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BEFORE THE ARIZONA CORPORATION COMMISSION
Arizona Corporation Commission

2001 JAN 31 A 3: 36

WILLIAM A. MUNDELL DOCKETED

Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

JAN 31 2001

AZ CORP COMMISSION
DOCUMENT CONTROL

DOCKETED BY 

IN THE MATTER OF THE GENERIC INVESTIGATION INTO U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH CERTAIN WHOLESALE PRICING REQUIREMENTS FOR UNBUNDLED NETWORK ELEMENTS AND RESALE DISCOUNTS.

DOCKET NO. T-00000A-00-0194

QWEST CORPORATION'S REPLY TO AT&T, WORLDCOM, AND STAFF IN SUPPORT OF QWEST'S MOTION FOR RECONSIDERATION OF THE PROCEDURAL ORDER ISSUED DECEMBER 14, 2000

I. INTRODUCTION

Qwest Corporation ("Qwest"), submits this consolidated reply in support of its motion requesting the Arbitrator to reconsider part of the Procedural Order issued December 14, 2000 ("Procedural Order"). This reply addresses the responses to Qwest's motion submitted by AT&T Communications of the Mountain States, Inc. ("AT&T"), WorldCom, Inc. ("WorldCom"), and Commission Staff.

The responses to Qwest's motion raise three fundamental arguments, none of which has merit. First, the responses incorrectly assert that Qwest's motion for reconsideration raises arguments that the Arbitrator already considered before issuing the Procedural Order and, therefore, does not provide a ground for modifying the Order. The ruling in the Procedural Order to revisit in this docket the rates for unbundled network elements ("UNEs") established in Decision No. 60635 rests on the Arbitrator's conclusion that "[i]t appears that the Commission has not itself determined that the UNE rates it set in Decision No. 60635 comply with the FCC

1 pricing rules." Procedural Order at 2. Contrary to the assertions in the responses, the Procedural
2 Order put this basic premise – that the Commission did not consider whether UNE rates comply
3 with the FCC pricing rules – expressly at issue for the first time. Accordingly, Qwest's motion
4 for reconsideration is premised primarily on a detailed recitation of the many places in Decision
5 No. 60635 where the Commission invoked the principles from the FCC's pricing rules. These
6 references were properly not addressed in detail in previous briefing, and, in Qwest's view,
7 demonstrate that the Arbitrator was mistaken in her conclusion that the Commission did not
8 consider the FCC pricing rules.
9

10 Second, the responses selectively quote from the Commission's deliberations relating to
11 Decision No. 60635 in an attempt to suggest that the Commission always intended that the UNE
12 rates from that proceeding would be interim and the new rates would be established in another
13 proceeding. As Qwest has demonstrated previously, a full reading of the deliberations
14 demonstrates that the Commission spoke of the possibility of revisiting the UNE rates if, over
15 time, they proved to be inaccurate or improper. The absence of any specific criticisms of the
16 UNE rates and the fact the a federal district court has affirmed the lawfulness of the rate for the
17 unbundled loop provide compelling evidence that the UNE rates from Decision No. 60635 are
18 neither inaccurate nor improper.
19

20 Third, AT&T offers the sweeping, non-specific assertion that there is no meaningful
21 competition in Arizona's local exchange market, particularly the residential market, because the
22 UNE rates are too high. This claim lacks any factual support. As discussed below, there is
23 significant competition in Arizona's local exchange market. There are at least 45 facilities-based
24 competitors in the market, and at the end of 2000, seventeen CLECs had purchased and phased
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1 in 14,883 UNE loops from Qwest in Arizona. The reality is that AT&T has chosen not to
2 compete in the Arizona residential local exchange market for reasons wholly unrelated to
3 Qwest's UNE rates; its claim that the UNE rates have prevented it from competing is
4 disingenuous. Equally important, just last week, the FCC made clear that the relevant pricing
5 inquiry for purposes of an application pursuant to section 271 of the Telecommunications Act of
6 1996 is whether the rates of an incumbent local exchange carrier ("ILEC") comply with the cost-
7 based TELRIC standards in the FCC's pricing rules, not whether the rates are at a level that
8 permits CLECs to earn the profits they desire as a condition for entry into the market. As Qwest
9 has shown, the UNE rates from Decision 60635 are cost-based and TELRIC-compliant; whether
10 those rates are at a level that would allow a CLEC to earn the profits it desires for entry into the
11 market is irrelevant.
12

13
14 Accordingly, Qwest requests that the Arbitrator modify the Procedural Order to establish
15 that Phase II of this proceeding will not include a review of the UNE rates or, alternatively, that
16 consistent with the approach recently followed in Colorado, UNE rates will be revisited only if
17 the CLECs provide a prima facie showing that individual rates are improper.

18 **II. DISCUSSION**

19 **A. Qwest's Motion for Reconsideration Properly Provides for the First**
20 **Time Detailed References to the Commission's Reliance on the FCC's**
21 **Pricing Rules in Decision No. 60635.**

22 In their responses, WorldCom and Staff assert that in Decision No. 60635, the
23 Commission did not find that the UNE rates it ordered complied with the FCC's pricing rules.¹
24 They provide this assertion in a sweeping fashion without responding at all to the many places in
25 Decision No. 60635 where the Commission expressly invoked the FCC's pricing rules. Most

26 ¹ AT&T remains tellingly silent on this fundamental issue.

1 prominent is their failure to acknowledge the Commission's express reliance in Decision No.
2 60635 on the FCC's pricing methodology as the basis for the UNE rates: "The prices for
3 unbundled network elements are intended to recover the costs of a forward-looking, least cost,
4 efficient network, not embedded costs." Decision No. 60635, Conclusion of Law No. 9
5 (emphasis added). Nor do they acknowledge the Commission's finding in Decision No. 60635
6 that its rulings are "consistent with the Act, the FCC Order and Rules, and all applicable law . . .
7 ." Id. Conclusion of Law No. 6 (emphasis added). By themselves, these two findings confirm
8 that contrary to the statement in the Procedural Order, the Commission did apply the FCC's
9 pricing methodology in setting UNE rates.

10 In addition to this finding, in the motion for reconsideration, Qwest cites six other
11 instances in which the Commission expressly relied on FCC pricing principles in Decision No.
12 60635. Motion for Reconsideration at 7. These references show the Commission applying FCC
13 pricing principles to the low-level inputs to cost models that provide the foundation for UNE
14 rates, including, for example, overall network design, depreciation lives, overhead expenses, fill
15 factor rates, and methods for installing outside plant. Qwest properly brought these references to
16 the Arbitrator's attention for the first time in its motion for reconsideration because it was not
17 until the Arbitrator's Procedural Order that it became appropriate and necessary to highlight these
18 Commission findings. Again, WorldCom and Staff do not acknowledge any of these findings
19 and references, all of which undermine their claim that the Commission failed to consider the
20 FCC's pricing rules.

21 Further, Staff points out again that when the Commission issued Decision No. 60635, the
22 United States Court of Appeals for the Eighth Circuit had stayed the FCC's pricing rules.
23 However, the fact that the rules were stayed does not erase the equally established fact that the
24 Commission and the parties nevertheless chose to follow those rules. See Qwest's Response to
25 Staff's Motion for Clarification of Procedural Order at 2-4. The decision by the parties and the
26

1 Commission to follow the pricing rules despite the stay renders the stay irrelevant.²

2 **B. The Commission did not Unconditionally Express an Intention to**
3 **Revisit the UNE Rates From Decision No. 60635.**

4 While AT&T, WorldCom, and Staff argue that the Commission's public deliberations in
5 connection with Decision No. 60635 reveal an intent to establish interim UNE rates that would
6 be revisited within a short period of time, a closer reading of those deliberations reveals
7 otherwise. A fair reading of the deliberations discloses an intent not to reevaluate rates
8 precipitously and, instead, to reevaluate if necessary to correct identified errors. Thus, Chairman
9 Irvin commented that "if the numbers and the calculations prove to be wrong," rates could be
10 revisited, "if necessary." No member of the Commission, and certainly not the Commission
11 itself, stated that rates would automatically be revisited within a year or any other time as a
12 matter of course. The Commission did not identify the passage of time alone as a reason.

13 In its response, AT&T cites an exchange between Commissioner Irvin and Hearing
14 Officer Rudibaugh in which Mr. Rudibaugh explained an August 2000 procedural order in this
15 proceeding. According to AT&T and Staff, Mr. Rudibaugh's reference to the unbundled loop
16 rate of \$21.98 and to "several court decisions which have made modifications" confirm the
17 Commission's intent to revisit UNE rates. However, in U S WEST v. Jennings, the court
18 expressly affirmed the two-wire loop rate to which Mr. Rudibaugh referred, and there is,
19 therefore, no "court modification" that provides a basis for revisiting that rate. 46 F. Supp.2d at
20 1012. The court did remand issues relating to the price of the four-wire loop, nonrecurring
21 charges, and resale discounts, and Qwest agrees that these are "court modifications" that require
22 revisiting these issues in Phase II. However, these limited rulings do not provide a basis for
23 revisiting all UNE rates, including rates that the court upheld, as AT&T and Staff suggest.

24 ² In its brief, Staff cites a statement from U S WEST Communications, Inc. v. Jennings, 46 F. Supp.2d
25 1004, 1009 (D. Ariz. 1999), in which the court declined to apply FCC rules that were vacated at the time
26 the Commission issued Decision 60635. However, despite the statement, the court clearly applied the
FCC's TELRIC pricing standard in reviewing UNE rates from Decision 60635, as evidenced by the

1 **C. AT&T's Assertion that the UNE Rates Have Prevented Competition is**
2 **Inaccurate.**

3 In its response, AT&T includes an inflammatory statement accusing Qwest of being
4 motivated to avoid reevaluation of the UNE rates by a desire "to continue its monopoly in the
5 provision of residential telecommunications services in Arizona." AT&T Response at 1. Later
6 in its brief, AT&T asserts that "there is virtually no competition using UNEs from Qwest
7 because the prices for those elements are too high." Id. at 4 For several reasons, these assertions
8 and accusations require a brief response.

9 First, AT&T's portrayal of competition in the Arizona local exchange market is
10 inaccurate. There is vigorous competition in this market, as demonstrated by the fact that there
11 are at least 45 facilities-based providers in the market. At the end of 2000, seventeen CLECs had
12 purchases 14, 883 unbundled loops for Qwest in Arizona. The Commission has approved
13 numerous CC&Ns for CLECs and many interconnection agreements between Qwest and those
14 CLECs.

15 Second, there is obvious irony in the fact that AT&T is claiming that UNE rates are
16 hindering competition in the residential market. In Arizona, as in virtually every other state,
17 AT&T has made almost no effort to compete in the residential market and has all but expressly
18 admitted a lack of interest in that market through its public statements. AT&T's lack of entry
19 into the residential local exchange market has nothing to do with Qwest's UNE rates and
20 everything to do with AT&T's deliberate business decision not to enter this market.

21 Third, in an order issued just last week, the FCC made it clear that broad claims by
22 CLECs that an ILEC's UNE rates are too high to permit competition are an inadequate basis for
23 challenging rates and are not relevant to the FCC's analysis of an ILEC's application to enter the
24 long distance market pursuant to section 271 of the Act. In In the Matter of Joint Application by
25 SBC Communications for Provision of In-Region, InterLATA Services in Kansas and

26 court's several references to that standard. Id. at 1009, 1012.

1 Oklahoma, CC Docket No. 00-217, Memorandum Opinion and Order (Rel. Jan. 22, 2001),
2 AT&T and WorldCom asserted the same argument that AT&T offers here – UNE rates cannot
3 be lawful if they preclude CLECs from earning desired profits and, hence, decrease competition.
4 The FCC flatly rejected this argument as being irrelevant, stating that "[t]he Act requires that we
5 review whether the rates are cost-based, not whether a competitor can make a profit by entering
6 the market." Id. ¶ 92. The FCC explained further that it will reject a section 271 application
7 "only if basic TELRIC principles are violated or the state commission makes clear errors in
8 factual findings on matters so substantial that the end result falls outside the range that the
9 reasonable application of TELRIC principles would produce." Id. ¶ 74 (quoting In the Matter of
10 Application by Bell Atlantic New York, Memorandum Opinion and Order, 15 FCC Rcd. 4084
11 ¶ 244 (Rel. Dec. 22, 1999).

12 For the same reasons, AT&T's unsupported, inaccurate assertions that the Arizona UNE
13 rates are hindering competition are irrelevant and do not provide a basis for reevaluating the
14 UNE rates from Decision No. 60635.

15 **III. CONCLUSION**

16 For the reasons stated here and its opening brief in support of this motion, Qwest
17 respectfully requests that the Arbitrator reconsider the Procedural Order and establish that the
18 Phase II hearing will not include revisiting the UNE rates from Decision No. 60635.
19 Alternatively, the Arbitrator should modify the Procedural Order to establish that the UNE rates
20 presumptively comply with the FCC's pricing rules and that the CLECs have the burden of
21 demonstrating non-compliance with those rules.
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RESPECTFULLY SUBMITTED this 31st day of January, 2001.

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