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February 8, 2005

Via Facsimile and U.S. Mail

Cheryl Walker
Oregon Public Utility Commission
550 Capitol St., NE
Suite 215
Salem, OR 97301

Re: ARB 6(14) and 6(15) – MCI

Dear Ms. Walker:

Enclosed for filing please find an original and (5) copies of Qwest Corporation's Comments Regarding MCI's Motion for Reconsideration of Order No. 04-661, along with a certificate of service.

If you have any question, please do not hesitate to give me a call.

Sincerely,

Carla M. Butler

CMB:

Enclosure

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 6

In The Matter Of The Petition For Arbitration
And Request For Consolidation Filed By MCI
Metro Access Transmission Services, Inc.

**QWEST'S COMMENTS REGARDING
MCI'S MOTION FOR
RECONSIDERATION**

Qwest Corporation ("Qwest") hereby submits these comments regarding the motion for reconsideration that MCI Metro Access Transmission Services, L.L.C. ("MCI") has filed in this docket, and respectfully requests that the Commission consider them.

BRIEF PROCEDURAL HISTORY

The procedural history in this docket is well-known to the Commission. Qwest does not disagree with MCI's chronology of events. (See MCI Motion for Reconsideration ("MCI Motion"), pp. 1-4, ¶¶ 1-8.) However, Qwest will set forth the few pertinent events to set the context of its comments.

A. MCI's filing of the QPP and amendment, and Qwest's motion to dismiss

On July 29, 2004, MCI filed for approval from the Commission pursuant to section 252 of the Telecommunications Act of 1996 ("the Act") a contract entitled "Master Services Agreement" (otherwise known as the "QPP™ Agreement"). MCI also filed with the QPP™ Agreement an amendment to the parties' current interconnection agreement entitled "Elimination of UNE-P and Implementation of a Batch Hot Cut Process" ("batch hot cut amendment" or "BHC amendment").¹

Thereafter, on September 2, 2004, Qwest filed a motion to dismiss MCI's filing of the QPP™ Agreement. MCI, as well as Commission Staff and AT&T, opposed the motion to dismiss.

¹ Qwest had also filed the BHC amendment for approval, on August 2, 2004, but not the QPP™ Agreement, on grounds that the QPP™ Agreement is not a section 252 agreement that must be filed and approved by a state commission, including this Commission. MCI later re-submitted its filing on August 12, 2004, apparently at the request of the Commission, for the reasons stated in MCI's motion.

B. The Commission's Order No. 04-661 rejecting MCI's filing

On November 9, 2004, the Commission denied Qwest's motion to dismiss, and thus ruled that the QPP™ Agreement must be filed for approval under section 252. Nevertheless, the Commission also rejected MCI's filing of the BHC amendment. See Order No. 04-661, pp. 5-7.

The Commission's reasoning for rejecting MCI's filing of the BHC amendment was based on Staff's concern about certain language in section 4.0 of the BHC amendment regarding the parties' agreement, during the term of the QPP™ Agreement, that MCI would not *order* or *purchase* certain unbundled network elements (UNEs) out of "any other interconnection agreement governed by 47 U.S.C. section 25[1] and 252." Staff, and therefore the Commission, reasoned that this quoted language meant that the parties had agreed the QPP™ Agreement would not be subject to section 252. The Commission and Staff also reasoned that this quoted language conflicts with the Commission's determination that, because Qwest remains obligated to continue providing unbundled access to the network elements included in the QPP™ Agreement, it is an interconnection agreement that must be filed. In other words, Staff (and then the Commission) concluded that this language meant that the parties were attempting to "negotiate away the filing requirements set forth in § 252." This ruling is the basis for MCI's motion for reconsideration.

SUMMARY OF MCI'S MOTION AND QWEST'S COMMENTS

A. Summary of MCI's motion

MCI argues that the Commission erred in rejecting MCI's filing of the BHC amendment to the parties' current interconnection agreement that MCI had filed for approval along with the QPP™ Agreement. Specifically, MCI argues that the Commission erred in rejecting the approval of the BHC amendment based on Staff's (and the Commission's) expressed concerns about the

language in section 4.0 of the amendment, especially because that section does not even address filing requirements, and because MCI did in fact file the QPP™ Agreement.

B. No Staff response to the motion

Qwest assumed that the Commission, through its Staff and its attorneys at the Oregon Department of Justice, would file a response to MCI's motion for reconsideration. Staff did not file any response, however. Accordingly, Qwest recently inquired of Staff as to why it had not formally filed any response during the time period permitted for a response. Qwest was advised that Staff did not intend not to file any formal response, but instead would act as an advisor to the Commission.

C. Qwest's reasons for and summary of its comments

Before the Commission rules on MCI's essentially unopposed motion, and because Qwest has logistical concerns regarding its recent filing of the QPP™ agreements (under protest and reservation of rights) and the filing (or re-filing) of the corresponding BHC amendments (all of which contain the identical section 4.0 language to which the Commission and Staff had concerns), Qwest respectfully requests that the Commission consider these brief comments.²

Although Qwest does not agree with all of the arguments that MCI has raised in its motion, Qwest agrees that the Commission erred in rejecting the BHC amendment. Qwest further agrees that the language in section 4.0 of the amendment does *not* attempt to "negotiate away" any section 252 filing requirements that might otherwise exist, and that nothing in that language of section 4.0 even addresses any filing requirements. Further, to the extent that the Commission's

² As Qwest notes below, the Commission had not only rejected the BHC amendment with MCI in Order No. 04-661 in this docket, but it also rejected six other BHC amendment filings with other CLECs. See e.g., Order Nos. 04-664, docket ARB 535(2) (Preferred Long Distance); 04-663, docket ARB 483(2) (Unicom); 04-678, docket ARB 516(1) (Granite); 05-013, docket ARB 354(3) (New Access); 05-014, docket ARB 374(5) (AEG dba Bend Data); 05-040, docket ARB 349(2) (Z-Tel). Pursuant to Order No. 04-661, which Qwest has not appealed, Qwest has since filed the QPP™ agreements with these CLECs, and has re-filed the previously rejected BHC amendments. Qwest has also recently filed additional QPP™ agreements and BHC amendments that were entered into after the Commission's Order No. 04-661 on November 9, 2004. Qwest has made all of these filings under protest and a reservation of its rights. However, all of the BHC amendments filed with these QPP™ agreements contain identical or similar language in section 4.0 as the BHC amendment with MCI that is at issue in this docket.

and Staff's concerns about section 4.0 were valid, such concerns are *moot*. Finally, the Commission did not rule on the MCI or Qwest BHC amendment filings within 90 days of filing.

COMMENTS

A. The Commission erred with respect to the language in section 4.0 of the amendment

Qwest continues to disagree with the Commission's and MCI's positions that the QPP™ Agreement is a section 252 agreement that must be filed for approval. Nevertheless, Qwest agrees with that portion of MCI's motion that argues that the Commission erred in rejecting the BHC amendment, and specifically, that the Commission erred in reaching its conclusions about the language in section 4.0 of the BHC amendment.

To be certain, Qwest continues to believe that the QPP™ Agreement is not a section 252 agreement, and thus should not be required to be filed for Commission approval. However, as MCI notes, nowhere in the quoted language, or indeed in section 4 of the amendment, is there any discussion about filing requirements.

As MCI further mentions (at p. 16, ¶ 33), Staff's concerns that the QPP™ Agreement allegedly "provides no assurance that future QPPs will be filed for Commission approval" is simply without any basis. First, nothing in section 4.0 says anything of the sort. Second, the Commission should not base a decision based on *speculation* regarding what it believes some other party may or may not do in the future. Third, the Commission has now ruled in Order No. 04-661 that QPP™ agreements are section 252 agreements that must be filed for Commission approval. Although Qwest disagrees, the Commission has so ruled, and Qwest is filing other QPPs under protest and a reservation of its rights.

In short, as MCI noted (p. 17, ¶ 34), nothing in section 4.0 allows the parties to avoid any section 252 filing requirements that they are ordered to have or to avoid filing any updates of the

QPP™ Agreement. Further still, section 4.0 was not intended and does not allow Qwest or other CLECs who enter into the QPP™ Agreement to avoid any section 252 filing requirements.

B. Any concerns about the language in section 4.0 of the amendment are now moot

Moreover, even if Staff had any reasonable concerns about what Qwest or any other non-MCI CLEC might do (such as not filing their QPP™ agreements for approval), the concerns have been rendered **moot**. This is especially so because (1) the Commission has ruled that the QPP™ Agreement is a section 252 agreement that must be filed for approval, (2) MCI in fact filed the QPP agreement with the Commission under section 252; and (3) Qwest has filed and will be filing QPP™ agreements (under protest and a reservation of its rights) that it has entered into with other Oregon CLECs subject to future rulings from the Oregon Commission, the courts, or the FCC that section 252 is not applicable to the QPP agreements.³

Finally, in early January 2005, Qwest advised all CLECs that it had set a January 31, 2005 deadline to enter into the QPP™ Agreement. Since then, a number of CLECs have entered into the QPP™ Agreement, and corresponding BHC amendments, and Qwest has filed, or is in the process of filing, both agreements (under protest and a reservation of rights). Thus, as a practical matter, there should be very few additional QPP™ agreements that need to be filed in any event.

C. The Commission did not rule on MCI's or Qwest's amendment within 90 days

Finally, Qwest agrees with MCI that the Commission failed to rule (approve or reject) the BHC amendment within 90 days of its submission to the Commission. Indeed, the Commission failed to do so *twice*. That is, the Commission failed to approve or reject *MCI's* July 29, 2004

³ Indeed, Qwest has to date filed (under protest and reservation of rights) at least 12 QPP™ agreements, and filed (or re-filed) the corresponding BHC amendments, and has committed to file all subsequent QPP™ agreements that CLECs have entered into by the January 31, 2005 deadline. Qwest notes, however, that all of the corresponding BHC amendments have identical or similar language in section 4.0 as the BHC amendment with MCI. Thus, Qwest is concerned that if the Commission does not modify its Order No. 04-661 with respect to the expressed concerns about the language in section 4.0, the Commission may believe it needs to reject all of these numerous QPP™ and BHC amendment filings, for no legitimate reason, especially since the original concern (to the extent it was well-founded) is now moot.

filing of the QPP and the BHC amendment within 90 days of filing. However, Qwest itself also filed the BHC amendment (but not the QPP™ Agreement) on August 2, 2004. In fact, Commission Staff even originally recommended approval of that amendment filing on August 23, 2004. The Commission, however, *never ruled on Qwest's* August 2, 2004 submission of the BHC amendment, as it only ruled on MCI's August 12, 2004 *re-submission* of its filing. Qwest does not believe that the explanation that is set forth in footnote 13 of Order No. 04-661 changes the fact that, at least as to *Qwest's* stand-alone BHC amendment filed on August 2, 2004, the Commission did *not* approve or reject it within the required 90 days.

CONCLUSION

For the reasons set forth above, although Qwest does not agree with all of MCI's arguments in its motion for reconsideration, Qwest respectfully requests the Commission grant MCI's motion for reconsideration of Order No. 04-661 by deleting the language regarding section 4.0 of the batch hot cut amendment, and thus by ruling that the batch hot cut amendment, with the language in section 4.0, is in the public interest.

DATED: February 8 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

ARB 6

I hereby certify that on the 8th day of February, 2005, I served the foregoing **QWEST CORPORATION'S COMMENTS REGARDING MCI'S MOTION FOR RECONSIDERATION** 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 8th day of February, 2005.

QWEST CORPORATION

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