ORIGINAL

0000004206

BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
Chairman
WILLIAM MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN MAYES
Commissioner

Arizona Corporation Commission
DOCKETED
APR 23 2004
DOCKETED BY

RECEIVED
2004 APR 23 P 3: 59
AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF QWEST CORPORATION'S FILING AMENDED RENEWED PRICE REGULATION PLAN.	DOCKET NO. T-01051B-03-0454
IN THE MATTER OF THE INVESTIGATION OF THE COST OF TELECOMMUNICATIONS ACCESS.	DOCKET NO. T-00000D-00-0672 **OMNIBUS REPLY IN SUPPORT OF QWEST'S APPLICATION FOR REHEARING**

I. INTRODUCTION.

Qwest Corporation ("Qwest") offers the following Omnibus Reply to the comments filed by the Residential Utility Consumer Office ("RUCO"), Commission Staff, and MCI in response to Qwest's February 25, 2004 Application for Rehearing in the above-captioned matter. Qwest has made every effort to keep this Reply as brief as possible, and therefore incorporates the arguments contained in its Application for Rehearing. Qwest has already filed a Reply in Support of its Motion to Revise Productivity Factor, so Qwest will not address those issues except to the extent that other parties have made additional substantive comments in their most recent filings.

II. ARGUMENT.

A. RUCO

First, Qwest notes that RUCO supports Qwest's application for rehearing on the issue of intrastate access rate reductions. RUCO's Response at 1 & 4-6. RUCO correctly

points out that the language in the 2001 Settlement Agreement and the Price Cap Plan is unambiguous in calling for only three $5 million access rate reductions at specific times during the initial term of the Plan. *Id.* at 5. RUCO's role as a consumer advocate gives it considerably greater credibility on this issue than MCI, which is the only party claiming that the Agreement and the Plan require additional access rate reductions.

Qwest does not agree, however, with RUCO's analysis regarding the productivity adjustment mechanism. Although it is true that the access provision of the Plan functions differently than the Basket One provision, interpreting Decision No. 63487 to enact arbitrary annual Basket One rate reductions after the initial term of the Plan has ended is not inherently more logical or lawful than interpreting the Decision to require additional access rate cuts. Qwest has outlined its interpretation of the Basket 1 provisions of the Plan, and has cited the relevant law and the supporting evidence at some length in its Application for Rehearing. Qwest will not repeat those arguments here, but will note briefly where RUCO has taken evidence significantly out of context.

As an initial matter, although RUCO points out that the Plan calls for "annual" reductions, it fails to note that the Plan mandates the reduction mechanism be applied only "for the initial three year term of the Plan." 2001 Price Cap Plan at 1, ¶ 2(b)(i). Similarly, the Settlement Agreement clearly states that the Basket 1 reductions will be made "for each year *of the initial term*." Settlement Agreement at 4 (emphasis added). RUCO also presents testimony out of context. RUCO quotes attorneys for Staff and Qwest asking questions of witnesses based on the premise that the Plan, and particularly the Basket One hard caps, would continue in effect during any interim period after expiration of the initial term of the Plan. RUCO's Response at 7-8. RUCO argues that these exchanges imply that the Basket One Price Cap Index adjustments should also be made during any interim period. RUCO does not mention, however, that these questions were asked in response to specific concerns raised by RUCO's witness, Dr. Ben Johnson,

who had suggested two potential problems that could occur during an interim period.

First, Dr. Johnson suggested that the service-specific hard caps on Basket One services might somehow disappear after the initial three-year term. Supplemental Testimony of Dr. Ben Johnson. Ph.D. at 20-21 (Nov. 13, 2000). The context shows that Staff and Qwest wanted to make clear that the caps on Qwest's Basket One rates would not be removed if the Plan expired without a new rate structure in place. Hearing Transcript, Vol. III at 443, 456-59 (Dec. 1, 2000). The language ultimately adopted in the Settlement Agreement to address this issue also demonstrates that the parties were primarily concerned with ensuring that "the hard caps on Basket One services" would continue during any interim period. Settlement Agreement at 6. Neither the Agreement nor the Plan (nor the record testimony) says anything about making additional index reductions after the end of the initial term.

Second, none of the testimony RUCO points to supports the proposition that any of the parties expected additional rate reductions to be made during the interim period using the outdated 4.2% productivity factor. In fact, based on his experience in Indiana, Dr. Johnson appeared to be suggesting that the productivity factor was *too low* for the long run, and that *Qwest* should not be able to keep this inappropriately low productivity factor in effect during any interim period. *See* Hearing Transcript, Vol. III at 444 (Dec. 1, 2000). If anything, the quoted testimony supports Qwest's argument that the parties did ***not*** expect to continue using the same productivity factor after the initial three-year term, and that the factor should be adjusted if it is applied at all. Taken in context, the 2000 hearing testimony cited by RUCO shows only that the parties originally interpreted the Settlement Agreement and Plan to require the rates in effect at the end of the initial term to continue in effect during any interim period.

Finally, RUCO suggests that Qwest is somehow asking for the immediate implementation of new rates. RUCO's Response at 10. To the contrary, Qwest is

arguing that the Agreement and Plan call for the rates in effect on March 31, 2004 to remain in effect during any interim period. This is the only result that complies with Arizona law. Alternatively, if the Agreement and Plan are interpreted to call for an April 1, 2004 rate reduction, Qwest argues that the Plan at least requires additional Basket One reductions to be made on the basis of a productivity factor that is recalculated according to the method expressly outlined in the Plan. If the Plan is interpreted to require arbitrary annual reductions based on an outdated productivity factor for an indefinite period of time, then the Plan's provision for the interim period after the initial three-year term is clearly unconstitutional under *Scates*.

B. Staff

First, Staff suggests that Qwest made new arguments in the Application for Rehearing. Staff's Response at 2. Such a characterization is incorrect. The only argument Qwest made that might conceivably be considered "new" is Qwest's response to specific language from Decision No 66772 and the Open Meeting Transcript strongly suggesting that rate reductions were being made on the basis of inadequate evidence, with the improper purpose of giving Qwest an "incentive" to bring these proceedings to a rapid conclusion. Qwest's Application for Rehearing at 12-13. Qwest's arguments were sensible and proper responses to the reasoning set forth, for the first time, by the Commission at the Open Meeting and in its Decision. Moreover, even if Qwest had made new arguments in its Application for Rehearing, Qwest had little opportunity to make such arguments earlier in the process. Qwest did not submit significant exceptions because Qwest supported the ALJ's original Recommended Order.

On the other hand, Staff makes a new argument that the continuation clause in the Settlement Agreement is "the *only* provision in the Agreement and Price Cap Plan that governs during a 'gap period'" and that "Qwest's reliance on upon other portions of the

Plan is simply not appropriate."[1] Staff's Response at 2 & 7 (emphasis in original). Staff seems to be suggesting that the continuation clause provides for a standardless interim period during which the Commission can ignore the Plan's clear limitations on the allowable number of rate cuts. This is clearly wrong. The continuation clause itself expressly provides that the other terms of the Plan will continue in effect, so the terms of the Plan must be reconciled with any action the Commission takes during this interim period.

Contrary to Staff's assertion, Qwest has not suggested that "when the Continuation Clause was added, all of the other provisions of the Agreement had to be modified." Staff's Response at 7. The continuation clause expressly provides the opposite – that the Plan will continue unmodified during any interim period. The Plan provides for rate cuts only during the initial term, and the continuation clause does not change that.

With regard to access rates, Staff forthrightly points out that additional access rate reduction was not intended when the original Settlement was made, and that the parties intended to "examine this issue again" before making any additional cuts. Staff's Response at 2. However, Staff attempts to justify the additional access rate cut in Decision 66772 by suggesting that it is "revenue neutral." *Id.* Qwest agrees with Staff that the additional access cuts, if lawful at all, must be accompanied by offseting increases in the Basket Three caps. However, there is no evidence in the record that Qwest will actually be able to recover this revenue "dollar for dollar" by implementing rate increases in highly competitive services, so the access reduction required by

---

[1] Staff previously suggested that the continuation clause was "the only provision of the Plan that expressly applies to the issue raised by Qwest in its Motion," but Staff also recognized that "the Continuation provision does not exempt any provision of the Plan from its terms." Staff's Exceptions at 3-4. Staff's new argument is apparently necessary because Staff admits that the specific provisions of the Agreement would normally control over Staff's extrapolated interpretation based solely on the general continuation clause. Staff's Response at 7.

Decision No. 66772 cannot be justified on that basis.

With regard to the Basket One productivity reductions, Staff advanced yet another new argument in its Response to Qwest's Motion to Revise the Productivity Factor. Staff now contends that the April 1 Basket One reduction is justified regardless of the continuation clause because it was the regularly scheduled third reduction in the three-year Plan. Staff's Response at 3. As Qwest previously pointed out this is wrong – the Plan already included three adjustments to Basket One, and the adjustment on April 1, 2004 is the fourth. Qwest's Omnibus Reply in Support of Motion to Revise Productivity Factor at 7. The first adjustment was to establish stipulated rates on April 1, 2001. Settlement Agreement at 4-3. Additional annual adjustments were made in accordance with the formula on April 1 of the following two years, during the initial term of the Plan. 2001 Price Cap Plan at 1, ¶ 2(b)(i & iii). The fact that April 1, 2004 falls outside the initial term of the Plan strongly suggests that the parties intended to deal with the appropriate rate adjustment, if any, as part of whatever new rate structure might exist on April 1, 2004.

Staff further suggests, "Qwest is really trying to argue that the Commission could require Qwest to make the adjustment on March 31, 2004 . . . but not on April 1, 2004. . . ." Staff's Response at 4. This misstates Qwest's argument. The Plan does not give the Commission the power to order *any* additional Basket One reductions on any date other than the annual dates specified *during the initial term* of the Plan. In support of its interpretation of the Plan, Qwest pointed out that the date on which such adjustments had been made in previous years (April 1) was beyond the initial term of the Plan in 2004. Again, this is evidence that the parties never intended such an adjustment to be made in 2004, except possibly as part of a subsequent term.

Qwest also takes exception to Staff's characterization of Qwest's filings as an improper "Trust Me" approach. Staff's Response at 4. Qwest has simply followed the

procedure set forth in the Plan for both the productivity factor revision and proposing terms for a successor plan. It is Staff that has changed its position from that in the Settlement Agreement and now wants to revert to the traditional rate case process instead of using the streamlined process set forth in the Plan. It is also not Qwest's fault that Staff is unhappy with the limited information currently in the record. Qwest is not "solely" responsible for the slow progress of this docket. *See* Staff's Response at 7. During the nine-month period when the parties were supposed to be negotiating over a successor Plan, including more than three months since audited financial information has been available, Staff has not served Qwest with a single data request in this matter.

Staff also mischaracterizes Qwest's position by suggesting that a full rate case filing is necessary because "Qwest is requesting a rate and revenue increase in excess of $200 million." Staff's Response at 5. Contrary to this assertion, Qwest simply filed the data required by the Plan and pointed out that the resulting numbers indicated a $200 million projected revenue requirement. Qwest proposed deregulatory solutions to this deficit within the context of price cap regulation. *See* Notice of Filing New Price Regulation Plan (July 1, 2003). Qwest did not ask for a traditional dollar-for-dollar revenue increase justifying a traditional rate case filing.

C. MCI

MCI repeats a number of its earlier arguments in an attempt to defend the Commission's adoption of access rate reductions in Decision No. 66772. None of these arguments adequately account for the basic principles of law applicable to utility rate-making, which are set forth in Qwest's Application for Rehearing. Once again, MCI argues that the Commission's vague, aspirational statements in Decision No. 63487 are sufficient to justify specific access rate cuts now. MCI's Response at 2-3. To the contrary, the Commission cannot authorize itself to act in the absence of a fair value finding and in the absence of substantial evidence simply by suggesting the "direction"

that a rate should go in the future. *See id.* at 2. MCI's suggestion that the Access Docket contains additional evidence does not save its argument. *See* MCI's Response at 3-4; MCI's Supplemental Response at 2. The Commission expressly recognized in Decision No. 66772 that it did not have sufficient evidence to make a finding, but went ahead and ordered access rate cuts anyway. Decision No. 66772 at 7. Similarly, MCI's policy arguments and complaints about delay are irrelevant to the basic issues – the Commission did not have sufficient evidence to support a rate reduction, and the Commission cannot make piecemeal rate adjustments under Arizona law even if substantial evidence did exist.

Finally, MCI's most recent filing suggests that the Commission had the power to set "interim" rates because the slow progress of this docket created an "emergency." MCI's Supplemental Response at 2-3. MCI cites *Scates* for the proposition that interim rates are allowed in an emergency situation, but fails to consider the basic requirements clearly set forth in *Scates* and subsequent cases. *Id.*; *Scates v. Ariz. Corp. Comm'n*, 118 Ariz. 531, 578 P.2d 612 (App. 1978). At the most basic level, the Commission made no finding of an emergency in this case. Moreover, there is no evidence of an emergency relating to access rates and MCI cites none.

D. AT&T

On April 9, 2004, AT&T filed a Motion for Leave to File a Response to Qwest's Omnibus Reply regarding the productivity factor. Qwest has not received any procedural order indicating that AT&T's motion has been granted or that any further briefing is expected on this issue. Qwest therefore does not address the substance of AT&T's additional comments.

III. CONCLUSION.

The time allowed by statute for the Commission to act on an application for rehearing has already expired. However, this Commission retains authority to revise its

order under A.R.S. § 40-252. For the reasons stated above, Qwest's Application for Rehearing should be granted, and the Commission should amend Decision No 66772 to either (1) terminate the 2001 Price Cap Plan and freeze rates at their March 31, 2004 levels until a new rate structure is adopted; or (2) continue the 2001 Price Cap Plan in accordance with its terms during the interim period, allowing Qwest to follow the simplified filing requirements, and making no further adjustments to access rates or Basket One rates until a new rate structure is in place.

RESPECTFULLY SUBMITTED this 23rd day of April, 2004.

FENNEMORE CRAIG

By: _____

Timothy Berg
Theresa Dwyer
3003 North Central Ave., Suite 2600
Phoenix, Arizona 85012-2913
(602) 916-5421

-and-

Norman Curtright
QWEST LAW DEPARTMENT
4041 North Central Avenue
11th Floor
(602) 630-2187
Attorneys for Qwest Corporation

ORIGINAL and 15 copies hand-delivered for filing this 23 day of April, 2004 to:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
Phoenix, AZ 85007

COPY of the foregoing delivered
this 23 day of April, 2004 to:

Jane Rodda
Administrative Law Judge
ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
Phoenix, AZ 85007

Maureen A. Scott
Legal Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
Phoenix, AZ 85007

Ernest G. Johnson, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
Phoenix, AZ 85007

COPY of the foregoing mailed
this 23 day of April, 2004 to:

Joan S. Burke
Osborne Maledon
2929 N. Central Ave., 21st Fl.
Phoenix, AZ 85067

Scott S. Wakefield, Chief Counsel
Daniel W. Pozefsky, Esq.
RUCO
1110 West Washington, Suite 220
Phoenix, AZ 85007

Michael W. Patten
Roshka Heyman & DeWulf, PLC
One Arizona Center
400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004

Mark A. DiNunzio
Cox Arizona Telcom, LLC
20401 North 29th Avenue
Phoenix, Arizona 85027

Thomas H. Campbell
Michael T. Hallam
Lewis and Roca
40 N. Central Avenue
Phoenix, Arizona 85004

Thomas F. Dixon
WorldCom, Inc.
707 17th Street, 39th Floor
Denver, Colorado 80202

Richard S. Wolters
Mary Tribby
AT&T
1875 Lawrence Street, Room 1575
Denver, CO 80202-1847

Peter Q. Nyce, Jr.
Regulatory Law Office
U.S. Army Litigation Center
901 N. Stuart Street, Suite 713
Arlington, VA 22203-1837

Richard Lee
Snavely King Majoros O'Connor & Lee
1220 L. Street N.W., Suite 410
Washington, DC 20005

Patrick A. Clisham
AT&T Arizona State Director
320 E. Broadmoor Court
Phoenix, AZ 85022

Accipiter Communications, Inc.
2238 W. Lone Cactus Dr., Ste.100
Phoenix, AZ 85027

Alliance Group Services, Inc.
1221 Post Road East
Westport, CT 06880

Archtel, Inc.
1800 West Park Drive, Ste. 250
Westborough, MA 01581

Brooks Fiber Communications of Tucson, Inc.
201 Spear Street, 9th Floor
San Francisco, CA 94105

Centruytel
PO Box 4065
Monroe, LA 71211-4065

Citizens Utilities Rural Co. Inc.
Citizens Communications Co. of Arizona
4 Trial Center, Suite 200
Salt Lake City, UT 84180

Citizens Telecommunications Co. of the White Mountains, Inc.
4 Triad Center, Ste. 200
Salt Lake City, UT 84180

Comm South Companies, Inc.
2909 N. Buckner Blvd., Ste. 200
Dallas, TX 75228

Copper Valley Telephone, Inc.
PO Box 970
Willcox, AZ 85644

Electric Lightwave, Inc.
4 Triad Center, Ste. 200
Salt Lake City, UT 84180

Eschelon Telecom of Arizona, Inc.
730 Second Avenue South, Ste.1200
Minneapolis, MN 55402

Ernest Communications, Inc.
6475 Jimmy Carter Blvd., Ste. 300
Norcross, GA 30071

Global Crossing Local Services, Inc.
180 South Clinton
Rochester, NY 14646

Global Crossing Telemanagement, Inc.
180 South Clinton
Rochester, NY 14646

Global Crossing Telecommunications, Inc.
180 South Clinton
Rochester, NY 14646

Intermedia Communications, Inc.
3608 Queen Palm Drive
Tampa, FL 33619-1311

Level 3 Communications, LLC
1025 Eldorado Blvd.
Broomfield, CO 80021

Max-Tel Communications, Inc.
105 N. Wickham
PO Box 280
Alvord, TX 76225

MCI WorldCom Communications
201 Spear Street, 9th Floor
San Francisco, CA 94105

MCIMetro
201 Spear Street, 9th Floor
San Francisco, CA 94105

Metropolitan Fiber Systems of Arizona, Inc.
201 Spear Street, 9th Floor
San Francisco, CA 94105

Midvale Telephone Exchange
PO Box 7
Midvale, ID 83645

Navajo Communications Co., Inc.
4 Triad Center, Suite 200
Salt Lake City, UT 84180

Nextlink Long Distance Svcs.
3930 E. Watkins, Ste. 200
Phoenix, AZ 85034

North County Communications Corporation
3802 Rosencrans, Ste. 485
San Diego, CA 92110

One Point Communications
Two Conway Park
150 Field Drive,Ste. 300
Lake Forest, IL 60045

Opex Communications, Inc.
500 E. Higgins Rd., Ste. 200
Elk Grove Village, IL 60007

Pac-West Telecomm, Inc.
1776 W. March Lane, #250
Stockton, CA 95207

The Phone Company/Network Services of New Hope
6805 Route 202
New Hope, PA 18938

Rio Virgin Telephone Co.
Rio Virgin Telephone and Cablevision
PO Box 189
Estacada, OR 97023-000

Rhythm Links, Inc.
9100 E. Mineral Circle
Englewood, CO 80112

San Carlos Apache Telecommunications Utility, Inc.
PO Box 701
245 S. Hill
Globe, AZ 85502

South Central Utah Telephone Association, Inc.
PO Box 226
Escalante, UT 84726-000

Southwestern Telephone Co., Inc.
PO Box 5158
Madison, WI 53705-0158

Special Accounts Billing Group
1523 Withorn Lane
Inverness, IL 60067

Sprint Communications Company, L.P.
6860 W. 115th, MS:KSOPKD0105
Overland Park, KS 66211

Touch America
130 N. Main Street
Butte, MT 59701

Table Top Telephone Co, Inc.
600 N. Second Avenue
Ajo, AZ 85321-0000

TCG Phoenix
1875 Lawrence Street, Room 1575
Denver, CO 80202

Valley Telephone Cooperative, Inc.
752 E. Malley Street
PO Box 970
Willcox, AZ 85644

Verizon Select Services Inc.
6665 MacArthur Blvd, HQK02D84
Irving, TX 75039

VYVX, LLC
One Williams Center, MD 29-1
Tulsa, OK 74172

Western CLEC Corporation
3650 131st Avenue SE, Ste. 400
Bellevue, WA 98006

Williams Local Network, Inc.
One Williams Center, MD 29-1
Tulsa, OK 74172

XO Arizona Inc.
3930 Watkins, Ste. 200
Phoenix, AZ 85034

1537315.2/67817.336