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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

DOCKETED

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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 SERVICES)

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

RESPONSE TO QWEST'S
MOTION TO DISMISS

MCImetro Access Transmission Services, LLC ("MCImetro") files its response to Qwest's Motion to Dismiss filed in this docket on or about August 6, 2004. For the reasons stated below, MCImetro opposes the motion.

INTRODUCTION

Qwest Corporation moved to dismiss any review and approval of what is known as the Qwest Master Services Agreement (the "Commercial Agreement") under which Qwest agreed to provide to MCImetro Qwest Platform Plus™ services under Section 271 of the

1 federal Telecommunications Act of 1996 (“federal Act”). These Section 271 services
2 consist primarily of local switching and shared transport network elements in combination
3 with certain other services.¹ (emphasis added).
4

5 In support of its Motion, Qwest states that the Commercial Agreement expressly
6 provides that it does not amend or alter the terms and conditions of any existing
7 interconnection agreements (“ICA”) between MCI and Qwest. Qwest also states that,
8 since the Commercial Agreement contains no terms and conditions for services that Qwest
9 must provide under Section 251(b) and (c), it is not an ICA or an amendment to an ICA
10 between Qwest and MCI. Accordingly, Qwest argues that this Commission has no
11 authority under Section 251 or 252 of the federal Act to review or approve the
12 Commercial Agreement.²
13
14

15 Relevant sections of the Commercial Agreement provide in pertinent part:

16 4.3 The provisions in this Agreement are intended to be in compliance with and
17 based on the existing state of the law, rules, regulations and interpretations thereof,
18 including but not limited to Federal rules, regulations, and laws, as of the Effective
Date regarding Qwest’s obligation under Section 271 of the Act to continue to
provide certain Network Elements (“Existing Rules”).

19 4.5 To receive services under this Agreement, MCI must be a certified CLEC
20 under applicable state rules. MCI may not purchase or utilize services or Network
Elements covered under this Agreement for its own administrative use or for the use
by an Affiliate.

21 4.6 Except as otherwise provided in this Agreement, the Parties agree that
22 Network Elements and services provided under this Agreement are not subject to
23 the Qwest Wholesale Change Management Process (“CMP”) requirements,
24 Qwest’s Performance Indicators (PID), Performance Assurance Plan (PAP), or any
25 other wholesale service quality standards, liquidated damages, and remedies.
Except as otherwise provided, MCI hereby waives any rights it may have under the
PID, PAP and all other wholesale service quality standards, liquidated damages,

26 ¹ Qwest’s Motion to Dismiss, at 1.

² *Id.* at 1-3.

1 and remedies with respect to Network Elements and services provided pursuant to
2 this Agreement. Notwithstanding the foregoing, MCI proposed changes to QPP
3 attributes and process enhancements will be communicated through the standard
account interfaces. Change requests common to shared systems and processes
subject to CMP will continue to be addressed via the CMP procedures.

4 (emphasis added). Finally, that portion of the Commercial Agreement entitled, Service
5 Exhibit 1 - Qwest Platform Plus™ Service, provides in Section 1.1:

6 QPP™ services shall consist of the Local Switching Network Element (including
7 the basic switching function, the port, plus the features, functions, and capabilities
8 of the Switch including all compatible and available vertical features, such as
9 hunting and anonymous call rejection, provided by the Qwest switch) and the
10 Shared Transport Network Element in combination, at a minimum to the extent
available on UNE-P under the applicable interconnection agreement or SGAT
where MCI has opted into an SGAT as its interconnection agreement (collectively,
“ICAs”) as the same existed on June 14, 2004.

11 (emphasis added).

12 ARGUMENT

13 A. Federal Law Requires that the Commercial Agreement Be Filed for 14 Review and Approval.

15 Section 252(a)(1) of the federal Act, entitled “Voluntary Negotiations”, states:

16 (1) Upon receiving a request for interconnection, services, or network
17 elements pursuant to section 251, an incumbent local exchange carrier may
18 negotiate and enter into a binding agreement with the requesting
19 telecommunications carrier or carriers without regard to the standards set forth in
subsections (b) and (c) of section 251. The agreement, including any
interconnection agreement negotiated before the date of the Telecommunications
Act of 1996, shall be submitted to the State commission under subsection (e) of this
section.

20 Section 252(e)(1) and (3) provide in part:

21 (1) Any interconnection agreement adopted by negotiation or arbitration
22 shall be submitted for approval to the State commission

23 . . .

24 (3) Notwithstanding paragraph (2), but subject to section 253 of this title,
25 nothing in this section shall prohibit a State commission from establishing or
26 enforcing other requirements of State law in its review of an agreement, including
requiring compliance with intrastate telecommunications service quality standards
or requirements.

1 This section was interpreted by the Federal Communications Commission (“FCC”)
2 in October 2002:

3 7. . . .we believe that the state commissions should be responsible for applying, in
4 the first instance, the statutory interpretation we set forth today to the terms and
5 conditions of specific agreements. Indeed, we believe this is consistent with the
6 structure of section 252, which vests in the states the authority to conduct fact-
7 intensive determinations relating to interconnection agreements

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

12 10. Based on their statutory role provided by Congress and their experience to
13 date, state commissions are well positioned to decide on a case-by-case basis
14 whether a particular agreement is required to be filed as an “interconnection
15 agreement” and, if so, whether it should be approved or rejected.³

16 As noted by Qwest, footnote 26 referenced in Paragraph 8 states: “[W]e find that
17 only those agreements that contain an ongoing obligation relating to section 251(b) or (c)
18 must be filed under 252(a)(1).” However, in March 2004, in its Notice of Apparent
19 Liability for Forfeiture issued to Qwest, the FCC stated in Paragraph 21: “We have
20 historically given broad construction to Section 252(a)(1).” The FCC further stated:

21 any agreement that creates an ongoing obligation pertaining to resale, number
22 portability, dialing parity, access to rights-of-way, reciprocal compensation,
23 interconnection, unbundled network elements, or collocation is an interconnection
24 agreement that must be filed pursuant to section 252(a)(1).⁴

25 ³ Memorandum Opinion and Order FCC 02-276 issued in WC Docket 02-89, entitled
26 *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)*, Paragraphs 7, 8 and 10.

⁴ *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.

1 In this latter instance, the FCC did not limit its direction to only those agreements
2 that contain an ongoing obligation relating to section 251(b) or (c).⁵ Because this
3 agreement creates an ongoing obligation pertaining to Qwest's provision of unbundled
4 network elements (albeit pursuant to Section 271, not Section 251/252), the parties have
5 an obligation to file the Commercial Agreement with the state so that the state can
6 determine whether the Commercial Agreement discriminates against a
7 telecommunications carrier not a party to the Commercial Agreement and whether
8 approval of the Commercial Agreement is not consistent with the public interest,
9 convenience and necessity as described in Section 252(e)(2)(A).
10

11 Thus, MCImetro believes that the Commercial Agreement must be filed with the
12 state under federal law.
13

14 **B. The Commercial Agreement Must Be Filed under State Law for Review and**
15 **Approval.**

16 In this Commission's rules governing the submission of interconnection
17 agreements, the Commission defines an "interconnection agreement" as follows:
18

19 D. "Interconnection Agreement" means a formal agreement between any
20 telecommunications carriers providing or intending to provide telecommunications
21 services in Arizona, setting forth the particular terms and conditions under which
22 interconnection and resale services, as appropriate, will be provided.⁶

23 "Interconnection Services" are further defined by the Commission as:

24 11. "Interconnection Services" means those features and functions of a local
25 exchange carriers network that enable other local exchange carriers to provide local
26 exchange and exchange access services. Interconnection services include, but are

⁵ *Id.* at ¶ 22.

⁶ A.A.C. R14-2-1502.D.

1 not limited to, those services offered by local exchange carriers which have been
2 classified by the Commission as essential services.⁷

3 “Essential services” are defined as:

4 8. "Essential facility or service" means any portion, component, or function of the
5 network or service offered by a provider of local exchange service; that is necessary
6 for a competitor to provide a public telecommunications service; that cannot be
7 reasonable duplicated; and for which there is no adequate economic alternative to
8 the competitor in terms of quality, quantity, and price.⁸

9 As stated by Qwest in its Motion, the Section 271 services provided under the
10 Commercial Agreement consist primarily of local switching and shared transport network
11 elements in combination with certain other services. Using the Commission's definitions
12 stated above, the Commercial Agreement is a formal agreement between
13 telecommunications carriers providing or intending to provide telecommunications
14 services in Arizona, setting forth the particular terms and conditions under which features
15 and functions of Qwest's network that enable MCImetro to provide local exchange and
16 exchange access services and resale services will be provided to MCImetro. It is,
17 therefore, an interconnection agreement under the Commission's rules.

18 Under the Commission's rules governing submission of interconnection
19 agreements, the Commercial Agreement must be submitted to the Commission for
20 approval for a determination whether the negotiated amendments discriminate against
21 nonparty telecommunications carriers or lack consistency with the public interest,
22 convenience, and necessity, or lack of consistency with applicable state law requirements.
23

24
25 ⁷ A.A.C. R14-2-1302.11.

26 ⁸ A.A.C. R14-2-1302.8.

1 Qwest's assertion that state regulation concerning filing and review requirements is
2 preempted because it is inconsistent with FCC rulings and federal law is not correct.⁹

3 Filing the Commercial Agreement with this Commission is not inconsistent, because both
4 federal law and state law require filing.
5

6 On August 3, 2004, the Michigan Public Service Commission ("Michigan
7 Commission") addressed the filing of agreements entered into by SBC Michigan ("SBC")
8 and Sage Telecom, Inc. ("Sage") under Section 252.¹⁰ On April 28, 2004, the Michigan
9 Commission ordered SBC and Sage to file that agreement in its entirety with the
10 Commission for review pursuant to Section 252(a) and (e) of the federal Act. In addition,
11 the Michigan Commission found that its jurisdiction over the agreement at issue was not
12 limited to the federal Act, citing Section 355 of the Michigan Telecommunications Act,
13 1991 PA 179, as amended, MCL 484.2101 *et seq.* ("MTA"). The Commission stated that,
14 under the MTA, a provider of basic local exchange service such as SBC "must unbundle
15 and separately price each basic local exchange service offered by the provider into loop
16 and port components."¹¹ The Commission also noted that Section 355 obligates a provider
17 to "allow other providers to purchase such services on a nondiscriminatory basis."¹²
18
19
20
21
22

23 ⁹ See Qwest Motion to Dismiss, at 8.

24 ¹⁰ *In the Matter of the Request for Commission Approval of an Interconnection Agreement*
25 *between SBC Michigan and Sage Telecom, Inc.*, Case No. U-13513, and *In the Matter, On*
26 *the Commission's Own Motion to Require SBC Michigan and Sage Telecom, Inc., to*
Submit Their Interconnection Agreement for Review and Approval, Case No. U-14121.

¹¹ *Id.* at 2.

¹² *Id.* (quoting MCL 484.2355).

1 The Michigan Commission found that it has broad discretion under Section 252 for
2 determining whether an agreement between an incumbent local exchange carrier and a
3 competitive local exchange carrier must be filed. The Michigan Commission cited the
4 FCC ruling in which the FCC addressed this issue when Qwest faced litigation in
5 Minnesota regarding its intentional failure to file secret interconnection agreements. In
6 that case, the FCC stated that ““an agreement that creates an ongoing obligation pertaining
7 to resale, number portability, dialing parity, access to rights-of-way, reciprocal
8 compensation, interconnection, unbundled network elements, or collocation is an
9 interconnection agreement that must be filed pursuant to section 252(a)(1).””¹³

12 The Michigan Commission found that most of the provisions of Sage Commercial
13 Agreement and the eighth amendment qualified for review and approval under the federal
14 Act. Specifically, the Michigan Commission concluded that, except for the commercially
15 sensitive information redacted from the public version of the agreement filed by SBC and
16 Sage, the remainder of the Commercial Agreement and eighth amendment are subject to
17 the Commission’s review and approval. The Michigan Commission also found:
18

19
20 SBC and Sage should be obligated to make the LWC Agreement pricing schedule
21 public. The Commission finds that the LWC Agreement pricing schedule, which is
22 an attachment to the LWC Agreement, is an integral part of the arrangement that
23 must be disclosed. Further, any of the redacted provisions of the LWC Agreement
24 that refer to the pricing schedule should also be disclosed. The FCC’s recent
25 decision to change its “pick and choose” rule (47 CFR 51,809) to an “all or
26 nothing” rule provides further support for requiring the disclosure of the bulk of the
LWC Agreement because there is no reason for SBC to now claim that a provider
can choose to be bound by only certain provisions of the agreement and attempt to
negotiate better terms regarding those provisions not chosen.¹⁴

¹³ *Id.* at 15 (quoting Qwest Order, ¶ 8).

¹⁴ *Id.* at 16.

1 Here, like the SBC/Sage LWC Agreement, the Commercial Agreement is an integral part
2 of the arrangement and available under the FCC's recent "all or nothing" pick and choose
3 rule.

4 For the reasons stated above, Qwest's Motion to Dismiss should be denied.

5 Respectfully submitted this 24th day of August, 2004.

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21 ORIGINAL and fifteen (15) copies
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