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 JOINT REPLY TO THE RESPONSES OF MCI, AT&T AND COMMISSION STAFF TO QWEST'S MOTION TO DISMISS APPLICATION FOR REVIEW OF NEGOTIATED COMMERCIAL AGREEMENT**

Pursuant to OAR 860-013-0050(2), OAR 860-011-0000(3), ORCP 10C, and UTCR 10(b), respondent Qwest Corporation ("Qwest") hereby requests that the Public Utility Commission of Oregon ("the Commission") consider this reply to the responses from petitioner MCImetro Access Transmission Services, L.L.C. ("MCI"), from AT&T Communications of the Pacific Northwest, Inc. ("AT&T"), a non-party to this arbitration, and from Commission Staff ("Staff"), to Qwest's motion to dismiss MCI's application to the extent it seeks review of the QPP™ Master Service Agreement negotiated between Qwest and MCI. This is especially necessary because both AT&T and Staff have recently filed an initial pleading (both entitled a "response" to Qwest's motion to dismiss), and thus Qwest should be given an opportunity to reply to these initial filings.[1]

INTRODUCTION

The agreement that is the subject of Qwest's motion is the "Qwest Master Services Agreement" (the "QPP" or "Commercial Agreement"), under which Qwest has agreed to provide to MCI Qwest Platform Plus™ services under section 271 of the federal Telecommunications Act of 1996 ("federal Act"). (See MCI Response, p. 1.) In their various responses to Qwest's

[1] In addition, Qwest notes that MCI and Staff served their responses on September 20, 2004, in response to a motion to dismiss that Qwest served on September 2, 2004 (18 days earlier). Pursuant to OAR 860-013-0050(2), a party responding to a motion has 15 days to respond, although ORCP 10C allows three additional days if the motion was served by mail. See also OAR 860-010-0000(1). Recently, however, counsel for numerous CLECs, including MCI, has argued that the three additional days of ORCP 10C for motions served only by mail do not apply to Commission dockets. Qwest disagrees with that interpretation for a number of reasons, especially because of OAR 860-010-0000(1), and thus does not advocate here that these responses are not timely. Rather, Qwest simply notes for the record that even CLECs like MCI must necessarily agree that ORCP 10C applies for motions served only by mail. However, to the extent the Commission disagrees that ORCP 10C applies to Commission proceedings, then Qwest submits that the Commission should so advise the parties and enforce the timelines consistently.

motion to dismiss, MCI, AT&T and Staff do not dispute that under the agreement, these section 271 services consist primarily of local switching and shared transport, in combination with other services. Instead, they argue that the Commercial Agreement must be filed with, and approved by, this Commission pursuant to section 252 of the federal Act, (1) in order to preserve the status quo and because of the FCC's recent *Interim Rules Order* (MCI), (2) to prevent the possibility of discrimination and because it is allegedly required under section 271 (AT&T),[2] and because the FCC recently issued its *Interim Rules Order* (Staff).

However, each of these respondents has failed to address the plain (and critical) findings in two controlling opinions which govern this matter, one from the FCC and the other from the United States Court of Appeals for the District of Columbia.[3] These critical findings definitively establish that the Commercial Agreement is not subject to either sections 251 or 252 and is, therefore, not subject to review and approval by this Commission. First, as unequivocally stated by the FCC, "we find that **only those agreements** that contain an ongoing obligation **relating to section 251(b) or (c) must be filed under 252(a)(1)**." *Declaratory Order*, ¶ 8, fn. 26. (Emphasis added.) This FCC finding could not be more clear. Second, as the *USTA II* court stated, "[w]e

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[2] Although Qwest is including AT&T in this combined reply, Qwest does not concede, and does not believe, that AT&T should be allowed to intervene in this docket. In fact, the Oregon Administrative Rules for interconnection arbitrations (Division 16 of Chapter 860) do not allow for intervention in arbitration proceedings. See e.g., OAR 860-016-0000 (which defines only a "petitioner" (MCI here) and a "respondent" (Qwest here), and no other parties or intervenors); see also OAR 860-016-0030(6) (which states that "only the negotiating parties will have full party status," and the Arbitrator may confer with Staff for assistance). Thus, there is no procedure for "intervention" by a third party.

Moreover, given its recent decision and public announcement that it is turning away from "wireline residential telephone services," it is difficult, at best, to determine what direct and substantial interest AT&T has in this proceeding. AT&T publicly stated "[a]s a result of recent changes in regulatory policy governing local telephone service, AT&T will no longer be competing for residential local and standalone long distance (LD) customers." A copy of AT&T public statement is attached to this reply as Exhibit A. Finally, AT&T admits in its response that Qwest has made the Commercial Agreement available to each of its in-region state commissions, and that Qwest has offered the Commercial Agreement to any interested CLEC assuming the same obligations as MCI. However, to date AT&T has consistently refused to adopt the Commercial Agreement. Thus, AT&T's arguments concerning the potential for this Commercial Agreement to be used to discriminate against telecommunications carriers who are not parties to the agreement are both confusing and unfounded. Simply put, even if it were allowed to participate here, at this point in time AT&T has no direct and substantial interest in the Commercial Agreement, or in this docket.

[3] *See* 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, 2002 FCC Lexis 4929 (October 4, 2002) ("*Declaratory Order*"), and *United States Telephone Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

vacate the Commission's subdelegation to state commissions of decision-making authority over impairment determinations . . . for mass market switching and certain dedicated transport elements (DS1, DS3 and dark fiber). We also vacate and remand the Commission's nationwide impairment determinations with respect to these elements." *USTA II*, 359 F.3d at 594. Consequently, Qwest is no longer obligated to provide unbundled access to local switching or shared transport pursuant to section 251 of the federal Act. If these elements are not governed by section 251 of the Act, the FCC's *Declaratory Order* is clear that an agreement relating to these elements is not required to be filed for approval pursuant to section 252.

ARGUMENT

Because the QPP Commercial Agreement at issue in this docket does not pertain to the provisioning of network elements that Qwest is required to provide pursuant to sections 251(b) and 251(c) of the federal Act, the Commercial Agreement is not an "interconnection agreement" that must be filed under section 252(a)(1) of the Act.

I. Only agreements pertaining to provisioning of network elements pursuant to sections 251(b) and 251(c) must be filed with state commissions pursuant to section 252(a)(1)

The cornerstone of MCI's argument appears to be that *any* agreement that concerns the provisioning of "network elements" must be filed with the Commission for approval. MCI bases this conclusion on the following quote from the FCC's *Notice of Apparent Liability for Forfeiture.*[4] The quote is set forth below in the context in which it appears in MCI's response:

> ... in March 2004, in its Notice of Apparent Liability for Forfeiture issued to Qwest, the Commission states in Paragraph 21: 'We have historically given broad construction to Section 252(a)(1).' The FCC goes on to state that:
>
> > any 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).

[4] *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, File No. EB-03-IH- 0263, NAL Account No. 200432080022, FRM No. 0001-6056-25, Paragraph 22 (March 12, 2004) ("*Notice of Apparent Liability for Forfeiture*").

> In this latter instance, the FCC does not limit its direction to only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1). (MCI Response, p. 5, quoting *Notice of Apparent Liability for Forfeiture*, ¶ 22.)

MCI's claim – that the FCC does not limit the agreements to be submitted for review to those that contain an ongoing obligation relating to sections 251(b) and 251(c) – is **directly** refuted by the footnote that MCI inexplicably *omitted* from its response, but which appears at the end of the passage that MCI quotes from the *Notice of Apparent Liability*:

> [70] . . . **The sentence quoted in the text is a summary of the interconnection obligations listed in section 251 of the Act. 47 U.S.C. § 251** . . . . *Notice of Apparent Liability for Forfeiture*, p. 13, fn. 70. (Emphasis added.)

Contrary to MCI's assertion, even in the *Notice of Apparent Liability for Forfeiture*, the FCC was careful to limit the section 252(a)(1) filing requirement to only those agreements that contain an ongoing obligation relating to network elements offered pursuant to *section 251*.

AT&T also relies on the FCC's decision in the *Notice of Apparent Liability for Forfeiture* for its central argument. AT&T argues that "[s]ection 252 requires that such an agreement be filed with the state commission, however, so that the state commission can fulfill its statutory mandate to ensure that the agreement is nondiscriminatory." (AT&T Response, pp. 8-9 (citing *Notice of Apparent Liability for Forfeiture,* ¶ 47).) The FCC's *Notice of Apparent Liability for Forfeiture*, however, was based on, and specifically referred to, its earlier *Declaratory Order,* in which the FCC specifically rejected the idea that all agreements between an ILEC and a CLEC must be filed with a state commission for approval. In the *Declaratory Order,* the FCC stated:

> We therefore disagree with the parties that advocate the filing of **all** agreements between an incumbent LEC and a requesting carrier. *See* Office of the New Mexico Attorney General and the Iowa Office of Consumer Advocate Comments at 5. Instead, **we find that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)** . . . . *Declaratory Order*, ¶ 8, fn. 26. (Emphasis added.)

Because the QPP Commercial Agreement includes what MCI characterizes as "network elements," and because Qwest was previously required to provide these "network elements"

pursuant to sections 251(b) and 251(c) of the Act, MCI and AT&T erroneously conclude that this Commission must approve the agreement pursuant to section 252(a)(1) of the Act. The critical distinction that MCI and AT&T fail to draw is the distinction between network elements that must be provided pursuant to sections 251(b) and 251(c) of the Act, and network elements that are being provided pursuant to section 271 of the Act.[5]

Only agreements pertaining to the provisioning of network elements pursuant to sections 251(b) and 251(c) must be filed with state commissions pursuant to section 252(a)(1). *Declaratory Order*, ¶ 8, fn. 26. Agreements pertaining to the provisioning of network elements pursuant to section 271 do not need to be filed with state commissions pursuant to section 252(a)(1). Neither MCI nor AT&T dispute the dispositive question regarding section 252 obligations – that is, they do not dispute that switching and shared transport are not today section 251 elements.

II. Section 271 does not require BOCs to file non-251 agreements with state commissions, and section 271 does not give state commissions authority to approve such agreements

AT&T also argues that section 271 itself requires Bell Operating Companies ("BOCs") to file non-section 251 agreements with state commissions, and gives state commissions authority to approve agreements containing terms and conditions for access to network elements provided under section 271. For several reasons, this argument is simply wrong.

A state administrative agency has no role in the administration of federal law, absent express authorization by Congress. That is so even if the federal agency charged by Congress with the law's administration attempts to delegate its responsibility to the state agency. *USTA II*, 359 F.3d at 565-68. Here, no provision of the federal Act authorizes state commissions to impose or enforce obligations under section 271. *See Indiana Bell Tel. Co. v. Indiana Utility*

[5] Qwest notes that as part of its recent Order and Notice of Proposed Rulemaking, the FCC has sought comment on carriers' obligations under section 252 to file commercial agreements with state commissions for approval, where the agreements govern access to network elements for which there is no section 251(c)(3) unbundling obligation. Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313 and CC Docket No. 01-338, FCC No. 04-179, ¶ 13 (F.C.C. August 20, 2004) ("the *Interim Rules Order*").

Regulatory Commission, 2003 WL 1903363 at 13 (S.D. Ind. 2003) (state commission not authorized by section 271 to impose binding obligations), *aff'd*, 359 F.3d 493 (7th Cir. 2004).[6]

Section 271(d)(3) expressly confers upon the *FCC*, not state commissions, the authority to determine whether BOCs have complied with the substantive provisions of section 271, including the "checklist" provisions upon which AT&T bases its argument. 47 U.S.C. § 271(d)(3). State commissions have only a non-substantive, "consulting" role in that determination. 47 U.S.C. § 271(d)(2)(B). *See also Indiana Bell, supra,* 2003 WL 1903363 at 13 ("section 271 clearly contemplates an advisory role for the [state commission], not a substantive role").[7]

As one court has explained, a state commission has a fundamentally different role in implementing section 271 than it does in implementing sections 251 and 252:

> Sections 251 and 252 contemplate state commissions may take affirmative action towards the goals of those Sections, **while Section 271 does not contemplate substantive conduct on the part of state commissions. Thus, a "savings clause" is not necessary for Section 271** because the state commissions' role is investigatory and consulting, not substantive, in nature. *Indiana Bell, supra,* 2003 WL 1903363 at 11. (Emphasis added.)

Section 271 does not provide even for a consulting role for state commissions with respect to the interpretation and enforcement of non-section 251 obligations following the BOC's receipt of authorization to provide interLATA service in the state. *See* 47 U.S.C. § 271(d)(6). Even if it were lawful for the FCC to delegate to state commissions its responsibilities, which it

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[6] See also Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 19,020 (2003) (*"TRO"*), at ¶¶ 186-87 ("states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations").

[7] Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by section 271, likewise provide no role for state commissions. That authority as been conferred by Congress upon the FCC and federal courts. *See* 47 U.S.C. § 201(b) (authorizing the FCC to prescribe rules and regulations to carry out the Act's provisions); 47 U.S.C. § 205 (authorizing FCC investigation of rates for services, etc., required by the Act); 47 U.S.C. § 207 (authorizing FCC and federal courts to adjudicate complaints seeking damages for violations of the Act); 47 U.S.C. § 208(a) (authorizing FCC to adjudicate complaints alleging violations of the Act). The FCC has thus confirmed that "[w]hether a particular [section 271] checklist element's rate satisfies the just and reasonable pricing standard is a fact specific inquiry that **the Commission** [*i.e.*, the FCC] will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)." *TRO* at ¶ 664. (Emphasis added.)

is not, the FCC has not even attempted such delegation. To the contrary, the FCC has stated that it will make any determinations under section 271 that should thereafter be necessary.[8]

Without citing to any language in the federal Act that confers section 271 decision-making authority on state commissions, AT&T presents a convoluted analysis under which it claims the Act provides inferentially to state commissions authority to approve non-section 251 agreements. An inferential argument that states have authority cannot substitute for the express grant of authority that is required for states to be able to administer provisions of federal law. Moreover, the statute is not reasonably susceptible to the inference that AT&T seeks to draw.

AT&T's argument relies on section 271(c)(2)(B), which, according to AT&T, establishes access requirements for all network elements that a BOC provides, including elements required by section 271, but not section 251 ("section 271 network elements"). According to AT&T, section 271(c)(2)(A) requires that access to section 271 network elements be provided, pursuant to "binding agreements that have been approved under section 252." Thus, the argument goes, state commissions have authority to approve terms and conditions relating to section 271 elements.[9]

The first flaw in this argument is AT&T's contention that the "binding agreements" required under section 271(c)(1)(A) include agreements addressing access to section 271 elements. Section 271(c)(1)(A) refers expressly to "agreements that have been approved **under section 252**," making it clear that the agreements referred to in that section are those that relate to section 252 – not section 271 – obligations. As discussed above, the FCC established in its

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[8] *TRO* at ¶ 665 ("[S]ection 271(d)(6) grants **the Commission** [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271. In particular, this section provides **the Commission** with enforcement authority where a BOC 'has ceased to meet any of the conditions required for such approval.'") (Emphasis added.) (Footnote omitted.)

[9] AT&T also attempts to make this same argument based on the Commission's rules in a more subtle way, although in doing so, it reads requirements into Oregon law that simply do not exist. That is, AT&T claims in its response that "Oregon also has substantive requirements for the filing **and approval** of interconnection agreements. OAR 860-016-0020." (AT&T Response, p. 5, fn. 3 (emphasis added).) However, although OAR 860-016-0020 does require that interconnection agreements be filed with the Commission, this provision applies only to "interconnection, services, or network elements pursuant to **Section 251** of the Act." See OAR 860-016-0020(1). (Emphasis added.) Clearly, as AT&T admits, these are not section 251 services or elements.

Declaratory Ruling that the scope of section 252 agreements is limited to terms and conditions relating to the obligations imposed by sections 251(b) and 251 (c). Accordingly, the reference in section 271(c)(1)(A) to agreements "approved under section 252" is limited to agreements that address section 251(b) and 251(c) obligations, and does not include commercial agreements that address issues unrelated to those sections. That section therefore does not give states authority to review agreements containing terms and conditions for access to section 271 elements.[10]

AT&T's argument also is contradicted by the provisions of the federal Act that define the authority of state commissions to approve interconnection agreements. Section 252(e)(1) authorizes state commissions to approve interconnection agreements "adopted by negotiation," and the negotiations to which the section refers are those addressed in section 251(c)(1), which expressly relate only to the obligations imposed by sections 251(b) and 251(c).[11] There is no mention anywhere in either section 251 or section 252 of negotiations relating to section 271 obligations, or of state authority to approve negotiated agreements addressing section 271 obligations. The section 252(e)(1) authority of state commissions to approve negotiated interconnection agreements is limited, therefore, to agreements relating to section 251(b) and 251(c) obligations.

This conclusion is further supported by section 252(e)(6) of the Act, which grants parties the right to seek judicial review of state commission determinations relating to interconnection agreements. That section limits judicial review to "whether the agreement . . . meets the requirements of section 251 and this section." Significantly, Congress did not authorize courts to review agreements for compliance with section 271, demonstrating that Congress did not intend

[10] Section 271(c)(1)(A) also does not impose any filing requirements for agreements. Instead, it only establishes as a requirement for obtaining long distance authority under Track A that there be a "facilities-based competitor" with whom the BOC has a binding agreement approved under section 252.

[11] Section 251(c)(1) imposes on ILECs "[t]he duty to negotiate in good faith . . . the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of [§ 251(b)] and this subsection."

that state commissions would make any determinations relating to agreements that address section 271 obligations. If Congress had intended otherwise, it easily could have stated as much.

For these reasons, there is no merit to AT&T's contention that section 271 requires BOCs to file non-section 251 agreements with state commissions, or that section 271 gives states authority to approve agreements containing terms and conditions for access to network elements provided under section 271. The Commission should thus disregard these incorrect arguments.

III. The FCC's recent *Interim Rules Order* does not require that the QPP be filed

Both MCI and Staff argue that the FCC's recent *Interim Rules Order* somehow requires that the subject QPP Commercial Agreement be filed with the Commission for approval. In the case of Staff, the *Interim Rules Order* appears to be the *only reason* why it believes that the Commercial Agreement should be filed for approval.[12] MCI, however, takes a somewhat different position; namely, that it is "unsettled" whether there is a filing requirement for contracts that address non-section 251 network elements (citing to the FCC's seeking comments on filing requirements of commercial agreements and an FCC Commissioner's comments about this issue). (MCI Response, pp. 5-7.) However, there is nothing in the *Interim Rules Order* that requires state commission approval for agreements for non-section 251 services.

As the Commission knows, the issue before the Commission in this docket is this whether the Commercial Agreement between Qwest and MCI must be filed and approved pursuant to section 252(a)(1) of the 1996 Act. The answer to this question is no. The duty to file an agreement with a state commission under section 252(a)(1) is premised upon the fact that the service or element provided pursuant to the contract is a service or element that an ILEC must

[12] Prior to the issuance of the Interim Rules Order, Qwest was under the impression that Staff agreed that the QPP Commercial Agreement was not required to be filed under section 252. Staff has recently confirmed that its position is based upon the *Interim Rules Order*. Accordingly, if the Commission agrees with Qwest that the *Interim Rules Order* does not require this agreement to be filed, that should be the end of the discussion.

provide in accordance with sections 251(b) or 251(c).[13] Because the Commercial Agreement at issue here concerns network elements that Qwest is no longer required to provide pursuant to sections 251(b) or 251(c), there is no section 252(a)(1) obligation to file the agreement with a state commission. Nor does section 252 vest state commissions with the power to review and approve the agreement. The *Interim Order* has done nothing to change this conclusion. In fact, if anything, the *Interim Order* supports it.[14]

A. The *Interim Rules Order*

First, in the *Interim Order*, the FCC has determined that until the earlier of six months after Federal Register publication of the *Interim Order*; or the effective date of the FCC's final unbundling rules, ILECs are 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 ("Interim Period"). See e.g. *Interim Order*, ¶ 29. These rates, terms, and conditions for switching, enterprise market loops, and dedicated transport are to remain in place during the Interim Period, *except* to the extent that they are or have been superseded by *voluntarily negotiated agreements*, an intervening Commission order affecting specific unbundling obligations (*e.g.*, an order addressing a pending petition for reconsideration), or (with respect to rates only) a state public utility commission order raising the rates for network elements. *Id.* Here, the rates, terms and conditions for these facilities and services have been superseded by the voluntarily-negotiated QPP Commercial Agreement.

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[13] 47 U.S.C. § 252(a)(1) ("Upon receiving a request for interconnection, services, or *network elements pursuant to section 251*. . . an incumbent local exchange carrier may negotiate and enter into a binding agreement . . . . The agreement . . . shall be submitted to the State commission under subsection (e) of this section.") (Emphasis added.)

[14] It is important to note that in the *Interim Order*, the FCC has sought comment on carriers' obligations under section 252 to file commercial agreements with state commissions for approval, where the agreements govern access to network elements for which there is no section 251(c)(3) unbundling obligation. Because the FCC has stated it will revisit the issue in a future order, anything the FCC stated in the *Interim Order* on the issue must be considered *dicta*. Nevertheless, the FCC's rulings in the *Interim Order* are consistent with its prior rulings that agreements that do not concern network elements to be provided pursuant to sections 251(b) or 251(c) need not be filed with and approved by state commissions pursuant to section 252(a)(1).

With respect to these agreements, the FCC has held "that competitive LECs may not opt into the contract provisions 'frozen' in place by this interim approach." *Interim Rules Order*, ¶ 22. In addition, the FCC expressly preserves ILECs' contractual prerogatives to initiate change of law proceedings, to the extent consistent with their governing interconnection agreements, in order to allow a speedy transition in the event it ultimately declines to unbundle switching, enterprise market loops, or dedicated transport. *Id.* The FCC explained that the:

> fundamental thrust of the interim relief ... 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. *Interim Rules Order*, ¶ 22.

By stating that CLECs may not "opt-in" to contract provisions concerning switching, enterprise market loops and dedicated transport during the Interim Period, the FCC has essentially determined that section 252(i) should not apply with respect to these contract provisions. Section 252(i) requires an exchange carrier to make available to any other requesting telecommunications carrier any interconnection, service, or network element provided under an agreement approved under section 252 upon the same terms and conditions as those provided in the agreement. 47 U.S.C. § 252(i). By its very terms, section 252(i) only applies to interconnection, services, or network elements provided under an agreement approved under section 252. In turn, section 252 only requires the approval of agreements that concern networks elements being provided pursuant to sections251(b) or 251(c).

B. The logic of the *Interim Order* prohibiting opt-ins is consistent with *USTA II*

The logic behind the FCC's decision to prohibit CLECs from opting into contract provisions concerning switching, enterprise loops and dedicated transport is consistent with the fact that, given *USTA II*'s invalidation of the FCC's unbundling rules, these elements are not being provided under sections 251(b) or 251(c). Because the opt-in provision in section 251(i) applies only to agreements containing section 251 obligations (and that have been approved

under section 252), it follows that the "frozen agreements" containing non-251 obligations for access to switching, enterprise loops, and transport should not be available for opting in. Thus, the FCC has correctly held that CLECs may not opt-into these contract provisions, because ILECs are no longer obligated to provide these network elements pursuant to sections 251(b) and 251(c). This ruling is further support for the proposition that section 252 can only be read to apply to agreements that concern obligations arising out of sections 251(b) and 251(c).[15] In turn, under section 252(a)(1), carriers need only file, and a state commission may only approve, agreements that govern network elements offered pursuant to sections 251(b) or 251(c).

As Qwest explained in its motion to dismiss, whether the Commission has the power to review and approve the Commercial Agreement is a question of federal law governed by the provisions of the federal Act and the controlling federal authorities construing the federal Act. (Qwest Motion to Dismiss, p. 3.) Moreover, as explained in the motion to dismiss, and again in this reply, there are two primary controlling authorities in this docket. The first is the decision of the United States Court of Appeals for the District of Columbia in *USTA II*. The second is the *Declaratory Order* that defines "the scope of the mandatory filing requirement set forth in section 252(a)(1)." *Declaratory Order*, ¶ 1. Read together, these authorities definitively establish that the QPP Commercial Agreement is not subject to either section 251 or section 252, and thus is not subject to Commission review and approval. Nothing in the FCC's recent *Interim Rules Order* changes that conclusion.

Further still, there has been no finding of impairment for the subject services. As the Commission knows from the FCC's 1996 First Report and Order in the *Local Competition*

[15] Paragraph 23 of the *Interim Rules Order* provides that "new" contracts are not subject to opt in. This means that a new contract (which is what the QPP agreement is) cannot be a section 252 contract; otherwise, it would be subject to section 252(i) as a matter of law. New CLECs also cannot opt into pre-June 15, 2004 provisions relating to switching under the *Interim Rules Order*. This again means that switching cannot be a section 251(c) service or a section 252 interconnection provision; otherwise, new CLECs would be able to opt-in pursuant to subject to 252(i) as a matter of law.

docket, a finding of impairment is a necessary element to a section 251 service, and thus a section 252 agreement. Here, there has been no finding of impairment for the subject services. See e.g., *USTA II*, 359 F.3d at 594.

Finally, there are strong policy reasons why the FCC's *Interim Rules Order* does not require the filing of non-section 251 commercial agreements. First, the *Interim Rules Order* presents a clear FCC policy for not allowing opt-INS, as stated above. In paragraph 22, for example, the FCC discusses a "speedy transition in the event [it] ultimately decline[s] to unbundle switching, enterprise market loops or dedicated transport." This is the basis for the second sentence in paragraph 22 and paragraph 23 for not allowing opt-ins. The FCC further states that the thrust of the interim relief is to "maintain the *status quo* in certain respects without expanding unbundling beyond that which was in place in June 15, 2004." This is yet another policy statement that would be thwarted by requiring that the QPP Commercial Agreement is subject to section 252 filing requirements.

In short, the *Interim Rules Order* does not change the analysis of the lack of a filing requirement under section 252 for the non-section 251 services QPP Commercial Agreement.

IV. The Commission decisions and Staff comments from other states are inapposite

Finally, both MCI and AT&T cite to a Michigan Public Service Commission ("Michigan Commission") order in which the Michigan Commission required SBC Michigan ("SBC") and Sage Telecom, Inc. ("Sage") to file their Local Wholesale Complete agreement ("LWC") for approval, and then approved the agreement. (MCI Response, p. 10; AT&T Response, p. 10.)[16]

[16] Order, *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 Nos. U-13513 and U-4121 (Mich. PSC, April 28, 2004); and Order, *In the Matter of the Request for Commission Approval of an Interconnection Agreement Between SBC MICHIGAN and SAGE TELECOM, INC. and 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 Nos. U-13513 and U-14121 (Mich. PSC, August 3, 2004) ("*Michigan Commission Decision*").

The *Michigan Commission Decision* and those from the other states that reviewed the SBC Sage LWC are inapposite for several reasons.[17]

The Michigan Commission cited the FCC's *Declaratory Order* and determined that the federal Act required that the LWC be reviewed under section 251(a)(1). *Michigan Commission Decision*, p. 15, quoting *Declaratory Order*, ¶ 8. In reaching its conclusion, however, the Michigan Commission quoted the language that MCI quotes to this Commission in its response:

> 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).

Ironically, however, the Michigan Commission also made the same inexplicable mistake that MCI and AT&T made in their responses here; *it failed to include the explanatory footnote* that appears at the end of the passage it quoted from the FCC's *Declaratory Order*:

> We therefore disagree with the parties that advocate the filing of **all** agreements between an incumbent LEC and a requesting carrier. *See* Office of the New Mexico Attorney General and the Iowa Office of Consumer Advocate Comments at 5. Instead, **we find that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)** . . . . *Declaratory Order*, ¶ 8, fn. 26. (Emphasis added.)

If one reads the entirety of the FCC's *Declaratory Order* and *Notice of Apparent Liability For Forfeiture* – including the footnotes MCI, AT&T and the Michigan Commission *omitted* from their analyses of these FCC's orders – one can only conclude that the obligation to file an agreement with a state commission does not extend beyond those agreements that pertain to the provisioning of network elements pursuant to sections 251(b) and 251(c). It appears that because the Michigan Commission misread the FCC's *Declaratory Order*, it did not analyze whether the LWC pertained to network elements provided pursuant to sections 251(b) and 251(c) of the

[17] AT&T also cites to five other state commission decisions involving the same SBC/Sage agreement. (AT&T Response, pp. 10-12.) Because these out-of-region decisions are inapposite, and all are similar to the Michigan decision (and indeed, they appear to largely copy from each other), Qwest's discussion about the Michigan decision applies similarly to the other SBC state decisions.

federal Act. The same flawed analysis appears to have been used by the other state commissions, as cited by AT&T in its response. (AT&T Response, pp. 10-12.) Because these state commissions did not engage in the required fundamental analysis of whether the LWC pertained to network elements provided pursuant to sections 251(b) and 251(c) of the federal Act, they are of no value in terms of the issue to be decided here; namely, whether the Act requires the QPP Commercial Agreement to be filed with this Commission for approval.

The Michigan Commission also went on to find that the LWC should be filed pursuant to Michigan state law. Whether the Michigan Commission's decision on this issue is in fact lawful need not be addressed in this case because, as Qwest has already demonstrated, the Oregon rule requiring filing that AT&T cites (OAR 860-016-0020) applies only to "interconnection, services or network elements pursuant to *Section 251* of the Act." (Emphasis added.)

Further, unlike the LWC, Qwest has previously provided the Commercial Agreement to the Commission for informational purposes, and is offering its terms and conditions to any carrier that assumes the same obligations as MCI. As previously noted, although AT&T admits that Qwest has made the Commercial Agreement available to each of its in-region state commissions, and that Qwest has offered the Commercial Agreement to any interested CLEC that assumes the same obligations as MCI, to date AT&T has consistently refused to adopt the Commercial Agreement. As a result, many of the concerns that AT&T and MCI express regarding the potential for "discrimination" are simply inapplicable regarding the Commercial Agreement.

Finally, MCI refers to the comments filed by the staffs of the Arizona and New Mexico commissions. (MCI Response, p. 9.) However, these comments, which are not binding here, and which have no persuasive value, and which are not even Commission decisions, are completely bereft of any meaningful analysis.

For example, these comments simply either ignore, or fail to mention, the points that Qwest has raised in its motion to dismiss and reply here (and which it also raised in those states). Perhaps a telling example is that, other than to summarize that Qwest relies on the *TRO* and the *USTA II* decision, neither staff substantively discusses these decisions. Another example is that they simply wax generally on "broad Commission authority under section 252" regarding the filing of agreements, but without any serious discussion of the limitations of such authority. These comments also gloss over the lack of any filing requirement for section 271 services (of which the QPP is based) by simply arguing (but without citing to authority) that the Commission *can* require section 271 agreements to be filed. Finally, in desperate catch-all attempts to seemingly invoke emotional appeals for a filing requirement for this agreement, the two staffs resort to arguing that the "public interest" requires filing, that the filed batch hot cut amendment and the Commercial Agreement are "interdependent," and that a lack of a filing requirement would lead to "two different sets of rules." Clearly, this Commission should not give any weight to these comments.

CONCLUSION

For the reasons above, Qwest respectfully moves that the Commission should disregard the responses by MCI, AT&T and Staff, and thus that it dismiss the application for approval filed by MCI to the extent it seeks review and approval of the Qwest Master Services Agreement.

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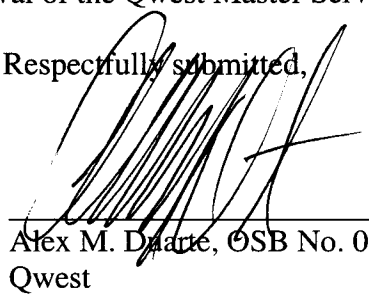
Respectfully submitted,



Alex M. Duarte, OSB No. 02045
Qwest
421 SW Oak Street, Suite 810
Portland, Oregon 97204
(503) 242-5623
(503) 242-8589 (facsimile)
Alex.Duarte@qwest.com

Attorney for Qwest Corporation