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BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
Chairman
JAMES M. IRVIN
Commissioner
WILLIAM MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner

Arizona Corporation Commission

DOCKETED

AUG 26 2003

DOCKETED BY *CR*

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

DOCKET NO. RT-00000F-02-0271

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

DOCKET NO. T-00000A-97-0238

ARIZONA CORPORATION COMMISSION,

Complainant,

v.

QWEST CORPORATION,

Respondent.

DOCKET NO. T-01051B-02-0871

**QWEST CORPORATION'S
RESPONSE TO AT&T'S MOTION TO
COMPEL**

Qwest Corporation ("Qwest") hereby responds to AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively "AT&T") August 18, 2003 Motion to Compel responses to its Fifth Set of Data Requests to Qwest. Specifically, AT&T has moved to compel Qwest to respond to two data requests in its Fifth Set of Data requests:

First, AT&T seeks to compel production of "all copies of all documents, worksheets, communications, memorandums, and emails provided or sent by Qwest to Staff from the commencement of settlement discussions through July 25, 2003." AT&T 005-002. As will be discussed below, the motion to compel should be denied as to this

1 request because it seeks information that is protected from discovery under Rule 408 of
2 Arizona's Rules of Evidence and under Rule 26(b)(1) of the Arizona Rules of Civil
3 Procedure.

4 Second, AT&T asks that Qwest be compelled to provide: "disregarding the
5 maximum allocation provided for in the Settlement Agreement, provide the maximum
6 amount Qwest would have to pay in discount credits to all Eligible CLECs for the period
7 of January 1, 2001, through June 30, 2002, if Section 3 Discount Credits includes Section
8 251 (b) and (c) services, all intrastate services *and all interstate services* purchased by
9 Eligible CLECs." AT&T 005-001(c) (emphasis added). Information about what a 10%
10 discount applied to interstate services purchased by CLECs between January 1, 2001 and
11 June 30, 2002 is not discoverable under Rule 26(b)(1) because it is not relevant to the
12 issues in this docket and is not calculated to lead to the discovery of admissible evidence.
13 First, this Commission has no jurisdiction over a claim based on interstate services. Also,
14 under the Telecommunications Act of 1996, CLECs do not have a right to opt into
15 agreements made by other CLECs to purchase interstate services. This information is
16 simply irrelevant to any issue before the Commission.

17
18 **A. The Information Requested in AT&T 05-002 is Not Discoverable Under Rule 408.**

19 Rule 408 bars AT&T from obtaining the information it has requested in Data
20 Request 005-002. In its motion, AT&T attempts to claim that Qwest failed to raise Rule
21 408, Arizona Rules of Evidence, as a basis for objecting to AT&T/TCG data request 05-
22 002. The assertion is erroneous for several reasons. First, the objection directly references
23 the provision of the Settlement Agreement that parallels Rule 408 by which Staff and Qwest
24 explicitly agreed that communications between the two parties with respect to the
25 Settlement would be confidential. Second, while Qwest did not write into its objections to
26

1 AT&T/TCG 05-002 the words "408", counsel for Qwest verbally told counsel for AT&T
2 that Rule 408 was one of the bases for its objection in a telephone call shortly after the
3 objection was mailed on August 4, 2003. During this call, counsel for Qwest made it clear
4 that Qwest contended that communications between itself and Staff during the negotiation
5 of the Settlement Agreement was privileged under Rule 408. In addition, at the settlement
6 meetings attended by representatives of several CLECs, including AT&T, Qwest made it
7 clear that the meetings and information exchanged in the process of arriving at the
8 Settlement were subject to Rule 408. To now attempt to argue that Qwest cannot rely on
9 Rule 408 in response to a data request directed solely at the negotiation discussions and
10 documents relayed between Staff and Qwest is an attempt to elevate form over substance.
11 AT&T seeks information that is clearly confidential under Rule 408.

12 With regard to the merits of Qwest's objections, discussions between Qwest and
13 Staff, drafts Qwest exchanged with Staff, and information Qwest provided to Staff are
14 subject to Rule 408. This information all fits squarely within the scope of the Rule, which
15 states that "evidence of conduct or statements made in compromise negotiations" is not
16 admissible. Rule 408 (emphasis added). In its motion to compel, AT&T argues that it is
17 attempting to obtain information regarding the basis for, validity of and consistency of the
18 monetary values and discount credits contained in the proposed Settlement Agreement. To
19 the extent that AT&T wants statements exchanged between Staff and Qwest on this issue, is
20 precisely the kind of information Rule 408 seeks to protect.

21 Evidence of offers to compromise or settlement negotiations must be excluded when
22 offered to prove the invalidity of a claim or its amount. *See Deforest v. Deforest*, 143 Ariz.
23 627, 631, 694 P.2d 1241, 1245 (App. 1985). Rule 408 precludes discussing or referring to
24 any information provided during settlement discussions or offers of compromise. AT&T
25 seeks to use evidence of Qwest's settlement with Staff as evidence that the monetary values
26

1 or discount credits for CLECs set forth in the proposed Settlement Agreement are
2 inadequate. *See AT&T's Motion to Compel* at 4 (“Staff has agreed to a discount on only
3 Section 251(b) and (c) services, although Staff’s witness recommended a 10% discount on
4 Section 251(b) and (c) services and intrastate services.” “The values in the Settlement for
5 discount credits are inconsistent with Qwest’s responses to AT&T/TCG 005-001(b).”).
6 Information relating to the Settlement amounts and the validity of those amounts that AT&T
7 calls into question is precisely the type of evidence that Rule 408 is designed to protect.

8 In its motion to compel, AT&T states that it is “attempting to obtain factual
9 information” regarding the basis for any of the monetary values in the Settlement and the
10 purported change of Staff’s position with regard to the fines and discounts on intrastate
11 services. AT&T is free to do discovery of specific, relevant factual information with respect
12 to the monetary amounts contained in the Settlement. Indeed, AT&T asked for just such
13 calculations and Qwest provided the requested information to AT&T in the response to data
14 requests numbered 005-001(a) and 005-001(b). AT&T is entitled to ask Qwest or Staff for
15 any relevant facts about how calculations were made or why certain amounts were agreed
16 to. What it is not entitled to do is ask for communications between Staff and Qwest with
17 respect to the Settlement. AT&T cannot get around Rule 408 by simply arguing that it seeks
18 the communication between Staff and Qwest so that it can obtain facts that support the
19 parties’ positions and the Settlement Agreement. In so doing, AT&T confuses the
20 communications made in the course of negotiations, which it cannot obtain, with the
21 underlying facts about which it is free to ask.

22 If AT&T wants to know, for example, why Staff’s position appears to contradict it
23 earlier testimony, AT&T should ask Staff what formed the basis of the its position in the
24 Settlement Agreement and why it agreed to the amounts in the Settlement Agreement. If
25 AT&T is concerned with an alleged conflict between Qwest’s responses to AT&T 05-
26

1 001(b) and Section 3 of the Settlement Agreement, the proper course of action is to ask
2 Qwest to explain the basis for its calculations not to improperly delve into privileged
3 communications between Staff and Qwest.¹ While it is possible that those communications
4 may contain “facts” as well as opinions and settlement negotiations, the communications
5 themselves are still privileged and not subject to discovery. To the extent AT&T wishes to
6 discover “facts”, it must propound discovery addressed to the facts and not to confidential
7 communications.

8 While there do not appear to be any Arizona cases on point, Arizona Rule 408 is
9 identical to Federal Rule 408, and federal courts have applied the policy of Rule 408 to limit
10 discovery. For example, in *Bottaro v. Hatton Assoc.*, 96 F.R.D. 158 (1982), the court
11 refused to allow a litigant to conduct discovery regarding terms of a settlement agreement:
12

13 Given the strong public policy of favoring settlements and the
14 congressional intent to further that policy by insulating the
15 bargaining table from unnecessary intrusions, we think the
16 better rule is to require some particularized showing of a
likelihood that admissible evidence will be generated by the
dissemination of the terms of a settlement agreement.

17 *Id.* at 160. AT&T has not shown or attempted to show that it cannot obtain the information
18 sought without resorting to discovery of privileged communications protected by Rule 408.

19 The public policy underlying both the Arizona and federal rules of evidence also
20 support Qwest’s position. The purpose of Rule 408 is to encourage parties to engage in
21 settlement by fostering complete candor between parties. *Hernandez v. State*, 203 Ariz.
22

23 ¹ In data request 05-001(b), AT&T asked for calculations of credits including both Section 251 and
24 252 services and intrastate access. That calculation does not match the numbers in Paragraph 3 of the
25 Settlement Agreement because the Agreement does not include credits on intrastate access. Qwest’s
26 response to data request 05-001(a) shows that the amount included in the Settlement Agreement for
credits for 251 and 252 services is just at or slightly above the upper end of the range of amounts Qwest
calculated for credits for Section 251 and 252 services.

1 196, 52 P.3d 765 (2002) (citing 23 Charles Alan Wright & Kenneth W. Graham, Jr.,
2 *Federal Practice & Procedure: Evidence* § 5314 (1980)). Similarly, in *Advanced*
3 *Cardiovascular Systems, Inc. v. Medtronic, Inc.*, 265 F.3d 1294 (Fed. Cir. 2001), the
4 appeals court upheld a trial court's refusal to permit discovery into settlement negotiations,
5 pointing out that "we are mindful, as was the district court, of the policy in favor of
6 protecting settlement negotiations from being admitted as evidence, thus serving to
7 encourage settlements." *Id.* at 1308.

8 If outside parties, such as AT&T, are allowed to use communications made in an
9 attempt to compromise against the negotiating parties, Rule 408 would be rendered moot as
10 providing absolutely no incentive for parties to be entirely candid and cultivate settlements
11 in furtherance of the Rule's goals. For these reasons, the Commission should deny AT&T's
12 motion to compel Qwest's response to AT&T 05-002.

13 **B. There is No Legitimate Basis for Compelling Information Relating to**
14 **Interstate Services.**

15 As stated in Qwest's objection to AT&T 05-001(c), information regarding the
16 maximum amount Qwest would have to pay if the proposed 10-percent discount included
17 interstate services purchased by eligible CLECs is not relevant or reasonably calculated to
18 lead to the discovery of admissible evidence. There are two primary reasons for rendering
19 this request irrelevant: (1) interstate services are wholly outside the jurisdiction of this
20 Commission; and (2) it is beyond the scope of any remedy available in the dockets that are
21 subject to the Settlement Agreement.

22 The Act is clear that the FCC retains exclusive jurisdiction over interstate
23 communications, including interstate access. *See* 47 U.S.C. § 152; 47 C.F.R. § 69.1 *et seq.*
24 The Commission therefore lacks authority to order a discount on interstate access charges as
25 an element of any penalty order. *See, e.g.* Tr. Vol. IV, Testimony of Marta Kalleberg, at
26

1 879:23-880:1 (“I did not include interstate access [in the discount penalty recommendation]
2 due to the fact that this Commission’s jurisdiction is in the State of Arizona, and interstate
3 access is outside of the State of Arizona, is my understanding.”).

4 In addition, under the 1996 Telecommunications Act (“1996 Act”), CLECs only
5 have a right to opt into Section 251 and 252 services. Thus, opt-in remedies available in this
6 case cannot extend to services outside of Sections 251 and 252. And the remedies in this
7 proceeding are limited to those that address Qwest’s failure to permit CLECs other than
8 Eschelon and McLeod to opt into interconnection agreements.

9 The FCC has made it very clear that interstate and intrastate access charges,
10 respectively, are subject to the federal and state regulatory regimes that predate the
11 enactment of the 1996 Act, and that access charges are not subject to the provisions of
12 Sections 251 and 252.² Because Qwest was not required to file agreements with respect to
13 access services, CLECs cannot opt into such agreements. Therefore, Qwest’s failure to file
14 an agreement covering access charges cannot be the basis for any claim against Qwest and
15 cannot be a basis for requesting discovery. The fact that Eschelon, for example, may have
16 received a discount for interstate or intrastate wholesale purchases from Qwest does not
17 expand the scope of opt in rights under Sections 251 and 252. Any favorable rates on non-
18 Section 252 services cannot cause discrimination under Section 251, and are not redressable
19 by opt-in remedies.

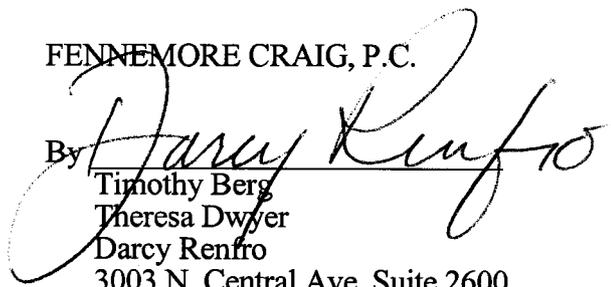
20 Taken together, there simply is no basis for disclosing the information requested by
21 AT&T in 005-001(c) since the information has absolutely no bearing on the remedies
22 sought in these dockets and, therefore, whether the Settlement is reasonable. The
23 reasonableness of a settlement pending before the Commission must be considered against
24

25 ² *First Report and Order*, 11 FCC Rcd 15499, ¶¶ 176, 1033-35, *aff’d in pertinent part sub nom.*
26 *Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997); *subsequent history*
omitted.

1 remedies the Commission has authority to order. Since the Commission lacks authority to
2 consider a claim under the Act or for discounts under state law with respect to interstate
3 services, discovery about such a claim does not seek relevant evidence or information that is
4 calculated to lead to the discovery of admissible evidence.

5 DATED this 26th day of August, 2003.

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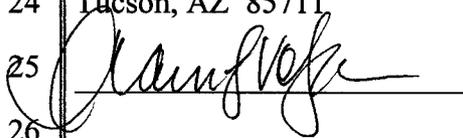
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