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BEFORE THE ARIZONA CORPORATION COMMISSION

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)	DOCKET NO. RT-00000F-02-0271
IN THE MATTER OF QWEST)	
CORPORATION'S COMPLIANCE WITH)	AT&T'S COMMENTS ON
SECTION 252(e) OF THE)	SUPPLEMENTAL STAFF
TELECOMMUNICATIONS ACT OF 1996)	REPORT AND
<hr/>)	RECOMMENDATIONS

AT&T Communications of the Mountain States, Inc. and TCG Phoenix
(collectively, "AT&T") hereby file their comments on the Supplemental Staff Report and Recommendation.

I. INTRODUCTION

The Supplemental Staff Report has shed additional light on the scope and extent of the unfiled agreements Qwest Corporation ("Qwest") entered into with competitive local exchange carriers ("CLECs"). Staff has attempted to thoroughly investigate the unfiled agreements; however, the issues raised by the unfiled agreements and the effect on this proceeding and the section 271 proceeding are complex and not always readily apparent. Therefore, although AT&T may disagree with some of the findings, conclusions or recommendations in the Supplemental Staff Report, AT&T's comments should not be perceived to be, nor are they intended to be, critical of the Supplemental Report as a whole.

Arizona Corporation Commission
DOCKETED

AUG 29 2002

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II. COMMENTS

A. Summary of Staff Discovery and Analysis

1. Exhibit A

Staff states that “data requests were sent to 80 carriers including CLECs certificated to do business in Arizona, as well as parties to this proceeding and the 271 proceeding.” Supplemental Staff Report at 4. The reader is referred to Exhibit A.

Exhibit A lists 80 companies. Exhibit A has a column with the title “271 PROCEEDING.” In this column “Xs” are placed next to the names of 22 companies. AT&T assumes Staff is attempting to identify the companies that are parties to the section 271 proceeding.

Without debating the accuracy of the list, AT&T must point out that only a handful of companies actually participated in the section 271 proceeding, and this was during the initial workshops. In fact, most of the companies identified never actually participated in the section 271 proceeding. During the last year of workshops, only AT&T, WorldCom, and occasionally Cox, attended workshops. AT&T wishes to eliminate any impression that there were 22 active parties in the section 271 proceeding.

2. Exhibit B

Exhibit B contains Staff’s data requests to the CLECs. A major problem with Staff’s first set of data requests is that the questions are phrased in a manner which limits the scope of the inquiry. A review of the first set of data requests shows that the inquiry is limited to whether the CLECs have any unfiled “interconnection agreements or amended interconnection agreements with Qwest.” By limiting the inquiry to interconnection agreements, Staff has limited the scope of the responses. Since there

were a substantial number of agreements that were not filed because the parties did not believe they were “interconnection agreements,” Staff should have asked whether the CLECs have entered into *any* agreements with Qwest. *See* Supplemental Staff Report at 4-5. Staff should have obtained all agreements, then applied its analysis: “Staff believes that the term “interconnection agreement” as used in Section 252(e) must be defined broadly to include any contractual agreement or amendment which relates to or affects interconnection, services or network elements between an ILEC and another carrier in Arizona.” Staff Report at 14.¹

By phrasing the questions as Staff did there is no assurance Staff has received copies of all agreements in order for it to make a determination whether they should have been filed under section 252(e). In some cases Staff may have received only agreements that the responding party considered to be interconnection agreements or amendments to interconnection agreements. This leaves too much judgment to the responding party which could limit the response.²

The second set of data requests is phrased consistent with Staff’s recommendation but is limited to oral agreements. Therefore, Staff’s data requests may not have generated responses that included all written agreements that affect interconnection, wholesale services or unbundled network elements.

¹ Citation to original Staff Report dated June 7, 2002. Staff further stated: “Staff concludes then that if Qwest enters into a negotiated agreement with a competitor that has any affect on its provision of interconnection, services, or network elements, it is to file said agreement with the State commission for approval.” *Id.*

² Admittedly, in some cases, CLECs responding to Staff’s data requests answered more broadly by stating that there were no other agreements with Qwest except the filed and approved interconnection agreement, or provided agreements the CLEC did not consider to be interconnection agreements.

3. Exhibit C

Staff notes that the data request responses revealed that Qwest had oral agreements with Eschelon and McLeod. Supplemental Staff Report at 5. In response to a Staff data request, Qwest stated that it “has not entered into any oral agreements with another telecommunications carrier which affects or affected rates, terms and conditions applicable to interconnection, wholesale services and/or unbundled network elements.” *Id.*, Ex. C at 3. Staff’s Supplemental Report does not describe in detail the nature of the oral agreements, nor does it attempt to reconcile Staff’s finding with Qwest’s response to the data request.

This lack of an explanation of the oral agreements raises serious concerns. First, and foremost, why weren’t the agreements reduced to writing. How can such an agreement be filed and subsequently opted into by other CLECs if the terms are not written down? How can the Commission determine if the agreement is in the public interest? This becomes even more problematic if the parties disagree on the existence or the terms of the oral agreement.

The Minnesota Public Utilities Commission is investigating Qwest’s unfiled agreements. Recently, supplemental testimony was filed by Mr. W. Clay Deanhardt on behalf of the Minnesota Department of Commerce. Depositions have also been taken of several past and present employees of McLeod and one employee of Qwest.

Mr. Deanhardt investigated the oral agreements at length, sending out extensive data requests. Mr. Deanhardt concluded that “Qwest and McLeod entered into an oral agreement whereby Qwest would provide discounts to McLeod for all purchases made by McLeod by Qwest. The discount ranged from 6.5% to 10% depending of the volume of

purchases made by McLeod from Qwest over the course of the year. The discount applied to all purchases McLeod made from Qwest, not just purchases of the wholesale services Qwest is required to provide under the Telecommunications Act of 1996 (the "Act")."³ The discount applied to purchases of switched access, wholesale long distance and tariffed services, which are not covered by the Act. Supplemental Testimony of W. Clay Deanhardt at 2.

In addition to raising issues under section 252(e) of the Act, the oral agreement raises issues of discrimination under State law. By providing discounts on tariffed services, Qwest violated state law, which requires that all customers pay the tariff rate, no less or no more. A.R.S. § 40-334. *Southern Pacific Co. v. State Corporation Commission*, 3 P. 2d 518, 520 (1931); *Town of Wickenburg v. Sabin*, 68 Ariz. 75, 200 P. 2d 342, 343-344 (1948). Since a preference cannot be provided, either McLeod, and any other CLEC that received discounts on tariffed services, must reimburse Qwest for the discounts or Qwest must provide the discounts to all carriers and customers⁴ purchasing similar service from Qwest during the period the discounts were provided.⁵

Mr. Deanhardt also noted that McLeod asked to have the discount put in writing. Qwest would not do so. According to Mr. Deanhardt, McLeod's negotiator told him that Qwest was concerned that other CLECs would want the same discount. Supplemental

³ *In the Matter of a Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, MPUC Docket Nos. P-421/C-02-197 and P421-CI-01-1371 and OAH Docket Nos. 6-2500-14782-2 and 7-2500-14486-2, Supplemental Testimony of W. Clay Deanhardt at 2 (emphasis in original).

⁴ This may include the State of Arizona.

⁵ The only equitable solution would be to provide discounts to all other similarly situated CLECs. Otherwise, Qwest would get the benefit of its bargain and return of the consideration on which the bargain was based. This hardly seems to be an equitable solution for a corporation that has knowingly and unlawfully provided discounts in return for the carriers not contesting its section 271 application.

Testimony of W. Clay Deanhardt at 8-9.⁶ In order to circumvent this problem, Qwest entered into a take-or-pay agreement whereby it agreed to make minimum purchases from McLeod. *Id.*, at 9. *See* Exhibit 402 at 33-44. Qwest claims that it did not enter into an oral discount agreement with McLeod, *id.* at 17, although the documents attached to Mr. Deanhardt's testimony overwhelmingly prove otherwise. *Id.*, at 17-23.

What Mr. Deanhardt's testimony and exhibits show is that there was an oral agreement that provided McLeod discounts on all purchases, including tariffed services, and Qwest entered into a take-or-pay agreement to hide the nature of the transaction and to avoid having to provide other CLECs similar discounts. None of this is addressed by Staff in its Supplemental Report. By failing to address these issues, the scope, nature and legality of the oral agreements are minimized. Staff should more fully explain the rates, terms and conditions of all the oral agreements.⁷

AT&T recommends that the Commission initiate an investigation into all oral agreements to determine if Qwest paid, and certain CLECs received, discounts off tariffed services in violation of Arizona law and that appropriate remedies be ordered by the Commission.

B. Agreements Subject to Section 252(e) Filing Obligations

AT&T provided a number of examples of unfiled agreements that should have been filed for Commission approval in its comments on the initial Staff Report and Recommendations. Staff generally accepted AT&T's position on the agreements cited by

⁶ *See* Ex. 402 to Mr. Deanhardt's testimony at 59-60, which is a deposition of Mr. Blake Fisher, McLeod's negotiator on the agreements between McLeod and Qwest, on which Mr. Deanhardt's testimony relies. This raises serious concerns regarding denial of opt-in obligations contained in section 252 of the Act.

⁷ AT&T recognizes Staff has gone to great lengths to investigate the issue of the unfiled agreements. However, oral agreements raise issues above and beyond the lack of filing agreements pursuant to section 252(e) and need to be thoroughly investigated.

AT&T. AT&T's list, however, was not intended to be all-inclusive, but was intended only to serve as a list of obvious examples of agreements that should have been filed to demonstrate that Qwest failed to comply with section 252(e). However, since Staff has proposed that Qwest pay fines on all unfiled agreements, the issue has shifted from a simple determination of whether Qwest failed to file any agreements under section 252(e) to a determination regarding what specific agreements should have been filed under section 252(e). AT&T has once again reviewed the agreements and proposes that the list be expanded to include additional agreements.⁸ A list of additional agreements that should be filed with the Commission pursuant to section 252(e) is attached as Exhibit A.⁹

An issue is raised by Staff's identification of "interconnection agreements," "letter agreements which contained individualized business arrangements with the carriers involved," and "billing settlement agreements." Supplemental Staff Report at 2 and 4. Staff has stated that regardless of the name of the agreement, if the terms affected the terms of the original interconnection agreement in any way, "Staff recommended that these agreements should be treated as 'interconnection agreements' subject to section 252(e)'s filing requirement." *Id.*, at 2. AT&T believes Staff's approach is the correct one. However, Staff has also suggested that some agreements may be company specific, for example, decommissioning agreements or settlement agreements regarding reciprocal compensation for ISP bound traffic. *Id.*, at 8-9. Or, according to Staff, "[i]t is possible that Qwest and a carrier may be able to work out an agreement that is more suitable to the specific costs and circumstances involved." *Id.*, at 9. These statements give AT&T

⁸ AT&T's interest is not to raise the level of fines, as the fines will be paid to the State of Arizona, and the amounts are inconsequential to Qwest. AT&T's interest is to see that all agreements, or portions thereof, that carriers are entitled to opt into are filed with the Commission.

⁹ AT&T's list is very conservative. AT&T has identified agreements that it believes without question affect interconnection, service or network elements.

pause, in light of the history of unfiled agreements and Staff's proposal that Qwest be permitted to file agreements under seal with Staff for a Staff determination of whether the agreements need to be filed with the Commission pursuant to section 252(e). It is imperative that the filing obligation be kept separate from the opt-in obligation. A determination whether an agreement needs to be filed pursuant to section 252(e) is independent from the obligation under section 252(i). Even assuming for the sake of argument that an agreement that affects interconnection, wholesale services or network elements can be carrier-specific, this does not preclude the need to file the agreement with the Commission under section 252(e). It appears that Staff has left agreements off Exhibit G not because the agreements do not qualify as interconnection agreements under Staff's interpretation but because Staff believes another carrier could not opt-in. Staff should confirm that Exhibit G was derived by determining whether the agreement has any affect on Qwest's provision of interconnection, services or network elements. *See* Staff Report at 14. Using Staff's analysis, it appears to AT&T that Staff has omitted a number of agreements from Exhibit G that affect interconnection, services or network elements.

C. Scope of Further Proceedings

1. Section 252(e) Proceeding

The section 252(e) proceeding was initiated by Staff in response to a motion filed by AT&T to reopen the record for the public interest portion of the section 271 proceeding. AT&T's position was based on language in the *Ameritech Michigan Order*. The Federal Communications Commission ("FCC") stated it would be interested in

knowing about violations of federal and state laws and regulations.¹⁰ Staff believed that until a determination had been made that Qwest violated section 252(e) it was more appropriate to deal with the issue in a separate docket. Staff has now concluded that Qwest should have filed 28 agreements with the Commission for approval.

AT&T believes the original purpose of the section 252(e) proceeding has largely been served. There may be disagreements over whether some number of additional agreements should have been filed or greater fines should be imposed. Staff has agreed to review the parties comments. Staff has also stated that disagreements regarding these issues can be considered at the hearing. Supplemental Staff Report at 7.

AT&T generally agrees with Staff's discussion of the scope of hearings in the section 252(e) proceeding. Supplemental Staff Report at 7-8. AT&T does not oppose Staff's position that opt-in be decided on a case-by-case basis; however, this position requires that Qwest immediately file all agreements for which it has agreed to pay fines. By agreeing to pay the fines proposed by Staff, Qwest has admitted that the agreements should have been filed for Commission approval. The CLECs should not have to wait for a final Commission order in the section 252(e) proceeding in order to be able to opt-in to these agreements, as it would unnecessarily delay the right to opt into the agreements, or portions thereof.

2. Bifurcation of Non-252(e) Issues

i. Phase B to Address Section 252(e) Complaints

Staff recommends that a Phase B in the section 252(e) docket "be set up to address any complaints of carriers as a result of Qwest denying them opt-in rights for

¹⁰ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum and Opinion, FCC 97-298 (rel. Aug. 19, 1997), ¶ 397.

specific contracts. The complaints could be addressed on a case by case basis as they arose.” Supplemental Staff Report at 8. AT&T has no objection to this approach. However, as noted, Qwest needs to file with the Commission, at a minimum, the 28 agreements identified in the Supplemental Staff Report, and any other agreements subsequently added to the list of agreements that should be filed. In addition, Staff needs to advise whether Phase B will be limited to opt-in issues raised regarding the agreements identified in Exhibit F to the Supplemental Staff Report.

Staff makes several comments regarding whether certain types of agreements may or may not be available for opt-in by other carriers. Supplemental Staff Report at 8-9. AT&T has pointed out some possible disagreements with Staff over whether certain agreements should be included in the list of agreements to be filed. The Commission’s ultimate ruling may resolve AT&T’s concerns. Although, AT&T may disagree with comments made by Staff, some of these issues will come up again when case-specific issues arise.

However, one statement by Staff needs clarification. Staff suggests that Qwest and a CLEC may be able to work out an agreement “that is more suitable to the specific costs and circumstances involved. Therefore, Staff believes that opt-in availability should be determined on a case-by-case basis, if necessary, once carriers elect to opt-in to certain agreements, and are denied by Qwest.” *Id.*, at 9. Staff has suggested that Qwest may submit an agreement to Staff, on a confidential basis, for a Staff determination whether the agreement needs to be filed pursuant to section 252(e). AT&T assumes that if the agreement affects network elements, services, or interconnection it will be filed with the Commission by Qwest so other carriers can elect to opt-in. Staff Report at 2;

Supplemental Staff Report at 8. As noted earlier, the initial determination that must be made by Staff is whether the agreement needs to be filed pursuant to section 252(e), not whether another CLEC can opt-in pursuant to section 252(i).

ii. Interference with the Section 271 Regulatory Process

Staff identifies four carriers that agreed not to oppose Qwest's section 271 application.¹¹ Supplemental Staff Report at 9. Apparently, based on these four carriers' agreements with Qwest, Staff believes that a sub-docket to the 271 proceeding should be opened to address Qwest interference with the section 271 proceeding. Staff believes CLECs should have 10 days after the sub-docket is opened to file additional written comments. Qwest would have 10 days to "demonstrate in formal written comments filed with the Commission, why it should not be held in contempt of Commission rules of process and orders ..." *Id.*, at 10.

Staff should more fully explain the basis of its recommendation before CLECs are required to provide "additional" written comment. Staff states that "[g]iven the responses to Staff's data requests and the comments filed in the 271 proceeding, Staff believes that an initial showing has been made that Qwest interfered with the 271 proceeding before the Commission and that the Commission's processes and the ability of two carriers to present their issues to the Commission were adversely impacted." *Id.* (emphasis added). See also page 6, n. 13. AT&T supports Staff's conclusion; however, it would be helpful to AT&T if Staff provided more detail for the basis of Staff's conclusion. Specifically, what responses and comments is Staff relying on? Staff can

¹¹ AT&T believes that agreement number 82 on Exhibit F should be added to Exhibit G, Category 2, agreements. See paragraph 7: "Scindo therefore agrees to immediately withdraw from and forgo all aspects of all current and future regulatory and legal proceedings in all jurisdiction (state and federal) for a 9-month period from the date of the Parties' execution of this Agreement (the "Stand Down Period")."

provide this information as part of the notice in the section 271 proceeding advising the parties of the initiation of the sub-docket if Staff's recommendation is adopted in this proceeding.¹²

AT&T agrees with Staff that the issue of whether the section 271 proceeding was adversely affected should be addressed in the section 271 proceeding. *Id.*, at 8.

iii. Consolidation of Section 252(e) and Section 271 Proceeding

Staff believes that “[a]ttempting to resolve 271 issues in a consolidated proceeding with section 252(e) filing would confuse the records of both proceedings unnecessarily.” *Id.*, at 11. Staff believes it may raise issues that had been agreed upon previously in the section 271 proceeding. Staff also believes consolidation of the section 252(e) issues with the entire section 271 proceeding may become “unwieldy.” *Id.*

The issue of consolidating *the record* of the section 252(e) proceeding with the section 271 proceeding was raised by AT&T. AT&T never suggested that the two proceedings be consolidated.

AT&T's concern is that issues raised and developed in the hearings in the section 252(e) case would have to be developed again in the section 271 proceeding. AT&T believes many of the facts regarding the level of fines will be relevant to the public interest analysis. AT&T is suggesting that when the notice of the hearing in the section 252(e) proceeding is sent out that the section 271 case be included in the notice. As a result, the transcript would be a part of the record in both proceedings. This procedure would eliminate the concerns raised by Staff.

¹² AT&T agrees with Staff that the appropriate place to address the process issues is in the section 271 proceeding, the proceeding impacted by Qwest's actions.

D. The Section 271 Proceeding

It is AT&T's understanding that Staff will be releasing an additional report on the effect the unfiled agreements had on the section 271 proceeding. "Staff will be addressing the issue of whether the 271 record was tainted is a result of the secret agreements in its 271 Report." *Id.*, at 8. Also, "Staff believes that allowing for additional comment in the public interest phase of the 271 proceeding is also appropriate." *Id.* AT&T agrees. AT&T raised the issue of the unfiled agreements in the section 271 proceeding in the first place. Now that the Staff has determined that some of the unfiled agreements should have been filed pursuant to section 252(e), that fact is now part of the public interest analysis in response to the FCC's scope of inquiry identified in the *Ameritech Michigan Order*. Pursuant to the Procedural Order, AT&T will file its comments on Staff's report after it is issued. AT&T, however, wishes to make it clear that it believes the record in the public interest portion of the section 271 proceeding should be reopened to address the secret agreements, unlawful tariff preferences, indefeasible right of use ("IRUs"), Qwest's violation of the Minnesota interconnection agreement on comprehensive testing, *and any other issues regarding the public interest*. A lot has transpired since the record on the public interest was closed. The record on the public interest must be brought up to date.

"Staff recognizes that an argument can be made that confidential unfiled agreements implicate Qwest's compliance with Checklist Item 2, or the provision of UNEs on a nondiscriminatory basis." *Id.*, at 10. However, Staff makes no recommendation regarding how the implications are to be addressed. Staff states that a workshop was held on July 30-31, 2002, to specifically address the issue of whether the

record in the section 271 proceeding was “tainted by the unfiled agreements.” *Id.* The workshop was not held to determine if the section 271 proceeding was tainted. The notice of the workshop specifically states that the “purpose of the workshop is to allow parties who believe they were precluded from raising issues during the course of this case, to put their issue into the record for resolution.”¹³ This is a different purpose than reviewing whether the section 271 proceeding had been “tainted” or Checklist Item 2 had been implicated by the unfiled agreements. These issues have not been resolved nor have comments been filed yet. AT&T will address these issues in response to Staff’s section 271 report. However, AT&T wishes to point out that it believes Checklist Items 2 and 4 have been impacted by the unfiled agreements, and it will provide the basis of its opinion in its comments.

Dated this 28th day of August, 2002.

AT&T Communications of the
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¹³ This is what took place at the workshop. Echelon and McLeod were permitted to raise their issues. AT&T was not provided any opportunity to raise issues unrelated to issues raised by Eschelon or McLeod.

EXHIBIT "A"

**LIST OF ADDITIONAL AGREEMENTS THAT SHOULD
BE FILED FOR COMMISSION APPROVAL**

1. Eschelon Confidential Purchase Agreement with Qwest dated 10/01/2000
2. Eschelon Feature Letter from Qwest dated 11/15/2000
3. McLeod USA Confidential Billing Settlement Agreement with Qwest dated 12/31/2001
4. Electric Lightwave Confidential Settlement Document and Release with U S WEST dated 6/16/1999
5. XO Confidential Billing Settlement Agreement with QCC dated 12/31/2001
6. XO Confidential Billing Settlement Agreement with Qwest dated 12/31/2001
7. XO Take or Pay Agreement with Qwest Service Corporation dated 12/31/2001
8. XO Amendment to Confidential Billing Settlement Agreement
9. SBC & NAS Confidential Consent to Assignment & Collocation Change of Responsibility Agreement dated 6/1/2000
10. Mountain Telecom. Confidential Billing Settlement Agreement with Qwest dated 8/30/2000
11. Scindo Networks Confidential Settlement Agreement with Qwest dated 5/4/2001
12. Scindo Networks Confidential Settlement Agreement with Qwest dated 8/10/2001
13. Ernest Communications Confidential Settlement Agreement and Release with Qwest dated 9/17/2001
14. Z-Tel Memo of Understanding with Qwest dated 5/18/2001
15. XO Take or Pay Agreement with Qwest dated 12/31/2001
16. Eschelon Confidential Second Amendment to Confidential/Trade Secret Stipulation with U S WEST dated 3/19/2001

CERTIFICATE OF SERVICE
(Docket No. RT-00000F-02-0271)

I certify that the original and 10 copies of AT&T's Comments on Supplemental Staff Report and Recommendations were sent by overnight delivery on August 28, 2002 to:

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