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IN THE MATTER OF THE
APPLICATION OF QWEST
COMMUNICATIONS CORPORATION
D/B/A QWEST LONG DISTANCE FOR
EXTENSION OF ITS EXISTING
CERTIFICATE OF CONVENIENCE AND
NECESSITY TO INCLUDE AUTHORITY
TO PROVIDE RESOLD AND
FACILITIES-BASED LOCAL
EXCHANGE AND RESOLD LONG
DISTANCE SERVICES IN ADDITION
TO ITS CURRENT AUTHORITY TO
PROVIDE FACILITIES-BASED LONG
DISTANCE SERVICES, AND PETITION
FOR COMPETITIVE CLASSIFICATION
OF PROPOSED SERVICES WITHIN THE
STATE OF ARIZONA

DOCKET NO. T-02811B-04-0313

QWEST COMMUNICATIONS
CORPORATION'S RESPONSE TO
STAFF REPORT

Qwest Communications Corporation, Inc. ("Qwest") hereby files its Response to the Staff Report, which was filed by the Arizona Corporation Commission Staff ("Staff") in this docket, pursuant to the Procedural Order dated February 1, 2005.

1 I. INTRODUCTION

2 As a beginning point for examining QCC's Application and Staff's Report, it is helpful to
3 observe what is not present in this docket. First, Staff's only objection to QCC's application is to
4 suggest that QCC should be excluded from operating in QC territory. Staff does not question
5 QCC's technical, financial, or managerial abilities to provide competitive local exchange
6 telephone service. Indeed, of the twenty-eight paragraphs of recommendations included in
7 section 6.1 of the Report, only one, ¶ 19, recommends any limitations or conditions on QCC's
8 certificate that are materially different from conditions applied to other CLECs' certificates.

9 Second, it is important to note that Staff's Report provides no evidence to back up any of
10 its concerns. Staff hypothesizes five "unresolved concerns" at page 8 of its Report, but provides
11 no evidence that QCC has engaged in any such conduct, or has the opportunity or motivation to
12 do so. To the contrary, most of the anti-competitive behavior Staff expresses concern about is
13 already prohibited by both Arizona and federal law. For the Commission to follow Staff's
14 recommendation and bar QCC from competing for most customers in Arizona because of
15 unsubstantiated fears that QCC would engage in unlawful conduct would be arbitrary,
16 capricious, and illogical.

17 Third, it is notable that no competing carrier has intervened and argued that QCC's
18 statewide presence and operation as a CLEC would be unlawful, harm competition, or be adverse
19 to the public interest. Staff's single objection is raised in a vacuum of protest from the entities
20 Staff claims would suffer most if QCC acted against the law: QCC's competitors. This silence
21 of intervention speaks loudly against the credibility of the concerns Staff raises in its Report.

22 What *is* present and undisputed in QCC's application is the fact that because of their
23 organizational limitations, QC and QCC presently are restricted from segments of the market
24 their competitors are not: the business or governmental entity that wants interLATA services and
25 local exchange services from a single provider, with a single point of contact, and a single bill.
26 Permitting QCC to operate statewide, rather than providing an unfair competitive advantage as

1 Staff speculates, will instead level the playing field so that QCC can compete for these customers
2 on an equal footing compared to its competitors. Adding QCC to the competitive landscape will
3 increase competition, and therefore serves the public interest.

4 **II. ARGUMENT**

5 **A. Staff's Proposal Effectively Excludes QCC from Competing in Arizona in Violation**
6 **of 47 USC § 253.**

7 Although Staff proposes only a single limitation on QCC's certificated authority, the
8 condition Staff recommends would, as a practical matter, exclude QCC from the Arizona
9 marketplace. QC incumbent territory encompasses Arizona's largest cities and the vast majority
10 of its citizens. The territory where QC is not the incumbent is largely served by independent
11 ILECs, many of which could refuse to sell network elements or make their retail
12 telecommunications services available for resale at a discount to QCC pursuant to the so-called
13 "rural exemptions" of section 251(f) of the federal Telecommunications Act (the "Act"). Thus,
14 QCC would as a practical matter be excluded from operating as a CLEC even in the
15 limited area for which Staff recommends approval, unless it builds its own facilities. This
16 practical prohibition on QCC's operations would violate section 253 of the Act:

17 No State or local statute or regulation, or other State or local legal requirement,
18 may prohibit or have the effect of prohibiting the ability of any entity to provide
any interstate or intrastate telecommunications service.¹

19 Section 253 bars states not only from prohibiting entities like QCC from providing
20 telecommunications service, but also from regulating QCC in such a way that it has the effect of
21 prohibiting QCC from providing telecommunications service. Staff proposes that this
22 Commission do both.

23 The Staff's recommendation not only violates federal law, it is unsupported by law,
24 policy, or the facts. In point of fact, Staff examined the relationship between QCC and QC to
25 ensure compliance with federal law and this Commission's orders in Decision No. 66612 and

26

¹ 47 USC § 253.

1 64654, and found that both QC and QCC have largely complied with these orders.² As discussed
2 in more detail below, Staff's recommendations are arbitrary and capricious in light of this failure
3 of evidence. After erroneously raising its concerns, Staff then proceeds to discuss its view of the
4 state of the law regarding Bell Operating Company ("BOC") affiliates providing competitive
5 local exchange services in the BOCs' incumbent territory. However, that discussion provides an
6 incomplete and inaccurate picture of the state of the law.

7 **B. Staff's Report Inaccurately Describes Current Law.**

8 Staff points to paragraph 312 the FCC's 1996 *Section 272 Non-Accounting Safeguards*
9 *Order*³ in connection with the contention that section 272 of the federal Act resolves some, but
10 not all, of its listed concerns. That paragraph concludes that section 272 does not prohibit BOC
11 affiliates from offering long distance service. Staff fails, however, to point out the FCC's
12 discussion of affiliated CLEC competition and the public interest, three paragraphs later:

13 *We also conclude as a matter of policy that regulations prohibiting BOC [Bell*
14 *Operating Company] section 272 affiliates from offering local exchange service*
15 *do not serve the public interest.* The goal of the 1996 Act is to encourage
16 competition and innovation in the telecommunications market. We agree with the
17 BOCs that the increased flexibility resulting from the ability to provide both
18 interLATA and local services from the same entity serves the public interest,
19 because such flexibility will encourage section 272 affiliates to provide innovative
20 new services. *To the extent that there are concerns that the BOCs will*
21 *unlawfully subsidize their affiliates or accord them preferential treatment, we*
22 *reiterate that improper cost allocations and discrimination are prohibited by*
23 *existing Commission rules and sections 251, 252 and 272 of the 1996 Act, and*
24 *that predatory pricing is prohibited by the antitrust laws.* Our affiliate
25 transaction rules, as modified by our companion Accounting Safeguards Order,
26 address the BOCs' ability to engage in improper cost allocation. The rules in this
Order and our rules in our First Interconnection Order and our Second
Interconnection Order ensure that BOCs may not favor their affiliates. *In sum, we*
find no basis in the record for concluding that competition in the local market
would be harmed if a section 272 affiliate offers local exchange service to the
*public that is similar to local exchange service offered by the BOC.*⁴

² Staff Report, at 5. Staff stated that it believed that some of the filings had been made late, but found no evidence of any anticompetitive behavior, which was the basis for the requirement to file all affiliate contracts.

³ *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21095, FCC Release No. 96-489, ¶ 315 (1996) (*Section 272 Non-Accounting Safeguards Order*). A copy is attached as *Appendix A*.

⁴ *Section 272 Non-Accounting Safeguards Order*, ¶ 315 (1996)(emphasis added).

1 The FCC reached these conclusions in 1996 – when wireless communications barely dented the
2 telecommunications market, before cable giants like Cox Telecom had begun to erode BOC
3 market share, and before the Act enabled a passel of wholly and partially facilities-based carriers
4 to use Qwest’s facilities to compete for Qwest’s customers. Nine years later, Staff relies on the
5 same rejected concerns the FCC addressed in 1996, and instead of proposing an approach to
6 regulating QCC’s entry that would allow QCC to compete on relatively equal footing while
7 making sure QC and QCC continued to follow federal and state law,⁵ Staff proposes a total ban
8 on QCC’s presence in the vast majority of Arizona.

9 Staff also overstates the states’ laws bases for its draconian recommendation. For
10 example, Staff argues that only “*some* states within Qwest’s in-region footprint” (emphasis
11 added) permit BOC CLEC affiliates to operate in BOC incumbent territory. But at the time Staff
12 issued its Report, thirteen states where QCC has requested authority to operate in QC incumbent
13 territory had given QCC that authority. Arizona’s pending application is the only exception.

14 Three states, Iowa, North Dakota, and Nebraska, have directly addressed disputes
15 regarding whether QCC should be allowed to operate in QC incumbent territory. The Iowa
16 Utilities Board, after considering objections from the Iowa Office of the Consumer Advocate and
17 interveners almost identical to Staff’s concerns here,⁶ concluded that granting QCC authority to
18 compete in QC territory was in the public interest.⁷ In North Dakota, the Public Service
19 Commission determined that allegations of consumer confusion were largely unfounded in view

20 ⁵ Such an approach would be consistent with paragraph 317 of the *Section 272 Non-Accounting Safeguards Order*,
21 which permits states to regulate such CLECs differently than other carriers. No FCC ruling or other law permits the
22 Staff recommendation of abandoning “regulation” altogether and barring QCC from QC incumbent territory
23 outright.

24 ⁶ Those objections included that competition between affiliates is not true, “arms length,” or effective competition;
25 that any loss of customers by Qwest to QCC would reflect a migration policy of the consolidated entity
26 accomplished through a joint marketing program which does not distinguish between regulated and non-regulated
operations; that customers will not recognize the risk of being migrated from the regulated entity to the unregulated
entity; that allowing QCC to operate in QC territory would allow Qwest to circumvent rate regulation of local
exchange service simply by providing that service through QCC; and that such “self-deregulation” would be
accomplished without the Board making a finding of effective competition, as required by the established statutory
deregulation scheme. *In re: Qwest Communications Corporation*, Docket TCU-03-13, Order dated November 29,
2004 (“*Iowa QCC Order*”), at 4-5.

⁷ *Iowa QCC Order*, at 5.

1 of QCC's agreement to continue QC's current practice (which is also in place in Arizona) of
2 disclosing to customers who call Qwest to inquire about obtaining services of the availability,
3 from QC, of rate-regulated, flat-rate single line residential service (1FR).⁸

4 In Nebraska, the Public Service Commission granted QCC authority to operate statewide,
5 subject to certain limitations and controls for QCC service in QC incumbent territory that were
6 already in place from a 1998 Nebraska Commission order; however, the Commission observed
7 in its order granting QCC authority that the changing market for telecommunications requires re-
8 evaluation of older views of affiliate competition in incumbent territory:

9 In light of the testimony of Qwest regarding the state of competition in Nebraska,
10 however, the Commission encourages Qwest to immediately file a request to
11 terminate the limitation of service offerings within the affiliate ILEC's service
territory consistent with the direction in Docket No. C-1839/PI-22. The
Commission will process Qwest's request on an expedited basis.⁹

12 QCC has filed the request "encouraged" by the Nebraska Commission, and the proceeding is
13 pending.¹⁰ QCC believes that the restrictions imposed by the Nebraska Commission's 1998
14 order are improper and is optimistic that they will be lifted in the pending docket; regardless,
15 Nebraska still allows QCC to compete for a substantial portion of business and government
16 customers in QC territory.

17 Staff's Report also mentions a few non-QC states that purportedly limit BOC affiliates
18 from competing in incumbent territory, but closer examination of the laws in these states shows
19 that none of them have taken the extreme approach recommended by Staff here. Some of the
20 states do not even take the approach Staff claims they do. For instance, Kansas is cited as a
21 jurisdiction which only approves CLEC affiliate applications for advanced services. But in the
22 application cited in the Staff Report, the applicant, an affiliate of SBC, only requested to provide

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24 ⁸ *Qwest Communications Corporation, Local Exchange Public Convenience and Necessity*, Case No. PU-04-160,
Order dated July 21, 2004 ("North Dakota QCC Order"), at 3-4.

25 ⁹ *In the Matter of the Application of Qwest Communications Corporation Seeking Authority to Operate as a*
Competitive Local Exchange Carrier of Telecommunications Services Within the State of Nebraska, Application
No. C-3201, Order Dated December 14, 2004 ("Nebraska QCC Order"), at 5.

26 ¹⁰ The matter is Docket No. C-3335, and is titled *In the Matter of the Application of Qwest Communications*
Corporation to Remove Restrictions of Commission Order in Docket C-1839.

1 advanced services.¹¹ The provision of basic, voice services was not proposed and was not at
2 issue. Similarly, in the Alabama case cited in footnote 8 of the Staff Report, while Staff claims
3 that “at least one state has certificated the BOC CLEC affiliate to operate outside of its BOC
4 ILEC service territory,” the applicant in that case was BellSouth, Inc., the BOC itself, which was
5 seeking CLEC authority outside its incumbent territory.¹² Neither the issue of CLEC affiliate
6 authority nor the issue of affiliates serving in incumbent territory were present in that case.

7 Staff also claims that in Texas, TEX. UTIL. CODE § 54.102 permits an affiliated CLEC to
8 provide advanced services, but not flat-rated local exchange services to residential and business
9 customers in the BOC’s serving area. However, TEX. UTIL. CODE § 54.102(e) expressly *permits*
10 affiliated CLECs to provide such services, except to the extent that the provision of services
11 would result in an individual customer-based contract that the affiliated ILEC could not
12 otherwise offer:¹³

13 *An affiliate of a company that holds a certificate of convenience and necessity*
14 *and that serves more than five million access lines in this state may hold a*
15 *certificate of operating authority or service provider certificate of operating*
16 *authority to provide service in an area of this state in which its affiliated*
17 *company is the incumbent local exchange company. However, the affiliate*
18 *holding the certificate of operating authority or service provider certificate of*
19 *operating authority may not provide in that area any service listed in Sections*
20 *58.051(a)(1)-(4) or Sections 58.151(1)-(4), or any subset of those services, in a*
21 *manner that results in a customer-specific contract so long as the affiliated*
22 *company that is the incumbent local exchange company may not provide those*
23 *services or subsets of services in a manner that results in a customer-specific*
24 *contract under Section 58.003 in that area. . . .*¹⁴

21 _____
22 ¹¹ In the Matter of the Application of SBC Advanced Solutions, Inc. for a Certificate of Convenience and Authority
23 to Transact the Business of a Telecommunications Carrier for the Purpose of Providing Advanced Data Services and
24 Other Telecommunications Services Within the State of Kansas and for Approval of its Initial Tariff, Docket No.
25 OO-SBAT-247-COC, Kansas Corporation Commission, 2000 Kan. PUC LEXIS 1068 (January 13, 2000), ¶¶ 1, 14.

26 ¹² *BellSouth Telecommunications, Inc., Applicant*, DOCKET 27663, Alabama Public Service Commission
2000 Ala. PUC LEXIS 72 (Order dated September 13, 2000).

¹³ It would appear from the statutory language that if the affiliated ILEC could offer an individual customer-based
contract, the affiliated CLEC could also offer such services in the incumbent’s territory.

¹⁴ TEX. UTIL. CODE § 54-102(e) (emphasis added). TEX. UTIL. CODE § 58.003 permits large ILECs to offer
customer-specific contracts if the ILEC installed SS7 signaling and fiber links between its central offices and
tandem switches.

1 One state Staff did not mention in its survey of states addressing competition by affiliated
2 CLECs is Kentucky. In 1997, Kentucky's Public Service Commission limited a BellSouth
3 affiliated CLEC, BellSouth BSE, to areas outside BellSouth's incumbent territory. In 1999,
4 Kentucky's Commission removed that restriction, and permitted BellSouth BSE "to provide
5 local exchange service on a statewide basis."¹⁵ That 1999 order did not restrict BellSouth BSE
6 from pursuing any specific customers or class of customers in BellSouth's incumbent territory,
7 but did impose some reporting, separations, and accounting requirements on BellSouth BSE.¹⁶
8 Subsequently, on October 29, 2004, most of even those restrictions were deemed unnecessary
9 and removed, because the Kentucky Commission found the concerns it previously held about
10 anticompetitive behavior and use of an affiliate to avoid Commission regulation "have not
11 materialized."¹⁷ Kentucky's approach reflects regulation aimed at the current competitive
12 landscape – not the vastly different competitive environment that existed in 1997 and 1998.

13 Finally, Staff's Report ignores the fact that in 2003, this Commission, after years of
14 testing, investigation, and testimony, concluded that Arizona's telecommunications markets were
15 open to competition when it recommended that the FCC approve Qwest's application to re-enter
16 the long distance market in Arizona. These realities of the present market and legal landscape
17 require and warrant a far different approach than contained in Staff's Report, and Staff's
18 recommendation number 19 in particular.

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24 ¹⁵ Order, *An investigation into the Propriety of, and Potential Safeguards for, the Provision of Local Exchange
Service by GTE Communications Corporation*, Case No. 98-410, Kentucky Public Service Commission, August 31,
1999.

25 ¹⁶ 1999 Kentucky PSC Order, p 4-5.

26 ¹⁷ Order, *An investigation into the Propriety of, and Potential Safeguards for, the Provision of Local Exchange
Service by GTE Communications Corporation*, Case No. 98-410, Kentucky Public Service Commission, October 29,
2004.

1 C. **QCC Lacks the Legal Ability to Improperly Leverage QC's ILEC Position and**
2 **Engage in Anti-Competitive Conduct such as Cross-Subsidization, Discrimination,**
3 **or Price-Squeezing.**

4 The first and third listed concerns on page 8 of Staff's Report boil down to the same
5 argument: QC will treat QCC more favorably than other CLECs, which would harm
6 competition. These concerns are based on two false premises: (1) that under existing federal and
7 Arizona law, QC can discriminate in favor of QCC compared to other CLECs, and (2) that the
8 FCC and this Commission are unable and/or unwilling to enforce these laws.

9 **1. Federal and state laws prohibit discrimination.**

10 As to the first point, a bevy of federal and state laws currently require transparency of all
11 of QC's transactions with QCC, and prevent both QC and QCC from improperly "leveraging"
12 their relationship. Sections 251 and 252 of the Act bar QC from discriminating against other
13 CLECs in its interconnection dealings with QCC imposing on QC:

14 The duty to provide, to any requesting telecommunications carrier for the
15 provision of a telecommunications service, nondiscriminatory access to network
16 elements on an unbundled basis at any technically feasible point on rates, terms,
and conditions that are just, reasonable, and nondiscriminatory¹⁸

17 To this end, in all fourteen QC in-region states, QCC has entered into agreements with QC
18 consistent with and modeled upon QC's statement of generally available terms ("SGAT"), and
19 those agreements have been filed for approval and have become effective.

20 Arizona's state discrimination laws are similarly broad. Arizona's Constitution requires
21 QC's charges for its services to be just, reasonable, and non-discriminatory:

22 All charges made for service rendered, or to be rendered, by public service
23 corporations within this State shall be just and reasonable, and no discrimination
24 in charges, service, or facilities shall be made between persons or places for
rendering a like and contemporaneous service¹⁹

25
26 ¹⁸ 47 USC § 251(c)(3).

¹⁹ ARIZONA CONSTITUTION, Art. 15, § 12.

1 Similarly, Arizona Rev. Stat. § 40-334 prohibits discrimination in a wide array of circumstances:

2 **Discrimination between persons, localities or classes of service as to rates, charges, service or facilities prohibited.**

3 A public service corporation shall not, as to rates, charges, service, facilities, or in
4 any other respect, make or grant any preference or advantage to any person or
subject any person to any prejudice or disadvantage.

5 No public service corporation shall establish or maintain any unreasonable
6 difference as to rates, charges, service, facilities or in any other respect, either
between localities or between classes of service.

The commission may determine any question of fact arising under this section.²⁰

7 In addition, the existing requirements of AAC R14-2-804 regarding Commission review of
8 transactions between public utilities and affiliates further require transparency and fairness in
9 affiliate transactions.²¹ These requirements prevent discrimination, cross-subsidization, or other
10 anti-competitive conduct, as the FCC observed in paragraph 315 of the *Section 272 Non-*
11 *Accounting Safeguards Order* quoted above.²²

12 Sections 271 and 272 of the Act, and the regulations adopted under those statutes, even
13 more sharply limit and control any opportunity for QCC to receive more favorable treatment
14 from QC compared to any other CLEC, on a broader spectrum of transactions. Section 272(b)
15 requires the long distance affiliates of QC, like QCC, to be structurally separated from the ILEC,
16 specifically requiring that QC and QCC:

17 (1) shall operate independently from the Bell operating company;

18 (2) shall maintain books, records, and accounts in the manner prescribed
19 by the Commission which shall be separate from the books, records, and accounts
20 maintained by the Bell operating company of which it is an affiliate;

21
22 ²⁰ ARIZ. REV. STAT. § 40-334.

23 ²¹ Because of the limited extent of the waiver from R14-2-803 granted in Decision No. 64654,
24 QCC agrees with Staff's recommendation in section 2.8 of its Report that the waiver need not be
revisited at this time.

25 ²² *Supra*, p.4 ("To the extent that there are concerns that the BOCs will unlawfully subsidize
26 their affiliates or accord them preferential treatment, we reiterate that improper cost allocations
and discrimination are prohibited by existing Commission rules and sections 251, 252 and 272 of
the 1996 Act, and that predatory pricing is prohibited by the antitrust laws. . .").

1 (3) shall have separate officers, directors, and employees from the Bell
2 operating company of which it is an affiliate;

3 (4) may not obtain credit under any arrangement that would permit a
4 creditor, upon default, to have recourse to the assets of the Bell operating
5 company; and

6 (5) shall conduct all transactions with the Bell operating company of
7 which it is an affiliate on an arm's length basis with any such transactions reduced
8 to writing and available for public inspection.²³

9 Moreover, QC cannot discriminate in favor of QCC and against other CLECs – and not only in
10 the more limited context of interconnection pursuant to sections 251 and 252. Section 272(c)
11 requires that QC :

12 (1) may not discriminate between that company or affiliate and any other
13 entity in the provision or procurement of goods, services, facilities, and
14 information, or in the establishment of standards; and

15 (2) shall account for all transactions with an affiliate described in
16 subsection (a) in accordance with accounting principles designated or approved
17 by the Commission.²⁴

18 In addition, section 272(e) provides that QC:

19 (1) shall fulfill any requests from an unaffiliated entity for telephone
20 exchange service and exchange access within a period no longer than the period
21 in which it provides such telephone exchange service and exchange access to
22 itself or to its affiliates;

23 (2) shall not provide any facilities, services, or information concerning its
24 provision of exchange access to the affiliate described in subsection (a) unless
25

26 ²³ 47 USC § 272(b). See also 47 CFR § 53.203.

²⁴ 47 USC § 272(c).

1 such facilities, services, or information are made available to other providers of
2 interLATA services in that market on the same terms and conditions;

3 (3) shall charge the affiliate described in subsection (a), or impute to itself
4 (if using the access for its provision of its own services), an amount for access to
5 its telephone exchange service and exchange access that is no less than the
6 amount charged to any unaffiliated interexchange carriers for such service; and

7 (4) may provide any interLATA or intraLATA facilities or services to its
8 interLATA affiliate if such services or facilities are made available to all carriers
9 at the same rates and on the same terms and conditions, and so long as the costs
10 are appropriately allocated.²⁵

11 Staff ignores these laws. *Staff Data Request Response* No. 1-4(c) indicates that the “anti-
12 competitive conduct” alleged in the first identified concern in the Staff Report means QC
13 charging QCC below market rates for certain services, “because QCC’s competitors would not
14 have access to the same deals available to QCC from QC.” *Staff Data Request Response* No. 1-
15 4(f) defines “cross-subsidization” as used in the first listed concern in the Staff Report as “the
16 ability of QCC to receive services from QC at below market rates.” *Staff Data Request Response*
17 No. 1-6(a) defines “discrimination” as identified in Staff’s third listed concern to “mean[] that
18 QC could provide more favorable terms of service to QCC that it does not provide to other
19 CLECs.” But each of these three concerns is clearly and repeatedly condemned in the Act, its
20 underlying regulations, the *272 Non-Accounting Safeguards Order*, and Arizona’s constitution
21 and statutes.

22 In its Report, Staff claims that the prohibitions of section 272 “do[] not address all of
23 Staff’s concerns in this regard.” QCC inquired why, and *Staff Data Request* No. 1-4(b)

24 _____
²⁵ 47 USC § 272(e)

25 ³⁰ *Section 272 Non-Accounting Safeguards Order*, ¶ 216.

26

1 answered: "Section 272 applies to QCC's provision of interLATA services. The various
2 restrictions do not apply to QCC's provision of competitive local services." That simply
3 misstates the law. The FCC interprets the non-discrimination obligations of section 272(c) very
4 broadly, holding in the *Section 272 Non-Accounting Safeguards Order* that "in enforcing the
5 nondiscrimination requirement of section 272(c)(1), we intend to construe these terms broadly to
6 prevent BOCs from discriminating unlawfully in favor of their section 272 affiliates."³⁰ As a
7 result, the FCC refused "to interpret the terms in section 272(c)(1) as including only
8 telecommunications-related or, even more specifically, common carrier-related 'goods, services,
9 facilities, and information,'"³¹ and ultimately concluded "that the protection of section 272(c)(1)
10 extends to any good, service, facility, or information that a BOC provides to its section 272
11 affiliate."³² More specifically, the FCC determined that the non-discrimination obligations of
12 section 272(c) include and extend beyond the non-discrimination obligations of section 251(c),³³
13 such that there should be no dispute as to whether BOCs' nondiscrimination obligations apply
14 even to its affiliates' local exchange operations:

15 Although we conclude that the 1996 Act authorizes section 272 affiliates to
16 purchase unbundled elements, *we emphasize that BOC facilities and services*
17 *provided to section 272 affiliates must be made available to others on the same*
18 *terms, conditions, and prices provided to the BOC affiliate pursuant to the*
19 *nondiscrimination requirements of sections 272 and 251(c)(3).* Thus, if a BOC
20 affiliate is a requesting carrier under section 251, the BOC is required to treat
21 unaffiliated requesting carriers in the same manner that the BOC treats its
22 affiliate, unless the unaffiliated entity has requested different treatment. For
23 example, if a BOC were to provide its section 272 affiliate with access to
24 operational support systems (OSS) functions via a different method or system
25 than it provides to requesting carriers under section 251, we would regard such
26 discriminatory treatment as a violation of section 251(c)(3). *We believe such*
nondiscrimination requirements will prevent BOCs from providing special
*treatment to their affiliates.*³⁴

31 *Id.*, ¶ 217.

32 *Id.*, ¶ 218.

33 *Id.*, ¶ 219 ("We also conclude that the terms "services," "facilities," and "information" in section 272 should be interpreted to include, among other things, the meaning of these terms under section 251(c). The term "facilities," therefore, includes but is not limited to the seven unbundled network elements described in the First Interconnection Order.")

34 *Id.*, ¶ 316 (emphasis added). See also ¶ 315, quoted *supra* p.4.

1 Staff is simply wrong on the law – and this is without even considering the broad non-
2 discrimination requirements of the Arizona Constitution and ARIZ. REV. STAT. § 40-334. Quite
3 simply, QC cannot provide virtually any service – whether telecommunications or non-
4 telecommunications, local or non-local – to QCC in a discriminatory fashion.

5 **2. Existing regulations require disclosure and monitoring to ensure prohibited**
6 **discrimination does not occur.**

7 The existing federal scheme does not rely simply on prohibiting discrimination by BOCs.
8 Section 272 and the regulations adopted thereunder also require QC to post all transactions
9 between itself and QCC to a website, and to make the agreements underlying those transactions
10 available on request. In fact, the Staff refers to this requirement on page 5 of its report and states
11 that it has reviewed these filings and found that QC and QCC substantially comply with these
12 regulations, and further states that it “is not aware of any complaint filed by another carrier
13 against QCC and/or QC alleging anticompetitive conduct.” These requirements of separation,
14 non-discrimination, and disclosure are further enforced and monitored by a biennial audit by an
15 independent auditor, whose report is submitted to the FCC and made available to applicable state
16 Commissions.³⁵ Staff glosses over these existing protections. Despite the fact that its own
17 additional investigation and review of the biennial audit revealed that Qwest is complying with
18 these obligations (without comment from the competitors and regulators from various states with
19 access to the audit report),³⁶ Staff nevertheless assumes violations of the law will take place, and
20 further assumes that the FCC and this Commission lack the ability or will to enforce these laws.
21 These baseless assumptions insult the integrity of the enforcement system as well as QC and
22 QCC. Such assumptions are bad policy and would result in bad law.

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26 ³⁵ 47 USC § 272(d); 47 CFR § 53.209 *et seq.*

³⁶ Staff Report, at 6.

1 **3. Use of the Qwest brand is not improper "leveraging" of QC's ILEC position.**

2 Staff's only articulated concern regarding QCC's "leveraging" QC's ILEC position,
3 indicated in its responses to QCC's data requests, "addresses the potential advantages that a QCC
4 CLEC operation could gain over other CLECs by using QC's ILEC customer recognition,
5 knowledge of customers and established assets."³⁷ No law or public interest prohibits QCC from
6 benefiting from name recognition associated with the Qwest brand, just as AT&T's CLEC
7 operations may benefit from the AT&T brand, regardless of the formal name of the corporate
8 entities involved. There is no legal justification for this Commission to limit Qwest's ability to
9 brand its services more than it limits AT&T's or MCI's. Moreover, as discussed above, QCC
10 and the other section 272 affiliate of QC, Qwest LD Corp. ("QLDC") already use the Qwest
11 brand name; use of the Qwest name would only continue branding for QCC's CLEC operations
12 that is already in place for its long distance operations.

13 **4. Staff's Concerns About CPNI Misuse Are Unfounded.**

14 Staff claims in its Report that QCC's responses to data requests cause concern that QCC
15 and QC will misuse QC CPNI, thus giving QCC an improper competitive advantage. First, this
16 "concern" is based on a misunderstanding of CPNI law. QCC will not have access to QC's
17 CPNI any differently than another CLEC would have access to the CPNI of its affiliates or the
18 CPNI of its own customers for other categories of service. Second, Staff admits that QCC's
19 proposed use of QC CPNI, as stated in its responses to Staff data requests, would comply with
20 federal CPNI law³⁸ and the currently proposed Arizona state CPNI rule.³⁹ When QCC asked
21 staff to articulate "how and why the Staff's concern about permissible use of CPNI is different
22 for the relationship between QC and QCC as compared to AT&T's use of its customers' CPNI
23 related to local and long distance services and sales, Staff responded that "AT&T is not the
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25 ³⁷ Staff's Response to Qwest [Communications] Corporation's First Set of Data Requests ("*Staff Data Request*
Response"), No. 1-4(a).

26 ³⁸ *Staff Data Request Response* No. 1-12(c).

³⁹ *Staff Data Request Response* No. 1-12(d).

1 dominant provider of either local or long distance service to customers in Arizona.”⁴⁰ In other
2 words, Staff’s concern is not with how CPNI would be shared, but who would be sharing that
3 information, thus prohibiting such sharing for some carriers but not others. The Commission
4 should reject Staff’s discriminatory “concerns” in this regard.

5 **5. Staff’s “price squeeze” concerns are unfounded and belong in another**
6 **docket.**

7 Staff’s Report does not discuss its concern about so-called price squeezes. Even its
8 responses to the Qwest Data Requests indicate “price squeeze” issues are being addressed in the
9 AFOR docket, and are “more of a concern with respect to CLECs in general.”⁴¹ While QCC
10 disagrees with most of the arguments commonly made about “price squeezes,” QCC does agree
11 those arguments really have no place in this docket. No action the Commission could take on
12 QCC’s Application could alter QC’s wholesale obligations. QCC, as a CLEC reliant on non-
13 discriminatory access to QC’s network elements under the readily available terms of QC’s
14 SGAT, simply cannot place any other carrier in a price squeeze position. Even if at some point
15 in the future QCC obtained facilities for its local exchange operations, and if QCC were to sell
16 access to those facilities or services using those facilities at wholesale, and if QCC’s prices were
17 higher than TELRIC standards would otherwise yield, any carrier would still have access to
18 network elements from QC at TELRIC rates. Staff’s “price squeeze” concerns are baseless.
19 Regardless, resolution of these concerns is more properly left to other dockets.

20 **D. QCC’s Joint Marketing Efforts, Expressly Permitted Under Section 272 of the Act,**
21 **Will Not Create Any Harmful Confusion in the Marketplace.**

22 Without foundation, Staff claims that consumer confusion could result from QCC and
23 QC both offering services in QC incumbent territory. To the contrary, the fact that QC and QCC
24 will both use the Qwest brand name will *reduce* any potential for customer confusion. Use of
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26 ⁴⁰ Staff Data Request Response No. 1-12(e).

⁴¹ Staff Data Request Response No. 1-4(i).

1 the Qwest name tells Arizona customers from whom their telephone services are purchased and
2 from whom they can obtain service. This will continue as QCC uses the Qwest name to market
3 its CLEC services. On the other hand, if QCC used different names for its CLEC services and its
4 IXC services, customer confusion would likely result, as the Qwest affiliation would not be clear
5 to consumers. The use of a name other than Qwest to market its services could potentially
6 subject QCC to allegations that it was intentionally trying to mislead customers and hide its
7 relationship to QC. It is not clear that a QCC customer who thought he/she was dealing with the
8 RBOC entity because the service had been marketed as "Qwest" would be more confused and/or
9 upset than a customer who purchased service from "Generic Arizona CLEC" believing that
10 he/she was dealing with someone other than Qwest. Moreover, as noted above, similar corporate
11 names or branding strategies have been allowed in Arizona for years. Many independent
12 incumbent carriers use their corporate name in their CLEC operations, and other IXC/CLEC
13 affiliates such as AT&T, MCI, and Sprint are permitted to use their parent corporations' brands
14 in their marketing. Use of the Qwest brand is consumer-friendly and is in the public interest.

15 Staff's concern about consumer confusion must also be rejected on legal grounds. In
16 section 272(g) of the Act, Congress made clear that BOCs like QC and Section 272 affiliates like
17 QCC could jointly market their services. Staff's concern about customer confusion would, as a
18 practical matter, limit QCC's rights to joint marketing in contravention of the federal Act. The
19 Commission should reject Staff's proposal to preempt section 272.

20 **E. Approving QCC's Application Will Not Enable QC to Evade its Regulatory**
21 **Obligations.**

22 Staff argues that if QCC has authority to provide CLEC services in QC incumbent
23 territory, QC will be able to evade its regulatory obligations. Staff fails to articulate, however,
24 either what obligations QC could possibly evade with QCC's presence in its incumbent territory,
25 or how QCC's presence in QC incumbent territory could enable QC to evade any of those
26 obligations. Staff doesn't articulate these risks, because they do not exist. As noted above,

1 approving QCC's Application will not have any effect whatsoever on QC's regulatory
2 obligations in QC's territory. QC will retain all wholesale obligations, and will retain all of its
3 non-discrimination, rate and service quality obligations. Even Staff concedes that the FCC has
4 "many times stated that a BOC can not use an affiliate to evade its regulatory obligations under
5 sections 252, 252, and 271 of the Act."⁴² QCC agrees.

6 **F. QCC's Presence in Arizona's Competitive Market for Telecommunications Will**
7 **Serve the Public Interest.**

8 Staff's fifth articulated concern is that Arizona's telecommunications market is not
9 sufficiently competitive to permit QCC to operate in QC incumbent territory. This concern
10 misses the mark in two different ways. First, Arizona is a strongly competitive market. Cox
11 Telephone has made huge gains in the Phoenix and Tucson markets. Wireless services offer a
12 substitute for wireline for an increasing number of consumers every year.⁴³ And voice over
13 internet protocol – a service for which providers need no state certificate of authority – is
14 radically changing the competitive environment. Moreover, the ready availability of unbundled
15 network elements at TELRIC prices means that an entrepreneur can compete with Qwest with
16 only a limited capital investment. These existing market forces, combined with the relative ease
17 with which a competitor could enter the market even if anticompetitive behavior drove other
18 carriers away, effectively prevents Qwest from engaging in – or at least profiting from – any
19 anticompetitive behavior, even if the Commission assumes it cannot enforce existing laws.
20 Consumers have so many alternatives to Qwest service, and barriers to entry are so low, that any
21 increased costs or decreased profits Qwest might suffer in order to pursue any given
22 anticompetitive business strategy cannot be regained even if Qwest could drive its wireline
23 competitors from the market.

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25 ⁴² Staff Report, at 10.
26 ⁴³ Though not a perfect substitute for every customer, wireless services offer a full or partial substitute for many
wireline customers and services. Indeed, QCC anticipates that the evidence at hearing will reveal that there are now
more wireless "access lines" than wireline. Thus, the presence of wireless services in the market constrains almost
every marketing decision wireline carriers make.

1 Second, Staff's concerns appear to be articulated from the perspective of protecting
2 competitors, rather than the perspective of competition or consumers themselves. If QCC is
3 granted the authority it seeks, customers in QC incumbent territory that desire single provider,
4 single bill, and combined local services with intra- and interLATA services will have an
5 additional choice they presently lack. Additional choices for consumers mean more competition,
6 lower prices and greater innovation.⁴⁴ This serves the public interest.

7 **III. NOTICE REQUIREMENTS**

8 In Section 5.1 of the Staff Report, at page 16, Staff states, "At this time, the Applicant has
9 not yet published legal notice of the Application in all counties in which it requests authorization
10 to provide service." QCC has complied with the notice requirements of the procedural
11 order in this docket. The legal notice was published on February 11, 2005 and the
12 affidavit was filed with Docket Control on February 24, 2005.

13 **IV. CONCLUSION**

14 For the reasons stated above, the Qwest's Application for Certificate of Convenience and
15 Necessity is reasonable and in the public interest and should be approved. Staff's recommended
16 condition number 19 is unreasonable, arbitrary, and capricious. To the extent that the concerns
17 Staff expresses are not illusory, existing laws provide ample protection against potential abuse.
18 Further, Staff's recommended condition number 19 would prohibit or have the effect of
19 prohibiting the ability of Qwest Communications Corporation to provide intrastate telephone
20 service, and would therefore violate 47 U.S.C. Section 253 of the Act. Qwest Communications

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26 ⁴⁴ Section 272 Non-Accounting Safeguards Order, ¶ 315 ("We agree with the BOCs that the increased flexibility
resulting from the ability to provide both interLATA and local services from the same entity serves the public
interest, because such flexibility will encourage section 272 affiliates to provide innovative new services.")

1 Corporation's certificate of convenience and necessity should not be limited to areas outside of
2 Qwest Corporation's service territory, or otherwise.

3 RESPECTFULLY SUBMITTED this 16th day of March, 2005.

4
5 QWEST COMMUNICATIONS CORPORATION

6
7
8 By: 

9 Norman G. Curtright
4041 N. Central Avenue, Suite 1100
Phoenix, AZ 85012
10 *Its Attorney*

11 Original and 13 copies of the foregoing
12 Were filed this 16th day of March, 2005 with:

13 Docket Control
14 Arizona Corporation Commission
1200 West Washington Street
15 Phoenix, AZ 85007

16 Copy mailed and e-mailed
17 this 16th day of March, 2005 to:

18 Maureen A. Scott (mscott@cc.state.az.us)
Legal Division
19 ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
20 Phoenix, AZ 85007

21 Ernest G. Johnson, Director (ernestjohnson@cc.state.az.us)
Utilities Division
22 ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
23 Phoenix, AZ 85007

24 

25
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