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BEFORE THE ARIZONA CORPORATION COMMISSION

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AZ CORP COMMISSION
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IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S
COMPLIANCE WITH § 271 OF THE
TELECOMMUNICATIONS ACT OF 1996

) Docket No. T-00000A-97-0238
)
) AT&T'S MOTION FOR
) EXTRAORDINARY PROTECTIVE
) ORDER

AT&T Communications of the Mountain States, Inc. (hereafter "AT&T"),
through its attorneys, submits this Motion for Extraordinary Protective Order as follows:

1. This motion comes in response to discovery requests from Commission Staff, seeking proprietary information that is highly sensitive and contains extremely confidential trade secrets relating to the current operating status of AT&T's business in Arizona ("Confidential Information"). While the existing Protective Order in this docket, issued August 9, 2001, sets out a minimum level of protection for materials produced herein, AT&T believes that the specific information requested by Staff requires an additional, higher level of protection.

2. For the reasons set forth below, AT&T respectfully requests that the Commission enter a Protective Order that the Confidential Information described below be made available only to individual members of the Commission, one (1) Staff witness, one (1) attorney per party, or, where a party is not represented by Arizona Corporation Commission party's representative, and no others.

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3. In this case, Staff has requested that AT&T provide a count of the loop facilities owned and operated by AT&T within the state of Arizona. Staff further requests that this loop count information be broken down between residential and business facilities. AT&T regards this information as highly sensitive, because it directly reflects upon AT&T's ability to provide services to the public. Hence, the information has the potential to affect AT&T's position in the marketplace, and its status and position among other carriers. For this reason alone, it is extremely valuable to AT&T's competitors. Moreover, to the extent the information requested reflects AT&T's entry strategy within the Arizona local exchange market, it is of even greater value to its competitors' marketing and sales forces. AT&T provides this information to the FCC on Form 477, subject to the most stringent confidentiality protections afforded under federal law.

4. The protections afforded under the existing Protective Order are insufficient for this information. Because the information requested by Staff would be advantageous to Qwest, as well as to other competitors, AT&T must take every precaution to ensure that the information is not used by those competitors. If those competitors have access to the Confidential Information, even under the existing Protective Order, they would have an economic advantage not intended by the Commission in these proceedings. Once the Confidential Information is available in any context to competitive interests, restrictions on the use of such information are by and large meaningless. Advisors and consultants could easily use the Confidential Information to advise their clients without identifying the source of the information (or by that time having ample opportunity to find corroborating sources).

5. Rule 26(c) of the Arizona Rules of Civil Procedure, adopted by the Commission in R14-3-101(A), allows discretionary treatment of evidence by providing in pertinent part that a court (or in this case the Commission):

...may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including...(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

6. The information sought here—loop counts within a specific state, broken down between business and residential categories—clearly falls within the category of trade secret or other confidential information. At the FCC, competitively sensitive information is protected from mandatory disclosure pursuant to 5 U.S.C. 552(b)(4), or “Exemption 4.” The D.C. Circuit has recently held that information that would “provide competitors with valuable insights into the operational strengths and weaknesses of a [company threatens]...the type of competitive harm envisioned in Exemption 4.” *Public Citizens Health Research Group v. FDA*, 185 F.3d 898, 905 (D.C. Cir. 1999), internal quotations omitted. The FCC itself has found “confidential” information to include information relating to a carrier’s investment in plant (because that information would allow “competitors to devise strategies to introduce new services to the competitors’ benefit, or exploit weaknesses in [the carrier’s]...existing operations”) and also information about a carrier’s deployment status, including construction information.¹ Again, this is the very type of information being sought here.

¹ *Local Exchange Carriers’ Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, 14 FCC Rcd. 978 (1999), *Southern Company; Request for Waiver of Section 90.629 of the Commissions’ Rules*, 14 FCC Rcd. 1851, at 1860 (1998).

7. At least one state court agrees that line count information is highly proprietary and must be protected to avoid exploitation by competitors. See *State of North Carolina ex rel. Utilities Commission v. MCI Telecommunications Corp.*, 514 S.E.2d 276, 283 (N.C.App. 1999) (“provid[ing] public access to [such information]...would provide competitors rather extensive insight into the business plans of a particular [competitive LEC]”).

8. Many of the parties who have intervened in this matter are direct competitors of AT&T. It would be manifestly unjust to allow disclosure of the Confidential Information to these parties without placing specific additional restrictions on the use of that information. Competitors could potentially use this information to assess AT&T’s ability to provide service within the state, and upstage or counter AT&T’s future plans for facilities and business development.

9. In determining whether a party has made a showing of good cause for the issuance of a protective order, many courts have applied a balancing test. *Mountain States Tel. and Tel. Co. v. Department of Public Service Regulation*, 194 Mont. 277, at 285-6, 634 P.2d 181, at 187 (1981) (court and commission should balance competing interests presented in the case); *Krahling v. Executive Life Insurance Co., et al.*, 125 N.M. 228, 959 P.2d 562 (1998), citing Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv.L.Rev. 427, 432-33 (1991) (court should balance the party’s need for information against the injury that might result if uncontrolled disclosure is compelled). In this case, the legitimate interest of Qwest, for example, to view this Confidential Information is not really apparent, even in the context of these proceedings. In other words, does the fact that Qwest seeks interLATA authority

to compete with AT&T give Qwest a legitimate interest in the competitively sensitive information of AT&T, its future competitor? AT&T contends that the answer is no, and that the disclosure of this information should by rights be limited to examination *in camera* by the Commission, and Commission Staff only. At the same time, however, AT&T is cognizant of the fact that such a limitation would bring howls of dissent from Qwest and its attorneys. That is the reason AT&T has attempted to craft a different standard for disclosure here—one which is necessarily higher than the usual standard, but not so restrictive as to foreclose all participation by Qwest and the other competitors.

10. In a balancing of interests, the scales here must tip in favor of AT&T's ability to maintain its privacy interest in its Confidential Information. While it may be important for the Commission itself, together with Staff, to review the information in order to be able more accurately to determine the level of competition present within the State, there is no reason to allow disclosure of the information to Qwest or the other competitors.

11. AT&T here seeks an extraordinary Protective Order that contemplates that the Confidential Information described above be made available only to individual members of the Commission, one (1) Staff witness, one (1) attorney per party, or, where a party is not represented by an attorney, by the party's representative, and no others. In addition, the Confidential Information should not be released to any party who has not already intervened in these proceedings. AT&T contends that such a limitation, above and beyond the normal standard used in protecting proprietary information, is necessary and appropriate in view of both the nature of the Confidential Information, and the legitimate interests of the parties to these proceedings.

12. AT&T has filed a similar motion in Colorado, and Qwest has not objected.

See Exhibit A, attached hereto.

Dated this 22nd day of August, 2001.

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MOUNTAIN STATES, INC. AND TCG
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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

Docket No. 97I-198T

IN THE MATTER OF THE INVESTIGATION INTO U S WEST COMMUNICATIONS,
INC.'S COMPLIANCE WITH §271 (C) OF THE TELECOMMUNICATIONS ACT OF 1996

**QWEST CORPORATION'S RESPONSE TO AT&T'S MOTION FOR
EXTRAORDINARY PROTECTIVE ORDER**

Qwest Corporation ("Qwest") files this Response to AT&T's Motion for Extraordinary Protective Order.

1. Qwest's position is simple: Qwest wants the data requests regarding business access lines and business customers answered. AT&T has already answered the same data requests for residential access lines and residential customers. As grounds for its Motion, AT&T expresses concern about this confidential data reaching marketing or sales departments of other companies. *AT&T Motion, p. 5*. It is Qwest's understanding, and Qwest has trusted that it is AT&T's understanding as well, that even "regular" confidential information cannot be shared with the marketing or sales departments.

2. While Qwest is not commenting one way or the other on whether AT&T has stated good grounds for "super" confidentiality protection, Qwest wants to expedite the process. Therefore, Qwest does not oppose AT&T's Motion.

DATED this 2nd day of August, 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the original and 10 copies of AT&T's Motion for Extraordinary Protective Order in Docket No. T-00000A-97-0238 were sent by overnight delivery on August 22, 2001 to:

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