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Arizona Corporation Commission

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IN THE MATTER OF QWEST)
CORPORATION'S COMPLIANCE WITH) DOCKET NO. RT-00000F-02-0271
SECTION 252(e) OF THE) AT&T'S REPLY
TELECOMMUNICATIONS ACT OF 1996) COMMENTS

AT&T Communications of the Mountain States, Inc. and TCG Phoenix
(collectively, "AT&T") hereby file their reply comments to the comments of RUCO,
WorldCom, Inc., on behalf of its regulated subsidiaries ("WCom"), Qwest Corporation
("Qwest") and the reply comments of the Staff of the Arizona Corporation Commission.

I. INTRODUCTION

It has been AT&T's purpose to obtain an affirmative finding that the unfiled agreements between Qwest and competitive local exchange carriers should have been filed with the Arizona Commission pursuant to section 252(e) of the Telecommunications Act of 1996 ("Act"). AT&T attempted to obtain this ruling in the section 271 proceeding. Staff proposed that a separate proceeding be initiated. Staff has found that a number of unfiled agreements should have been filed with the Commission pursuant to section 252(e) of the Act and has recommended fines. However, the proceeding is by no means complete. RUCO and WCom make valid points regarding the need for future proceedings in the context of the present docket. AT&T does not suggest, nor should it

be inferred from AT&T's previous comments that AT&T suggests, that other parties be precluded from having hearings on the extent of fines to be imposed on Qwest or other issues related to Qwest's failure to file the agreements with the Commission.

Furthermore, AT&T agrees with RUCO that the oral agreements should be investigated so that the rates, terms and conditions of the oral agreements are documented and any discrimination ferreted out.

II. COMMENTS

A. RUCO

"RUCO recommends the scope of the hearings be comprehensive, to permit a full investigation of the business-to-business conduct among Qwest, McLeod USA and Eschelon." RUCO Comments at 3. AT&T has no objection to RUCO's recommendation and believes RUCO should have such opportunity. Staff apparently agrees with RUCO. *See* Staff Reply at 5 ("The 252(e) hearing proposed by Staff would be comprehensive in nature and the type of evidence offered by RUCO in its Investigatory Report is the type of evidence that should be submitted in the context of the 252(e) hearing.")

The two governmental agencies chartered to review the interests of utility consumers agree the proceeding should be comprehensive. The scope of the proceeding, therefore, should not be subject to debate.

B. WCom

WCom makes a number of valid points, in some cases more clearly and artfully than AT&T. First, AT&T agrees with WCom that proprietary and trade information contained in agreements be redacted. For example, customer names, locations, telephone numbers or other identifying information is not necessary for a determination of whether

a carrier wishes to opt-in to an agreement. AT&T would have no objection to a requirement that the Staff be provided a non-redacted copy for its perusal and records.

AT&T also agrees with WCom's assessment of the ability to opt-in if a company has no knowledge of the agreement.

As a practical matter it is virtually impossible for a company to exercise any opt-in rights if the company has no knowledge of an unfiled agreement particularly when they have yet to be filed with the Commission. Until the agreements are filed, Staff's concerns cannot reasonably be addressed.

WCom Comments at 4. Therefore, Staff correctly has determined that section 252(e) should be interpreted broadly. However, AT&T is still concerned that Staff is applying the standard too narrowly, as evidenced by its list of agreements on Exhibit G to the Supplemental Staff Report and Recommendations.

WCom maintains that "the Commission should withhold a recommendation on Qwest's pending 271 application until the Commission has fully investigated these agreements and their impact on the 271 process, not just determine whether to impose higher fines." *Id.*, at 6. AT&T strongly agrees. It appears that RUCO also agrees with this position.¹

AT&T also agrees with WCom that the other states in the region, except for Minnesota, which is conducting a thorough review, have not investigated the issue of the unfiled agreements. Any state decision claiming that the unfiled agreements are not an

¹ RUCO agrees the Act prohibits discrimination. RUCO claims there was discrimination. RUCO also argues for an extensive investigation of the oral and unfiled agreements between Qwest and Eschelon and Qwest and McLeod. RUCO also recommends consolidation of the hearings. AT&T must conclude that RUCO intends to use the results of the investigation and any findings of discrimination in the section 271 proceeding. This can only be done if the Commission withholds its recommendation in the section 271 proceeding until the section 252(e) proceeding is complete.

issue in the section 271 proceeding is not based on any type of record, is unsupportable, and should carry no weight with this Commission.

C. Qwest

Qwest seeks to reargue the issue of whether the unfiled agreements need to be filed pursuant to section 252(e) of the Act. Qwest Comments at 3-9. This issue was argued and Staff made its recommendation. Qwest previously agreed to comply with the standard articulated by Staff. TR 16 (June 19, 2002). This issue, therefore, is no longer open for discussion or debate.

Qwest takes issue with the fines levied by Staff. Once again, Qwest agreed to pay fines based on the initial Staff Report and Recommendation. TR 7 (June 19, 2002). AT&T acknowledges that the list of agreements has changed and, accordingly, so has the amount of the fines. Qwest is not prevented from arguing that additional fines should not be assessed. But it is bound by its agreement on the record to pay the level of fines established by Staff in its initial Report.

Qwest argues that there can be no willful or intentional violation because there is no articulated standard. Qwest Comments at 18. AT&T disagrees. The Act does provide an articulated standard. Qwest knew some agreements had to be filed. Is there evidence that Qwest did not file agreements it knew needed to be filed or structured agreements in a manner to avoid the obligation to file?

There is evidence that Qwest did not enter into a written agreement with McLeod on the discounts for the wholesale services it purchased from Qwest to avoid having to provide the same discounts to other CLECs. *See* AT&T's Comments on Supplemental Staff Report and Recommendations at 5-6. Qwest must have believed that an agreement

evidencing such a discount had to be filed under section 252(e). Did Qwest structure the agreement (take-or-pay agreement) to avoid the requirements of section 252(e)?

Contrary to Qwest's claims, there is no lack of an articulated standard in order to find willfulness – the statute is the standard.

Qwest's arguments of extensive corrective actions are disturbing. They evidence a continuing pattern by Qwest to justify past transgressions by implementation of new policies and procedures. These are the same arguments made in response to findings of section 272 non-compliance and inadequate operations support systems. Repeated claims of corrective action are not only suspect, they demonstrate either poor internal controls or a corporate culture that does not take regulatory and statutory requirements seriously.

Qwest has argued it has filed contracts on its website. Generally, Qwest has only posted the agreements that have become public. The postings to date are minimal in relation to the total number of unfiled agreements and do not reflect any overall change in Qwest's position.

Qwest argues it will provide some of the agreements to CLECs on a going-forward basis. This is of little consolation to the CLECs that were discriminated against by agreements that have expired.

Qwest believes contempt proceedings are not warranted. Qwest Comments at 23-39. AT&T will not attempt to respond at length. The Staff and Commission ultimately have the burden on this issue. However, AT&T wishes to make an observation. Now that Eschelon has been released from the prohibition of participating in the section 271 proceedings contained in the unfiled agreement between Qwest and Eschelon, Eschelon has provided some very interesting information in workshops and in

pleadings. It is obvious that many of the problems Eschelon has been attempting to resolve have not been resolved.

Qwest almost pulled it off. Had the unfiled agreements remained secret a little longer, Eschelons's problems would never have come to light. After it had obtained section 271 authority Eschelon's only avenue of redress would have been the long, drawn out and expensive complaint process. Public policy may favor the resolution of disputes but the disputes were not resolved and Eschelon, under the terms of the agreement, was denied any meaningful avenue of redress. This is inconsistent with public policy. The agreements were arguably adhesion contracts and unconscionable. Adhesion contracts are not consistent with any stated policy goals of the Act. Qwest is selectively picking the public policy that supports its position while ignoring other public policy that undermines its position. The Commission should not be misled by Qwest's policy arguments.

D. Staff Reply Comments

Staff argues against consolidation. Staff Reply Comments at 4. However, the more AT&T reads the various comments, the more consolidation of the records becomes a necessity.

AT&T continues to recommend that transcripts and exhibits from the hearings held on the unfiled agreements be made a part of the records of both proceedings. The overlap is apparent. Even Qwest acknowledged that there is a nexus between the agreements and the section 271 proceeding. TR 12 (June 19, 2002). Qwest and Commissioner Spitzer debated the extent of this nexus at length.

Although Staff agrees that the sub-docket it proposes must be completed before the section 271 proceeding is completed, Staff apparently does not agree that the section 271 proceeding should be held up until the section 252(e) proceeding is completed. Staff does state that the two proceedings can proceed independently. Supplemental Staff Report and Recommendations at 14. To AT&T, this position is ambiguous and implies that the section 271 proceeding may conclude before the section 252(e) case. If there is a nexus, if it is determined there was discrimination as RUCO alleges, these matters should be raised in the section 271 proceeding. Furthermore, RUCO has more fully explored the oral agreements between Qwest, Eschelon and McLeod than Staff has. *See* RUCO Investigation Appendix to RUCO's Comments. If the hearings prove RUCO's allegations to be correct, the discriminatory effects of the agreements on any checklist items must be addressed in the section 271 proceeding. AT&T is concerned that the premature closure of the section 271 proceeding may preclude the development of a complete record.

Staff's Reply Comments, as well as the comments from RUCO and WCom, demonstrate that the issues are not easily tied down. Understanding this difficulty, AT&T is more concerned at this point with ensuring that the section 271 proceeding is not completed prematurely. AT&T believes that RUCO and any CLEC should have an opportunity to develop the record on the section 252(e) and discrimination issues. However, because of the nexus between the 252(e) case and the 271 case and because discrimination issues are relevant to section 251(c) and the checklist items, there must be a procedural method to carry the results of the investigation into the section 271 proceeding. Simply stated, the section 271 proceeding cannot be closed until the section

252(e) case is complete, and the relevant results of the 252(e) case must be transferable to the section 271 case. This is the ambiguity AT&T sees in the Supplemental Staff Report and Recommendation and Staff's Reply Comments. The issues cannot easily be compartmentalized into the section 252(e) or the section 271 proceeding. The contracts provide the evidence of any discrimination. Discrimination cannot be divorced from section 271. Until Staff recognizes and admits the dependencies, the two proceeding will continue to be bogged down in procedural wrangling.

III. CONCLUSION

The Commission should suspend the section 271 proceeding until the section 252(e) hearings are complete. RUCO and other parties should be given the opportunity to conduct their investigation. The parties should be free to use the record developed in the section 252(e) case in the section 271 case to demonstrate that Qwest has discriminated against CLECs that were not parties to the agreements and that Qwest's conduct surrounding the agreements and decision not to file the agreements justify finding that Qwest's entry into the in-region, interLATA long distance market is not in the public interest. The parties should be given the opportunity to take the results of the section 252(e) investigation and use them in the section 271 proceeding to demonstrate Qwest's application is not in the public interest and that Qwest fails to meet the checklist requirements contained in section 271.

Dated this 16th day of September, 2002.

**AT&T COMMUNICATIONS OF
THE MOUNTAIN STATES, INC.
AND TCG PHOENIX**

A handwritten signature in cursive script, appearing to read "Richard S. Wolters", written over a horizontal line.

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CERTIFICATE OF SERVICE
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