

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

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| IN THE MATTER OF THE FILING FOR) | ORDER DENYING MOTION |
| APPROVAL OF A MASTER SERVICES) | TO DISMISS; ORDER |
| AGREEMENT BETWEEN QWEST) | APPROVING AGREEMENT |
| CORPORATION AND MCIMETRO ACCESS) | |
| TRANSMISSION SERVICES, LLC) | TC04-144 |

On August 2, 2004, the Commission received a filing from MCImetro Access Transmission Services, LLC (MCI) for approval of an Amendment to an Interconnection Agreement for Elimination of UNE-P and Implementation of Batch Hot Cut Process and Discounts (ICA Amendment) and Qwest Master Services Agreement (MSA) (together, Agreements) between MCI and Qwest Corporation (Qwest).

On August 5, 2004, the Commission electronically transmitted notice of this filing to interested individuals and entities. The notice stated that any person wishing to comment on the parties' request for approval had until August 23, 2004, to do so. On August 17, 2004, the Commission received a Motion to Dismiss Filing for Approval of Negotiated Commercial Agreement from Qwest. On August 23, 2004, the Commission received Comments from AT&T Communications of the Midwest, Inc. (AT&T) and a Response to Qwest Motion to Dismiss from MCI. On October 6, 2004, the Commission received a Supplement to Response to Qwest's Motion to Dismiss from MCI. On October 8, 2004, the Commission received Qwest's Joint Reply to MCI's Response to Qwest Motion to Dismiss and to AT&T's Comments. On October 21, 2004, the Commission received a second Supplement to MCI's Response to Qwest's Motion to Dismiss and Qwest's Reply to MCI's Supplement to Response to Qwest's Motion to Dismiss. On October 25, 2004, the Commission received a third Supplement to MCI's response to Qwest's Motion to Dismiss.

At its duly noticed October 26, 2004, meeting, the Commission considered this matter. Commission Staff recommended denial of Qwest's Motion to Dismiss and approval of the MSA. The Commission unanimously voted to deny the motion to dismiss and to approve the MSA.

The Commission has jurisdiction over this matter pursuant to SDCL Chapter 49-31, particularly 49-31-81, ARSD 20:10:32:21 through 20:10:32:23 and 47 U.S.C. § 252.

Having considered the filings of record and applicable law, the Commission makes the following Findings of Fact, Conclusions of Law and Final Decision and Order:

FINDINGS OF FACT

1. MCI filed the Agreements with the Commission on August 2, 2004, in accordance with 47 U.S.C. § 252 and ARSD 20:10:32:21 implementing SDCL 49-31-81. On August 17, 2004, Qwest filed a Motion to Dismiss Filing for Approval of Negotiated Commercial Agreement. In its motion, Qwest argues that the MSA is not required to be filed and approved under 47 U.S.C. § 252 and ARSD 20:10:32:21. On October 26, 2004, at its regular meeting, the Commission held a motion hearing on Qwest's Motion to Dismiss and considered MCI's request for approval of the Agreements.
2. On July 26, 2004, Qwest filed the ICA Amendment. On September 22, 2004 in Docket No. TC04-135, the Commission approved the ICA Amendment. Qwest filed the MSA for "informational

purposes only." The Commission did not approve the MSA following such filing but rather issued a Request for Comments from interested persons in its Weekly Filings Notice for the period July 22-July 28, 2004.

3. The Commission finds that it can consider the Agreements as filed according to their terms without reference to extrinsic facts and that it can rule on the Motion to Dismiss without an evidentiary hearing.

4. The current standard for determining whether an agreement between carriers is an "interconnection agreement," the filing and approval of which is required by 47 U.S.C. § 252, was laid down by the FCC in *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 Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum and Order, 17 F.C.C.R. 19337 (Rel. Oct. 4, 2002), ¶ 8:

. . . [W]e find that an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1). This interpretation, which directly flows from the language of the Act, is consistent with the pro-competitive, deregulatory framework set forth in the Act.

5. As found by the Washington Commission in *In the Matter of MCIMetro Access Transmission Services, LLC and Qwest Corporation for Approval of Negotiated Interconnection Agreement, in its Entirety, Under the Telecommunications Act of 1996*, Order Approving Negotiated Interconnection Agreement in its Entirety, Dockets Nos. UT-960310 and UT-043084 (Oct. 20, 2004) (*Washington Order*), several provisions of the Agreements indicate that they are intended to function as an integrated contractual arrangement. These integrating provisions include, but are not limited to: (i) MSA, Section 23, which provides in pertinent part:

In the event the FCC, a state commission or any other government authority or agency rejects or modifies any material provision in this Agreement, either Party may immediately upon written notice to the other Party terminate this Agreement and any interconnection agreement amendment executed concurrently with this Agreement. (emphasis supplied).

(ii) ICA Amendment, Section 2.2, which provides in pertinent part:

If the QPP MSA is terminated (for reasons other than material breach by MCI) with respect to a particular state, this Amendment shall, by its own terms and notwithstanding any requirement that subsequent modifications or amendments be in writing signed by both Parties, automatically be terminated in the state, and MCI shall be free thereafter to pursue any available means to purchase UNE-P or equivalent services from Qwest.

(iii) ICA Amendment, Section 2.6:

In the event the FCC, a state commission or any other governmental authority or agency rejects or modifies any material provision in this Amendment, either party may immediately upon written notice to the other Party terminate this Amendment

and the QPP MSA.

(iv) ICA Amendment, Section 4.1, which provides in pertinent part:

The agreement not to order UNE-P services embodied in this Section shall remain in effect for the Term of this Amendment, and for the avoidance of doubt, shall no longer be binding on MCI or otherwise enforceable in a particular state if the QPP MSA is terminated as to that state (other than for reason of a material breach by MCI).

(v) MSA, Service Exhibit 1- QWEST PLATFORM PLUS™ SERVICE, Section 3.2, which provides *inter alia*:

To the extent that the monthly recurring rate for the loop element in a particular state is modified on or after the Effective Date, the QPP™ port rate for that state in the Rate Sheet will be adjusted (either up or down) so that the total rate applicable to the QPP™ service and loop combination in that state (after giving effect to the QPP™ Port Rate Increases as adjusted for any applicable discount pursuant to Section 3.3 of this Service Exhibit) remains constant.

(vi) MSA, Service Exhibit 1- QWEST PLATFORM PLUS™ SERVICE, Section 3.3, which provides *inter alia*:

Provided that Qwest has implemented the Batch Hot Cut Process in a particular state pursuant to the terms and conditions of the Amendment to MCI's ICAs entered into contemporaneously with this Agreement, the monthly recurring rates for the switch port in the attached Rate Sheets shall increase incrementally by the amount of the applicable QPP™

6. As the Washington Commission found, the Commission finds that the Agreements "reflect integrated pricing in combination of the two agreements, which have to be considered together in order for one to understand the entire agreement between the two parties. This integrated pricing also makes it apparent that the bargain struck by the parties encompasses both the QPP and the . . ." [ICA Amendment].

7. All of the state Commissions that have considered the ICA Amendment and MSA arrangement within Qwest's territory to date have denied Qwest's motions to dismiss, and Utah and Washington have determined that both the ICA Amendment and MSA are required to be filed pursuant to 47 U.S.C. § 252 and enabling state laws and regulations (the New Mexico Commission deferred decision on the issue of whether filing was required because of a pending consolidated proceeding on the issue to be concluded beyond the 90-day time limit of § 252). See *Washington Order, In the Matter of the Interconnection Agreement Between Qwest Corporation and MCIMetro Access Transmission Services, LLC for Approval of an Amendment for Elimination of UNE-P and Implementation of Batch Hot Cut Process and QPP Master Service Agreement*, Docket No. 04-2245-01, Order Denying Motion to Dismiss (Utah PSC, Sep. 30, 2004); *In the Matter of the Amendment to the Interconnection Agreement Between MCI and Qwest Dated July 16, 2004, and the Master Services Agreement Between MCI and Qwest Dated July 16, 2004*, Case No. 04-00245-UT (N.M. PRC, Oct. 12, 2004). See also, *Sage Telecom, LP v. Public Utility Commission of Texas*, Case No. A-04-CA-364-SS (W.D. Tex., Oct. 7, 2004); *In the Matter of the Request for Commission*

Approval of an Interconnection Agreement Between SBC Michigan and Sage Telecom, Inc., Case No. U-13513 (Mich. PSC, Aug. 3, 2004); *In the Matter, on the Commission's Own Motion, to Require SBC Michigan and Sage Telecom, Inc. to Submit Their Interconnection Agreement for Review and Approval*, Case No. U-14121 (Mich. PSC, April 28, 2004).

8. The Commission accordingly finds that the ICA Amendment and the MSA are sufficiently linked both functionally and legally to be treated as an integrated agreement for purposes of determining whether the MSA is required to be filed and approved pursuant to 47 U.S.C. § 252 and ARSD 20:10:32:21. Since the ICA Amendment is indisputably an interconnection agreement pursuant to 47 U.S.C. § 252 and ARSD 20:10:32:21, the Commission finds that the MSA is also part of an integrated interconnection agreement that is required to be filed and approved.

9. An additional factor militating in favor of finding that the MSA should be required to be filed is the recognized uncertainty involving unbundling requirements and the scope of the filing obligation. The Agreements themselves state as a central assumption of their purpose that "both MCI and Qwest acknowledge certain regulatory uncertainty in light of the DC Circuit Court's decision in *United States Telecom Association v. FCC*, 359 F.3d 554 (March 2, 2004), with respect to the future existence, scope, and nature of Qwest's obligation to provide such UNE-P arrangements under the Communications Act" The relationship between this uncertainty and the filing obligation under 47 U.S.C. § 252 is brought into sharper focus by the FCC's explicit acknowledgement of the issue recently in *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, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179 (Rel. Aug. 20, 2004). The FCC stated in ¶13:

Additionally, we incorporate 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, 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?

Given the consequences that have attended filing omissions in previous cases, the Commission finds that it is prudent to err on the side of requiring filing until more definitive guidance is forthcoming regarding the precise boundaries of the filing requirement. See *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, NAL Acct. No. 200432080022, FRM No. 0001-6056-25, Notice of Apparent Liability for Forfeiture, FCC 04-57 (Rel. March 12, 2004).

10. The Commission does not reach the issue of whether an agreement dealing with network elements that are not required to be unbundled pursuant to 47 U.S.C. §251(c) is required to be filed pursuant to 47 U.S.C. 252 and ARSD 20:10:32:21 in the absence of material linkage between such agreement and an interconnection agreement dealing with network elements that are required to be unbundled pursuant to 47 U.S.C. §251(c).

11. The Agreements taken as a whole do not discriminate against a telecommunications carrier that is not a party thereto and are consistent with the public interest, convenience, and necessity.

CONCLUSIONS OF LAW

1 The Commission concludes that it can consider the Agreements as filed according to their terms without reference to extrinsic facts and that it can rule on the Motion to Dismiss without an evidentiary hearing.

2. The ICA Amendment was previously approved in Docket No. TC04-135.

3. The ICA Amendment and the MSA are sufficiently linked both functionally and legally to be treated as an integrated agreement for purposes of determining whether the MSA is required to be filed and approved pursuant to 47 U.S.C. § 252 and ARSD 20:10:32:21. Since the ICA Amendment is indisputably an interconnection agreement pursuant to 47 U.S.C. § 252 and ARSD 20:10:32:21, the Commission concludes that the MSA is also part of an integrated interconnection agreement that is required to be filed and approved.

4. Qwest's Motion to Dismiss should be denied.

5. The Agreements do not discriminate against a telecommunications carrier that is not a party thereto and are consistent with the public interest, convenience, and necessity.

It is therefore

ORDERED, that Qwest's motion to dismiss is denied; and it is further

ORDERED, that the Commission approves the Master Services Agreement between Qwest and MCI dated July 16, 2004.

Dated at Pierre, South Dakota, this 29th day of October, 2004.

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| CERTIFICATE OF SERVICE |
| The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon. |
| By: _____ |
| Date: _____ |
| (OFFICIAL SEAL) |

BY ORDER OF THE COMMISSION:

ROBERT K. SAHR, Chairman

GARY HANSON, Commissioner

JAMES A. BURG, Commissioner