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ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

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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, AND PETITION)
FOR COMPETITIVE CLASSIFICATION)
OF PROPOSED SERVICES WITHIN)
THE STATE OF ARIZONA)

DOCKET NO. T-02811B-04-0313

BRIEF OF COMMISSION STAFF

I. INTRODUCTION

Qwest Communications Corporation's ("QCC") Amended Application to provide local services to Enterprise customers (large and medium business customers i.e., those customers with four (4) or more lines) within its affiliate Incumbent Local Exchange Carrier ("ILEC") Qwest Corporation's ("QC") service territory raises many complicated and difficult issues which go far beyond the normal issues contained in the typical Certificate of Convenience and Necessity ("CC&N") application. These issues include matters arising under 47 U.S.C. Sections 251, 252, 253, 271 and 272 of the Telecommunications Act of 1996,¹ as well as FCC Orders and Court decisions relating thereto. They also include novel state law issues regarding public interest considerations concerning a competitive local exchange carrier ("CLEC") affiliated with the ILEC competing against the ILEC in the ILEC's service territory and the ramifications for the ILEC with respect to loss of customer base and revenues, maintenance of its network and competition.

¹ Pub.L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. Sec. 151 *et seq.*

1 The Commission has not yet approved an application by any CLEC affiliated with an
2 ILEC to provide local service in competition with the ILEC. Because of the concerns raised and
3 QCC's failure to adequately address them, the Staff initially recommended that QCC's request
4 for expansion of its CC&N be approved only for those areas outside of QC's service territory.
5 Based upon extensive discussions with the Applicant, Staff submitted a supplement to its initial
6 Report which recommended that the Company's Application be granted inside QC's service
7 territory for Enterprise customers only subject to certain conditions. The Company has since
8 amended its Application to request an expansion of its CC&N to provide local service within
9 QC's service territory for Enterprise customers only, however it opposes several of Staff's
10 conditions.

11 Staff, through its supplement to its Report, has attempted to accommodate the Company
12 needs. However, the conditions to which the Company objects are both necessary and reasonable
13 in Staff's opinion, and are an integral part of Staff's supplemental recommendation.

14 **II. PROCEDURAL HISTORY**

15 On April 23, 2004, QCC filed an Application to have its CC&N modified to include
16 resold long distance service, resold local exchange service, facilities-based long distance service,
17 and facilities-based local exchange service. Previously, on December 9, 2003, in Decision No.
18 66612, QCC d/b/a Qwest Long Distance was granted authority to provide facilities-based long
19 distance telecommunications services throughout the state of Arizona.

20 On September 20, 2004, QCC filed a letter clarifying its Application, which indicated that
21 the scope of its service offering was actually much narrower than presented in its April 23, 2004
22 Application. In its September 20, 2004 letter QCC stated it actually only intended to provide one
23 local exchange service. That product was one that provided access from the local exchange to
24 frame relay and asynchronous transfer mode ("ATM") services offered by several carriers. QCC
25 stated that the service would be provided on an Individual Contract Basis ("ICB").

26 As a result of conversations between Staff and QCC during the next few months, on
27 December 17, 2004, QCC filed a supplement or amendment to its application and petition. In its
28 filing, QCC supplemented Section A-9 of its application and filed a new Local Exchange

1 Services Arizona Tariff No. 3. The filing also revised QCC's responses concerning proposed
2 rates and charges for each service; and included tariff maximum rates and prices, and terms and
3 conditions applicable to the provision of services. In the filing, Qwest also withdrew the
4 statements made in its September 20, 2004 letter. QCC also asked for competitive classification
5 of its proposed services in its December 14, 2004 filing.

6 On January 12, 2005, QCC filed a Notice of Errata because several tariff pages provided
7 on December 17, 2004 were incomplete.

8 Staff filed a Letter of Administrative Completeness on February 2, 2005. The ALJ issued
9 a Procedural Order setting the hearing in this matter to commence on March 23, 2005.

10 Staff filed its initial Staff Report and Recommendation on February 23, 2005. In its
11 initial Report and Recommendation, Staff recommended that QCC be allowed to provide the
12 requested services outside of Qwest Corporation's current service area only. On March 16, 2005,
13 QCC filed its Response to the Staff Report.

14 Both QCC and Staff requested continuances of the hearing on this matter in an attempt to
15 reach a settlement on the issues in dispute. The parties were ultimately unable to reach a
16 settlement of the issues in dispute.

17 On May 13, 2005, Staff filed a supplement to its February 23, 2005 Staff Report. The
18 Supplemental Staff Report stated that Staff was offering an alternative recommendation which
19 would allow QCC to provide resold and facilities-based local service to Enterprise customers in
20 QC's service territory, as long as certain conditions were imposed.

21 On May 16, 2005, QCC filed a Second Supplement to its Application and Petition.
22 QCC's May 16, 2005, filing amended the scope of the Company's Application to provide local
23 exchange service in QC's service territory only for Enterprise customers.

24 A hearing on QCC's amended Application was held on May 17, 2005. Subsequently, the
25 ALJ requested additional information on the impacts of QCC's application on QC and asked the
26 parties to respond to five (5) issues through the filing of supplemental testimony. A hearing on
27 the supplemental testimony of Staff and QCC was held on August 29, 2005.

28 Following is Staff's brief on the issues in dispute in this case.

1 **III. BACKGROUND**

2 A public service corporation is required to obtain a CC&N pursuant to A.R.S. § 40-281
3 prior to constructing any line, plant, service or system, or any extension thereof, without first
4 having obtained from the commission a certificate of public convenience and necessity. The
5 Commission is required to investigate all applicants for a CC&N for a given area and to issue the
6 certificate only upon a showing that the issuance to a particular applicant would serve the public
7 interest. *James P. Paul Water Co. v. Arizona Corp. Commission*, 137 Ariz. 426, 671 P.2d 404
8 (1983).

9 Section 253(a) of the Telecommunications Act of 1996 (“1996 Act”) provides “[n]o State
10 or local statute or regulation, or other State or local legal requirement, may prohibit or have the
11 effect of prohibiting the ability of any entity to provide any interstate or intrastate
12 telecommunications service.” Section 253(c) provides “[n]othing in this section affects the
13 authority of a State or local government to manage the public rights-of-way or to require fair and
14 reasonable compensation from telecommunications providers, on a competitively neutral and
15 nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the
16 compensation required is publicly disclosed by such government.”

17 QC is a Bell Operating Company as defined in 47 U.S.C. 153(4). In December 2003, QC
18 was granted Section 271 relief by the Federal Communications Commission (“FCC”) allowing it
19 to provide interLATA toll service in Arizona.² Pursuant to 47 U.S.C. Section 272(a), a Bell
20 Operating Company may not provide originating interLATA telecommunications services except
21 through a separate subsidiary. The Section 272 affiliate is subject to a myriad of structural and
22 transactional and nondiscrimination requirements.

23 In its *272 Non-Accounting Safeguards Order*,³ the FCC concluded in para. 312 “[b]ased
24 on our analysis of the record and the applicable statutory provisions, we conclude that section
25 272 does not prohibit a section 272 affiliate from providing local exchange services in addition to

26 ² *In the Matter of the Application of Qwest Communications Intl., Inc. for Authorization to Provide In-Region,*
27 *InterLATA Services in Arizona*, WC Docket No. 03-194, FCC 03-309, Memorandum Opinion and Order (Rel.
December 3, 2003).

28 ³ *In the Matter of Implementation of 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
(1996)(“*272 Non-Accounting Safeguards Order*”).

1 interLATA services, nor can such a prohibition be read into this section.” The FCC also went on
2 to state in that Order “[a]lthough we conclude that the 1996 Act permits section 272 affiliates to
3 offer local exchange service in addition to interLATA service, we recognize that individual states
4 may regulate such integrated affiliates differently than other carriers.” *Id.* at para. 317.

5 QCC received a CC&N to provide facilities-based interexchange intraLATA and
6 interLATA long-distance service in Arizona on December 9, 2003. QCC operates as a 272
7 affiliate of QC.

8 **IV. ARGUMENT**

9 **A. The Staff’s Supplemental Recommendation is Designed to Meet Qwest’s** 10 **Needs for Large Business Customers while at the Same Time Minimizing the** 11 **Potential for Competitive Harm.**

12 Staff’s alternative recommendation contained in its Supplement to its May 13, 2005, Staff
13 Report was an attempt to accommodate Qwest’s needs for large business customers while at the
14 same time minimize the potential for competitive and ratepayer harm. QCC indicated in
15 response to Staff data requests that grant of its request to act as a CLEC in QC’s service territory
16 would allow it to provide a single contract and an integrated bill to business customers for local
17 and long distance services. QCC further stated that many requests for proposals require that a
18 responding entity be able to provide services through a single contract and a unified bill and
19 customer relationship, and not deliver the requested services through different entities, billing
20 mechanisms, or affiliates. According to QCC, many customers, whether or not a formal RFP is
21 involved, desire this “one stop shopping” because it provides a simple, straightforward means to
22 address various issues or concerns that may arise about its service, i.e., a single contact for
23 purposes of repair and inquiries as well as a unified bill.

24 Staff’s initial Report recommended granting QCC’s request for an expansion of its
25 CC&N outside of QC’s service territory only. Staff’s initial Report issued on February 23, 2005,
26 pinpointed several concerns associated with QCC competing against QC in both the mass market
27 and the Enterprise market within QC’s service territory which Staff believed QCC’s Application
28 did not satisfactorily resolve. These concerns included:

- 1 (1) The ability of QCC to leverage QC's ILEC position and engage in anti-
2 competitive conduct including but not limited to cross-subsidization and price-
3 squeezing;
- 4 (2) The potential for significant confusion on the part of customers given the
5 similarity in names;
- 6 (3) Use of QCC (the CLEC) to evade QC's (the ILEC) obligations within QC's
7 service territory;
- 8 (4) The potential for discrimination by QC; and
- 9 (5) Whether it is in the public interest for an RBOC to have an affiliated CLEC
10 operating within its territory, when the local market is not sufficiently
11 competitive.

12 In its Supplemental Report, Staff recommended that QCC be allowed to provide
13 competitive local service within QC's service territory to Enterprise customers only. Staff's
14 Supplemental Report identified how this approach would be a way for the Commission to
15 accommodate Qwest but at the same time minimize any customer and competitive harms.
16 However, the conditions contained in Staff's Supplemental Report are an integral and necessary
17 component of Staff's alternative recommendation.

18 The following is a relevant excerpt from Staff's Supplemental Report as to how the above
19 identified competitive concerns are addressed by Staff's alternative recommendation:

20 **Staff Concern 1 – The ability of QCC to leverage QC's ILEC**
21 **position and engage in anti-competitive conduct including but**
22 **not limited to cross-subsidization and, price-squeezing:**

23 Discussion: The Enterprise Market is highly competitive. The
24 level of competition by large participants, such as MCI and AT&T,
25 should help temper the behavior of QC & QCC and limit the
26 effectiveness of any attempts to leverage QC's ILEC position.
27 While claims of cross-subsidization and price-squeezing could still
occur, Enterprise customers and competitors are capable of
bringing such issues before the Commission. Inappropriate
behavior by QCC should therefore be infrequent and subject to
direct regulation by the very market in which QCC will be
participating.

28 **Staff Concern 2 – The potential for significant confusion on the**
part of customers given the similarity in names.

1 Discussion: Enterprise customers have sufficient resources and are
2 sufficiently self-reliant to minimize the confusion that QCC may
3 add to the local exchange market by using the Qwest brand
4 traditionally associated with ILEC services. Many of the
5 Enterprise market competitors have well-established brands, if not
6 even stronger brands in many niches. Enterprise customers used to
7 managing the complexities of business-to-business and business-to-
8 residence marketing will not be easily confused by more than one
9 Qwest competitor.

10 **Staff Concern 3 – Use of QCC (the CLEC) to evade QC's (the**
11 **ILEC) obligations within QC's service territory.**

12 Discussion: Enterprise customers have sufficient resources and
13 impetus to bring before the Commission matters in which QC may
14 have evaded its ILEC obligations. Any efforts by QC to evade its
15 ILEC obligations stand the risk of being well-documented and
16 supported by the very formalities of business-to-business sales,
17 marketing and operations. QC remains the Carrier of Last Resort
18 (COLR) within its service territories. Attempts by QC to evade its
19 ILEC obligations will be further scrutinized by reports, available to
20 Staff, that should highlight intended or unintended attempts by QC
21 to migrate customers to QCC.

22 **Staff Concern 4 – The potential for discrimination by QC.**

23 Discussion: Enterprise customers have sufficient resources and
24 impetus to bring before the Commission matters in which they
25 believe QC may have acted in a discriminatory manner. Any
26 claims of discrimination by QC stand the risk of being well-
27 documented and supported by the very formalities of business-to-
28 business sales, marketing and operations. QC's chances of
discriminating within a market segment in which it has diminished
presence seem unlikely and of little consequence.

**Staff Concern 5 – Whether it is in the public interest for an RB
OC to have an affiliated CLEC operating within its territory,
when the local market is not sufficiently competitive.**

Discussion: While Staff does not take the position that the market
is sufficiently competitive to warrant competitive relief for QC in
the context of its current Price Cap application, the presence of an
affiliated CLEC should not be injurious to the overall competitive
situation given the known presence of strong business brands, such
as MCI and AT&T. The Enterprise Market may, in fact, welcome
another competitor since QC's presence in the Enterprise Market
has substantially diminished. Staff also notes that no CLEC has
filed objections to QCC's application. QCC has explained that it
seeks to serve customers desirous of interLATA solutions that

1 cannot be offered by QC. Additional competitive alternatives for
2 the Enterprise market appear to have more upside than downside.

3 Staff Supplemental Report at 2-3.

4 In addition, the conditions proposed by Staff should operate to provide the Commission
5 and Staff with sufficient information to ensure that any problems will quickly come light so that
6 they can be promptly addressed by the Commission. In addition, the conditions provide
7 safeguards to attempt to protect customer safety and welfare and ensure continuation of universal
8 service.

9 **B. The Staff's Alternative Recommendation Contains Reasonable Conditions
10 that Should be Adopted by the Commission if QCC's Amended Application
11 is Granted.**

12 Staff has proposed various conditions in addition to the conditions contained in its
13 original Staff Report, if the Commission grants the Company's amended Application. It is
14 Staff's understanding, based upon the Applicant's statements at the hearing that the Company
15 does not object to and is willing to accept conditions 1, 2, 4, 5, 6, 7, 8(a), 10, 11, and 12. It is
16 Staff's understanding that the Applicant objects to conditions 3, 8(b) and 9. See Tr. at 14-18,
17 Vol. 1 (May 17, 2005).

18 **Staff Supplemental Report Condition 3**

19 Staff Condition 3 provides as follows:

20 Notwithstanding the services and areas which Staff recommends
21 for approval, QCC should not file an application to amend its
22 certification to provide local exchange services to Residence and/or
23 Small Business customers in the QC service area in Arizona for a
24 period of 24 months from the date of the Commission's Order
25 approving its request for an expanded CC&N. QCC may file an
26 application for either the Small Business market or Residential
27 market before the expiration of the 24 month period only if it can
28 meet all of the following: 1) QC and QCC can demonstrate that
there will be no adverse impact upon QC's operations, 2) QCC can
demonstrate that the Staff's five concerns identified in its February
23, 2005 Staff Report can be successfully resolved, and 3)
competitive conditions in the markets in which QCC seeks entry
are sufficiently competitive so that sufficient alternatives are
available. Any application by QCC shall be accompanied by at
least 18 months of the data identified in paras. 8 and 9 below which
period shall commence from the date the Commission issues its
order in this case.

1 Staff believes that Condition 3 is reasonable and necessary. Even though QCC has
2 amended its Application to provide competitive local service to Enterprise customers only in
3 QC's service territory, the Company may at some point in the future request a further expansion
4 to include the ability to provide competitive local service to the mass market in QC's service
5 territory. When this happens, Condition 3 ensures that the Company will file with its Application
6 certain information which will be informative to the Commission on the impact of any such
7 Application. Without Condition 3, the Company would not be on notice that it will have to file
8 certain information with the Commission with any application for expansion it submits in the
9 future and in all likelihood if the requirement is not imposed as part of the Commission's order in
10 this proceeding, the Company will claim that it does not have the information being requested.

11 QCC objects to Condition 3, on two grounds. It is unnecessary because QCC has
12 amended its application to serve Enterprise customers in QC's service territory only. Second,
13 QCC believes that Staff has not provided any basis in its Report for why it is appropriate to
14 restrict QCC's right to file an application and why its appropriate to impose filing requirements
15 on QCC when they are not imposed on other CLECs. Tr. at 16, Vol. 1 (May 17, 2005). Based
16 on QCC's actions in other states, at some point in the future QCC will likely request an
17 expansion of its CC&N to provide service to mass market (residential and small business)
18 customers within QC's service territory. Evidence of such intentions has been seen in Iowa,⁴
19 Idaho,⁵ Minnesota⁶ and Nebraska⁷ where expanded authority was granted 1 year, 2 years, 4 years
20 and 7 years, respectively, following the issuance of QCC's limited CLEC authority in those
21 states.⁸ Second, Staff is not restricting QCC's right to file an application, but is merely
22 specifying the information that the Company should provide to the Commission at the time it
23 files another application for expansion of its CC&N. The information will provide a basis for
24 the Commission to determine whether further expansion of QCC's CC&N within QC's service is
25

26 ⁴ Initial authority granted 9/14/02; expanded authority granted 11/29/04.

27 ⁵ Initial authority granted 8/27/02; expanded authority granted 6/7/04.

28 ⁶ Initial authority granted 10/13/99; expanded authority granted 12/11/03.

⁷ Initial authority granted 10/7/98; expanded authority granted 4/19/05.

⁸ While expanded authority has been granted in these states, QCC is not providing competitive local exchange service to the mass market in any of its in-region states as of this date.

1 in the public interest. Staff's condition does not discriminate against QCC because if QCC's
2 amended Application is granted, QCC will be the only CLEC that the Commission has
3 certificated to provide competitive local service within its affiliated ILEC's service territory.

4 **Staff Supplemental Report Condition 8(b)**

5 Staff's Condition 8(b) imposes the following reporting requirements upon QC:

6 b. QC Reports

- 7 1. The total number of business accounts that have moved from QC to
8 QCC by QC wire center are to be provided in Excel file format
9 using electronic media.
- 10 2. The total number of business lines that have moved from QC to
11 QCC by QC wire center are to be provided in Excel file format
12 using electronic media.
- 13 3. The total annualized revenues associated with total business
14 accounts that have moved from QC to QCC by QC wire center are
15 to be provided in excel file format using electronic media.
- 16 4. State-wide summarized Listings Data should be provided. The
17 information should contain all main listings and additional line
18 listings by QC, QCC, CLECs, ILECs, Wireless Providers, or Other
19 for each NPA-NXX. This information should be separated by
20 residence and business and include a count of all listings in QC's
21 comprehensive database(s), not just those published in the white
22 pages directories or available via directory assistance. All
23 information should be rolled-up to the NPA-NXX level; no end-
24 user specific information should be provided. The information
25 shall be provided in excel file format using electronic media.
- 26 5. State-wide summarized LERG Information should be provided.
27 The report should contain the following column headings and be
28 provided in excel file format using electronic media:
- a. All Switch CLLIs;
 - b. All Switch Locations (addresses);
 - c. All Switch Owner Names;
 - d. All Switch Owner ID;
 - e. All NPA NXXs, or thousands blocks where NPA NXXs are shared, assigned to each switch; and

1 f. All owner names corresponding to each NPA NXXs, or
2 thousands block where NPA NXXs are shared.

3 Staff believes that the reporting information required in Condition 8(b) is both reasonable
4 and necessary. First, with respect to Conditions 8(b)(1) through 8(b)(3), this information is
5 necessary in order for the Staff and Commission to evaluate QCC's impact upon QC for purposes
6 of future QC AFOR proceedings. If data shows a significant migration of large QC business
7 customers to QCC, the Commission may want to consider this in QC's next AFOR proceeding.
8 Indeed, Staff believes that the Commission should consider this information. The Commission,
9 in this case, may want to impute the revenues lost to QCC back to QC for ratemaking purposes.
10 Without the information requested in 8(b)(1) through 8(b)(3), the Commission will not have the
11 necessary information to make any assessments in this regard.

12 With respect to Conditions 8(b)(4) and 8(b)(5), this information will be used by Staff for
13 compliance and monitoring purposes and to determine the impact of QCC's expanded presence
14 in QC's service territory upon competition.

15 Both QCC and QC object to these informational requirements. QCC first argues the
16 reports have nothing to do with whether QCC is a fit or proper entity to provide local exchange
17 service. QCC further argues it has nothing to do with transactions between QCC and QC, its
18 affiliate. And, according to QCC, the reports have nothing to do with whether QCC is providing
19 an appropriate level of service to its customers on a going-forward basis. Tr. at 17, Vol 1 (May
20 17, 2005). Second, QCC contends the requirements in 8(b) impose an obligation on QC in this
21 docket, when QC is not a party to the docket. QCC and QC believe it is inappropriate as a part
22 of the Commission's order in this docket, to impose an obligation on a non-party. *Id.* Finally,
23 QCC argues that with respect to 8(b)(5), Staff can obtain this information directly from
24 Telcordia. Tr. at 300-303, Vol. 2, (August 29, 2005).

25 With regard to 8(b)(1) through 8(b)(3), the reports requested will contain information on
26 the impact that QCC and competition in general have had on QC by wire center. The trending
27 information provided will be very informative to the Staff and the Commission. One of QC's
28 main objections seems to be that it has to provide the reports on a "wire center" basis. However,
QC's operations are disaggregated on a wire center basis so reporting on this basis should not be

1 burdensome. Further, QCC's arguments to the contrary notwithstanding, the reports may give
2 important information about transactions between QCC and QC. For instance, QCC has
3 emphasized that its business interests are in the Enterprise Markets; so, if a large migration of
4 customers is seen in a wire center containing an insignificant number of Enterprise customers,
5 Staff will know that this will require examination. Another example where such information
6 would be useful is that it would indicate any massive shift of customers from QC to QCC in a
7 particular wire center which could indicate that preferential terms are being offered to the
8 customers in that particular serving area. Staff has no other way to obtain information on
9 customer and geographic impact without QC providing the information.

10 With respect to Conditions 8(b)(4) and 8(b)(5), this information is of value because it is
11 derived from the entire local exchange market, not just QC. With the information requested,
12 Staff will be more easily able to determine if QC is actually limiting its provision of service
13 consistent with any grant of authority by the Commission. Second, if QCC were to serve
14 residence customers outside of QC's areas, Staff may be able to determine from the information
15 provided whether the provision of such service is based on leveraging QC assets within QC's
16 service areas, through the use of assets acquired by QC or through arrangements with other
17 providers. Finally, Staff will also be able to better monitor whether QCC is actually targeting
18 business customers with four lines or more.

19 Staff also notes that Qwest indicated in its responses to DR 36-12 and DR 36-13⁹ that it
20 uses the listings information for internal, weekly analysis and that the information is incorporated
21 in many related Qwest databases. Qwest's objections to providing the listings information in
22 8(b)(4) suggests that Qwest believes that only it should be allowed to analyze the extensive
23 information contributed by many telecommunications providers within Arizona. Given Qwest's
24 existing, internal use of the listings information, Staff's request is neither unusual or burdensome.

25 With respect to QCC's second argument, that it is inappropriate for the Commission to
26 impose reporting requirements on QC when it is not a party to this docket; QC is the repository
27

28 ⁹ *In the Matter of Qwest Corporation's Filing of Renewed Price Regulation Plan*, ACC Docket No. T-01051B-03-0454.

1 of the information (not QCC) and, therefore, Staff has no alternative but to request the
2 information from QC in this Docket. The Company's Witness, Ms. LaFave, stated that QCC's
3 concern actually comes down to parity. Ms. LaFave contended at the hearing that the
4 requirements that Staff is recommending be imposed on the Qwest companies have not been
5 imposed on any other entity, particularly any CLEC seeking authority to do business in the state.
6 Tr. at 296-97, Vol. 2 (August 29, 2005). However, Ms. LaFave herself acknowledged several
7 times that this was the first time that the Commission would be approving an application of a
8 CLEC affiliated with an ILEC to compete against the ILEC in the ILEC's service territory. Tr. at
9 295-96, Vol. 2 (August 29, 2005).

10 QCC's preference would be to have the Commission conduct a rulemaking proceeding
11 and impose the requirements upon QC within the rulemaking docket. However, when asked
12 whether QCC would be willing to suspend its Application until the Commission completes a
13 rulemaking proceeding, the Company stated that it would not be willing to do this.

14 In the alternative, QCC Witness LaFave stated that QCC would be willing in the interim
15 to agree to imposition of the Iowa reporting requirements. Tr. at 297, Vol. 2 (August 29, 2005).

16 Those requirements are as follows:

- 17 a. The number of local numbers ported by the ILEC to
18 nonaffiliated CLECs;
- 19 b. The number of local numbers ported by the ILEC to
20 its affiliated CLEC;
- 21 c. The number of unbundled network element loops (UNE-
22 Ls) provided by the ILEC to nonaffiliated CLECs;
- 23 d. The number of UNE-Ls provided by the ILEC to its
24 affiliated CLEC;
- 25 e. The number of unbundled network element platforms
26 (UNE-Ps), or their equivalent, provided by the ILEC to
27 nonaffiliated CLECs;
- 28 f. The number of UNE-Ps, or their equivalent, provided by
the ILEC to its affiliated CLEC;
- g. The number of resale access lines provided by the ILEC
to nonaffiliated CLECs;

- 1 h. The number of resale access liens provided by the ILEC
2 to its affiliated CLEC;
3 i. The number of central office collocation sites
4 provided by the ILEC to nonaffiliated CLECs; and
5 j. The number of central office collocation sites
6 provided by the ILEC to its affiliated CLEC.

7 See, Post-Hearing Submission of Qwest Communications Corporation, Exhibit No. 5 (filed May
8 27, 2005).

9 However, the Iowa informational reporting requirements would not provide much critical
10 information that Staff seeks. For instance, there would be no information concerning customers
11 and revenues transferred from QC to QCC for consideration in QC's next AFOR proceeding.
12 There would be no tracking or trending information at all on QCC's impact upon QC. There
13 would be no listings information provided. There would be no information by wire center. Staff
14 believes that all of the information contained in Condition 8(b) is important to the Commission
15 and Staff for evaluation and monitoring purposes and should be required if the Commission
16 grants the Company's amended Application.

17 While the Company's Witness Mary Ferguson LaFave also complained about the
18 potential costs involved in tracking this information, she conceded that she did actually know
19 how much it would cost in terms of IT changes to track this information. Tr. at 299, Vol. 2
20 (August 29, 2005).

21 Finally, Ms. Ferguson LaFave also argued that Staff could obtain the information required
22 in Condition 8(b)(5) directly from Telcordia, and therefore, QC should not be required to provide
23 the information to Staff. Ms. LaFave indicated that QC has a contract with Telcordia, but she did
24 not know offhand whether Telcordia would charge for the information requested or what those
25 charges would be, if any. Tr. at 302, Vol. 2 (August 29, 2005). She did not know if QCC would
26 have access to the information from Telcordia. *Id.* at 303. She also did not know what Telcordia
27 would charge the Commission if QC did not provide the information requested. *Id.* at 300.
28 Given that QC has an established business relationship with Telcordia and has worked with
Telcordia a lot in the past, Staff believes that it would be most expedient if QC or QCC obtained
the information from Telcordia and provided it to Staff. If necessary and at the appropriate time,

1 Staff will request the information from Telcordia as a third party verification method to what QC
2 has provided. Staff also notes that QC's extensive operational experience with the LERG and
3 Telcordia should enable QC to obtain the information much easier than Staff. Indeed, QCC's
4 arguments regarding the burdensome and difficult nature of providing the information ring
5 hollow when viewed in the context of QC's already extensive use of the information and the fact
6 that it already has a contract with Telcordia to obtain the information.

7 **Staff Supplemental Report Condition No. 9**

8 Staff's Condition No. 9 provides:

9 Any of the above listed information can be used by Staff in future
10 AFOR/Price Cap proceedings to assist in the evaluation of QC's
11 revenue requirements.

12 Staff believes that this condition is also reasonable and necessary. This condition
13 recognizes that revenues and customers lost from QC to QCC should be examined in QC's next
14 AFOR/Price Cap proceeding. Staff does not believe that QC customers should be held
15 accountable for lost revenues and customers that QCC takes from QC.

16 QCC's objection to this Condition is not based on Staff being able to use the information
17 in QC's next AFOR/Price proceeding, but is based again on QCs having to provide the
18 information when it is not a party to this docket. Tr. at 18-19, Vol. 1 (May 17, 2005). Staff has
19 asked for the reporting requirements to be imposed upon QC, and not QCC, because once again
20 QC is the repository of the information. QC could agree to provide the information to QCC,
21 which QCC could then provide to the Commission; however, it is Staff's understanding that QC
22 does not want to provide the information at all. And, QCC will not agree to suspend its
23 Application until a generic rulemaking can be concluded.

24 The Company argues that parity is the issue. However, this is surely a red herring. If the
25 Company's amended Application is granted, this will be the first and only time that the
26 Commission has authorized a CLEC affiliated with the ILEC to provide local service in
27 competition with the ILEC in the ILEC's service territory. In addition, the FCC acknowledged
28

1 that though the 1996 Act does not preclude Section 272 affiliates from offering local exchange
2 service, the states may regulate the integrated affiliates differently than other carriers.

3 Finally, Staff is aware of no rule or law that would preclude the Commission from
4 imposing requirements on an affiliate even if it is not a party to the particular proceeding when it
5 is the repository of the information requested and the information is necessary to for compliance,
6 monitoring or informational purposes.

7 Staff conditions 3, 8(b) and 9 are reasonable and should be adopted by the Commission if
8 it grants QCC's amended Application.

9 **C. The Public Interest Test is Broad and Requires Consideration of Many**
10 **Factors which Go Beyond the Typical CC&N Case.**

11 In addition to the public interest considerations addressed by Staff in its initial and
12 supplemental reports, the ALJ identified several additional considerations, to be considered
13 under the broad public interest test:

- 14 (1) Why should QCC be allowed to take customers and their associated
15 revenues away from Qwest, the regulated entity?
- 16 (2) If QCC is allowed to compete with QC in the local market for Enterprise
17 customers, how should QC and QCC revenues be treated from a
18 ratemaking perspective? What will the effect be on QC's future rates and
19 revenues?
- 20 (3) Explain how the Commission can insure that maintenance and expansion
21 of Qwest's infrastructure will not suffer as a result of allowing QCC to
22 take customers and their revenues away from Qwest.
- 23 (4) Why are Staff's alternative recommendations in the public interest?

24 Staff Witness Abinah's testimony best captures the unique public interest concerns posed
25 by QCC's Application:

26 All of the issues posed by the ALJ raise concerns that Staff has
27 considered as well. However, Staff does not know at this time
28 what the impact of QCC will be on QC's operations. As a result,
Staff has proposed an approach in its alternative recommendation
which would allow QCC to compete with QC on a more limited
basis initially, in the Enterprise market, and impose informational
and reporting requirements intended to provide sufficient
information to assess the impacts upon QC.

1 QCC is likely to take away both customers and revenues from QC.
2 This raises concerns with regard to QC's future rates and with the
3 ability of QC to maintain and update its network in the future. To
4 initially address these concerns, if the Commission adopts Staff's
5 alternative recommendation, the Commission should adopt Staff's
6 informational and reporting requirements which would allow the
7 Commission to assess the actual impact of this loss on the revenues
8 of QC. It is Staff's position that any loss of customers and
9 revenues should be considered and accounted in QCC's next rate
10 review proceeding. With respect to network upgrades and
11 maintenance, while the Service Quality Tariff and aggressive
12 competition in the Enterprise market offer some protection, they
13 are not a "guarantee" that the erosion of QC's customer and
14 revenue base due to QCC will not have an adverse impact upon
15 QC's network. Network maintenance issues should be closely
16 monitored by the Commission if QCC's amended application is
17 granted.

18 Staff's alternative recommendation is in the public interest only if
19 all of Staff's informational and reporting requirements are adopted
20 and the Commission is satisfied that QCC and QC have presented
21 sufficient assurance that QC's ratepayers will not be harmed by the
22 loss of Enterprise customers and revenues that is likely to occur.

23 Supplemental Testimony of Elijah Abinah, Executive Summary, p. 2 (Staff Exh. S-5).

24 QCC is likely to rely upon 47 U.S.C. Section 253(a) to argue that the Commission cannot
25 deny QCC's Application to provide local service to Enterprise customers in QC's service
26 territory.¹⁰ 47 U.S.C. 253(a) provides:

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

There is no published case under Section 253(a) or (b) that raises the exact same issues
that are presented in this case. However, the Commission can get some idea how a court might
view this issue from the case law that does exist under this section of the Communications Act.
It is generally recognized that Subsections 253 (b) and (c) set aside a large regulatory territory for

¹⁰ QCC's affiliate QC, already provides local service in all of the areas in dispute. It is unclear to what extent
Section 253(a) requires that the Commission certificate multiple providers of the same entity (Qwest) in the same
service area.

1 State authority.¹¹ However, there is a vast difference in the authority protected by subsections (b)
2 and (c), and thus, the case law under each of these subsections is different.¹²

3 In *Level 3 Communications of Virginia v. State Corporation Commission*, 604 S.E.2d 71
4 (Va. 2004), Level 3 sought review of the Virginia Commission’s denial of its application for a
5 certificate of public convenience and necessity to provide local and interexchange
6 telecommunications services. Level 3 argued that the Virginia Commission’s expansive
7 definition of the term public interest gave the Commission “unfettered discretion” in denying the
8 applications at issue and that this “unfettered discretion” constituted a “barrier to entry”
9 prohibited by 47 U.S.C. § 253(a). *Id.* at 75. The court noted that § 253(b) of the Act provided a
10 “safe harbor” for state regulations based on protection of the interest of public welfare and safety.
11 *Id.* It went on to note that the only limitation on the broad exception set out in
12 47 U.S.C. § 253(b) of the Telecommunications Act of 1995 is that the decisions or procedures
13 must be competitively neutral. *Id.* In that case, the court found that the public interest standard
14 as applied by the Commission involved the protection of public welfare was competitively
15 neutral and, therefore, did not violate Section 253(a) of the Telecommunications Act of 1996.
16 *Id.*

17 In another case, *Communications Telesystems International v. California Public Utilities*
18 *Commission*,¹³ a long distance provider brought suit alleging the sanctions imposed on it for
19 “Slamming” by the California Commission violated federal law. More specifically, the
20 Company argued in part that the portion of the decision preventing it from providing intrastate
21 service for three (3) years was preempted. *Id.* at p. 1170. The court rejected the Company’s
22 arguments stating that the California Commission’s order was not “a prohibition on entry by an
23 entire class of potential competitors.” *Id.* It went on to distinguish the case from *In the Matter of*
24
25

26 ¹¹ *City of Abilene, Texas v. FCC*, 164 F.3d 49, 53 (D.C.Cir. 1999)(“States may act to preserve and advance universal
27 service, protect the public safety and welfare, ensure the continued quality of telecommunications services,
28 safeguard the rights of consumers, manage the public rights-of-way, and require fair and reasonable compensation
from telecommunications providers for use of public rights-of-way. See 47 U.S.C. Section 253 (b), (c)).

¹² *Level 3 Communications of Virginia v. State Corporation Commission*, 604 S.E.2d 71, 75 (Va. 2004).

¹³ 14 F.Supp.2d 1165 (N.D. Cal. 1998).

1 *New England Public Communications Council Petition for Preemption Pursuant to Section 253,*
2 11 FCC Rcd 19, 713, FCC 96-470 (Rel. Dec. 1996):

3 By issuing a blanket prohibition, the DPUC had tarred all
4 payphone companies with the same brush. The DPUC argued that
5 its prohibition was necessary because the economic structure of the
6 payphone industry led to abusive practices of independent
7 payphone providers. 1996 WL 709132 at 6. There were, however,
8 no findings that all independent providers were guilty of abusive
9 practices. In addition, the DPUC had not shown that the economic
10 structure of the payphone industry which allegedly led to abusive
11 practices, was any different from the structure of the LEC industry.
12 Here, by contrast, findings were made that an individual company
13 had violated a statute that unquestionably was designed to protect
14 the rights of consumers. The CPUC concluded, after investigation
15 and numerous proposed opinions by the ALJ on which CTS was
16 allowed to comment, that sanctions, including a suspension on
17 providing intrastate service, were necessary. CTS may disagree
18 with the findings and the sanctions, but it has not shown the court
19 that preemption of the decision of the CPUC is "readily apparent"
20 or that the sanctions imposed are disallowed by section 253(b).

21 The court went on to state "further factual inquiry would be needed in order to determine
22 whether the action of the CPUC was necessary to preserve and advance universal services,
23 protect the public safety and welfare, ensure the continued quality of telecommunications
24 services, and safeguard the rights of consumers." *Id.* at 1171.

25 In very general terms, Section 253(b) gives the Commission wide latitude to impose
26 whatever conditions it believes necessary in this case to protect the public safety and welfare.
27 QCC's parity arguments notwithstanding, even the FCC recognized in the 272 Non-Accounting
28 Safeguards Order "[a]lthough we conclude that the 1996 Act permits section 272 affiliates to
offer local exchange service in addition to interLATA service, we recognize that individual states
may regulate such integrated affiliates differently than other carriers." *Id.* at para. 317.

If appropriate conditions can be implemented under Section 253(b) to preserve and
advance universal service, protect the public safety and welfare, ensure the continued quality of
telecommunications services, and safeguard the rights of consumers, than § 253(a) may operate
as a bar to denial of the Company's Application in this case. If, however, the Commission
believes that appropriate conditions cannot be implemented to ensure these important objectives,
then § 253(a) may not operate as a bar to denial of the Company's Application.

1 **D. While QCC's Request is Not a "Reorganization" Under the Affiliated**
2 **Interest Rules, the Proposed Expansion to Its CC&N Raises Many of the**
3 **Same Concerns which May Require a Re-evaluation of the Previous Waiver**
4 **Granted to the Companies.**

5 One of the issues raised by the ALJ in this case is whether the limited waiver granted to
6 QC and its affiliates should be revisited if QCC's amended Application is granted. The
7 Commission adopted the Affiliated Interest Rules in Decision No. 56844 on March 14, 1990.
8 The stated purpose of the Rules is to "regulate the formation of public utility holding companies
9 and certain transactions between a public service corporation and affiliated interests." See
10 Decision No. 56844, Finding of Fact 2. Attachment B to Decision No. 56844 contained the
11 following explanatory statement or reasons (in part) for adoption of the Rules:

12 Article 8 is designed to insure that utility ratepayers are insulated
13 from the dangers proven to be inherent in holding company
14 structure and diversification. Its singular purpose is to ensure that
15 ratepayers do not pay rates for utility service that include costs
16 associated with holding company structure, financially beleaguered
17 affiliates, or sweetheart deals with affiliates intended to extract
18 capital from the utility to subsidize non-utility operations. The
19 rules provide procedures by which holding companies may be
20 formed, identify affiliated activities which require Commission
21 approval, provide for review of transactions between a public
22 utility and its affiliated interests and prescribe reporting
23 requirements for the affected utilities.

24 The rules implement the following general principles. First, utility
25 funds must not be commingled with non-utility funds. Second,
26 cross-subsidization of non-utility activities by utility ratepayers
27 must be prohibited. Third, the financial credit of the utility must
28 not be affected by non-utility activities. Fourth, the utility and its
29 affiliates must provide the Commission with the information
30 necessary to carry-out regulatory responsibilities.

31 QC was granted a limited waiver to A.A.C. R14-2-803 in Decision No. 58087 on
32 November 23, 1992. The waiver was reaffirmed and extended to all of QC's affiliates in
33 Decision No. 64654 on March 25, 2002. The limited waiver requires QC, its affiliates, QCC or
34 its parent Qwest Communications International to file a notice of intent to organize or re-
35 organize a public utility holding company only for those re-organizations or organizations that
36 are likely to result in increased capital costs to QC, result in additional costs allocated to the
37 Arizona jurisdiction, or result in a reduction of QC's net operating income.

1 Witness Abinah presented Staff's position on this issue. If Staff's initial recommendation
2 is adopted, there would be no need for re-evaluation of the limited waiver, since Staff's initial
3 recommendation was to deny QCC's request for an expanded CC&N within AC's service
4 territory. *See* Supplemental Testimony of Elijah Abinah, p. 4. If Staff's alternative
5 recommendation (including all of the conditions contained therein) is adopted, Staff believes that
6 enough safeguards and information would be available to Staff, such that Staff could continue to
7 support the limited waiver of A.A.C. R14-2-803. As Mr. Abinah testified: "There are no known
8 risks of which Staff is aware, associated with keeping the waiver in place under these
9 conditions." Supplemental Testimony at p. 4.

10 Finally, Mr. Abinah testified that if Staff's alternative recommendation is adopted, but all
11 of the conditions contained therein are not adopted, Staff would have a concern that it would not
12 have sufficient information available to it in order to determine the actual impact of QCC upon
13 QC and how ratepayers are being affected. *Id.* While Witness Abinah acknowledged that
14 QCC's request for an expansion of its CC&N may not technically qualify as a "reorganization"
15 under R14-2-803 as that term is used, QCC's Application raises many of the same concerns
16 identified by all sections of the rules, including A.A.C. R14-2-803(C): whether QCC's ability to
17 take away customers from QC will "impair the financial status of the public utility, otherwise
18 prevent it from attracting capital at fair and reasonable terms, or impair the ability of the public
19 utility to provide safe, reasonable and adequate service."

20 It is for this reason, that if Staff's alternative recommendation is adopted, but not all of
21 the conditions are, that Staff would recommend that the exemption be significantly narrowed or
22 that the waiver be completely eliminated.

23 **E. The Company's Argument that its Application Was Not Processed in a**
24 **Timely Manner is without Merit.**

25 Toward the end of this proceeding, QCC began to assert at various times that its
26 Application was not processed in a timely manner. The Company relies upon A.A.C. R14-2-
27 510(E) which imposes time frames for processing applications for a CC&N, including an
28 amendment or change thereto.

1 The Commission should reject the Company's belated arguments in this regard. The
2 Company, through letters and/or formal filings, amended its Application at least three (3) times.
3 In September, 2004, the Company's counsel sent a letter to Staff counsel which indicated that the
4 Company actually was going to provide only one service. This was inconsistent with the
5 Company's Application and with their responses to Staff data requests up to that point. Staff and
6 the Company had several conversations regarding this letter which prompted Staff to issue
7 further data requests to the Company. In December, 2004, the Company filed what it called the
8 first supplement to its Application which was actually more in the nature of an amendment. At
9 the same time the Company withdrew its original Exchange Service Tariff No. 3 and filed a new
10 Tariff. With the December filing, Staff issued a Letter of Administrative Completeness on
11 February 2, 2005. The letter indicated that substantial amendments to the filings would result in
12 the need for additional time.

13 Between March 16, 2005 and May 16, 2005, the Company and Staff engaged in a series
14 of settlement discussions in an effort to resolve the issues in dispute. While a settlement was not
15 ultimately reached, those discussions resulted in a Supplemental Staff Report dated May 13,
16 2005 and another amendment by the Company to its Application. QCC again labeled its second
17 formal amendment as a "Second Supplement" to its original Application, however it was more in
18 the nature of an amendment to its Application. QCC's second amendment was filed on May 16,
19 2005. The second amendment contained a new supplemented application for a CC&N attached
20 to the filing as Exhibit 1. It is Staff's position, that with each revision and supplement to its
21 Application the time-clock began to run anew.

22 The Company's arguments are also disingenuous since the Staff was in continual
23 discussions with the Company in the August through December, 2004 timeframe regarding the
24 inconsistencies contained in the Company's various filings and the need for the Company to
25 harmonize its various filings so that Staff could make a meaningful recommendation to the
26 Commission.

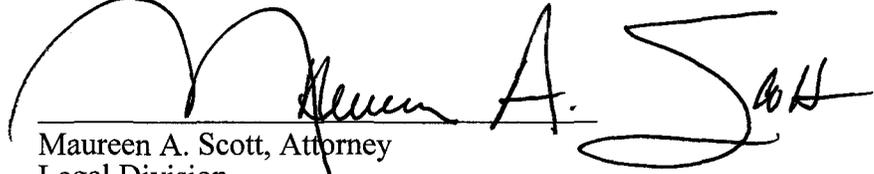
27 In addition, the Company's Application was certainly not the typical CC&N application
28 contemplated by A.A.C. R14-2-510(E). The Company's Application raises many difficult and

1 complex issues that go far beyond the typical CC&N Application, and which Staff believes place
2 it outside of the normal processing timeframes of A.A.C. R14-2-510(E).

3 **V. CONCLUSION**

4 Staff's alternative recommendation was offered as a means to accommodate the
5 Company's desire to provide one-stop shopping to large Enterprise customers. Staff can support
6 the Company's amended Application as long as the additional conditions proposed by Staff in its
7 Supplement to its Report and Recommendation are adopted and the Commission is satisfied that
8 QCC and QC have presented sufficient assurance that QC's ratepayers will not be harmed by the
9 loss of Enterprise customers and revenues that is likely to occur.

10 RESPECTFULLY submitted this 30th day of September, 2005.

11 

12 Maureen A. Scott, Attorney
13 Legal Division
14 Arizona Corporation Commission
15 1200 West Washington Street
16 Phoenix, Arizona 85007

17 ATTORNEYS FOR COMMISSION STAFF

18 Original and thirteen (13) copies
19 of the foregoing were filed this
20 30th day of September, 2005 with:

21 Docket Control
22 Arizona Corporation Commission
23 1200 West Washington Street
24 Phoenix, Arizona 85007

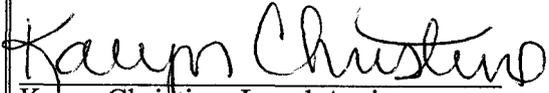
25 Copy of the foregoing mailed this
26 30th day of September, 2005, to:

27 Timothy Berg, Esq.
28 Theresa Dwyer, Esq.
Fennemore Craig
3003 North Central Avenue
Suite 2600
Phoenix, Arizona 85012-2913

1 Norman G. Curtright
Corporate Counsel
2 Qwest Corporation
4041 North Central Avenue
3 Suite 1100
Phoenix, Arizona 85012

4

5



6

Karyn Christine, Legal Assistant

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