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ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

3052

**COMMISSIONERS**

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

2005 DEC 30 P 2:43

AZ CORP COMMISSION  
DOCUMENT CONTROL

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

Docket No. T-02811B-04-0313

**STAFF'S COMMENTS ON QWEST CORPORATION'S  
RESPONSE TO DECEMBER 14, 2005 PROCEDURAL ORDER**

On December 14, 2005, the Hearing Division issued a Procedural Order which joined Qwest Corporation ("QC") as an indispensable party to this case pursuant to Arizona Administrative Code R14-3-101.A and the Arizona Rules of Civil Procedure Rules 19(a) and 21. QC's joinder was deemed to be necessary by the Administrative Law Judge ("ALJ") because the evidence presented indicated that QC may be adversely impacted by revenue losses. The December 14, 2005 Procedural Order further required QC to make a filing stating whether it preferred to submit its position through the filing of briefs or whether it desired to reopen the record to obtain additional factual information regarding the effect on QC of granting Qwest Communications Corporation's ("QCC") Application. It also required Staff and QCC to file comments on QC's response. Following are Staff's comments

1 on QC's filing. While Staff believes QC has waived any objections that it may have with respect to  
2 its nonparticipation in this docket on the grounds that it is indispensable party, Staff supports the  
3 ALJ's decision to include QC as a party because of QCC's arguments that the Commission cannot  
4 impose reporting obligations upon QC since it is not a party to this proceeding.

5  
6 **I. QC had notice of QCC's Application and chose not to participate in the proceeding; thus it has waived any claims that it is an indispensable party under Ariz. R. Civ. Pro. 19(a)(2).**

7 The ALJ found "after a full review of the record, it appears that a just and equitable  
8 adjudication of QCC's application requires the joinder of QC as a party in order to have its interests  
9 represented." Procedural Order at p. 2. In support thereof, the ALJ stated:

10 We are concerned with the fact that while Qwest Corporation was not  
11 formally represented in these proceedings, evidence was presented that  
12 Qwest Corporation may be adversely impacted by revenue losses, if  
13 QCC is granted the authority it requests to provide services in direct  
14 competition with Qwest Corporation for Enterprise Market customers,  
15 using the Qwest name. We find that Qwest Corporation clearly has an  
16 interest in this matter that requires its participation in this proceeding.

17 Procedural Order at p. 3.

18 However, the ALJ also noted in Footnote 3 of her Order, "Qwest Corporation is likely to have  
19 constructive notice of QCC's application, since QCC was represented throughout this proceeding by  
20 Qwest Corporation's corporate counsel, through the Qwest Law Department, and QCC's witness  
21 stated that she spends a predominant amount of her employment time working for Qwest  
22 Corporation."

23 Because QC has had notice of this proceeding since its inception and has knowingly and  
24 voluntarily chosen not to participate in this case, Staff believes that QC has waived any claims that it  
25 may have had that it is an indispensable party such that its absence may as a practical matter impair  
26 or impede its ability to protect that interest. *See* Ariz. R. Civ. Pro. 19(a)(2). Moreover, in its  
27 response to the Procedural Order, QC "disclaims an interest in whether QCC's application for a  
28 certificate of convenience and necessity should be granted." QC Response at p. 2.

While Staff supports QC's joinder, it does so because of QCC and QC's insistence that  
before the Commission can impose any reporting obligations upon QC, QC must be made a party to

1 this proceeding. While Staff does not necessarily agree with this argument by QC and QCC, in order  
2 to avoid litigation on this issue in the future, it may be simpler at this point to simply join QC as an  
3 indispensable party as the ALJ has done.

4 In its response to the Procedural Order, QC parrots many of QCC's arguments that the  
5 Commission is treating the Companies much differently than other CC&N applicants for no apparent  
6 reason. This is simply not true. This case is very different from other CC&N applications which  
7 have come before the Commission because QCC is an affiliate of QC's; and it is QC's affiliate that  
8 will be taking revenue away from QC. The Commission has not to-date granted the application of a  
9 CLEC affiliated with the ILEC to operate within the ILEC's service territory.

10 Further, it has been Staff's position throughout this case that the extent to which QCC takes  
11 revenues away from QC should be taken into account in QC's next price cap application. The extent  
12 to which QCC (as opposed to other CLECs) takes revenues away from QC is important because these  
13 revenues stay within the Qwest family of companies. Some of Staff's proposed reporting  
14 requirements which QCC takes strong exception to in this case, are designed to determine the amount  
15 of revenues shifted from QC to QCC, so that this information can be considered in QC's next price  
16 cap application. The revenue reporting information is also necessary to ensure that the Company is in  
17 compliance with the Commission's decision in this matter.

18 However, because QCC takes the position that the Commission cannot require QC to provide  
19 any information in this Docket without making QC a party, Staff supports joinder unless QC and  
20 QCC agree to undertake any reporting requirements ordered by the Commission without making an  
21 issue out of QC's party status.

22 **II. QCC has essentially taken the position in this case that QC is an indispensable**  
23 **party under Ariz. R. of Civ Pro. 19(a), by arguing that the Commission cannot**  
24 **impose reporting requirements upon QC because it is not a party to this docket.**

25 While both QC and QCC strenuously object to QC's being made an indispensable party to  
26 this Docket, it has actually been QCC that has advocated throughout this proceeding that the  
27 Commission cannot impose reporting requirements upon QC because QC is not a party to this  
28

1 Docket. Indeed, in its response to the December 14, 2005 Procedural Order, QC again refers to the  
2 imposition of adverse burdens *upon QC* as a condition of a certificate for QCC and implies that it is  
3 inappropriate for the Commission to do this without QC's participation in the Docket. QC Response  
4 at p. 3.

5 This is consistent with QCC's arguments that the Commission cannot impose any reporting  
6 requirements, as recommended by Staff, upon QC without QC's direct participation in the Docket.  
7 QCC has argued that the Commission should impose such reporting requirements in a generic  
8 rulemaking proceeding; however, QCC will not agree to suspend its application until such a generic  
9 proceeding can be concluded by the Commission.

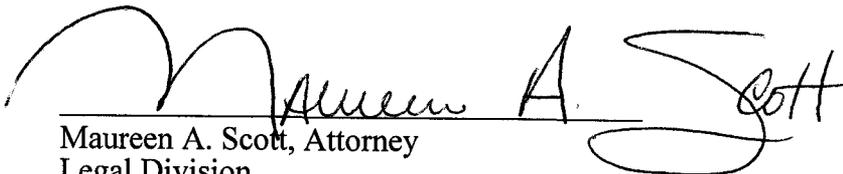
10 It has been Staff's position, on the other hand, given the unique nature of QCC's Application,  
11 the Commission can impose reporting requirements upon QC when it (not QCC) has sole possession  
12 of the information needed by the Commission to carry out its responsibilities under 47 U.S.C.  
13 253(b), with respect to QCC's Application.

14 Further QC has had notice of this proceeding from its inception. It knowingly and voluntarily  
15 chose not to intervene, even though it knew that Staff in its Supplemental Report issued on May 13,  
16 2005, was proposing reporting requirements that it would have to comply with if the same  
17 information was not available from QCC. Thus, while QCC argued throughout that QC had to be a  
18 party for the Commission to impose any requirements upon QC, QC took no action to intervene or  
19 become a party to this proceeding. Now, that the Commission is attempting to make QC a party, as  
20 QCC has consistently argued is necessary, both it and QC strenuously oppose such action by the  
21 Commission. To a large extent, QCC and QC must take responsibility for any delay that may occur  
22 due to the ALJ's determination that joinder is appropriate and necessary for complete relief in this  
23 proceeding.

24 While Staff believes that QC's joinder is not required to impose reporting requirements upon  
25 QC given the unique nature of this Docket, and the fact it is in sole possession of the information  
26 needed by the Commission to monitor conditions in the market if QCC's Application is granted in  
27 order to ensure that the objectives of 47 U.S.C. 253(b) are met; it believes that it is appropriate for the  
28

1 ALJ to take this action given QCC's arguments that the Commission cannot impose any reporting  
2 requirements on QC unless it is a party to this proceeding. Unless QC is willing to provide any  
3 information ordered by the Commission in its decision on QCC's application, Staff does not believe  
4 that QC or QCC have a legitimate basis to object to joinder of QC.

5 RESPECTFULLY submitted this 30th day of December, 2005.

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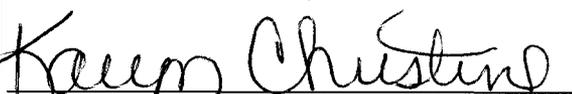
14 Original and 13 Copies of the foregoing  
15 filed this 30<sup>th</sup> day of December, 2005  
16 with:

17 Docket Control  
18 Arizona Corporation Commission  
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20 Phoenix, Arizona 85007

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