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Chairman  
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Commissioner  
**MARC SPITZER**  
Commissioner

DOCKETED BY	
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**IN THE MATTER OF 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**

**AT&T AND XO'S RESPONSE IN OPPOSITION  
TO QWEST'S MOTION TO COMPEL**

AT&T Communications of the Mountain States, Inc. and XO Arizona, Inc., in response and opposition to Qwest Corporation's ("Qwest") motion to compel responses to certain of Qwest's Data Requests, state as follows:

**INTRODUCTION**

AT&T and XO filed their direct testimony in this case on May 16, 2001. Notwithstanding a hearing already scheduled to commence on July 9, 2001, Qwest did not serve any data requests upon AT&T and XO until nearly three weeks later on June 5, 2001. On that date, Qwest served 131 data requests. On June 11, 2001, Qwest served 38 additional data requests on AT&T and XO. AT&T and XO filed timely responses to the first set of requests on June 19, 2001 and responses to the second on June 26, 2001. Of the 169 data requests propounded, only 11 are the subject of Qwest's motion to compel.<sup>1</sup>

<sup>1</sup> Qwest's Data Requests 17, 23, 28, 37, 39, 54, 63, 71, 161, 163 and 164.

In response to Data Requests 37 and 39, AT&T and XO stated the documents sought are property of a third party, that the documents are not in the possession or control of AT&T and XO and thus they cannot produce the documents. Nonetheless, AT&T and XO offered (directly in its response to the requests) to assist Qwest in making contact with the third party to expedite production. Based upon previous experience, the third party (Taylor-Nelson-Sofres Telecom – “TNS”) has routinely permitted parties in dockets of this nature to inspect records in its possession. Qwest never requested AT&T or XO to assist it in gaining access to inspect the documents (which AT&T and XO are still willing to do). Instead, it simply resorted to a motion to compel.

For Data Requests 17, 163 and 164, AT&T and XO also responded that the documents sought were not in their possession or control or in the possession or control of the witness who referenced the requested documents in direct testimony. Nonetheless, AT&T and XO are seeking to obtain the documents sought in DR 163 and 164 from the third party. That effort is ongoing. Mr. Lathrop, the witness to whom Data Request 17 was addressed, has now obtained copies of the documents sought by that request and is in the process of producing them. There should be no further controversy with respect to this request.

In Data Requests 28 and 54, Qwest sought information regarding the cable placement activities of AT&T Broadband in Arizona. The requests are indisputably irrelevant to the issues in this docket<sup>2</sup>, AT&T & XO provided an answer to both questions. AT&T Broadband has no cable facilities in Arizona and thus there simply is no information responsive to the request. Qwest sought the same information for AT&T Broadband’s activities in other states within the Qwest service territory. Those activities have absolutely no bearing whatsoever upon resolution

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<sup>2</sup> Qwest itself has refused to respond to an almost identical question about its own cable placement activities. See Exhibit 1.

of the issues in this Arizona proceeding and Qwest offers no cogent argument in its motion to the contrary.

The remaining 4 data requests at issue (23, 63, 71 and 161), seek the production of information concerning AT&T and XO's costs and operational activities. These requests are not proper. The focus of this cost docket pertains to establishing costs and prices for the incumbent carrier, Qwest, not competing carriers and thus are not the proper subject of discovery. Qwest has made no showing to the contrary.

For these reasons, Qwest's motion should be summarily denied.

### **ARGUMENT**

#### **A. Documents or information not in the control or possession of AT&T or XO**

Of the 11 data requests at issue, AT&T and XO have responded to 7 of the data requests that proprietary documents or information are not in their possession or control but rather are held by third parties. Common sense (and the rules of Civil Procedure) would necessarily dictate that AT&T and XO cannot possibly be compelled to produce documents from third parties over whom they have no control. See CR 34(a). Despite common sense, however, Qwest is of the view that AT&T and XO must take affirmative steps to obtain this information from the third parties. AT&T and XO are not aware of such an obligation under Arizona law. As identified in the introduction, AT&T and XO are not in possession of documents or information responsive to Data Requests 28, 37, 39, 54, 163 and 164.

Nonetheless, in response to Data Requests 37 and 39 (documents and information sought that is in the control and possession of TNS), AT&T and XO incorporate by reference their answer to data request 25, where they state in pertinent part as follows:

In other proceedings, TNS has permitted parties to review TNS's proprietary processes at TNS's offices. **If Qwest wishes AT&T to contact TNS in an attempt to make similar arrangements for this proceeding, Qwest should advise AT&T through counsel.** (emphasis added).

Despite this clear offer of assistance, Qwest has never contact AT&T and XO for help obtaining the requested information nor for that matter are AT&T and XO aware whether Qwest has contacted TNS directly to review the information at issue. Likewise, with respect to Data Requests 163 and 164, AT&T and XO are making an effort to obtain the documents from the third parties.

As to Data Requests 28 and 54 (pertaining to documents and information regarding the activities of AT&T Broadband), AT&T and XO responded that AT&T Broadband has no cable activities within Arizona. It necessarily follows that there would be no information available responsive to these two data requests. AT&T and XO cannot be compelled to produce information that does not exist. However, in Data Requests 28 and 54, Qwest also seeks the very same information regarding AT&T Broadband's activities in other Qwest states. Qwest has failed to demonstrate the significance or relevance of such information.

In a futile attempt to buttress its argument regarding the production of proprietary third party information and documents, Qwest argues that "[I]n this very docket, AT&T, XO and Worldcom have served data requests on Qwest that require the production of confidential, third-party information. In response to such requests, Qwest has made a good faith effort to contact any such third party and obtain authorization to release such information, subject to the terms and conditions of the protective orders and agreements in this docket." (Qwest motion, p. 4).

In point of fact, in multiple responses to data requests from AT&T and XO, Qwest objected on grounds that the information sought is proprietary business information involving a third party. Although Qwest claims that it is seeking permission to produce these documents, the

substantive responses so far have not borne fruit. There are still a multitude of Data Requests for which Qwest has still not presented any responsive information. In fact, as argued in AT&T and XO's recently filed motion to strike, the information withheld by Qwest has prevented any critical review of some of the costs it has presented in this proceeding. Qwest cannot, in good faith, be heard to accuse AT&T and XO of failing to produce third party information when in point of fact it has failed to produce the same kind of information to AT&T and XO.

**B. AT&T and XO's costs and operational activities.**

In the remaining four data requests, Qwest seeks certain cost (Data Request 23) and operational information from AT&T and XO (Data Requests 63, 71 and 161).<sup>3</sup> These requests are not proper. None of the information Qwest seeks from AT&T and XO in these requests will be of any assistance to the Commission in making this determination. Qwest offers no cogent reasons to support the opposite conclusion. Moreover, the disclosure of highly sensitive and proprietary cost and operational activity can only result in harm to AT&T & XO. This highly sensitive information could be misused by Qwest, a competitor, to the disadvantage and detriment of AT&T and XO. The risk of harm to AT&T and XO associated with this disclosure far outweighs any relevance Qwest claims in favor of its release. See CR 26(c).

The first type of information Qwest seeks concerns costs incurred by AT&T and XO regarding the purchase and installation of 410 and 89 type termination blocks (Data Request 23). These costs are not relevant to this proceeding. The Telecommunications Act of 1996 deals explicitly with establishing costs and prices for incumbent local exchange carriers, not new entrants. Recognizing this focus, the FCC has determined that it is reasonable for a new entrant to refuse to provide data about its own cost experience in constructing a network:

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<sup>3</sup> Qwest has also sought production of similar information from WorldCom in response to Data Request 22. This Request is improper for all of the reasons set forth in this response by AT&T and XO.

[T]he refusal of a new entrant to provide data about its own costs does not appear on its face to be unreasonable, because the negotiations are not about unbundling or leasing the new entrant's facilities.<sup>4</sup> (emphasis added).

There is simply no relationship between the pricing of an incumbent's network and the experience of a new entrant developing local service from the ground up.

This conclusion finds additional support elsewhere in the First Report and Order. Because the incumbent has superior access to cost and other information regarding its network, the FCC requires the incumbent to prove the nature and magnitude of its forward looking costs that it seeks to recover in the pricing of interconnection or unbundled network elements. *Id.*, ¶680, Order. In establishing this burden of proof, the FCC has recognized that the relevant data is that of the incumbent, not new entrants, regardless of the purpose for which a new entrant may construct facilities, i.e., long distance or local service. Of equal significance, the FCC's cost methodology (TELRIC) is based upon the most efficient technology "deployed in the incumbent LEC's current wire center locations." ¶685, First Report and Order. (emphasis added). The FCC's focus on the incumbent's local network to establish rates for unbundled network elements and interconnection buttresses the conclusion that AT&T and XO's costs are not a proper area of inquiry for the Commission.

The second type of information concerns certain types of proprietary operational activities of AT&T and XO (Data Request 63 – Documentation regarding utilization rates for DS-3 and OC-3 circuits in the AT&T and XO networks; Data Request 71 – identification of operational support systems or other mechanized systems used for pre-ordering, ordering and provisioning process of an end user request and other specific information regarding such

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<sup>4</sup> *In Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, First Report and Order (Rel. Aug. 8, 1996, ¶680 ("Order")).

systems; and Data Request 161 - information relating to delays in bringing new optical/digital plant capacity on line in Arizona until capacity exhausted).

Qwest has made no legitimate showing why information concerning the highly sensitive business activities of AT&T and XO should be produced in this proceeding when, in point of fact only the business activities of Qwest are at issue. As to Request 63, Qwest claims the information sought pertains to “utilization rates experienced by Joint CLECs [i.e., AT&T, Worldcom and XO]” and thus “directly relate[s] to the Commission’s determination concerning realistic utilization rates and network capacity.” (Qwest motion, p. 9-10). Qwest does not support this vacuous conclusion with any argument whatsoever. It cannot. It is altogether unclear how utilization rates and network capacity of competing carriers could have any bearing on the Commission’s determination of realistic utilization rates for Qwest within Arizona.

For Data Request 71 Qwest claims that “fallout rates from OSS and resulting NRC’s are a key issue in this, as testified to by Messrs. Denney, Weiss, Hydock.” Again, Qwest misses the point altogether. The fallout rate from the OSS and other mechanized systems of competing carriers is not at issue in this case. Rather, it is the fallout rate for the Qwest OSS and related systems that are of central concern to this Commission. Finally, as to Data Request 161, Qwest offers absolutely no argument whatsoever to rebut AT&T and XO’s objection that the information sought in the request is irrelevant.

**CONCLUSION**

For the foregoing reasons, AT&T Communications of the Mountain States, Inc. and XO Arizona, Inc. request that Qwest's motion to compel be denied.

**AT&T COMMUNICATIONS OF THE  
MOUNTAIN STATES, INC. AND XO  
ARIZONA, INC.**

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Arizona  
Docket No. T-00000A-00-0194  
AT&T 002-067

INTERVENOR: AT&T Communications of the Mountain States, Inc.

REQUEST NO: 067

RE: Loop Pricing  
Witness: Buckley

Please produce the most recent documentation available of Qwest's actual loop placement activities in the state of Arizona. This should include documents indicating the extent to which Qwest uses trenching, directional boring, plowing, and other placement activities assumed in LoopMod to place loop facilities in the state of Arizona.

RESPONSE:

Qwest objects to this request on the grounds that the requested information is not relevant or likely to lead to the discovery of relevant information. Qwest does not retain records of the quantity of placement methods used in growing and maintaining the existing network at the level requested. Furthermore, the placement activities that Qwest is experiencing in adding to or maintaining the existing network are not pertinent to the modeling of a total replacement network. The TELRIC models are structured to reflect the economies that can be achieved in using forward-looking technologies and serving the universe of demand. The placement activities associated with the existing network do not address this modeling approach.

Respondent: Jennifer Peppers

## CERTIFICATE OF SERVICE

ACC Docket No. T-00000A-00-0194

I hereby certify that on the 29<sup>th</sup> of June 2001, the original and ten (10) copies of *AT&T and XO's Response in Opposition to Qwest's Motion to Compel*, in the above-referenced matter, was sent via FedEx, next business morning delivery, to:

Docket Control  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, AZ 85007

And, I further certify that a true and correct copy of the foregoing was sent via FedEx, next business morning delivery, to:

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And a true and correct copy of the foregoing was sent via First Class U.S. Mail to:

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Dated this 29 June 2001

by ~~Eric S. Heath~~