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BEFORE THE ARIZONA CORPORATION CC

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COMMISSIONERS

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2006 JUL 28 P 4: 52
AZ CORP COMMISSION
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Arizona Corporation Commission
DOCKETED

JUL 28 2006

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IN THE MATTER OF THE STAFF'S REQUEST
FOR APPROVAL OF COMMERCIAL LINE
SHARING AGREEMENT BETWEEN QWEST
CORPORATION AND COVAD
COMMUNICATIONS COMPANY.

DOCKET NO. T-03632A-04-0603
DOCKET NO. T-01051B-04-0603

BRIEF OF COMMISSION STAFF

I. INTRODUCTION.

By procedural order dated June 23, 2006, Administrative Law Judge ("ALJ") Jane Rodda ordered the parties to file supplemental authorities and legal analysis in this docket by July 28, 2006. Judge Rodda also asked the parties to offer any procedural recommendations to resolve the issues raised in this docket. Staff files this short Brief in response to Judge Rodda's July 23, 2006 procedural order.

II. BACKGROUND.

This case involves a dispute between Qwest Corporation ("Qwest") and the Staff regarding Qwest's obligations to file certain agreements with the Commission for review and approval under Section 252 of the Telecommunications Act of 1996 ("1996 Act"). In addition to the dispute between Qwest and Staff on this issue, some of these same issues are in dispute in other jurisdictions. The issue of whether certain agreements are "interconnection agreements" which must be filed with the state commission under Section 252 has also now been the subject of federal court review. While the Federal Communications Commission ("FCC") has also requested comment on the obligations of carriers such as Qwest to file certain agreements with the State Commissions for review and approval, as of this date the FCC has not yet addressed the subject.

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1 Since the Staff and Qwest submitted their briefs on this matter, several federal district courts
2 have issued decisions which bear directly on the issues raised in this docket. In addition, the
3 Commission has issued a ruling with respect to the Qwest Platform Plus ("QPP") Agreement finding
4 that it is an interconnection agreement that must be filed with the Commission under Section 252 of
5 the 1996 Act.

6 Staff's brief will focus on the federal district court decisions which have issued since the
7 parties' briefing in this matter, as well as the Commission's recent QPP decision.

8 Staff offers the following as a brief background in this matter. On May 14, 2005
9 Qwest submitted two agreements to the Commission. The first was entitled "Commercial Line
10 Sharing Amendment to the Interconnection Agreement" and was filed by Qwest to comply with
11 terms and conditions of the FCC's Triennial Review Order which determined that Line Sharing was
12 no longer required under Section 251(c) of the 1996 Act. Since it addressed transitional terms and
13 conditions mandated by the TRO, Qwest submitted this agreement for approval under Section 252 of
14 the 1996 Act. Qwest then provided a second agreement entitled "Terms and Conditions for
15 Commercial Line Sharing Arrangements" ("Arrangements Agreement") to the Staff for informational
16 purposes only, claiming that it was not an "interconnection agreement" required to be filed with the
17 Commission under Section 252 of the 1996 Act. The Arrangements Agreement applies to Line
18 Sharing orders placed after the transition period expires, or for orders placed after October 1, 2004.

19 On August 26, 2004, Staff filed the Arrangements Agreement with Docket Control and
20 requested that a Docket be opened to review the matter as is normally done when interconnection
21 agreements are filed with the Commission for approval under Section 252 of the 1996 Act. Qwest
22 filed a Motion to Dismiss and Staff filed an Opposition. Oral argument is held and the matter was
23 pending a determination by Judge Rodda. The June 23, 2006 procedural order orders the parties to
24 file briefs updating the record and in particular discussing any subsequent decisions which support
25 their position.

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1 **III. DISCUSSION.**

2 **A. There are several new federal district court decisions, as well as the Commission's**
3 **Decision No. 68116 in Docket No. T-10151B-04-0540, which support the Staff's**
4 **position in this docket.**

5 Staff's position is that under Section 252 of the Federal Act, State Commissions are given
6 broad authority to review and approve "interconnection agreements" between carriers. While the Act
7 encourages carriers to undertake voluntary negotiations and to enter into voluntary binding
8 agreements without regard to the standards set forth in subsections (b) and (c) of Section 251 of the
9 Act, if disputes arise, the State Commission resolves them through an arbitration which is binding on
10 both parties. In addition, the State Commissions are the designated repository for all such agreements,
11 whether arrived at through arbitration or voluntary negotiation.

12 The FCC has addressed the types of agreements which fall within the scope of Section 252
13 several times, one of most recent being in response to a Petition for Declaratory Ruling filed by
14 Qwest. In its *Declaratory Ruling*¹ in response to Qwest's Petition, the FCC stated that if the
15 agreement related to an ongoing obligation pertaining to resale, number portability, dialing parity,
16 access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or
17 collocation, it was an interconnection agreement over which the State Commission has jurisdiction.

18 The FCC also stated that the State Commissions should be responsible for applying, in the
19 first instance, the statutory interpretation to the terms and conditions of specific agreements.

20 In its *Declaratory Ruling*, the FCC stated:

21 "Based on their statutory role provided by Congress and their
22 experience to date, state commission are well positioned to decide on a case
23 by case basis whether a particular agreement is required to be filed as an
24 "interconnection agreement" and, if so, whether it should be approved or
25 rejected. Should competition-affecting inconsistencies in state decisions arise,
26 those could be brought to our attention through, for example, petitions for
27 declaratory ruling. The statute expressly contemplates that the section 252
filing process will occur with the states, and we are reluctant to interfere with
their processes in this area. Therefore, we decline to establish an exhaustive,
all-encompassing "interconnection agreement" standard. The guidance we
articulate today flows directly from the statute and services to define the basic
class of agreements that should be filed. We encourage state commissions to
take action to provide further clarity to incumbent LECs and requesting
carriers concerning which agreements should be filed for their approval. At

28 ¹ *In the Matter of Qwest Communications International Petition for Declaratory Ruling on the Scope of
the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 251(a)(1),
Memorandum Opinion and Order, 2002 WL 31204893, 17 F.C.C.R. 19337 (October 4, 2002) ("Declaratory Ruling").*

1 the same time, nothing in this declaratory ruling precludes state enforcement
2 relating to these issues.

* * * * *

3 Consistent with our view that the state should determine in the first
4 instance which sorts of agreements fall within the scope of the statutory
5 standard, we decline to address all the possible hypothetical situations
6 presented in the record before us.”²

7 The importance of the Section 252 review and filing requirements was underscored by the
8 FCC in the following passage from its *Local Competition First Report and Order*.

9 “State commissions should have the opportunity to review all agreements,
10 including those that were negotiated before the new law was enacted, to ensure
11 that such agreements do not discriminate...and are not contrary to the public
12 interest...Requiring all contracts to be filed also limits an incumbent LEC’s
13 ability to discriminate among carriers, for at least two reasons. First, requiring
14 public filing of agreements enables carriers to have information about rates,
15 terms, and conditions that an incumbent LEC makes available to others.
16 Second, any interconnection, service or network element provided under an
17 agreement approved by the state commission under section 252 must be made
18 available to any other requesting telecommunications carrier upon the same
19 terms and conditions, in accordance with section 252(i)...Conversely,
20 excluding certain agreements from public disclosure could have
21 anticompetitive consequences.”³

22 Qwest argues that the language of Section 252(a)(1) limits State Commission authority to the
23 provision of network elements, interconnection or services made under Section 251 of the Act.
24 Section 252(a)(1) states in relevant part: “Upon receiving a request for interconnection, services, or
25 network elements **pursuant to section 251**, an incumbent local exchange carrier may negotiate and
26 enter into a binding agreement with the requesting telecommunications carrier or carriers without
27 regard to the standards set forth in subsections (b) and (c) of section 251.”

28 However, instead of finding that the language relied upon by Qwest limits the filing
obligation of carriers to network elements meeting the impairment standard, several Federal District
Courts have now recognized that Section 251 is broader in nature and that the reference “pursuant to
251” should be construed broadly:

The phrase “pursuant to section 251” refers to both the general and specific
duties set forth in Section 251 including the duty of telecommunication
carriers to “interconnect directly or indirectly with the facilities and equipment
of other telecommunications carriers.”⁴

² *Declaratory Ruling* at paras. 10 and 11.
³ *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket
No. 96-98, First Report and Order (Rel. August 8, 1996) (“*Local Competition First Report and Order*”) at para. 167.
⁴ *See, Qwest v. Public Service Commission of Utah*, 2005 WL 3534301 at 3534307 (D. Utah 2005).

1 This same Federal District Court (citing to another Texas District Court decision) expressly
2 rejected the argument that the Section 252 state review and approval requirement applies only to
3 network elements that are compelled by Section 251 of the Federal Act:

4 “Finally, a case in the Western District of Texas provides additional reasoning
5 to support the Commission’s interpretation. In *Sage Telecom v. Public Service*
6 *Comm’n of Texas*, Case No. A-04-CA-364-SS (W.D.Tex. Oct. 7,
7 2004)(attached as Ex. 1 to Defs.’ Response Br.), the court dealt with disputes
8 regarding the filing requirement for a voluntary agreement between Sage
9 Telecom and Southwestern Bell Telephone. The agreement included services
10 and network elements, some of which were compelled network elements and
11 some of which were not. Sage and Southwestern Bell opposed the filing of the
12 entire agreement. They argued that only the portions of the agreement setting
13 forth compelled network elements needed to be filed with the state
14 commission. The Sage Telecom court rejected the parties’ distinction between
15 required network elements and non-obligatory network elements with respect
16 to filing requirements.”⁵

17 The express language of Section 251(a)(1) in fact permits parties to negotiate and enter into a
18 binding interconnection agreement **without regard to** the standards set forth in Section 251 of the
19 Act. Thus, regardless of whether an agreement meets the standards of Section 251(b) and (c) (which
20 includes the impairment standard), it is subject to the State filing and review process. The Utah
21 District Court summed up this point very well:⁶

22 As set forth above, Section 251 contains both the general requirement that
23 “telecommunication carriers “interconnect” with the “facilities and equipment
24 of other telecommunication carriers, “ as well as certain specific duties and
25 obligations. Moreover, Section 252 contemplates that even those agreements
26 an ILEC enters with a “requesting telecommunications carrier or carriers
27 without regard to the standards set forth in subsections (b) and (c) of section
28 251...shall be submitted to the State commission under subsection (3) of this
section.” Based on the plain language of the statute, I find that the Section 252
is not limited solely to agreements involving the specific duties and obligations
set forth in Section 251(b) and (c). The phrase “pursuant to section 251” refers
to both the general and specific duties set forth in Section 251, including the
duty of telecommunication carriers to “interconnect directly or indirectly with
the facilities and equipment of other telecommunications carriers.”⁷

29 _____
30 ⁵ See, *Qwest v Public Service Commission of Utah*, 2005 WL 3534301 (D.Utah 2005); *Qwest*
31 *Corporation v. the Public Utilities Commission of Colorado*, 2006 WL 771223 (D.Colo. 2006).

32 ⁶ *Id.*

33 ⁷ *Qwest Corporation v. the Public Utilities Commission of Colorado*, 2006 WL 771223 at 771227 (D.
34 Colo. 2006).

1 In addition, the provision that governs the review authority of State Commissions is actually Section
2 252(e), under which the State Commissions are given review and approval authority over **any**
3 interconnection agreement. Section 252(e)(1) provides:

4
5 “**Any** interconnection agreement adopted by negotiation or arbitration shall be
6 submitted for approval to the State commission. A State commission to which
an agreement is submitted shall approve or reject the agreement, with written
findings as to any deficiencies.” (Emphasis added).

7 There is no limiting language as Qwest suggests that only interconnection agreements
8 containing network elements meeting the Section 251 impairment standard need to be filed with,
9 reviewed and approved by a State Commission. In fact, this Commission in Decision 68116 also
10 made the same finding.

11 “The QPP Agreement clearly does not fall within any of the exceptions in the
12 *Declaratory Order* and it is therefore subject to the Section 252 filing
13 requirements because the agreement’s terms specifically address prices to be
14 paid for network elements under the definition set forth in 47 U.S.C. Section
153 and the QPP Agreement addresses ongoing obligations between Qwest
and MCI.”

15 *Id* at p. 10.⁸ Like the situation in this case, the QPP Agreement addressed network elements that were
16 not required under the 251(c) standard.

17 Had Congress intended to limit the scope of the filing obligation or the State Commission’s
18 review and approval authority in this fashion, Congress would merely have added such limiting
19 language to Section 252(e); it did not. The fact that Congress did not underscores that a State
20 Commission’s review authority under Section 252 is very broad and was not intended to be limited to
21 agreements containing network elements that meet the 251 impairment standard.”⁹ Indeed, as already
22 discussed, this would conflict directly with other language in Section 251(a) which provides that
23 voluntarily negotiated agreements may be negotiated **without regard** to the standards in Sections
24 251(b) and (c). Emphasis added.

25 ...

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27 ⁸ The exceptions to the filing requirement identified in the FCC’s *Declaratory Ruling* included: dispute
28 resolution and escalation provisions (para. 9); agreements addressing settlements of “backward-looking” billing disputes
(para. 12); forms used by requesting carries to obtain service (para. 13); and certain agreements with bankrupt competitors
entered into at the direction of the bankruptcy court (para. 14.).

⁹ See 47. U.S.C. 251(a).

1 **B. Just because Line Sharing, a network element, is offered by Qwest on a voluntary**
2 **basis, does not mean it is not subject to the 252 approval process.**

3 There is no question that Line Sharing was considered by the FCC to be a network element
4 when required under the Section 251(c) standard. Just because Qwest now offers it on a voluntary
5 basis, and not under the mandates or strictures of Section 251(c), does not put it outside the ambit of
6 the Section 252 filing and approval requirements. It is a network element or term of interconnection
7 between the parties and as such is properly included in an interconnection agreement. The
8 supplemental authority cited by Staff above supports Staff's position on this point.

9 In addition, at least three Federal District Courts have now found, that the filing and approval
10 obligations of Section 252 are not limited to the unbundled network elements compelled by Section
11 251(c)'s impairment standard.¹⁰

12 Such an interpretation is also supported from a policy perspective. There is no logical reason
13 why unbundled network elements that the ILEC chooses to offer on a voluntary basis should not be
14 subject to the same nondiscrimination safeguards, as network elements that are compelled by Section
15 251(c).

16 **C. There is no basis for FCC preemption of continued State oversight over network**
17 **elements used to provision competitive local exchange service.**

18 Finally, Qwest is wrong when it argues that State filing and review requirements are not
19 permissible because they are inconsistent with or preempted by Federal law or policy. The Arizona
20 Commission is not aware of any Federal law or policy that would be thwarted by State review and
21 approval of agreements containing network elements. Moreover, the FCC has sought comment on
22 the issue of whether certain agreements need to be filed under Section 252, but has made no decision
23 to-date on the issue.¹¹

24 ...

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26 ¹⁰ See also *Verizon New England Inc. v. Maine Public Utilities Commission*, 2006 WL 2007655 (D.Me.
27 2006).

28 ¹¹ *Order and Notice of Proposed Rulemaking in the Matter of Unbundled Access to Network Elements*,
WC Docket No. 04-313, and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*,
CC Docket No. 01-338, 19 FCC Rcd. 16783.

1 The Company also argues that the filing and review of contracts entered into on a voluntary
2 basis is a Federal matter that has not been delegated to the States. This loses sight of the fact that the
3 network elements at issue are to be used in the provision of competitive "local" service.

4 Moreover, even if the Qwest's arguments had some merit, the FCC itself has found that the
5 State's authority under Section 252 extends to both intrastate and interstate matters. In the *Local*
6 *Competition First Report and Order*, the FCC discussed its role with that of the States over local
7 competition matters:

8 "We conclude that, in enacting sections 251, 252, and 253, Congress created a
9 regulatory system that differs significantly from the dual regulatory system it
10 established in the 1934 Act. (cite omitted). That Act generally gave
11 jurisdiction over interstate matters to the FCC and over intrastate matters to
12 the states. The 1996 Act alters this framework, and expands the applicability
13 of both national rules to historically intrastate issues, and state rules to
14 historically interstate issues. Indeed, many provisions of the 1996 Act are
15 designed to open telecommunications markets to all potential service
16 providers, without distinction between interstate and intrastate services.

17 For the reasons set forth below, we hold that section 251 authorizes the FCC
18 to establish regulations regarding both interstate and intrastate aspects of
19 interconnection, services and access to unbundled elements. We also hold
20 that the regulations the Commission establishes pursuant to section 251 are
21 binding upon states and carriers and section 2(b) does not limit the
22 Commission's authority to establish regulations governing intrastate matters
23 pursuant to section 251. **Similarly, we find that the states' authority**
24 **pursuant to section 252 also extends to both interstate and intrastate**
25 **matters.** Although we recognize that these sections do not contain an explicit
26 grant of intrastate authority to the Commission or of interstate authority to the
27 states, we nonetheless find that this interpretation is the only reasonable way
28 to reconcile the various provisions of sections 251 and 252, and the statute as
a whole. (Emphasis added).¹²

20 **D. The Federal Act Does Not Carve Out Any Exception to the Section 252(e) Filing**
21 **Requirement for "Commercially Negotiated" Agreements.**

22 The Arizona Commission is not aware of any provision in the 1996 Act which defines
23 "commercially negotiated" agreements and carves them out of the filing requirements of Section
24 252(e). At least one federal court has found that regardless of what the agreement is called, when
25 "[an] agreement entered into by competing carriers...implicates issues addressed by the Act [it] is an
26 interconnection agreement".¹³

28 ¹² *Local Competition First Report and Order* at para. 84.

¹³ *Qwest v. Public Service Commission of Utah*, 2005 WL 3534301 (D. Utah 2005).

1 “Qwest unpersuasively argues that the Commercial Agreement is not an
2 interconnection agreement. Although the Act does not define
3 “interconnection agreement,” the language of the Act suggests that any
4 agreement entered into by competing carriers that implicates issues address by
5 the Act is an interconnection agreement. The court does not believe that
6 Congress intended to completely eliminate the statutory filing requirement
7 (which is the first line of defense to avoid discrimination against CLECs) for
8 certain agreements relating to interconnection. Qwest’s restrictive
9 interpretation is contrary to the purpose of the Act because Qwest’s
10 construction of the Act’s language would permit it to circumvent the
11 protective mechanisms set up by Congress.”¹⁴

12 Indeed, in its recent *Declaratory Ruling* involving 252(e) filing obligations, the FCC
13 expressly identified only a few exceptions to the Section 252(e) filing obligation. Those included
14 settlement agreements, order and contract forms completed by carriers to obtain service pursuant to
15 terms and conditions set forth in an interconnection agreement, and agreements with bankrupt
16 competitors that are entered into at the direction of a bankruptcy court or trustee and do not otherwise
17 change the terms and conditions of the underlying interconnection agreement.¹⁵ Unlike, the types of
18 agreements at issue here, all of the exceptions to the filing requirements noted by the FCC involved
19 agreements that do not implicate the policy of the Act’s interconnection requirements.¹⁶

20 RESPECTFULLY submitted this 28th day of July, 2006.

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29 Original and thirteen (13) copies
30 of the foregoing were filed this
31 28th day of July, 2006 with:

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36 ¹⁴ *Id.* at 3534308.

¹⁵ *See Declaratory Ruling* at paras. 12, 13 and 14,

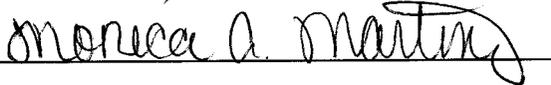
¹⁶ *Qwest v. Public Service Commission of Utah*, 2005 WL 3534301 at 3534308 (D.Utah 2005).

1 Copy of the foregoing mailed this
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competition." Under the Act, incumbent local exchange carriers ("ILECs"), ones which previously had enjoyed a monopoly over the provision of local telephone service, acquired affirmative duties. *Southwestern Bell Tel. Co. v. Apple*, 309 F.3d 713, 715 (10th Cir.2002) (internal citations omitted). Qwest is an ILEC. "To enable new firms to enter the field despite the advantages of the [ILECs], the Act gave the Federal Communications Commission [the "FCC"] broad powers to require ILECs to make 'network elements' available to other telecommunications carriers, most importantly the competitive local exchange carriers ('CLECs')." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 561 (D.C.Cir.2004) (hereinafter referred to as "*USTA II*") (internal citation omitted). MCIMetro is a CLEC.

*2 On July 16, 2004, Qwest and MCIMetro contemporaneously entered into two agreements. The first was the Commercial Agreement, a privately negotiated agreement in which Qwest agreed to provide certain network elements (*i.e.*, switching and shared transport elements) to MCIMetro. The second agreement was the Interconnection Agreement Amendment, in which Qwest agreed to provide a different network element (*i.e.*, a "loop" element) to MCIMetro.

Under the Act, as recently interpreted by courts and the FCC, Qwest is not obligated to provide switching or shared transport elements under Section 251 because they are not "unbundled network elements" (UNEs). See 47 U.S.C. § 251(c)(3) (requiring access to certain UNEs); *USTA II*, 359 F.3d at 571, 588 (noting that switching and shared transport elements are not UNEs); *FCC Order on Remand in the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313 and CC Docket No. 01-338, 20 FCC Red. 2533 (Feb. 4, 2005) (hereinafter "Triennial Review Remand Order" or "TRRO") ¶ 199 ("[W]e impose no section 251 unbundling requirement for mass market local circuit switching nationwide."). Qwest does not dispute, however, that it is obligated to provide the unbundled loop element under Section 251 of the Act because it is a UNE. (See Qwest's Opening Br. at 20.)

On July 27, 2004, MCIMetro filed both agreements with the Commission based on Section 252(a)(1) of the Act. That provision, dealing with filing requirements for agreements arrived at through voluntary negotiations, contains the following language:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

47 U.S.C. § 252(a)(1). Subsection (e) of Section 252 provides that approval by the state commission is required for interconnection agreements: "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies." 47 U.S.C. § 252(e)(1).

On August 13, 2004, Qwest moved to dismiss MCIMetro's application for approval of the Commercial Agreement, arguing among other things that agreements like the Commercial Agreement, which addresses network elements not required by section 251, are not subject to the jurisdiction of the Commission. Qwest did not challenge MCIMetro's filing of the Interconnection Agreement Amendment because that agreement addresses a required network element under Section 251(c)(3) of the Act.

*3 Qwest bases its argument, in part, on language contained in an October 4, 2002 FCC Declaratory Order ^{FN2} which, Qwest asserts, definitively establishes the filing standard under section 252. Interestingly, the Commission also relies on language in the Declaratory Order, but it relies on the Declaratory Order to support a position contrary to Qwest's position. The language of the Declaratory Order will be set forth and discussed in more detail below.

FN2. The full citation for the FCC Declaratory Order is *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)*, WC Docket No. 02-98, 17 FCC Red 19337 (Oct. 4, 2002).

On September 20, 2004, the Commission issued its final order denying Qwest's motion and rejecting Qwest's argument that the Commercial Agreement need not be filed. After the Commission rejected Qwest's motion, Qwest filed an appeal of the Commission's Order, which is

Id. ¶ 8 n. 26 (underline emphasis added). In footnote 26, the FCC rejected the commentors' very broad suggestion that all agreements between carriers, regardless of their relevance to Section 251, should be filed with the state commissions.

But the FCC further stated that "[i]n issuing this decision, however, we believe that the state commission should be responsible for applying, in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements." *Id.* ¶ 7. The FCC continued by stating that

[b]ased 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*.... Therefore, *we decline to establish an exhaustive, all-encompassing "interconnection agreement" standard.* The guidance we articulate today flows directly from the statute and serves to define the *basic class of agreements that should be filed.*

Id. ¶ 10 (emphasis added). See also FCC Forfeiture Order ¶ 34 ("After an agreement is filed with a state commission, the commission may approve or reject that agreement. The state commission can advise the carrier whether a certain type of agreement is considered an interconnection agreement that requires filing in that state. *Until an agreement is filed, however, the state commission would not be in a position to approve, reject, or determine whether a certain type of agreement does not require filing.*") (emphasis added) (interpreting Declaratory Order).

Finally, the FCC said that, "[c]onsistent with our view that the states should determine in the first instance which sorts of agreements fall within the scope of the statutory standard, we decline to address all the possible hypothetical situations presented in the record before us." FCC Declaratory Order ¶ 11. But the FCC did provide some guidance in the Declaratory Order by enumerating narrow exceptions to the mandatory filing and state commission requirements of section 252(a)(1). See Declaratory Order pp. 14-19. The FCC summarized those narrow exceptions in a subsequent order: (1) settlement agreements that simply provide for backward-looking consideration that do not affect an incumbent LEC's ongoing obligations relating to section 251; (2) forms completed by carriers to obtain service pursuant to terms and conditions set forth in an interconnection agreement; and (3) agreements with bankrupt competitors that are entered into at the direction of a bankruptcy court or trustee and that do not otherwise change the terms and conditions of the underlying interconnection agreement.

*7 *In the Matter of Application By Qwest Communications International Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota*, WC Docket No. 03-90, 18 FCC Rcd. 13323, n. 271 (citing Declaratory Order ¶¶ 9-14). See also FCC Forfeiture Order ¶ 23 ("The [Declaratory Order] noted some reasonable but narrow exceptions to the general rule that any agreement relating to the duties outlined in sections 251(b) and (c) falls within section 252(a)'s filing requirement.").

FCC's August 20, 2004 Order and Notice of Proposed Rulemaking

On August 20, 2004, the FCC released its *Order and Notice of Proposed Rulemaking in the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, 19 FCC Rcd. 16783 (hereinafter "2004 NPR"). In the 2004 NPR, the FCC incorporated three petitions regarding *incumbent LEC obligations to file commercial agreements, under section 252 of the Act, governing access to network elements for which there is no section 251(c)(3) unbundling obligation.* To that end, [the FCC asked] should we properly treat commercially negotiated agreements for access to network elements that are not required to be unbundled pursuant to section 251(c)(3) under section 252, section 211, or other provisions of law?

2004 NPR ¶ 13 (emphasis added). The issue presented by the FCC in the above-quoted paragraph 13 is the very issue that Qwest claims was resolved in the FCC's Declaratory Order.

The Commission's Position is Consistent With the Act's Plain Language and Purpose

Qwest argues for a restrictive construction of Section 252 that covers only the filing of agreements that address compelled terms required under Section 251(b) and (c). (See Qwest's Opening Br. at 25-30.) But Qwest's interpretation of the Act is contrary to the Act's plain language and purpose. None of the Act's provisions suggest that the filing and approval requirements apply only to select agreements. The language of section 252(e) is unambiguous. "Any interconnection agreement

adopted by negotiation or arbitration shall be submitted for approval to the State commission." Qwest incorrectly asserts that section 252(e)'s language incorporates an unspoken limitation necessarily required by section 251 and section 252(a)(1). Section 252(a)(1) is clear:

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. *The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.*

***8** (emphasis added).

Also, contrary to Qwest's assertion, the FCC has interpreted that language very broadly and has expressly stated that the last sentence of 252(a)(1) should be read independently of the rest of 252(a)(1)'s language. See, e.g., First Report & Order ¶¶ 165-66; FCC Declaratory Order ¶ 8 ("on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions").

After an agreement is filed with a state commission, the commission may approve or reject that agreement. The state commission can advise the carrier whether a certain type of agreement is considered an interconnection agreement that requires filing in that state. *Until an agreement is filed, however, the state commission would not be in a position to approve, reject, or determine whether a certain type of agreement does not require filing.*

FCC Forfeiture Order ¶ 34 (emphasis added) (interpreting Declaratory Order); see also *id.* ¶ 33 ("Section 252(a)(1) does not condition filing on a state commission first telling a carrier that a certain agreement (which has not yet been seen) must be filed.").

Qwest unpersuasively argues that the Commercial Agreement is not an interconnection agreement. Although the Act does not define "interconnection agreement," the language of the Act suggests that any agreement entered into by competing carriers that implicates issues addressed by the Act is an interconnection agreement. The court does not believe that Congress intended to completely eliminate the statutory filing requirement (which is the first line of defense to avoid discrimination against CLECs) for certain agreements relating to interconnection. Qwest's restrictive interpretation is contrary to the purpose of the Act because Qwest's construction of the Act's language would permit it to circumvent the protective mechanisms set up by Congress.

Moreover, Qwest's reliance on the FCC Declaratory Order's "ongoing obligation" language is misplaced. In its Declaratory Order, the FCC describes very narrow exceptions to the filing requirement. Those exceptions address agreements that do not implicate the policy of the Act's interconnection requirements. As the **Commission** notes in its brief, "[t]he distinction between the State Defendants' and **Qwest's** understanding and application of the Declaratory Order's footnote 26 is that the State Defendants see it as a potential floor whereas **Qwest** sees it as an absolute ceiling on the need to file interconnection agreements." (Defs.' Response Br. at 14.) The court agrees with the **Commission's** reading and finds that the FCC's Declaratory Order is consistent, when read in its entirety and in light of later FCC statements regarding its holding, with the Act's language and purpose. In fact, **Qwest's** citation to the Declaratory Order loses strength in light of the FCC's 2004 NPR that raises the very issue that **Qwest** claims was definitively decided in the Declaratory Order.

***9** Finally, a case in the Western District of Texas provides additional reasoning to support the **Commission's** interpretation. In *Sage Telecom v. Public Service Comm'n of Texas*, Case No. A-04-CA-364-SS (W.D.Tex. Oct. 7, 2004) (attached as Ex. 1 to Defs.' Response Br.), the court dealt with disputes regarding the filing requirement for a voluntary agreement between Sage Telecom and Southwestern Bell Telephone. The agreement included services and network elements, some of which were compelled network elements and some of which were not. Sage and Southwestern Bell opposed the filing of the entire agreement. They argued that only the portions of the agreement setting forth compelled network elements needed to be filed with the state commission. The *Sage Telecom* court rejected the parties' distinction between required network elements and non-obligatory network elements with respect to filing requirements.

Although the facts in *Sage Telecom* are not exactly the same as the situation faced here, the reasoning in *Sage Telecom* is persuasive, particularly in light of the fact that Qwest and MCIMetro entered into two agreements on the same day—one dealing with compelled network elements (the Interconnection Agreement Amendment) and one dealing with non-obligatory elements (the Commercial Agreement). The *Sage Telecom* court rejected Sage's and Southwestern Bell's position

because it was not supported by the text of the Act itself. *Sage Telecom* at 9. The *Sage Telecom* court also noted that the parties' suggestion that only contract provisions addressing compelled network elements need be filed "would allow the policy goals of the Act to be circumvented too easily." *Id.* at 7.

As noted above, the Act provides two mechanisms to prevent discrimination. First, state-commission-approval provides administrative review to ensure that agreements do not discriminate against other carriers, and second, the public-filing requirement gives other carriers an independent opportunity to resist discrimination by having access to the terms and conditions obtained by the favored carrier. Under Qwest's interpretation of the filing requirements, carriers could circumvent these mechanisms. Carriers could simply place some of their agreed-upon terms and conditions in one agreement (to be withheld) and place terms and conditions for Section 251 compelled services or network elements in another agreement (to be filed). "If the public filing scheme could be evaded entirely by a CLEC's decision [to split up its agreement], the statute would have no hope of achieving its goal of preventing discrimination against less-favored CLECs." *Sage Telecom* at 8.

The *Sage Telecom* court also rejected an alternative argument by the parties that mirrors the situation presented in this case. The court noted two problems with the filing of one agreement while withholding a related agreement. "First, § 252(e)(1) plainly requires the filing of any interconnection agreement." *Id.* at 10. Second, if only certain parts of the parties' agreement are known, the filing of only the Section 251 relevant documents "might fundamentally misrepresent the negotiated understanding of what the parties agreed." *Id.* at 11. Without access to and review of all the terms and conditions of the parties' interconnection agreement, the state commission could not make an adequate determination under the discrimination or public interest tests. That is, what might appear to be appropriate terms and conditions in the document dealing with Section 251 duties could be inappropriate when viewed in conjunction with terms and conditions in another document dealing with non-Section 251 duties. Also, other carriers would not be able to judge and evaluate (not only in their monitoring role but for their own business decisions as participants in the market) the carriers' total arrangement. Citing to *Coserv Ltd. Liability Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir.2003), the *Sage Telecom* court stated that

***10** the entire § 252 framework contemplates [that] non- § 251 terms may play a role in interconnection agreements: "[b]y including an open-ended voluntary negotiations provision in § 252 (a)(1), Congress clearly contemplated that the sophisticated telecommunications carriers subject to the Act might choose to include other issues in their voluntary negotiations, and to link issues of reciprocal interconnection together under the § 252 framework."

Sage Telecom at 15-16.

The court finds that the Commission's interpretation of the Act is consistent with the language of the Act as well as FCC's interpretation and implementation of the Act. Accordingly, the court upholds the PSC Order.

ORDER

For the foregoing reasons, the PSC Order is AFFIRMED. Qwest's request for declaratory and injunctive relief is DENIED.

DATED this 14 day of November, 2005.

Copr. (C) West 2006 No Claim to Orig. U.S. Govt. Works D.Utah,2005.

Qwest Corp. v. Public Service Com'n of Utah

Slip Copy, 2005 WL 3534301 (D.Utah)

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- [2005 WL 4112941](#) (Trial Motion, Memorandum and Affidavit) Qwest Corporation's Opening Brief on Appeal (Apr. 8, 2005)  [Original Image of this Document with Appendix \(PDF\)](#)
- [2005 WL 4115980](#) (Trial Pleading) Answer of the Public Service Commission of Utah, Ric Campbell, Constance White, and Ted Boyer, Commissioners of the Public Service Commission of Utah (Jan. 20, 2005)  [Original Image of this Document \(PDF\)](#)
- [2004 WL 3956715](#) (Trial Pleading) Complaint (Dec. 10, 2004)  [Original Image of this Document with Appendix \(PDF\)](#)

Slip Copy, 2006 WL 771223 (D.Colo.)

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,

D. Colorado.

QWEST CORPORATION, a **Colorado** corporation, Plaintiff,

v.

THE PUBLIC UTILITIES COMMISSION OF COLORADO, a regulatory agency of the State of **Colorado**; Gregory E. Sopkin, in his official capacity as a Commissioner of the **Public Utilities Commission of Colorado**; Polly Page, in her official capacity as a Commissioner of the **Public Utilities Commission of Colorado**; and Carl Miller, in his official capacity as a Commissioner of the **Public Utilities Commission of Colorado**;; Defendants.

No. 04-D-02596-WYD-MJW.

March 24, 2006.

Elizabeth A. Woodcock, Denver, CO, for Plaintiff.

ORDER

DANIEL, J.

I. INTRODUCTION

*1 THIS MATTER is before the Court on Plaintiff **Qwest** Corporation's Appeal from a November 16, 2004, decision of The **Public Utilities Commission of Colorado** ("the PUC"). **Qwest** brings this appeal pursuant to section 252(e)(6) of the Federal Telecommunications Act of 1996 (the "Telecommunications Act"). **Qwest** filed its Opening Brief on March 18, 2005. The **Commission** filed a Response Brief on May 2, 2005, and **Qwest** filed its Reply Brief on May 27, 2005. A hearing was held on Thursday, August 25, 2005.

The issue raised in this appeal is whether, pursuant to various provisions of the Telecommunications Act, the Master Services Agreement between **Qwest** Corporation ("**Qwest**") and MCI Metro Access Transmission Services, L.L.C. ("MCI Metro"), is an "interconnection agreement" that must be filed with the PUC for review and approval. In the Master Services Agreement, **Qwest**, an incumbent local exchange carrier or "ILEC," agrees to provide a product called **Qwest** Platform Plus0 ("QPP") to MCI Metro, a competitive local exchange carrier or "CLEC," for a negotiated price (the "QPP Agreement"). On July 23, 2004, MCI Metro filed a motion for approval of the QPP Agreement with the PUC. **Qwest** moved to dismiss the application for approval and asserted that the PUC lacked jurisdiction to review the QPP Agreement. The **Commission** disagreed, and on November 16, 2004, issued an Order Approving Interconnection Agreement, Docket No. 96A-366T, ("Final Order"), stating that "[t]he **Qwest** Corporation Platform Plus Master Service Agreement must be filed as an interconnection agreement for approval by the **Commission**." **Qwest** appeals the PUC's decision and seeks (1) a declaratory judgment that the PUC's Final Order violates 47 U.S.C. § 252 of the Telecommunications Act, and (2) a permanent injunction to prevent the PUC from enforcing the Final Order against **Qwest** with regard to the QPP Agreement.

II. BACKGROUND

This Court has jurisdiction over this matter pursuant to 47 U.S.C. § 252(e)(6), which provides in relevant part that "[i]n any case in which a State **commission** makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and section." I review *de novo* issues concerning the PUC's procedural and substantive compliance with the Telecommunications Act, and whether the PUC has met the specific requirements of federal and state law. *U.S. West Communications, Inc. v. Hix*, 986 F.Supp. 13, 19

(D.Colo.1997).

A. *Telecommunications Act- §§ 251 and 252*

The Telecommunications Act of 1996, 47 U.S.C. § 251 et seq., was designed to end monopolies in the local telephone market by requiring local telephone carriers to open their facilities, services and equipment to competitors for a negotiated price. See *Atlas Telephone Co. v. Oklahoma Corp. Comm'n*, 400 F.3d 1256, 1259-60 (10th Cir.2005); *Mainstream Marketing Services, Inc. v. F.T.C.*, 358 F.3d 1228, 1248 (10th Cir.2004); *Hix*, 986 F.Supp. at 14. Pursuant to § 251 of the Telecommunications Act, it is the "[g]eneral duty" of an ILEC, such as Qwest, "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers..." 47 U.S.C. § 251(a)(1). Specific "interconnection" duties are set forth in § 251(b) & (c). Section 251(b) requires an ILEC (1) not to prohibit or unreasonably limit resale of their services, (2) provide number portability, (3) provide dialing parity, (4) provide access to rights-of-way, and (5) establish reciprocal compensation arrangements. Section 251(c) requires an ILEC to (1) negotiate agreements to fulfill the duties described in § 251(b)(1)-(5) & (c) in good faith, (2) provide interconnection of their network with the network of any requesting telecommunications carrier, (3) provide access to unbundled network elements ("UNEs"), (4) offer their services for resale, (5) provide notice of changes, and (6) provide reasonable conditions for collocation.

*2 Section 252 of the Telecommunications Act sets forth procedures for negotiation, arbitration, and approval of interconnection agreements. Section 252(a)(1) provides that:

[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an [ILEC] may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title... The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State **commission** under subsection (e) of this section.

47 U.S.C. § 252(a)(1) (emphasis added). Section 252(e)(1) provides that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State **commission**. A state **commission** to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies." Based on the language in § 252(a)(1) & (e)(1), the PUC concluded that **Qwest** must file the QPP Agreement with the PUC for approval.

B. *The Parties' Positions on Appeal*

On appeal, **Qwest** asserts that in ruling that the QPP Agreement must be filed as an interconnection agreement, the PUC exceeded its authority under the Telecommunications Act.^{FN1} According to **Qwest**, the phrase in § 251(a)(1) which states "[u]pon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title," means that the § 252(e)(1) filing requirement relates solely to agreements involving those specific interconnection duties, services, or network elements that an ILEC is required to provide pursuant to § 251(b) & (c). Put another way, it is Qwest's position that "the filing obligations of section 252 arise only if a section 251 service or element is the subject of the agreement." Opening Brief at 24.

FN1. After concluding that the QPP Agreement must be filed, the PUC approved the QPP Agreement. Qwest does not contend that this approval was in error, only that the PUC lacks the power to either approve or reject the QPP Agreement.

Here, the QPP consists of two network elements-"switching" and "shared transport."^{FN2} Pursuant to § 251(c)(3), ILECs have a duty to provide nondiscriminatory access to network elements on an unbundled basis. However, § 251(c)(3) does not require an ILEC to provide unbundled access to all network elements. The Federal Communications Commission recently determined that switching and shared transport are no longer subject to the unbundling requirement set forth in § 251(c)(3).^{FN3} See Order on Remand, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533, 2005 WL 289015 (Feb. 4, 2005). Qwest argues that because these network elements are not ones that an ILEC is required to provide under § 251, the QPP Agreement is not an "interconnection agreement" within the meaning of § 252(e)(1).

FN2. Generally, "switching" is the process by which a call on the network is routed to the called party. "Shared Transport" refers to the sharing of interoffice facilities that link switches together and connect the network of one carrier to the network of another carrier.

FN3. Section 251(d)(2) states that:

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether

- (A) access to such network elements as are proprietary in nature is necessary; and
- (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

Qwest notes that the prices for switching and shared transport, as set forth in the QPP Agreement are market-based prices, and are no longer subject to the "total element long run incremental cost ("TELRIC") that the FCC mandates be used for elements required by section 251(c)(3).

Qwest concedes, however, that it remains obligated to provide switching and shared transport under § 271 of the Telecommunications Act.^{FN4} Qwest further acknowledges that the QPP Agreement allows switching and shared transport elements to be used with other network elements for which Qwest still has a duty to provide under § 251(c)(3), but points out that those network elements are provided pursuant to a separate, preexisting interconnection agreement between the parties. Indeed, the QPP Agreement states that "[t]his agreement is offered by Qwest in accordance with Section 271 of the Act."

FN4. Section 271 sets forth the process by which Regional Bell Operating Companies (ROBC's) can apply for authority to provide "interLATA," or long distance, services. Many of the unbundled network elements (UNEs) that have been removed from the list of UNEs under § 251(3)(c) must still be provided unbundled pursuant to § 271(c)(2)(B).

*3 The PUC agrees that Qwest is only required to provide switching and shared transport on an unbundled basis pursuant to § 271. However, the PUC notes that § 252(e), unequivocally states that "[a]ll interconnection agreements be filed. According to the PUC, switching and shared transport "clearly fall into the category of 'interconnection.'" Response Brief at 21. In addition, the PUC contends that the QPP Agreement is an agreement negotiated as the result of Qwest having received "a request for interconnection, services, or network elements pursuant to section 251." The PUC states that "there is no question that the QPP Agreement 'creates' and 'contains' obligations on the part of Qwest to continue to provide the interconnection, services, and unbundled network elements previously provided in accordance with section 251(c)." Response Brief at 23. Thus, the PUC asserts that "[t]he QPP Agreement must be filed and approved in accordance with 47 U.S.C. § 252(a)(1) and § 251(e)(1) or some combination of the two sections."

The primary authority **Qwest** relies upon in support of its interpretation of §§ 251 and 252 is an October 4, 2002, Memorandum Opinion and Order issued by the Federal Communications Commission ("FCC") ("Declaratory Order"). 2002 WL 31204893, 17 F.C.C.R. 19337 (Oct. 4, 2002). The Declaratory Order addresses **Qwest's** petition for a declaratory ruling on "the scope of the mandatory filing requirement set forth in section 252(a)(1) of the [Telecommunications Act]." In its petition, **Qwest** asserted that certain ILEC agreements should not be subject to section 252(a)(1), including (a) agreements defining business relationships and administrative procedures; (b) settlement agreements; and (c) agreements regarding "matters not subject to sections 251 or 252," such as agreements involving "network elements that have been removed from the national list of elements subject to mandatory unbundling." Declaratory Order at ¶ 3. The FCC granted Qwest's request in part, and denied it in part. The FCC declined to find that certain categories of agreements, such as settlement agreements and agreements containing dispute resolution and escalation provisions, are per se outside the scope of 252(a)(1). Declaratory Order at ¶¶ 9 and 12. In the

context of this discussion, the FCC observed that an agreement that creates an "ongoing obligation pertaining to [the requirements of §§ 251(b) & (c)] is an interconnection agreement that must be filed pursuant to section 252(a)(1)." Declaratory Order at ¶ 8. In a footnote, the FCC further stated "[w]e therefore disagree with the parties that advocate the filing of all agreements between an incumbent LEC and a requesting carrier.... 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)." Declaratory Order at n. 26.

III. ANALYSIS

The services to be provided in the QPP Agreement-shared transport and switching-are "network elements" related to "interconnection." Section 252(e) clearly states that "any" interconnection agreement "shall be" submitted to the state commission for approval. The issue raised in this appeal, however, is whether all agreements that relate to "interconnection" are "interconnection agreements" subject to filing under § 252(e), or whether only those agreements that relate to the specific duties set forth in § 251(b) & (c) are "interconnection agreements" within the meaning of § 251(e).

*4 To resolve this issue, I turn to the plain language of § 252(a)(1) & (e). *Quarles v. U.S. ex rel. Bureau of Indian Affairs*, 372 F.3d 1169, 1172 (10th Cir.2004). I must attempt to construe the words of the statute "in their ordinary sense," and give operative effect to every word. *Quarles*, 372 F.3d at 1172. The first sentence of § 252(a)(1) refers to agreements negotiated following "a request for interconnection, services, or network elements pursuant to section 251...." I disagree with Qwest's assertion that the phrase "pursuant to section 251" means a request for those services or network elements specifically listed in section 251(b) & (c). Nothing in the plain language of the statute suggests that I should ascribe such a narrow meaning to this phrase. As set forth above, § 251 contains both the general requirement that telecommunication carriers "interconnect" with the "facilities and equipment of other telecommunication carriers," as well as certain specific duties and obligations. Moreover, § 252 contemplates that even those agreements an ILEC enters with a "requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 ... shall be submitted to the State commission under subsection (e) of this section." Based on the plain language of the statute, I find that the § 252 is not limited solely to agreements involving the specific duties and obligations set forth in § 251(b) & (c). The phrase "pursuant to section 251" refers to both the general and specific duties set forth in § 251, including the duty of telecommunication carriers to "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." I find that the QPP is an interconnection agreement that must be filed pursuant to § 252(a)(2) & (e)(1).

I am not persuaded that any of the authorities cited by Qwest, including the Declaratory Order, require a different result. As an initial matter, I find that the Declaratory Order does not address the precise issue presented in this appeal. Qwest relies heavily on the language in ¶ 8 and footnote 26 of the Declaratory Order, in which the FCC states that agreements involving set forth in sections 251(b) and (c) are appropriately deemed "interconnection agreements." However, the FCC did not directly address whether agreements involving access to network elements that were no longer subject to the mandatory unbundling requirements contained in sections 251(b) and (c), should be excluded from the section 252(a)(1) filing requirements. Moreover, it appears that the FCC has recently sought comment "regarding incumbent LEC obligations to file commercial agreements, under section 252 of the Act, governing access to network elements for which there is no section 251(c)(3) unbundling obligation." See Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements, and Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 F.C.C. Rcd. 16783, 2004 WL 1900394, ¶ 13 (Aug. 20, 2004). I agree with the PUC that this recent inquiry suggests that the FCC did not take a definitive position on this issue in the Declaratory Order. Finally, in the body of the Declaratory Order the FCC specifically "decline[d] to establish an exhaustive, all-encompassing 'interconnection agreement' standard," and encouraged state commissions "to take action to provide further clarity to [ILECs] and requesting carriers concerning which agreements should be filed for their approval." Declaratory Order at ¶ 10. The PUC's action are consistent with this direction.

*5 The parties cite no published cases, nor am I aware of any published cases, that address the issues presented here. The parties acknowledge the existence of a single, unpublished opinion from the District of Montana in which the Magistrate Judge concluded that because the agreement at issue involved a service or element that was not being provided pursuant to section 251, the agreement

was not an "interconnection agreement" as contemplated in section 252. **Qwest v. Schneider et al.**, CV-04-053-H-CSO, Order on **Qwest's** Motion for Judgment on Appeal (D. Mont. June 9, 2005) (unpublished). For the reasons set forth in this Order, I do not find the reasoning in the *Schneider* case persuasive, and decline to adopt that reasoning here.

III. CONCLUSION

For the reasons set forth above, I affirm the PUC's Order that the QPP Agreement must be filed as an interconnection agreement for approval by the **Commission**, and I deny **Qwest's** request for declaratory judgment and injunctive relief.

Qwest Corporation's Appeal from The **Public Utilities Commission** of **Colorado's** Order of November 16, 2004, is DENIED.

Copr. (C) West 2006 No Claim to Orig. U.S. Govt. Works D.Colo.,2006.

Qwest Corp. v. Public Utilities Com'n of Colorado

Slip Copy, 2006 WL 771223 (D.Colo.)

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--- F.Supp.2d ----, 2006 WL 2007655 (D.Me.)

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
D. Maine.
VERIZON NEW ENGLAND INC. d/b/a Verizon Maine, Plaintiff
v.
MAINE PUBLIC UTILITIES COMMISSION et al., Defendants.
Civil No. 05-53-B-C.
July 18, 2006.

Catherine R. Connors, Mark E. Porada, William D. Hewitt, Pierce, Atwood LLP, Portland, ME, Donald W. Boecke, Verizon Communications, Boston, MA, Scott H. Angstreich, Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, Washington, DC, for Plaintiff.
Trina M. Bragdon, Andrew S. Hagler, Maine Public Utilities Commission, Augusta, ME, for Defendants.

**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT OR, ALTERNATIVELY, FOR JUDGMENT ON
THE PLEADINGS**

GENE CARTER, Senior District Judge.

*1 This case is before the Court on the Motion of the Plaintiff, Verizon New England Inc. d/b/a Verizon Maine for Summary Judgment or, Alternatively, for Judgment on the Pleadings (Docket Item No. 74) and on Defendants Maine Public Utilities Commission and the Commissioners of the Maine Public Utilities Commission's Motions for Judgment on the Pleadings (Docket Item No. 71) ^{FN1} and for Summary Judgment (Docket Item No. 82). Verizon Maine ("Verizon") seeks an order declaring that the Maine Public Utilities Commission's ("PUC") September 3, 2004, March 17, 2005, and September 13, 2005 Orders, and other Orders in collateral dockets, are unlawful. The Court previously denied Verizon's Motion for Preliminary Injunctive relief. Docket Item No. 70.

FN1. Because of the disposition of Defendants' Motion for Summary Judgment, it is unnecessary for the Court to address Defendants' Motion for Judgment on the Pleadings.

I. FACTS^{FN2}

FN2. Additional background concerning this dispute may be found in the Court's Order Denying Plaintiff's Motion for Preliminary Injunction. *Verizon New England, Inc. v. Maine Public Utilities Com'n*, 403 F.Supp.2d 96 (D.Me.2005).

Verizon is an "incumbent local exchange carrier" ("ILEC") within the meaning of the 1996 Telecommunications Act ("TCA"). See 47 U.S.C. § 251(h)(1). **Verizon**, as successor to New England Telephone and Telegraph Company, is also a Bell Operating Company ("BOC") within the meaning of the TCA. See 47 U.S.C. § 153(4). In a letter dated March 1, 2002, the PUC advised **Verizon** that as a condition of its support of **Verizon's** Application to the FCC for permission to enter the InterLATA long distance market in Maine, it would require a commitment by **Verizon** to, *inter alia*, file a wholesale tariff for the Commission's review and approval. In a letter dated March 4, 2002, **Verizon** responded to the Commission's letter by committing to meet all of the PUC's conditions set forth in the March 1, 2002 letter, including the requirement that it file a wholesale tariff for the Commission's review and approval. **Verizon** filed a proposed wholesale tariff covering **Verizon's** network interconnection, unbundling, and resale obligations under § 251 with the PUC on November 1, 2002. On September 3, 2004, the PUC issued its first order in **Verizon's** Wholesale Tariff Proceeding finding

that **Verizon's** agreement to file a "wholesale tariff" included all of **Verizon's** wholesale obligations, both those under § 251 as well as those under § 271 of the Act. See **VERIZON MAINE, Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)**, Order-Part II, Docket No. 2002-682 (Me.P.U.C. Sept. 3, 2004) at 12. **Verizon's** proposed tariff did not include rates for § 271 unbundled network elements ("UNEs"). With regard to the pricing of **Verizon's** wholesale offerings, the PUC found that until **Verizon** submitted and the PUC approved tariffs for § 271 UNEs, **Verizon** must continue to provide § 271 UNEs at TELRIC rates.^{FN3} The PUC adopted the previously-approved TELRIC rates for § 271 UNEs as a temporary measure until **Verizon** filed a tariff proposing rates which used the FCC's "just and reasonable" standard under §§ 201 and 202. *Id.*

FN3. The PUC had previously adopted specific TELRIC rates for **Verizon's** § 251 UNEs in Docket No. 1997-505. Investigation Into Total Long Run Incremental Cost (TELRIC) Cost Studies and Pricing for Unbundled Network Elements, Docket No. 1997-505, Order (Feb. 12, 2002) (TELRIC Order).

In February 2005, after the FCC issued the Triennial Review Remand Order ("TRRO") further modifying the ILECs' unbundling requirements pursuant to § 251, additional disputes arose between Verizon and the CLECs regarding Verizon's obligations to provide UNEs in Maine and resulted in supplemental filings at the PUC by Verizon and the CLECs. *Triennial Review Remand Order, Unbundled Access to Network Elements, Order on Remand, WC Docket No. 04-313; CC Docket No. 01-338, 20 FCC Rcd 2533 (2005)*. On March 17, 2005, the PUC issued an order denying the CLECs' requested relief from the TRRO. See **VERIZON MAINE, Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)**, Order, Docket No. 2002-682 (Me.P.U.C. March 17, 2005). In addition, the PUC reminded Verizon that it remained obligated to comply with the September 3, 2004 order and encouraged the parties to bring any disagreements concerning which UNEs qualify as § 271 UNEs to the commission. Finally, on September 13, 2005, the PUC issued an order addressing the current legal status of each of the UNEs appearing on a joint matrix submitted by the parties in September 2004. See **VERIZON MAINE, Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)**, Order, Docket No. 2002-682 (Me.P.U.C. Sept. 13, 2005) (hereinafter "September 13, 2005 Order"). The PUC found that it had "authority to make such determinations, absent an order from the FCC making specific contrary findings, under sections 251, 252 and 271 of the TelAct and under the terms of Verizon's commitment to file a wholesale tariff in our 271 Proceeding", and that it was "acting within [its] authority under both state and federal law." *Id.* at 6. Additionally, the PUC purported to resolve a dispute between Verizon and Biddeford Internet Corporation d/b/a Great Works Internet ("GWI"), determining that their interconnection agreement required Verizon to provide GWI with § 271 elements at the rates set by the PUC.

*2 Verizon contends that these orders are unlawful for four reasons: (1) the PUC lacks authority to set rates for elements required by § 271; (2) federal law preempts the PUC's requirement that elements required by § 271 be provided at TELRIC rates on a temporary basis; (3) the PUC erroneously interpreted § 271 to include elements not covered by that section; and (4) the PUC erroneously interpreted the interconnection agreement to require the provision of elements required by § 271 at rates set by the PUC. For the reasons stated below, Verizon is unable to succeed on any of these claims, and, accordingly, Defendants are entitled to judgment as a matter of law.

II. ANALYSIS

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed.R.Civ.P. 56(c)*. "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir.2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir.1995)). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving

party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir.2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir.1999) (citation and internal punctuation omitted); Fed.R.Civ.P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir.2001) (citation and internal punctuation omitted).

A. Whether the PUC may lawfully set rates for elements required by § 271

Verizon first argues that the PUC cannot lawfully set rates for elements required by § 271.^{FN4} The resolution of this matter, Verizon contends, turns upon whether "Congress conferred on state commissions the authority to regulate and enforce the Section 271 obligations." Plaintiff's Motion for Summary Judgment at 14. The Court disagrees. Federal law is not the only source of the PUC's authority. The state of Maine "has granted broad authority to the PUC to make orders that are necessary to carry out the purpose of making modern telecommunications services more available and affordable to Maine residents upon terms that are just and reasonable."^{FN5} *Verizon New England, Inc., v. Public Utilities Commission*, 2005 ME 64, ¶ 19, 875 A.2d 118, 123. Thus, in order to succeed on its claim, Verizon must demonstrate that this power has been preempted; an argument that Verizon fails to make here.^{FN6} Accordingly, Verizon is unable to demonstrate that the PUC may not lawfully set rates for elements required by § 271.

^{FN4}. At times throughout its brief, Verizon characterizes the PUC's Order as regulating the conditions BOCs must satisfy to provide long-distance service. This characterization, the Court thinks, is somewhat deceiving. Although § 271 deals with the provision of long distance service, none of the PUC's orders at issue purport to limit or otherwise regulate Verizon's ability to provide long distance services.

^{FN5}. Verizon does not argue that the PUC's orders exceed its authority under state law.

^{FN6}. Although Verizon presented a preemption argument in seeking preliminary injunctive relief, it does not reassert that argument at this stage in the case. Had it done so, the Court remains convinced as indicated in the Order Denying Plaintiff's Motion for Preliminary Injunction that the PUC's authority to set rates for elements required by § 271 has not been preempted. *Verizon New England*, 403 F.Supp.2d at 102.

B. Whether the PUC's Decision to Require TELRIC Rates is Preempted

*3 Verizon next argues that, even if the PUC has some authority to set rates for elements required by § 271, the PUC's decision to temporarily require TELRIC pricing for § 271 elements conflicts with federal law and is, therefore, preempted. On this issue, Verizon presents no new facts and makes no additional arguments to those it offered in seeking preliminary injunctive relief. For the reasons stated in the Court's Order Denying Preliminary Injunction, *Verizon New England*, 403 F.Supp.2d at 102-05, the Court remains persuaded that Verizon is unable to demonstrate that the PUC's orders requiring, on a temporary basis, the provision of § 271 elements at TELRIC rates are preempted.

C. Whether the PUC Erroneously Interpreted Checklist Items 4 and 5

The PUC found that Checklist Item 4 requires **Verizon** to provide access to line sharing and dark fiber loops, and that Checklist Item 5 requires **Verizon** to provide access to dark fiber transport and entrance facilities. See Sept. 13, 2005 Order at 9-12, 23-24, 39-40, 43. **Verizon** argues that the

PUC's interpretation of checklist items 4 and 5 is erroneous. The Court will review the PUC's determination *de novo*. ***Global Naps, Inc. v. Verizon New England, Inc.***, 396 F.3d 16, 23 & n. 8 (1st Cir.2005). For the reasons stated below, the Court concludes that the elements found by the PUC to be included in checklist items 4 and 5 are required by § 271.

1. Checklist Item 4

Checklist Item 4 states that an ILEC must provide access to local loops as follows: "Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services." 47 U.S.C. § 271(c)(2)(B)(iv). With respect to line sharing ^{FN7}, Verizon argues that it "does not provide a competitor with 'loop' transmission, because [it] provides a competitor with only a *portion* of the loop, while [it] continues to provide voice service over the loop." Plaintiff's Motion for Summary Judgment at 24. Likewise, when a competitor obtains a dark fiber loop ^{FN8}, Verizon argues that it "does not provide loop 'transmission,' because dark fiber is a piece of glass, incapable of transmitting anything unless and until electronics are attached to it." *Id.* However, Verizon's arguments are of no consequence since § 271 only requires that Verizon provide "access" "to local loop transmission" and not that Verizon actually provide a dedicated "loop" or actual "transmission." 47 U.S.C. § 271(c)(2)(B) ("Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following [checklist items.]"). Based upon the plain language of the statute, the Court agrees that checklist item 4 includes line sharing and dark fiber loops.

^{FN7}. Line sharing allows a CLEC to use the high frequency part of a loop to provide xDSL service (broadband) while Verizon uses the low frequency portion of the loop to provide voice service to the same end user.

^{FN8}. Dark fiber consists of unused fiber within an existing fiber optic cable that has not been activated through optronics to make it capable of carrying communications services. Users of unbundled dark fiber loops furnish their own electronic equipment to activate the dark fiber strands to provide voice and data services.

Verizon contends, however, that the FCC implicitly decided that these elements were not included in checklist item 4 because it did not address them in any of its pre-1999 approval orders. See Memorandum Opinion and Order, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, (rel. December 22, 1999) ("New York 271 Approval Order"), ¶ 31 & n. 70. The erroneous assumption contained in Verizon's argument is that the FCC actually considered the issue of what elements are required under Checklist Item 4 in the New York § 271 Approval Order. Contrary to Verizon's assertion, the Court does not find that silence on the part of an agency means that the agency has considered and decided the issue. Thus, the FCC's silence on this issue is not something to which the Court may appropriately give deference.

*4 In support of its position, the PUC points to specific FCC decisions that it argues demonstrate that once the FCC established line sharing and dark fiber as network elements in 1999, it has consistently interpreted § 271's loop requirement to include line sharing and dark fiber. For example, in the Maine 271 Approval Order, the FCC specifically stated that in order to meet Checklist Item No. 4 all technically feasible functionalities of the loop must be unbundled. See Memorandum Opinion and Order, *Application by Verizon New England Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Maine*, 17 FCC Rcd 11659 (rel. June 19, 2002) (hereinafter "Maine 271 Approval Order"), Appendix D, ¶ 49 ("the BOC must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested."); see also Memorandum Opinion and Order, *Application of Verizon New England Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988 (rel. April 16, 2001) (hereinafter "Massachusetts 271 Approval Order"), ¶ 163 ("On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251(c)(3) of the Act and, thus,

checklist items 2 and 4 of section 271."). The FCC then described how an ILEC must make line sharing available in order to meet § 271's requirements. Maine 271 Approval Order, Appendix D, ¶¶ 50-51. With respect to dark fiber loops, the FCC stated that the UNE Remand Order provided that "dark fiber and loop conditioning are among the features, functions and capabilities of the loop," thus affirming the necessity of providing access to dark fiber loops under § 271. *Id.* at ¶ 48, n. 440. Consideration of the Maine and Massachusetts § 271 Approval Orders, along with the language of the statute, persuades the Court that Checklist Item 4 requires provision of any functionality of the loop, including line sharing and dark fiber. Accordingly, Verizon is unable to demonstrate that the PUC's interpretation of Checklist Item 4 is erroneous.

2. Checklist Item 5

Checklist Item 5 states that an ILEC must provide access to "local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services." 47 U.S.C. § 271 (c)(2)(B)(v). Verizon contends that neither dark fiber transport ^{FN9} nor dark fiber entrance facilities ^{FN10} fit within this description because these dark fiber elements cannot provide any transport without electronics being attached. Plaintiff's Motion for Summary Judgment at 24. As with the elements from Checklist Item 4, it is irrelevant whether dark fiber alone can transport anything as long as CLECs are provided access to local transport. 47 U.S.C. § 271(c)(2)(B) ("Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following [Checklist Items.]")(emphasis added).

^{FN9}. Dark fiber transport refers to unlit fiber facilities between two ILEC central offices. TRO at ¶¶ 365, 381. CLECs purchase dark fiber transport from an ILEC, add their own electronics on both ends of the route, and then use the fiber to carry traffic.

^{FN10}. Dark fiber entrance facilities connect a CLEC's collocation space in the ILEC central office to the CLEC's switch and are used to backhaul traffic from the CLEC's network to its switch.

***5** Although the FCC made no specific mention of dark fiber transport in its Maine § 271 Approval Order, the PUC relies on several statements made by the FCC in other states' § 271 Approval Orders that it suggests support the PUC's view that dark fiber transport fits under the requirements of Checklist Item 5. Specifically, the Pennsylvania § 271 Approval Order refers to Verizon's compliance with Checklist Item 5 in the context of requiring Verizon to file tariffs with the Pennsylvania PUC for its dark fiber offerings. See Memorandum Opinion and Order, Application of Verizon Pennsylvania Inc. for Authorization to Provide In-Region, InterLATA Services in the State of Pennsylvania, 16 FCC Rcd 17419 (rel. September 19, 2001) (hereinafter "Pennsylvania 271 Approval Order") at ¶ 109 n. 372. In addition, in the Arkansas/Missouri 271 Approval Order, the FCC stated that it was relying upon Southwest Bell's affidavit stating that it provided non-discriminatory access to dark fiber as evidence that it provided access to dedicated transport. See Memorandum Opinion and Order, In the Matter of Joint Application by SBC Communications Inc., To Provide In-Region, InterLATA Services in Arkansas and Missouri, Order Granting Application, 16 FCC Rcd 20719 (rel. November 16, 2001), ¶ 116 n. 365. Finally, in the Rhode Island § 271 Approval Order and the Vermont § 271 Approval Order, the FCC addressed arguments by a CLEC that Verizon's dark fiber offering did not meet the Checklist's requirements. See Memorandum Opinion and Order, In the Matter of Application by Verizon New England Inc. for Authorization To Provide In-Region, InterLATA Services in Rhode Island, Order Granting Application, 17 FCC Rcd 3300 (rel. February 22, 2002), ¶¶ 92-93 and Memorandum Opinion and Order, In the Matter of Application by Verizon New England Inc., for Authorization To Provide In-Region, InterLATA Services in Vermont, Order Granting Application, 17 FCC Rcd 7625 (rel. April 17, 2002), ¶¶ 56-57. While the FCC ultimately dismissed the CLECs' complaints in both cases on other grounds, it did not indicate in any way that dark fiber was not a requirement of Checklist Item No. 5. Regarding dark fiber entrance facilities, in the Maine 271 Approval Order when discussing Checklist Item 5, the FCC stated that it "required that BOCs provide both dedicated and shared transport to requesting carriers." Maine 271 Approval Order, Appendix D, ¶ 53. The FCC then noted that dedicated transport included dedicated transmission facilities between "the wire centers of BOCs and requesting

carriers," *i.e.* entrance facilities. *Id.* at n. 448. Thus, the FCC interpreted the local transport provision of Checklist Item 5 as requiring access to entrance facilities. Furthermore, even though it has found that CLECs are not impaired without access to dark fiber entrance facilities under § 251, the FCC continues to define the term "dedicated transport" to include entrance facilities. TRRO at ¶ 137 ("In response to the court's remand, we reinstate the Local Competition Order definition of dedicated transport to the extent that it included entrance facilities, but we find that requesting carriers are not impaired without unbundled access to entrance facilities.")

*6 Consideration of various states' 271 Approval Orders, other FCC orders, and the language of the statute itself, convinces the Court that Checklist Item 5 requires access to dark fiber transport and entrance facilities. Accordingly, Verizon is unable to demonstrate that the PUC's interpretation of Checklist Item 5 is erroneous.

D. Whether the PUC Erroneously Interpreted the Interconnection Agreement

Lastly, Verizon challenges that part of the PUC's September 13, 2005 Order, which purports to resolve a dispute concerning the interpretation of an existing interconnection agreement between Verizon and GWI. The underlying dispute is whether the terms of the interconnection agreement require Verizon to provide § 271 network elements at rates prescribed by the PUC. The agreement requires Verizon to provide UNEs "only to the extent required by Applicable Law." Interconnection Agreement attached as Ex. F to Meehan Aff. (Docket Item No. 77), at 79, § 1.1, Network Elements Attachment. The agreement defines "Applicable Law" as "[a]ll effective laws, government regulations and government orders, applicable to each Party's performance of its obligation under this Agreement." *Id.* at 28, § 2.8, Glossary. The PUC interpreted the term "Applicable Law" to include its order requiring the provision of § 271 elements at TELRIC rates.^{FN11}

FN11. Verizon also argues that the PUC's order violates federal law because it is premised on the PUC's order requiring § 271 elements at TELRIC rates. Because the Court has already determined that Verizon has failed to raise a trialworthy issue on their claim that these orders violate federal law, the Court will not address this argument again.

Verizon first argues that "the PUC's decision violates federal law because state commissions' authority to interpret and enforce interconnection agreements is necessarily limited to provisions implementing or related to Section 251 duties." ^{FN12} Plaintiff's Motion for Summary Judgment at 28. Verizon, however, points to no authority for the proposition that a state commission's review of an interconnection agreement must be limited to requirements imposed by federal law. As with Verizon's claim concerning the PUC's authority to set rates for § 271 elements, it is insufficient to point out that the TCA does not grant the PUC authority to act; Verizon must establish preemption. See *Verizon New England*, 2005 ME 64, ¶ 19, 875 A.2d at 123. Verizon, however, has failed to identify, and the Court has not found, any provision of the TCA or other federal law which would preempt state commissions from interpreting or enforcing terms in interconnection agreements not otherwise required by the TCA. To the contrary, the First Circuit Court of Appeals has noted that in the TCA "Congress expressly preserved each state's authority to 'establish[] or enforc[e] other requirements of State law in [a state commission's] review of an agreement....'" *Global Naps, Inc. v. Massachusetts Department of Telecommunications and Energy*, 427 F.3d 34, 47 (1st Cir.2005) (quoting 47 U.S.C. § 252(e)(3)). In light of Verizon's failure to demonstrate that the PUC's enforcement of state mandated rates through interpretation of an interconnection agreement conflicts with federal law, Verizon's claim for preemption fails.

FN12. Although Verizon asserts that the TCA authorizes the PUC to interpret and enforce interconnection agreements, the Court notes that there appears to be nothing in the TCA which supports this construction of the statute. The Court does not reach this issue, however, because even assuming, *dubitante*, that Verizon is correct on this point, they have failed to demonstrate preemption.

*7 Verizon's other attack on the PUC's Order is that the PUC misinterpreted the interconnection

agreement. While Verizon's argument on this issue is less than clear, the Court perceives Verizon as making two distinct claims of error: (1) that the PUC's interpretation of the agreement conflicts with federal law; and (2) that the PUC's interpretation of the agreement conflicts with the language in the agreement. The Court will address these in turn.

Verizon argues that the order conflicts with federal law because "the only law that is 'applicable,' in the context of UNEs are the FCC's decisions implementing Section 251." Plaintiff's Motion for Summary Judgment at 29. In support of this argument, Verizon asserts that federal law defines § 271 elements as not being "UNEs." While it is true that § 271 does not use the term "unbundled network element" or "UNE," there is nothing in the TCA or other federal law which defines the term as limited to elements required by § 251. Moreover, neither the TCA nor other federal law prohibits the parties to the agreement from ascribing any particular meaning whatsoever to that term. Federal law does not provide a required or default definition for the term, and, thus, the PUC order does not conflict with federal law on this basis.

This leads naturally to Verizon's other claim of error, specifically, whether the PUC's interpretation conflicts with the agreement itself. Before addressing this claim, however, the Court must consider whether it has subject matter jurisdiction to do so.

In its Amended Complaint, Verizon expressly alleges jurisdiction based upon a violation of federal law. While Verizon's claim that the PUC's interpretation of the interconnection agreement conflicts with federal law clearly falls within this court's federal question jurisdiction, there is some disagreement among courts as to whether the review of a state commission's interpretation of an interconnection agreement presents a federal question. See *Verizon Maryland v. Global Naps*, 377 F.3d 355 (4th Cir.2004); *Global Naps v. Verizon*, 332 F.Supp.2d 341, 361-63 (D.Mass.2004), *rev'd on other grounds* 427 F.3d 34 (1st Cir.2005). Consequently, the Court ordered the parties to brief the issue. See Docket Item No. 97. Having now reviewed those briefs, the Court concludes that it need not reach the issue.

In Verizon's brief it argues that the Court may exercise supplemental jurisdiction, 28 U.S.C. § 1367, to consider the claim. See Plaintiff's Supplemental Brief on Jurisdiction at 17-19 (Docket Item No. 99). Although Verizon does not explicitly allege supplemental jurisdiction in its Amended Complaint, the Amended Complaint does allege sufficient facts to permit this Court to exercise supplemental jurisdiction. Furthermore, the precise basis of the Court's jurisdiction is of no consequence here as it does not affect the applicable standard of review. Although an argument can be made that, if the interpretation of an interconnection agreement is a matter of federal law, then there is no deference owed to the PUC's interpretation, both parties agree ^{FN13} that the Court should review the PUC's interpretation to determine if it is "arbitrary or capricious." ^{FN14} Accordingly, the Court will exercise supplemental jurisdiction to determine if the PUC's interpretation of the agreement is "arbitrary or capricious."

^{FN13}. Verizon asserts that, while determinations that rest principally on an interpretation of the TCA are subject to *de novo* review, that all other state agency determinations should be reviewed under the arbitrary and capricious standard. Plaintiff's Motion for Summary Judgment at 13-14. The PUC explicitly accepts this as the applicable standard of review. Defendants' Motion for Summary Judgment at 31.

^{FN14}. Although it need not decide, the Court assumes that under Maine Law, "arbitrary or capricious" is the applicable standard. See *Quirion v. Public Utilities Com'n* 684 A.2d 1294, 1297 (Me.1996) (upholding PUC action which was not "arbitrary or capricious").

*8 Having reviewed the parties' arguments and the relevant provisions of the agreement at issue, the Court concludes that the PUC's interpretation is neither arbitrary nor capricious. The PUC's Order requiring Verizon to provide § 271 elements at TELRIC rates on a temporary basis clearly falls within the term "applicable law" as that term is defined in the agreement. Furthermore, although reasonable minds could disagree as to whether the parties intended the term "UNEs" to include § 271 elements, the PUC's interpretation is not unreasonable. ^{FN15} Accordingly, Verizon is unable to demonstrate that the PUC's interpretation of the interconnection agreement is erroneous.

^{FN15}. Although Verizon argues that a separate provision of the agreement conflicts with

the PUC's interpretation, the Court disagrees. The provision at issue provides, "Verizon shall have the right to establish Charges for [elements required under § 271] in a manner that differs from the manner in which under Applicable Law (including, but not limited to, Section 252(d) of the Act) Charges must be set for Services provided under Section 251." Interconnection Agreement attached as Exh. F. to Meehan Aff. (Docket Item No. 77) at 116, § 4, Pricing. The Court notes that this provision is entirely consistent with the PUC's order, as Verizon does retain the *right* to set prices for 271 elements in a manner that differs from the manner required for 251 elements. Verizon has simply failed, thus far, to exercise that right.

III. CONCLUSION

For the reasons stated above, the Court concludes that Defendants are entitled to judgment as a matter of law. Accordingly, the Court **ORDERS** that Verizon's Motion for Summary Judgment or, Alternatively for Judgment on the Pleadings (Docket Item No. 74) be, and it is hereby, **DENIED**. Defendants' Motion for Summary Judgment (Docket Item No. 82) be, and it is hereby, **GRANTED**. In addition, the Court **ORDERS** that Verizon's Motion for Oral Argument be, and it is hereby, **DENIED**. Copr. (C) West 2006 No Claim to Orig. U.S. Govt. Works D.Me.,2006. Verizon New England Inc. v. Maine Public Utilities Com'n --- F.Supp.2d ----, 2006 WL 2007655 (D.Me.)

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- [2006 WL 1315287](#) (Trial Motion, Memorandum and Affidavit) Defendants' Motion for Summary Judgment and Incorporated Consolidated Memorandum of Law in Support of Defendants' Motion for Summary Judgment, in Reply to Verizon's Opposition to Defendants' Motion to Dismiss, and in Opposition to Verizon's Motion for Summary Judgment (Apr. 14, 2006) [Original Image of this Document \(PDF\)](#)
- [2006 WL 1315288](#) (Trial Motion, Memorandum and Affidavit) Memorandum of Amicus Curiae Biddeford Internet Corporation D/B/A/ Great Works Internet and Amicus Curiae Cornerstone Communications, LLC in Opposition to Verizon New England Inc.'s Motion for Summary Judgment (Apr. 14, 2006) [Original Image of this Document \(PDF\)](#)
- [2006 WL 1040886](#) (Trial Motion, Memorandum and Affidavit) Plaintiff's Motion for Summary Judgment or, Alternatively, for Judgment on the Pleadings, Incorporated Memorandum of Law, and Opposition to Defendants' Motion for Judgment on the Pleadings (Mar. 28, 2006) [Original Image of this Document \(PDF\)](#)
- [2006 WL 1040885](#) (Trial Motion, Memorandum and Affidavit) Motion of Defendant Maine Public Utilities Commission, Et Al., for Judgment on the Pleadings and Incorporated Memorandum of Law (Mar. 7, 2006) [Original Image of this Document \(PDF\)](#)
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 - [2005 WL 3635153](#) (Trial Motion, Memorandum and Affidavit) Plaintiff's Opposition to the Motion to Intervene Filed by Biddeford Internet Corporation d/b/a Great Works Internet, Skowhegan Online, Inc. and Cornerstone Communications, LLC (Jun. 10, 2005)  [Original Image of this Document \(PDF\)](#)
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