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IN THE MATTER OF QWEST CORPORATION'S PETITION FOR ARBITRATION AND APPROVAL OF AMENDMENT TO INTERCONNECTION AGREEMENT WITH ARIZONA DIALTONE, INC. PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996 AND APPLICABLE STATE LAWS

DOCKET NO. T-01051B-07-0693
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QWEST CORPORATION'S MOTION IN LIMINE TO BAR TESTIMONY AT MAY 1, 2008 HEARING

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I. INTRODUCTION AND BACKGROUND

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Qwest Corporation ("Qwest") hereby files this Motion in Limine to Bar Testimony at the May 1, 2008 Hearing and any continuance thereof. The need for this motion arises from Arizona Dialtone, Inc.'s ("AZDT") stated intent to present testimony in support of its request for the Commission to set rates for the network element known as local switching. As described below, AZDT's request conflicts directly with *Qwest Corporation v. Arizona Corporation Commission*,¹ in which the federal district court of Arizona ruled that this Commission does not have authority to set rates for the network elements that Qwest provides pursuant to Section 271 of the Telecommunications Act of 1996 ("the Act"). Because Qwest provides the local switching at issue in this proceeding under Section 271, the ruling of the Arizona court – in addition to the

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¹ 496 F.Supp.2d 1069 (D. Ariz. 2008).

1 rulings of 11 other federal courts around the country – affirmatively prohibits the Commission
2 from taking the action that AZDT is requesting. Accordingly, AZDT must be barred from
3 presenting any evidence that relates to its request for the Commission to set switching rates.

4 AZDT's Statement of Issues In Dispute and Request to Present Testimony, filed April 4,
5 2008, lists so-called "mixed issues of fact and law" for which AZDT seeks to present testimony
6 and other evidence. The issues described in that filing make it clear that AZDT is asking the
7 Commission to rule on the rates that Qwest is permitted to charge for local switching. For
8 example, as described in Issue 16, AZDT is asking the Commission to rule whether Qwest's "rate
9 for 'alternative [switching] service arrangements'" is "an above-market rate" and therefore
10 impermissible. Relatedly, in Issue 17, AZDT is requesting that the Commission decide an issue
11 relating to the reasonableness of Qwest's switching rate by determining whether permitting
12 Qwest to charge that rate will "drive AZDT out of the Public Access Lines ('PAL') product
13 market." In the same vein, in Issue 18, AZDT requests that the Commission decide the extent to
14 which "Qwest has a monopoly position in certain geographic areas" and the effect that alleged
15 position – and the resulting switching rate – has had on AZDT's ability to move its "embedded
16 base of PAL customers to other carriers."

17 In presenting these issues, AZDT is plainly seeking a ruling on the rate Qwest is charging
18 for local switching and on related sub-issues concerning the effects that Qwest's rate, as alleged
19 by AZDT, is having on the market. In addition, in other issues that it lists, AZDT is indirectly
20 requesting that the Commission rule upon the appropriateness of Qwest's switching rate. For
21 example, in Issue 15, AZDT requests that the Commission address whether Qwest is entitled to a
22 true-up in the amount of the difference between the former Arizona rate for local switching and
23 the rate Qwest is currently charging. Implicit in this request is that the Commission rule upon
24 the reasonableness of the switching rate that Qwest is currently charging. The same implicit
25 issue is found in AZDT's Issue 14, which asks the Commission to determine which of several
26 possible rates AZDT should be required to pay for switching.

1 In addition to conflicting with the jurisdictional ruling in *Qwest v. Arizona Corporation*,
2 AZDT's request for the Commission to address these issues amounts to an impermissible
3 collateral attack on the FCC's *Triennial Review Remand Order* ("TRRO").² In that order, the
4 FCC made a nationwide finding that competitive local exchange carriers ("CLECs") are not
5 competitively impaired without regulated access to mass market switching. Based on that
6 finding, the FCC removed mass market switching from the unbundling obligations imposed by
7 Section 251,³ thereby establishing that the rates for switching are now governed by the market
8 and not by the "TELRIC" ("total element long run incremental cost") pricing methodology
9 applies only to Section 251 services. By requesting that the Commission invalidate Qwest's
10 switching rate and replace it with the old TELRIC rate that applied before the *TRRO*, AZDT is
11 seeking to circumvent the FCC's ruling that switching is no longer within Section 251 and is not
12 governed by the highly regulated TELRIC methodology.

13 For these reasons, Qwest seeks an order prohibiting AZDT from presenting any evidence
14 relating to the validity of Qwest's existing rate for local switching or the alleged effects of
15 Qwest's rate on AZDT's business or the Arizona market for public access lines. In the discussion
16 that follows, Qwest describes the relevant provisions of the Act, the FCC orders, and the judicial
17 decisions that establish the Commission is without authority to decide the issues AZDT has
18 presented.

19 **II. THE ABSENCE OF COMMISSION AUTHORITY TO ADDRESS RATES FOR THE** 20 **LOCAL SWITCHING THAT QWEST PROVIDES UNDER SECTION 271**

21 **A. Sections 251 And 271 Impose Different Unbundling Obligations And** 22 **Different Pricing Schemes For Network Elements**

23 To open local markets to competition, Congress imposed certain duties on all local
24 exchange carriers in § 252(b) and other duties in § 251(c) that apply only to ILECs. Of

25 ² *Order on Remand, Review of the Section 251 Unbundling Obligations of ILECs*, 20 FCC Rcd 2533,
26 2654 (2005) ("*TRRO*").

³ *Id.* at ¶ 199.

1 particular significance, § 251(c)(3) requires ILECs to provide CLECs with leased access to
2 unbundled network elements ("UNEs") – a term of art that refers to certain piece-parts of the
3 ILECs' networks – at regulated rates. The UNEs that ILECs must provide are limited to those
4 the FCC has determined meet the "impairment" standard in § 251(d)(2).⁴ Only if the FCC makes
5 a determination under § 251(d)(2) that CLECs will be competitively impaired without access to a
6 network element must an ILEC provide the element as a UNE under § 251(c)(3). The rates that
7 apply to UNEs are set by state commissions applying the FCC's TELRIC pricing methodology.⁵

8 The *TRRO* establishes that CLECs are not impaired without access to – and cannot lease
9 as UNEs at TELRIC rates – multiple network elements, including local switching.⁶ However,
10 the "competitive checklist" in Section 271 requires BOCs like Qwest to provide access to certain
11 network elements -- including local switching -- as a condition to being permitted to provide
12 interstate long distance service in their designated geographic regions. This obligation applies
13 even if the FCC has determined that there is no longer a duty to provide these elements as UNEs
14 under § 251.

15 Importantly, there are fundamental differences between UNEs provided under § 251 and
16 network elements that a BOC provides under § 271.⁷ Most significantly, BOCs are not required
17 to provide § 271 elements at the TELRIC rates that apply to § 251 UNEs. Instead, prices for
18 these elements are governed by the "just, reasonable, and nondiscriminatory rate standard of
19 sections 201 and 202" of the Communications Act of 1934.⁸ Under this standard, BOCs may
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22 ⁴ Section 251(d)(2)(B) requires the FCC to determine whether "the failure to provide access to such
23 network elements would impair the ability of the telecommunications carrier seeking access to provide
the services that it seeks to offer."

24 ⁵ See *Local Competition Order*, 11 FCC Rcd. at 15499, 15844, ¶ 672 (1996).

24 ⁶ *TRRO* at ¶ 199.

25 ⁷ See *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange*
26 *Carriers*, 18 F.C.C.R. 16978 at ¶¶ 653-64 (August 21, 2003) ("*TRO*"); *USTA v. FCC*, 359 F.3d 554, 588-
90 (D.C. Cir. 2004).

26 ⁸ *TRO* at 17389, ¶ 663.

1 charge a market-based rate.⁹ Further, as discussed below, the FCC alone has the authority to set
2 rates for Section 271 elements, and state commissions have no power to address those rates.

3 In this case, Qwest is providing local switching to AZDT pursuant to Section 271 and
4 based upon a market rate. This offering is entirely consistent with the FCC's removal of
5 switching from Section 251 and its rulings that market-based rates apply to switching and other
6 network elements that have been removed from Section 251 but that BOCs continue to provide
7 under Section 271.

8 **B. As The Court Held In *Qwest Corporation v. Arizona Corporation Commission*, This
9 Commission Does Not Have Authority To Review Or Otherwise Set Rates For
Section 271 Elements.**

10 While AZDT's list of issues presumes that the Commission has authority to review and
11 set rates for the switching Qwest provides pursuant to Section 271, that presumption was
12 squarely rejected in *Qwest Corporation v. Arizona Corporation Commission*. Indeed, in that
13 case, the court permanently enjoined the Commission from conducting a proceeding to set rates
14 for Section 271 elements. If the Commission were to consider the Section 271 rate issues that
15 AZDT is attempting to inject into this proceeding, it would be acting directly in conflict with the
16 court's ruling.

17 The court, in addressing the Commission's position Section 271 grants states
18 implementation authority, found that the Commission's "interpretation of the Act makes no
19 textual sense."¹⁰ The court explained that Congress "'unquestionably' took 'regulation of local
20 telecommunications competition away from the States,' and required that the participation of the
21 state commissions in the new federal regime be guided by federal-agency regulations."¹¹
22 Accordingly, states are not permitted to regulate local telecommunications competition "except

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24 ⁹ Third Report and Order, *Implementation of the Local Competition Provisions of the
Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 473 (1999); see also TRO at ¶¶ 656-64.

25 ¹⁰ 496 F. Supp. 2d at 1076.

26 ¹¹ *Id.* (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 378 n.6) (citing *Indiana Bell Tel. Co. v.
Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 494 (7th Cir. 2004); *Southwestern Bell Tel. L.P. v.
Missouri Public Service Comm'n*, 461 F.Supp.2d 1055, 1058 (E.D. Mo. 2006)).

1 by express leave of Congress."¹² The court explained that "the plain terms" of the Act make it
2 clear that Congress did not grant state commissions any authority to impose requirements under
3 § 271. The court emphasized that the only role of the states under § 271 is to consult with the
4 FCC concerning a BOC's compliance with that section, and that the arbitration authority granted
5 to states in § 252 only permits states to impose requirements concerning the duties created by §
6 251, not § 271.¹³ The FCC alone has the authority to enforce the requirements of § 271 and state
7 commissions are preempted from interfering with those requirements.¹⁴

8 Of particular relevance for the purpose of this motion, the court ruled that the ACC had
9 no authority to dictate the rates Qwest must charge for § 271 elements. The court found that
10 because "the ACC does not have the authority or jurisdiction to impose Section 271 requirements
11 in ICAs, it follows that *the ACC does not have [the] authority to set the prices for those Section*
12 *271 elements.*"¹⁵

13 This ruling is consistent with the rulings of 11 of other federal courts that have addressed
14 this issue.¹⁶ There is not a single ruling in the country that goes the other way.

17 ¹² *Id.* (citing *MCI Telecommunications Corp. v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 510 (3d Cir.
2001)).

18 ¹³ *Id.* at 1077.

19 ¹⁴ *Id.* at 1076-77.

20 ¹⁵ *Id.* (emphasis added).

21 ¹⁶ *Verizon New England v. Maine Public Utils. Commission*, 509 F.3d 1, (1st Cir. 2007); *Illinois Bell Tel.*
22 *Co. v. Hurley*, No. 05 C 1149, 2008 WL 239149 (N.D. Ill. Jan. 28, 2008); *BellSouth Telecommunications,*
23 *Inc. v. Georgia Pub. Service Comm'n*, No. 1:06-CV-00162-CC, slip op. (N.D. Ga. Jan. 3, 2008);
24 *Michigan Bell Tel. Co. v. Lark*, No. 06-11982, 2007 WL 2868633 (E.D. Mich. Sept. 26, 2007), *appeals*
25 *pending*, Nos. 07-2469, 07-2473 (6th Cir.); *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*,
26 No. 06-65-KKC, 2007 WL 2736544 (E.D. Ky. Sept. 18, 2007); *Illinois Bell Tel. Co. v. O'Connell-Diaz*,
No. 05-C-1149, 2006 WL 2796488, (N.D. Ill. Sept. 28, 2006); *Dieca Communications, Inc. v. Florida*
Pub. Serv. Comm'n, 447 F. Supp. 2d 1281 (N.D. Fla. 2006); *Southwestern Bell Tel., L.P. v. Missouri Pub.*
Serv. Comm'n, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), *appeals pending*, Nos. 06-3701, 06-3726, 06-3727
(8th Cir.); *Verizon New England, Inc. v. New Hampshire Pub. Utils. Comm'n*, No. 05-cv-94, 2006 WL
2433249 (D.N.H. Aug. 22, 2006), *aff'd*, *Verizon New England*, 2007 WL 2509863; *BellSouth*
Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n, 368 F. Supp. 2d 557 (S.D. Miss. 2005); *Indiana Bell*
Tel. Co. v. Indiana Utility Regulatory Commission, 2003 WL 1903363 (S.D. Ind. 2003), *aff'd*, 359 F.3d
493 (7th Cir. 2004).

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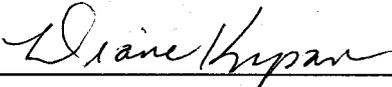
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