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VIA FACSIMILE, U. S. MAIL AND EMAIL

November 5, 2004

Ms. Cheryl Walker
Administrative Assistant
Public Utility Commission of Oregon
P. O. Box 2148
Salem, OR 97308-2148

Re: ARB 628(1) (Cal-Ore/Qwest)- Qwest's Notice of Supplemental Authority

Dear Ms. Walker:

Enclosed with the original of this letter is the original and five copies of Qwest's Response to Staff's Comments Recommending Rejection of Amendment in the above-entitled matter. We have also served this response by regular mail and by courtesy electronic copy to Cal-Ore and to Commission Staff.

If you have any questions about this request, please feel free to call me.

Very truly yours,

Alex M. Duarte

cc Edward Ormsbee, Cal-Ore (w/ encl.)
Dave Booth, OPUC Staff (w/ encl.)
Celeste Hari, OPUC Staff (w/ encl.)

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 628(1)

In The Matter Of CAL-ORE TELEPHONE COMPANY AND QWEST CORPORATION First Amendment to the Interconnection Agreement Previously Submitted for Commission Approval Pursuant to Section 252(e) of the Telecommunications Act of 1996	**QWEST'S RESPONSE TO STAFF'S COMMENTS RECOMMENDING REJECTION OF AMENDMENT**

Qwest Corporation ("Qwest") respectfully responds to the October 22, 2004 Staff comments recommending the Commission reject the amendment to the interconnection agreement ("Amendment") that Cal-Ore Telephone Company ("Cal-Ore") and Qwest filed on September 28, 2004. The primary basis for these comments is that, unlike other amendments that Staff has recently recommended that the Commission reject (the issues of which are pending in docket ARB 6), the Amendment pertains to an interconnection agreement that executed *after June 15, 2004*. As such, pursuant to the FCC's recent *Interim Rules Order*, any freeze of rates, terms and conditions does not apply to interconnection agreements entered into after June 15, 2004. Moreover, CLECs cannot opt in to pre-June 15th ("frozen") contract provisions.

Accordingly, Qwest respectfully submits that the Commission should approve the parties' Amendment that they filed on September 28, 2004.

PERTINENT BACKGROUND

A. The parties' filing of the SGAT Agreement and Staff recommendation of approval

On September 23, 2004, Qwest and Cal-Ore filed the parties' fully-executed Agreement to Adopt Qwest's Statement of Generally Available Terms and Conditions ("Agreement" or "SGAT") (Sixteenth Revision) seeking the Commission's approval of the agreement pursuant to

section 252(e) of the Telecommunications Act of 1996. (See Exhibit A.) On October 12, 2004, Commission Staff recommended approval. (See Staff Comments, docket ARB 628, Exhibit B.)[1]

B. The parties' filing of the TRO and USTA II Amendment

Meanwhile, on September 28, 2004, a few days after the filing of the SGAT Agreement for approval, Qwest and Cal-Ore filed a first amendment to the agreement ("Amendment" or "TRO and USTA II Amendment"). (See Exhibit C.) The Amendment is entitled "Triennial Review Order and USTA II Decision Amendment to the Interconnection Agreement between Qwest Corporation and Cal-Ore Telephone Co. for the State of Oregon." (Id.)

The Amendment states that the CLEC (Cal-Ore) and Qwest entered into an interconnection agreement (the current Qwest SGAT) after June 15, 2004, which was based on law existing before October 2, 2003. The Amendment then discusses the August 21, 2003 Federal Communications Commission (FCC) *Triennial Review Order* (*TRO*), the United States Court of Appeals for the Washington, D.C. Circuit (D.C. Circuit) decision in *USTA II v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (effective June 16, 2004), and the FCC's August 20, 2004 Interim Rules in its Order and Notice of Proposed Rulemaking *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 ("Interim Rules"). The Amendment then states that the *TRO*, the *USTA II* decision and the Interim Rules "materially modified Qwest's obligations under the Act with respect to, among other things, the requirement to offer certain network elements in an unbundled basis," and thus the parties wish to amend the [SGAT] Agreement to

[1] Although Staff's recent October 22, 2004 comments (ARB 628(1)) recommending rejection of the Amendment indicates that it is a first amendment "to the interconnection agreement previously approved by the [Commission]," in fact the Agreement has not yet been approved.

comply with these orders and thus agree to certain terms and conditions as reflected in Attachment 1 and Exhibit A to the Amendment. (See Exhibit C.)[2]

C. Staff's recommendation that the Commission reject the Amendment

On October 22, 2004, Staff issued its comments recommending that the Commission reject the TRO and USTA II Amendment. Staff's comments indicate that "the amendment removes all aspects of UNE-P, mass market switching and shared transport from the agreement and states that those elements are to be discontinued or converted to an "alternative arrangement' on or before January 1, 2005," and that "[i]t appears that whatever arrangement is made, it will not be filed with the Commission." (See Exhibit D.) Thus, Staff concluded that the Amendment does not comply with the FCC's August 20, 2004 Order No. 04-179 (the "*Interim Rules Order*") because that order "creates a temporary rule that provides that unbundled access to switching, enterprise market loops and dedicated transport remains a Section 251(c) obligation." (Id.)[3]

Staff further concluded that it "believes that the parties may negotiate to change the rates, terms and conditions, but they cannot negotiate away the Section 252 filing requirement," and thus it interpreted the *Interim Rules Order* "to mean that these elements must be filed with state commissions for approval under section 252 of the Act." (Exhibit D.) Staff thus concluded that the Amendment "is contrary to law and contrary to the public interest, convenience and necessity," and that the "unfiled portion of the amendment also appears to be discriminatory to any carrier who is not a party to the amendment." (Id.)

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[2] The attachment addresses issues such as unbundled network elements generally, unbundled loop, subloop unbundling, line sharing, unbundled dedicated interoffice transport (UDIT), unbundled local switching, commingling, ratcheting, directory assistance service, toll and assistance operator services and routine modifications. (See Exhibit C.)

[3] Prior to the issuance of the *Interim Rules Order*, Qwest was under the impression that Staff agreed that a commercial agreement that provided substitutes for the UNEs that were eliminated in the *TRO* and *USTA II* and that were offered pursuant to section 271 of the Act (instead of section 251) were not required to be filed under section 252, although an amendment to an interconnection agreement that eliminates UNE-P would need to be filed. However, Staff has confirmed in docket ARB 6 that its position about the required filing of such commercial agreements is based solely upon the *Interim Rules Order*. Thus, Qwest presumes, based on Staff's October 22, 2004 comments and its discussions with Staff, that the *Interim Rules Order* is the only basis for its recommendation that the Commission reject the TRO and USTA II Amendment that is at issue here.

D. Qwest's notifying Staff that the Agreement is a post-June 15, 2004 agreement

Finally, on October 28, 2004, counsel for Qwest called the Staff analyst who drafted the comments to advise Staff that the Agreement and Amendment was not like the Qwest Platform Plus™ (QPP) agreements that are at issue in ARB 6 (MCI) and other ARB dockets (regarding which Qwest understands the Commission intends to rule soon).[4] Rather, this is an amendment to an interconnection agreement that was executed *after June 15, 2004*, and counsel cited to the FCC *Interim Rules Order*, paragraphs 22 and 23. Staff's analyst indicated Staff cannot retract comments once they are submitted, and thus Qwest would need to file its comments with its position. Thus, Qwest requested that Staff ask the Commission not to rule on Staff's comments or the Amendment until after Qwest had filed its comments the following week. (See Exhibit E.)

ARGUMENT

Qwest respectfully submits that, for the reasons below, the Commission should approve the Amendment. It appears Staff has confused the TRO and USTA II Amendment with the amendments that have been filed in various ARB dockets (including docket ARB 6 involving

[4] On July 16, 2004, Qwest and MCI entered into a commercial agreement entitled the "Qwest Master Service Agreement" under which Qwest agreed to provide Qwest Platform Plus™ services to MCI (the "Commercial Agreement" or "QPP"). The QPP services are offered under *section 271* of the Act and consist primarily of the local switching and shared transport network elements in combination with certain other services. As a result of the D.C. Circuit's decision in *United States Telecom Association v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), it is Qwest's view that it is no longer required to provide these network elements under sections 251 or 252 of the Act. The QPP expressly provides that it does not amend or alter the terms and conditions of existing interconnection agreements between Qwest and MCI. Most importantly, because the QPP does not create any terms or conditions for services that Qwest must provide under sections 251(b) and 251(c), it is not an interconnection agreement or an amendment to the existing interconnection agreement between Qwest and MCI. Nevertheless, Qwest has provided the QPP to Commission Staff for informational purposes, and is offering its terms and conditions to any carrier assuming the same obligations as MCI.

Also on July 16, 2004, Qwest and MCI entered into a separate agreement that is an amendment to their interconnection agreement in Oregon entitled "Amendment to Interconnection Agreement for Elimination of UNE-P and Implementation of Batch Hot Cut Process and Discounts" (the "ICA Amendment"). The ICA Amendment generally provides for the deployment of a batch hot cut process and contains certain other terms and conditions that may fall within the scope of section 251 of the Act. *Both Qwest and MCI have filed the ICA Amendment* with *the Commission and have requested the Commission's approval pursuant to section 252 of the Act*.

However, MCI also filed the *QPP* for approval on August 12, 2004 in docket ARB 6. Thus, Qwest filed a motion to dismiss that filing on September 2, 2004. The parties have fully briefed the issues pertaining to that filing.

In the meantime, a number of other CLECs have entered into the QPP, and Qwest has provided Staff with copies of those QPP agreements as well, in addition to filing the ICA Amendment for Commission approval. Staff and Qwest have agreed to request that the Commission not rule on these other ICA Amendments involving other QPP CLECs until the Commission has ruled on these same issues in docket ARB 6.

MCI) pertaining to CLECs which have entered into the QPP agreement with Qwest. However, the Amendment does *not* involve the QPP agreement, and there is no "unfiled portion of the amendment." More importantly, the Amendment pertains to an interconnection agreement entered into *after June 15, 2004*. As such, regardless how the Commission may ultimately rule in docket ARB 6, the Amendment is completely different, and involves a post-June 15, 2004 agreement. Thus, Qwest respectfully submits the Commission should approve the Amendment.

I. The *Interim Rules Order* freeze does not apply to post-June 15, 2004 agreements

Preliminarily, the FCC's *Interim Rules Order* should not apply here, and thus the TRO and USTA II Amendment does not conflict with the *Interim Rules Order*. This is so because the "freezing" of rates, terms and conditions applies only to interconnection agreements in place "*as of June 15, 2004*." (Emphasis added.) Here, the interconnection agreement between Qwest and Cal-Ore was entered in September 2004, *after June 15, 2004*.

As Staff quoted in footnote 1 of its comments, the FCC's *Interim Rules Order* (paragraph 16) provides in pertinent part:

> Specifically, we conclude that the appropriate interim approach here is to require incumbent LECs to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions *that applied under their interconnection agreements as of June 15, 2004*. (Emphasis added.)
>
> The FCC further reiterated in pertinent part (paragraph 21):
>
> Specifically, we require that between the effective date of this Order and the effective date of the permanent unbundling rules that the Commission plans to issue before the close of 2004, incumbent LECs shall continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the rates, terms and conditions that *applied under their interconnection agreements as of June 15, 2004*. [footnote omitted] (Emphasis added.)

Finally, the FCC *Interim Rules Order* ruled (paragraph 22) in pertinent part as follows:

> We also hold that competitive LECs may *not opt into the contract provisions "frozen" in place by this interim approach*. The fundamental thrust of the interim relief provided here is to maintain the *status quo* in certain respects *without expanding unbundling beyond that which was in place on June 15, 2004. This aim would not be served by a*

requirement permitting new carriers to enter during the interim period. (Emphasis added.) (See also ¶ 23.)

Accordingly, unlike the pre-June 15, 2004 interconnection agreements at issue in the MCI QPP matter (docket ARB 6) and the other QPP ARB dockets, the new (post-June 15, 2004) Agreement between Qwest and Cal-Ore is specifically exempted from any rate, term and condition freeze in the *Interim Rules Order*. Further, Cal-Ore may not "opt-in" to a pre-June 15, 2004 agreement. As such, it is clear that, regardless of whether the *Interim Rules Order* applies to the QPP agreements at issue in docket ARB 6 and several other ARB dockets, and regardless how the Commission rules on the pending motion to dismiss in docket ARB 6, the TRO and USTA II Amendment at issue here does not conflict with the *Interim Rules Order*. Thus, Staff's October 22, 2004 comments recommending rejection are mistaken, and therefore, Qwest respectfully submits that the Commission should approve the parties' TRO and USTA II Amendment that they filed on September 28, 2004.

II. The parties have not negotiated away any Section 252 filing requirements

In addition, Staff appears to have confused the QPP situation (in which Qwest has not filed the QPP, but has filed the ICA amendment (that eliminated UNE-P and implemented a batch hot cut process and discount)) with the TRO and USTA II Amendment.[5] This is so because Staff has concluded that although it "believes the parties may negotiate to change the rates, terms and conditions" (which is exactly what the TRO and USTA II Amendment does), "they cannot negotiate away the Section 252 filing requirement." However, unlike the QPP agreement (which Qwest does not believe is required to be filed), here Qwest and Cal-Ore have in fact *filed* their "change [of] rates, terms and conditions" (the TRO and USTA II Amendment). That is, the parties have filed the original agreement (the SGAT) *and* the first amendment to that

[5] Indeed, Staff's October 22, 2004 comments here are similar to Staff's recent comments recommending rejection of the ICA Amendments (eliminating UNE-P and implementing a batch hot cut process and discount) filed in conjunction with CLECs entering into the QPP agreement. (See e.g., Staff comments in dockets ARB 483(2) (Unicom), September 20, 2004; ARB 535(2) (Preferred Long Distance), September 20, 2004; ARB 516(1) (Granite), September 20, 2004); ARB 354(3) (New Access), October 2, 2004.)

agreement (the TRO and USTA II Amendment), and thus they have not negotiated away any filing requirements.

Accordingly, Staff's October 22, 2004 comments about an attempt to "negotiate away" section 252 filing requirements are mistaken, as Qwest and Cal-Ore have not attempted to negotiate away any filing requirements, and have, in fact, specifically filed the TRO and USTA II Amendment. As such, Qwest respectfully submits that the Commission should approve the parties' TRO and USTA II Amendment that they filed on September 28, 2004.

III. There are no "unfiled portions" of the Amendment

Further still, Staff concludes that the Amendment "is contrary to law and contrary to the public interest, convenience and necessity," based on its understanding that the "unfiled portion of the amendment also appears to be discriminatory to any carrier who is not a party to the amendment." Again, however, it appears Staff has confused this TRO and USTA II Amendment with the QPP situation, in which Qwest has filed the ICA Amendment (eliminating UNE-P and implementing a batch hot cut process and discount), but has not filed the QPP agreement itself. Here, however, there is no "unfiled portion of the amendment," as the TRO and USTA II Amendment is the entire amendment to the Agreement, and there is no separate agreement.

Finally, Staff's comments note that the Amendment states that the UNEs at issue (which are no longer UNEs pursuant to the TRO and USTA II decision) "are to be discontinued or converted to an "alternative arrangement' on or before January 1, 2004." Thus, Staff surmises that "[i]t appears that whatever arrangement is made will not be filed with the Commission for approval." However, again, Staff appears to confuse the QPP agreement and ICA Amendment with the TRO and USTA II Amendment at issue here.

First, the TRO and USTA II Amendment specifically states that any conversion will be to an alternative arrangement "such as resale or Qwest Tariffed service." Thus, if the alternative arrangement is resale, there would be no need to file such arrangement because the SGAT

Agreement at issue here already has a resale provision, and thus such services would be under the Agreement. Further still, if the alternative arrangement is Qwest's tariffed services, it necessarily would not be under the Agreement, but instead it would be under the Commission-approved tariffs that Qwest has publicly filed with the Commission. Finally, to the extent that any alternative arrangement involves section 251 services that are not already provided for in the Agreement, Qwest would file an amendment to the Agreement in the normal course.[6]

Accordingly, Staff's October 22, 2004 comments about "the unfiled portion of the amendment" and alternative arrangements "will not be filed with the Commission for approval" are apparently based on a misunderstanding about the TRO and USTA II Amendment. To the contrary, there are no unfiled portions of the Amendment or separate agreement, and if any alternative arrangements in the future involve a section 251 services, and those services are not already provided for in the parties' SGAT Agreement, the parties intend to file an amendment to the Agreement. Thus, Qwest respectfully submits that the Commission should approve the parties' TRO and USTA II Amendment that they filed on September 28, 2004.

CONCLUSION

For the reasons set forth above, Qwest respectfully requests the Commission approve the Amendment that the parties filed on September 28, 2004.

DATED: November __, 2004

Respectfully submitted,

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[6] Obviously, if the alternative arrangements do not involve section 251 services or facilities, there would be no section 252 filing requirement.

CERTIFICATE OF SERVICE

ARB 628(1)

I hereby certify that on the 5th day of November, 2004, I served the foregoing **QWEST'S RESPONSE TO STAFF'S COMMENTS RECOMMENDING REJECTION OF AMENDMENT** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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DATED this 5th day of November, 2004.

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