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BEFORE THE ARIZONA CORPORATION COMMISSION

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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
IMPLEMENTAITINO OF BATCH HOT
CUT PROCES AND QPP MASTER
SERVICES

DOCKET NO. T-01051B-04-0540
T-03574A-04-0540

**QWEST'S SUPPLEMENTAL BRIEF IN
SUPPORT OF ITS MOTION TO DISMISS**

Qwest Corporation ("Qwest") submits the following Supplemental Brief in support of its motion requesting that the Arizona Corporation Commission dismiss the application of MCImetro Access Transmission Services, L.L.C., ("MCI") to the extent it seeks review of the QPP™ Master Service Agreement negotiated between Qwest and MCI.

I. Background and Introduction

This dispute centers around the second of two agreements filed by MCI for approval in this docket. All parties agree that the Commission has jurisdiction over the first agreement – an interconnection agreement entitled "Amendment to Interconnection Agreement for Elimination of UNE-P and Implementation of Batch Hot Cut Process and Discounts" (the "ICA Amendment") – and all parties agree that the Commission should approve the ICA Amendment under section 252 of the Federal Telecommunications Act (the "Act").

1 The parties differ over whether the second agreement, entitled "Qwest Master
2 Service Agreement" (the "Commercial Agreement") is subject to the filing requirement
3 under section 252. Qwest has provided the Commission (and the commissions in all
4 states where the Commercial Agreement applies) with the Commercial Agreement – for
5 informational purposes. Qwest stands ready to offer the terms of the Commercial
6 Agreement to any other carrier, and the agreement is publicly available on Qwest's
7 website. Even so, Qwest contends that the Commission need not, and cannot under the
8 Act, act to approve the Commercial Agreement under section 252 of the Act.

9 MCI filed the ICA Amendment and the Commercial Agreement on July 23, 2004,
10 and requested that the Commission review and approve both Agreements. Qwest filed
11 its Motion to Dismiss with respect to the Commercial Agreement on August 6, 2004.
12 Subsequently, MCI, AT&T, and the Arizona Commission Staff ("Staff") filed their
13 responses in opposition to the Qwest Motion to Dismiss, and Qwest filed its Joint Reply
14 in Support of its Motion to Dismiss on September 20, 2004. In addition, MCI and Staff
15 have subsequently filed supplemental authorities with the Commission citing six different
16 decisions: An Order from the Utah Public Service Commission relating to the
17 Commercial Agreement (the "Utah Order");¹ a federal district court opinion in Texas
18 relating to an agreement between SBC and another carrier ("Sage Telecom");²; an
19 Order from the Washington Utilities and Transportation Commission (the "Washington
20
21

22 ¹ Before the Public Service Commission of Utah, Order Denying Motion to Dismiss, *In*
23 *the Matter of the Interconnection Agreement Between Qwest Corporation and MCI/metro*
24 *Access Transmission Services, LLC for Approval of an Amendment for Elimination of*
25 *UNE-P and Implementation of Batch Hot Cut Process and QPP Master Service*
26 *Agreement*, Docket No. 04-2245-01, issued September 30, 2004.

² *Sage Telecom LP v. Public Utility Commission of Texas*, Case No. A-04-CA-364-SS
(W.D. Tex. October 7, 2004).

1 Order”);³ an Order of the State of South Dakota Public Utilities Commission (the “South
2 Dakota Order”);⁴ an Order from the Public Service Commission of Wyoming (the
3 “Wyoming Order”);⁵ and an Order from the Colorado Public Utilities Commission (the
4 “Colorado Order”).⁶ Each of these decisions are cited as authority for the position that
5 the Commission should approve the Commercial Agreement as an interconnection
6 agreement and reject Qwest’s Motion to Dismiss.

7 None of these decisions, however, is binding or even persuasive authority to this
8 Commission in the resolution of this matter. These decisions do not apply the standard
9 as stated by the FCC, which is the standard that the Arizona Staff acknowledged and
10 applied in the unfiled agreements investigation, or they misinterpret the Commercial
11 agreement. The FCC filing standard under section 252 is simply whether the agreement
12 contains terms and conditions relating to services that Qwest must provide under section
13 251(b) or (c). The Commercial agreement contains terms and conditions for non-251
14 services and is independent from the ICA Amendment. These essential principles and

15 ³ Before the Washington State Utilities and Transportation Commission, Order Approving
16 Negotiated Interconnection Agreement in its Entirety, *In the Matter of Request of*
17 *MCImetro Access Transmission Services, LLC and Qwest Corporation for Approval of*
18 *Negotiated Interconnection Agreement in its Entirety, Under the Telecommunications Act*
of 1996, effective October 20, 2004.

19 ⁴ Before the Public Utilities Commission of the State of South Dakota, Order Denying
20 Motion to Dismiss; Order Approving Agreement, *In the Matter of the Filing for Approval*
of a Master Services Agreement Between Qwest Corporation and MCImetro Access
Transmission Services, LLC, TC04-144, released October 29, 2004.

21 ⁵ Before the Public Service Commission of Wyoming; Order; *In the Matter of the*
22 *Contract Filings of MCImetro Access Transmission Services, LLC for Approval of an*
23 *Amendment to its Interconnection Agreement and Approval of the Qwest Master Service*
Agreement Entered into with Qwest Corporation; Docket Nos. 70027-TK-04-38 and
70000-TK-04-1020; Issued November 1, 2004.

24 ⁶ Before the Public Utilities Commission of the State of Colorado, Order Approving
25 Interconnection Agreement, *Re: The Application for Approval of Interconnection*
Agreement Between U S WEST Communications, Inc. and MCImetro Access
26 *Transmission Services, LLC*. Docket No. 96A-366T, Adopted October 27, 2004.

1 facts demonstrate that the Commercial Agreement is not within section 252, and the
2 decisions from other states stray from the FCC standard or vary the contracts between
3 Qwest and MCI..

4 **II. The Utah and Colorado Orders**

5 In arguing that Qwest should be required to file the Qwest/MCI QPP agreement
6 with the Commission for approval, MCI and Staff, fundamentally misinterpret the relevant
7 provisions of the 1996 Telecommunications Act and the FCC's *Declaratory Order*⁷, and
8 incorrectly assumed that state commissions have authority to approve or reject terms
9 and conditions of agreements that fall outside the list of services under sections 251(b)
10 and (c). The Utah and Colorado Orders share similar flaws.

11 **A. The Utah and Colorado Orders Misinterpret the Filing Requirements** 12 **of Section 252.**

13 The parties base their arguments in large part on their interpretations of section
14 252(e)(1) and the language in that section providing that "[a]ny interconnection
15 agreement adopted by negotiation or arbitration shall be submitted for approval to the
16 State commission." The Utah and Colorado Commissions make the same errors of
17 interpretation. According to these Orders filed as supplemental authority, the reference
18 to "any interconnection agreement" broadly encompasses agreements that do not
19 involve ongoing obligations relating to sections 251(b) and (c).⁸ However, this
20 interpretation is directly contradicted by another sub-section of 252(e) that the
21 Commissions did not consider, and by the FCC's *Declaratory Order*. In addition, by
22 focusing on the term "any" in section 252(e)(1), these decisions fail to recognize that

23 ⁷ *In the Matter of Qwest Communications Petition for Declaratory Ruling on the Scope of*
24 *the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements*
25 *under Section 252(a)(1)*, WC Docket No. 02-89, 17 FCC Rcd 19337, 2002 FCC LEXIS
4929 (rel. Oct. 4, 2002) ("*Declaratory Order*").

26 ⁸ Utah Order at 3, 10.

1 only "interconnection" agreements must be filed. It is essential to define the term
2 "interconnection agreement" in determining which agreements must be filed, and,
3 specifically, to use the FCC's binding definition of that term -- an agreement involving
4 ongoing obligations under sections 251(b) and (c). The Orders fail to give effect to this
5 critical definitional ruling in the *Declaratory Order*.

6 While Section 252(e)(1) requires an "interconnection agreement adopted by
7 negotiation" to be filed with a state commission, section 252(e)(2) establishes that the
8 negotiated interconnection agreements that must be filed for approval are those that
9 were negotiated under section 252(a). Specifically, in delineating the grounds upon
10 which a state commission may reject an interconnection agreement filed for approval,
11 section 252(e)(2)(A) only authorizes review of "an agreement (or any portion thereof)
12 *adopted by negotiation under subsection [252](a).*" (emphasis added).⁹ In turn, section
13 252(a)(1) refers to negotiations conducted pursuant to "a request for interconnection
14 services, or network elements *pursuant to section 251*" (emphasis added). Thus,
15 under this plain language of the Act, the only negotiated agreements that must be
16 submitted to a state commission for approval are those that resulted from negotiations
17 relating to a request for interconnection or network elements *pursuant to section 251*.

18 This literal reading of section 252(e) is entirely consistent with the FCC's
19 *Declaratory Order* in which the FCC concluded that carriers are only required to file for
20 approval with state commissions agreements containing ongoing obligations relating to

21
22 ⁹ The Colorado Commission also interpreted section 252(e) as creating a different filing
23 obligation and standard than section 252(a). Colorado ruled that a section 252(a) filing
24 requirement may be limited to section 251 services, but the section 252(e) requirement
25 extends beyond section 251 services due to its "any interconnection agreement"
26 language. The fact that section 252(e)'s filing requirement references agreements
negotiated under section 252(a) shows that the definition of the agreement described in
both section 252(a) and (e) is the same. Indeed there is no policy or legislative purpose
behind two different filing standards within under section 252.

1 section 251(b) or (c). The FCC's statement was clear and unequivocal: "[W]e find that
2 **only those agreements that contain an ongoing obligation relating to section**
3 **251(b) or (c) must be filed under 252(a)(1).**"¹⁰ While the Utah and Colorado
4 Commissions acknowledge this statement by the FCC, they ascribed a meaning to it that
5 is contradicted by the FCC's express words.

6 According to these Commissions, what the FCC really meant to say is that the
7 term "interconnection" means any wholesale agreement between an ILEC and a CLEC
8 *regardless whether the agreement involves an ongoing obligation relating to section*
9 *251(b) or (c)*. But that is not what the FCC said. Instead, the FCC established as an
10 express condition to any filing obligation the requirement that an agreement involve an
11 ongoing obligation relating to section 251(b) or (c). The Commissions simply read these
12 words out of the *Declaratory Order*. In doing so, the Commissions made the same
13 mistake parties in this docket make when they concluded that the FCC's reference to
14 ongoing section 251(b) and (c) obligations – which appears in a footnote – does not
15 mean what it says when read in the context of the body of the *Declaratory Order* where
16 the footnote appears.¹¹ However, in the paragraph in which the footnote appears, the
17 FCC specifically addresses the ILECs' duty to negotiate in good faith under section
18 251(c)(1) "to implement their duties set forth in sections 251(b) and (c)." Indeed, this
19 reference to the ILECs' section 251 duties appears immediately before the sentence in
20 which the FCC lists the types of agreements that must be filed with state commissions,
21 with the FCC prefacing the list by referring back to what is required by "these statutory
22 provisions [251(b) and (c)]." The FCC's reference to "these statutory provisions"
23 confirms that the agreements that must be filed with state commissions all must relate to
24 an ILEC's ongoing section 251(b) and (c) obligations. Thus, contrary to the

25 ¹⁰ *Declaratory Order* at ¶ 8 & n.26 (emphasis added).

26 ¹¹ Utah Order at 7-8.

1 Commission's conclusion, the body of the *Declaratory Order* confirms what the FCC said
2 expressly in the footnote – that only agreements involving section 251(b) and (c)
3 obligations need be filed.

4 The Utah Commission also concluded incorrectly that the *Declaratory Order*
5 establishes as the “operative consideration [] whether the agreement's terms address or
6 create an ongoing obligation dealing with interconnection, services or *network*
7 *elements*.”¹² However, in listing the types of agreements to be filed with state
8 commissions in the *Declaratory Order*, the FCC was careful to refer to agreements
9 relating to “*unbundled network elements*,” not “*network elements*.”¹³ This distinction is
10 significant, since the FCC specifically uses the term “unbundled network elements” to
11 describe elements that ILECs are required to unbundle under section 251 based upon
12 findings of impairment.¹⁴ Thus, the FCC's reference to agreements involving “unbundled
13 network elements” refers to agreements involving access to UNEs under section 251.
14 Those agreements, unlike agreements relating to section 271 “network elements,” must
15 be filed with state commissions for approval.

16 Nor is there merit to the Utah and Colorado Commissions' conclusions that the
17 network elements that comprise the Commercial Agreement “fall within [section] 252's
18 rubric of ‘interconnection, services, or network elements.’”¹⁵ This conclusion assumes
19 that the term “network elements” as it is used in section 252(a)(1) has the same meaning
20 as the term “network element” set forth in section 153(29). However, the use of the term
21 in section 252(a)(1) is expressly limited to network elements “pursuant to section 251,”

22 ¹² Utah Order at 7 (emphasis added).

23 ¹³ *Declaratory Order* at ¶ 8 (emphasis added).

24 ¹⁴ See, e.g., *TRO* at ¶ 662 (Distinguishing between network elements that must be
25 “unbundled” under section 251 and network elements provided under section 271 that
do not meet the section 251 “unbundling” standard).

26 ¹⁵ Utah Order at 6. See Colorado Order at para. 9

1 while there is no such limitation in section 153(29)'s definition of network elements. In
2 other words, section 252(a)(1) refers specifically to network elements provided under
3 section 251, while section 153(29), by its terms, refers more broadly to any network
4 element "used in the provision of a telecommunications service."

5 Significantly, in its discussion of network elements in the *Declaratory Order*, the
6 FCC did not invoke the definition in section 153(29) but, instead, as discussed above,
7 referred specifically to "unbundled network elements." Because the network elements
8 that comprise the Commercial Agreement are not "unbundled network elements"
9 provided pursuant to section 251, they are not, contrary to the Commissions' conclusion,
10 within the rubric of section 252 network elements.

11 ***B. The Utah and Colorado Commissions Interpreted Section 252(a)(1)***
12 ***Incorrectly And In A Manner That Conflicts With The Declaratory***
13 ***Order.***

14 The Utah and Colorado Commissions also based their orders on the reference in
15 section 252(a)(1) to the ability of an ILEC, upon receiving a request for "network
16 elements pursuant to section 251," to "negotiate and enter into a binding agreement . . .
17 without regard to the standards set forth in [section 251(b) and (c)]." According to these
18 Commissions, the ability of an ILEC to enter into agreements that exceed the
19 requirements of section 251(b) and (c), coupled with the obligation in sections 252(a)
20 and 252(e) to file such agreements for approval, establishes that agreements containing
21 obligations unrelated to section 251 must be filed for approval.¹⁶

22 This conclusion is effectively a determination that although the FCC has
23 declared that only those negotiated agreements that concern section 251(b) or (c)
24 obligations must be filed with and approved by state commissions, section 252(e)
25 requires all negotiated wholesale agreements between an ILEC and a CLEC to be filed
26 and approved by state commissions. However, the FCC specifically rejected that

¹⁶ Order at 8-9.

1 contention in the *Declaratory Order*.¹⁷ Moreover, the Commissions' reading of section
2 252(a)(1) improperly disregards the limiting effect of the opening clause of that section:
3 "Upon receiving a request for interconnection, services, or network elements *pursuant to*
4 *section 251*" (emphasis added). It is essential to read all of section 252(a)(1) by
5 giving effect to this opening clause. Thus, in a negotiation *pursuant to section 251*,
6 ILECs are free to enter into interconnection agreements without regard to the standards
7 of sections 251(b) and (c) and must file such agreements with state commissions. The
8 starting point for this filing obligation, as the opening clause makes clear, must be a
9 negotiation for services offered pursuant to section 251.

10 In this case, the QPP Commercial Agreement was not entered into pursuant to
11 section 251 or for services required to be offered under section 251 but, instead,
12 pursuant to Qwest's offering of network elements under section 271. That Qwest offered
13 these elements pursuant to section 271, not section 251, is confirmed by the fact that
14 *USTA // eliminated switching and transport as section 251 elements*. Moreover, the
15 pricing in the QPP Commercial Agreement is not based on the section 252(d) pricing
16 standards that apply uniquely to unbundled network elements provided under section
17 251. The parties' agreement not to apply those standards further confirms that the
18 Commercial Agreement negotiations were not conducted for services offered pursuant to
19 section 251.

20 The Utah and Colorado Commissions also interpreted section 252(a)(1) as if
21 Congress added the following bold-faced and italicized phrase: "Upon receiving a
22 request for interconnection, services, or network elements pursuant to section 251, an
23 incumbent local exchange carrier may negotiate and enter into a binding agreement with
24 the requesting telecommunications carrier or carriers ***without regard to the FCC***
25 ***approved list of network elements incumbent local exchange carriers are required***

26 ¹⁷ *Declaratory Order* at ¶ 8 & n.26.

1 **to provide under section 251(b) and (c)** or the standards set forth in subsections (b)
2 and (c) of section 251.” However, the standards pursuant to which ILECs must provide
3 unbundled network elements pursuant to section 251(b) and (c) are clearly different from
4 the unbundled network elements themselves. Had Congress meant to state that parties’
5 negotiations for terms and conditions without reference to the unbundled network
6 elements an ILEC is required to provide pursuant to section 251(b) and (c) were still
7 subject to state commission jurisdiction and approval, it would have included that
8 language in the statute. Congress did not, and the statute cannot reasonably be
9 interpreted to include that language.

10 Importantly, the first sentence of Section 252(a)(1) juxtaposes its opening clause -
11 - “Upon a request for interconnection, services, or network elements **pursuant to**
12 **Section 251**” – with the last clause of that sentence – “without regard to the **standards**
13 set forth in subsections (b) and (c) of Section 251.” MCI’s interpretation (and that of the
14 Utah and Colorado Commissions) suggests that the last clause addresses and trumps
15 the first clause. A reading of the whole sentence shows that the first clause of that
16 sentence addresses **services**, and the services at issue in section 252 are section 251
17 services. Further, the phrase “without regard to the standards of section 251(b) or (c)”
18 should be interpreted according to the plain meaning of that language, which is that the
19 ILEC and the CLEC may negotiate the provisioning of section 251 services and adopt a
20 different degree or level of requirement than expressly required by sections 251(b) and
21 (c). That is, an ILEC and a CLEC may negotiate different terms, rates or conditions than
22 those mandated by section 251, but by no means does this language suggest that the
23 agreements for services that must be filed under Section 252 are limitless, as MCI
24 argues.

25 Finally, the Commissions’ interpretation that the filing standard can be determined
26 “without regard to whether the services at issue are section 251 services,” cannot be

1 reconciled with the *Declaratory Order*, in which the FCC ruled that not all ILEC/CLEC
2 agreements must be filed and that the section 252 filing requirement is defined by
3 section 251 services.

4 **C. *The Utah and Colorado Commissions Failed To Address The Absence***
5 ***Of Any State Commission Approval Or Decision-Making Authority***
6 ***Under Section 271.***

7 Because the Commercial Agreement is comprised of network elements –
8 switching and transport – that Qwest is providing under section 271, a determination that
9 state commissions can review this and similar QPP agreements necessarily assumes
10 that state commissions have authority under the Act to impose terms and conditions
11 relating to section 271 network elements. However, Congress did not grant that
12 authority. State commissions, therefore, are not permitted to impose any terms and
13 conditions relating to section 271. The Utah Commission did not address this absence
14 of authority to act under section 271, and the Colorado Commission incorrectly ruled that
15 section 271 imposes a filing requirement.

16 Under the Act, Congress and the FCC took over the regulation of local telephone
17 service, leaving the states only with authority that Congress expressly granted. The
18 Seventh Circuit recently described this regulatory regime:

19 In the Act, Congress entered what was primarily a state system of
20 regulation of local telephone service and created a comprehensive federal
21 scheme of telecommunications regulation administered by the Federal
22 Communications Commission (FCC). While the state utility commissions
23 were given a role in carrying out the Act, Congress "unquestionably" took
24 "regulation of local telecommunications competition away from the State"
25 on all "matters addressed by the 1996 Act;" it required that the participation
26 of the state commissions in the new federal regime be guided by federal-
agency regulations.¹⁸

25 ¹⁸ *Indiana Bell Telephone Co., Inc., v. Indiana Utility Regulatory Commission*, 359 F.3d
26 493, 494 (7th Cir. 2004) (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n. 6
(1999)).

1 Under this regime, states are not permitted to regulate local telecommunications
2 competition "except by the express leave of Congress."¹⁹ As described by the Third
3 Circuit, "[b]ecause Congress validly terminated the states' role in regulating local
4 telephone competition and, having done so, then permitted the states to resume a role in
5 that process, the resumption of that role by a state is a congressionally bestowed
6 gratuity."²⁰ Thus, the court explained, a "state commission's authority to regulate comes
7 from Section 252(a) and (e), not from its own sovereign authority."²¹

8 Under this regime therefore, a state commission has authority to regulate only
9 when Congress has expressly granted that authority. A plain reading of the Act shows
10 that Congress did not authorize any decision-making regulatory role for state
11 commissions in the implementation and administration of section 271. Indeed, section
12 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to
13 determine whether BOCs have complied with the substantive provisions of section 271,
14 including section 271's "checklist" provisions.²² State commissions have only a non-
15 substantive, "consulting" role in that determination.²³ As one court has explained, a
16 state commission has a fundamentally different role in implementing Section 271 than it
17 does in implementing Sections 251 and 252:

18 Sections 251 and 252 contemplate state commissions may take affirmative
19 action towards the goals of those Sections, *while Section 271 does not*
20 *contemplate substantive conduct on the part of state commissions.* Thus,
21 a "savings clause" is not necessary for Section 271 because the state

22 ¹⁹ *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 510 (3rd
23 Cir. 2001) (internal citations omitted).

24 ²⁰ *Id.*

25 ²¹ *Id.*

26 ²² 47 U.S.C. 271(d)(3).

²³ 47 U.S.C. 271(d)(2)(B).

1 commissions' role is investigatory and consulting, not substantive, in
2 nature.²⁴

3 Sections 201 and 202, which govern the rates, terms and conditions applicable to
4 the unbundling requirements imposed by Section 271,²⁵ likewise provide no role for state
5 commissions. That authority has been conferred by Congress upon the FCC and federal
6 courts.²⁶ The FCC has thus confirmed that "[w]hether a particular [section 271] checklist
7 element's rate satisfies the just and reasonable pricing standard is a fact specific inquiry
8 that *the Commission* [*i.e.*, the FCC] will undertake in the context of a BOC's application
9 for Section 271 authority or in an enforcement proceeding brought pursuant to Section
10 271(d)(6)."²⁷

11 Through their orders requiring Qwest to submit the QPP Commercial Agreement
12 for approval, the Utah and Colorado Commissions attempted to assert regulatory
13 decision-making authority over section 271 network elements. Because Congress has
14 conferred no such authority upon state commissions, these rulings are not supported or
15 authorized by the Act.

16 ***D. The FCC's Determination That State Commissions Should Evaluate***
17 ***Agreements To Determine Whether They Must Be Submitted For***
18 ***Approval Does Not Expand The Authority Of State Commissions To***
19 ***Create A New Standard.***

20 The Utah and Colorado Orders accurately describe the FCC's determination in

21 ²⁴ *Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at
22 13 (S.D. Ind. 2003) (state commission not authorized by section 271 to impose binding
23 obligations), *aff'd*, 359 F.3d 493 (7th Cir. 2004) (emphasis added).

24 ²⁵ TRO at ¶¶ 656, 662.

25 ²⁶ See *id.*; 47 U.S.C. 201(b) (authorizing the FCC to prescribe rules and regulations to
26 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).

²⁷ TRO at ¶ 664.

1 the *Declaratory Order* that where there is uncertainty concerning whether carriers should
2 submit an agreement to a state commission for approval, the state commission should
3 evaluate the agreement in the first instance to assess whether the filing requirement
4 applies.²⁸ However, that determination does not, as the Utah and Colorado Orders
5 imply, expand the categories of agreements that must be submitted to state
6 commissions for approval and does not permit states to apply their own standard for
7 when agreements must be submitted for approval.

8 While states are permitted to conduct the initial evaluation of whether an
9 agreement must be filed, they must apply the filing requirements of the Act, as
10 implemented by the FCC, in making that evaluation. Specifically, a state commission
11 must determine, in the words of the FCC, whether the agreement contains "an ongoing
12 obligation relating to section 251(b) or (c)." If an agreement does not contain such
13 obligations, a state commission is without authority to require carriers to submit it for
14 approval.

15 The FCC's discussion of the states' reviewing role in the *Declaratory Order*
16 confirms the limited nature of these initial evaluations by state commissions. The FCC
17 explained that it had defined "the basic class of agreements that should be filed" – those
18 involving an ongoing obligation relating to section 251(b) or (c) – and that states should
19 apply that standard based on their statutory role and experience relating to
20 interconnection agreements.²⁹ The FCC cited, for example, provisions relating to
21 dispute resolution and escalation procedures involving "obligations set forth in sections
22 251(b) and (c)," which it concluded "are appropriately deemed interconnection
23 agreements." Significantly, the FCC premised its conclusion that these provisions are
24

25 ²⁸ Utah Order at 5; Colorado Order at 4; *Declaratory Order* at ¶ 10.

26 ²⁹ *Declaratory Order* at ¶ 10.

1 interconnection agreements subject to filing requirements on the fact that they involve
2 section 251(b) and (c) obligations. These examples provide clear instruction for states to
3 follow in their initial evaluations of whether agreements should be filed – states must
4 evaluate whether the agreements involve section 251(b) and (c) obligations. If an
5 agreement does not involve such an obligation, there is no basis for a state commission
6 to impose a filing requirement.

7 ***E. The Arizona Corporation Commission Staff has Previously Espoused***
8 ***the Same FCC Filing Standard for Sections 252(a)(1) and 252(e) that is the***
9 ***Foundation of Qwest's Motion to Dismiss—i.e., Whether the Agreement***
10 ***Creates Ongoing Obligations Under Section 251 (b) and (c)***

11 The Arizona Staff has previously argued before the Commission that whether an
12 agreement must be filed under Section 252(a)(1) and 252(e) turns on whether the
13 agreement creates ongoing obligations under Section 251 (b) and (c). That is a different
14 standard than is urged by the Staff in this proceeding, and is in fact entirely consistent
15 with, and supportive of, Qwest's Motion to Dismiss.

16 The cornerstone of Qwest's Motion to Dismiss is the unequivocal statement by
17 the FCC, "we find that only those agreements that contain an ongoing obligation relating
18 to section 251(b) or (c) must be filed under 252(a)(1)."³⁰ Although Staff now argues for a
19 different standard than that declared by the FCC, such was not always the case. In
20 another proceeding before this Commission, where Qwest's obligations to file certain
21 agreements under Section 252 was at issue,³¹ the Staff discussed the Declaratory Order
22 at some length. In a section of the Staff Post-Hearing Brief entitled, "Operator Services,
23 Directory Services and ICNAM Services are Section 251(b) or (c) Services and

24 ³⁰ *Declaratory Order*, at para 8 & 26.

25 ³¹ *In the Matter of Qwest Corporation's Compliance with Section 252(e) of the*
26 *Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271 (the "Unfiled
Agreements Case").

1 Provisions Containing Ongoing Obligations Relating to These Services are
2 Interconnection Agreements and Must be Filed with the Commission for Approval," Staff
3 declared:

4 "The filing requirement contained in Section 252(a)(1) applies to both 251(b)
5 and (c) services." *Moreover, in its Declaratory Ruling, the FCC recognized that*
6 *Section 251(c)(1) requires incumbent LECs to negotiate in good faith, in*
7 *accordance with Section 252, the particular terms and conditions of agreements*
8 *to implement their duties set forth in Sections 251(b) and (c) (footnote citing FCC*
9 *Declaratory Ruling at para. 8.) Further, if one closely examines the FCC's*
10 *standard, it refers to an agreement that creates an ongoing obligation with regard*
11 *to inter alia "dialing parity" which is defined under Section 251(b)(3) as: "[t]he duty*
12 *to provide dialing parity to competing providers of telephone exchange service*
13 *and telephone toll services, and the duty to permit all such providers to have*
14 *nondiscriminatory access to telephone numbers, operator services, directory*
15 *assistance, and directory listing, with no unreasonable dialing delays. Therefore,*
16 *clearly terms and conditions pertaining to its ongoing obligations with regard to*
17 *the nondiscriminatory provision of operator services and directory assistance is an*
18 *interconnection agreement which must be filed under Section 252(a)(1) and*
19 *252(e). Accordingly, Staff believes that Qwest's Operator Service, Directory*
20 *Assistance and ICNAM Service agreements with Allegiance constitute*
21 *interconnection agreements that Qwest is required to file under Section 252(a)(1)*
22 *and 252(e) of the Act*³² *(emphasis added).*

23 In the Unfiled Agreements Case, Staff also stated,

24 As the FCC stated in its Declaratory Ruling, the label or name of an
25 agreement is not controlling as to whether it needs to be filed or not; rather
26 one must look at the substance of the agreement to determine whether it
contains ongoing obligations relating to Section 251(b) and (c) services.³³

In the Unfiled Agreements Case, the Staff's advocacy regarding what
interconnection agreements were required to be filed under Section 252(a)(1) and
252(e) depended on a proper reading of the FCC ruling--whether the services addressed
by the agreement relate to ongoing obligations under Section 251(b) and (c). In the

³² Id., Staff's Initial Post-Hearing Brief Confidential Version, p. 12, submitted May 1, 2003.

³³ Id., Staff's Reply Brief Confidential Version, p. 5, filed May 15, 2003.

1 case now before the Commission, however, the Staff suggests that the rule laid down in
2 the Declaratory Order is a novel interpretation. In fact, as is clear from the positions
3 articulated by Staff in the Unfiled Agreements Case, the Staff's arguments in this matter
4 are not supported by the FCC's Declaratory Order.

5 **III. The Wyoming Order**

6 Staff submitted as supplemental authority and Order issued by the Public Service
7 Commission in Wyoming, concerning the MCI filing of the Commercial Agreement under
8 Section 252.³⁴ The Order concludes without discussion or analysis that Qwest's Motion
9 to Dismiss is denied and that the Commercial Agreement was a negotiated
10 interconnection agreement subject to that state's Public Service Commission's review
11 and approval pursuant to Section 252(e) of the Act. Absent any more detailed findings
12 and conclusions, the Wyoming Order sheds no light on the issues raised by Qwest.

13 **IV. Sage Telecom is Inapposite.**

14 In *Sage Telecom* a federal district court affirmed the Texas PUC's conclusion that
15 SBC could not redact portions of a single agreement it entered with Sage Telecom. The
16 provisions SBC sought to redact addressed a product SBC offers that is similar to
17 Qwest's QPP product. The decision in that case is inapposite for several reasons,
18 however.

19 Significantly, the agreement at issue in *Sage Telecom*, unlike the Commercial
20 Agreement, was a single agreement that contained terms and conditions that
21 indisputably related to ongoing obligations under sections 251(b) and (c) in addition to
22 non-251 terms. In particular, the single agreement addressed section 251 terms relating
23 to reciprocal compensation arrangements and access to unbundled loops. In concluding

24 ³⁴ Order, *In the Matter of the Contract Filings of MCImetro Access Transmission*
25 *Services, LLC for Approval of an Amendment to its Interconnection Agreement and*
26 *Approval of the Qwest Master Service Agreement Entered Into With Qwest Corporation,*
Docket No. 70027-TK-04-38; Docket No. 70000-TK-04-1020. issued November 1, 2004.

1 that the Act required submission of the agreement to the Texas Commission for
2 approval, the court emphasized that its decision was based in substantial part on the fact
3 that the agreement addressed these section 251 obligations.³⁵ The court specifically
4 stated that it was not addressing whether a filing requirement would exist if the
5 agreement contained no section 251 terms and conditions, since that was not the case
6 with the agreement between Sage and SBC.³⁶

7 In this case, by contrast, the Commercial Agreement does not contain terms and
8 conditions relating to section 251. Thus, the ruling in *Sage Telecom* is plainly
9 inapplicable, as established by the court's express statement that it was not addressing
10 whether a filing requirement could apply to agreements that do not include section 251
11 terms and conditions. The relevant ruling is that provided by the FCC in the *Declaratory*
12 *Order*, which establishes that the filing requirement applies only to agreements that
13 address ongoing obligations under sections 251(b) and (c).

14 Unlike the agreement in *Sage Telecom*, the MCI Commercial Agreement is
15 separate and distinct from any section 251(b) or (c) services. Unlike the agreement in
16 *Sage Telecom*, the Commercial Agreement is separate in its expression, statement and
17 form from any section 251(b) or (c) services. Most importantly, unlike the agreement in
18 *Sage Telecom*, the mutual promises and duties (the "consideration" in the law of
19 contracts) of Qwest and MCI in the QPP Agreement stand on their own, and are
20 completely independent of the contractual consideration for any section 251(b) or (c)
21 services.

22 If the Commission erroneously applies *Sage Telecom* to this situation, it will make
23 the provisions of the Commercial Agreement be an integral part of the interconnection

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³⁵ Slip op. at 10.

25 ³⁶ *Id.* at 8 ("The Court need not address this dispute, however, because the parties agree
26 the LWC does, in fact, address at least two sets of § 251 duties . . .").

1 agreement, effectively combining provisions which the parties intended to make separate
2 and took great care to keep separate. It would also combine contracts which are
3 separate obligations under the law of contracts. Of greater concern for regulatory
4 purposes, such action would conjoin section 251 (b) and (c) obligations with provisions
5 other than those which are necessary to implement what ILECs are legally obligated to
6 provide CLECs under the Act.

7 The *Sage Telecom* opinion is useful in that it reveals the potential that a
8 Commission decision requiring filing and approval of the Commercial Agreement could
9 work to the disadvantage of CLECs. The unintended and forced conjoining of section
10 251 obligations and non-section 251 obligations would in view of the FCC's new "all or
11 nothing rule," in which a "a requesting carrier may only adopt an effective interconnection
12 agreement in its entirety, taking all rates, terms, and conditions of the adopted
13 agreement."³⁷ Under the new rule, if this Commission erroneously applies the Section
14 252 filing requirement to include non-section 251 services, then a CLEC wishing to
15 obtain the 251 services must take the burdens of the non-251 obligations as well. It also
16 means that, in order to opt into the Commercial Agreement, the CLEC must opt into the
17 entire MCI interconnection agreement, which may contain terms and conditions
18 undesirable to the requesting CLEC. CLECs will not universally want or need the non-
19 251 provisions, but those that do not will be unable to reject the unwanted provisions.
20 The negative ramifications of such a decision on CLECs not wanting the non-251
21 obligations far outweigh any attempt to portray the action as beneficial to the goals of the
22 Act.

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25 ³⁷ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange*
26 *Carriers, CC Docket No 01-338, Second Report and Order* (released July 13, 2004)
("FCC Report and Order) at para.10.

1 Thus, a Commission decision to include non-section 251 services in a section 252
2 interconnection agreement may have the opposite policy effect desired by the
3 Commission. That is, instead of achieving the policy goal of making services more
4 available to CLECs, placing non-251 services into a section 252 agreement may make
5 the non-section 251 services less available due to the CLECs' burdens of having to opt
6 into the entire MCI interconnection agreement. The converse is also true, which is that
7 by including non-section 251 services in an interconnection agreement, section 251
8 services become less available due to the increased burdens of a CLEC to assume the
9 burdens of the non-section 251 services. Qwest, as shown by its willingness to
10 negotiate the MCI QPP Commercial Agreement, will continue to negotiate with carriers
11 to offer non-section 251 services to fit their wholesale needs. But, the Commission
12 should consider the prospect that requiring the filing of non-section 251 services in a
13 section 252 interconnection agreement most likely will decrease the availability for
14 services to CLECs under the all-or-nothing rule.

15 **V. The Washington Order Changes the Agreements Between Qwest and MCI.**

16 The Washington Commission³⁸ correctly did not expand the section 252 filing
17 standard beyond agreements containing section 251 services. However, the
18 Washington Commission interpreted the MCI Commercial Agreement as integrated with
19 the ICA Amendment and other terms contained in the parties' interconnection
20 agreement. Applying the Sage theory that every term in a single agreement containing
21 section 251 services and non-251 services should be filed, the Washington Commission
22 ruled that the Commercial Agreement fell within the section 252 filing requirement.

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25 ³⁸ The South Dakota Order applies the same rationale as the Washington Commission,
26 and thus Qwest's response to the supplemental filing of the Washington Order applies
equally to the South Dakota Order.

1 With due respect for the Washington Commission, Qwest believes that its
2 interpretation changes the intentions and agreements of Qwest and MCI, and it does not
3 consider the practice typical in commercial transactions that one agreement may
4 reference matters outside the four corners of the documented agreement. The fact that
5 one agreement may reference another does not alter the independence of the two
6 agreements. Qwest and MCI intended to enter into separate and independent
7 agreements.³⁹ And, the Commercial Agreement and the ICA Amendment were drafted
8 in strict conformity of the FCC section 252 filing standard. That is, all of the terms setting
9 rates or other conditions for non-section 251 services are contained in the Commercial
10 Agreement, and all of the rates and other terms for section 251 services are stated in the
11 ICA Amendment.

12 The Washington Commission focused upon the fact that non-251 services,
13 switching and transport, were combined with loops, and that if loop rates change, then
14 the rates for QPP services may change.⁴⁰ This analysis misses the point, because the
15 question is whether the Commercial Agreement contains rates, terms and conditions that
16 could affect section 251 services. Loops serving mass market customers currently are
17 section 251 services, and all rates, terms and conditions relating to loops must be
18 contained in a section 252 agreement. But, Qwest and MCI have placed each term
19 relating to loops in their interconnection agreement on file with the Washington
20 Commission. The Washington Commission did not identify a term or provision in the
21 Commercial Agreement itself that affects the loop rates, and there are none. The fact
22 that the QPP rates may change if the loop rate changes does not affect the rates for
23 loops set by the Commission. Absent a finding that the Commercial Agreement contains

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25 ³⁹ See Master Services Agreement, para. 33.

26 ⁴⁰ Washington Order, para. 30.

1 or affects the terms for provisioning a section 251 service, the section 252 filing
2 requirement does not apply.

3 **VI. Conclusion**

4 The authorities and arguments presented by MCI and Staff do not require this
5 Commission to take jurisdiction over the Commercial Agreement. At best, they raise
6 questions as to the propriety of asserting jurisdiction over the Commercial Agreement.
7 In resolving these questions, in addition to squarely addressing the FCC's clear
8 statements in the *Declaratory Order* that MCI and the Staff ignore or gloss over, this
9 Commission must ask itself: why assert jurisdiction now? What purposes will be served?
10 Not the interests of public knowledge and dissemination of the Commercial Agreement's
11 terms – the agreement is publicly available and is on the Qwest website. Not the
12 interests of non-discrimination – Qwest has pledged to make, and has indeed made, the
13 terms of the Commercial Agreement available to all carriers. Qwest is still bound by anti-
14 discrimination rules under federal law. And, as illustrated above, requiring filing and
15 approval of the Commercial Agreement could actually work to the disadvantage of
16 CLECs by making the terms of the Commercial Agreement less, not more, available. No
17 interest is served by the assertion of jurisdiction over the Commercial Agreement, and
18 the FCC has recognized such assertion of jurisdiction as improper when it characterized
19 its ruling in the *Declaratory Order* as “removing unnecessary regulatory impediments to
20 commercial relations between incumbent and competitive LECs.”

21 For these and the other reasons set forth herein, Qwest respectfully moves that
22 the Commission dismiss the application filed by MCI to the extent it seeks review of the
23 Commercial Agreement.

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25 DATED this 23rd day of November, 2004
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Respectfully submitted,

QWEST CORPORATION

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A handwritten signature in black ink, appearing to read 'T. F. Dixon', is written over a horizontal line. The signature is stylized and cursive.