Decision No. C03-0036

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 96A-287T

IN THE MATTER OF THE PETITION OF MFS COMMUNICATIONS COMPANY, INC., FOR ARBITRATION PURSUANT TO 47 U.S.C. § 252(B) OF INTERCONNECTION RATES, TERMS AND CONDITIONS WITH U S WEST COMMUNICATIONS, INC.

DOCKET NO. 97T-507

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND GLOBAL CROSSING LOCAL SERVICES, INC. F/K/A FRONTIER LOCAL SERVICES, INC.

DOCKET NO. 98T-042

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND NEXTLINK COLORADO, L.L.C.

DOCKET NO. 98T-519

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND ADVANCED TELECOM GROUP, INC.

DOCKET NO. 99T-040

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND ERNEST COMMUNICATIONS, INC.

DOCKET NO. 99T-067

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND DIECA COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS COMPANY.

DOCKET NO. 99T-598

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND KINGS DEER TELEPHONE COMPANY, INC.

DOCKET NO. 00T-064

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND ELECTRO-TEL, INC.

DOCKET NO. 00T-277

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND SOUTHERN BELL TELECOM, INC.

DOCKET NO. 01T-013

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND TIME WARNER TELECOM OF COLORADO, L.L.C.

DOCKET NO. 01T-019

THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT BETWEEN U S WEST COMMUNICATIONS, INC. AND MCLEOD USA TELECOMMUNICATIONS SERVICES, INC.

ORDER

Mailed Date: January 13, 2003
Adopted Date: December 18, 2002

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of applications for rehearing, reargument, or reconsideration (RRR) filed by Staff of the Commission (Staff),

WorldCom, Inc. (WorldCom), and Qwest Corporation (Qwest). The applications were filed in response to Commission Decision No. C02-1295 which approved certain agreements as amendments to interconnection agreements (ICAs) entered into between Qwest and given competitive local exchange providers (CLECs), and rejected other ICAs.

2. Staff requests that the Commission clarify that any inter-CLEC discrimination that may have occurred between the signing and the filing of the ICA's with the Commission remains an issue for Investigatory Docket No. 02I-572T (investigatory docket). Staff also requests clarification that the rejected agreements would be the subject of further investigation in Docket No. 02I-572T.

3. WorldCom takes issue with the provisional definition of an ICA we employed to determine whether to approve or reject the submitted agreements. WorldCom argues the definition is too broad because it fails to exclude agreements between incumbent local exchange carriers (ILECs) and interexchange carriers (IXCs), and it fails to exempt agreements such as right-of-way agreements entered into pursuant to § 224 of the Communications Act. WorldCom also argues that the definition is overinclusive because it encompasses backward-looking agreements or order and contract forms.

4. WorldCom notes that the Commission summarily rejected the entire MCI Confidential Billing Agreement without describing the portions it considered fit within its provisional definition. WorldCom claims that we should have addressed the remaining terms of the agreement under the provisional definition.

5. Finally, WorldCom urges that the Commission overreached in rejecting provisions not related to §§ 251(b) and (c) of the Act. Therefore, WorldCom requests that the Commission

specifically "identify which portions of the MCI Confidential Billing Agreement related to Section 251(b) and (c) it has ejected [sic] rather than 'denying the agreement as a whole.'"

6. Qwest requests clarification that rejection of the agreements did not render the entire agreement null and void, but rather just the rejected portions. Qwest offers three reasons. First, the issue of whether the entire agreements were void under contract law was not before the Commission. Second, under applicable Colorado contract law, the rejected ICAs are severable from the remainder of the contracts, and therefore, the remainder of the contracts are still valid. Third, the reasons specified for rejecting the interconnection provisions are not sufficient to justify the time, expense, and inconvenience it would take for Qwest and the various CLECs to unwind all of the arrangements made pursuant to the broader contracts.

7. Now, being duly advised in the matter, we construe Staff's application for RRR as a request for clarification and deny the applications for RRR of WorldCom and Qwest consistent with the discussion below.

B. Background

8. This matter arose from 11 motions for approval of 16 amendments to ICAs entered into between Qwest and various CLECs, as submitted in these various dockets. On August 21, 2002, Qwest filed the motions for approval of these amendments.

9. We created a two-phase process. First, we requested comments from the parties as to a definition of an ICA pursuant to § 251 of the Act. We took into account a definition of an ICA provided by the Federal Communications Commission (FCC) in response to Qwest's

petition for a declaratory order.[1] Based on the FCC's declaratory order, existing Commission rules and comments received from the parties, we developed a provisional definition of an ICA to be used exclusively within the context of these 11 dockets:

> An interconnection agreement, for purposes of Section 252(e)(1) of the Telecommunications Act of 1996, is a binding contractual agreement or amendment thereto, without regard to form, whether negotiated or arbitrated, between an Incumbent Local Exchange Carrier and a telecommunications carrier or carriers that includes provisions concerning ongoing obligations pertaining to rates, terms, and/or conditions for interconnection, network elements, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, or collocation.

10. We found that the agreements here met the ICA definitional requirements, and therefore subjected each agreement to Phase II of this process: whether to accept or reject the ICA under 47 U.S.C. § 252(e). Based on our provisional definition and the comments received from the parties, we approved two of the filed agreements, and rejected 12 agreements for terms in violation of public policy, and rejected two agreements as incomplete.

11. The two approved agreements met the provisional definition of an ICA and did not violate public policy, were non-discriminatory, and were consistent with the public convenience and necessity. We denied 14 agreements, finding that they all contained confidential provisions that were an essential element of the respective agreements, or redacted essential financial information from the filed agreements. Because the confidentiality provisions in these agreements were an essential and non-severable part of the bargain, we found that those confidentiality provisions were inextricably tied to the entire agreement and contrary to the public approval process in § 252(e) of the Act. We also noted the paradox of approving an

[1] On April 23, 2002, Qwest petitioned the FCC for a declaratory ruling on the scope of mandatory filing requirements set forth in § 252(a)(1) of the Act. On October 4, 2002, the FCC issued its Memorandum Opinion and Order FCC 02-276 in WC Docket No. 02-89.

agreement with a confidentiality term, when that term was being self-evidently breached by the filing of the agreement. Therefore, we determined that the agreements should be rejected in their entirety.

12. In addition to the confidentiality provisions in these agreements, we found that 7 of the 12 agreements also contained an arrangement between Qwest and the representative CLEC where the CLEC withdrew from the U S WEST/Qwest merger proceeding or the Qwest § 271 proceeding. We found it against public policy to barter a CLEC's participation in proceedings of general applicability before this Commission, the main purpose which is to record actual commercial experience for the overall goal of increased competition and ease with which CLECs do business with Qwest.

C. Staff's Arguments

13. Staff expresses concern regarding the time lag of approximately 14 months between the time each agreement was executed and the time when it was presented to this Commission under § 252(e). Staff takes the position that the time lag may constitute a violation of the Act and of the Commission's rules regarding processing of interconnection issues. According to Staff, the time lag suggests discrimination may have occurred between parties to the agreements and non-parties during the time the agreements were in effect but not available to other carriers, as the Act requires. Therefore, Staff requests that we clarify our order to indicate that the issue of whether the time lag may have damaged other carriers will be considered in our investigatory docket.

14. Staff also believes that it was our intent to order that the rejected ICAs be subject to further investigation in Docket No. 02I-572T, and therefore requests that we clarify our previous order to indicate that we will further investigate the rejected agreements.

D. WorldCom's Arguments

15. WorldCom argues that our provisional definition of an ICA is too broad and unclear and does not reflect the appropriate criteria for filing ICAs under § 252 of the Act. WorldCom argues that our provisional definition appears to be broader in scope than the FCC parameters. For example, WorldCom asserts that our provisional definition is not limited by its terms to agreements for local services or local exchange services, nor does it appear to exclude agreements between ILECs and telecommunications carriers that are IXCs. Additionally, WorldCom argues that the definition exempts agreements such as right-of-way agreements entered into pursuant to § 224 of the Communications Act.

16. WorldCom believes that an agreement for collocation would not be an interconnection agreement if it were strictly for use in the provision of long distance service. Further, WorldCom asserts that a settlement or other agreement for collocation that was not related to local service would not be an ICA subject to filing with the state under § 252 of the Act. Additionally, WorldCom finds that the provisional definition does not exclude backward-looking agreements or order and contract forms such as access service requests (ASRs).

17. We rejected the MCI Confidential Billing Agreement because it contained confidential provisions that were an essential element of the agreement. Because WorldCom and Qwest eventually agreed to public disclosure of the agreement as redacted to exclude monetary provisions, WorldCom contends that the Commission should not have used the confidentiality provision to deny the agreement as a whole. Rather, WorldCom contends that we should have addressed the remaining terms of the agreement using the provisional definition. As such, WorldCom believes the only ongoing obligations that fit within our provisional definition were those bracketed by Qwest and those provisions relating to reciprocal compensation that were

subject to a filed amendment to WorldCom subsidiaries' ICAs that were formally approved by this Commission.

18. Finally, WorldCom urges that the Commission does not have authority to reject provisions that are not related to §§ 251(b) and (c) of the Act and should have investigated the rejected agreement during the 90-day process.

E. Qwest's Arguments

19. Qwest requests that we clarify our Order to indicate that rejection of the ICAs did not render the entire agreements in which they were contained null and void for three reasons.

20. First, Qwest argues that the validity of the entire agreements was not at issue in these dockets. Qwest points out that the Commission did not foretell the effect rejecting a portion of the agreements would have on the validity of the remainder of the agreements in which they were contained. Before the Commission makes any decision concerning the validity of the agreements containing the ICA provisions, Qwest recommends that the Commission should accept briefing by the parties on the subject to inform us "of the legal terrain and the potential real world impact of any decision."

21. Second, Qwest argues that Colorado contract law supports severing the rejected interconnection provisions from the remainder of the agreements. Because § 252 of the Act and our Rule 4 *Code of Colorado Regulations* (CCR) 723-44 do not contain any terms concerning the enforcement of contracts generally, Qwest determines that the affect of any rejection of the interconnection provisions upon the remainder of the agreements in which they are found turns on application of general principles of contract law.

22. According to Qwest's line of reasoning, in order to give effect to the intent of the parties, any provisions of a contract that are unenforceable should be severed from the remainder of the contract, and the remainder of the agreement that the parties intended to enter left in force. Citing *Reilly v. Korholz*, 320 P.2d 756, 760 (Colo. 1958), Qwest puts forth the proposition that "a lawful promise that is made for lawful consideration is not invalid merely because an unlawful promise was made at the same time and for the same consideration." *Id.* Therefore, Qwest posits that because the contracts we rejected had explicit severability clauses, the provisions we found unenforceable must be severed from the remaining lawful provisions in order to give proper effect to the intent of the parties.

23. Finally, Qwest maintains that invalidation of the entire agreements would require it and the CLECs to unwind complex relationships at great expense. Qwest points out that the interconnection provisions we rejected represent just one portion of the overall contracts. The contracts also involved provisions for the payment of retrospective consideration in settlement of billing disputes, which are exempted from the FCC filing requirements, and "provisions concerning non Section 251(b) or (c) matters, neither of which are subject to the filing and approval requirements of Section 252(e) and 4 C.C.R. 273-44." [sic]

24. According to Qwest, if the agreements are declared null and void in their entirety, it raises the possibility that Qwest and the CLECs would have to unwind the complex arrangements at great expense to all parties involved. Qwest concludes that such a drastic remedy is not warranted in light of the nature of the provisions that caused the Commission to reject the ICAs.

F. Analysis

25. We interpret Staff's filing to be a request for clarification of Decision No. C02-1295. The 16 agreements at issue in this docket may also be addressed in Docket No. 02I-572T. We did not discuss the "time lag" situation here. Neither did we discuss possible discriminatory treatment; nor, more important to that docket, what, if any, anticompetitive injury was suffered by CLECs. These matters are left for the investigatory docket and other dockets that might follow. It is our understanding from Qwest's filing that it has already filed the 14 rejected agreements in the investigatory docket for Staff's review.

26. WorldCom's first concern in its RRR filing is that our provisional definition of an ICA is too broad. We addressed this question in a recent decision, Decision No. C02-1446, in the investigatory docket and will repeat that discussion here. Our provisional definition of an ICA set forth in Decision No. C02-1183 either implicitly or explicitly excludes all the concerns raised by WorldCom.[2]

27. Already encompassed in this definition are two very important elements that go to the heart of the issue raised in this RRR. First, the definition includes a list of obligations from §§ 251 (b) and (c), and a limitation that this definition is for purposes of § 252(e)(1) only. These §§ 251 (b) and (c) obligations are for local exchange carriers and ILECs, respectively. Section 251(a) which references obligations for *all telecommunications carriers* is not under this

[2] This is not to say that we do not have considerable sympathy with WorldCom's epiphany that the breadth of the ICA definition will have perverse consequences. Some of the problems identified here—such as the wholesale rejection of the entire agreements—can be remedied going forward by the negotiation of a severability provision in the given ICA. As for the affects on negotiating ICAs, amending ICAs and settlement of disputes, those incentives are altered considerably, mainly for the worse. Standard offers will replace private negotiation. Settlements will have to be backward-looking, cash payments only—it would seem even payment terms over time have a "forward-looking" component making a settlement with payments terms an ICA. Destroying parties' private negotiating incentives to chase down the dubitable anticompetitive affects of CLEC-to-CLEC discrimination (and who can tell when the CLEC-to-CLEC discrimination is anticompetitive or recognizing real cost differences?) seems a steep price to pay.

Commission's authority to review under § 252 (e)(1). This Commission has never approved or rejected an agreement between a local exchange carrier and an IXC. These agreements do not fall under this Commission's approval authority, nor is the "protection" of the parties of those agreements the intent of the Act. In addition, the FCC stated in its Order on Qwest's Petition for Declaratory Ruling, at footnote 26, "[i]nstead, 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)." No mention is made of obligations under 251(a).

28. Second, the definition states that agreements with provisions that create *ongoing obligations* need to be filed for approval. WorldCom's concern that ASRs, and the like, must be filed is unfounded. These requests do not have ongoing obligations.

29. WorldCom also requests that this Commission review the MCI Confidential Billing Agreement and identify which portions of the agreement related to §§ 251 (b) and (c) we rejected rather than denying the agreement as a whole. For the reasons set forth below in our analysis of Qwest's RRR filing, we deny WorldCom's request.

30. Qwest first argues that the validity of the entire agreements was not at issue in these dockets. According to Qwest, it submitted the interconnection provisions in these dockets for approval as amendments to ICAs pursuant to 4 CCR 723-44.4, which requires any ICA or amendment to be submitted for Commission approval under 47 U.S.C. §§ 252(a)(1) and 252(e)(1). Qwest maintains that no other issue was before the Commission in these dockets.

31. Additionally, Qwest points to the comments filed by the parties here, noting that none of them deal with the effect that denial of the interconnection provisions would have. Qwest suggests that we accept briefs from the parties on this subject to "inform fully and

adequately the Commission of the legal terrain and the potential real-world impact of any such decision," before making any decision concerning the validity of the agreements.

32. We decline the clarification or further process that Qwest requests.

33. Section 252 of the Act and 4 CCR 723-44 *et seq*. vests the Commission with authority to accept or reject ICAs and amendments thereto. As explained in more detail below, the confidentiality provisions contained in these agreements were the result of bargained-for consideration between the parties. In most cases, the confidentiality provision was integral to the agreement as a whole, *by the terms of the confidentiality provision itself.* It is impossible for us to determine what the parties negotiated provision by provision, or to parse out "acceptable" portions of the agreement from rejected parts of the agreement. What is clear is that the confidentiality provisions encompassed the entire agreements. Because the confidentiality provisions were an integrated and non-severable part of each ICA, the entire agreements must be voided.

34. Qwest also urges that we should clarify Decision No. C02-1295 to indicate that rejection of the interconnection provisions does not render the remainder of the agreements null and void. We decline to adopt such language. In our decision, we cited our Rule 4 CCR 723-5.7.2 *et seq*. for the grounds required to reject an ICA or amendment to an ICA. We indicated that Rule 5.7.2 requires that we reject an ICA or amendment if it is discriminatory, not consistent with the public interest, convenience, and necessity, or is not in compliance with intrastate telecommunications service quality standards. Pursuant to Rule 5.7.2 (as well as § 252 of the Act) we found the rejected agreements discriminatory and inconsistent with the public interest.

35. We further found that the agreements subject to rejection[3] all contained confidential provisions that were an essential element of the respective agreements, or the agreements redacted essential financial information from the filed agreement. We also held that the confidentiality provisions in these agreements were part of the ICA bargain. Therefore, the confidentiality provisions were inextricably tied to, and were an essential element of the entire agreement. Because the confidentiality clauses were bound inextricably to the whole, we denied the agreements in whole. Generally, we found that because the confidentiality provisions permeated the entire agreement as an essential, bargained for element of the agreements, it was impossible for us to extract any provision as not tainted by the confidentiality provision.

36. Qwest cites several cases including *Reilly v. Korholz*, *supra* to support its position that because the agreements at issue all had severability clauses, even if a provision of the agreements is declared unenforceable or unlawful, then the parties are still bound by the remainder of the agreement as if the invalidated provision had not been part of the agreement. Further, Qwest argues that regardless of whether the agreements contained an explicit severability clause, the provisions that the Commission found unenforceable must be severed from the remaining lawful provisions in order to give proper effect to the intent of the parties. According to Qwest, "[t]he rule is that a lawful promise made for a lawful consideration is not

[3] The rejected agreements included: 96A-287T MCI Confidential Billing Agreement dated June 29, 2001; 97T-507 Global Crossing Local Services, Inc. Confidential Billing Agreement dated July 13, 2001; 98T-042 NextLink Colorado, LLC formerly known as XO Colorado, Inc. Confidential Billing Agreement dated December 31, 2001; 98T-519 Advanced Telecom Group, Inc. Facility Decommissioning Agreement dated October 8, 2001; 99T-067 DIECA Communications, Inc., doing business as Covad Communications Company Facility Decommissioning Agreement dated January 3, 2002 and U S WEST Service Level Agreement dated April 19, 2000; 99T-598 Kings Deer Telephone Company, Inc., now known as SunWest Communications, Inc. Settlement Agreement and Mutual Release dated May 31, 2001 and Confidential Billing Settlement Agreement dated January 18, 2002; 00T-277 Southern Bell Telecom, Inc. Letter Proposing Settlement Terms dated June 1, 2000; and 01T-013 Time Warner Telecom of Colorado, LLC Confidential Billing Settlement Agreement dated March 16, 2001.

invalid merely because an unlawful promise was made at the same time and for the same consideration." *Id*. at 760 (quoting 17 C.J.S. § 289).

37. We are not persuaded by Qwest's argument. As we indicated in our order, the confidentiality provisions in the rejected agreements so permeated the agreements in their entirety as to render it impossible to extract any provision not tainted by the bargained for confidentiality requirements. In *Woodward v. Jacobs*, 541 P.2d 691 (Colo. App. 1975), the defendant-appellant argued that the trial court should have separated the cost of the work which turned a duplex into a triplex (which violated zoning restrictions) from the cost of building the duplex, citing *Reilly v. Korholz* for the proposition that if the illegal portion of the contract may be severed, the valid portion of the contract may be enforced. However, the *Woodward* court ruled that "[w]here an illegal condition or promise on one side is a part of the consideration for the entire obligation on the other side, it is owing to the impossibility of determining the weight or extent of such portion of the consideration which moved to induce the engagement thereupon, that such void promise for consideration is held to be unseverable, and avoids the whole contract." *Id* at 692. (citation omitted). In other words, the default rule for contracting is just the opposite of the one that Qwest urges here. The presumption is of non-severability, that can of course be contracted-around, but was not in the ICAs at issue here.

38. We are persuaded by the court's holding in *Woodward supra*. Our order was clear that it was impossible to distinguish those portions of the agreements that were not part of the bargained for confidentiality. There was no evidence that would have enabled us to conclude that the confidentiality provisions were not an integral part of the information of the entire agreements. Therefore, we deny Qwest's argument here.

39. Qwest also argues that invalidation of the entire agreements would require Qwest and the CLECs to unwind complex relationships at great expense. Qwest states that, "[I]f the agreements were declared null and void in their entirety, it raises the possibility that Qwest and the CLECs would have to unwind the complex arrangements that were the subject of the agreements – at great expense to all parties involved." Further, Qwest suggests that the interconnection arrangements contained in the rejected agreements could be addressed on an ongoing basis while the investigatory docket is proceeding.

40. Qwest and the CLECs that were parties to these rejected agreements, have now found themselves in a precarious position. We have rejected 14 agreements that the parties executed approximately 2 years ago and have relied on in their business relationships. The rejection of these agreements tenders them null and void for the signatory parties. How the parties handle the renegotiation and refiling is dependent upon the parties involved. In the first instance, these agreements should have been filed shortly after they were executed. In the normal timeframe, if the Commission had rejected them, the parties would have been in a better position to renegotiate the terms and refile the agreements. As it is, some two years later, it is not this Commission's fault that neither Qwest nor the CLEC signatory to the individual agreements, filed for our approval.

41. In the second instance, these agreements should not have contained both interconnection arrangements, *i.e.*, §§ 251 (b) and (c) terms, as well as arrangements not under this Commission's review authority, *e.g.*, billing dispute settlement provisions. We restate from our above discussion that in this instance because of the confidentiality clauses and the redacted portions of the agreements, this Commission is not in a position to sever the §§ 251 (b) and (c) provisions and the arrangements that fall under this Commission's authority to review, and the

arrangements that do not. We have one party's opinion on this issue, Qwest's, and for the above stated reasons, we decline to take on this task.

II. ORDER

A. The Commission Orders That:

1. Commission Staff's application for rehearing, reargument, or reconsideration is construed as a request for clarification of Decision No. C02-1295.

2. We clarify Decision No. C02-1295 consistent with the discussion above.

3. WorldCom, Inc.'s application for rehearing, reargument, or reconsideration is denied consistent with the discussion above.

4. Qwest Corporation's application for rehearing, reargument, or reconsideration is denied consistent with the discussion above.

5. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING December 18, 2002.

(S E A L)

ATTEST: A TRUE COPY

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

POLLY PAGE

JIM DYER

Commissioners

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