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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

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Arizona Corporation Commission

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AZ CORP COMMISSION
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IN THE MATTER OF THE)
INVESTIGATION OF THE COST OF)
TELECOMMUNICATIONS ACCESS) DOCKET NO. T-00000D-00-0672
AT&T'S MOTION TO COMPEL

AT&T of the Mountain States, Inc. hereby moves for an order requiring Qwest Corporation ("Qwest") to respond to AT&T's First Data Requests to Qwest.

I. INTRODUCTION

On or about October 24, 2003, AT&T served its First Set of Data Request on Qwest. AT&T received Qwest's responses on November 7, 2003. A copy of the non-confidential responses are attached hereto as Exhibit A. AT&T First Set of Data Requests asked Qwest to respond to 28 data requests. Qwest objected in whole or in part to 26 requests.¹ Qwest objected to 22 requests in their entirety.²

It appears that Qwest seeks to limit the scope of the case to the rates it charges for switched access. However, the case is much broader. AT&T maintains this proceeding is also about whether Qwest can place, or has placed, the interexchange carriers ("IXCs")

¹ Qwest objected to AT&T 01-002, 003, 004, 005, 006, 007, 008, 009, 010, 011, 012, 013, 014, 015, 016, 017, 018, 019, 020, 021, 022, 023, 025, 026, 027 and 028.

² Partial answers were provided for AT&T 01-003, 006, 008, and 011.

in a price squeeze. The questions AT&T asked, and the questions Qwest objected to, seek information relevant to the issue of Qwest's cost of providing interexchange *services* in Arizona, not just Qwest's costs of switched access. With the information AT&T has requested it can determine whether Qwest is providing, or based on any proposed rate for switched access whether Qwest would be providing, interexchange service at prices less than its imputed cost, or the price floor.

II. ARGUMENTS

Qwest has raised essentially 3 objections: the requests do not seek information that is relevant to the cost of switched access, the requests seek information regarding affiliates and the requests are overly broad and unduly burdensome. It is AT&T's position each of the objections lack merit.

A. Scope of the Proceeding

In response to 23 of the 28 requests, Qwest has argued that AT&T "seeks information that is not relevant to the cost of telecommunications access and is therefore not reasonably calculated to lead to the discovery of admissible evidence in this docket," or has made essentially the same objection using similar language.³ Qwest misunderstands the true scope of the proceeding. The requests by AT&T seek information well within the scope of the proceeding.

Qwest has stated publicly that its rates for intrastate, interLATA calls may be as low as \$.05 per minute. The average rate for switched access in Arizona is \$.033. This means that the access cost to AT&T for an intrastate call is \$.066 for a call requiring AT&T to pay originating and terminating switched access. This is above the rate Qwest

³ AT&T 01-002, 004, 005, 006, 007, 009, 010, 012, 013, 014, 015, 016, 017, 018, 019, 020, 021, 022, 023, 025, 026, 027 and 028

proposes to charge. The \$0.66 cost does not include any other tariffed rates for services and non-tariff costs that Qwest must impute per Commission rules. R14-2-1310(C).

In the Opinion and Order dismissing an access complaint filed by MCI, the Commission recognized U S WEST's access charges were not set at economic cost. The Commission dismissed the case because it believed it could not change Qwest's rates for access without reviewing the impact on Qwest's overall rate of return.⁴ However, the Commission stated: "We find that the pricing of access charges should be taken into consideration as part of any request by U S WEST to enter into Arizona's interLATA toll market. Opinion and Order, Decision No. 60596 (Jan. 14, 1998).⁵

In the public interest phase of Qwest Section 271 proceeding, AT&T argued that very high access rates still are a problem in Arizona, and allowing Qwest in the interLATA market while maintaining Qwest's high switched access rates will permit Qwest to place A&T and other IXCs in a price squeeze at the rate levels proposed by Qwest. Until switched access rates are lowered and the appropriate price floor for Qwest's services is established, AT&T argued it is not in the public interest to allow Qwest in the in-region, interLATA market.

AT&T raised two issues in the public interest phase of the Section 271 proceeding – high switched access charges and the possibility of a price squeeze if access charges are not lowered before Qwest enters the in-region interLATA long distance market.⁶ At the special open meeting held on September 19, 2003, Chairman Spitzer addressed AT&T's

⁴ Qwest is now under price caps. Opinion and Order, Decision No. 63487 (March 30, 2001). Qwest recently filed a petition to renew the Plan, with modifications. Docket No. T-01051B-03-0454.

⁵ On September 5, 2000, the Staff initiated the present investigation of the cost of telecommunications access. Docket No. 00000D-00-0672. The case had until recently been suspended at the request of Staff.

⁶ A decision is expected from the Federal Communications Commission on Qwest's application no later than December 3, 2003.

filing. Chairman Spitzer found the AT&T comments "compelling." Docket No. T-00000A-97-0238, TR 98 (Sept. 19, 2003).

CHMN. SPITZER: The ayes have it. I'm going to bifurcate, because there was a different discussion on the two issues. The first is the access charges. I would move that the access charge issue be removed from this order and be placed into an expedited docket. Hopefully it would be my expectation that docket would be completed prior to Qwest's entry into the long-distance. I feel the access charge issue was compelling. Is there any discussion on that?

COM. IRVIN: I have no discussion, Mr. Chairman, and I would fully support that amendment.

CHMN. SPITZER: You've heard the motion. All in favor please say aye.

(Chorus of ayes.)

CHMN. SPITZER: Opposed no.

(No response.)

CHMN. SPITZER: The ayes have it.

TR 123-124.

On September 26, 2003, Staff filed a Staff Request for an Expedited Procedural Conference. Staff stated,

At the Open Meeting held on September 19, 2003, during which the Commissioners deliberated on the issue of whether Qwest's 271 Application was in the public interest, Staff was ordered to resume its examination of Qwest's intrastate access charges on an expedited basis.

Therefore, based on the issues raised by AT&T's public interest filing – high access charges and possible price squeeze – and the Commission's subsequent ruling, the price squeeze/price floor issue is within the scope of this proceeding.

AT&T previously filed testimony in this proceeding maintaining that access rates must be reduced to forward-looking economic cost.⁷ AT&T has also argued that high

⁷ See Direct Testimony of William H. Lehr on behalf of AT&T (July 3, 2002) at 4-8.

access charges provide Qwest a cost advantage that can lead to a price squeeze.⁸

Therefore, not only did the Commission make Qwest's costs of providing interexchange service an issue in this proceeding, AT&T's initial testimony did as well.

The Rules of Civil Procedure for the Superior Court of Arizona apply to discovery. R14-3-101. Rule 26(b)(1) states that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to a claim or defense of the party seeking discovery or to the claim or defense of any other party...” Furthermore, rules of discovery are to be liberally construed.

It is also a common principle that the rules of discovery are to be broadly and liberally construed to facilitate identifying the issues, promote justice, provide a more efficient and speedy disposition of cases, avoid surprise, and prevent the trial of a lawsuit from becoming a ‘guessing game.’

Cornet Stores v. Superior Court in and for County of Yavapai, 108 Ariz. 84, 86, 492 P. 2d 1191, 1193 (1972), *en banc*. It is readily apparent that AT&T's requests meet these standards.

Although Qwest and Staff have advocated that switched access charges should be reduced to interstate levels,⁹ there is no certainty the Commission will ultimately decide to reduce switched access rates to interstate levels.¹⁰ Therefore, it is imperative that evidence be presented regarding Qwest's costs of providing interexchange service in

⁸ *Id.*, at 12.

⁹ In the last Qwest rate case establishing the Price Cap Plan, Staff expert recommended the reduction of switched access rates to interstate levels over the life of the Plan. Docket No. T-01051B-99-0105, Staff Ex. 12 at 12. Admittedly, the Stipulation entered into between Staff and Qwest did not incorporate this Staff recommendation. Recently, Qwest filed comments in a California access case recommending the reduction of intrastate switched access rates to interstate switched access levels. *Order Instituting Rulemaking to Review Policies Concerning Intrastate Carrier Access Charge, Rulemaking 03-08-018 (Phase I)*, Comments of Qwest Communications Corporation (Sept. 25, 2003) at 4-6 & 9.

¹⁰ The interstate switched access rate is \$0.0055 per minute.

order to establish a price floor for Qwest's interexchange rates. Reducing switched access rates alone will not prevent Qwest's ability to squeeze other competitors. For example, if the rate for switched access in Arizona is reduced to only \$0.01 a minute and Qwest's other costs (tariff and non-tariff) are \$0.04 per minute, Qwest retail rates could not be less than \$0.06 per minute (imputing \$0.01 on both the originating and terminating ends). By simply reducing the switched access rate to \$0.01, the Commission would not know the price floor for Qwest's retail rates because it would not know Qwest's other costs of providing interexchange service. Therefore, Qwest's costs of providing interexchange service are integral to any decision regarding where access rates are set. AT&T may agree that knowing Qwest's costs of providing interexchange service may be less important if switched access rates were set at interstate levels, but there is no assurance the rates will be set at interstate levels. Therefore, AT&T must have the information to put on a case regarding the price floor for Qwest's interexchange service based on Qwest's costs of providing interexchange services. *See* R14-2-1310(c).¹¹

B. Information Regarding Affiliates

In response to 22 of the requests, Qwest objected to the data request because they required information regarding its affiliates: "Qwest further objects to this request as it pertains to its affiliates on the grounds that these affiliates are not parties to this proceeding."¹² Only 11 of the data requests contain the word "affiliate," but this is not

¹¹ The Commission ordered that originating access shall be considered an essential facility for purposes of R14-2-1310(c). Opinion and Order, Decision No. 63487 (March 30, 2001).

¹² The only data requests for which this objection was not made are AT&T 01-006, 014, 015, 016, 018, and 024.

surprising, considering that Qwest does not provide all its toll services through one or more of its affiliates.¹³

Under the provisions of the Telecommunications Act of 1996, Qwest is required by law to provide in-region, interLATA services through an affiliate. 47 U.S.C. § 272(a). However, the Act recognizes the role of state commissions in setting rates and specifically allows the state commission to obtain access to the financial accounts and records of each company and its affiliates that are necessary for the regulation of rates. *Id.*, § 272(d)(3)(A). In the *Accounting Safeguards Order* the FCC made it clear that Section 271 and 272 “do not alter the jurisdictional division of authority with respect to matters falling outside their scope, including rates charged to end users for intrastate, interLATA service.”¹⁴

It is obvious that under the federal Act, the state commissions retain the authority to review the records of the regulated provider of local exchange service and the affiliate and that the federal Act requirement to provide long distance service through an affiliate was not meant to affect state commission oversight of intrastate rates. Simply put, Qwest cannot hide behind its affiliate, which was created to provide structural, transactional and nondiscrimination safeguards for Qwest’s competitors. The Commission has ample authority to require Qwest to provide the information requested under both state and federal law.

Qwest will market its long distance affiliate’s interLATA services. Although presently prohibited by federal law from jointly marketing its affiliate’s in-region, interLATA services, as soon as Qwest receives in-region, interLATA relief, the joint

¹³ Qwest historically has not provided intraLATA toll service through an affiliate.

¹⁴ *Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, FCC 96-490 (rel Dec. 24, 1996), ¶ 42. *See id.*, ¶ 41.

marketing restriction will be lifted. Qwest currently markets its affiliate's services in other states. It bundles local, intrastate and interstate services in one offering. If Qwest markets its affiliate's services, it cannot argue the affiliate's costs are off-limits. This would deprive the Commission of the ability to effectively monitor and set Qwest's rates.

Qwest is seeking certificates of convenience and necessity for several long distance affiliates. The Commission should carefully consider the conditions it imposes on these affiliates when granting the certificates; otherwise, Qwest may obtain to hide behind its corporate structure every time the Commission seeks information relevant to Qwest that Qwest claims is in the possession of a non-party affiliate.

Finally, it is AT&T's understanding that the Commission made every telecommunications carrier a party to the access investigation; therefore, Qwest's own costs to provide intraLATA toll service should not be at issue. As soon as the Commission grants a certificate to an affiliate of Qwest, the affiliate should be made a party to this proceeding. As noted earlier, the FCC will issue its order on or before December 3, 2003. The Arizona Commission will shortly rule on an affiliate's request for a certificate. By the time the Administrative Law Judge rules on this Motion, the affiliate can be made a party, negating Qwest's arguments.

The ultimate question is, can Qwest structure its services in a manner that prevents Commission oversight over Qwest. Qwest is marketing local and intraLATA toll services now. It will be marketing interLATA services shortly. Qwest's objection simply is disingenuous. It should be overruled.

C. The Requests are Not Overly Broad or Unduly Burdensome

The burden of proving the validity of an objection is upon the objecting party. *Cornet Stores* at 86, 1193. General objections – that the requests are unreasonably burdensome, oppressive, immaterial or irrelevant – are insufficient. *Id.* The person objecting has the burden of showing that the requests are an unreasonable burden, and must provide some indications of the work involved in answering the request. *Id.*, at 88, 1195. Qwest objections fail on all counts.¹⁵ It is obvious that AT&T's requests fall within the scope of the proceeding, are relevant and are related to AT&T's claims. Therefore, Qwest's objections are meritless.

Qwest has also objected to AT&T 01-006 because it claims it requires Qwest to conduct a special study. Qwest has failed to demonstrate that AT&T's request requires an expensive expenditure of time, effort or financial resources.

We are aware of the holdings that a party interrogated is not required to research and compile data and information not readily know to him... But the principle should also be applied that if the answers involve no great, excessive expenditure of time, effort, or financial resources, even though involving research and compilation of data from documents or records, they must be given.

Id., at 89, 1196 (citations omitted). Once again, Qwest's objection lacks merit.

III. CONCLUSION

AT&T has demonstrated that its requests meet the requirements of Rule 26, are within the scope of the proceeding, relevant and related to a claim raised by AT&T. Furthermore, Qwest has failed to meet is burden of showing that AT&T's requests are

¹⁵ AT&T assumes Qwest will try to meet the standards for objections in its response to AT&T's motion. Accordingly, it will be necessary for AT&T to file a reply.

overly broad and unduly burdensome. Therefore, AT&T respectfully requests an order compelling Qwest to answer AT&T's First Set of Data Requests to Qwest.

Submitted this 25th day of November, 2003.

**AT&T COMMUNICATIONS OF THE
MOUNTAIN STATES, INC. AND TCG
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CERTIFICATE OF SERVICE

(Docket No. T-00000D-00-0672)

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