

ORIGINAL

EXCEPTION



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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

**QWEST'S EXCEPTIONS TO DRAFT SUPPLEMENTAL ORDER ON
QWEST'S COMPLIANCE WITH CHECKLIST ITEM 3 AND
REQUEST FOR RELIEF FROM EXISTING COMPLIANCE SGAT
FILING PROCEDURES**

Qwest Corporation ("Qwest") submits its exceptions to the Draft Supplemental Order on Qwest's Compliance with Checklist Item 3 – Poles, Ducts, Conduits, and Rights-of-Way ("Draft Supplemental Order") issued by the Arizona Corporation Commission on December 5, 2001, and set for open meeting on December 20, 2001. In addition, Qwest seeks relief from procedures currently in place regarding compliance filings of Qwest's Statement of Generally Available Terms and Conditions ("SGAT").

As explained below, the Commission should: (1) modify the Draft Supplemental Order as set forth below; and (2) relieve Qwest of the obligation to file conforming SGATs a set number of days after the issuance of Commission orders in favor of a process under which the Commission would make clear in its orders that Qwest's compliance with checklist items is contingent upon its filing of conforming SGAT language.

Arizona Corporation Commission

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BACKGROUND

On March 9, 2001, the Commission issued its decision finding that Qwest complied with Checklist Item 3 under section 271 of the Telecommunications Act of 1996 ("Act"). Pursuant to the procedural order issued by the Hearing Division on March 26, 2001, AT&T Communications of the Mountain States, Inc. and AT&T Local Services on behalf of TCG Phoenix ("AT&T") and WorldCom, Inc. ("WCom") (collectively the "Joint Intervenors") requested leave to supplement the record regarding Checklist Items 3, 7, and 10 ("Joint Intervenors' Motion"). Qwest submitted an initial response to the Joint Intervenors' Motion on April 17, 2001, and a supplemental response to the motion on October 12, 2001. On November 5, 2001, the Commission Staff issued its Supplemental Report on Qwest's Compliance with Checklist Item 3 – Poles, Ducts, Conduits, and Rights-of-Way ("Supplemental Report"). Qwest filed its comments on the Supplemental Report on November 15, 2001. The Draft Supplemental Order followed.

As set forth in Qwest's response and supplemental response to the Joint Intervenors' Motion and its comments on the Supplemental Report, although Qwest continues to oppose the attempts of the Joint Intervenors to raise issues that they could have raised previously in the Arizona Section 271 workshops, as set forth below, Qwest has made significant efforts to resolve disputes with the Joint Intervenors on Checklist Items 3. Qwest has agreed to numerous SGAT modifications to meet the Joint Intervenors' needs. It is noteworthy that in several instances, Qwest has agreed to modifications that were unnecessary for compliance purposes, but which provided the Joint Intervenors greater clarity or options. As further evidence of its commitment to this process and competition in Arizona, Qwest will agree to make further amendments to its SGAT in Arizona as stated here and set forth in Attachments 1 and 2 to these comments. These amendments should fully address the concerns raised by the Joint Intervenors in their request to supplement the record regarding Checklist Item 3.

EXCEPTIONS TO DRAFT SUPPLEMENTAL ORDER

I. Definition of "Rights-of-Way"

After considering the Joint Intervenors' arguments regarding Qwest's definition of the term "right-of-way," which incorporates the recommendations of the Facilitator in the Multi-State proceeding, Staff recommended additional revisions to Section 10.8.1.3.1 to further satisfy the Joint Intervenors' concerns.¹ Qwest filed comments on the Supplemental Report seeking clarification of Staff's recommendation regarding the definition of rights-of-way. As Qwest pointed out its comments on the Supplemental Report, Staff's recommended revision of Section 10.8.1.3.1 would modify the definition of right-of-way to mean "access to private property" as opposed to Qwest's definition which provides that right-of-way means "a real property interest in privately-owned real property."² Staff's recommended revisions are as follows:

10.8.1.3 Rights of Way (ROW) – Where it has ownership or control to do so, Qwest will provide to CLEC, via an Access Agreement in the form of Attachment 4 to Exhibit D, access to available ROW for the purpose of placing telecommunications facilities. ROW includes land or other property owned or controlled by Qwest and may run under, on, above, across, along or through public or private property or enter multi-unit buildings.

10.8.1.3.1 ROW means ~~a real property interest in privately owned~~ real property access to private property owned or controlled by Qwest, but expressly excluding any public, governmental, federal or Native American, or other quasi-public or non-private lands, sufficient to permit Qwest to place telecommunications facilities on such real property; such property owner may permit Qwest to install and maintain facilities under, on, above, across, along or through private property or enter multi-unit buildings. Within a multi-unit building, a ROW includes a pathway that is actually used or has been specifically designated for use by Qwest as part of its transmission and distribution network where the boundaries of the pathway are clearly defined either by written specifications or unambiguous physical demarcation.

¹ See Supplemental Report at 11-12.

² See Qwest Comments on Supplemental Report (11/15/01) at 4-5.

In its Draft Supplemental Order, the Commission agrees with Staff's recommended changes, concluding that "Staff's proposed language accurately captures the intent of the FCC Order, and should be adopted."³

As Qwest noted in its comments on the Supplemental Report, Staff's proposed revision would include in the concept of right-of-way *all* property owned or controlled by Qwest, including, for example, ladders, trucks, signage, and Qwest offices. In response, the Commission has indicated that Qwest's comments in this regard "appear strained" and that Qwest did "not explain how these items could be seen as part of a defined pathway."⁴ That such items could be deemed a part of the right-of-way under Staff's proposed revision flows directly from the language of the provision as revised. Under the plain terms of Staff's proposal as contained in the Commission's Draft Supplemental Order, if Qwest has "access to private property" that it "own[s] or control[s]" and that is "sufficient to permit Qwest to place telecommunications facilities" on the property, Qwest is deemed to have a right-of-way as to such property, regardless of whether the property forms a part of a "defined pathway."⁵

Moreover, the actual language of Staff's proposal and the Commission's comments on it causes further confusion and demonstrates the unworkable nature of the proposal. While on the one hand, the Commission has indicated that *personal property* may be deemed "a part of the right-of-way,"⁶ the plain language of the provision appears to refer only to *real property*.⁷ In

³ Draft Supplemental Order at 5, ¶ 22.

⁴ *Id.*

⁵ *See id.* at 4, ¶ 20.

⁶ *See id.* at 5, ¶ 22 (noting that "[p]ersonal property that is part of a defined pathway and designated or used in the transportation and distribution network would be part of the right-of-way") (emphasis added).

short, the Commission's conclusion regarding personal property cannot be squared with the actual language of the provision at issue even if Staff's revision is adopted.

To the extent that Staff's proposed revision seeks to expand rights-of-way beyond concepts of "defined pathways" and "boundaries" marked by "unambiguous physical demarcation" or "written specification"⁸ to some notion of "access" to real or personal property, the expansion is unwarranted under the FCC's pronouncements and not supported by general principles regarding right-of-way law. If, on the other hand, the proposed revision is intended to maintain the traditional real property-based concepts noted above, then the Commission should say so and clarify the provision by rejecting Staff's proposed change. The Commission, therefore, should change "private" to "real."⁹

II. Access to MDU Agreements

On the issue of CLEC access to non-recorded agreements between Qwest and third-party property owners of multi-dwelling units ("MDUs"), Qwest agrees to implement nearly all of the recommendations contained in the Draft Supplemental Order. As set forth below, however, Qwest respectfully requests that the Commission (1) clarify the Commission's direction on one of the four "options" available to CLECs in Arizona that seek information regarding non-recorded right-to-way agreements and (2) reconsider its determination that Qwest not be allowed

⁷ See SGAT § 10.8.1.3.1 (providing that "ROW means access to private property owned or controlled by Qwest, . . . sufficient to permit Qwest to place telecommunications facilities *on such real property*") (emphasis added).

⁸ See First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Dkt. No. 99-217, CC Dkt. Nos. 96-98, 88-57, FCC 00-366 (rel. Oct. 25, 2000) ("*MTE Order*"), at ¶¶ 82, 83.

⁹ AT&T's concern with Qwest's definition, though not fully articulated, appeared to center on the terms "interest in" real property, not the real property concept itself. Qwest would agree to eliminate those terms to close this issue.

to enter into, on a going-forward basis, right-of-way agreements that contain provisions that prevent disclosure of at least portions of the agreements.

A. The Commission Should Clarify Qwest's "Duty" to Seek Landowner Consent to Disclose Non-Recorded Right-of-Way Agreements.

First, Qwest agrees that under SGAT provisions submitted by Qwest for the Commission's approval CLECs have a number of options in seeking information regarding the non-recorded agreements at issue. In addition to the to options of gaining property owner consent or indemnifying Qwest for any liability arising from disclosure without property owner consent, Qwest recently proposed a third option of executing the Form Protective Agreement set forth as Attachment 5 to Exhibit D of the SGAT.

The Commission's discussion of fourth option – a duty on Qwest to seek the building owner's consent to disclose an agreement – requires some clarification.¹⁰ Qwest is willing to incorporate this as one of now four options available to CLECs seeking right-of-way information so long as Qwest is entitled to recover from CLECs the costs associated with this activity. The Commission should, therefore, clarify that in the event that a CLEC chooses to request that Qwest seek permission to disclose information concerning non-recorded right-of-way agreements, Qwest is entitled to recover from the CLEC all costs associated with that effort.

This clarification is fully consistent with the cost recovery principles embodied in the Telecommunications Act of 1996, 47 U.S.C. § 151, *et seq.*, (the "Act") and should be adopted. With this clarification, Qwest is willing to incorporate this option into Qwest's SGAT in Arizona.

B. The Commission Should Reconsider the Draft Supplemental Order's Unreasonable Limitation on Qwest's Right to Contract with Third-Party Property Owners in Arizona.

In at least one important respect, the Draft Supplemental Order goes beyond Staff's Supplemental Report to order that Qwest "revise its SGAT and exhibits to preclude its entering

¹⁰ Draft Supplemental Order at 7, ¶ 28.

into right-of-way agreements that contain such confidentiality provisions."¹¹ The Commission should reconsider this aspect of the Draft Supplemental Order for at least four reasons.

First, this restriction on Qwest's ability to freely negotiate and enter into contractual arrangements with third-parties in Arizona is wholly unwarranted given what are now four options available to CLECs in the State to gain access to information relating to right-of-way agreements that is relevant to CLEC access to MTEs under the Act. These four options range from seeking for themselves the consent of the third-party property owner to access the agreement, requesting that Qwest seeks such consent from the third-parties, executing a form protective agreement, or agreeing to indemnify Qwest for any liability associated with the disclosure of the information absent property owner consent. Each of these options apply to any agreement that contains a confidentiality provision and adequately provides CLECs with all of the information to which they are entitled under the Act relating to access to Qwest's rights-of-way. Qwest also commits in SGAT Section 10.8.2.26 to certify that its right-of-way-agreements are not exclusive.

Second, the Commission's blanket prohibition fails to account for situations in which a *landowner* may wish to make aspects of its arrangement, for legitimate business purposes, confidential and proprietary and not subject to disclosure absent consent. The Commission's rule, if adopted, would unnecessarily infringe upon both Qwest's and these third-parties' freedom of contract. Again, in light of the CLECs' ability to get access to relevant, access-related information, even where confidentiality provisions in the property owner's favor exist, make this prohibition especially onerous and unwarranted.

Closely related to this second point is the third – under the Commission's approach as set forth in the Draft Supplemental Order, only Qwest would be prohibited from entering into agreements with third-parties that contain confidentiality provisions; CLECs would be free to do

¹¹ *Id.* at 7, ¶ 28.

so. This disparity would place Qwest at a significant competitive disadvantage as compared to its competitors in Arizona in that Qwest would be effectively precluded from competing with CLECs in the State for the business of any property owner that wishes, for legitimate business reasons, to keep from its competitors the terms (financial and otherwise) of its arrangement with its telecommunications provider. The resulting competitive disparity is contrary to the pro-competitive mandates of the Act and, therefore, should be reconsidered.

Finally, at a minimum Qwest should be able to enter into agreements that safeguard the confidentiality of the financial terms of any agreement it reaches with third-party property owners. The financial arrangements contained in right-of-way agreements have nothing to do with the securing for CLECs access to Qwest's rights-of-way. While CLECs are certainly entitled to information sufficient to allow them to discover relevant, access-related information,¹² at a bare minimum, Qwest and third-party property owners should be allowed to protect this competitively sensitive information that has nothing to do with legitimate, access-related inquiries of CLECs concerning rights-of-way.

REQUEST FOR RELIEF FROM SGAT FILING PROCEDURES

Under established procedures, Qwest is generally required to file SGAT language conforming with Commission decisions within seven days of the date of the order at issue. Under this procedure, Qwest to date has filed *nine* revisions to its Arizona SGAT already. As at

¹² As noted in the Draft Supplemental Order at 6-7, Qwest has agreed to expand the universe of the types of acceptable access-related information that CLECs are entitled to review documents or information in order to determine. They include information to determine: (a) the ownership or control over ducts, conduits, or rights-of-way within the property described in the agreement, including provisions which define the scope of Qwest's ownership or control of the ducts, conduits or rights-of-way; (b) the ownership of wire within the property described in the agreement; (c) the demarcation point between Qwest facilities and the property owner's facilities in the property described in the agreement; (d) the legal description of any property interest of a third-party owner, including any metes and bounds of the property; (e) the term of the agreement; and (f) the parties to the agreement. See SGAT § 10.8.2.27.4.

least one CLEC has recently pointed out, the pace with which Commission orders (and required SGAT revisions) have been issued has begun to tax the parties' ability to keep up. *See* AT&T's Comments on Qwest's SGAT, Ninth Revision (Dec. 10, 2001) at 2-3. For its part, Qwest can agree that the short turnaround time required for compliance SGAT filings under the existing approach has, on occasion, not allowed Qwest to devote the time and resources that Qwest believes the process deserves. This is particularly difficult when the Commission issues orders on individual checklist items seriatim.

As the Commission is aware, Qwest is currently involved in proceedings similar to this one in other states within its 14-state region. No other state is close to the number of SGAT revisions submitted in Arizona. For example, in the State of Colorado, which has nearly completed the 271 process, Qwest has filed only six SGAT revisions. Similarly, in Idaho, which has also virtually completed the 271 process (only general terms and conditions and performance assurance plan issues remain) Qwest has submitted only two SGAT revisions. Looking to the future, it is clear that under the current process, there could well be as many as nine more SGAT revisions filed in Arizona.

In short, Qwest believes that the 271 process in Arizona would be better served if, on a going forward basis, the Commission refrains from setting time frames for compliance SGAT filings and, instead, provides in its orders that, before the Commission's recommendation on the checklist items or item at issue becomes effective, Qwest will be required to make the necessary indicated changes to its SGAT changes as reflected in appropriate compliance filings. Under this approach, Qwest would then be able to consolidate appropriate changes to the SGAT in subsequent SGAT filings and therefore reduce the overall number of SGAT revisions in Arizona. CLECs, of course, would be afforded an opportunity within a reasonable timeframe to comment upon the SGAT filings.

Qwest will have a number of opportunities to file SGAT revisions relating to major issues that remain outstanding in the 271 process underway in this State. These will include

compliance SGAT filings relating to the Commission's orders on general terms and conditions, interconnection, collocation, loops, local number portability, and the performance assurance plan.

Accordingly, Qwest requests that the Commission relieve Qwest of the obligation of filing within set time frames, conforming SGAT language and, instead, include language in its future orders making clear that the Commission's recommendation that Qwest has met its obligations under any given checklist item is contingent upon the filing of conforming SGAT language relating to the order at issue.

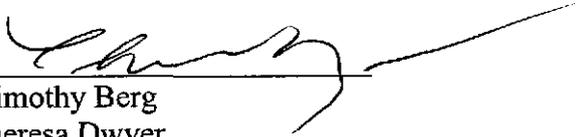
CONCLUSION

For the foregoing reasons, the Commission should modify the Draft Supplemental Report to properly define the term "right-of-way" and to eliminate the prohibition on Qwest's ability to contract with third-party property owners in Arizona.

In addition, the Commission should relieve Qwest of the duty to file conforming SGAT language within defined periods of a Commission decision affecting the SGAT and, instead, include language in its future orders making clear that the Commission's recommendation that Qwest has met its obligations under any given checklist item is contingent upon the filing of conforming SGAT language relating to the order at issue.

DATED this 13th day of December, 2001.

Respectfully submitted,

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