

STATE OF COLORADO

PUBLIC UTILITIES COMMISSION

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Ex parte submission

November 26, 2002

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: Qwest Communications International, Inc., Colorado/Idaho/Iowa/Nebraska/North Dakota/Montana/Washington/Wyoming/Utah, WC Docket No. 02-314

Dear Ms. Dortch:

On November 21, 2002, at the request of the Federal Communications Commission (Commission) Staff, the undersigned, together with Ms. Rebecca Quintana of the Staff of the Colorado Public Utilities Commission (COPUC), met by telephone with Carol Matthey, Deputy Chief; Michael Carowitz; and other Commission Staff members, all of the Wireline Competition Bureau. The purpose of the telephone meeting was to answer Commission Staff questions concerning COPUC decisions and activities related to the Qwest Corporation (Qwest) unfiled "secret" agreements.

As you are aware, it is not necessary for state commissions to file *ex parte* submissions concerning contacts they may have with the Commission or its Staff during the course of this proceeding. See DA 02-2438 at 6. This *ex parte* submission is filed at the specific request of the Commission Staff to address one issue: the effect of COPUC Decision No. C02-1295. (For the Commission's convenience, a copy of Decision No. C02-1295 is attached.)

On November 19, 2002, the COPUC mailed Decision No. C02-1295 (decision), entered in a consolidated proceeding concerning 16 motions to amend existing interconnection agreements (ICAs) filed by Qwest in 11 different COPUC dockets. In the decision the COPUC reaffirmed its provisional definition of an ICA¹ and, using that

¹ The provisional definition only applies in these 11 consolidated dockets. See Decision No. C02-1295 at 3-6.

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definition, approved two of the filed ICA amendments; rejected on their merits 12 of the filed ICA amendments; and rejected as incomplete two of the filed ICA amendments.

The COPUC rejected on their merits 12 filed amendments because the COPUC found that the filed amendments did not meet the requirements of 47 U.S.C. § 252(e)(2) and of COPUC Rule 4 *Code of Colorado Regulations 723-44-5.7.2 et seq.* See Decision No. C02-1295 at 9-12. The COPUC rejected as incomplete two filed amendments because the information provided in each filing was insufficient for the COPUC to make the required determinations. See Decision No. C02-1295 at 12-13.

Commission Staff inquired about the effect of the decision. Ms. Quintana and the undersigned explained that the decision rests on the federal Telecommunications Act and that the rejected ICA amendments are null and void under the Act.

Commission Staff, Ms. Quintana, and I discussed both other aspects of the decision and the COPUC's current docket investigating the Qwest unfilled "secret" agreements. Commission Staff, however, has not requested that this *ex parte* submission address those discussions. See DA 02-2438 at 6.

Respectfully submitted,

_____/s/_____

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Decision No. C02-1295

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 96A-287T

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

DOCKET NO. 97T-507

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

DOCKET NO. 98T-042

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

DOCKET NO. 98T-519

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

DOCKET NO. 99T-040

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

DOCKET NO. 99T-067

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

DOCKET NO. 99T-598

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

DOCKET NO. 00T-064

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

DOCKET NO. 00T-277

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

DOCKET NO. 01T-013

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

DOCKET NO. 01T-019

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

**ORDER DENYING CERTAIN AMENDMENTS
TO INTERCONNECTION AGREEMENTS AND
GRANTING CERTAIN AMENDMENTS**

Mailed Date: November 19, 2002
Adopted Date: November 13, 2002

I. BY THE COMMISSION

A. Background

1. This matter arises from 11 motions for approval of 16 amendments to interconnection agreements entered into between Qwest Corporation (Qwest) and various competitive local exchange carriers (CLECs) as submitted in these respective dockets. On August 21, 2002, Qwest filed the motions for approval of these amendments, under a new policy of filing all contracts, agreements, or letter of understanding between Qwest and CLECs that create obligations that meet the requirements of 47 U.S.C. § 251(b) or (c) of the Telecommunications Act of 1996 (Act).

2. According to Qwest, it reviewed all of its currently effective agreements with CLECs in Colorado that were adopted prior to its new policy. The 11 agreements filed here represent those contracts relating to § 251(b) or (c) of the Act that have not been terminated or superseded by agreement, commission order, or otherwise.

3. Before deciding, to approve or deny the 16 filed agreements in the 11 dockets, we found it necessary, for the

limited purposes of this matter, to define what constitutes an interconnection agreement (ICA) under § 251, subject to state commission approval as provided in the Act. To accomplish this, we determined that a two-phase process was necessary.

4. In Phase I, we requested comment from the parties to these captioned dockets as to a definition of an ICA pursuant to § 251. In response to that request, Qwest, AT&T Communications of the Mountain States, Inc. (AT&T), SBC Telecom, Inc., WorldCom, Inc. (WorldCom), Commission Staff (Staff), and the Colorado Office of Consumer Counsel (OCC) submitted comments about what constitutes an ICA.

5. In addition to considering the parties' comments, we also took into account a definition of an ICA provided by the Federal Communications Commission (FCC) in response to Qwest's petition for a declaratory order.¹ There, the FCC provided a definition of an ICA, holding 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

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

collocation is an interconnection agreement that must be filed pursuant to § 252(a)(1) (emphasis in original)."²

6. The FCC defined a basic class of agreements that should be filed with the states. The FCC declined to establish a comprehensive, in-depth ICA standard, instead leaving it to the states to provide the necessary clarity to incumbent local exchange carriers (ILECs) and CLECs concerning which agreements should be filed for approval. We took additional note of language in the FCC's order that it disagreed with Qwest's assertion that the content of interconnection agreements should be limited to the schedule of itemized charges and associated descriptions of the services to which the charges apply.³

7. Utilizing the FCC's parameters and considering the comments filed by the parties to this matter, we derived a provisional definition of an ICA to be used exclusively within the context of these 11 dockets as follows:

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

² FCC 02-276 at ¶ 8, pp. 4-5.

³ *Id.*

rights-of-way, reciprocal compensation, or collocation.

8. Having determined a provisional ICA definition, we then found that the agreements filed in these 11 dockets met our definitional requirements and were therefore subject to Phase II of this process--whether to grant or reject the individual agreements. We again entertained comments on this phase of the process. Phase II comments and replies were filed by Qwest, OCC, Staff, AT&T, WorldCom, and Time Warner Telecom of Colorado, LLC (Time Warner).

9. In general, the OCC and Staff both recommend that the Commission reject all 16 amendments because they all fail to comply with the requirements set forth in §§ 252(a)(1) and 251(c)(1) of the Act, as well as the Commission's rule on Interconnection Agreements, 4 *Code of Colorado Regulations* (CCR) 723-44. Staff states that these agreements should be rejected for failure to adhere to the process requirements in § 252 (a)(1), alone. In addition, Staff asserts the agreements are incomplete, potentially discriminatory, and not consistent with the public interest because they do not fully explain the rates, terms, and conditions of the service offerings.

10. WorldCom and AT&T state that all the agreements should be approved by the Commission and should be available for other carriers to opt-in. WorldCom and AT&T state that allowing

carriers to opt-into these agreements as soon as possible protects against, or at least mitigates, the discriminatory issues raised by Staff and the OCC.

B. Amendments Subject to Approval

1. The Act requires that the Commission review and approve or reject ICAs involving ILECs 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 is guided by § 47 U.S.C. 252(e)(2) requiring that ICAs not discriminate against non-parties and be consistent with the public convenience and necessity.

2. Upon thorough scrutiny of the filed agreements and consideration of the Phase II comments, we conclude that 2 of the filed agreements will be granted, 12 agreements will be denied due to provisions that violate public policy, and 2 agreements will be denied as incomplete, as detailed in the following discussion.

C. Approved Agreements

1. Qwest filed a motion in Docket No. 96A-287T seeking approval of two attached agreements as amendments to an ICA between Qwest and WorldCom approved by this Commission in Decision No. C97-48 issued January 15, 1997, as amended.

Relevant here, the parties entered into a Business Escalation Agreement dated June 29, 2001. The Agreement provides that the parties agree to use an escalation process to resolve business issues that may arise. The escalation procedure involves three levels of participation to resolve issues that may arise.

2. We find that this agreement meets our provisional definition of an ICA. We further find that the terms of the amendment do not violate public policy, are non-discriminatory, and are consistent with the public convenience and necessity, therefore, we grant Qwest's motion for approval of this amendment to the ICA between Qwest and WorldCom.

3. In Docket No. 01T-019, Qwest filed a motion for approval of a confidential letter agreement dated October 26, 2000. The confidential agreement provides that McLeod USA Telecommunications Services, Inc. (McLeod), and Qwest will meet as necessary to develop an implementation process to establish processes and procedures to better implement the parties' ICAs. Specifically, the parties agree to attend and participate in quarterly executive meetings to attempt to resolve business issues and disputes.

4. We find that this agreement also meets our provisional definition of an ICA. We further find that the terms of the amendment do not violate public policy, are non-discriminatory and are consistent with the public convenience

and necessity, therefore, we grant Qwest's motion for approval of this amendment to the ICA between Qwest and McLeod.

5. The Commission has not previously approved all of the amended conditions proposed in these two dockets. However, we find it consistent with the terms of the agreement, the directives of the Act and our own ICA rules to approve the amendments, subject to our own rules and general ratemaking proceedings.

D. Denied Agreements

1. Qwest also filed motions for approval of amendments in the following dockets:

96A-287T MCI Confidential Billing Agreement dated
June 29, 2001

97T-507 Global Crossing Local Services, Inc.
Confidential Billing Agreement dated
July 13, 2001

98T-042 NextLink Colorado, LLC f/k/a XO
Colorado, Inc. Confidential Billing
Agreement dated December 31, 2001

98T-519 Advanced Telecom Group, Inc. Facility
Decommissioning Agreement dated
October 8, 2001

99T-040 Ernest Communications, Inc.
Confidential Settlement Agreement dated
September 17, 2001

99T-067 DIECA Communications, Inc. d/b/a Covad
Communications Company Facility
Decommissioning Agreement dated
January 3, 2002 and U S WEST Service Level
Agreement dated April 19, 2000

- 99T-598 Kings Deer Telephone Company, Inc.
n/k/a SunWest Communications, Inc.
Settlement Agreement and Mutual Release
dated May 31, 2001 and Confidential
Billing Settlement Agreement dated
January 18, 2002
- 00T-277 Southern Bell Telecom, Inc. Letter
Proposing Settlement Terms dated
June 1, 2000
- 01T-013 Time Warner Telecom of Colorado, LLC
Confidential Billing Settlement
Agreement dated March 16, 2001

2. Commission Rule 4 CCR 723-44-5.7.1 requires that we either reject or approve an application or motion for approval of an amendment with written findings as to any deficiencies. Rule 4 CCR 723-5.7.2 *et seq.* provides the grounds to reject an ICA or amendment to an ICA. Generally, Rule 5.7.2 requires that we reject an ICA or amendment if it is discriminatory, not consistent with the public interest, convenience, and necessity, or is not in compliance with intrastate telecommunications service quality standards.

3. These agreements all contain confidential provisions that are an essential element of the respective agreements, or redact essential financial information from the filed agreement. The confidentiality provisions in these agreements were part of the ICA bargain. Thus, the confidentiality provision is inextricably tied to, and is an essential element of the entire agreement. Because the

confidentiality clauses are bound inextricably to the whole, these agreements must be denied in whole.⁴

4. Further, §§ 251 and 252 of the Act requires that ICAs and amendments be negotiated and proffered in as transparent a manner as possible. This transparency is encouraged in order to advance the intent of the Act to promote non-discrimination and competition in local telecommunications service areas. To the extent that the parties' have redacted substantive financial information from the filed amendments that prevent other ILECs from picking and choosing provisions we deny Qwest's motions for approval of these amendments to the ICAs.

5. In addition to the confidentiality provisions found in these agreements, 7 of these 12 agreements also contain an arrangement between Qwest and the representative CLEC that the CLEC will withdraw from the U S WEST/Qwest merger proceeding or the Qwest § 271 proceeding.⁵ The bartering of a CLEC's participation in proceedings of general applicability before this Commission--the main purpose of which is to record actual commercial experience for the overall goal of increased competition and ease with which CLECs do business with Qwest--is

⁴ There is also the logical impossibility here of us approving an agreement with a confidentiality term when that term is being self-evidently breached by the filing of the agreement.

⁵ The agreements are with, variously: Covad Communications, SunWest Communications, Southern Bell Telecom, Time Warner, and McLeod.

against the public interest. The analogy we draw is to that of contracts void against public policy. See *Wood v. Casserleigh*, 30 Colo. 287, 71 P. 360, 361 (1902). We cannot countenance contracts that by their terms impede the Commission's access to information in proceedings of general applicability.⁶ Therefore, these agreements must be rejected under 47 U.S.C. § 252(e)(2)(A)(ii).

E. Agreements Denied on Other Grounds

1. Qwest filed motions for approval of amendments in the following two remaining dockets:

00T-064 Electro-Tel, Inc. (Eschelon)
Settlement Agreement dated
March 1, 2002

01T-019 McLeodUSA
Confidential Billing Settlement Agreement
Dated May 1, 2000

2. Commission Rule 4 CCR 723-44-5.2 states that "the interconnection agreement or amendment in its entirety, including any attachments, shall be submitted to the Commission." These two documents filed by Qwest do not contain the entire agreements. The March 1, 2002 Settlement Agreement

⁶ We hasten to distinguish agreements to cease specific, private party complaints and agreements not to participate in proceedings of general applicability. Both the Qwest/U S WEST merger proceeding and the Qwest § 271 proceeding required the Commission receive all information, from all parties, relevant to the merits of those applications. Settlement agreements not to participate in those proceedings - often settling issues collateral to those general proceedings - preclude the Commission from receiving the relevant information to decide in those dockets. Therefore, we cannot accept such settlements.

between Qwest and Eschelon contains both redaction of credit amounts, and references to eight other agreements to be terminated. These terminated agreements are not part of this record. In addition, this agreement states at paragraph (c) "Attachment 3 to the Implementation Plan dated July 31, 2001/August 1, 2001 relating to UNE-E will continue to bind the Parties unless the Parties agree otherwise in a writing executed by both Parties." The Implementation Plan and its Attachment 3 were not made part of this filing. As stated above, Rule 5.7.2 requires that we reject an amendment if it is discriminatory or not in the public interest. Without the entire agreement and all attachments before us, we cannot make a finding that the requirements of Rule 5.7.2 have been met.

3. The May 1, 2000, McLeod Billing Settlement Agreement contains redacted information concerning credit amounts paid by U S WEST to McLeod for dismissing, with prejudice, a complaint proceeding before this Commission. Again, because we do not know all the rates, terms, and conditions, in this agreement, we cannot make a finding that the requirements of Rule 5.7.2 have been met.

4. These agreements are thus rejected.

F. Other Procedural Matters

1. Staff submitted a confidential version and a public version of its Phase II Initial Comments. It therefore,

filed a Motion to Accept the Public Version of Staff's Phase II Initial Comments on November 8, 2002. We grant Staff's motion.

2. Time Warner late-filed its Phase II Reply Comments and Motion for Their Acceptance on November 12, 2002. We grant Time Warner's motion to accept its late-filed reply comments.

II. ORDER

A. The Commission Orders That:

1. The motion of Qwest Corporation in Docket No. 96A-287T seeking approval of a Business Escalation Agreement dated June 29, 2001 as an amendment to its Interconnection Agreement with MCI WorldCom Communications, Inc., is granted consistent with the discussion above.

2. The motion of Qwest Corporation in Docket No. 01T-019 seeking approval of a Confidential Letter Agreement dated October 26, 2000 as an amendment to its Interconnection Agreement with McLeod USA Telecommunications Services, Inc., is granted consistent with the discussion above.

3. The motion of Qwest Corporation in Docket No. 96A-287T seeking approval of a Confidential Billing Agreement dated June 29, 2001 as an amendment to its Interconnection Agreement with MCI WorldCom Communications, Inc., is denied consistent with the discussion above.

4. The motion of Qwest Corporation in Docket No. 97T-507 seeking approval of a Confidential Billing Agreement dated July 13, 2001 as an amendment to its Interconnection Agreement with Global Crossing Local Services, Inc., is denied consistent with the discussion above.

5. The motion of Qwest Corporation in Docket No. 98T-042 seeking approval of a Confidential Billing Agreement dated December 31, 2001 as an amendment to its Interconnection Agreement with NextLink Colorado, LLC, formerly known as XO Colorado, Inc., is denied consistent with the discussion above.

6. The motion of Qwest Corporation in Docket No. 98T-519 seeking approval of a Facility Decommissioning Agreement dated October 8, 2001 as an amendment to its Interconnection Agreement with Advanced Telecom Group, Inc., is denied consistent with the discussion above.

7. The motion of Qwest Corporation in Docket No. 99T-040 seeking approval of a Confidential Settlement Agreement dated September 17, 2001 as an amendment to its Interconnection Agreement with Ernest Communications, Inc., is denied consistent with the discussion above.

8. The motion of Qwest Corporation in Docket No. 99T-067 seeking approval of a Facility Decommissioning Agreement dated January 3, 2002 and a U S WEST Service Level

Agreement dated April 19, 2000, as an amendment to its Interconnection Agreement with DIECA Communications, Inc., doing business as Covad Communications Company is denied consistent with the discussion above.

9. The motion of Qwest Corporation in Docket No. 99T-598 seeking approval of a Settlement Agreement and Mutual Release dated May 31, 2001 and Confidential Billing Settlement Agreement dated January 18, 2002, as an amendment to its Interconnection Agreement with Kings Deer Telephone Company, Inc., now known as SunWest Communications, Inc., is denied consistent with the discussion above.

10. The motion of Qwest Corporation in Docket No. 00T-277 seeking approval of a Letter Proposing Settlement Terms dated June 1, 2000 as an amendment to its Interconnection Agreement with Southern Bell Telecom, Inc., is denied consistent with the discussion above.

11. The motion of Qwest Corporation in Docket No. 01T-013 seeking approval of a Confidential Billing Settlement Agreement dated March 16, 2001 as an amendment to its Interconnection Agreement with Time Warner Telecom of Colorado, Inc., is denied consistent with the discussion above.

12. The motion of Qwest Corporation in Docket No. 00T-064 seeking approval of a Settlement Agreement dated March 1, 2002 as an amendment to its Interconnection Agreement

with Eschelon Telecom of Colorado, Inc., formerly known as Electro-Tel, Inc., is denied consistent with the discussion above.

13. The motion of Qwest Corporation in Docket No. 01T-019 seeking approval of a Confidential Billing Settlement Agreement dated May 1, 2000 as an amendment to its Interconnection Agreement with McLeod USA Telecommunications Services, Inc., is denied consistent with the discussion above.

14. Commission Staff's request to accept the public version of its Phase II Initial Comments is granted.

15. Time Warner Telecom of Colorado, LLC's Late-Filed Phase II Reply Comments and Motion for Their Acceptance is granted.

16. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' DELIBERATION MEETING
November 13, 2002.**

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

POLLY PAGE

JIM DYER

Commissioners

ATTEST: A TRUE COPY

A handwritten signature in cursive script, reading "Bruce N. Smith".

Bruce N. Smith
Director