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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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COMMISSIONERS

- KRISTIN K. MAYES, Chairman
- GARY PIERCE
- PAUL NEWMAN
- SANDRA D. KENNEDY
- BOB STUMP

IN THE MATTER OF THE REVIEW AND POSSIBLE REVISION OF ARIZONA UNIVERSAL SERVICE FUND RULES, ARTICLE 12 OF THE ARIZONA ADMINISTRATIVE CODE.

Docket No. RT-00000H-97-0137

IN THE MATTER OF THE INVESTIGATION OF THE COST OF TELECOMMUNICATIONS ACCESS.

Docket No. T-00000D-00-0672

AT&T'S MOTION TO QUASH SUBPOENA DUCES TECUM AND ITS WRITTEN OBJECTION TO THE SUBPOENA ISSUED AT QWEST'S REQUEST

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively, "AT&T") request that the Administrative Law Judge quash the Subpoena Duces Tecum issued at the request of Qwest<sup>1</sup> and dated November 10, 2009 (the "Subpoena"). Alternatively, pursuant to Rule 45(c)(2)(B), AT&T<sup>2</sup> submits this written objection to the Subpoena. That rule provides that this objection relieves AT&T of any obligation to comply with the Subpoena until Qwest secures an order compelling it to do so.<sup>3</sup>

<sup>1</sup> The Joint Application was submitted by Qwest Corporation and Qwest Communications Company, LLC. Qwest Communications Company, LLC is not a party to these consolidated dockets and, therefore, has no standing to request a subpoena under the rules.

<sup>2</sup> In regard to the objection, AT&T also objects on behalf of AT&T Corp., AT&T Inc. and any affiliate, subsidiary or predecessor-in-interest of those entities.

<sup>3</sup> AT&T makes its objection pursuant to Rule 45 without waiver of its position that Qwest may not use a subpoena to compel production of documents by a party.

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1           The Subpoena is improper, unreasonable and oppressive under the Commission's Rules  
2 of Practice and Procedure and the Arizona Rules of Civil Procedure.<sup>4</sup> It is contrary to and  
3 inconsistent with standard Commission discovery practice. Finally, the Subpoena seeks  
4 information and documents which are beyond and inconsistent with the scope of this proceeding  
5 as defined in the Administrative Law Judge's September 29, 2009 Procedural Order.

6           The Subpoena should be quashed because it is an improper use of ARCP Rule 45 where,  
7 as here, a party to the proceeding such as AT&T is involved. "Rule 34 establishes the exclusive  
8 procedure for securing production of documents from a party; its procedures may not be  
9 circumvented by service of a subpoena *duces tecum* upon a party."<sup>5</sup> The correct procedure to  
10 request documents production from a party is pursuant to Rule 34. Rule 45 is reserved for the  
11 "issuance of subpoenas to witnesses, generally." *McDonald v. Hyder*, 12 Ariz. App. 411, 413,  
12 471 P.2d 296, 298 (1970).

13           Qwest's Application for Subpoena demonstrates that it is fully aware that data requests  
14 under Rule 34, not subpoenas under Rule 45, are, in fact, the correct procedure to be followed.  
15 Exhibit 1 to the Application is a data request which sought, among other things, production of  
16 documents from many parties to this proceeding, including AT&T. To the extent Qwest was  
17 dissatisfied with any party's response, its correct course of conduct was first to seek a meet and  
18 confer and then, if necessary, dispute resolution by the Administrative Law Judge, not to ignore  
19 the rules and cause unnecessary time and expense for the parties and Commission by seeking the  
20 Subpoena.

21           Similarly, the Subpoena should be quashed because it is contrary to the Commission's  
22 standard discovery practices, party dispute resolution procedures and R14-3-109.O. That latter

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23 <sup>4</sup> ARCP generally governs procedure before the Commission. R14-3-101.A.

24 <sup>5</sup> Arizona Civil Rules Handbook, 2009 Edition, p. 436 (emphasis supplied).

1 subpoena provision allows a party to compel the attendance, testimony or production by a non-  
2 party witness by subpoena. It does not allow use of a subpoena to bypass discovery dispute  
3 resolution procedures between parties, nor to allow parties to circumvent standard Commission  
4 practice.

5 Qwest seems aware that its Application for the Subpoena was improper and it should,  
6 instead, be following standard data request practice. Attached as Exhibit A is an e-mail AT&T's  
7 counsel received late the afternoon of November 10. It belatedly asks for a meet-and-confer  
8 conference to discuss AT&T's responses to its access contract data requests. That request,  
9 however, arrived more than two weeks after AT&T responded to the data requests. Given this  
10 delay in following the correct procedures, to the extent Qwest thinks it will now be hampered in  
11 preparing its testimony "in a timely manner," it has only itself to blame.<sup>6</sup>

12 Finally, the Subpoena should be quashed because it seeks documents and information  
13 which the Administrative Law Judge has already determined are not relevant or material to the  
14 issues involved in these policy dockets. As background, on July 27, 2009, Qwest filed a request  
15 to broaden these dockets to include an investigation of intrastate access contracts. As  
16 particularly relevant to this issue, it specifically asked that the "Commission order all LECs to  
17 provide...copies of contracts that they have entered into with any other carrier" and other  
18 information concerning those agreements—an identical request to the information sought in this  
19 Subpoena and the earlier data requests.<sup>7</sup>

20 After many parties objected to broadening the policy dockets, Qwest retreated at the  
21 procedural conference, clarifying that its request to address CLEC contracts with the IXCs was  
22 not intended "to examine or seek restitution for past behavior but to examine whether such

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23 <sup>6</sup> Joint Application, p. 2.

24 <sup>7</sup> Qwest Communications Company, LLC's Request to Examine Contracts, pp. 1 and 3.

1 contracts should be allowed in the future.<sup>8</sup> Accordingly, the September 29 Procedural Order did  
2 not grant Qwest's requests to expand these dockets, nor did it order the parties to provide the  
3 contracts. The Procedural Order did, however, note that AT&T, Staff and RUCO agreed that the  
4 policy question of contractual access rates was appropriate and added that issue as item 4 at  
5 page 5, ll. 1-2.

6 Qwest's sweeping Subpoena demand for "copies of each and every contract... since  
7 2002"<sup>9</sup> violates the letter and spirit of the Procedural Order, violates Commission rules and is  
8 clearly burdensome, unreasonable and oppressive. (Emphasis supplied.) AT&T objects to and,  
9 if necessary, requests that the Administrative Law Judge quash the Subpoena.

10 RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of November, 2009.

11 GALLAGHER & KENNEDY, P.A.

12  
13 By   
14 Michael M. Grant  
15 2575 East Camelback Road  
16 Phoenix, Arizona 85016-9225  
Attorneys for AT&T Communications of the  
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17 **Original and 15 copies** filed this  
18 12<sup>th</sup> day of November, 2009, with:

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

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23 <sup>8</sup> Procedural Order, p. 4, ll. 5-6.

24 <sup>9</sup> Subpoena, p. 2, ll. 3-4.

1 **Copies** of the foregoing delivered or e-mailed  
2 this 12<sup>th</sup> day of November, 2009, to:

3 Jane L. Rodda  
4 Administrative Law Judge  
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12 **Copies** of the foregoing mailed and/or e-mailed  
13 this 12<sup>th</sup> day of November, 2009, to:

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**EXHIBIT A**

**Grant, Michael M.**

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**From:** Curtright, Norm [Norm.Curtright@qwest.com]  
**Sent:** Tuesday, November 10, 2009 4:55 PM  
**To:** Grant, Michael M.  
**Cc:** Hensley Eckert, Lisa; Peterson, Reed; Ziegler, David  
**Subject:** Meet and Confer Request

Mike,

Qwest asks that we hold a meet and confer conference call as soon as possible to discuss the responses AT&T / TCG have given to the Data Request regarding contracts for switched access services that your clients provide to IXCs. Please let me know when that might be possible to have.

Thank you.

Norman Curtright  
Qwest Corporate Counsel  
602-630-2187

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11/11/2009