaled \$152 million in the period, yielding an operating margin of 2.7 percent. Second-quarter 2004 operating income included net restructuring and other charges of \$52 million related to employee separations. The operating margin declined from the prior-year second quarter, reflecting the ongoing mix shift from retail LD products toward advanced and wholesale services.
- The sequential increase in second-quarter operating margin was primarily driven by favorable access settlements. In the second half of 2004, we expect the operating margin to be eroded by continuing pricing pressure in the enterprise segment, RBOC share gains in the small and medium business markets and the customary impact of seasonality.
- Capital expenditures were \$463 million as AT&T Business continued to invest in its network and systems to drive continued cost efficiencies and expand its customer-focused networking capabilities.
- AT&T Business showed an improvement in market share trends at the high end of the market, consistent with its strategy of keeping and building its enterprise customer base.
- During the second quarter, a number of sizable customer wins and contract extensions were signed with companies including Lockheed Martin, Deutsche Bank and Providea, as well as The United States Army and The Internal Revenue Service, among many others.

AT&T Consumer

- Revenue was \$2.0 billion, a decline of 14.6 percent versus the prior-year second quarter, driven by lower standalone LD voice revenue as a result of the continued impact of competition, wireless and Internet substitution and customer migration to lower-priced products and calling plans, partially offset by targeted price increases.

- Operating income totaled \$240 million, yielding an operating margin of 11.9 percent. The margin decline from the prior-year second quarter was largely due to ongoing substitution and competition. In addition, increased spending for marketing and new initiatives such as VoIP contributed to the margin decline. Such declines were partially offset by the effects of pricing actions.
- According to industry estimates, more than 40% of American households have now migrated to some combination of bundled communications services. Recent regulatory decisions make it financially infeasible for AT&T to offer a competitive bundle of services to consumers. AT&T has determined that it cannot effectively compete against bundled competition by selling only standalone LD.
- As of June 30, 2004 AT&T Consumer offered its residential VoIP AT&T CallVantageSM Service in 72 major markets throughout the U.S. Recently, the company expanded the availability of its offer to 100 major markets in 32 states and Washington D.C.

OTHER CONSOLIDATED FINANCIAL HIGHLIGHTS

- Free cash flow was \$0.6 billion for the quarter. Free cash flow is defined as cash flow provided by operating activities of \$1.1 billion less cash used for capital expenditures and other additions of \$0.5 billion.
- AT&T ended the quarter with net debt of \$7.9 billion, a \$0.5 billion decrease from the end of the first quarter of 2004. Net debt is defined as total debt of \$11.2 billion less cash of \$2.5 billion, restricted cash of \$0.5 billion and net foreign debt fluctuations of \$0.3 billion.

DEFINITIONS and NOTES

AT&T Business

LD Voice - includes all of AT&T's domestic and international LD revenue, including Intralata toll when purchased as part of an LD calling plan.

Local Voice - includes all local calling and feature revenue, Intralata toll when purchased as part of a local calling plan, as well as Inter-carrier local revenue.

Data Services- includes bandwidth services (dedicated private line services through high-capacity optical transport), frame relay and asynchronous transfer mode (ATM) revenue for LD and local, as well as revenue for managed data services.

Internet Protocol & Enhanced Services (IP&E-services) - includes all services that ride on the IP common backbone or that use IP technology, including managed IP services, as well as application services (e.g., hosting, security).

Outsourcing, Professional Services & Other - includes complex bundled solutions primarily in the wide area/local area network space, AT&T's professional services revenue associated with the company's federal government customers, as well as all other Business revenue (and eliminations) not previously defined.

Data, IP&E-Services - Percent Managed - managed services refers to AT&T's management of a client's network or network and applications including applications that extend to the customer premise equipment.

Data, IP&E-Services - Percent International - a data service that either originates or terminates outside of the United States, or an IP&E-service installed or wholly delivered outside the United States.

AT&T Consumer

Bundled Services - includes any customer with a local relationship as a starting point, and all other AT&T subscription-based voice products provided to that customer.

Standalone LD, Transactional & Other Services - includes any customer with solely a long distance relationship, non-voice products, or a non subscription-based relationship.

Local Customers - residential customers that subscribe to AT&T local service.

Other Definitions and Notes

Restricted cash - \$0.5 billion of cash that collateralizes a portion of private debt and is included in "other current assets" on the balance sheet.

Foreign currency fluctuations - represents mark-to-market adjustments, net of cash collateral collected, that increased the debt balance by approximately \$0.3 billion at June 30, 2004, on non-U.S. denominated debt of about \$1.8 billion. AT&T has entered into foreign exchange hedges that substantially offset the fluctuations in the debt balance. The offsetting mark-to-market adjustments of the hedges are included in "other current assets" and "other assets" on the balance sheet.

-
- [2Q04 Income Statement \(PDF\)](#)
 - [2Q04 Quarterly Income Statements \(PDF\)](#)
 - [2Q04 Historical Segment Data \(PDF\)](#)
 - [2Q04 Balance Sheet \(PDF\)](#)
 - [2Q04 Cash Flow \(PDF\)](#)
 - [2Q04 Reconciliation of Non-GAAP Measures \(PDF\)](#)

The foregoing contains "forward-looking statements" which are based on management's beliefs as well as on a number of assumptions concerning future events made by and information currently available to management. Readers are cautioned not to put undue reliance on such forward-looking statements, which are not a guarantee of performance and are subject to a number of uncertainties and other factors, many of which are outside AT&T's control, that could cause actual results to differ materially from such statements. These risk factors include the impact of increasing competition, continued capacity oversupply, regulatory uncertainty and the effects of technological substitution, among other risks. For a more detailed description of the factors that could cause such a difference, please see AT&T's 10-K, 10-Q, 8-K and other filings with the Securities and Exchange Commission. AT&T disclaims any intention or obligation to update or revise any forward-looking statements, whether as a result of new information, future events or otherwise. This information is presented solely to provide additional information to further understand the results of AT&T.

About AT&T

For more than 125 years, AT&T (NYSE "T") has been known for unparalleled quality and reliability in communications. Backed by the research and development capabilities of AT&T Labs, the company is a global leader in local, long distance, Internet and transaction-based voice and data services.

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