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MOUNTAIN TELECOMMUNICATIONS, INC.
Complainant,

DOCKET NO. T-01051B-03-0092

v.

QWEST CORPORATION,
Respondent

MOTION FOR PRELIMINARY
INJUNCTION

MOTION FOR PRELIMINARY INJUNCTION

Mountain Telecommunications, Inc. ("MTI"), by its attorneys, pursuant to A.R.C. R14-3-106 and Rule 65 of the Arizona Rules of Civil Procedure (16 Ariz. Rev. Stat., Rules of Civil Procedure, Rule 65), hereby files this Motion for Preliminary Injunction to enjoin Qwest Corporation ("Qwest") from charging unjust and unreasonable prices to MTI for unbundled network elements pending the resolution of the above-captioned proceeding and the Commission's issuance of final rules regarding the pricing of transport facilities.¹

¹ Concurrent with this Motion for Preliminary Injunction, MTI is filing a Complaint against Qwest which requests injunctive and declaratory relief concerning Qwest's prices for unbundled network elements.

BACKGROUND

On January 9, 2003, MTI filed applications to intervene in two docketed proceedings before this Commission regarding Qwest's pricing of unbundled network elements.² As of the date of this motion, MTI's applications to intervene remain pending. On January 16, 2003, MTI filed a Motion for Injunction in the Commission's docketed proceedings regarding Qwest's implementation of the Qwest Wholesale Pricing Decision and the Complaint and Order to Show Cause addressed to Qwest. MTI's Motion for Injunction requested the Commission to enjoin Qwest from charging unjust and unreasonable prices to MTI for unbundled network elements and to stay the effective date of the interim rules for pricing transport facilities established in Decision No. 64922. Both Qwest and AT&T Communications of the Mountain States, Inc. ("AT&T") filed oppositions to MTI's Motion for Preliminary Injunction, but MTI has not yet filed its reply. Simultaneously with the filing of this motion, MTI filed a complaint against Qwest based on recently received invoices containing charges for transport and local interconnection facilities and local loops.

STATEMENT OF FACTS

MTI is a telecommunications carrier certificated by the Commission to provide services, including competitive local exchange services, in the State of Arizona. MTI is incorporated under the laws of the State of Arizona, and its corporate headquarters are located at 1430 W. Broadway, Suite A-200, Tempe, Arizona 85282.

² In the Matter of the Investigation into Qwest Corporation's Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts, Docket No. T-0000A-00-0194 (Phase II) ("Qwest Wholesale Pricing Decision" or "Decision No. 64922") and Complaint and Order to Show Cause, Docket No. T-0105B-02-0871.

As a provider of telecommunications services, MTI utilizes network elements of Qwest Communications, the predominant incumbent local exchange carrier (ILEC) in Arizona, which it acquires on an unbundled basis pursuant to Section 251(c)(3) of the Communications Act of 1934, as amended ("Communications Act") (47 U.S.C. § 251(c)(3)) and subject to an interconnection agreement approved by the Commission. MTI is especially reliant on the transport facilities of Qwest, as well as Qwest's local interconnection facilities. MTI uses Qwest transport facilities to connect its customers' premises with serving wire centers and to move telecommunications traffic between central offices within Qwest territory.

On June 12, 2002, the Commission issued Decision No. 64922, in which the Commission adopted new rates to be charged by Qwest for unbundled network elements and resale. In the Qwest Wholesale Pricing Decision, regarding transport, the Commission adopted the results of the HAI model for development of transport rates, notwithstanding its concern that rates based on that model might not be appropriate. The Commission stated in Decision No. 64922:

[a]lthough we are adopting the HAI model's results at this time, we believe that this issue should be re-examined in Phase III so that a full record may be developed. . . . In Phase III, Qwest should provide the parties, through discovery, the wire center specific information necessary for the CLECs to determine how the HAI model can be deaveraged into appropriate fixed and per mile components.³

The issue of appropriate modeling for establishment of transport rates will be re-examined based on a full record in Phase III of the proceeding.

As a CLEC operating in Arizona, MTI is reliant on access to Qwest unbundled network elements at prices approved by the Commission based upon the Total Element Long Run

³ Decision No. 64922, at 79.

Incremental Cost (TELRIC) standard promulgated by the Federal Communications Commission (FCC), as part of its implementation of the Telecommunications Act of 1996 (Pub. L. 104-104, 110 Stat. 56 (1996)).⁴ The Commission indicated in the Qwest Wholesale Pricing Decision that the record compiled to date is not sufficient to conclude that transport rates and the rates for local interconnection facilities based on the HAI model will produce lawful rates in accordance with Sections 251(c)(3) and 252(d) of the Communications Act (47 U.S.C. §§ 251(c)(3)), 252(d)) and the FCC's TELRIC standard.

The rates for network elements, interconnection and resale mandated by the Qwest Wholesale Pricing Decision were to be effective on June 12, 2002. Qwest did not begin to implement those rates until January 2003.⁵ On January 2, 2003, MTI received its first invoice from Qwest containing charges for transport facilities based upon Qwest's understanding and implementation of Decision No. 64922. Qwest's invoice to MTI received on January 2, 2003 included charges for transport facilities that were significantly higher than the previously-applicable charges for that service. Indeed, the charges for transport and local interconnection facilities provided as unbundled network elements as reflected in that January 2 invoice, as well as in subsequently-received invoices, are significantly higher than the charges for the identical facilities when purchased pursuant to Qwest's interstate access service tariff (Tariff FCC No. 1) on file with the FCC, rates which are not subject to TELRIC pricing.

⁴ In Re Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 15499, *aff'd. sub. nom. Verizon Communications, Inc. et al. v. FCC*, 122 S. Ct. 1646 (2002).

⁵ Qwest's delay led to Commission Staff filing a Complaint and Order to Show Cause on November 26, 2002 requesting that Qwest be ordered to show cause why its failure to implement the rates required by Decision No. 64922 is not unreasonable and why it should not be held in contempt. By Decision No. 65450 issued December 12, 2002, Qwest has been ordered to show cause.

Qwest's invoice received by MTI on January 2, 2003, included monthly transport charges for December 2002 that represented an increase by forty-two percent (42%) in the Tucson LATA (668) and by seventy-one percent (71%) in the Phoenix LATA (666).⁶ For example, Qwest implemented the following monthly rate increases for transport: Circuit ID No. 16 HCFU710813 (Tucson Main – Tucson East) has increased from \$46.49 to \$153.59; Circuit ID Nos. 16 HCFU710814 and 16 HCFU711110 (Tucson Main – Tucson Craycroft), each has increased from \$48.44 to \$153.59; Circuit ID Nos. 14 HCFU998297 and 14 HCFU998298 (Scottsdale Main – Tempe Main), each has increased from \$47.79 to \$153.59; Circuit ID Nos. 14 HCFU969107 and 14 HCFU970017 (Scottsdale Main – Scottsdale Thunderbird) (DS-3 circuits), each has increased from \$353.05 to \$1,834.61.

Qwest's invoice received by MTI on January 2, 2003, included monthly local interconnection facilities charges for December 2002 that represented an increase by thirty-four percent (34%) in the Tucson LATA and by one hundred fifty four percent (154%) in the Phoenix LATA. For example, Qwest implemented the following monthly rate increases for local interconnection service: Circuit ID 101T1ZF SNMNAZMADADCO (San Manuel Main – Tucson Main) increased from \$46.88 to \$75.95; Circuit ID Nos. 105T1ZFSRVSAZMAHJ1, 107SRVSAZMAHJ1, and 108T1ZFSRVZSAZMAHJ1 (Sierra Vista Main – Sierra Vista South), each increased from \$19.94 to \$75.95; Circuit ID No. 101T3MESAAZMAK19 (Mesa Main – Scottsdale Main) increased from \$371.71 to \$1,137.30; Circuit ID Nos. 101T3PHNXAZMAK06

⁶ MTI has calculated these percentage increases by comparison of its invoices received from Qwest for October 2002 service (based on the pre-Decision No. 64922 rates) with its invoices for December 2002 service (received in January 2003, based upon Qwest's selective implementation of the rate changes reflecting its understanding of Decision No. 64922).

and 101T3PHNXAZNOK14 (Scottsdale Main – Phoenix Main), each increased from \$391.48 to \$1,137.30; Circuit ID No. 102T1PHNXAZMYDCO (Phoenix North – Phoenix Maryvale) increased from \$20.59 to \$75.95; Circuit ID No. 102T1PHNXAZSODGO increased from \$20.59 to \$75.95.

In addition to the substantial rate increases for transport and local interconnection facilities first reflected in Qwest's January 2, 2003 invoice to MTI, Qwest now has attempted to invoice MTI the far higher transport and local interconnection facilities rates retroactively to June 2002. Qwest's invoices dated January 26, 2003 included line item charges totaling \$327,274.66 retroactively applying increased transport charges to service provided between June 12, 2002 and December 25, 2002. MTI estimates that the increased monthly charge for transport and local interconnection facilities will increase MTI's costs by \$54,866.60 per month, based upon current usage levels.

While Qwest has implemented substantial price increases for transport , it continues to delay its implementation of price decreases for other network elements mandated by the Commission in Decision No. 64922. In invoices received on January 10, 2003, Qwest incorporated the rate changes for unbundled loops only for recurring charges on new loops installed in December 2002. Recurring charges for loops installed prior to December 2002 continue to be invoiced at the far-higher pre-Decision No. 64922 rates. The nonrecurring (installation) charge for local loops installed in December failed to reflect the new rates set forth in Decision No. 64922. Therefore, MTI is being charged prices for unbundled loops that are significantly higher than those permitted in the Qwest Wholesale Pricing Decision.

Qwest's massive rate increases for transport and local interconnection facilities, as well as Qwest's continued and unjustified delay in implementing new lower rates for local loops, are inconsistent with the Commission's intent in Decision No. 64922 and violate the statutory requirements codified at Section 252(d)(1)(A) of the Communications Act (47 U.S.C. § 252(d)(1)(A)) that unbundled network element rates must be based on cost (without reference to rate of return or other rate-based proceeding), must be nondiscriminatory, and may include a reasonable profit. Neither do the rates charged for transport conform with the FCC's TELRIC standard, nor with the statutory standard of lawfulness codified at A.R.S. § 40-361.

Continued imposition on MTI of the unlawful transport, local interconnection facility and local loop rates reflected in Qwest's recent invoices will make it uneconomic for MTI to offer competing local telecommunications services through use of unbundled network elements as it is statutorily entitled to do, and may have the unintended consequence of forcing MTI to exit the local service marketplace in Arizona.

Therefore, MTI requests the Commission to issue an order enjoining Qwest from charging unjust and unreasonable prices to MTI for unbundled network elements. Specifically, MTI seeks an order enjoining Qwest from charging unjust and unreasonable prices to MTI for unbundled network elements pending the resolution of the above-captioned proceeding and the Commission's issuance of final rules regarding the pricing of transport facilities in Phase III of the proceeding in Docket No. T-00000A-00-0194.

ARGUMENT

In evaluating a motion for injunctive relief, the Commission must consider four factors:

1) whether the applicant has made a strong showing of likelihood of success on the merits; 2)

whether the applicant will be irreparably injured absent an injunction; 3) whether grant of the injunction will substantially injure other interested parties; and 4) where the public interest lies. See Overstreet v. Thomas Davis Medical Centers, P.C., 978 F. Supp. 1313 (D. Ariz. 1997); see also Motion of Ranger Cellular and Miller Communications, 17 FCC Rcd 9320, ¶ 5 (citing Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958)); Kromko v. City of Tucson, 202 Ariz. 499, 501, 47 P.3d 1137, 1139 (Ariz. Ct. App. 2002) (citing Schoen v. Schoen, 167 Ariz. 58, 804 P.2d 787 (Ariz. Ct. App. 1991)). The standard for evaluating requests for injunctions is the same as the standard used for evaluating requests for stays. See Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983).

The Ninth Circuit uses two tests to determine whether an injunction or stay should be issued: the traditional test described above and a less stringent alternate test. The alternate test requires the moving party to show: “1) a combination of probable success on the merits and the possibility of irreparable injury; or 2) that serious questions are raised, the balance of hardship tips sharply in the movant’s favor and the movant has a fair chance for success on the merits.” Pentax Corporation v. Myhra, 182 F.R.D. 458, 462 (9th Cir. 1994); see Schoen, 167 Ariz. at 63, 804 P.2d at 792. An injunction or stay may be issued under either test. Id. (citing National Wildlife Federation v. Coston, 773 F.2d 1513, 1517 (9th Cir. 1985)).

In this case, MTI has made a substantial showing on all four factors in the traditional test, as well as on the requirements of the alternate test, that mandates the Commission’s grant of MTI’s request for an injunction.

I. THERE IS A STRONG LIKELIHOOD OF SUCCESS ON THE MERITS.

The first factor of the four-part test for injunctive relief requires a petitioning party to make a showing that the petitioner has a substantial likelihood of prevailing on the merits of the underlying case. In this instance, MTI's likelihood of success on the merits is strong.

Section 251(c)(3) of the Communications Act (47 U.S.C. § 251(c)(3)) requires incumbent local exchange carriers, such as Qwest, to provide nondiscriminatory access to network elements on an unbundled basis "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . Section 252." Section 252 of the Communications Act (47 U.S.C. § 252) requires that state commissions establish rates based on the statutory standard contained in that section. Section 252(d)(1)(A) provides that the "just and reasonable rate for network elements for purposes of subsection (c)(3) [of Section 251] (A) shall be – (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and (ii) nondiscriminatory, and (B) may include a reasonable profit." In addition, Section 40-361 of Arizona's Revised Statutes mandates that "[c]harges demanded or received by a public service corporation for any commodity or service shall be just and reasonable. Every unjust and unreasonable charge demanded or received is prohibited and unlawful."

Qwest has substantially increased the prices it charged MTI for transport and local interconnection facilities on both a retroactive and prospective basis. Qwest has increased its prices for transport by 42 percent in the Tucson LATA and by 71 percent in the Phoenix LATA. In addition, Qwest has increased its prices for local interconnection facilities by 34 percent in the Tucson LATA and by 154 percent in the Phoenix LATA. Such drastic price increases are not

the result of identical increases in Qwest's costs of providing transport and local interconnection facilities, and therefore, violate Section 252(d)(1)(A) of the Communications Act and the FCC's TELRIC standard. Furthermore, Qwest's increased prices for transport and local interconnection facilities are unjust and unreasonable in violation of Section 252(c)(3) of the Communications Act.

Qwest's dramatically increased charges for transport and local interconnection facilities and Qwest's charges for other network elements, including unbundled loops, which continue to be priced far above the rate levels mandated by Decision No. 64922, are inconsistent with the intent of Decision No. 64922. In Decision No. 64922, the Commission stated:

it is our duty and our goal in this proceeding to set prices for interconnection and network elements at a level that fairly compensates Qwest and allows CLECs that operate as efficient providers to compete, thereby bringing competitive choices to the intended beneficiaries of the 1996 Act, the end-user customer.⁷

The rate changes mandated in Decision No. 64922 were to have been effective immediately on June 12, 2002. Commencing January 2003, Qwest began charging MTI rates for transport that are purportedly in accordance with the HAI model and rates for local interconnection facilities that are purportedly in accordance with Decision No. 64922. However, these rates constitute an increase in prices for transport by a minimum of 34 percent and an increase in prices for local interconnection facilities by a minimum of 42 percent over the prices that Qwest charged for those services prior to Decision No. 64922. This result is directly contrary to the Commission's stated purpose of the Qwest Wholesale Pricing Decision, which was to fairly compensate Qwest while facilitating competition in the provision of

⁷ Decision No. 64922, at 81.

telecommunications services. MTI asserts that it is highly improbable that Qwest's cost of providing transport and local interconnection facilities justified the increased prices which Qwest now seeks to charge for those network elements. Qwest's insistence on charging a drastically increased and exorbitant rates for transport and local interconnection facilities is neither just nor reasonable.

While Qwest has determined a way to increase MTI's transport rates, Qwest has failed to implement the rate changes for local loops required by Decision No. 64922. As a result, MTI is subject to dramatically increased transport charges, while it is denied the benefit of decreased local loop charges as was intended by the Commission in Decision No. 64922. Therefore, MTI is subject to increased costs which make it uneconomic for MTI to continue providing competitive service in Arizona. Such a result is directly contrary to the goal of Decision No. 64922, which was to bring competitive choices to end users, and further indicates that Qwest's prices are unjust and unreasonable in violation of Section 40-361 of Arizona's Revised Statutes..

In conclusion, MTI has demonstrated that there is a substantial likelihood that the Commission will find that Qwest is charging unjust and unreasonable prices for unbundled network elements in violation of Sections 251(c)(3) and 252(d)(1)(A) of the Communications Act and Section 40-361 of Arizona's Revised Statutes.

II. MTI WILL SUFFER IRREPARABLE HARM IF INJUNCTIVE RELIEF IS NOT GRANTED.

The second factor requires a petitioner to show that irreparable injury will be suffered unless the injunction is issued. "In order to meet this burden [petitioners] need to establish that at the time of the injunction it was under a substantial '... threat of harm which cannot be undone . . .' through monetary remedies." Speigel v. Houston, 636 F.2d 997, 1001 (5th Cir. 1981).

“Generally, destruction of a business constitutes irreparable harm sufficient to warrant the granting of an injunction provided the other three elements [for granting injunctive relief] . . . are met.” Perpetual Bldg. Limited Partnership v. District of Columbia, 618 F. Supp. 603, 616 (D.D.C. 1985); see also Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

MTI will suffer irreparable harm if Qwest is not prevented from charging MTI unjustly and unreasonably high amounts for unbundled network elements. As explained in Section I of this Argument, Qwest has increased its prices for transport by 42 percent in the Tucson LATA and by 71 percent in the Phoenix LATA, and has increased its prices for local interconnection facilities by 34 percent in the Tucson LATA and by 154 percent in the Phoenix LATA. MTI has estimated that the increased monthly transport and local interconnection facilities charges will cause MTI’s monthly cost of providing service to increase by over \$54,000 based upon its current requirements. As MTI’s business grows, the amount of these excessive transport and local interconnection facilities charges will increase. This increase will negatively impact MTI’s ability to provide telecommunications service to its customers and make it uneconomical for MTI to continue to provide competitive local telecommunications service. Such pricing increases could result in limiting the services which MTI can economically offer to consumers. As such, MTI would be irreparably harmed if Qwest is permitted to charge MTI for transport and local interconnection facilities at its current rate.

III. THERE WILL BE NO HARM TO QWEST IF INJUNCTIVE RELIEF IS GRANTED.

Factor three of the four-part test for injunctive relief requires a petitioner to show that the threatened injury to the petitioner outweighs any damage the proposed injunction may cause to

the opposing party. In contrast to the irreparable harm that will be suffered by MTI if Qwest is permitted to charge exorbitant and unjustifiable amounts for transport and local interconnection facilities, while refusing to implement price decreases for local loops as required by Decision No. 64922, Qwest will not suffer any injury if an injunction is granted. MTI will pay Qwest in full for all transport and local interconnection facilities at the previous rates charged for those services and MTI will pay Qwest for local loops at the rates mandated by Decision No. 64922. A Commission order requiring Qwest to charge the transport and local interconnection facilities rates it had been charging and requiring Qwest to comply with the Qwest Wholesale Pricing Decision regarding the pricing of unbundled local loops would not harm Qwest in any manner. In fact, if Qwest is permitted to continue to charge MTI at unreasonably high rates, it will receive an unjust enrichment. Given that no harm will result to Qwest if the injunction is granted, the balance of hardships favors MTI and favors granting the injunctive relief requested herein.

IV. THERE IS A SIGNIFICANT PUBLIC INTEREST IN COMPETITION WITHIN THE MARKET FOR LOCAL TELECOMMUNICATIONS SERVICES.

Finally, factor four of the test for injunctive relief requires a petitioner to show that the injunction will not be adverse to public interest. MTI's receipt of transport and local interconnection facilities from Qwest is essential to MTI's provision of basic telecommunications services to MTI's customers in Arizona. Qwest's continued charging of exorbitant transport and local interconnection facilities rates to MTI will cause MTI to be economically unable to provide telecommunications service to end-users. The loss of a competing provider of service is contrary to the goal of Decision No. 64922, which is to encourage competition in order to provide consumers with competitive choices. Furthermore, as explained in Section I of this Argument, Qwest's actions violate Sections 251(c)(3) and 252(d) of the Communications Act and Section 40-361 of the

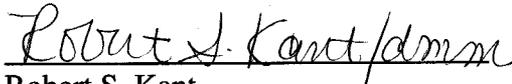
Arizona Revised Statutes. There is a strong public interest benefit in having carriers engage in lawful activities and comply with their legal obligations.

CONCLUSION

Based on the foregoing, MTI respectfully requests the Commission to grant MTI's Motion for Preliminary Injunction and issue an order enjoining Qwest from charging unjust and unreasonable prices to MTI for unbundled network elements pending the resolution of the above-captioned proceeding and the Commission's determination of final rules governing the pricing of transport facilities.

Respectfully submitted,

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February 12, 2003

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Motion for Preliminary Injunction on all parties of record in this proceeding by mailing a copy thereof, properly addressed with first class postage prepaid to the following:

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Dated at Washington, D.C., this 12th day of February, 2003.


Michelle D. Diedrick

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