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IN THE MATTER OF INVESTIGATION INTO) DOCKET NO. T-00000A-00-0194
QWEST CORPORATION'S COMPLIANCE) PHASES II AND II-A
WITH CERTAIN WHOLESALE PRICING)
REQUIREMENTS FOR UNBUNDLED NETWORK)
ELEMENTS AND RESALE DISCOUNTS)

**OPPOSITION OF MOUNTAIN TELECOMMUNICATIONS, INC. TO
QWEST CORPORATION'S MOTION FOR RECONSIDERATION
RELATING TO WHOLESALE RATES FOR SWITCHING AND TRANSPORT**

Mountain Telecommunications, Inc. ("MTI"), by its attorneys, respectfully opposes the motion for reconsideration filed on October 27, 2003 by Qwest Corporation ("Qwest") in the above-captioned proceeding.

At an open meeting on September 30, 2003, the Commission unanimously voted to adopt the Recommended Supplemental Opinion and Order issued by Assistant Chief Administrative Law Judge Dwight D. Nodes on September 16, 2003.¹ In Decision No. 66385, the Commission resolved the pending issues before it regarding the pricing of dedicated transport by requiring the

¹ Decision No. 66385, issued October 6, 2003 ("Supplemental Order").

first of two pricing options recommended by Commission Staff, and ordering that the transport rates resulting from Staff Option 1 be made effective June 12, 2002 – the effective date of Commission Decision No. 64922.² MTI recognizes that neither Section 40-253 of Arizona Revised Statutes, nor R14-3-111 of the Commission’s rules codified in the Arizona Administrative Code governing motions for rehearing contemplate oppositions to rehearing/reconsideration motions. However, because Qwest’s motion mischaracterizes the Commission’s order as well as misstates its own position in this proceeding, some brief opposition is warranted.

First, Qwest complains that the Commission’s decision to adjust the transport rates as of June 12, 2002 – the effective date of the Phase II Order – somehow violates the prohibition against retroactive ratemaking. The Commission correctly concluded in the Supplemental Order that ordering the transport rates to be corrected as of the effective date of the Phase II Order does not constitute retroactive ratemaking. The order noted that since the rates implemented by Qwest were based on a “mistaken assumption” (*i.e.*, that all users of transport also use entrance facilities with each transport facility obtained from Qwest), then the rates determined by Qwest following the Phase II Order should be considered “void *ab initio*.”³ Since those rates – based on a mistaken assumption – were void *ab initio*, they were never properly in effect and therefore did not enjoy the status of being lawfully approved rates either on June 12, 2002 or any time thereafter. Since those rates were deemed void from the outset, the only lawfully approved rates were those in effect prior to the Phase II Order. The Commission correctly recognized that those

² Decision No. 64922 Investigation into Qwest Corporation’s Compliance with Certain Wholesale Pricing Requirements for Unbundled Network Elements and Resale Discounts (“Phase II Order”).

³ Supplemental Order at 7.

rates are the most appropriate rates for transport services during the interim period pending a final determination of transport rates based on a complete record in Phase III.

Qwest now claims that it “disagrees” with the conclusion that the transport rates which it implemented in January 2003, following the Commission’s June 12, 2003 Phase II Order were based on a mistaken assumption.⁴ Curiously, Qwest never expressed any disagreement with the view – held by every other party, including Staff – that the rates resulted from a mistaken assumption until it filed its exceptions to the Recommended Decision on September 25, 2003. In fact, Qwest previously had acknowledged that its post- Phase II Order transport rates warranted adjustment. In its post-hearing brief in this proceeding, Qwest states as follows:

And while Qwest agrees that the transport rates require recalculation, the need for consistency in order to ensure accurate cost recovery certainly has not diminished since adoption of the Phase II Order.⁵

Contrary to Qwest’s sudden revelation that it now disagrees with the aforementioned conclusion, it never before articulated any disagreement with the conclusion reached by Staff that the inclusion of entrance facility charges in all transport rates produced unanticipated results. As long ago as July, Qwest specifically endorsed the need to recalculate those rates. Thus, Qwest’s eleventh hour “flip flop” on transport rates should be seen by the Commission for what it is: a *post hoc* rationalization to support its ability to enjoy a windfall of hundreds of thousands of dollars in revenues for facilities (*i.e.*, transport facilities) that it has not provided to customers but for which it wants to charge for the period from June 12, 2002 until October 6, 2003.

Moreover, Qwest’s professed concern about a rule against retroactive ratemaking is belied by its own previous position in this proceeding. At the prehearing conference held on

⁴ Qwest Motion for Reconsideration at 2 n. 4.

⁵ Qwest Corporation’s Post-Hearing Brief Relating To Wholesale Rates For Switching And Transport, submitted July 1, 2003, at 7 (emphasis added).

March 25, 2003, Qwest stated that it would accept payment of the pre-Phase II Order rates from customers who disputed the bundled transport/entrance facility rates which Qwest implemented following the Phase II Order.⁶ By agreeing to accept payment at the pre Phase II Order rates as of June 12, 2002, subject to reconciliation at the end of this expedited proceeding, Qwest recognized that those were the rates which could be determined to be the appropriate rates. If Qwest truly believed that rates once implemented ostensibly in conformance with a Commission order cannot be adjusted other than prospectively, there would have been no reason for Qwest to accept the prior rates pending resolution of the issue. Once again, Qwest's legal prose set forth in its motion for reconsideration is contradicted by its own prior statements and prior conduct.

The question of retroactive ratemaking has been extensively briefed and argued by the parties. The relevant - and irrelevant - cases have been discussed and distinguished. The Commission concluded quite correctly that the holding in Arizona Grocery Co. v. Atchison, Topeka and Santa Fe Railway Co.⁷ is readily distinguishable and not relevant to the instant facts. MTI does not wish to further argue points of law that have already been extensively argued and addressed by the Commission other than to reiterate that where, as here, the Commission has determined the rates implemented following the Phase II Order to be void *ab initio*, the only rates to have been determined to be lawful are those rates approved by the Commission and most recently in effect prior to the void rates.⁸

⁶ Docket No. T-00000A-00-0194 Procedural Conference, March 25, 2003, Tr. 43-44.

⁷ 284 U.S. 370 (1932)

⁸ While Qwest continues to assert claims of "retroactive ratemaking," a review of the Phase II Order reveals that rates were not prescribed therein. What was ordered was the use of a model (the HAI Model) to set rates. In the case of transport rates, the Phase II Order specifies that the transport rates produced by that model would not be based on complete data and would be in effect on an interim basis pending further review of transport pricing in Phase III.

In summary, the questions of how to adjust the transport rates to rectify the misunderstanding regarding entrance facilities and when to make the adjustment effective have been the subject of extensive comment and analysis. Staff reviewed this matter and got it right; the Administrative Law Judge reviewed the matter and got it right; and on September 30, the Commission reviewed the matter and unanimously got it right. The Supplemental Order is legally correct and, of equal importance, produces a result that is fair to all parties and consistent with Commission's policies as well as those policy objectives which underlie the Telecommunications Act of 1996. Further consideration of the issues resolved by the Supplemental Order would serve no purpose, and would divert Commission resources from the numerous critical matters before it. Accordingly, MTI opposes Qwest's motion for reconsideration and respectfully urges the Commission not reconsider or rehear the matters resolved in the Supplemental Order.

Respectfully submitted,

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November 6, 2003

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Opposition of Mountain Telecommunications, Inc. to Qwest Corporation's Motion for Reconsideration Relating to Wholesale Rates for Switching and Transport on all parties of record in these proceedings by mailing a copy thereof, properly addressed with first class postage prepaid to the following:

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Dated at Washington, D.C., this 6th day of November, 2003.


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