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Arizona Corporation Commission

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

MOTION TO COMPEL

AT&T Communications of the Mountain States, Inc. and TCG Phoenix
(collectively, "AT&T") hereby move for an order compelling Qwest Corporation to
answer AT&T's Fifth Set of Data Requests to Qwest.

I. INTRODUCTION

On or about July 28, 2003, AT&T served its Fifth Set of Data Requests on Qwest
by email and overnight delivery. Qwest's responses were received by AT&T on August
5, 2003.

AT&T's Fifth Set of Data Requests contained two requests. Qwest objected to
AT&T/TCG 05-001(c) and 05-002. AT&T believes the questions are within the proper
bounds of discovery.

II. ARGUMENTS

A. AT&T/TCG 05-001(c)

In Docket No. RT-00000F-02-0271, the Section 252(e) case, Staff's witness discussed one of the Eschelon agreements: "An agreement for a 10 percent discount on *all* of Eschelon's purchases of Qwest services, including, but not limited to, Section 251(b) and (c) services, for 5 years." Kalleberg Direct at 21 (emphasis added). The Settlement Agreement provides eligible CLECs a 10% discount credit on only Section 251(b) and (c) services for the period of January 1, 2001, to June 30, 2002.

In AT&T/TCG 05-001(c), AT&T asked for the maximum amount Qwest would have to pay if the 10% discount for the period included Section 251(b) and (c) services (AT&T/TCG 05-001(a)); Section 251(b) and (c) and intrastate services (AT&T/TCG 05-001(b)); and Section 251(b) and (c), intrastate and interstate services (AT&T/TCG 05-001(c)). Qwest answered subparts (a) and (b), but in response to subpart (c) responded:

Qwest objects on the grounds that this request is not reasonably calculated to lead to discovery of admissible evidence because the requested information pertains to service outside the jurisdictional scope of the Arizona Corporation Commission.

The Arizona Rules of Civil Procedure state:

(1) *In General*. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party ... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b).

The subject matter of the litigation was Qwest's failure to file certain agreements under Section 252(e) and the appropriate remedies for that failure. Staff maintains that

the agreement with Eschelon containing the 10% discount should have been filed for approval. Kalleberg Direct at 29. *See also id.*, Table 1 (4). Therefore, the subject matter of the litigation involves an agreement that Staff alleges should have been filed under Section 252(e) that contains a 10% discount on Section 251(b) and (c), intrastate and interstate services.

The Settlement Agreement only provides a discount on Section 251(b) and (c) services. AT&T maintains the discount should be on all services. Furthermore, the Release of All Claims releases claims against Qwest for all services – Section 251(b) and (c), intrastate and interstate. For purposes of evaluating the Settlement Agreement, which is essentially provides for remedies, it is entirely relevant to ask what the value of the claims the CLECs are waiving under the terms of the Settlement Agreement.

AT&T believes it is entirely reasonable and relevant for the Commission to know this amount in order to evaluate the settlement. Because the Release of All Claims includes all services, the Commission may elect to reject the Settlement Agreement unless Qwest amends the Agreement to include all services within the scope of the discount. Even assuming for the sake of argument the Commission has no jurisdiction over interstate services, it may provide Qwest the option of having the settlement rejected and the cases decided on the merits through the regular process (recommended order, exceptions and order) or allowing Qwest to amend the Settlement Agreement to include all intrastate and interstate services, in addition to Section 251 (b) and (c) services.

B. AT&T/TCGG 05-002.

Staff and Qwest have been negotiating the terms of the settlement for some time. Only at the end of the process were a few of the CLECs allowed to see and comment on the terms that Staff and Qwest had agreed to.

Several sections of the Settlement Agreement reflect monetary values. For example, the section on access line credits has minimum and maximum allocations of \$600,000 and \$660,00 respectively. In addition, in several sections of the Agreement, Staff has agreed to provisions that are not consistent with Staff's testimony. Staff has agreed to substantially reduced fines. Staff has agreed to a discount on only Section 251(b) and (c) services, although Staff's witness recommended a 10% discount on Section 251(b) and (c) services and intrastate services.

AT&T is attempting to obtain all factual information sent by Qwest to Staff that forms the basis of or relates to the Settlement Agreement. Did Qwest provide Staff any documents that provide a basis for any of the monetary values? Or were the values accepted by Staff without any support being provided by Qwest? These questions are relevant. The values in the Settlement for discount credits are inconsistent with Qwest's responses to AT&T/TCGG 005-001(b). This highlights the need to determine the basis of some of the information contained in the Settlement Agreement.

Rule 26(b) states parties may obtain any information relevant that is not privileged. Qwest has not relied on any recognized privilege, for example, the attorney-client privilege. Qwest has relied on contract language that was not enforceable until after the information was provided and the Settlement Agreement was signed. (See Rule 26.1(f) for the requirements that must be met to rely on a claim of privilege. The

requirements have not been met.) Parties to litigation cannot contractually bind themselves to foreclose discovery from other parties.

AT&T discussed the two data requests with Qwest's counsel in an attempt to resolve the discovery disputes. Qwest elected to stand on its responses. However, assuming for the sake of argument that Qwest subsequently could raise Rule 408 in its response, Rule 408 makes it clear that it does not exclude discoverable evidence ("This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."). Therefore, if Rule 408 does not exclude evidence or provide a privilege against discoverable materials, the parties surely cannot do so themselves.

Although Rule 408 states that "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible", Qwest has not raised Rule 408 as an objection to AT&T's requests. Furthermore, there is no certainty that all documents, worksheets, communications, memorandums and e-mails sought are evidence of conduct or statements made in compromise negotiations but may, in fact, be discoverable material not excepted from Rule 408. Qwest has provided no legal basis to object to AT&T/TCG 05-002.

III. CONCLUSION

AT&T has shown the relevancy of the materials sought. Qwest has not provided a justifiable basis for not providing the information to AT&T. AT&T therefore requests that Qwest be compelled to answer AT&T/TCG 05-001(c) and 05-002.

Dated this 14th day of August, 2003.

**AT&T COMMUNICATIONS OF THE
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CERTIFICATE OF SERVICE
(Docket No. RT-00000F-02-0271)

I certify that the original and thirteen copies of AT&T Communications of the Mountain States, Inc. and TCG Phoenix's Motion to Compel were sent by overnight delivery on August 14, 2003 to:

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