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Arizona Corporation Commission

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8 IN THE MATTER OF US WEST
9 COMMUNICATIONS, INC.'S
COMPLIANCE WITH § 271 OF THE
TELECOMMUNICATIONS ACT OF 1996

Docket No. T-00000B-97-238

11 **COX ARIZONA TELCOM II, L.L.C.'S RESPONSE**
12 **TO US WEST'S MOTION TO COMPEL**

13 Even though US WEST has not yet submitted a sufficient Section 271 filing to the Arizona
14 Corporation Commission, US WEST has persisted in demanding that all parties who have simply
15 filed a "notice of interest" in the 271 docket respond to 41 overreaching and burdensome data
16 requests. Many of those data requests contain subparts and request extensive supporting
17 documentation. A large percentage of the requests seek information about other ILECs, about
18 activities outside Arizona and about CLECs' internal business operations. Even though Cox
19 believes all of the data requests are premature given US WEST's lack of a sufficient filing, Cox has
20 endeavored – and is continuing to endeavor – to provide responses to those data requests that are
21 directly and narrowly related to whether US WEST has met the 14-point checklist in Arizona. Cox,
22 however, has objected to data requests that seek information outside of Arizona, information
23 concerning other ILECs, or information concerning Cox's own internal business operations.

24 Given the current procedural status of this docket and the limited, narrow role of the
25 Commission under Section 271 – which is to consult with the FCC on whether US WEST is in
26 compliance with the 14-point checklist (47 U.S.C. § 271(d)(2)(B)) in Arizona – Cox believes it has

1 more than met its discovery obligations under Section 271 and the March 2, 1999 procedural order
2 in this docket. US WEST's motion to compel should be denied.

3 **A. Circumstances Leading to the Motion to Compel**

4 In May 1997, the Arizona Corporation Commission in an effort be in a position to timely
5 respond to the FCC in the event of a Section 271 filing by US WEST, adopted Decision No. 60218,
6 which set forth a procedural framework for the Commission's consideration of pertinent issues
7 related to Section 271. In that Decision, the Commission requested that parties who might be
8 interested in the "271 docket" file a "notice of interest" within 21 days of the Decision and numerous
9 CLECs did so. Cox's primary aim in filing the notice was to be timely notified of any activity in the
10 docket.

11 As a reward for expressing some interest in the 271 docket, US WEST served the current set
12 of 41 data requests on all CLECs who had filed the notice of interest. Subsequent to service of that
13 discovery, the Commission determined that US WEST's February 8, 1999 Section 271 filing was
14 insufficient, and gave US WEST additional time with which to supplement its filing. [March 2,
15 1999 Procedural Order] Despite that order, which also purported to limit US WEST's discovery, US
16 WEST indicated to all CLECs that it still expected each CLEC to respond to every one of the
17 pending 41 data requests.¹ Cox's "meet-and-confer" with US WEST resulted in US WEST
18 steadfastly requesting answers to all parts of all 41 data requests.

19 **B. The Arizona Corporation Commission's Limited Role Under Section 271**

20 Under Section 271(d)(2)(B), the only issue about which the FCC will consult with the
21 Arizona Corporation Commission is whether or not US WEST has complied with the 14-point
22 checklist in this state. That should be the only concern of the Arizona Corporation Commission and
23

24 ¹ Indeed, US WEST insisted on responses even though other states had rejected numerous similar
25 data requests *even where* US WEST actually had submitted a sufficient 271 filing in those jurisdictions. *See*
26 Notice of Commission Action, Docket No. 097.5.87 (Public Service Commission of Montana, July 16, 1998);
Order Relating to Outstanding Discovery Motions, Docket No. 97-106-TC (New Mexico State Corporation
Commission, Sept. 21, 1998) (Cox understands that AT&T is submitting copies of these orders to the Hearing
Division). That is *not* the procedural status here.

1 should be the only focus of any discovery in this docket. Despite the Arizona Corporation
2 Commission's limited role, US WEST improperly attempts throughout its motion to compel – and
3 without any cited legal authority – that this Commission is burdened with the task of determining the
4 “public interest.” That simply is not the case under the plain language of Section 271 and should not
5 be the basis for any discovery here. The FCC – and the FCC alone – is authorized to make that
6 determination. 47 U.S.C. § 271(d)(3)(C); *see SBC Communications v. FCC*, 138 F.2d 410, 416-17
7 (D.C. Cir. 1998).

8 **C. Cox's Dilemma**

9 Cox now finds itself in a situation where it is being requested to respond to unduly
10 burdensome discovery on many tangential, speculative 271 issues, even before Cox has an
11 opportunity to see how and why US WEST believes it has met the 14-point checklist. Without
12 seeing that filing, Cox does not know what issues it may wish to comment on as contemplated in
13 Decision No. 60218. Further, to fully respond to all of the pending data requests would require
14 enormous expenditure of resources by Cox. Given the relatively nascent Cox Arizona Telcom
15 operations in Arizona, responding to all the data requests – even if they were relevant – could
16 interfere with Cox's ability to properly carry on its day-to-day business operations. Perhaps this is
17 what US WEST desires. US WEST's discovery smacks of anti-competitive behavior, particularly
18 given the current status of the proceedings in this docket and a complete lack of any indication that
19 Cox will challenge some or all of US WEST's Section 271 assertions. That being said, Cox has
20 endeavored, and continues to endeavor, to provide basic information about its complaints regarding
21 the 14 points of the Section 271 checklist.

22 If US WEST is allowed to continue to overburden CLECs with discovery – particularly at
23 this premature stage – it could force CLECs to limit or terminate their participation in this docket.
24 CLECs may not be around to provide comments on US WEST's 271 filing as the Commission
25 contemplated in Decision No. 60218, ¶ 6. That will not benefit the Commission's assessment of the
26 14-point checklist since the Commission would be deprived of the full picture, including the input

1 and perspective of those CLECs who have important interests at stake.

2 **D. Specific Discovery Issues**

3 **1. Future CLEC Plans**

4 US WEST seeks extensive information on CLECs' future operational plans. Not only does
5 this require CLECs to produce extremely sensitive, proprietary information (assuming such
6 information exists) at an extraordinarily early stage of the proceeding (*i.e.*, US WEST has failed to
7 submit a sufficient filing), it goes beyond this Commission's role in the 271 process. As noted
8 above, this Commission's sole focus in a 271 context is to determine whether US WEST has met the
9 checklist in Arizona. The FCC has identified that that standard focuses only on whether US WEST
10 is "currently furnishing" or "is ready to furnish" the checklist items. *See Application of BellSouth*
11 *for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order,
12 FCC 98-271 (Oct. 13, 1998), ¶¶ 54-56. That is the minimum threshold that US WEST must meet at
13 this point. Discovery into any future plans or demands of CLECs is irrelevant unless US WEST can
14 prove it is currently furnishing the checklist items *and* the CLECs in response to US WEST's
15 forthcoming 271 submittal raise the issue that, although US WEST may be able to meet current
16 demand, US WEST cannot meet future demand. That has not happened, and it is rank speculation at
17 this time. If and when a CLEC raises that issue, then some limited discovery *might* be appropriate.
18 It is not appropriate at this time.

19 **2. Operational Support System Information**

20 The issue with regard to operational support system is whether US WEST is providing OSS
21 service to CLECs on a non-discriminatory basis and that is it is at least equal in quality to what US
22 WEST provides to itself. *See* 47 U.S.C. § 251(c)(2), (3). Internal CLEC OSS and other ILEC OSS
23 systems are irrelevant to whether US WEST is providing non-discriminatory and equal OSS service
24 to CLECs in Arizona. Moreover, at this point, US WEST has not even agreed to any mechanism for
25 insuring that US WEST is, in fact, providing non-discriminatory and equal OSS services to the
26 CLECs. That issue remains unresolved in the consolidated service quality arbitration.

1 **3. Out-of-State Information**

2 This issue is clear example where US WEST is putting the cart before the horse. US WEST
3 speculates, based on other 271 proceedings, that CLECs may inject out-of-state evidence into the
4 Arizona proceeding. Again, none of the CLECs have seen US WEST's forthcoming 271 filing and
5 Cox does not know – and cannot know – whether US WEST will make some sort of
6 misrepresentation that requires reference to out-of-state evidence. Expanding discovery beyond
7 Arizona boundaries is simply another way to overburden CLECs interested in this proceeding and to
8 chill their participation.

9 **E. Appropriate Balance Regarding Discovery**

10 The key factual issue in this docket ultimately will be whether US WEST meets the 14-point
11 checklist in Section 271 in Arizona. US WEST is in sole possession of the evidence needed to
12 explain what US WEST has done to meet those checklist items. Once US WEST has explained how
13 it believes it has satisfied each checklist item, the CLECs *may* choose to submit evidence contrary to
14 US WEST's contentions – on one or several (or perhaps even none) of those checklist items. Cox
15 requests that a proper balance be taken with regard to discovery in this docket, particularly at this
16 early stage of the proceeding. Although Cox believes discovery of CLEC information should be
17 delayed until CLECs actually state their position in this docket (other than through a “notice of
18 interest”), Cox has responded to data requests requesting information on complaints Cox has with
19 respect to the 14-point checklist items as they pertain to Arizona in an effort to meet the March 2,
20 1999 procedural order. Cox will continue to endeavor to provide such information to US WEST.
21 That should be enough for now. Once US WEST submits a sufficient 271 filing to the Commission
22 and Cox responds pursuant to the procedures set forth in Decision No. 60218, the issue of
23 appropriate additional discovery may be raised again.

24 To date, US WEST's discovery tactics in this docket smack of an attempt to dissuade any
25 CLEC from participating further in this proceeding. If CLECs are inundated with what amounts to a
26 “fishing expedition” by US WEST on potential issues that the CLECs may or may not ultimately

1 choose to raise, CLECs may decide not to participate further in this proceeding. In that case, the
2 Commission will be faced with an incomplete and inaccurate record on which to assess the narrow
3 271 issues before it.

4 CONCLUSION

5 Cox understands that other CLECs may be filing extensive request-by-request responses to
6 the motion to compel and Cox generally concurs with much of the other CLECs' positions. Cox
7 urges the Commission to appropriately limit discovery at this stage of the proceeding.

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9 Dated: March 26, 1999.

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Respectfully submitted,

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COX ARIZONA TELCOM II, L.L.C.

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