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BEFORE THE ARIZONA CORPORATION CO.

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

Arizona Corporation Commission

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IN THE MATTER OF THE)
INTERCONNECTION AGREEMENT)
BETWEEN QWEST CORPORATION AND)
MCI metro ACCESS TRANSMISSION)
SERVICES, LLC. FOR APPROVAL OF AN)
AMENDMENT FOR ELIMINATION OF)
UNE-P AND IMPLEMENTATION OF)
BATCH HOT CUT PROCESS AND QPP)
MASTER SERVICE AGREEMENT)

Docket No. T-03574A-04-0540

Docket No. T-010151B-04-0540

AT&T'S RESPONSE TO MCI'S
APPLICATION FOR REVIEW
AND APPROVAL AND QWEST'S
MOTION TO DISMISS

AT&T Communications of Mountain States, Inc and TCG Phoenix (collectively, "AT&T") hereby respond to MCI metro Access Transmission Services, L.L.C.'s ("MCI") Application for Review and Approval and Qwest Corporation's ("Qwest") Motion to Dismiss.

I. INTRODUCTION

On July 20, 2004, Qwest posted a general notification¹ on its web site advising that on July 16, 2004, Qwest and MCI had signed a commercially negotiated agreement and an 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. Furthermore, according to the notification,, "[t]he

¹ GNRL.07.20.04.3.000460.QPP A copy is attached to AT&T's Response.

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." The announcement states that "Qwest provided a courtesy copy of the commercial agreements to its in-region state commissions." Qwest will make the QPP commercial agreement available to any interested competitive local exchange carrier ("CLEC").

On July 28, 2004, MCI filed its Application for Review and Approval. Attached to MCI's Application are two agreements: 1) Amendment to Interconnection Agreement for Elimination of UNE-P and Implementation of Batch Hot Cut Process and Discounts and 2) Master Service Agreement for the Provision of Qwest Platform Plus™ Service ("QPP™ MSA"). MCI's filing describes the terms of the agreements and asks the Commission to approve the QPP™ MSA agreement and the amendment to its ICA.

The amendment to the ICA essentially makes three changes to the ICA: 1) batch hot cut terms and conditions are added (§ 3.0); 2) "Qwest shall not offer or provide to MCI and MCI shall not order or purchase from Qwest, unbundled mass market switching, unbundled enterprise switching or unbundled shared transport, in combination with other network elements as part of the unbundled network element platform ("UNE-P"), out of its existing interconnection agreement(s), with Qwest, a Qwest SGAT or any other interconnection agreement governed by 47 U.S.C. §§ 251 and 252 that MCI or one of its affiliates may in the future entered into with Qwest and MCI waives any right under applicable law in connection there with[]" (§ 4.0); and 3) line splitting will be available for loops provided pursuant to the ICA. § 5.3. The ICA, except as amended, will remain in full force and effect. § 5.1. The amendment also provides that if "the FCC, state

commission or any governmental agency rejects or modifies any material provision in this Agreement, either party may immediately upon written notice to the other party terminate this Amendment and the QPP MSA.” § 2.6.

The QPP™ MSA contains three relevant terms: 1) the definition of QPP™ service (Service Exhibit 1); 2) performance targets (Attachment A to Service Exhibit 1); and 3) the recurring and nonrecurring charges for QPP™. 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. “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 ...” QPP™ MSA, Service Ex. 1, § 1.1. *See also id.*, § 1.2. The QPP™ MSA provides that if “the FCC, a state commission or any governmental authority or agency rejects or modifies any material provision of this Agreement, either Party may immediately upon written notice to the other Party terminate this Agreement and any interconnection agreement amendment executed concurrently with this Agreement.” § 23.

The result is that the existing ICA is amended to: 1) add a batch hot cut process; 2) 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 3) 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 terms of its ICA, MCI can purchase the

“Local Switching Network Element” and “Shared Transport Network Element” out of the QPP™ MSA and have Qwest combine these “Network Elements” with loops purchased from the existing ICA to enable MCI to provide local service. MCI may no longer purchase UNE-P, but for all intents and purposes, the new service is the same except for the prices MCI pays for the network elements purchased under the QPP™ MSA.

On July 29, 2004, Qwest filed the amendment to MCI’s existing interconnection agreement with the Commission. Qwest did not request approval of the amendment.

On August 6, 2004, Qwest filed a Motion to Dismiss Application for Review of Negotiated Commercial Agreement (with Alternative Request for Intervention).² Qwest argues the QPP™ MSA does not have to be filed with the Commission for approval because the network elements or services provided therein are not required to be provided pursuant to Sections 251(b) and (c) of the Act. Motion at 7. AT&T disagrees with Qwest’s reasoning and opposes Qwest’s Motion.

AT&T supports MCI’s Application to the extent MCI believes the QPP™ MSA and the amendment to the existing ICA need to be filed with the Commission for approval pursuant to Section 252(e)(1) of the Act. AT&T takes no position here on whether the agreements meet the standards for approval contained in Section 252(e)(2)(A).

II. ARGUMENT

A. Section 252 of the Act

Qwest’s QPP™ MSA with MCI is an “interconnection agreement adopted by negotiation” that must be filed with the state commissions for approval pursuant to

² Even Qwest agrees the amendment to the ICA must be filed. Therefore, the real issue is whether the QPP™ MSA must be filed for Commission approval.

Section 252(e)(1). 47 U.S.C. § 252(e)(1). Although Qwest's notification claims that its agreement is a "commercial" agreement negotiated outside the requirements of the 1996 Act, the statute clearly requires the MCI QPP™ MSA to be filed with the Arizona commission to ensure that the agreement is nondiscriminatory, consistent with the public interest, and that its terms are available to others. The Arizona Commission should assert its authority under Section 252 and should reject Qwest's Motion to Dismiss.

The statutory language is clear: "Any interconnection agreement adopted by negotiation or arbitration *shall* be submitted for approval to the State commission." 47 U.S.C. § 252(e)(1) (emphasis added).³ The FCC has declined to adopt a definitive interpretation of the term "interconnection agreement" as used in Section 252(e).⁴ ("We decline to establish an exhaustive, all-encompassing 'interconnection agreement' standard.") Rather, the FCC has left it up to the states to make those determinations on a case-by-case basis. *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.")

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 has 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

³ Arizona also has substantive requirements for the filing and approval of interconnection agreements. Ariz. Adm. Code, Title 14, Ch. 2, Art. 15, §§ 1506-1509.

⁴ *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*"), ¶ 10.

resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation.” *Id.*, ¶ 8. The FCC has recognized that certain classes of agreements need not be filed under Section 252, but those classes are extremely narrow and ancillary: (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. *Id.* ¶¶ 9, 12-14. The QPP™ MSA does not fall within any of those exceptions.

More fundamentally, as a matter of simple statutory interpretation, the filing requirement must be at least as broad as necessary to permit the state commissions to perform the reviewing functions that Congress gave them in Section 252; otherwise, those provisions would be effectively nullified. For example, Congress expressly required the state commissions to ensure that incumbent LECs do not enter into *negotiated* agreements that “discriminate against a telecommunications carrier not a party to the agreement.” 47 U.S.C. § 252(e)(2)(A)(1). Indeed, non-discrimination is a bedrock principle of the Communications Act in general. *See MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229-31 (1994). 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 would have no way of ensuring that incumbent LECs were not entering into discriminatory or preferential secret agreements with certain carriers regarding such

elements. This is true regardless of whether the incumbent LEC is offering those network elements voluntarily or pursuant to an FCC requirement.

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 network elements and evade Section 252 review by simply agreeing that their negotiations were not "pursuant to Section 251."⁵

The FCC has consistently recognized that the requirement that *all* agreements be filed and approved by the state commissions is the core statutory protection against discriminatory treatment in the context of local competition. For example, in the *Local Competition Order*⁶, 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." *Local Competition Order*, ¶ 167; *see also id.*, ¶ 151 (noting the anticompetitive dangers of nondisclosure agreements). 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." *Qwest NAL*, ¶ 46. 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." *Id.*, ¶ 43. In an environment in which the incumbent LEC is offering network elements voluntarily, rather than pursuant to nationally uniform minimum

⁵ 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 their 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*").

⁶ *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*").

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

Section 252 also requires the state commissions to enforce in the first instance the statutory requirement that a network element offered to one carrier in an approved interconnection agreement must be offered to all carriers – the so-called “pick and choose” rule. 47 U.S.C. § 252(i). Section 252(i) by its terms does not limit the incumbent LEC’s pick-and-choose obligations to network elements offered pursuant to an FCC rule; rather, the statute’s plain terms provide that “*any*” network element or service made available to one carrier must be made available to any carrier on the same terms and conditions contained in the approved agreement. Enforcement of Section 252(i), however, depends on carriers filing their agreements with the state commission for approval and their public availability. Under Qwest’s view, Section 252(i), like the nondiscrimination requirement, would become meaningless and easily evaded, because an incumbent LEC could avoid its pick-and-choose obligations simply by agreeing with a willing partner that their negotiations for network element terms would not be conducted “pursuant to” Section 251. *See Qwest NAL*, ¶ 20. (Absent the Section 252 mechanism of filing and approval, “the nondiscriminatory, pro-competition purpose of Section 252(i) would be defeated....” (citation omitted).)

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].”⁷ 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. *See, e.g., Qwest NAL*, ¶ 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.) Filing is also necessary to facilitate operation of the statutory “pick-and-choose” requirement.

Qwest argues that filing is not required under Sections 252(a)(1) and (e) because MCI’s request for network elements was not “pursuant to Section 251.” 47 U.S.C. § 251(a)(1). 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 was undoubtedly invoking Qwest’s duty under Section 251(c)(1) to negotiate with requesting carriers in good faith. *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). Moreover, MCI’s request for network elements, even if voluntarily provided by Qwest, necessarily depended on Qwest’s fulfillment of its continuing *duties* under Section 251 to provide local number portability, dialing parity, reciprocal compensation, and even unbundled loops, which remain a mandatory element. If Qwest had balked at providing any of these requirements, MCI could have invoked its right to arbitration under Section 252 – a fact which undoubtedly informed the parties’ negotiations. Accordingly, there is no

⁷ There is no question that the Local Switching Network Element and the Shared Transport Element described in, and provided under the terms of, the QPPTM MSA fall within the definition of network element contained in the Act. 47 U.S.C. § 153(45).

meaningful 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 MCI 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." 47 U.S.C. § 251(c)(1) & (c)(3). 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 QPP™ MSA must be filed with the state 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. *Qwest Declaratory Ruling*, ¶ 10. It is not for Qwest to determine unilaterally that the agreement falls outside Section 252's requirements; the agreement must be filed immediately to permit the state commission to make the determinations required by statute.⁸

⁸ Prompt submission to state commissions is all the more important because, even if Qwest could establish that some or all of the QPP™ MSA need not be filed Section 252 – and there is no conceivable basis for any such finding – the agreement would be subject to other filing requirements under state law. If the MCI

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 with them. 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.” Letter from Randolph L. Wu, State of California Public Utilities Commission, to SBC (April 21, 2004).

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].” Case No. U-14121, Michigan Public Service Commission (April 28, 2004). The Chair of the Michigan Public Service Commission also publicly 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 to ensure that the agreement is in the public interest and does not discriminate against other providers.” Michigan Public Service Commission, Press Release April 28, 2004 (available at <http://www.michigan.gov/mpsc>).

arrangements are not network elements for purposes of Section 252, then they are carrier-to-carrier interconnection arrangements under the Commission’s rule R14-2-1112.

On May 5, 2004, the Public Utilities Commission of Ohio directed SBC and Sage to file comments and legal analysis supporting their position 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.” Public Utilities Commission of Ohio News Release, May 5, 2004 (available at www.puc.state.oh.us).

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. *In re Agreement Between SBC Communications, Inc. & Sage Telecom, Inc.*, Order to Show Cause, Mo. P.S.C. Case no. TO-2004-0576 (May 11, 2004).

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.’”

On July 27, 2004, the Missouri Public Service 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 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.

Agreement between SBC Communications, Inc. and Sage Telecom, Inc., Case No. TO-2004-0576; *Amendment Superseding 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 3.⁹

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.)

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).¹⁰

NARUC also stated that SBC and Sage should be required 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

⁹ 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 without the commercial agreement also being filed for approval. The MCI ICA amendment and the QPP™ MSA are also indivisible. See ICA Amendment, § 2.6 and QPP™ MSA § 23.

¹⁰ The Kansas Staff found the amendment to the interconnection agreement and the commercial agreement to be “inextricably intertwined.” Order at 6.

in the States where they are effective as required by § 252(a)(1).” Letter from Stan Wise, NARUC President, to Sage and SBC, April 8, 2004. Mr. Wise noted: “Rapid filing and approval by the respective State commissions can only facilitate the ongoing industry negotiations.” *Id.*

B. Section 271 of the Act

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, 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 Arizona 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. 47 U.S.C. § 271(d)(6)(A)(iii). Furthermore, Qwest must offer competitive checklist items pursuant to “binding *agreements that have been approved under section 252[.]*” 47 U.S.C. § 271(c)(1)(A) (emphasis added).

47 U.S.C. § 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 to one or more agreements described in [Section 271(c)](1)(A)”¹¹ and (2) such “access and interconnection” must include the checklist items specified in subparagraph (B). 47 U.S.C. § 271(c)(2)(A)(ii).

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.¹²

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.

¹¹ 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.

¹² 47 U.S.C. § 271(c)(1)(A) (emphasis added). Subparagraph (B) of § 271(c)(1) does not apply in Arizona because it applies only where no request for access or interconnection is made.

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 request, determining that Section 252 creates a broad obligation to file 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 has also always recognized that it is essential that BOCs demonstrate compliance with Section 271 through binding and lawful Section 252 interconnection agreements containing specific terms and conditions implementing the competitive checklist. The FCC has made it clear that when a competitive LEC 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.”¹³

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

¹³ *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), ¶ 110 (emphasis added).

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 CLEC 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 other competitive checklist items, then Qwest would plainly have “cease[d] to meet” one of the essential conditions of section 271,¹⁴ namely, an “agreement[] that has been approved under section 252[.]”¹⁵

III. CONCLUSION

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

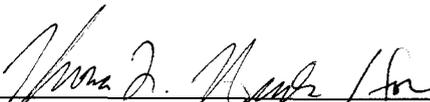
Qwest seeks to make a legal distinction that does not exist in the Act. The QPPTTM MSA provides for network elements as defined by the Act. In fact, Qwest calls the services network elements. It is a voluntary negotiated agreement. Qwest may argue that the elements are not provided under Sections 251(b) 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. Qwest’s Motion to Dismiss must be denied.

¹⁴ 47 U.S.C. § 271(d)(6)

¹⁵ See § 271(c)(2)(A) (“Agreement *required*”) (emphasis added).

Submitted this 17th day of August, 2004.

**AT&T COMMUNICATIONS OF THE
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CERTIFICATE OF SERVICE

I hereby certify that the original and 15 copies of AT&T's Response to MCI's Application for Review and Approval and Qwest's Motion to Dismiss were filed on this 17th day of August, 2004, with:

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Docket Control - Utilities Division
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and a true and correct copy was sent via United States Mail, postage prepaid, on this 17th day of August, 2004, to:

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