1	BEFORE THE PUBLIC UTILITY COMMISSION		
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3	ARB 6		
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5	In the Matter of The Petition For Arbitration And Request for Consolidation Filed By MCI Metro Access Transmission Services, Inc.	STAFF'S RESPONSE TO QWEST'S MOTION TO DISMISS APPLICATION FOR REVIEW OF NEGOTIATED COMMERCIAL AGREEMENT	
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7	INTRODUCTION		
8	On September 3, 2004, Qwest filed a Motion to Dismiss Application for Review of		
9	Negotiated Commercial Agreement ("Motion to Dismiss"). Qwest's Motion to Dismiss notes		
10	that Qwest and MCI Metro Access Transmission Services, L.L.C entered into a commercial		
11	agreement under which Qwest agreed to provide Qwest Platform Plus service to MCI. See		
12	Motion to Dismiss at 1.		
13	Qwest relies on the result of the D.C. Circuit's decision in <i>United States Telecom</i>		
14	Association v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II") to argue that Qwest is no longer		
15	required to provide the local switching and shared transport network elements in combination		
16	with certain other services under sections 251 or 252 of the Act. See Id. However, in response		
17	to the D.C. Circuit's USTA II decision the Federal Communications Commission ("FCC") issued		
18	an Order and Notice of Proposed Rulemaking, FCC 04-179, WC Docket No. 04-313 (released		
19	August 20, 2004) ("FCC Order") that created, by temporary rule, a continuing Section 251 and		
20	252 requirement for certain services, including those at issue in this docket, ARB 6.		
21	ARGUMENT		
22 23		decision in <i>USTA II</i> , governs the agreement agreements like the Commercial Agreement	
24	Staff agrees with Qwest that not all contracts need to be filed with state commission for		
25	approval under Section 252. The current question, however, is whether agreements that govern		
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I	unbundled mass market switching and unbundled shared transport still must be filed under		
2	Section 252. The recent FCC Order, at Paragraph 16, provides:		
3	Specifically, we conclude that the appropriate interim approach here is to		
4	require incumbent LECs to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms, and		
5	conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after the Federal Register publication of the Order, except to the extent that they are or have been superceded by (1) voluntary negotiated agreements, (2) an intervening Commission order affecting specific unbundling obligations (e.g.		
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8	an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network		
9	elements.		
10	The FCC Order has required by temporary rule that "unbundled access to switching,		
11	enterprise market loops, and dedicated transport <sup>1</sup> " remain a Section 251(c) obligation and		
12	agreements (such as this one) covering these items must be filed under Section 252 for state		
13	approval. Therefore, while parties can negotiate changes to rates, terms, and conditions in place		
14	June 15, 2004, they cannot negotiate away the Section 252 filing requirement. <sup>2</sup> According to the		
15	FCC Order, the commercial agreement must be filed for state approval and, therefore, Qwest's		
16	Motion to Dismiss should be denied.		
17	CONCLUSION		
18	Qwest's Motion to Dismiss relies on USTA II and an October 2002 FCC decision. <sup>3</sup>		
19	However, Qwest's reliance on these two opinions is misplaced now that the FCC has issued its		
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22	<sup>1</sup> Footnote 3 of the FCC's Order clarifies that "references to unbundled switching encompass mass market circuit switching and all elements that must be made available when such switching is made available." Shared transport is		
23	one of those elements.  In Paragraph 22 of the FCC Order, the FCC restricts opt-ins of "frozen" unbundling obligations. However, the		
24	FCC's restriction on opt-ins of frozen unbundling obligations does not alter the fact that the FCC has "frozen" Section 251 obligations and that the FCC has provided that certain elements, as outlined in paragraph 16, are		
25	currently Section 251 obligations and must be filed for state approval. <sup>3</sup> Memorandum Opinion and Order, <i>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</i>		
26	Arrangements under Section 252(a)(1), WC Docket No. 02-89, 17 Fcc Rcd 19337 (Oct. 4, 2002).		

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1	most current iteration of Section 251(c) obligations for unbundled access to switching, enterprise		
2	market loops, and dedicated transport.		
3	As a result of the recent FCC Order, Qwest's Motion to Dismiss should be denied.		
4	Furthermore, Qwest should be required to file portions of its Qwest Platform Plus agreement		
5	with the Commission for approval.		
6	DATED this day of September 2004.		
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8	8 Respectfully subn	nitted,	
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10		Attorney General	
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12	Jason W. Jones, # Assistant Attorner		
13		the Public Utility Commission	
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