

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA

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Case No. TC05-050

In the Matter of the Filing for Approval  
of an Adoption Agreement between  
Qwest Corporation and KMC Data, LLC

**COMMENTS AND  
MOTION TO DISMISS OR, IN  
THE ALTERNATIVE,  
REQUEST FOR DISAPPROVAL**

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Qwest Corporation ("Qwest") respectfully submits the following Comments, Motion to Dismiss or, in the alternative, Request for Disapproval of the filing by KMC Data, LLC ("KMC") on March 10, 2005. On March 10, 2005, KMC filed a Notice of Election of Interconnection Agreement (the "Notice") for approval by the Public Utilities Commission. Qwest seeks to dismiss the Notice, or to have the Commission disapprove it, because it reflects an attempt by KMC to enter into an interconnection agreement with Qwest without Qwest's consent, and then file the "agreement", which has been signed by KMC only, with the Commission for the Commission's approval.

**I. BACKGROUND**

By letter dated January 31, 2005, Qwest received notice from KMC that, for the State of South Dakota, KMC intended to adopt the terms and conditions of the interconnection agreement between Qwest and AT&T Communications of the Mountain States, Inc. ("AT&T") that was approved by the Commission on May 13, 2004 in Docket No. TC04-080 ("AT&T agreement"). In response to similar requests by KMC in other states, Qwest, by e-mail and correspondence, informed KMC that it was ineligible under the Federal Communications Commission ("FCC") Interim Rules Order to opt into the requested interconnection agreement,

but that KMC could adopt the AT&T agreement if it concurrently signed a TRO-USTA II Amendment. Qwest received no response from KMC for the states in which KMC sent Qwest opt-in letters, and on March 10, 2005, KMC filed the Notice with the Commission.

## I. DISCUSSION

### A. **KMC's Attempt To Have This Commission Approve Its Unilateral Adoption Of The AT&T Agreement Is Contrary To Federal Law And Has No Basis In South Dakota Law.**

Qwest responded to KMC's request to adopt the AT&T agreement by informing KMC that it would allow KMC to adopt the AT&T agreement if it also agreed to simultaneously execute appropriate TRO/USTA II amendments. The TRO/USTA II Amendment brings interconnection agreements ("ICAs") into compliance with the FCC's Triennial Review Order,<sup>1</sup> the D.C. Circuit Court's *USTA II* decision,<sup>2</sup> and the FCC's subsequently issued Interim Rules.<sup>3</sup>

With respect to the Interim Rules, the FCC required incumbent local exchange carriers ("ILECs") to maintain or "freeze" provisions relating to certain elements (high capacity loops,

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<sup>1</sup> Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147 (2003) ("Triennial Review Order").

<sup>2</sup> *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), cert. denied sub nom. *AT&T Corp. v. United States Telecom Ass'n*, 125 S. Ct. 316 (2004) & sub nom. *California v. United States Telecom Ass'n*, 125 S. Ct. 345 (2004). See also *United States Telecom Ass'n v. FCC*, No. 00-1012, order, (D.C. Cir. April 13, 2004) (granting a stay of the court's mandate through June 15, 2004). The *USTA II* mandate issued on June 16, 2004.

<sup>3</sup> Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, FCC No. 04-179, (F.C.C. August 20, 2004) ("Interim Rules" or "Interim Rules Order").

high capacity transport, and mass market switching) for competitive local exchange carriers (“CLECs”) that had those elements in their ICAs as of June 15, 2004.<sup>4</sup>

For CLECs entering the market without those elements after June 15, 2004, the FCC held that Qwest did not have to provide these elements, nor did Qwest have to allow CLECs to opt into ICAs with these elements under Section 252(i).<sup>5</sup> The FCC stated that its goal was to maintain the status quo as of June 15, 2004 without expanding unbundling obligations. The FCC concluded that “[t]his aim would not be served by a requirement permitting new carriers to enter during the interim period.”<sup>6</sup>

In accordance with the Interim Rules, Qwest required KMC and all other CLECs without interconnection agreements as of June 15, 2004 to sign the TRO/USTA II Amendment as a condition of opting into an ICA. The Amendment essentially removes the provisions subject to the freeze from the requested ICAs.

Instead of communicating further with Qwest, KMC filed the Notice with this Commission purportedly “opting into” the AT&T agreement. KMC's Notice is not authorized under federal law or South Dakota law.

First, there is no federal or state procedure for allowing CLECs to unilaterally file “Notices of Elections” to ICAs without Qwest’s written assent. Section 252(e) of the Telecommunications Act of 1996 authorizes state commissions to review for approval “[a]ny interconnection agreement adopted by negotiation or arbitration.”<sup>7</sup> KMC's purported ICA with Qwest is not the result of negotiation or arbitration. In the absence of any law authorizing the

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<sup>4</sup> Interim Rules Order, ¶ 22.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> 47 U.S.C. § 252(e).

adoption of an ICA by unilateral notice, KMC's Notice should be disapproved by the Commission as procedurally improper.

Further, KMC has sought to adopt the AT&T agreement pursuant to 47 U.S.C. § 252(i).<sup>8</sup> The FCC rules implementing Section 252(i) state that an ILEC need only make ICAs available for adoption for a "reasonable period of time".<sup>9</sup> If a CLEC were permitted to unilaterally opt-in to an existing ICA, then section 51.809(c) would serve no purpose. A "reasonable period of time" would simply be "indefinitely", which is clearly not what the provision intends. Pursuant to section 51.809(c), ILECs are authorized to limit the time in which an existing ICA is available for adoption. KMC cannot simply enter into an ICA with Qwest without Qwest's consent.

Second, as discussed above, the FCC's Interim Rules Order expressly disallowed CLECs, after June 15, 2004, from opting into existing ICAs containing provisions subject to the freeze.<sup>10</sup> Under the Interim Rules Order, KMC cannot opt into the provisions of the AT&T agreement that are subject to the freeze. If KMC could unilaterally adopt the AT&T agreement without any modifications, it would force Qwest to expand its unbundling obligations during the interim period in express contravention of the FCC's Interim Rules.

Third, KMC cannot opt into the AT&T agreement because a significant change in federal law has terminated the "reasonable period of time" in which the agreement was available for

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<sup>8</sup> This provision states that "[a] local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i).

<sup>9</sup> 47 C.F.R. § 51.809(c). This provision states that "[i]ndividual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(h) of the Act." 47 C.F.R. § 51.809(c).

<sup>10</sup> Interim Rules Order, ¶ 22.

adoption. The New York Public Service Commission has considered the question of whether CLECs, pursuant to 47 U.S.C. § 252(i), can opt-in unconditionally to an existing interconnection agreement despite a significant change in law.<sup>11</sup> The New York Commission determined that the issuance of the D.C. Circuit's decision in *USTA II* was a change in the law such that the "reasonable period of time" had ended, and Verizon was no longer required to make ICAs in existence prior to that decision available for adoption.<sup>12</sup> The New York Commission also noted that the FCC's Interim Rules froze interconnection agreements in place as they existed on June 15, 2004 and prevented CLECs from opting into those frozen agreements.<sup>13</sup> A change in law served to terminate the period for which it was reasonable to allow the existing interconnection agreement to be available for the CLEC to adopt.<sup>14</sup> Applying this reasoning to this matter, KMC may not adopt the AT&T agreement. *USTA II* and the Interim Rules Order have terminated the reasonable time period in which Qwest was obligated to offer the AT&T agreement for adoption under 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809(c).

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<sup>11</sup> Declaratory Ruling Allowing in Part Opt-In to AT&T's Interconnection Agreement with Verizon New York Inc., *Petition of DSCI Corp. for Approval of an Interconnection agreement with Verizon New York Inc.*, Case 04-C-0647, et al. (NY PSC September 28, 2004) ("New York Order"), attached hereto as Exhibit A.

<sup>12</sup> New York Order, p.8.

<sup>13</sup> *Id.*, p. 9.

<sup>14</sup> The FCC also appears to interpret its own rule to mean that a change in law can terminate the reasonable time period in which agreement terms are available for adoption. See Order on Remand and Report and Order, *In the matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 & 99-68, 16 FCC Rcd 9151, 2001 FCC LEXIS 2340, ¶ 82, n. 155 (FCC April 27, 2001) (concluding that "any 'reasonable period of time' for making available rates applicable to the exchange of ISP-bound traffic expires upon the Commission's adoption in this Order of an intercarrier compensation mechanism for ISP-bound traffic.")

Additionally, the recent issuance of the FCC's Order on Remand<sup>15</sup> on February 4, 2005 does not alter this analysis. The Remand Order is not effective yet.<sup>16</sup> Once the Remand Order takes effect, KMC can resubmit its opt-in request, and Qwest will consider it in light of the Remand Order's provisions. For the time being, however, any such hypothetical request is irrelevant since the instant request was made during the period in which the Interim Rules are effective. The Interim Rules Order, which is now in effect and was in effect at the time that KMC filed the Notice with the Commission, allows Qwest to deny KMC's request to opt into ICAs with certain elements. Rather than deny KMC's opt-in request, Qwest offered to allow the opt in, so long as KMC executed appropriate amendments. KMC apparently has refused Qwest's compromise and attempted to do end run around negotiations and the Interim Rules. KMC's Notice is directly contrary to the Interim Rules requirements.

WHEREFORE, Qwest objects to KMC's Notice of Election and requests that this Commission dismiss the Notice as procedurally improper. In the alternative, Qwest respectfully asks the Commission to determine that KMC has not, and cannot, adopt the AT&T agreement and to disapprove KMC's filing.

WHEREFORE, for the reasons set forth herein, Qwest respectfully moves the Commission to dismiss or disapprove the filing for approval of the Notice of Election of Interconnection Agreement submitted by KMC.

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<sup>15</sup> Order on Remand, *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, FCC No. 04-290, (F.C.C. February 4, 2005) ("Remand Order").

<sup>16</sup> The Remand Order indicates that it will be effective March 11, 2005. Remand Order, ¶ 235.

DATED this 11<sup>th</sup> day of April, 2005.

QWEST CORPORATION

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**CERTIFICATE OF SERVICE**

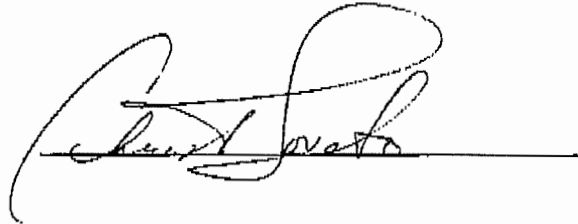
I hereby certify that on this 11<sup>th</sup> day of April, 2005, an original and 10 copies of the foregoing **QWEST CORPORATION'S COMMENTS AND MOTION TO DISMISS OR, IN THE ALTERNATIVE, REQUEST FOR DISAPPROVAL** was served upon the following party:

Ms. Pam Bonrud  
Executive Secretary  
South Dakota Public Utilities Commission  
State Capitol Building  
500 East Capitol Avenue  
Pierre, SD 57501-5070

a copy was also sent to the following:

Mr. Raymond Pifer  
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Ms. Andrea Pruitt Edmonds  
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A handwritten signature in black ink, appearing to read "Andrea Pruitt Edmonds", is written over a horizontal line.