

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of Qwest)	Application No. C-3255
Communications, Denver,)	
Colorado, seeking approval of an)	
amendment to the interconnection)	ORDER OVERRULING MOTION TO
agreement for elimination of)	DISMISS AND APPROVING
UNE-P and implementation of)	AGREEMENT
Batch Hot Cut Process and)	
Discounts with MCImetro Access)	
Transmission Services, LLC,)	
Denver, Colorado.)	Entered: January 4, 2005

BY THE COMMISSION:

On July 30, 2004, MCImetro Access Transmission Services (MCI) filed its amendment to interconnection agreement between MCI and Qwest Communications (Qwest) dated July 16, 2004, and the Master Service Agreement between MCI and Qwest, also dated July 16, 2004. On September 17, 2004, Qwest filed a Motion to Dismiss MCI's application for approval of part of the agreement known as the QPP™ Master Service Agreement (MSA) arguing that it was a "commercial agreement" which contains no terms and conditions related to services provided under section 251(b) and (c). With respect to the MSA, Qwest asserts the Commission lacks jurisdiction to require filing and review of that part of the agreement. Qwest does not argue that the interconnection agreement amendment (ICA Amendment) filed concurrently therewith should be dismissed. Rather, Qwest agrees with MCI that the ICA Amendment should be filed for Commission approval pursuant to Section 252 of the Act.

The Commission heard oral argument from the interested parties on October 28, 2004. Qwest, MCI and AT&T participated in the oral argument. Qwest argued the Commission has limited jurisdiction as the Federal Communications Commission (FCC) has indirectly supplanted the Commission's jurisdiction to review and approve what it terms "commercial" agreements by virtue of the USTA II decision. Qwest argues since the MSA contains no terms and conditions related to services provided under Section 251(b) and (c) it is not required to be filed for approval. In conjunction with the USTA II decision, Qwest relies on an FCC Declaratory Ruling Order issued in December of 2002 for the proposition that agreements which do not create an ongoing obligation do not need to be filed with state commissions for approval. MCI responded that the MSA and the ICA Amendment comprise an integrated agreement therefore both must be filed. Several other state commissions have agreed with that assessment. MCI also points to section 252(e) which requires all voluntarily negotiated agreements to be filed.

AT&T directed the Commission to the plain language of 47 U.S.C. Section 252(e)(1), which reads "any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the state Commission." AT&T also pointed out that every single state that has ruled on this issue has determined that the MSA was required to be filed. AT&T further argued that Qwest's reference to footnote 26 in the Declaratory Order was a "cramped" characterization of the footnote. Simply put, the meaning of the footnote changes by a review of the context of the order. AT&T argues that the FCC did not say that if the unbundling obligations go away that the requirement to file and receive approval of the interconnection agreement also goes away. Finally, AT&T argues that public policy favors the filing of this agreement.

O P I N I O N A N D F I N D I N G S

The federal Telecommunications Act of 1996 (the Act) states "[a]ny interconnection agreement adopted by negotiation ...shall be submitted for approval to the State commission." 47 U.S.C. § 252(e)(1). *Neb. Rev. Stat. § 86-122* requires the Commission to implement the Act, including section 252 of the act which establishes specific procedures for negotiation and arbitration of interconnection agreement between telecommunications companies. Section 86-122 further states, "[t]he authority granted to the commission pursuant to this section shall be broadly construed in a manner consistent with the federal Telecommunications Act of 1996." State commissions are granted the authority by federal law to reject a negotiated interconnection agreement that discriminates against carriers not a party to the agreement, and to reject a negotiated interconnection agreement that is not consistent with the public interest, convenience and necessity.¹

Qwest argues that this commission's authority to review interconnection agreements was limited generally by the FCC's Qwest Declaratory Order.² Specifically, Qwest quotes a portion of a footnote in the FCC's Declaratory Order where the FCC states:

¹ 47 U.S.C. Section 252(e)(2)(A).

² Memorandum Opinion and Order, *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, 17 FCC Rcd 19337 (October 4, 2002)("Declaratory Order").

We . . . 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 section 252(a)(1). (Emphasis supplied).³

However, in that same decision, the FCC finds that state commissions, "based on their statutory role provided by Congress and their experience to date," 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."⁴ The Commission finds that Qwest and other parties should err on the side of caution and bring agreements to the Commission for an interpretation of whether such agreement is required to be filed rather than deciding unilaterally that approval is not required.

Amidst the issues presented to the Commission is the question of whether the MSA and the ICA Amendment should be considered as a functionally integrated agreement. We agree with the argument presented by MCI and the findings of various other state commissions that several provisions taken from the MSA and the ICA Amendment indicate that they were intended to function as an integrated agreement. We concluded herein that the MSA and the ICA Amendment comprise one integrated agreement which, in its entirety, must be filed for approval pursuant to Section 252 of the Act.

As the Washington Commission found, several provisions in both the MSA and the ICA Amendment lead to this conclusion. Section 23 of the MSA for example provides "[i]n the event the FCC, a state commission or any other governmental authority or agency rejects or modifies any material provision in this Agreement, either Party may terminate this Agreement and any interconnection agreement amendment executed concurrently with this Agreement." (Emphasis Added). With respect to the ICA Amendment, Section 2.2 states in relevant part "If the QPP MSA is terminated . . . 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 that state, and MCI shall be free thereafter to pursue any available means to purchase UNE-P or equivalent

³ Declaratory Order, ¶ 8, n.26.

⁴ *Id.*, ¶ 10.

services from Qwest." (Emphasis Added). Section 2.6 of the ICA Amendment provides "[i]n the event the FCC, a state commission or any other governmental authority or agency rejects or modifies any material provision in this [ICA Amendment] Agreement, either party may immediately upon written notice to the other Party terminate this Amendment and the QPP MSA." (Emphasis Added). Section 4.1 provides further in relevant part "[t]he 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 material breach by MCI)." (Emphasis Added). Finally, sections 3.2 and 3.3 of the Exhibit to the MSA state "[t]o 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", and "[p]rovided that Qwest had 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..." (Emphasis Added).

We agree with the conclusion reached by the Washington Commission that the agreements must be considered together to give meaning to the pricing terms in the ICA Amendment. Likewise, in our view the integrated pricing makes it apparent that the MSA and the ICA Amendment read together is the complete statement of the bargain reached between Qwest and MCI. There was no dispute that Commission approval is required for the ICA Amendment portion of the agreement pursuant to section 252 of the Act. Because we conclude that the ICA Amendment and the MSA comprise one integrated agreement, we do not reach the issue of whether Section 252(a)(1) and (e) would apply to the MSA portion alone.

Upon consideration of the agreement filed in this case, the Commission is of the opinion and finds that it does have jurisdiction to approve the integrated agreement filed by MCI, and the agreement taken as a whole does not discriminate against a telecommunications carrier that is not a party thereto and the agreement is consistent with public interest, convenience and necessity. Accordingly, the agreement should be approved.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that the Motion to Dismiss filed by Qwest be and it is hereby overruled.

IT IS FURTHER ORDERED that the QPP™ Master Service Agreement and the ICA Amendment comprise a single integrated agreement which, for reasons described above, is hereby approved.

MADE AND ENTERED at Lincoln, Nebraska, this 4th day of January, 2005.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Deputy Director