

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 96A-366T

RE: THE APPLICATION FOR APPROVAL OF INTERCONNECTION AGREEMENT
BETWEEN U S WEST COMMUNICATIONS, INC. AND MCIMETRO ACCESS
TRANSMISSION SERVICES, LLC.

**ORDER APPROVING
INTERCONNECTION AGREEMENT**

Mailed Date: November 16, 2004
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I. BY THE COMMISSION**A. Background**

1. This matter comes before the Commission for consideration of the motion of MCImetro Access Transmission Services, L.L.C. (MCImetro) for approval of an Amendment to its Interconnection Agreement with Qwest Corporation, formerly known as U S WEST Communications, Inc. (Qwest).

2. MCImetro filed this motion on July 23, 2004 pursuant to 4 *Code of Colorado Regulations* (CCR) 723-44-4. In its motion, MCImetro seeks Commission approval of a negotiated amendment between Qwest and MCImetro for elimination of unbundled network element platform (UNE-P) and implementation of batch hot cut process and discounts, as well as approval of the QPP Master Service Agreement between Qwest and MCImetro.

3. Qwest filed an entry of appearance and notice of intervention on August 2, 2004. On August 3, 2004, Qwest filed a motion to dismiss the application, and on August 4, 2004, filed an errata to the motion to dismiss. Qwest's motion to dismiss applies only to the request for approval of the QPP Master Services Agreement, and not the request for approval of the agreement for elimination of UNE-P and implementation of batch hot cut process and discounts. MCImetro filed its reply to the motion to dismiss on August 17, 2004. On August 31, 2004, Qwest submitted a motion for leave to file a reply in support of its motion to dismiss, along with a proposed reply. Both Qwest and MCImetro support passage of the elimination UNE-P and implementation of a batch hot cut process and discounts amendment.

4. On August 9, 2004, AT&T Communications of the Mountain States, Inc. and TCG Colorado (collectively AT&T) filed an entry of appearance and notice of intervention as a matter of right, or in the alternative, a request for permissive intervention under Rule 4 CCR 723-

1-64. AT&T takes no position on whether the Qwest/MCImetro agreements should be approved; its argument addresses only whether the QPP Agreement must be filed with this Commission.

5. In Decision No. C04-1062, issued September 7, 2004, we granted AT&T's request for intervention, granted Qwest's motion for leave to reply, asked that additional briefs be filed by September 17, 2004, and asked the parties to appear for oral argument on September 28, 2004. Oral argument was held as scheduled, and Qwest was granted additional time to file a limited supplemental brief which was filed on October 6, 2004. Briefs filed by the parties also address whether Federal Communications Commission Order No. 04-179 affects the dispute in this matter which is whether Federal and Colorado law require that the Qwest Master Services agreement for Qwest Platform Plus service (the Agreement) be filed with this Commission for approval or rejection.

B. Discussion

1. Jurisdiction of the Commission

6. At the outset, the parties differ on whether the Commission has jurisdiction to approve or reject the QPP Agreement. Qwest asserts that because the Agreement was negotiated not with respect to § 251 of the Communications Act of 1996 (the Act), but rather was negotiated with respect to § 271 of the Act, the Commission lacks jurisdiction to review the Agreement. We disagree.

7. As demonstrated by both AT&T and MCImetro, the Federal Communications Commission (FCC) made clear in Order No. FCC 02-276, *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 (October 4, 2002) (Declaratory Order), that state

commissions are in a position to determine what constitutes an interconnection agreement that needs to be filed. The FCC stated, “[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 ¶10. Qwest argues that only the FCC sets the standard with respect to what agreements need be filed, but the Declaratory Order explicitly rejects this proposition. “Therefore, we decline to establish an exhaustive, all encompassing ‘interconnection agreement’ standard.... We encourage state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for approval.” *Id.* To be sure, the FCC sets forth principles that states should follow in determining what needs to be filed pursuant to § 252(a)(1). However, the FCC clearly expects that State Commissions will determine what agreements need to be filed and whether they should be approved. We thus have the jurisdiction to consider whether the QPP Agreement needs to be filed as an interconnection agreement, and to approve or reject it.

2. Federal Law

Section 252(a)(1)

Section 47 U.S.C. 252(a) (1) (of the Telecommunications Act of 1996), provides:

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

This statute provides authorization for parties, when a request is made pursuant to § 251, to negotiate an agreement without regards to the standards set forth in § 251 subsections (b) and (c). It then explicitly requires filing of those agreements with state commissions.

8. In its Declaratory Order, the FCC provided: “we 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)*.” (emphasis added) *Id.* at ¶8. Qwest, citing footnote 26 of the FCC order which provides that only those agreements that contain an ongoing obligation relating to §§ 251(b) or (c) must be filed under § 252(a)(1), interprets this to mean that Qwest has no obligation to file the Commercial Agreement, and the Commission has no authority to review and approve it. Qwest’s basis for this assertion is that the QPP Agreement relates only to obligations required by § 271 of the Act.

9. We agree that the FCC has clearly stated only those agreements containing “an ongoing obligation *relating* to section 251(b) or (c) must be filed *under 252(a)(1)* (emphasis added).” *Id.* fn 26. We are not prepared to say, however, that the QPP Agreement on mass market switching and shared transport is unrelated to §§ 251(b) or (c). Section 251(c) sets forth obligations of incumbent local exchange carriers which include interconnection. Certainly, mass market switching and shared transport are related to interconnection, and so is the QPP Agreement. It thus must be filed pursuant to § 252(a)(1). Even if we were to read the Declaratory Order as supporting Qwest’s position, it elaborates only upon what must be filed under § 252(a)(1), but says nothing about the requirements of § 252(e)(1).

Section 252(e)(1)

Section 47 U.S.C. 252(e)(1) provides:

(e) **Approval by State commission**

(1) **Approval required**

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

10. Qwest argues that, in its Declaratory Order, the FCC determined that the Act contemplates the filing of agreements with ongoing obligations *relating* to subsections (b) and (c) of § 251. Qwest states that there is no independent filing obligation under § 252(e)(1). Qwest believes that the FCC determination addresses the requirements of § 252(e)(1) of the Act. Specifically, Qwest argues that the Declaratory Order states that § 252(e)(1) requires the filing only of agreements relating to §§ 251(b) and (c). *Qwest Motion to Dismiss* at 5. Qwest ignores, however, that the Declaratory Order only refers to filing requirements pursuant to § 252(a)(1). In reality, nowhere does the Declaratory Order speak to the filing requirements of § 252(e)(1). We believe that the plain language of § 252(e)(1) requires all interconnection agreements to be filed with the Commission:

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission.

11. In interpreting statutes, courts look to the plain meaning of the statutory language, and the language and design of the statute as a whole. *U.S. v. Williams*, 376 F.3d 1048, 1052 (10th Cir. 2004). ‘Any’ means but one thing:

Read naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind." Webster's Third New International Dictionary 97 (1976). Congress did not add any language limiting the breadth of that word, and so we must read § 924(c) as referring to all "term[s] of imprisonment," including those imposed by state courts. *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 1035, 137 L.Ed.2d 132 (1997).

“[E]arlier this year, the Supreme Court explained, 'Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' " United States v. Gonzales, 520 U.S. 1, ----, 117 S.Ct. 1032, 1035, 137 L.Ed.2d 132 (1997) (citation omitted). Here, as in *Gonzales*, "Congress did not add any language limiting the breadth of that word," so "any" means all. See *id. Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir. 1997).

Here, as in the cases cited above, Congress did not add any limiting language in § 252(e)(1), so we must assume that all negotiated and arbitrated interconnection agreements must be filed with the Commission.

12. We evaluate and harmonize § 252(a)(1) and § 252(e)(1) as follows. The former concerns a limited set of interconnection agreements. It provides authority to negotiate agreements independent of the government requirements set forth in §§ 251(b) and (c). At the same time, the subsection reminds parties that, although independently negotiated, the parties still must submit the agreement to the states for approval. Subsection 252(a)(1) is as much about allowing companies to negotiate agreements without government restraint as it is about filing requirements. Even without subsection 252(a)(1), parties would be required to file these interconnection agreements under § 252(e)(1). This subsection requires the filing of all interconnection agreements. Without § 252(e)(1), parties to agreements requested and negotiated pursuant to the standards in subsections 251(b) and (c) would not be required to file their agreements.

3. Section 271

13. Section 47 U.S.C. § 271 requires that Regional Bell Operating Companies (RBOCs) unbundle certain network elements, albeit not at Total Element Long-Run Incremental Cost rates. As Qwest states in its brief, “[m]any of the elements which have been removed from the list of unbundled elements must still be unbundled pursuant to Section 271(c)(2)(B) of the 1996 Act.” *Qwest Motion to Dismiss*, p. 7. The elements covered by the QPP Agreement are

unbundled pursuant to § 271(c). Congress intended that state commissions play a role in monitoring RBOC compliance with § 271(c) requirements. Indeed, § 271(d)(2)(B) provides:

(B) Consultation with State commissions

Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

14. Congress clearly intended State Commissions to guide the FCC with respect to RBOC compliance with unbundling requirements in § 271(c). We cannot do this if interconnection agreements negotiated pursuant to § 271 are not filed with this Commission.

15. We do not accept Qwest's interpretation of the Declaratory Order. We believe that the FCC set forth guidelines as to what constitutes an interconnection agreement, and intends that state commissions apply those guidelines in determining what agreements need to be filed for approval. We believe the QPP Agreement is an "interconnection agreement." As argued by MCImetro, the agreement, which relates to mass market switching and shared transport, is an agreement for "network elements," even if they are provided under § 271 of the Act. The QPP Agreement meets the criteria set forth in the FCC Declaratory Order criteria for evaluating what is an interconnection agreement. It sets forth ongoing obligations that relate to interconnection and unbundled network elements. As an interconnection agreement, it must be filed under § 252(e)(1). Indeed, we believe that all agreements which set forth ongoing obligations which relate to interconnection and unbundled network elements must be filed with this Commission pursuant to § 252(e)(1).

4. State Law

16. We also find MCImetro and AT&T's state law arguments persuasive. Qwest provides no court decision, statute, or rule that invalidates this Commission's rules concerning

the filing of interconnection agreements. Qwest only asserts that because the agreement was for unbundling pursuant to § 271 as opposed to § 251, it is subject to federal jurisdiction and thus not state jurisdiction. Commission Rule 4 CCR 723-44-2.5 defines "interconnection agreement" as

[A]n agreement for interconnection, services, or network elements entered into between or among LECs or Telecommunications Carriers for the purpose of transmission of information by electronic, optical or any other means between separate points by prearranged means."

The state language is broad, and makes no distinction between §§ 251 and 271 of the Act. The QPP Agreement fits under this language, and pursuant to 4 CCR 723-44.4.1 it must be filed with the Commission. Indeed, whether negotiated or arbitrated pursuant to § 251, or § 271 of the Act, whether a "commercial agreement" or otherwise, any agreement between carriers that provides interconnection, services, or network elements for the purpose of transmission of information between separate points must be filed with the Commission pursuant to Colorado law.

5. Federal Communications Commission Order No. 04-179

17. We asked the parties to address whether FCC Order No. 04-179, WC Docket No. 04-3134 (August 20, 2004), which in effect stays the U.S. Court of Appeals for the District of Columbia's decision on the FCC's Triennial Review Order for six months, affects how this Commission should rule. We do not believe that the FCC order affects filing requirements.

18. Qwest asserts that the FCC's order that competitive local exchange carriers may not opt into agreements for switching, enterprise market loops and dedicated transport is evidence for its position on filing. We do not read the FCC's order on opt in provisions to address filing. Rather, we believe as argued by MCImetro, that the FCC has not addressed filing requirements for "commercial agreements." Indeed, Commissioner Abernathy's concurring statement ruing the lack of clarification of filing requirements reinforces this position.

19. We thus require that Qwest file QPP Master Service Agreements with the Commission for approval or disapproval. We also approve the motion as filed, including the elimination of UNE-P and implementation of a batch-hot cut process and the QPP Master Service Agreement.

20. Under the terms of 47 U.S.C. § 252(i) of the Act, MCImetro may at some future date opt into the terms and conditions of Commission approved and currently effective agreements:

[a] local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 U.S.C. § 251 *et seq.* of the Act requires that the Commission review and approve or reject interconnection agreements involving incumbent local exchange carriers like Qwest. To comply with the Act, rates in negotiated agreements must be just and reasonable, nondiscriminatory and based on the cost of providing the interconnection or network element. 47 U.S.C. § 252(e). In reviewing agreements (or portions thereof) the Commission generally is guided by 47 U.S.C. § 252(e)(2), requiring that interconnection agreements not discriminate against non-parties and be consistent with the public interest, convenience and necessity.

21. The Commission has not previously approved all of the amended rates and conditions proposed here. However, we find it consistent with the directives of the Act and our own interconnection agreement rules to approve the present amended terms and conditions subject to our own rules and general ratemaking proceedings.

II. ORDER

A. The Commission Orders That:

1. The Qwest Corporation Platform Plus Master Service Agreement must be filed as an interconnection agreement for approval by the Commission.

2. MCImetro Access Transmission Services, L.L.C.'s motion for approval is granted in its entirety, consistent with the discussion above.

3. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
October 27, 2004.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

CHAIRMAN GREGORY E. SOPKIN
SPECIALLY CONCURRING.

III. CHAIRMAN GREGORY E. SOPKIN SPECIALLY CONCURRING:

1. I concur with the result of today's decision – that the Interconnection Agreement between MCImetro Access Transmission Services, LLC and Qwest Corporation must be filed with the Commission. However, I do not subscribe to the entirety of the reasoning in the decision, so I write separately.

2. In my view, filing of the Agreement is mandated for two reasons. First, 47 U.S.C. § 252 is broadly written to include not only unbundled network elements, but also interconnection (which would include mass market switching and shared transport), and the Federal Communications Commission (FCC) has broadly interpreted this statute. Indeed, as pointed out by AT&T Communications of the Mountain States, Inc. in its brief, the FCC has deemed only four narrow categories of interconnection agreements (none applicable here) for which there is *no* state filing requirement.

3. Second, as pointed out in the Commission's decision *supra*, the FCC has given states broad deference in deciding which interconnection agreements must be filed. The only state guidance we have is twofold: (1) a provisional definition in Decision No. C02-1183 (Docket No. 96A-287T *et al*):

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.¹

¹ Decision No. 02-1183 at ¶ 5, p.6.

and (2) a Commission rule (4 CCR 723-44-2.5, cited *supra*) that also broadly defines “interconnection agreement.” While the provisional definition was not meant to apply to later cases, it appears consistent with the FCC’s treatment of the issue.

4. Today’s decision is legal. From a policy standpoint, privately negotiated commercial contracts lose much value (to both parties) when they must be made public. While the FCC’s adoption of the “all or nothing” opt-in rule mitigates this concern, it is not eliminated. In my view, the FCC should clarify when interconnection agreements must be filed with state commissions because of public policy and legal requirements, and when not. Until then, there is considerable uncertainty.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Chairman