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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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IN THE MATTER OF QWEST)
CORPORATION'S COMPLIANCE WITH)
SECTION 252(e) OF THE)
TELECOMMUNICATIONS ACT OF 1996.)

Docket No. RT-00000F-02-0271

IN THE MATTER OF US WEST)
COMMUNICATIONS, INC.'S COMPLIANCE)
WITH § 271 OF THE)
TELECOMMUNICATIONS ACT OF 1996.)

Docket No. T-00000A-97-0238

AT&T'S RESPONSE TO QWEST CORPORATION'S MOTION TO RECONSIDER PROCEDURAL ORDER

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively, "AT&T") oppose Qwest Corporation's Motion to Reconsider Procedural Order, dated November 7, 2002 (the "Order"). That Order provides that "the Section 252(e) investigation should proceed, and Phase A conclude, prior to the conclusion of the investigation into the public interest portion of the Section 271 investigation, as the findings may be relevant to our ultimate recommendation to the FCC." Order, p. 6. Qwest asks in its Motion that the Order be modified to allow an immediate vote on its Section 271 application, prior to completion of the Section 252(e) investigation. This request should be denied.

Parties to the Section 271 proceeding have alleged that Qwest entered into secret interconnection agreements to quiet opposition to its Section 271 application. The

natural and logical procedural response to this allegation would be to *stay* the Section 271 proceeding entirely and thoroughly investigate the claim. Instead, to Qwest's benefit, the Administrative Law Judge is allowing the two dockets to proceed on parallel tracks, with a clear directive that all information uncovered in the Section 252(e) proceeding (Phase A) be available to the Commission in the Section 271 docket. This approach is logical and fair. To do otherwise would: (1) breach commitments made by Qwest, Staff and the Hearing Division to procedures that now allow information to flow between the two dockets; (2) substantially weaken the credibility of the Commission's decision in the Section 271 docket; and (3) not advance the true interests of Arizona consumers.

1. Commitments to Parallel Track Proceedings

The Section 252(e) docket (RT-00000F-02-0271) was opened on April 8, 2002. On April 18, 2002, the Administrative law Judge issued a Procedural Order in the Section 271 docket and in that order discussed the relationship between the two dockets. The following excerpt from that procedural order reflects both AT&T's concerns and the Administrative Law Judge's response:

AT&T asserts that what is important is that the determination of whether Qwest violated the Act be made in time to raise it in the public interest phase of the 271 proceeding. Second, AT&T is concerned that having the documents filed in a separate docket would complicate the use of evidence, findings and conclusions of a proprietary nature in that docket in the 271 proceeding . . . We agree that Qwest's compliance with the Act, including Section 252(e), is relevant to our deliberations with respect to Section 271. It is not material whether our investigation takes place in the 271 docket or a separate docket.

April 18, 2002 Order, p. 2. The ALJ concluded that the "investigation would not occur on any different time schedule if it were to be conducted under the aegis of the Section 271 docket" and ordered "that any evidence, findings or conclusions arising out of

Docket No. RT-00000F-02-0271, may be cited when relevant to our consideration of Qwest's compliance with Section 271 of the Act or any other relevant proceeding." April 18, 2002 Order, p. 3. Following receipt of April 18, 2002 procedural order, participants in the two dockets clearly anticipated parallel proceedings with findings and disclosures in the Section 252(e) docket available for consideration and possible use in the public interest portion of the Section 271 proceeding.

On April 26, 2002, Qwest filed a Motion for an Extension of Procedural Schedule in the Section 252(e) docket, seeking additional time to negotiate a protective order with Staff and intervenors. A critical issue addressed in the negotiated Protective Order was whether confidential information used in the Section 252(e) proceeding could be used by parties subject to the Protective Order in the Section 271 proceeding. Qwest agreed to this condition, and the Protective order so stated:

Parties who are subject to and have complied with the terms of this Protective Order and who are subject to and have complied with the Protective Order on Docket T-00000A-97A-97-0238, or have executed a protective agreement in that docket, may refer to portions of the confidential agreements provided by Qwest to the Commission, or other confidential documents filed in this docket, in Docket T-00000A-97-0238, and any subsequent appeal or proceeding before the FCC consistent with the terms of this Protective Order.

May 8, 2002, Protective Order p. 2. The parties, the Administrative Law Judge, and even Qwest anticipated that information uncovered during the course of the Section 252(e) docket would be made available and used in the Section 271 docket. Qwest agreed to this arrangement. Parties relied on the Protective Order's assurance that the dockets would be separate but interconnected to the extent information could freely flow

from one to the other. Objections to a separate 252(e) docket were addressed, in part, by this “shared information” assurance.

Once the Protective Order was negotiated and issued, the Section 252(e) docket proceeded with Qwest filing the previously undisclosed interconnection agreements. Intervenors then commented on those agreements and Qwest responded to the intervenor comments. Staff filed its report on June 7, 2002. Throughout this process, AT&T continued to argue that the Section 271 public interest docket was the appropriate forum to conduct the investigation and that the record compiled in the two dockets should be consolidated.¹

The interconnected nature of these two dockets was again reaffirmed by the Administrative Law judge in the Procedural Order issued on July 9, 2002:

Based on the comments and arguments of the parties, a hearing in the Section 252 docket is required to address, at a minimum, the issues of the appropriateness of, and reasons for, Qwest’s failure to file the agreements and the appropriate amounts of any fines. Due to the inter-relationship between the Section 252 proceeding and the Section 271 issues, it may be beneficial to consolidate the two dockets for the purpose of hearing. Staff’s on-going investigation into the effect of the unfiled agreements, especially those containing prohibitions on participating in the 271 proceeding, will assist in the determination on whether the matters should be consolidated.

July 9, 2002 Order, p. 4. At each step in the development of the separate Section 252(e) docket, parties and Staff received assurances that information discovered in the Section 252(e) docket will be equally available in the Section 271 docket. Consistent with this understanding, the Administrative Law Judge ordered the parties to file comments in the

¹ In a letter to Commissioner Marc Spitzer dated June 26, 2002, and copied to the docket service list, AT&T submitted the following: “The Section 271 proceeding is the proper forum to conduct such investigation. If an investigation i[s] conducted in the section 252(e) proceeding, the Commission must recognize the relationship between any evidence gathered in the section 252(e) proceeding and the section 271 proceeding. . . . Consolidation of the two proceedings may be appropriate going forward.”

Section 252(e) docket with their “recommendations for the scope of a hearing, the time needed to prepare, whether the Section 271 and Section 252 dockets should be consolidate for the purposes of a hearing and proposed hearing procedures.” July 9, 2002 Procedural Order. In those comments Staff, AT&T and other intervenors all agreed that as a result of the unfiled agreements “additional comment in the public interest phase of the 271 proceeding is also appropriate.” Supplemental Staff Report and Recommendation, p. 11. In other words, Staff and intervenors all generally agreed that the preliminary information gathered in the Section 252(e) docket was relevant to the public interest phase of the Section 271 proceeding.

The history of these parallel track proceedings demonstrates that specific commitments were made by the Commission and the parties regarding shared information and the interconnected nature of the dockets. Every step in the Section 252 docket has reflected concern for how relevant information developed in the Section 252 proceeding would be used in the Section 271 docket. Qwest now asks that the Commission act as if these commitments and procedural protections never existed. AT&T opposes this request. The procedural safeguards were negotiated in good faith by the parties, ordered by the Administrative Law Judge, and were critical to the parties concurrence in a separate Section 252 docket. These safeguards should not now be ignored in favor of a premature decision in the Section 271 docket.

2. The Integrity of the Section 271 Proceeding

Qwest submits in its motion that the Section 271 review in Arizona “has been extraordinary,” recounting four years of work, almost \$70 million dollars in vendor and facilitator fees, and countless workshops. If this is the case, which AT&T does not here

dispute, why – at the end of such an “extraordinary” effort – cut this corner. The Commission would be doing exactly that if it recommends Section 271 relief before all evidence concerning the integrity of the Section 271 process is taken and evaluated. This evidence includes the extent and nature of the unfiled/secret agreement arrangements promoted by Qwest. If the Commission fails to consider and address this evidence in advance of granting Qwest relief, the Section 271 decision will, on the date it is signed, be vulnerable to collateral attack. If, as Qwest asserts, no prejudice was caused by the unfiled agreements, then that finding should be made by the Commission and included as evidence supporting the final Section 271 decision.

Given the resources and time the Commission has already invested in reviewing Qwest’s 271 application, waiting until April or May (as Qwest submits) for the Section 252 proceeding to conclude is reasonable. Even without the Section 252 proceeding, it is likely that Qwest’s application would not be considered by the Commission until Spring of 2003. The public interest portion of the section 271 proceeding has been reopened to address the secret agreements and the integrity of the Arizona Section 271 process. Additionally, other issues are still pending in the Section 271 docket which include: alleged unlawful tariff preferences, infeasible right of use (“IRUs”), section 272, OSS testing, issues raised by Eschelon Telecom, Inc. in the supplemental workshop (pending Staff report), and the adequacy of a number of performance measurements. Given what is yet to be finished in the Section 271 docket, and the historic change in Commission composition beginning in January 2003, it is unlikely the Section 252 proceeding will delay the Section 271 decision.

3. Consumers Will Not Benefit From A Premature § 271 Decision

Qwest submits that delaying the Section 271 docket by even six months “could cost Arizona consumers tens of millions of dollars.” Motion, p. 6. This is not an accurate portrayal of what Section 271 relief will bring to Arizona. It is Qwest, not consumers, that stands to suffer lost profits if early Section 271 approval is not granted. Local service competitors are on the brink of making a dent in Qwest’s monopoly hold over Arizona residential local service. However, if Qwest can – before competitors even enter the market – tie up the local, long distance, and internet business of its current local service customers, Qwest will reap enormous financial benefits.

Arizona consumers, in contrast, will not be well-served by this outcome. Qwest has publicly announced that it will offer in-state long distance for 10¢ per minute in Arizona once Section 271 approval is granted. That rate, however, is already available from a variety of in-state long distance providers. Consumers will not be greatly benefited by the addition of Qwest to a list of available long distance providers. In contrast, competition in local service will ultimately benefit consumers. Competition will drive price reductions, innovation, and improved customer service for years to come. If Arizona has no significant local service competition, consumers will suffer the harm. Qwest stands to gain much if immediate Section 271 approval is granted. Consumers, however, will suffer long-term harm if approval is granted before local service competition takes hold.

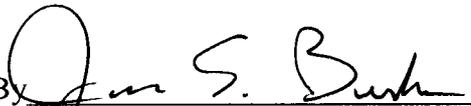
Conclusion

If, as alleged, Qwest has used its monopoly power to enter into secret, unfiled, interconnection agreements, and has through those contracts quieted opposition to its

Section 271 application, that conduct should be fully investigated before Section 271 approval is granted. To the extent this will cause a short delay in Commission consideration of Qwest's Section 271 application, that is the reasonable cost of protecting the integrity of the Commission's decision- making process. It is not, as Qwest has alleged, the Procedural Order that has caused this delay.

Dated this 2nd day of December, 2002.

OSBORN MALEDON, P.A.

By 

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CERTIFICATE OF SERVICE

I hereby certify that the original and 15 copies of AT&T's Response to Qwest Corporation's Motion to Reconsider Procedural Order were filed this 2nd day of December 2002, with:

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and that a copy of the foregoing was hand-delivered this 2nd day of December 2002 to the following:

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