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BEFORE THE PUBLIC UTILITY COMMISSION**

OF OREGON

ARB 6(14) & (15)

In the Matter of)	
)	
MCImetro ACCESS TRANSMISSION)	
SERVICES, L.L.C.,)	ORDER
)	
and)	
)	
QWEST CORPORATION)	
)	
For Approval of a Negotiated Agreement)	
Under the Telecommunications Act of)	
1996.)	

DISPOSITION: MOTION TO DISMISS DENIED; AMENDMENT AND AGREEMENT REJECTED

Introduction

MCImetro Access Transmission Services, L.L.C. (MCI) and Qwest seek Commission approval of an amendment to an interconnection agreement approved in Order No. 97-341. Under terms of the existing agreement, MCI purchases, among other things, the local loop, port, switching, and shared transport combination commonly known as unbundled network element platform (“UNE-P”).

Due to the regulatory uncertainty of Qwest’s obligation to provide such UNE-P arrangement, MCI and Qwest entered into two agreements. First, the parties amended their existing interconnection agreement (the ICA Amendment) to remove provisions related to UNE-P. Second, the parties entered into an Agreement entitled the “Qwest Master Service Agreement,” under which Qwest agreed to provide “Qwest Platform Plus” services to MCI (the QPP Agreement). Platform Plus services consist primarily of local switching and transport network elements services in combination with certain other services.

Both parties agree that the first agreement—the ICA Amendment—must be filed for Commission approval under §252 of the Telecommunications Act of 1996 (Act). The parties disagree, however, as to the proper treatment of the second agreement. In addition to the ICA Amendment, MCI also filed a copy of the QPP Agreement with the Commission and asked that it too be approved under §252 of the Act. Qwest contends that no Commission approval of the QPP Agreement is required and has moved to dismiss MCI’s request. The Commission Staff opposes the motion to dismiss and recommends the

Commission reject the ICA Amendment and QPP Agreement as contrary to the public interest.

Motion to Dismiss

At the outset, we must first determine whether the parties are required to file the QPP Agreement for our approval. In its motion to dismiss, Qwest contends that our ability to review and approve the QPP Agreement is a question of federal law governed by the Act and two primary controlling federal authorities: the recent decision of the United States Court of Appeals in *United States Telecom Ass'n v. FCC*, 359 F3d 554 (D.C. Cir. March 2, 2004) (*USTA II*) and a Declaratory Order issued by the FCC in October 2002 (*Declaratory Order*).¹

Qwest contends that it has no duty under §252 of the Act to file a voluntarily negotiated agreement with a state commission if the underlying services or elements do not have to be provided under §251 of the Act. It emphasizes that the switching and shared transport services encompassed by the QPP Agreement are no longer required to be unbundled by incumbent LECs pursuant to the recent decisions by the FCC in its *Triennial Review Order* and by the DC Circuit in the *USTA II* case.² Absent a §251 mandate to supply these services, Qwest asserts “there is no §252 obligation to file a privately-negotiated Agreement with a state commission, nor does the state commission have §252 authority to review and approve the Agreement.”

In support of its motion, Qwest also relies on the FCC’s *Declaratory Order*, which addressed the circumstances under which ILEC/CLEC Agreements must be filed with state commissions. In that Order, the FCC found:

[W]e find that 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).³

Qwest emphasizes that, since switching and shared transport are no longer required to be provided as UNEs under §251, the *Declaratory Order* makes clear that

¹Memorandum 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 02-89, 17 FCC Rcd 19337, 2002 FCC Lexis 4929 (Oct 4, 2002) (*Declaratory Order*).

² Qwest notes that *USTA II* vacated certain FCC rules relating to the unbundling of network elements, including mass market switching. In addition, the *Triennial Review Order* provides that shared transport is not required to be unbundled under §251 where unbundled switching is not required to be unbundled. Qwest Motion at 4-6.

³ *Id.* at Paragraph 8. (Emphasis in original.)

“Qwest has no obligation to file the QPP Agreement and the Commission has no authority to review and approve it” under §252.⁴

Qwest further argues that agreements pertaining to non-§251 network elements—switching and shared transport in this instance—are subject to exclusive federal jurisdiction. This includes, for example, network elements that have been removed from the FCC’s list of unbundled network elements but which still must be unbundled pursuant to §271 of the Act. Qwest asserts that the filing and review of Agreements entered into pursuant to §271 “is a federal matter which has not been delegated to the states.”⁵ Likewise, Qwest adds, compliance with other federal statutory requirements is within the exclusive purview of the FCC.⁶ Qwest contends that state filing requirements “would conflict irreconcilably” with the existing federal regulatory regime established to deal with contracts for interconnection services and elements not covered by §251.⁷

MCI, AT&T and the Commission Staff advance numerous arguments in opposition to Qwest’s Motion. Rather than address these matters at length, it is necessary to focus only upon the FCC’s recent *Order and Notice of Proposed Rulemaking*⁸ (*Interim Rules Order*), that continued, by temporary rule, the requirement for incumbent LECs to provide network elements, including the switching and shared transport elements encompassed by the QPP Agreement. The *Interim Rules Order* at Paragraph 16, states:

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. 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., 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 elements.

Likewise, at Paragraph 20 the FCC states:

⁴ Qwest Motion at 7.

⁵ *Id.* at 8.

⁶For example, Qwest notes that the FCC has the authority to require filing of contracts to provide network elements that do not meet the “necessary and impair” test (in §251(d)), to ensure that such Agreements comply with §202 of the Act regarding non-discrimination. *Id.* at 9.

⁷ *Id.* at 10.

⁸ *Order and Notice of Proposed Rulemaking*, FCC 04-179, WC Docket 04-313 (released August 20, 2004).

Our interim requirements will, during the first six months of our year-long plan, maintain existing unbundling obligations to minimize disruptive effects and marketplace uncertainty that otherwise would result from the abrupt elimination of particular unbundling requirements.

It is clear from these statements that the purpose of the *Interim Rules Order* is to continue the §251 unbundling obligations of incumbent LECs until such time as permanent rules can be adopted. Since Qwest remains obligated to continue providing unbundled access to the network elements included in the QPP, the QPP is an interconnection agreement that must be filed for state commission approval pursuant to §252 of the Act.

Qwest claims that the *Interim Rules Order* does not require the QPP to be filed with state commissions because incumbent LECs are no longer required under §§251(b) or (c) to provide switching and transport network elements, thereby excluding the QPP from being considered an interconnection agreement under the FCC's *Declaratory Order*.⁹ The *Interim Rules Order*, however, "maintain[s] existing unbundling obligations" promulgated by the FCC prior to the effective date of the *USTA II* decision.¹⁰ To the extent Qwest retains an "ongoing obligation pertaining to . . . unbundled elements," the QPP is properly considered as an interconnection agreement under the terms of the *Declaratory Order*.¹¹

Qwest points to the language in Paragraph 16 of the *Interim Rules Order* cited above, and emphasizes that the QPP is a *voluntarily negotiated agreement* which has superseded the pre-existing rates, terms and conditions applicable to unbundled switching and transport elements. While Qwest and MCI may have agreed to different rates, terms and conditions in the QPP, the fact remains that Qwest continues to be obligated by the *Interim Rules Order* to provide unbundled access to these network elements.

Finally, the *Interim Rules Order* includes a Notice of Proposed Rulemaking that seeks comment regarding whether commercially negotiated agreements for access to unbundled elements that are not required to be unbundled pursuant to §251(c)(3) should be treated under §252 or some other provisions of law. This inquiry suggests that the FCC does not preclude state commissions from requiring such filings. Indeed, the FCC's *Declaratory Ruling* declines to "establish an exhaustive, all-encompassing 'interconnection

⁹ As noted above, the *Declaratory Order* provides "that an agreement that creates an *ongoing* obligation pertaining to [section 251(b) and (c) requirements] is an interconnection agreement that must be filed [with state commissions] pursuant to section 252(a)(1)." *Declaratory Order* at Paragraph 8.

¹⁰ On October 6, 2004, the DC Circuit issued an order holding in abeyance until January 4, 2005, a petition for mandamus seeking to overturn the FCC's *Interim Rules Order*. As a consequence, the ILECs remain obligated to continue providing unbundled access to network elements consistent with the terms and conditions set forth in the *Interim Rules Order*.

¹¹ *Declaratory Order* at Paragraph 8.

agreement' standard," but rather emphasizes that the "states should determine in the first instance which sorts of agreements fall within the scope of the statutory standard."¹²

Based on the foregoing, Qwest's motion to dismiss is denied.

Section 252 Review

Having concluded that the parties are required to file both the ICA Amendment and the QPP Agreement, we proceed with our review under §252. Under the Act, the Commission must approve or reject an agreement reached through voluntary negotiation within 90 days of filing.¹³ The Commission may reject an agreement only if it finds that:

- (1) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
- (2) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.

In this case, Staff recommends the Commission reject the agreement because Section 4.0 removes all aspects of UNE-P, mass market switching and shared transport from the agreement and states that those elements are available in a separate agreement, *i.e.*, the QPP Agreement, that need not be filed with the Commission for approval. Staff explains that this provision is contrary to law and the public interest, as there is no assurance that future QPPs will be filed for Commission approval. MCI disagrees with Staff's interpretation of Section 4.0 and contends that the parties did not intend to usurp the Commission's ability to approve the agreement under §252.

Section 4.0 provides, in pertinent part:

Agreement Not to Order. During the term of this Agreement Qwest shall not offer or provide to MCI, and MCI shall not order or purchase from Qwest, unbundled mass marker switching, unbundled enterprise switching or unbundled shared transport, in combination with other network elements as part of the unbundled network element platform ("UNE-P") out of its existing interconnection agreements with Qwest, a Qwest SGAT or any other interconnection agreement governed by 47 U.S.C. Sections 252 and 252 (sic) that

¹²*Id.* at Paragraph 11. The FCC further states, "[b]ased on their statutory role provided by Congress and their experience to date, state commissions 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." *Id.* at Paragraph 10.

¹³ As noted above, both Qwest and MCI Metro made separate filings with the Commission. We consider the August 12, 2004 date of MCI Metro's filing, which contained the complete agreement between the parties, to be the effective date of filing for purposes of our review under §252.

MCI or one of its affiliates may in the future enter into with Qwest and MCI waives any right under applicable law in connection therewith. (Emphasis Added.)

We acknowledge the parties' desire to move the provision of UNE-P out of its existing interconnection agreement and into a separate commercial agreement. In doing so, however, the parties agreed that the commercial agreement would not be subject to our review pursuant to §252 of the Act. Accordingly, the highlighted language conflicts with our determination above that, because Qwest remains obligated to continue providing unbundled access to the network elements included in the QPP Agreement, the QPP Agreement is an interconnection agreement that must be filed for state commission approval pursuant to §252 of the Act.

As Staff notes, parties may negotiate to change the rates, terms and conditions of interconnection agreements; however, they cannot negotiate away the filing requirements set forth in §252. We agree with Staff that the ICA Amendment and related QPP Agreement are contrary to law and the public interest, convenience, and necessity. The agreements should be rejected.

ORDER

IT IS ORDERED that the ICA Amendment and QPP Agreement between Qwest Communications and MCImetro Access Transmission Services, L.L.C., are rejected.

Made, entered, and effective _____.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.