Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Qwest Communications International Inc.	)	WC Docket No. 02-89
	)	
Petition for Declaratory Ruling On the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Agreements Under Section 252(a)(1)	)	
	)	

REPLY COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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Qwest Communications International Inc. ("Qwest"), by counsel, hereby replies to the comments filed on its above-captioned Petition. 1/

INTRODUCTION AND EXECUTIVE SUMMARY

In this matter Qwest has asked the Commission to clarify an important issue of law arising under Section 252(a) of the Telecommunications Act: which contractual agreements between ILECs and CLECs are required to be filed with and approved by state regulators before taking effect, and which are not.

The comments filed here underscore the need for the Commission to rule on where the Act draws this line. No party argues that this Petition does not raise an important federal law question. No party argues that the legal issue presented in the Petition is premature. Some parties do engage in rhetorical

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1/ *Qwest Communications International Inc.*, WC Docket No. 02-89, DA 02-1363, Order (released June 11, 2002) (extending due date for replies to June 20, 2002).

attacks on Qwest for coming to the Commission for this ruling during the pendency of proceedings in the states that implicate the proper scope of Section 252(a)(1). But no party challenges the legal principle that the FCC has responsibility to resolve such federal questions and provide an interpretation that will apply nationwide. The comments provide no substantial argument refuting the practical need for a single ruling on this question from the Commission, rather than multiple diverging rulings from different states.

Indeed, the debate here demonstrates exactly why a Commission ruling is needed now. The parties present widely divergent views on the legal question presented, and the intent of Congress in Section 252(a)(1). This uncertainty has direct consequences on ILECs and CLECs as they structure their business affairs. If a particular contractual arrangement falls *within* the scope of Section 252(a), it must be filed and approved by a state utility commission before it can take effect – in a process that the Act provides may take up to 90 days. The agreement between the parties is not legally valid until so blessed by the regulators. In contrast, if the contract arrangement is *outside* the scope of Section 252(a), it is valid immediately.

Qwest has strong views on where that line is drawn in the Act, but we have emphasized from the outset that our primary goal here is to obtain clarification on this important question. We want to be sure that we meet the requirements of the Act in all respects, and that our agreements with CLECs go

through the regulatory approval process if and when required. This is an interest shared by all parties.

Qwest demonstrated in its Petition that Congress made a balancing decision when it crafted Section 252(a). On the one hand, Congress required prior regulatory approval for certain matters, focusing on "a detailed schedule of itemized charges for interconnection and each service or network element" subject to Section 251 – that is, interconnection product offerings and the rates charged for them. The Act deems those matters of sufficient importance that continuing regulation was required. On the other hand, Congress also wanted to encourage less regulation of ILEC-CLEC relations in the future. It did not want regulators micro-managing ILEC-CLEC affairs where those parties are able to work out matters among themselves. Section 252(a)(1) reflects this balancing by requiring some, but not all, ILEC-CLEC contract arrangements to go through the prior approval process inherent in filing.

The comments here show that the Commission must speak to this balancing. The parties raise multiple versions of where they think the filing line should be drawn, but in general they would require prior regulatory approval of many more negotiated contractual arrangements than Qwest believes Congress intended. If they are right, this calls into question the validity of multiple ILEC-CLEC contract terms that have not been so approved. And looking to the future, such an interpretation would add regulatory delay and cost to the future attempts by ILECs and CLECs to address their respective business needs quickly and flexibly.

In these reply comments Qwest discusses in more detail why the Commission should clarify the scope of Section 252(a) soon. We show that commenters themselves cannot articulate a consistent definition of which contract matters require prior PUC approval. We demonstrate that the standard proposed in our Petition more closely reflects the intent of Congress and its goal of reducing the role of regulation where ILECs and CLECs reach agreements on their own.

Indeed, commenters here dismiss far too quickly the costs and burdens of an overbroad filing/approval requirement for negotiated agreements. For example, some argue that the resulting implementation delay is not significant, and suggest that ILECs and CLECs should simply go ahead and implement such deals without waiting for regulatory approval. This is a peculiar argument – that the Commission should read Section 252(a)(1) broadly because parties can ignore its legal consequences.

Similarly, some parties argue that a contractual agreement between an ILEC and CLEC is legally valid even if it is not approved by the PUC. They apparently do not want the Commission to consider the full consequences of a broad ruling here on untold numbers of ILEC-CLEC negotiated contract provisions that have never been approved by regulators. But this argument is inconsistent with Section 252(e) of the Act and related precedent. It is clear that, insofar as an ILEC-CLEC agreement must be approved, it is not valid until such approval is granted. Congress knew this, and that is why Section 252(a)(1) is written more narrowly to limit the matters that require this filing/approval process of up to 90 days.

Significantly, many parties take a common approach: they try to answer the legal question presented in a result-oriented manner that reflects the result they want – and not the goal of the Act. For example, some commenters claim that a more narrow regulatory zone for voluntary agreements denies them the ability to know more about how an ILEC and CLEC are dealing with one another. But this assumes that the Act intended all such contract terms to be publicly regulated through a prior approval process. The answer is it did not. The Act balances the costs and benefits of regulation, and does not always impose those costs when an ILEC and CLEC reach a voluntary agreement on a business issue.

Similarly, some parties argue that a very broad interpretation of the filing/prior approval requirement under Section 252(a) is necessary to preserve pick and choose rights under Section 252(i). But this argument puts the cart before the horse. Section 252(i) only comes into play in the area of negotiated agreements if the contractual terms require prior PUC approval in the first place. Some commenters suggest this is a problem for them because they would only know the rates and other matters that make up the "detailed schedule of charges" that the Act prescribes for prior approval. The parties, however, overstate the burden of this limit. CLECs can ask ILECs for anything, and under Section 252(b) they can arbitrate "any issue," not just matters that require prior regulatory approval when negotiated. Admittedly they may not have complete knowledge of the business affairs of a rival CLEC and ILEC. They must think for themselves as to what is in their business interest, not simply look over the shoulder of others. But that is the

balance of the Act: some negotiated contract arrangements are required to be filed; others are not.

Miscellaneous other arguments show up in the comments in support of an overbroad reading of Section 252(a). Parties raise policy arguments for broad regulation of voluntary agreements, but the issue here is what Section 252(a) says. Some parties also introduce argumentation regarding specific Qwest contracts. Qwest will simply note that it is strongly disputing the characterization of those agreements (and the surrounding facts) in other proceedings. The issue for the Commission here is a legal one: what is the scope of business matters voluntarily negotiated by ILECs and CLECs that require prior PUC approval. Application of that standard to specific facts can and should occur elsewhere.

Again, Qwest submits that the comments here underscore the need for a prompt Commission ruling on this important federal question. As discussed below, Qwest believes that its understanding of Section 252(a) better reflects the intent of the Act. But in any event, clarification of the law is crucial so that parties can comply with its terms, while avoiding unnecessary regulatory costs where none are intended by the Act.

I. THE CONFUSION IN THE RECORD ON THIS IMPORTANT LEGAL QUESTION DEMONSTRATES THE NEED FOR FCC CLARIFICATION.

A. Different Parties Offer Inconsistent Interpretations of the Scope of Contractual Arrangements that Must be Filed and Approved Under Section 252(a)(1)

ILECs and CLECs necessarily engage in a wide variety of commercial transactions with one another. Some of the contract terms for such arrangements unquestionably are subject to the filing and advance approval requirements of Section 252(a)(1). At the same time, it would seem obvious that many of them are not.

Some parties, however, largely side-step the definitional issue at hand. They suggest that the legal question presented here can be resolved with a simplistic statement such as, in the words of WorldCom, "section 252(a)(1) requires approval of *all* interconnection agreements." 2/ The offices of the New Mexico Attorney General and the Iowa Consumer Advocate similarly assert that "all agreements means 'all' agreements." 3/ They go on: "The breadth and scope of the agreements that must be filed and subject to public inspection is *unlimited*: any agreement between an ILEC and a CLEC." 4/

Of course, some ILEC-CLEC agreements should be outside this standard because they concern interconnection matters that are not subject to

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2/ WorldCom Comments at 2 (emphasis in original),

3/ New Mexico AG/Iowa OCA Comments at 10.

4/ New Mexico AG/Iowa OCA Comments at 12 (emphasis supplied); *accord*, WorldCom Comments at 2 ("There are no carve-outs or exceptions.").

Sections 251 and 252, such as interstate access, Internet connectivity, and network elements that have been removed from the national list of elements subject to mandatory unbundling. Similarly, CLECs sell ILECs services and facilities, but those activities are not regulated by Section 252. 5/

But the overbreadth of an "all agreements" standard is evident even in the context of matters having some nexus to Section 251 requirements. Commenters ignore the many ways that ILECs and CLECs make contracts every day. They reach agreements on specific orders; they address provisioning details; they arrange and implement dispute resolution. This list is just by way of example. In short, commenting parties' assertion that "section 252(a)(1) requires approval of *all* interconnection agreements" begs the question of *which* agreements qualify as "interconnection agreements" for this particular purpose. 6/

5/ *See* Qwest Petition for Declaratory Ruling at 36-37 & notes 24-27 and sources cited therein; *see also* AT&T Comments at 17 ("Truly independent agreements to provide services not subject to the 1996 Act's obligations obviously are not interconnection agreements governed by § 252(a)(1) and need not be filed.").

6/ A number of parties make much of the FCC's determination that the Section 252(a)(1) filing and prior approval requirements apply to "all" interconnection agreements between neighboring, non-competing ILECs, even those negotiated before the enactment of the 1996 Act. *See, e.g.,* WorldCom Comments at 4; New Mexico AG/Iowa OCA Comments at 10-11 (both citing without mentioning subsequent reversal in pertinent part of *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15583-84, ¶¶ 165-68 (1996) ("*Local Competition Order*"), *rev'd in pertinent part, Iowa Utilities Board v. FCC*, 219 F.3d 744, 765 (8th Cir. 2000), *rev'd on other grounds, Verizon Communications, Inc. v. FCC*, 122 S.Ct. 1646 (2002)); *see also* AT&T Comments at 8-9 n.3. But the FCC's discussion of this issue says nothing about the question presented here – whether a particular agreement should or should not be deemed an "interconnection agreement" in the first place.

One point of view is that any contractual agreement that touches the subject of interconnection at all must be approved by state commissions. For example, the staff of the Arizona Corporation Commission recently took the position elsewhere that the filing requirement of Section 252(a) should be defined extremely broadly. According to the ACC staff, any time an ILEC such as Qwest "enters into a negotiated agreement with a competitor that has *any affect* [sic] on its provision of interconnection, services, or network elements, it is to file said agreement with the State Commission for approval." 7/ This begs the question of how absolute and open-ended this "any affect" standard is meant to be. 8/

The Iowa Utilities Board recently drew the line in a similar but different place. It calls for filing and prior approval of "any binding arrangement or understanding" about "any aspect of the interconnection between the two carriers, or the provision of services or network elements which in turn are used to provide a telecommunications service." 9/

7/ Arizona Corp. Comm'n Utilities Division, Staff Report and Recommendation in the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996, Docket No. RT-00000F-02-0271, at 14 (June 7, 2002) (emphasis added).

8/ The ACC Staff went on to review multiple Qwest agreements, and drew lines in various places that do not necessarily provide the most clear guidance for future operations. Qwest does not agree with many aspects of the Staff Report, but will reserve comment on the specifics of that proceeding.

9/ "[I]t would appear that any binding arrangement or understanding between an ILEC and a competitive local exchange carrier (CLEC) about any aspect of the interconnection between the two carriers, or the provision of services or network elements which in turn are used to provide a telecommunications service, should qualify as an interconnection agreement under § 252(a)(1) and should be filed with the Board for approval." *AT&T Corp. v. Qwest Corp.*, Docket No. FCU-02-2, Order

Some parties offer line-drawing suggestions that would omit some contractual arrangements but include many others. For example, the Minnesota Department of Commerce, which has leveled a barrage of baseless accusations against Qwest, states that it "does not attempt to categorize every agreement between Qwest and a CLEC as an interconnection agreement that must be filed under the Act." By way of example, it states that it "has no concern with Qwest not filing settlements of legitimate billing disputes, for example, that do not rise to the level of an interconnection agreement." 10/ The last phrase still begs the question of what the DOC considers an "interconnection agreement for purposes of Section 252(a)" and PUC approval requirements. Leaving aside this circularity, the Commission should note that the Department does not stop there. It goes on to argue that ILECs must, as a legal matter, obtain prior approval for preliminary agreements as to the *mechanics* of how parties negotiate such settlements in the first place. Surely the Act does not call for such micro-management.

Similarly, AT&T states that the Act does not require filing of "day-to-day business documents that are not themselves interconnection 'agreements' and that do not establish new or modified terms and conditions of interconnection on a going-forward basis." 11/ We agree with this, as far as it goes. However, the

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Making Tentative Findings, Giving Notice for Purposes of Civil Penalties, and Granting Opportunity to Request Hearing, at 7 (issued May 29, 2002) ("*IUB Order*") (attached to Iowa Utilities Board Comments).

10/ Minn. Dept. of Commerce Comments at 3, 36.

11/ AT&T Comments at 14.

conclusory nature of this statement itself – and the evident disagreements among the parties about which documents fall into which category – provides a strong reason why more clarity is needed from the Commission here.

Touch America concedes that "[t]he issue then is not whether every contract between an ILEC and a CLEC is subject to the mandatory filing and 90-day pre-approval requirements. Some may clearly not be subject to such requirements." 12/ Just so, but the legal question before the Commission is *which ones*.

B. The Commission Should Establish A Consistent National Understanding of the Scope of Section 252(a)(1)

The Commission is the correct body to bring clarity to question of which negotiated contractual agreements, as a matter of law, must be filed with and approved by a PUC before taking effect. The Commission has the authority and obligation to establish a clear, consistent national policy in this area. 13/ Some of the parties contend that state commissions, rather than the FCC, should address this issue in the first instance. 14/ But none of them disputes that the legal question presented here is a matter of federal law – and that the Supreme Court has made it absolutely clear that the FCC has authority to interpret the scope of Section 252, even though that section directs states to carry out many of its

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12/ Touch America Comments at 4.

13/ Qwest Petition at 24-28.

14/ *See*, *e.g.*, AT&T Comments at 2, 14-15; Minn. Dept. of Commerce Comments at 39-41; New Mexico AG/Iowa OCA Comments at 25; Focal/Pac-West Comments at 9.

provisions. 15/ Indeed, AT&T's position is particularly ironic given its long-standing position that explicit, national interpretations from the FCC regarding this provision of the 1996 Act will "give incumbent LECs" – as well as CLECs – "an incentive to negotiate[,]" thus "reducing the likelihood of potentially inconsistent determinations by state commissions and courts, and reducing burdens on new entrants that seek to provide service on a regional or national basis by limiting their need for separate network configurations and marketing strategies, and [ ] increasing predictability." 16/

None of the parties refutes Qwest's showing that there is a strong risk of inconsistent interpretations of the issue by different states in Qwest's region, and that such inconsistent rulings would have negative effects on ILEC/CLEC negotiations, which often proceed on a multi-state basis. 17/ The Minnesota Department of Commerce argues that "there is nothing wrong with different states reaching different conclusions about specific agreements if that is, in fact, what happens." 18/ This is simply incorrect, as Qwest has explained in detail in its

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15/ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 384-85 (1999).

16/ *Local Competition Order*, 11 FCC Rcd at 15523, ¶ 47 (summarizing comments of AT&T and other parties). The Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board* vindicated AT&T's arguments in this regard. AT&T notes the "ironic contrast" of "the self-styled defender of state regulatory authority [ ] seeking to preempt or circumvent that authority." AT&T Comments at 2. The irony cuts in more than one direction.

17/ Qwest Petition at 26-27 & notes 18-19 (citing the *Local Competition Order* and subsequent FCC rulings on the benefits of uniform national rules to avoid uncertainties and inconsistencies among states).

18/ Minn. Dept. of Commerce Comments at 40.

Petition. Inconsistent rules would not only complicate the interpretation of past multi-state agreements, but would impede the process of negotiating *future* agreements. 19/ The main issue here is not interpretation of individual agreements, but interpretation of Section 252 of the Communications Act. Thus, it makes little difference whether, as some parties argue, state commissions are empowered to interpret interconnection agreements. 20/ The Supreme Court has confirmed that, to paraphrase Justice Marshall, it is emphatically the province and duty of the FCC to say what the Communications Act is. 21/

II. THE LINE QWEST DRAWS IS REASONABLE AND IS MORE CONSISTENT WITH THE LANGUAGE AND PURPOSE OF THE ACT THAN THOSE PROPOSED BY OTHER PARTIES.

A. Agreements Defining Business-to-Business Relationships and Dispute Resolution Procedures Need Not Be Filed

The offices of the New Mexico Attorney General and the Iowa Consumer Advocate ask, "When does an agreement which defines a business

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19/ Qwest Petition at 27 & n.19; *Local Competition Order*, 11 FCC Rcd at 15528, ¶ 56 ("fair negotiations will be expedited by the promulgation of national rules").

20/ New Mexico AG/Iowa OCA Comments at 24; *see also* Minn. Dept. of Commerce at 41 ("Determinations as to whether or not *specific agreements* meet these standards should be left to the individual states") (emphasis added); *id.* at 35. While the FCC and some circuit courts of appeals have found that states possess authority to interpret interconnection agreements, others have come to a contrary conclusion and held that state commissions lack authority to interpret such agreements. *See* Qwest Petition at 25 n.13 and cases cited therein.

21/ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 384-85 (1999); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1804).

relationship rise to the level where it needs to be filed?" 22/ They contend that it is difficult to establish a clear standard that answers this question. The answer, however, is not to say, as they do, that the problem cannot be solved and therefore everything needs to be filed. This would create an anomalous situation in which ILECs and CLECs could not even agree to meet together on a certain date without obtaining the state commission's advance permission. This cannot be what the framers of the 1996 Act had in mind.

To the contrary, the answer can be found in the statute, which refers to agreements to provide "interconnection, services, or network elements pursuant to section 251" and requires that such agreements, when filed, include a "detailed schedule of itemized charges for interconnection and each service or network element included in the agreement." 23/ If an agreement addresses the rates and/or the key terms and conditions of interconnection matters subject to Sections 251 and 252, then the filing and prior approval requirements apply to this specific set of business relationships (*i.e.*, agreements to pay a certain amount and to receive certain specified interconnection, services, or elements). But the statute, by its terms, does not require filing or prior approval of agreements that do not address the rates, terms, and conditions of interconnection matters subject to Sections 251 and 252. 24/

22/ New Mexico AG/Iowa OCA Comments at 22.

23/ 47 U.S.C. § 252(a).

24/ The New Mexico AG/Iowa OCA (at 8-10) also rely on an analogy to the Natural Gas Act to argue for an expansive rule regarding which agreements must

Thus, there should be no need to file agreements that merely address administrative matters or the manner in which the parties will manage their day-to-day relationships, such as how often the parties should meet, or which contacts between corporate officers or other communications channels should be utilized to resolve disputes. Even AT&T apparently agrees with this proposition. 25/ To the extent that parties agree to dispute resolution procedures or other arrangements for managing their business-to-business relationships, those procedures and arrangements do not govern the rates, terms, and conditions of "interconnection, services, or network elements pursuant to section 251" and do not fall within the Section 252(a)(1) filing and prior approval requirements. These are the "normal 'business-to-business' commercial or other arrangements that do not constitute the interconnection terms specified in Section 251 and 252 and do not have to be filed." 26/

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be filed. Such a comparison is not persuasive. First, the principal case they cite, *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 334 (1956), addresses the question of whether a gas company could unilaterally effect a rate change in a private contract by filing a new public rate schedule with the regulatory body. This is not analogous to the question presented here – whether topics other than interconnection rates and key terms and conditions require filing under Section 252(a)(1) of the Communications Act. Additionally, the remaining cases that they cite to support the point that the Natural Gas and Communications Acts are similar were limited to applying concepts developed in *United Gas Pipeline Co.* to the long distance context. To the extent such cases are instructive in the present case, they only relate to agreements regarding rates charged for interconnection. Qwest admits that agreements regarding the core terms of interconnection, such as the rates charged, require filing under Section 252.

25/ AT&T Comments at 16.

26/ *Id.*

The interpretation proposed by Qwest strikes a balance between, on the one hand, the statutory requirement that agreements regarding the core matters addressed in Section 252(a)(1) – the "detailed schedule of itemized charges" for "interconnection, services, or network elements pursuant to section 251" – be filed and reviewed by state commissions, and on the other hand, the public interest in allowing ILECs and CLECs to develop individualized solutions to specific business challenges that do not rise to the level of the matters covered by the Section 252(a)(1) filing requirement. Qwest, for its part, has been widely praised for its willingness to work collaboratively with CLECs and to rapidly address their operational concerns without need for intervention by regulators. 27/

The commenting parties strongly emphasize the importance of public filing and regulatory review of interconnection agreements, as contemplated by Section 252(a)(1). 28/ However, Qwest urges the Commission to recognize that

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27/ *See, e.g.,* Letter from Richard Mathias, Chairman, Illinois Commerce Commission, to Edward A. Mueller, President and CEO, SBC/Ameritech-Illinois, at 5-6 (Oct. 3, 2001) ("There was a discussion of benchmarking the wholesale performance of SBC-Ameritech-Illinois to that of other incumbent local exchange carriers. For instance, many CLECs noted that Qwest appears to be more responsive than SBC-Ameritech-Illinois in servicing its wholesale customers. . . . Qwest apparently has established an account management/circulation process for operational concerns which incents the parties to reach settlement before arbitration."); Statement of Commissioner Michael J. Copps, *Joint Application by BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, FCC 02-147 (released May 15, 2002) ("Our expectation is that BellSouth's performance will continue to improve and that it will work cooperatively with other carriers through their business-to-business relationships to resolve any issues that develop.").

28/ *See, e.g.*, AT&T Comments at 7-9; Focal Communications and Pac-West Telecomm Comments at 6-7; Minn. Dept. of Commerce Comments at 28-34; New

there is also a public interest on the other side of this balance. The 1996 Act, following the pattern of ordinary commercial law, presumes that, except in extraordinary circumstances, the public interest is served by allowing parties to reach agreements privately and implement them immediately without disclosing terms to competitors. The Act thus enables ILECs and CLECs to engage in permissible transactions that are not subject to those requirements (such as settling disputes and working out administrative matters) rapidly and without the need to obtain state approval for every step along the way. It also facilitates an open, collaborative relationship between ILECs and CLECs, rather than perpetuating the environment of regulatory conflict, litigiousness, and distrust.

No party refutes Qwest's showing, in the Petition, that the legislative history supports Qwest's interpretation of Section 252(a)(1). 29/ The best the parties can do is to raise legislative history arguments focused on provisions other than Section 252(a)(1). The New Mexico AG/Iowa OCA point to the discussion of Section 252(i) in the legislative history, contending that this section was intended to make available for opt-in "any service, facility, or function provided under an interconnection agreement . . . ." 30/ But this is a circular argument. The question presented in Qwest's Petition is what types of agreements fall within this

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Mexico AG/Iowa OCA Comments at 5-6; Sprint Comments at 2-3; WorldCom Comments at 5-6.

29/ Qwest Petition at 13-14.

30/ New Mexico AG/Iowa OCA Comments at 18-19, *quoting* S. 652, Telecommunications Competition and Deregulation Act of 1995, Report of the Senate Committee on Commerce, Science and Transportation, S. Rep. No. 104-23 (Mar. 30, 1995).

definition – and Qwest believes that both Section 252(a)(1) and 252(i) apply to contract provisions concerning the rates and key terms and conditions for "interconnection, services, or network elements pursuant to section 251," but not to provisions concerning other matters.

For their part, Focal/Pac-West raise a legislative history argument regarding Section 252(a)(2) – not Section 252(a)(1), the provision Qwest has asked the Commission to interpret here. They point out that Section 252(a)(2), which permits negotiating parties to bring in state commissions to assist with mediating an agreement subject to Section 252(a)(1), was added as a result of the same compromise in which the House receded to the Senate approach which relied primarily on private negotiations among parties. 31/ If anything, this argument strengthens Qwest's point, not undermines it. The types of "interconnection agreements" to which Section 252(a)(1) applies are matters for which Congress clearly intended a significant role for state regulators, who are not only empowered to review and approve such agreements, but also to participate in the negotiation process as mediators. But in a "de-regulatory" enactment, 32/ Congress could not have intended that every possible transaction between ILECs and other carriers be brought under a regulatory microscope.

31/ Focal/Pac-West Comments at 3-5; *see also* Qwest Petition at 14 & n.7.

32/ Telecommunications Act of 1996, Conference Report, S.652, 104th Cong., 2d Sess., H. Rep. 104-458 (Jan. 31, 1996), at 1 (characterizing Act as "a pro-competitive, de-regulatory national policy framework").

Reaching an accurate answer to the question presented here is also important to protect the settled contractual expectations of CLECs, as well as ILECs. Erroneously classifying agreements as subject to advance filing and approval requirements would have serious, undesirable consequences for CLECs, because if an agreement is deemed subject to Section 252(a)(1), it is not enforceable until it is approved by the relevant state commission. 33/ AT&T and the Minnesota Department of Commerce attempt in vain to refute this proposition. They argue that nothing in Section 252 *prohibits* parties from *voluntarily* abiding by the terms of a negotiated agreement that is required to receive state approval but that a state has not yet approved. 34/ This may be correct, but it is beside the point. The point is that CLECs have no legal right to *enforce* contracts that have not been approved but are required to be approved. 35/ AT&T concedes, as it must, that these cases

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33/ Qwest Petition at 22-23 & n.10.

34/ AT&T Comments at 12; Minn. Dept. of Commerce Comments at 38.

35/ *See* Qwest Petition at 23 n.10; *Global NAPS, Inc. v. Verizon Communications*, File No. EB-01-MD-010, FCC 02-59, ¶ 23 (released Feb. 28, 2002) (dismissing as unripe a claim for enforcement of an interconnection agreement that had not yet been filed with the state commission); *GTE Northwest Inc. v. Hamilton*, 971 F. Supp. 1350, 1353 (D. Ore. 1997) ("[a] binding final agreement will not exist until after the [state] Commission reviews and approves the agreement signed and submitted" by the ILEC and the CLEC); *Indiana Bell Tel. Co. v. Smithville Tel. Co.*, 31 F. Supp. 2d 628, 633 (S.D. Ind. 1998) ("*Before any interconnection agreement may be implemented or enforced*, whether it was produced by negotiation or arbitration, it must be submitted for and receive approval by the State commission.") (emphasis added); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 402 (7th Cir. 2000) (filed rate doctrine [which among other things precludes courts from enforcing contracts that inconsistent with tariffs or similar documents that have been approved by regulatory authorities] applies to interconnection agreements); *Stein v. Pacific Bell Tel. Co.*, 173 F. Supp. 2d 975, 987 (N.D. Cal. 2001) (same).

mean courts and regulators cannot enforce (*i.e.*, order a party to comply with) unapproved agreements that require approval, because such challenges would not be "ripe" until approved, and/or because a district court would lack subject matter jurisdiction to entertain such challenges. 36/

It is clear that an agreement that falls *within* the scope of Section 252(a) is not legally enforceable until approved by state regulators. This lack of legal certainty about the validity of a contract would have direct consequences on ILECs and CLECs as they structure their business affairs. In contrast, if the contract arrangement is *outside* the scope of Section 252(a), it is valid immediately and can be implemented at once. Thus, it is critical that the Commission clearly draw the line between agreements that are, and that are not, subject to advance filing and approval requirements.

B. There Is No Requirement to File and Obtain State Approval of Contract Terms Regarding Matters Not Subject to Section 251, Even If They Are Negotiated Simultaneously with Interconnection Agreements.

Qwest has shown that agreements regarding matters that have nothing to do with a "detailed schedule of itemized charges" for "interconnection, services, or network elements pursuant to section 251" are not subject to the Section 252(a)(1) filing requirement. AT&T concedes that "[t]ruly independent agreements to provide services not subject to the 1996 Act's obligations" need not be filed, but it argues that when such agreements are negotiated in tandem with or in a " 'package

36/ AT&T Comments at 12 n.5.

deal' with a nominally-separate interconnection agreement, then such agreements . . . must be filed." 37/ While perhaps superficially appealing, AT&T's approach is legally unsupportable because it effectively would subject matters that clearly are not covered by the statute to the procedural framework of Sections 252(a) and (e), and conceivably also to opt-in rights under Section 252(i). Should state commissions have the opportunity to review and rule on the reasonableness of ILEC agreements to sell unregulated services to CLECs? And should other CLECs have a "pick and choose" right to opt into identical transactions with the ILEC? The answer to both questions is clearly no.

Indeed, the FCC considered a hypothetical situation involving negotiation of interconnection agreements and extraneous deals as a "package deal" in the 1996 *Local Competition Order*, and appears to have rejected the approach that AT&T now espouses:

> Time Warner contends that we should find that a party is not negotiating in good faith under section 252 if it seeks to tie resolution of issues in that negotiation to the resolution of other, unrelated disputes between the parties in another proceeding. . . . Parties, however, could mutually agree to link section 252 negotiations to negotiations on a separate matter. *In fact, to the extent that concurrent resolution of issues could offer more potential solutions or may equalize the bargaining power between the parties, such action may be pro-competitive*.
>
> For example, an incumbent LEC that offers video programming may be negotiating for the right to use video programming owned by a cable company while the cable company is negotiating terms for interconnecting with the incumbent LEC. Addressing some or all of the issues in the two negotiations collectively could expand the options for reaching agreement,

37/ AT&T Comments at 17-18.

> and would equalize the parties' bargaining power, because each has something that the other party desires. 38/

The FCC did not remotely suggest that an agreement concerning the sale of video programming (or other matters not related to interconnection) somehow would be pulled under the regulatory framework for interconnection matters. To the contrary, the Commission made it clear that parties may, in good faith, negotiate interconnection agreements simultaneously with agreements concerning matters outside the interconnection regulatory framework.

A number of parties argue that Section 252(a)(1) requires the filing and prior state commission approval of the entirety of agreements, even if only a portion of those agreements relate to the rates, terms, and conditions of interconnection and related matters. 39/ This argument elevates form over substance. As discussed above, if an ILEC and an interconnecting carrier enter two agreements, one relating to the rates, terms, and conditions for interconnection, and the other relating to extraneous matters, the latter agreement need not be filed. It should not make any difference whether these two agreements are incorporated into a single contract or in two separate documents.

Finally, the commenting parties also misunderstand Qwest's argument regarding the significance of the different substantive standards that Section 252

38/ *Local Competition Order*, 11 FCC Rcd at 15576, ¶ 153 & n.287 (emphasis added).

39/ *See, e.g.,* AT&T Comments at 3-4; Minn. Dept. of Commerce Comments at 33; Mpower Comments at 2-3; New Edge Comments at 3-4; New Mexico AG/Iowa OCA Comments at 7; Sprint Comments at 3; Focal/Pac-West Comments at 5; New Mexico AG/Iowa OCA Comments at 23-25; WorldCom Comments at 5-6.

applies to negotiated agreements (Section 252(a)), arbitrated agreements (Section 252(b)), and Statements of Generally Available Terms ("SGATs") (Section 252(f)). 40/ Section 252(b)(1) authorizes arbitration of "any open issues," and Section 252(f) authorizes an open-ended process of state review of SGATs – which means that state commissions may review a quite broad range of potential agreement provisions when examining arbitrated agreements or SGATs. By contrast, Section 252(a)(1) explicitly narrows the scope of negotiated agreements subject to its terms, by requiring that an agreement subject to this paragraph "shall include a detailed schedule of itemized schedule of itemized charges for interconnection and each service or network element included in the agreement." This is not to say that the schedule of charges is the *only* item that needs to be included in the agreement. 41/ But it does mean that agreements that do not and cannot include a schedule of charges – because they do not involve binding contractual commitments, going forward, regarding the rates and key terms and

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40/ *E.g.*, AT&T Comments at 9-10; *cf.* Qwest Petition at 11-12.

41/ A number of parties mischaracterize Qwest's position in this regard. *See, e.g.,* AT&T at 6-10; Focal/Pac-West Comments at 4; Sprint Comments at 2. Nor does Qwest suggest that only rates, and not terms and conditions, must be included – for example, Qwest specifically stated that matters such as the quality or performance of a service or network element, or the key operational support functionalities to which the parties have agreed, should be included in filed agreements. Qwest Petition at 29; *contra*, New Mexico AG/Iowa OCA Comments at 7-8; Focal/Pac-West Comments at 4.

conditions of interconnection-related offerings subject to Section 251 – cannot be subject to the requirements of Section 252(a)(1). 42/

C. The Commission Should Disregard Certain Commenters' Mischaracterizations of Qwest's Position

In order to address the important issue presented by Qwest's Petition for Declaratory Ruling, one must understand what that issue is. Yet a number of the commenting parties either misunderstand or mischaracterize Qwest's arguments. Once the straw men presented in these parties' comments can be cleared away, the actual issues presented for the Commission to decide can readily be addressed.

First, contrary to the mischaracterizations of the Minnesota Department of Commerce, Qwest does not propose a standard under which ILECs "could enter into bare-bones agreements with CLECs to be filed with the state commissions, leaving the interesting details in 'confidential' secret agreements that

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42/ The Commission should rebuff PageData's argument regarding agreements with paging carriers. PageData Comments, *passim*. In the *TSR Wireless* case, Qwest argued that paging carriers are not entitled to the benefits of interconnection agreements under the Act unless they enter interconnection agreements pursuant to Section 252. The Commission rejected this argument and concluded that paging carriers need not enter interconnection agreements under Section 252 in order to enjoy the benefits conferred by the Act. *TSR Wireless, LLC v. U S WEST Communications, Inc., et al.*, 15 FCC Rcd 11166 (2000), *aff'd, Qwest Corp. v. FCC*, 252 F.3d 462 (D.C. Cir. 2001). The Commission cannot now turn around and fault Qwest for failing to file interconnection agreements with paging carriers, when it was the Commission that ordered Qwest to give those parties benefits though they had never requested or executed interconnection agreements. If the Commission were to agree with PageData's arguments, it would have to reverse *TSR Wireless*.

the commissions never have an opportunity to review." 43/ The Department incorrectly claims that Qwest's "view would exclude from ICAs [interconnection agreements] important terms such as those setting the provisioning intervals for providing UNEs and terms describing how a CLEC would order UNEs. It would exclude terms describing reciprocal compensation arrangements and other aspects of interconnection, including collocation." 44/ To the contrary, Qwest's petition made it clear that the rates and the key terms and conditions (including binding commitments regarding service quality or performance) of offerings subject to Section 251 (including collocation and reciprocal compensation for *local* traffic) must be included in interconnection agreements. 45/

Similarly, some parties seem to think Qwest is arguing that agreements to settle disputes never need to be filed. 46/ This is also untrue. Qwest agrees that, to the extent settlement agreements provide new going-forward rates, terms, and conditions of interconnection, services, and network elements subject to Sections 251 those going-forward contractual commitments should be filed. But just as clearly, agreements to settle disputes in consideration for a cash payment,

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43/ Minn. Dept. of Commerce at 33. The real issue is which "interesting details" in negotiated agreements are within the scope of interconnection agreements for which Section 252(a)(1) requires prior filing and approval, and which "interesting details" are outside the scope of those requirements.

44/ *Id.*

45/ *See* Qwest Petition at 29-31.

46/ *See, e.g.,* AT&T Comments at 17; Minn. Dept. of Commerce Comments at 36; New Mexico AG/Iowa OCA Comments at 23.

cancellation of an unpaid bill, or other backward-looking consideration need not be filed. 47/ Any different ruling would be inconsistent with Section 252(a) and historical policies favoring resolution of disputes among carriers or between carriers and customers.

Some of the parties argue, erroneously, as if Qwest has attempted to set the FCC in the place of the state commissions as the adjudicator of the fact-intensive state cases now pending. 48/ To be sure, given the approach some state commissions appear to be taking and the high risk of contradictory rulings from different states, at some point in the future Qwest may well seek to bring the factual issues regarding specific agreements before the FCC for resolution. But Qwest has not done so here. Qwest, in its Petition, addresses only a matter of law – the interpretation of Section 252(a)(1) – and does not ask the FCC to opine on factual matters. An FCC declaratory ruling would significantly assist the state commissions in resolving the pending adjudications in a manner that is fully consistent with the Act, as interpreted by the Commission – but such a ruling by itself would not require the Commission to displace the state regulators' role as the finder of fact. More fundamentally, however, this proceeding does not seek an FCC

47/ Some parties seem to recognize that backward-looking settlement agreements do not implicate Section 252(a). However, they suggest that if at the same time the ILEC and CLEC agree to new forward looking arrangements, the entire settlement falls into Section 252(a). It is not enough that the parties file and obtain approval of the going-forward elements. *See* Minn. Dept. of Commerce Comments at 36; *see also* New Mexico AG/Iowa OCA Comments at 23 ("*To the extent* that any settlement agreement has an *on-going impact* either to ILEC or CLEC, it should be filed . . . .") (emphasis added).

48/ *E.g.*, AT&T Comments at 15; Minn. Dept. of Commerce Comments at 3-27.

ruling on the specific contracts and other conduct that are the subject of the Minnesota Department of Commerce's PUC complaint. 49/ Thus, the majority of this argumentation is simply irrelevant to the fundamental legal question at issue here. 50/

49/ The Minnesota Department of Commerce misperceives this proceeding as a second opportunity for it to make the case it is attempting to prove to the Minnesota PUC, and submits extensive fact-based argumentation, much of which is redacted because it is based on undisclosed provisions of contracts and other confidential, trade secret materials. The Department, however, made no arrangements to safeguard the confidentiality of this material or to enable Qwest to review and comment on this material. To date, Qwest's counsel have not had the opportunity to review this material, and are unable to respond to it. (Indeed, it is unclear whether this material has even been submitted to the Commission.) Moreover, the bulk of this material appears to be hearsay that lacks any foundation, and is being treated as hearsay in the Minnesota proceedings. Therefore, Qwest respectfully requests that the FCC strike from the record of this "permit but disclose" proceeding the entirety of Sections II and III of the Minnesota Department of Commerce comments, as well as all other paragraphs in those comments and attachments thereto that contain redactions. These arguments are based on factual materials that have not been disclosed to Qwest, and that cannot be considered by the Commission in this proceeding. For similar reasons, Qwest requests that the redacted appendices to WorldCom's comments be stricken from the record here.

50/ The Minnesota Department of Commerce's argument based on Qwest's alleged "behind-the-scenes involvement" in Mpower's petition for forbearance and rulemaking in CC Docket No. 01-117 is puzzling, to say the least. Minn. Dept. of Commerce Comments at 10-11. Qwest filed public comments on the Mpower petition, if that is what the Department is referencing. But Mpower's comments in this proceeding make it clear that the arguments raised in the Mpower proceeding are distinguishable from those at issue here. *See* Mpower Comments, *passim* (opposing Qwest petition and explaining differences from Mpower petition). The Mpower petition is totally irrelevant to the issues before the Commission in this proceeding.

D. The Public Interest Favors Settlements That Resolve Parties' Concerns About Merger Proceedings and Section 271 Applications

Several of the parties make much of the fact that, in some agreements, CLECs obtained solutions of particular business problems in exchange for their agreeing not to participate further in regulatory proceedings regarding the Qwest/U S WEST merger or the Qwest Section 271 applications. 51/ For some parties, this allegedly improper conduct seems to be a separate, but possibly even more outrageous "offense," from Qwest's alleged failure to file certain agreements. 52/ But far from being reprehensible efforts to "silence" these parties or inappropriately influence the regulatory process, such settlements are in fact consistent with the public interest and are precisely what the Commission and state regulators should be encouraging.

It is an unfortunate fact that parties engaged in disputes with merger participants or Section 271 applicants frequently intervene in regulatory proceedings and introduce a variety of arguments in opposition (that sometimes

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51/ *See, e.g.,* Minn. Dept. of Commerce at 13, 16-17, 22; AT&T Comments at 2; Touch America Comments at 3, 6.

52/ For example, the Arizona Commission Staff concludes that Qwest "acted based upon a good faith interpretation of the underlying statutes" when it – in the Staff's view, incorrectly – failed to file certain agreements. *See* Ariz. Corp. Comm'n Utilities Division, *Staff Report and Recommendation in the Matter of Qwest Corp.'s Compliance with Section 252(e) of the Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 16 (June 7, 2002). But the Arizona staff argues that higher fines should be imposed in the case of agreements in which CLEC agreed not to oppose Qwest's merger or section 271 application, characterizing these as "attempt[s] to suppress participation by all parties for full development of the record in regulatory proceedings . . . ." *Id.* at 1.

have little or nothing to with the merits of the proceeding) in an attempt to coerce regulatory concessions from these parties. CLECs and other parties have no obligation to engage in this process, and they do not incur the often substantial costs of participating in these regulatory proceedings in a public-interested, *pro bono* attempt to help regulators fully develop the record in their proceedings. Rather, these parties do it in order to obtain favorable resolutions of their disputes with the applicants. Indeed, if CLECs can advance their interests more effectively by reaching a settlement with the applicant, then it is permissible for them to do so.

There is thus nothing even remotely improper about parties agreeing to withdraw from merger or 271 proceedings in exchange for an agreement that gives them the relief they are seeking. To the contrary, regulators should welcome such private dispute resolution, which eliminates the need for regulators to address these issues in the context of merger or 271 proceedings. Settlements that advance the interests of the parties and take issues off the table in complex regulatory proceedings should advance the public interest in the private, consensual resolution of disputes.

CONCLUSION

For the reasons stated above and in Qwest's original petition, the Commission should issue the declaratory ruling Qwest seeks.

Respectfully submitted,

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