

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayner  
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Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of Qwest Corporation and  
MCImetro Access Transmission Services  
Amendment to Interconnection Agreement

ISSUE DATE: May 18, 2005

DOCKET NO. P-5321, 421/IC-04-1178

ORDER AFTER RECONSIDERATION  
RELEASING MASTER SERVICE  
AGREEMENT FROM APPROVAL REVIEW,  
REQUIRING AMENDMENT TO  
INTERCONNECTION AGREEMENT, AND  
REQUIRING SUBMISSION OF FUTURE  
COMMERCIAL AGREEMENTS

**PROCEDURAL HISTORY**

On December 2, 2004, the Commission issued its ORDER APPROVING AMENDMENT, DENYING MOTION TO DISMISS AND REJECTING MASTER SERVICE AGREEMENT in this matter.

On December 23, 2004, MCImetro Access Transmission Services LLC (MCImetro) filed a Petition for Reconsideration seeking approval of its Master Service Agreement (MS Agreement) with Qwest Corporation (Qwest) without the modifications required by the Commission's December 2, 2004 Order.

On December 30, 2004, Qwest filed a Reply to MCI's Petition for Reconsideration.

On January 13, 2005, the Commission granted the Department of Commerce's (the Department's) request to extend the reply comment period to allow parties to submit supplemental briefs regarding obligations under the Telecommunications Act of 1996 after the Federal Communications Commission (FCC) released its Triennial Review Remand Order (TRRO).

On February 24, 2005, the Department filed its reply comments and a Joinder of MCI's Petition for Reconsideration, Qwest filed Reply Comments, and MCI filed Supplemental Comments.

The Commission met on April 7, 2005 to hear oral argument from the parties on this matter and on April 14, 2005 to deliberate this matter.

## FINDINGS AND CONCLUSIONS

### **I. Commission Approval of Master Service Agreement is Not Required Under Federal Law**

#### **A. Background**

In its December 2, 2004 Order, the Commission found that § 252(a) of the Federal Telecommunications Act required the Master Service Agreement between Qwest and MCImetro to be filed with the Commission for approval or rejection. The Commission did so for several reasons, including: 1) that the FCC's Declaratory Order (October 4, 2002) listed a number of types of agreements that must be filed pursuant to § 252(a)(1), including agreements like the MS Agreement that deal with "interconnection, services, or network elements"; 2) the Act does not distinguish between agreements to provide mandatory network elements and agreements to provide "other" network elements; and 3) its view that a plain reading of the Act, therefore, required the MS Agreement, a negotiated agreement to provide network elements (switching and transport), to be filed for approval with the Commission.

#### **B. Summary of Decision After Reconsideration**

On reconsideration, having read the parties' comments and heard their oral arguments, the Commission is persuaded by the Department and Qwest that because the MS Agreement does not relate to elements or services mandated under § 251, § 252(a) does not require that it be formally approved.

#### **C. Commission Analysis**

In its initial Order, the Commission was guided by the apparently clear language of § 252(e) to conclude that Commission review and approval of **any** interconnection agreement was required. Section 252(e) states in relevant part:

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission.<sup>1</sup>

The Commission rejected the notion that because the parties had characterized this agreement as a "commercial agreement" that it was exempt from Commission review and approval as an interconnection agreement. Finding that the Master Service Agreement was in essence an interconnection agreement, the Commission concluded that it was subject to Commission review for approval as stated in § 252 (e).

The Commission continues to believe that a document's nature, rather than the label or characterization given it by the parties, controls how it is to be treated under the Act. The Commission also continues to view the MS Agreement as an interconnection agreement since it involves the provision of network elements. However, the Commission is persuaded that the term "interconnection agreement" *as used in § 252(e)* is to be understood in relationship to § 252(a). Section 252(a) requires an interconnection agreement to be submitted to State commissions under subsection (e) only if the agreement results from a request for interconnection, services, or network elements "pursuant to section 251".

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<sup>1</sup> 47 U.S.C. § 252(e)(1).

In short, there appear to be different kinds of interconnection agreements: 1) those that contain § 251 network elements and are therefore interconnection agreements within the meaning of § 252(e) and 2) those that contain network elements but do not contain § 251 network elements and therefore are not “interconnection agreements” within the meaning of § 252(e). The first kind of interconnection agreement (those that contain § 251 network elements) must be submitted to the Commission for approval or rejection pursuant to § 252(e). The second kind of interconnection agreement (those that do not contain § 251 network elements) need not be approved or rejected by the Commission pursuant to § 252(e).

Whether §§ 252(a) and (e) require the MS Agreement to be submitted to the Commission for approval, therefore, depends not simply on whether the agreement is an interconnection agreement as stated by the Commission in the December 2, 2004 Order, but on whether the MS Agreement fulfills § 251 obligations (interconnection, services, and network elements required to be provided by § 251.)

Even under this corrected view of when Commission approval is required, the Commission’s December 2, 2004 Order properly found that the MS Agreement was in fact required to be submitted to the Commission for approval because the MS Agreement provided certain network elements that, *as of that time*, were identified by the FCC as § 251 network elements, i.e., were required to be provided on an unbundled basis by § 251.<sup>2</sup>

Subsequently, however, the FCC issued a news release (December 15, 2004) and an order on February 4, 2005 clarifying that certain network elements earlier identified as § 251 network elements (mass market local switching and local transport) were not § 251 network elements.<sup>3</sup>

Following the FCC’s February 4, 2005 Order, the Department joined MCI’s request for reconsideration, analyzing the network elements provided per the MS Agreement (i.e., local switching, shared transport, access to call-related databases, and billing information) and advising that in light of the FCC’s February 4, 2005 Order none of the network elements provided by the MS Agreement continued to be required per § 251.<sup>4</sup> No party objected to the Department’s analysis on this point. No party continued to contend that the MS Agreement provides network elements required to be provided by § 251.

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<sup>2</sup> *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 6783, 16785-87, paras. 3-7 (August 20, 2004) (“*Interim Order*”).

<sup>3</sup> See FCC Press Release entitled FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers, December 15, 2004 and *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, WC Docket No. 04-313, Order on Remand, (released February 4, 2005) (“*Triennial Review Remand Order*”).

<sup>4</sup> See Department’s February 24, 2005 Reply to and Joinder of MCI’s Motion for Reconsideration and Supplemental Briefing, pages 16-17.

In short: this Order focuses on an agreement that contains network elements but which the Commission has now found does not concern provision of a network element required by § 251. Nor has any party asserted that the agreement contains any other obligation under § 251 (b) and (c). Because the MS Agreement does not contain an obligation under § 251 (b) or (c), therefore, Section 252 does not require that it be approved or rejected by the Commission.

#### **D. Commission Action**

Based on the new understanding of the requirements of §§ 251 and 252 with respect to interconnection agreements (see above), the FCC *Triennial Review Remand Order* clarifying the non-§ 251 status of certain network elements, and the Department's examination of the network elements provided by the MS Agreement, therefore, the Commission concludes that the Telecommunications Act of 1996 does not require the MS Agreement to be approved by the Commission.<sup>5</sup>

### **II. The Parties' Amended Interconnection Agreement Must be Further Amended**

#### **A. Introduction**

In its December 2, 2004 Order, the Commission addressed two documents submitted by MCImetro: 1) an amended Interconnection Agreement (ICA) between Qwest and MCImetro; and 2) the parties' Master Service Agreement. The previous section of this Order (Section I) addressed the Master Service Agreement. This section (Section II) addresses the parties' amended ICA.

#### **B. Background**

In comments submitted prior to the December 2, 2004 Order, the Department noted that neither the Master Service Agreement nor the amended Interconnection Agreement (ICA) contained language on six topics that the Commission has consistently required in recent interconnection agreements. Nevertheless, the Department recommended and the Commission agreed to approve the parties' amended ICA as submitted because the underlying ICA had been adopted by the parties and approved by the Commission before the Commission had begun requiring the language in question and the Commission's practice has been to "grandfather" the prior generation ICAs, i.e. to allow them to be amended and/or renewed without requiring the new language required in new ICAs.

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<sup>5</sup> In its February 24, 2005 comments joining Qwest's request for reconsideration, the Department acknowledged that before the Commission's December 2, 2004 Order, the Department had argued that the MS Agreement was an interconnection agreement that was properly before the Commission for approval pursuant to § 252(e). The Department clarified, however, that it had done so based on the FCC's Interim Order which had identified two network elements provided per the MS Agreement as § 251 elements. The Department argued that the FCC's subsequently issued Triennial Review Remand Order (February 4, 2005) removed from Qwest any § 251 obligation to provide the network elements covered by the MS Agreement and, hence, any requirement that the Commission review the MS agreement for approval.



### **C. Commission Analysis and Action**

This approach to the parties' amended ICA was reasonable since both the Department and the Commission viewed the parties' Master Service Agreement as a new interconnection agreement subject to Commission approval. As such, the Master Service Agreement was subject to the Commission's requirement that the specific language on six topics identified by the Department be added to it.

As discussed in the previous section, the Commission has now determined after reconsideration that the MS Agreement does not require Commission approval. As a consequence, the Commission's directive that the specific language on six topics identified by the Department be added to the Master Service Agreement as a condition of approval no longer applies.

At the hearing on reconsideration, MCImetro and Qwest agreed to add the language identified by the Department to their amended ICA. In light of the parties' agreement, the Commission need not analyze the issue further and will simply direct the parties to implement what the parties have agreed to before the Commission on this point.

## **III. All Future Commercial Agreements Must be Submitted for Threshold Determination**

### **A. Introduction**

This case has focused on whether the parties' commercial agreement (their MS Agreement) is an interconnection agreement within the meaning of Section 252(a) and the Commission has found that it is not.

This section of the Order addresses a further question: whether the Commission has authority to require the parties to file future agreements that they assert are "commercial agreements"<sup>6</sup> so the Commission can make the threshold determination whether or not the agreement in question is in fact a "commercial agreement". i.e. an agreement that is not subject to Commission approval pursuant to § 252(e).

### **B. Commission Analysis**

Based on the following analysis, the Commission concludes that it has authority to require and should require the parties to submit all their commercial agreements for Commission review of a threshold question: whether the agreement is subject to Commission approval or rejection pursuant to § 252(e).

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<sup>6</sup> The term "commercial agreement" is based on the FCC's encouragement that local exchange carriers (LECs) and competing local exchange carriers (CLECs) negotiate "commercially acceptable arrangements for the availability of unbundled network elements". When used in this Order, therefore, the term will be given that meaning: "a commercially acceptable arrangements for the availability of unbundled network elements". See the FCC's "Press Statement of Commissioners Powell, Abernathy, Copps, Martin and Adelstein On Triennial Review Next Steps" (March 31, 2004).

On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit vacated and remanded several of the rules that the FCC established in its Triennial Review Order regarding unbundled network elements.<sup>7</sup> Subsequently, citing the unsettled state of the law regarding unbundled network elements resulting from that decision, the FCC encouraged all telecommunications providers to voluntarily negotiate “commercially acceptable agreements for the availability of unbundled network elements” without awaiting final resolution of all parties’ legal obligations.<sup>8</sup>

Qwest has argued that by encouraging parties to negotiate “commercially acceptable agreements” the FCC was indicating that the agreements resulting from such negotiations are not to be subject to state commission review for approval. Further, while agreeing for the present to provide these agreements to the Commission for informational purposes, Qwest apparently believes that the Commission should allow parties to decide whether their agreement is a “commercial agreement” and hence not subject to Commission review and approval under § 252. The Commission does not adopt that approach.

State commissions draw their federal responsibilities in this regard from the Act. Section I of this Order focused on the fact that the Commission’s review of interconnection agreements for approval under § 252(e) is limited to interconnection agreements that contain § 251 obligations, but a correlative of that finding is also true: the Commission does have authority and an obligation under the Act to review for approval interconnection agreements that do contain § 251 obligations.

In this Order, the term “commercial agreement” refers to “a commercially acceptable arrangements for the availability of unbundled network elements”.<sup>9</sup> However, since the term “commercial agreement” is not used (let alone defined) in the Act, the Commission finds it clearer to delineate its responsibilities and parties’ responsibilities with respect to agreements as the Commission has done in this Order, i.e. in terms of whether an agreement involves ongoing obligations under §§ 251(b) and (c). If the agreement does not concern § 251 obligations, the Commission has no obligation or authority under the Act to review it for approval. If it does involve § 251 obligations, however, the Commission has an obligation under federal law to review it for approval.

The FCC has recognized the states’ role and authority in this area. The FCC has stated:

Based 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. . . . The statute expressly contemplates that the section 252 filing processes will occur with the states, and we are reluctant to interfere with their processes in this area. . . . We encourage state commissions to take action to provide further clarity to incumbent LECs and

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<sup>7</sup> *United States Telecom Association v. FCC*, 359 F.3d 554, 571, 574 (D.C. Cir. 2004).

<sup>8</sup> See the FCC’s “Press Statement of Commissioners Powell, Abernathy, Copps, Martin and Adelstein On Triennial Review Next Steps” (March 31, 2004).

<sup>9</sup> See Footnote 8, *supra*.

requesting carriers concerning which agreements should be filed for their approval.<sup>10</sup>

To make sure it is properly discharging its responsibility under § 252(e) of the Act to review for approval agreements that contain § 251 obligations, the Commission must review the parties' commercial agreements to determine whether the agreement in question addresses any § 251 obligations. Since the Commission is responsible under the Act to determine whether parties' agreements involve any § 251 obligation and assess it accordingly, it has authority under the Act to require parties to submit their commercial agreements regardless of how the parties label or characterize their agreement.<sup>11</sup>

### C. Relationship of This Order to the *Covad* Order

This Order rules that the Commission has authority to require and will require the parties to submit all their commercial agreements (commercially acceptable arrangements for the availability of unbundled network elements<sup>12</sup>) for Commission to decide a threshold question: whether the agreement is subject to Commission approval or rejection pursuant to § 252(e).

This decision is consistent with the Commission's September 27, 2004 Order in Docket No. P-5692, 421/CI-04-804 (*Covad* Order)<sup>13</sup> which states in part:

. . . the Commission is persuaded of the merits of directing Qwest to file its commercial agreements with the Commission, whether or not those agreements constitute "interconnection agreements" for purposes of the 1996 Act. Specifically, the Commission will direct Qwest to file agreements that –

- are associated with **elements of Qwest's network**,
- make reference to unbundled **network elements** (UNEs),

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<sup>10</sup> *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, Memorandum Opinion and Order, 17 FCC Rcd 19337, 2002 FCC Lexis 4929 (October 4, 2002) at ¶10.

<sup>11</sup> The Commission clarifies that this Order addresses the extent of Commission authority and responsibility under relevant federal law, the Telecommunications Act of 1996 and does not address the Commission's authority under applicable state law to review these agreements.

<sup>12</sup> See Footnote 6, *supra*.

<sup>13</sup> See *In the Matter of a Commission Investigation Regarding the Status of the Commercial Line Sharing Agreement Between Qwest Corporation and DIECA Communications d/b/a Covad*, Docket No. P-5692, 421/CI-04-804, ORDER DIRECTING QWEST TO FILE COMMERCIAL AGREEMENTS (September 27, 2004) (the *Covad* Order). Note that the Commission has issued an ORDER AFTER RECONSIDERATION ON ITS OWN MOTION (May \_\_, 2005) affirming the *Covad* Order on all substantial points and simply clarifying, consistent with its determination in Section I of the current Order, that the Commission's approach under federal law will be to review the parties' agreement to determine whether, based on a finding that the agreement provides § 251 elements, further review is required rather than to proceed automatically to review the agreement for approval under § 252.

- reflect a § 271 obligation, or
- reflect a state obligation.<sup>14</sup>

(Emphasis added.)

The current Order neither expands nor reduces the kinds of agreements that must be submitted pursuant to the *Covad* Order.<sup>15</sup> Instead, because this Order deals with an agreement containing network elements, it clarifies the type of review that the Commission will give such an agreement, i.e. a threshold determination whether any of the network elements provided under the agreement are § 251 network elements and hence must be further reviewed under § 252(e) for approval. Seen in context, then, the MS Agreement is part of a subset of the agreements that are reviewable under federal law to determine the threshold issue (whether they address obligations under § 251 (b) and (c)) but which are not ultimately required to be approved or rejected pursuant to § 252.

#### **D. Commission Action**

Accordingly, in exercise of its authority under the Federal Telecommunications Act of 1996 (§ 252(e)), the Commission will require Qwest to submit future commercial agreements (“commercially acceptable arrangements for the availability of unbundled network elements”) to the Commission so that the Commission can make the threshold determination whether the agreement contains § 251 network elements and hence must be further reviewed under § 252(e) for approval or whether the agreement contains no § 251 obligations and therefore warrants no further action by the Commission under § 252(e).

### **ORDER**

1. The Commission finds that federal law does not require the Commission to review and approve the Master Service Agreement in this matter because it contains no § 251 network elements.
2. Within two weeks of this Order, Qwest and MCImetro shall file a revised Interconnection Agreement Amendment incorporating in that document the language identified by the Commission in its December 2, 2004 Order in this matter (pages 10-14).
3. In addition to the agreements that Qwest believes it is required by federal law to submit to the Commission for review and approval because they contain § 251 network elements or other § 251 obligations, Qwest shall also submit to the Commission and the Department future agreements that it believes are strictly commercial agreements, not subject to Commission review for approval or rejection pursuant to § 251.

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<sup>14</sup> *Covad* Order at page 6.

<sup>15</sup> The Commission clarifies that the current Order addresses the extent of Commission authority and responsibility under relevant federal law, the Telecommunications Act of 1996, and does not address the Commission’s review authority under applicable state law, including Minn. Stat. Chapter 237, which the *Covad* Order references in speaking of agreements that “reflect a state obligation.” *Covad* Order at page 6.

4. The Commission will review an agreement submitted pursuant to Order Paragraph 3 to determine whether the agreement in fact contains no § 251 obligation. If the Commission determines that the agreement contains a § 251 obligation, the Commission will proceed to review the agreement for approval as required by § 252(e) of the Federal Telecommunications Act of 1996. If the Commission determines that the agreement does not contain § 251 obligations, no Commission review and approval will be required under federal law and the Commission will take no further action regarding the agreement under federal law.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

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