

ORIGINAL



0000004207

28

BEFORE THE ARIZONA CORPORATION COMMISSION

1
2 MARC SPITZER
Chairman
3 WILLIAM MUNDELL
Commissioner
4 JEFF HATCH-MILLER
Commissioner
5 MIKE GLEASON
Commissioner
6 KRISTIN MAYES
Commissioner

Arizona Corporation Commission

DOCKETED

APR 23 2004

DOCKETED BY

RECEIVED
2004 APR 23 P 3:53
AZ CORP COMMISSION
DOCUMENT CONTROL

8 IN THE MATTER OF QWEST
9 CORPORATION'S FILING AMENDED
10 RENEWED PRICE REGULATION PLAN.

DOCKET NO. T-01051B-03-0454

11 IN THE MATTER OF THE
12 INVESTIGATION OF THE COST OF
13 TELECOMMUNICATIONS ACCESS.

DOCKET NO. T-00000D-00-0672

OMNIBUS REPLY IN SUPPORT OF
QWEST'S APPLICATION FOR
REHEARING

14 I. INTRODUCTION.

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

23 II. ARGUMENT.

24 A. RUCO

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

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

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

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

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

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

13 Second, none of the testimony RUCO points to supports the proposition that any
14 of the parties expected additional rate reductions to be made during the interim period
15 using the outdated 4.2% productivity factor. In fact, based on his experience in Indiana,
16 Dr. Johnson appeared to be suggesting that the productivity factor was *too low* for the
17 long run, and that *Qwest* should not be able to keep this inappropriately low productivity
18 factor in effect during any interim period. *See* Hearing Transcript, Vol. III at 444 (Dec.
19 1, 2000). If anything, the quoted testimony supports Qwest's argument that the parties
20 did *not* expect to continue using the same productivity factor after the initial three-year
21 term, and that the factor should be adjusted if it is applied at all. Taken in context, the
22 2000 hearing testimony cited by RUCO shows only that the parties originally interpreted
23 the Settlement Agreement and Plan to require the rates in effect at the end of the initial
24 term to continue in effect during any interim period.

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

1 arguing that the Agreement and Plan call for the rates in effect on March 31, 2004 to
2 remain in effect during any interim period. This is the only result that complies with
3 Arizona law. Alternatively, if the Agreement and Plan are interpreted to call for an April
4 1, 2004 rate reduction, Qwest argues that the Plan at least requires additional Basket One
5 reductions to be made on the basis of a productivity factor that is recalculated according
6 to the method expressly outlined in the Plan. If the Plan is interpreted to require arbitrary
7 annual reductions based on an outdated productivity factor for an indefinite period of
8 time, then the Plan's provision for the interim period after the initial three-year term is
9 clearly unconstitutional under *Scates*.

10 **B. Staff**

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

23 On the other hand, Staff makes a new argument that the continuation clause in the
24 Settlement Agreement is "the *only* provision in the Agreement and Price Cap Plan that
25 governs during a 'gap period'" and that "Qwest's reliance on upon other portions of the
26

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

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

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

22
23 ¹ Staff previously suggested that the continuation clause was “the only provision of the
24 Plan that expressly applies to the issue raised by Qwest in its Motion,” but Staff also
25 recognized that “the Continuation provision does not exempt any provision of the Plan
26 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.

1 Decision No. 66772 cannot be justified on that basis.

2 With regard to the Basket One productivity reductions, Staff advanced yet another
3 new argument in its Response to Qwest's Motion to Revise the Productivity Factor. Staff
4 now contends that the April 1 Basket One reduction is justified regardless of the
5 continuation clause because it was the regularly scheduled third reduction in the
6 three-year Plan. Staff's Response at 3. As Qwest previously pointed out this is wrong –
7 the Plan already included three adjustments to Basket One, and the adjustment on April 1,
8 2004 is the fourth. Qwest's Omnibus Reply in Support of Motion to Revise Productivity
9 Factor at 7. The first adjustment was to establish stipulated rates on April 1, 2001.
10 Settlement Agreement at 4-3. Additional annual adjustments were made in accordance
11 with the formula on April 1 of the following two years, during the initial term of the Plan.
12 2001 Price Cap Plan at 1, ¶ 2(b)(i & iii). The fact that April 1, 2004 falls outside the
13 initial term of the Plan strongly suggests that the parties intended to deal with the
14 appropriate rate adjustment, if any, as part of whatever new rate structure might exist on
15 April 1, 2004.

16 Staff further suggests, "Qwest is really trying to argue that the Commission could
17 require Qwest to make the adjustment on March 31, 2004 . . . but not on April 1,
18 2004. . . ." Staff's Response at 4. This misstates Qwest's argument. The Plan does not
19 give the Commission the power to order *any* additional Basket One reductions on any
20 date other than the annual dates specified *during the initial term* of the Plan. In support
21 of its interpretation of the Plan, Qwest pointed out that the date on which such
22 adjustments had been made in previous years (April 1) was beyond the initial term of the
23 Plan in 2004. Again, this is evidence that the parties never intended such an adjustment
24 to be made in 2004, except possibly as part of a subsequent term.

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

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

10 Staff also mischaracterizes Qwest's position by suggesting that a full rate case
11 filing is necessary because "Qwest is requesting a rate and revenue increase in excess of
12 \$200 million." Staff's Response at 5. Contrary to this assertion, Qwest simply filed the
13 data required by the Plan and pointed out that the resulting numbers indicated a \$200
14 million projected revenue requirement. Qwest proposed deregulatory solutions to this
15 deficit within the context of price cap regulation. See Notice of Filing New Price
16 Regulation Plan (July 1, 2003). Qwest did not ask for a traditional dollar-for-dollar
17 revenue increase justifying a traditional rate case filing.

18 C. MCI

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

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

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

18 **D. AT&T**

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

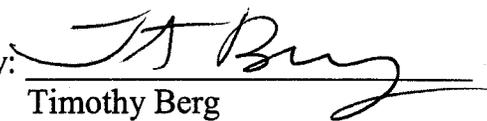
24 **III. CONCLUSION.**

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

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

8 RESPECTFULLY SUBMITTED this 23rd day of April, 2004.

9
10 FENNEMORE CRAIG

11 By: 
12 Timothy Berg
13 Theresa Dwyer
14 3003 North Central Ave., Suite 2600
15 Phoenix, Arizona 85012-2913
16 (602) 916-5421

17 -and-

18 Norman Curtright
19 QWEST LAW DEPARTMENT
20 4041 North Central Avenue
21 11th Floor
22 (602) 630-2187
23 *Attorneys for Qwest Corporation*

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

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

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

2 Jane Rodda
3 Administrative Law Judge
ARIZONA CORPORATION COMMISSION
4 1200 W. Washington St.
Phoenix, AZ 85007

5 Maureen A. Scott
6 Legal Division
ARIZONA CORPORATION COMMISSION
7 1200 W. Washington St.
Phoenix, AZ 85007

8 Ernest G. Johnson, Director
9 Utilities Division
ARIZONA CORPORATION COMMISSION
10 1200 W. Washington St.
Phoenix, AZ 85007

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

13 Joan S. Burke
Osborne Maledon
14 2929 N. Central Ave., 21st Fl.
Phoenix, AZ 85067

15 Scott S. Wakefield, Chief Counsel
16 Daniel W. Pozefsky, Esq.
RUCO
17 1110 West Washington, Suite 220
Phoenix, AZ 85007

18 Michael W. Patten
19 Roshka Heyman & DeWulf, PLC
One Arizona Center
20 400 East Van Buren Street, Suite 800
Phoenix, Arizona 85004

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

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

- 1 Thomas F. Dixon
- 2 WorldCom, Inc.
- 3 707 17th Street, 39th Floor
- 4 Denver, Colorado 80202

- 5 Richard S. Wolters
- 6 Mary Tribby
- 7 AT&T
- 8 1875 Lawrence Street, Room 1575
- 9 Denver, CO 80202-1847

- 10 Peter Q. Nyce, Jr.
- 11 Regulatory Law Office
- 12 U.S. Army Litigation Center
- 13 901 N. Stuart Street, Suite 713
- 14 Arlington, VA 22203-1837

- 15 Richard Lee
- 16 Snavelly King Majoros O'Connor & Lee
- 17 1220 L. Street N.W., Suite 410
- 18 Washington, DC 20005

- 19 Patrick A. Clisham
- 20 AT&T Arizona State Director
- 21 320 E. Broadmoor Court
- 22 Phoenix, AZ 85022

- 23 Accipiter Communications, Inc.
- 24 2238 W. Lone Cactus Dr., Ste.100
- 25 Phoenix, AZ 85027

- 26 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

- 1 Citizens Utilities Rural Co. Inc.
Citizens Communications Co. of Arizona
- 2 4 Triad Center, Suite 200
Salt Lake City, UT 84180
- 3
- 4 Citizens Telecommunications Co. of the White Mountains, Inc.
4 Triad Center, Ste. 200
Salt Lake City, UT 84180
- 5
- 6 Comm South Companies, Inc.
2909 N. Buckner Blvd., Ste. 200
Dallas, TX 75228
- 7
- 8 Copper Valley Telephone, Inc.
PO Box 970
Willcox, AZ 85644
- 9
- 10 Electric Lightwave, Inc.
4 Triad Center, Ste. 200
Salt Lake City, UT 84180
- 11
- 12 Eschelon Telecom of Arizona, Inc.
730 Second Avenue South, Ste.1200
Minneapolis, MN 55402
- 13
- 14 Ernest Communications, Inc.
6475 Jimmy Carter Blvd., Ste. 300
Norcross, GA 30071
- 15
- 16 Global Crossing Local Services, Inc.
180 South Clinton
Rochester, NY 14646
- 17
- 18 Global Crossing Telemanagement, Inc.
180 South Clinton
Rochester, NY 14646
- 19
- 20 Global Crossing Telecommunications, Inc.
180 South Clinton
Rochester, NY 14646
- 21
- 22 Intermedia Communications, Inc.
3608 Queen Palm Drive
Tampa, FL 33619-1311
- 23
- 24 Level 3 Communications, LLC
1025 Eldorado Blvd.
Broomfield, CO 80021
- 25
- 26

- 1 Max-Tel Communications, Inc.
105 N. Wickham
- 2 PO Box 280
Alvord, TX 76225
- 3 MCI WorldCom Communications
- 4 201 Spear Street, 9th Floor
San Francisco, CA 94105
- 5 MCIMetro
- 6 201 Spear Street, 9th Floor
San Francisco, CA 94105
- 7 Metropolitan Fiber Systems of Arizona, Inc.
- 8 201 Spear Street, 9th Floor
San Francisco, CA 94105
- 9 Midvale Telephone Exchange
- 10 PO Box 7
Midvale, ID 83645
- 11 Navajo Communications Co., Inc.
- 12 4 Triad Center, Suite 200
Salt Lake City, UT 84180
- 13 Nextlink Long Distance Svcs.
- 14 3930 E. Watkins, Ste. 200
Phoenix, AZ 85034
- 15 North County Communications Corporation
- 16 3802 Rosencrans, Ste. 485
San Diego, CA 92110
- 17 One Point Communications
- 18 Two Conway Park
150 Field Drive, Ste. 300
Lake Forest, IL 60045
- 20 Opex Communications, Inc.
- 21 500 E. Higgins Rd., Ste. 200
Elk Grove Village, IL 60007
- 22 Pac-West Telecomm, Inc.
- 23 1776 W. March Lane, #250
Stockton, CA 95207
- 24 The Phone Company/Network Services of New Hope
- 25 6805 Route 202
New Hope, PA 18938
- 26

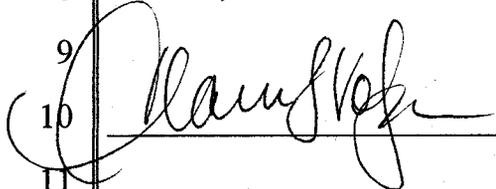
- 1 Rio Virgin Telephone Co.
Rio Virgin Telephone and Cablevision
- 2 PO Box 189
Estacada, OR 97023-000
- 3
- 4 Rhythm Links, Inc.
9100 E. Mineral Circle
Englewood, CO 80112
- 5
- 6 San Carlos Apache Telecommunications Utility, Inc.
PO Box 701
245 S. Hill
- 7 Globe, AZ 85502
- 8
- 9 South Central Utah Telephone Association, Inc.
PO Box 226
Escalante, UT 84726-000
- 10
- 11 Southwestern Telephone Co., Inc.
PO Box 5158
Madison, WI 53705-0158
- 12
- 13 Special Accounts Billing Group
1523 Withorn Lane
Inverness, IL 60067
- 14
- 15 Sprint Communications Company, L.P.
6860 W. 115th, MS:KSOPKD0105
Overland Park, KS 66211
- 16
- 17 Touch America
130 N. Main Street
Butte, MT 59701
- 18
- 19 Table Top Telephone Co, Inc.
600 N. Second Avenue
Ajo, AZ 85321-0000
- 20
- 21 TCG Phoenix
1875 Lawrence Street, Room 1575
Denver, CO 80202
- 22
- 23 Valley Telephone Cooperative, Inc.
752 E. Malley Street
PO Box 970
Willcox, AZ 85644
- 24
- 25 Verizon Select Services Inc.
6665 MacArthur Blvd, HQK02D84
Irving, TX 75039
- 26

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

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

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

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

9 
10 _____

11 1537315.2/67817.336

- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26