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Arizona Corporation Commission
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Date: January 24, 2007

RE: STAFF'S RESPONSE TO THE JOINT BRIEF OF COVAD COMMUNICATIONS COMPANY AND QWEST CORPORATION RELATING TO PHASE II PROCEEDING AND REQUESTING APPROVAL OF AMENDMENT TO INTERCONNECTION AGREEMENT (DOCKET NOS. T-01051B-04-0425 AND T-03632A-04-0425)

Introduction

On June 8, 2004, DIECA Communications, Inc., dba Covad Communications Company ("Covad") filed with the Arizona Corporation Commission ("Commission") a Petition for Arbitration ("Petition") of a proposed interconnection agreement with Qwest Corporation ("Qwest") pursuant to A.A.C. R14-2-1505 and Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act").

On February 2, 2006, the Commission issued Decision No. 68440 resolving the issues raised in the Petition. Among other things, the Commission ordered a further phase ("Phase II") of this proceeding shall be instituted within 30 days to determine just and reasonable rates consistent with state and federal law.

By Procedural Orders issued on March 3, 2006, and March 22, 2006, time extensions were granted for the commencement of Phase II. Qwest and Covad continued to engage in good faith negotiations in an attempt to resolve Phase II issues. On December 6, 2006, at a procedural conference, the Arbitrator ordered Qwest and Covad to file their Phase II settlement agreement(s) by December 22, 2006, and Commission's Staff to file its response by January 12, 2007.

On December 20, 2006, Qwest and Covad filed their Joint Brief of Covad Communications Company and Qwest Corporation Relating to Phase II Proceeding and Requesting Approval of Amendment to Interconnection Agreement ("Joint Brief"). On January 3, 2007, Qwest and Covad filed a Notice of Errata, submitting the signature pages for Attachment A and B of the Joint Brief.

On January 12, 2007, Commission Staff filed a Request for Extension of Time until January 24, 2007, to submit its response to the Joint Brief.

Background

Section 252 of the Act sets forth the procedures for negotiation, arbitration, and approval of agreements for interconnection, services, or unbundled network elements. Under Section 252, when carriers cannot arrive at an interconnection agreement through voluntary negotiation, they may mediate and arbitrate their unresolved issues before the state commission. Pursuant to Section 252(b)(4)(C), in arbitrating the disputes, the state commission must “resolve each issue set forth in the petition and the response” and must “conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request [for interconnection].” Finally, Section 252(e)(6) authorizes a party “aggrieved” by a state commission’s determination under Section 252 to bring an action in the federal district court.

As stated above, the Commission has made its determination in this proceeding and ordered among other things a Phase II pricing proceeding for the Section 271 elements. (See Decision No. 68440.) Qwest has appealed the Decision in the United States District Court for the District of Arizona and the case is still pending.

In the Joint Brief, Qwest and Covad request that the Commission: (1) defer the Phase II pricing proceeding, (2) direct the parties to provide a status report in the approximately eight months concerning the need for a pricing proceeding, and (3) approve an amendment to their arbitrated interconnection agreement for the purpose of implementing the Federal Communications Commission’s *Triennial Review Remand Order* (“TRRO”) for the reasons stated in the Joint Brief. The reasons include among other things that “the parties are content with the negotiated agreement they have reached and have no business need or desire to invest the significant resources that would be required for a Phase II pricing proceeding” and also given Qwest’s appeal of Decision No. 68440 “pending in the Arizona Federal District Court, it is in the interest of judicial economy to defer the pricing proceeding.”

Analysis

Below is Staff’s analysis and response to the relief requested in the December 20, 2006 Joint Brief. This analysis and response does not address jurisdictional issues pertaining to Section 271 elements. Staff expressly preserves and is not waiving its position that the Commission has authority to set prices and other terms and conditions for Section 271 elements.

Generally, Carriers that request service from ILECs such as Qwest may: (1) purchase services and elements through the Statement of Generally Available Terms and Conditions (“SGAT”) in states with effective SGATs; (2) adopt an entire agreement negotiated by another competitive carrier; or (3) negotiate a new interconnection agreement with the ILEC. If negotiation for interconnection fails, any of the parties may file for arbitration with the State Commission.

Attached to the Joint Brief are two agreements (a "price flex" contract and a *TRRO* amendment) resulting from the good faith negotiations between Qwest and Covad in an attempt to resolve Phase II issues. The "price flex" contract sets forth the terms, conditions and pricing under which Covad will be able to purchase interstate high-capacity transport from Qwest. The *TRRO* amendment implements ongoing obligations relating to the services required under Section 251(b) and (c).

Consistent with Section 252(e) of the Act, the State Commission may only reject an agreement, or any portion thereof, if it finds that the agreement, adopted by negotiations under subsection (a) of Section 252(e) either: (A) discriminates against a telecommunications service provider that is not a party to the agreement; or (B) is not consistent with the public interest, convenience, and necessity. Staff has reviewed both the "price flex" contract and the *TRRO* amendment mentioned above and found that they did not discriminate against any telecommunications service provider that is not a party to the agreement and is consistent with the public interest, convenience, and necessity. As such, Staff concludes that both the "price flex" contract and the *TRRO* amendment are consistent with the Act and the Arizona Administrative Code.

With regards to Qwest and Covad's relief requested, that the Commission defer the Phase II pricing proceeding and direct the parties to provide a status report in the approximately eight months concerning the need for a pricing proceeding, Staff has no objection to the relief requested provided that Qwest would make the "price flex" contract and the *TRRO* amendment available to any other Carrier, who is not a party to this proceeding, requesting to adopt the agreements. Staff also recommends that if Qwest agrees to make the two agreements available to other Carriers, that the Commission defer the Phase II pricing proceeding and address the pricing issues in the Phase III of T-00000A-00-0194 which will soon commence.

Qwest and Covad also requested for approval of the *TRRO* amendment to their arbitrated interconnection agreement. Staff believes that this relief requested is reasonable and is in the public interest. The *TRRO* amendment is bilateral and voluntary, and entered into as a result of good faith negotiations and compromise between competitors. All issues pertaining to the *TRRO* amendment have been decided between the parties and no arbitration is needed. Staff finds the *TRRO* amendment to be consistent with the Act and the Arizona Administrative Code and recommends approval of the *TRRO* amendment.

EGJ:BNC:tdp

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Docket Nos. T-01051B-04-0425, T-03632A-04-0425

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