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MEMORANDUM

TO: Docket Control

FROM: Ernest G. Johnson
Jan Director
Utilities Division

THRU: Wilfred Shand, Jr. *W*
Manager, Telecommunications & Energy Section
Utilities Division

Matthew Rowell *MR*
Chief, Telecommunications & Energy Section
Utilities Division

Arizona Corporation Commission

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AZ CORP COMMISSION
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DATE: November 15, 2004

RE: IN THE MATTER OF THE APPLICATION OF BCE NEXXIA CORPORATION FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE FACILITIES-BASED INTEREXCHANGE SERVICES AND PETITION FOR COMPETITIVE CLASSIFICATION OF PROPOSED SERVICES WITH THE STATE OF ARIZONA (DOCKET NO. T-04200A-03-0550)

On August 5, 2003, BCE Nexxia Corporation ("BCE") filed an application with the Arizona Corporation Commission ("Commission") to obtain a Certificate of Convenience and Necessity ("CC&N") to provide facilities-based interexchange telecommunications services in Arizona.

On April 22, 2004, a hearing on this matter took place. At this hearing, BCE indicated that it would enter into Interconnection Agreements for access to facilities to be used in terminating and originating traffic to large customers for data service needs.

On July 12, 2004, in Decision No. 67113, the Commission granted a CC&N to BCE to provide facilities-based interexchange telecommunications services in Arizona. In this Decision, BCE was ordered to, among other things, file any Interconnection Agreements that must be filed pursuant to the Federal Telecom Act with the Commission.

On October 20, 2004, BCE filed a Motion for Modification of Order Condition ("Motion") to modify Decision No. 67113. Specifically, BCE is requesting that the Commission delete the condition to procure an Interconnection Agreement within 365 days of the effective date of the Order in this matter or 30 days prior to the provision of service, unless it provides services solely through the use of its own facilities. BCE indicated that it misunderstood the

term "Interconnection Agreement" and that it instead plans to enter into "service agreements" with other carriers to provide customers access to the BCE network. BCE also indicated that conditions of this type are not normally contained in authorizations to provide facilities-based interexchange service and that it requests to be treated similar to other facilities-based interexchange carriers operating in Arizona.

On November 2, 2004, the Commission's Hearing Division ("Hearing") issued a Procedural Order which ordered Staff to indicate whether it objects to the granting of BCE's Motion and to explain the difference between an "Interconnection Agreement" and "Service Agreement" as described in BCE's Motion, and the extent to which such a service agreement may be subject to the Federal Telecommunications Act's filing requirements.

The Federal Communications Commission, in its Memorandum Opinion and Order, adopted October 2, 2002,¹ found that "Section 252(a)(1) provides that the binding agreement between the incumbent LEC and the requesting competitive LEC must include a "detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. In addition, section 251(c)(1) required incumbent LECs to negotiate in good faith, in accordance with section 252, the particular terms and conditions of agreements to implement their duties set forth in sections 251(b) and (c). Based on these statutory provisions, we find that an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled networks elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)." Interconnection Agreements that need to be filed for Commission approval pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 pertain to local exchange carriers only.

Staff believes that a "Service Agreement" is a general term that in the telecommunications industry, means any agreement between 2 telecommunications carriers pertaining to aspects of their business relationship not included in the above definition of Interconnection Agreement.

Because BCE is an interexchange carrier, not a local exchange carrier, Staff does not believe the term Interconnection Agreement is applicable to it. Staff believes that agreements BCE enters into with other telecommunications providers can be referred to as service agreements. Typically, the Commission has not required interexchange carriers to file Interconnection Agreements.

Staff supports BCE's motion requesting deletion of the condition that BCE enter into an Interconnection Agreement.

¹ *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 Agreements under Section 252(a)(1)*, Memorandum Opinion and Order, Adopted October 2, 2002, Released October 4, 2002, WC Docket 02-89

Originator: Adam Lebrecht

Attachment: Original and Sixteen Copies

SERVICE LIST FOR: BCE NEXXIA CORPORATION
DOCKET NO. T-04200A-03-0550

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Ms. Lyn Farmer
Chief Administrative Law Judge
Arizona Corporation Commission
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Lebrecht

BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

- MARC SPITZER - CHAIRMAN
- WILLIAM A. MUNDELL
- JEFF HATCH-MILLER
- MIKE GLEASON
- KRISTIN K. MAYES

OCT 20 2004

AZ Corporation Commission
Director Of Utilities

IN THE MATTER OF THE APPLICATION OF) DOCKET NO. T-04200A-03-0550
 BCE NEXXIA CORPORATION FOR A)
 CERTIFICATE OF CONVENIENCE AND)
 NECESSITY TO PROVIDE FACILITIES-BASED)
 INTEREXCHANGE SERVICES AND PETITION)
 FOR COMPETITIVE CLASSIFICATION OF)
 PROPOSED SERVICES WITH THE STATE OF)
 ARIZONA.)

MOTION FOR MODIFICATION OF ORDER CONDITION

BCE Nexxia Corporation ("BCE"), by its undersigned counsel, hereby moves the Arizona Corporation Commission ("Commission") to modify a condition contained in the above-captioned Opinion and Order ("Order") granting BCE authority to operate in Arizona, dated July 12, 2004.¹ Specifically, BCE requests the Commission remove the condition that BCE procure an Interconnection Agreement unless it provides services solely through the use of its own facilities.²

BCE believes that the condition was improperly included in the Order due to a misunderstanding of the term "interconnection agreement". BCE testified that it intends to enter into interconnection agreements for access facilities to be used in terminating and originating traffic to large customers for data service needs.³ In fact, BCE intends to enter into service agreements, not interconnection agreements, with other carriers in Arizona in order to provide

¹ See *In Re* Application of BCE Nexxia Corporation for a Certificate of Convenience and Necessity to Provide Facilities-Based Interexchange Telecommunications Services in Arizona and for Competitive Classification of its Services, *Opinion and Order*, Dkt. No. T-04200A-03-0550, Decision No. 67113 (July 12, 2004).

² See Order at ¶ 16, subsection (a).

³ Order at ¶ 14.

ROSHKA HEYMAN & DEWULF, PLC
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1 customers access to the BCE network. Due to the BCE's use of the term "interconnection
2 agreement", the Commission included in its Order a requirement that BCE enter into an
3 Interconnection Agreement and file such Agreement with the Commission. As an IXC, BCE
4 neither needs nor desires to enter into any such agreements in order to provide services to
5 customers in Arizona.

6 Further, it is BCE's understanding that the condition that BCE enter into an
7 Interconnection Agreement is not normally a condition contained in authorizations for facilities-
8 based IXC carriers. As such, there is no detriment to the public interest if the Commission grants
9 this motion. In fact, BCE only requests to be treated similarly as other facilities-based IXCs
10 operating in Arizona.

11 Lastly, BCE has conferred with Commission Staff regarding this motion, and has been
12 advised that Staff has no objection to this motion.

13 WHEREFORE, BCE respectfully requests that the Commission grant this motion and
14 remove the condition requiring BCE to enter into an Interconnection Agreement before being
15 allowed to offer facilities-based IXC services within the State of Arizona.

16 RESPECTFULLY SUBMITTED this 20th day of October, 2004

17 BCE Nexxia Corporation

18
19 By 
20 Michael W. Patten
21 ROSHKA HEYMAN & DEWULF, PLC
22 One Arizona Center
23 400 East Van Buren Street, Suite 800
24 Phoenix, Arizona 85004
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1 Original and 13 copies filed
2 this 20 day of October, 2004
3 with:

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

8 Copy of the foregoing hand-delivered
9 this 20 day of October, 2004 to:

10 Amanda Pope, Esq.
11 Administrative Law Judge
12 Hearing Division
13 Arizona Corporation Commission
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15 Phoenix, Arizona 85007

16 Lisa Vandenberg, Esq.
17 Attorney, Legal Division
18 Arizona Corporation Commission
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20 Phoenix, Arizona 85007

21 Adam LeBrecht
22 Utilities Division
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By Mary Appolito

BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

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

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AZ CORP COMMISSION
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NOV 02 2004

AZ Corporation Commission
Director Of Utilities

IN THE MATTER OF THE APPLICATION OF
BCE NEXXIA CORPORATION FOR A
CERTIFICATE OF CONVENIENCE AND
NECESSITY TO PROVIDE FACILITIES-BASED
INTEREXCHANGE SERVICES AND PETITION
FOR COMPETITIVE CLASSIFICATION OF
PROPOSED SERVICES WITH THE STATE OF
ARIZONA.

DOCKET NO. T-04200A-03-0550

PROCEDURAL ORDER

BY THE COMMISSION:

On July 12, 2004, the Arizona Corporation Commission ("Commission") issued Decision No. 67113 granting BCE Nexxia Corporation ("BCE") a Certificate of Convenience and Necessity ("CC&N") to provide competitive facilities-based interexchange telecommunications services in Arizona subject to certain conditions including, but not limited to, the procurement of an Interconnection Agreement, within 365 days of the effective date of the Order in this matter or 30 days prior to the provision of service, unless BCE provides services solely through the use of its own facilities.¹

On October 20, 2004, BCE filed a Motion for Modification of Order Condition ("Motion") requesting deletion of the condition that BCE procure an Interconnection Agreement unless it provides services solely through the use of its own facilities based upon the fact that BCE intends to enter in to "service agreements", not interconnection agreements, with other carriers in Arizona in order to provide customers access to the BCE network.

The Commission's Utilities Division Staff ("Staff") has not, however, filed a statement of its

¹ See Decision No. 67113 at ¶ 16, subsection (a).

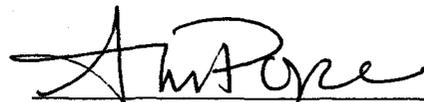
4/22/04 HEARING

1 position with regard to BCE's Motion.

2 It is, therefore, appropriate to require Staff to submit its position with regard to BCE's
3 Motion, which not only indicates whether it objects to the granting of the Motion but also explains
4 the difference between an interconnection agreement and a "service agreement", as described in
5 BCE's Motion, and the extent to which such a service agreement may be subject to the Federal
6 Telecommunications Act's filing requirements.

7
8 IT IS THEREFORE ORDERED that Staff shall file a response to BCE's Motion, which
9 addresses the issues raised above on or before November 15, 2004.

10 DATED this 2nd day of November, 2004.

11
12 
13 AMANDA POPE
14 ADMINISTRATIVE LAW JUDGE

15 Copies of the foregoing mailed/delivered
16 this 2 day of November, 2004 to:

17 Michael W. Patten
18 ROSHKA HEYMAN & DEWULF, PLC
19 One Arizona Center
20 400 East Van Buren Street, Suite 800
21 Phoenix, Arizona 85004

22 Christopher Kempley, Chief Counsel
23 Legal Division
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27 Ernest Johnson, Director
28 Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, Arizona 85007

29 By: 
30 Molly Johnson
31 Secretary to Amanda Pope

1 2003. These financial statements list total assets in excess of \$39 billion, total equity in excess of \$13
2 billion, and net income in excess of \$1.8 billion.

3 14. At the hearing, BCE testified that it intends to enter into interconnection agreements
4 for access facilities to be used in terminating and originating traffic to large customers for data
5 service needs. Accordingly, we will require BCE to file any interconnection agreements that must be
6 filed pursuant to the Federal Telecom Act with the Commission.

7 15. The Application states that BCE does not collect advances and deposits from its
8 customers.

9 16. Staff recommends that BCE's application for a Certificate to provide competitive
10 facilities-based interexchange telecommunications services be granted subject to the following
11 conditions:

- 12 (a) that, unless it provides services solely through the use of its own facilities,
13 Applicant be ordered to procure an Interconnection Agreement, within 365
14 days of the effective date of the Order in this matter or 30 days prior to the
15 provision of service, whichever comes first, that must remain in effect until
16 further order of the Commission, before being allowed to offer interexchange
17 exchange service;
- 18 (b) Applicant should be ordered to comply with all Commission rules, orders and
19 other requirements relevant to the provision of intrastate telecommunications
20 service;
- 21 (c) Applicant should be ordered to maintain its accounts and records as required
22 by the Commission;
- 23 (d) Applicant should be ordered to file with the Commission all financial and other
24 reports that the Commission may require, and in a form and at such times as
25 the Commission may designate;
- 26 (e) Applicant should be ordered to maintain on file with the Commission all
27 current tariffs and rates, and any service standards that the Commission may
28 require;
- (f) Applicant should be ordered to comply with the Commission's rules and
modify its tariffs to conform to these rules if it is determined that there is a
conflict between the Applicant's tariffs and the Commission's rules;
- (g) Applicant should be ordered to cooperate with Commission investigations
including, but not limited to, customer complaints;
- (h) Applicant should be ordered to participate in and contribute to a universal
service fund, as required by the Commission
- (i) Applicant should be ordered to notify the Commission immediately upon

must be filed for state commission review and approval.¹⁸

6. The commenters dispute Qwest's assertions concerning the burden of "overfiling" agreements for state commission approval¹⁹ and disagree with Qwest's interpretation of the legal status of agreements not filed under section 252 or not yet approved by state commissions under the same section.²⁰ Specifically, these commenters contend that nothing in section 252, or any other provision of the Act, provides that the parties are prohibited from abiding by the agreement's terms until a state commission completes its review of the negotiated agreement.²¹ Moreover, according to AT&T, not only does the 90-day approval process not present any legal impediment to parties that would like to begin operating under the terms of a negotiated agreement prior to state commission approval, there is no practical impediment (*e.g.*, compliance jeopardy) because interconnection agreements are rarely rejected.²²

III. DISCUSSION

7. We grant in part and deny in part Qwest's petition for a declaratory ruling. In issuing this decision, however, we believe that the state commissions should be responsible for applying, in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements. Indeed, we believe this is consistent with the structure of section 252, which vests in the states the authority to conduct fact-intensive determinations relating to interconnection agreements.²³

8. We begin our analysis with the statutory language. Section 252(a)(1) provides that the binding agreement between the incumbent LEC and the requesting competitive LEC must include a "detailed schedule of itemized charges for interconnection and each service or network element included in the agreement."²⁴ In addition, section 251(c)(1) requires incumbent LECs to negotiate in good faith, in accordance with section 252, the particular terms and conditions of agreements to implement their duties set forth in sections 251(b) and (c).²⁵ Based on these

¹⁸ AT&T Comments at 4, 6-9; Mpower Comments at 7; Sprint Comments at 3; WorldCom Comments at 6; ALTS Reply at 2.

¹⁹ *See, e.g.*, AT&T Comments at 13; Sprint Comments at 3.

²⁰ AT&T Comments at 12; Minnesota Department of Commerce Comments at 38.

²¹ AT&T Comments at 12; Minnesota Department of Commerce Comments at 38.

²² AT&T Comments at 12-13, citing Qwest Petition at 9.

²³ As an example of the substantial implementation role given to the states, throughout the arbitration provisions of section 252, Congress committed to the states the fact-intensive determinations that are necessary to implement contested interconnection agreements. *See, e.g.*, 47 U.S.C. § 252(e)(5) (directing the Commission to preempt a state commission's jurisdiction only if that state commission fails to act to carry out its responsibility under section 252).

²⁴ 47 U.S.C. § 252(a)(1).

²⁵ 47 U.S.C. § 251(c)(1).

statutory provisions, we find that an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).²⁶ This interpretation, which directly flows from the language of the Act, is consistent with the pro-competitive, deregulatory framework set forth in the Act. This standard recognizes the statutory balance between the rights of competitive LECs to obtain interconnection terms pursuant to section 252(i) and removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs. We therefore disagree with Qwest that the content of interconnection agreements should be limited to the schedule of itemized charges and associated descriptions of the services to which the charges apply. Considering the many and complicated terms of interconnection typically established between an incumbent and competitive LEC, we do not believe that section 252(a)(1) can be given the cramped reading that Qwest proposes. Indeed, on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions.

9. We are not persuaded by Qwest that dispute resolution and escalation provisions are *per se* outside the scope of section 252(a)(1).²⁷ Unless this information is generally available to carriers (*e.g.*, made available on an incumbent LEC's wholesale web site), we find that agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements. The purpose of such clauses is to quickly and effectively resolve disputes regarding section 251(b) and (c) obligations. The means of doing so must be offered and provided on a nondiscriminatory basis if Congress' requirement that incumbent LECs behave in a nondiscriminatory manner is to have any meaning.²⁸

10. 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. Should competition-affecting inconsistencies in state decisions arise, those could be brought to our attention through, for example, petitions for declaratory ruling. The statute expressly contemplates that the section 252 filing process will occur with the states,

²⁶ We therefore disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier. See Office of the New Mexico Attorney General and the Iowa Office of Consumer Advocate Comments at 5. Instead, we find that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1). Similarly, we decline Touch America's suggestion to require Qwest to file with us, under section 211, all agreements with competitive LECs entered into as "settlements of disputes" and publish those terms as "generally available" terms for all competitive LECs. Touch America Comments at 10, citing 47 U.S.C. § 211.

²⁷ Qwest Petition at 31-33.

²⁸ We note that Qwest has filed for state commission approval agreements containing both dispute resolution provisions and escalation clauses. See, *e.g.*, Qwest Supplemental Reply, WC Docket No. 02-148, at 26-27 (filed Aug. 30, 2002). We incorporate by reference this document into the record in the instant proceeding.