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BEFORE THE ARIZONA CORPORATION COMMISSION

2007 APR 24 P 12:48

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Chairman

WILLIAM MUNDELL  
Commissioner

JEFF HATCH-MILLER  
Commissioner

KRISTIN MAYES  
Commissioner

GARY PIERCE  
Commissioner

AZ CORP COMMISSION  
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Arizona Corporation Commission  
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IN THE MATTER OF THE PETITION OF  
DIECA COMMUNICATIONS, INC., dba  
COVAD COMMUNICATIONS COMPANY,  
FOR ARBITRATION OF AN  
INTERCONNECTION AGREEMENT WITH  
QWEST CORPORATION

DOCKET NO. T-03632A-04-0425  
T-01051B-04-0425  
(Phase II)

QWEST CORPORATION'S  
INITIAL RESPONSE TO STAFF'S  
MOTION TO CONSOLIDATE  
DOCKETS AND RESPONSE TO  
COX ARIZONA TELCOM'S  
MOTION TO COMMENCE PHASE  
III OF THE QWEST UNE PRICING  
DOCKET

Qwest Corporation ("Qwest") submits this response to Staff's motion to consolidate Phase II of this arbitration proceeding with any Phase III of the Qwest UNE Pricing Docket (the "Cost Docket"). As explained below, Qwest opposes the Staff's motion to consolidate Phase II of this proceeding with any future phase of the Qwest UNE Pricing Docket (the "Cost Docket").

The network elements for which the Staff seeks to set rates in Phase II of this proceeding are Section 271 Network elements. Staff Motion, p. 2, lines 15-17. However, Qwest has sought federal court review of the part of the Arizona Corporation Commission's Order, Decision No. 68440 (the "Arbitration Order"), which calls for the Phase II rate setting, in *Qwest Corporation v. Arizona Corporation Commission*, United States District Court, District of Arizona, Case No. CV06-1030-PHX-ROK (the "Arbitration Appeal"). The Arbitration Appeal has been briefed by the parties, and is set for oral argument on June 21, 2007.

1 Qwest submits that the Arizona Corporation Commission (the "Commission") was in  
2 error in the Arbitration Order when it ruled that in its limited, statutorily-defined role as an  
3 arbitrator of open issues relating to the obligations imposed by Section 251, it had authority  
4 under Section 271 of the Act and Arizona law to require Qwest to provide through the  
5 interconnection agreement "unbundled" access to network elements that the FCC has expressly  
6 ruled ILECs are not required to unbundle under Section 251. Further, the Commission's ruling  
7 that Qwest must provide unbundled access to these non-251 network elements at highly  
8 regulated, cost-based rates that, by law, apply only to the network elements that ILECs are  
9 required to provide under Section 251, is contrary to a binding ruling of the FCC that has been  
10 affirmed by the United States Court of Appeals for the District of Columbia Circuit. By  
11 requiring that the parties' interconnection agreement include this form of network unbundling,  
12 the Commission exceeded its Congressionally limited arbitration authority, violated the  
13 substantive provisions of the Act and federal policy, and violated substantive and procedural  
14 requirements of Arizona law. The unbundling requirements the Commission has impose also  
15 impermissibly conflict with and are preempted by binding rulings and orders from the FCC.

16 In the Arbitration Appeal pending at the United States District Court, Qwest has  
17 identified multiple legal authorities demonstrating that the Arbitration Order's imposition of  
18 terms relating to the obligations set forth in Section 271 in the interconnection agreement is  
19 unlawful, and that setting such rates based on TELRIC ("total element long run-incremental  
20 cost") is expressly contrary to the FCC's binding rulings. Qwest will not burden this response  
21 with the full explication of the law, which Qwest has set out at length in the Arbitration Appeal,  
22 and which Qwest incorporates herein by reference. However, the basic legal reasons why the  
23 Commission may not proceed with Phase II of the Arbitration, in a cost docket or otherwise are  
24 summarized here.

25 A state agency has no role in the administration of federal law, absent *express*  
26 authorization by Congress. *Pacific Bell v. Pac-West Telecomm*, 325 F.3d 1114, 1126-27 (9<sup>th</sup> Cir.

1 2003). Section 251(c) and Section 271 impose “independent” and substantively different  
2 network unbundling obligations. *USTA. v. FCC*, 359 F.3d 554, 588-89 (D.C.Cir.) *cert. denied*,  
3 123 S.Ct. 323 (2004) (“*USTA IP*”). The only UNEs an ILEC is required to provide under Section  
4 251(c)(3) are those that meet the “impairment” standard in Section 251(d)(2). Congress  
5 determined that without access to certain ILEC network elements, CLECs would become  
6 competitively impaired. Accordingly, ILECs are only required to provide “unbundled network  
7 elements” if there is an FCC finding of impairment and must do so through ICAs and at TELRIC  
8 rates.

9 Four federal courts have recently ruled that state commission do not have decision  
10 making authority under Section 271 to compel provision of Section 271 elements in an ICA or to  
11 establish the rates for Section 271 elements. A state commission cannot “parlay its limited role  
12 in issuing a recommendation under § 271” into an order imposing Section 271 obligations.  
13 *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm’n*, 359 F.3d 492, 497 (7th Cir. 2004).  
14 In *DIECA Covad Communications v. Florida Public Service Commission*, 47 F.Supp. 2d 1281  
15 (N.D. Fla. 2006), the Florida district court held that states are authorized only to implement the  
16 requirements of Section 251. Similarly, in *Southwestern Bell Telephone L.P. v. Missouri P.S.C.*,  
17 Case No. 4:05-CV-1264 CAS, slip op. at 20-21 (E.D. Mo. Sept. 14, 2006), the Missouri district  
18 court ruled that a state commission “lacks the jurisdiction and authority to order Section 271  
19 unbundling obligations to be included as part of an [ICA] arbitration pursuant to Section 252,  
20 where [the ILEC] had not agreed to negotiate access to those facilities pursuant to Section 251.  
21 And, in *Illinois Bell Telephone v. O’Connell Diaz*, Case No. 05 C 1149, slip op. 24-25 (N.D.Ill.  
22 Sept. 28, 2006), the Illinois district court held that state have only a “consulting” role under  
23 Section 271 and have no authority over elements provided under that section.

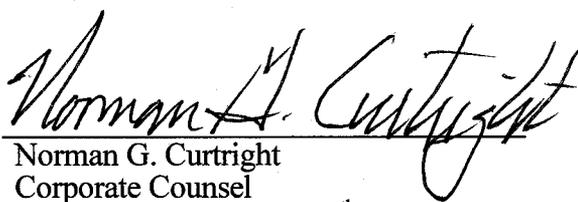
24 Qwest submits that it is clear that the Commission may not proceed to set rates for  
25 Section 271 network elements, as Staff proposes, for the reasons summarized above and as set  
26 forth in the Arbitration Appeal. However, as noted above the Arbitration Appeal is proceeding

1 forward to oral argument within two months. There is no reason to think that the federal court  
2 will not reach its decision on the Arbitration Appeal within several months. While Qwest  
3 believes that the Commission would simply be compounding its error in the Arbitration Order by  
4 proceeding with the Phase II rate setting in the context of the cost docket as Staff proposes,  
5 Qwest respectfully submits that as a simple matter of judicial economy, it does not make good  
6 sense to proceed with the Phase II rate setting while the Arbitration Appeal is pending. The  
7 better course is to await the jurisdictional ruling from the court before the Commission and the  
8 parties invest the substantial time and resources that would be required to the Section 271 pricing  
9 issues.

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DATED this 24th day of April, 2007.

QWEST CORPORATION

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2 were filed this 24th day of April 2007 with:

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