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BEFORE THE ARIZONA CORPORATION COMMISSION

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MARC SPITZER
Chairman

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MIKE GLEASON
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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 U S WEST COMMUNICATIONS,
INC.'S COMPLIANCE WITH SECTION 271 OF THE
COMMUNICATIONS ACT OF 1996

) Docket No. T-00000A-97-0238
)
)
)

ARIZONA CORPORATION COMMISSION,
Complainant,

) Docket No. T-01051B-02-0871
)
)
)

v.

QWEST CORPORATION,
Respondent

POST-HEARING BRIEF OF MOUNTAIN TELECOMMUNICATIONS, INC.

Mountain Telecommunications, Inc. (MTI), by its attorneys, hereby submits its post-hearing brief in the above-captioned consolidated proceeding and states as follows:

Before the Commission in this proceeding is a proposal crafted by Qwest Corporation (Qwest) and Staff to settle three pending Commission proceedings, each of which involve serious allegations of significant wrongful conduct by Qwest. Moreover, those allegations have been supported by substantial testimonial and documentary evidence which has been placed on the record in the three proceedings. MTI is a telecommunications carrier certificated by the Commission to provide service, including competitive local exchange service, in the State. MTI intervened in one of the three pending cases – Docket No. T-01051B-02-0871 (a proceeding commonly referred to as the Show Cause Proceeding).

The proposed settlement agreement which is the subject of the instant proceeding resulted from a series of private meetings held between Qwest and Staff between late April 2003 and June 2003. It was not until Qwest and Staff reached agreement on an Outline of Principles for the proposed agreement that other parties to any of the three captioned proceedings to be covered by the proposed agreement were even notified that Qwest and Staff had reached agreement on an Outline of Principles for a settlement agreement or allowed to comment on it. The proposed agreement would obligate Qwest to provide three forms of payment: 1) a monetary penalty payment to the State Treasury; 2) a “voluntary contribution” which would be directed at various charitable organizations, consumer education programs, and infrastructure investment; and 3) compensation and credits to those competitors of Qwest who have suffered economic harm as a result of Qwest’s wrongful conduct.

MTI has two fundamental concerns with the proposed settlement agreement which have caused it to oppose its approval. First, MTI does not believe that the procedures followed by Qwest and Staff in negotiating the material terms of the proposed agreement were appropriate; second, it does not believe that the funds to be received by eligible competitors (CLECs) will sufficiently compensate those companies for the economic harm which they have suffered as a result of Qwest’s wrongful conduct.

I. The Proposed Settlement Agreement Was Negotiated Without Meaningful Involvement of All Parties to the Pending Dockets

The record in this proceeding demonstrates conclusively that the proposed settlement agreement has its genesis in a series of meetings which took place between Qwest and Staff commencing on or about April 29, 2003. While there is some dispute as to the precise number of meetings,¹ there is no dispute that Qwest and Staff were the only parties who participated in these discussions which led to the formulation of an Outline of Principles upon which the proposed settlement agreement is based. It was not until after Qwest and Staff had agreed upon and memorialized their Outline of Principles that other parties to the referenced dockets were contacted and informed of a proposed settlement. Some, but not all, parties to the captioned dockets received e-mail messages on or about July 3 notifying them of the proposed settlement and inviting them to attend a meeting on July 10 to discuss the proposed settlement. Several of the CLEC parties to the dockets, including MTI, attended that meeting.

At that July 10 meeting, the Outline of Principles previously negotiated between Qwest and Staff was discussed. CLEC representatives participating in that meeting voiced strong criticisms as to the portions of the Outline of Principles, primarily those portions of the Outline of Principles governing CLEC compensation. Subsequent to that meeting, a draft settlement agreement was prepared by Qwest and Staff and distributed to the other participants. Significantly, no changes were made to the portions of the proposed agreement involving compensation to CLECs who had suffered injury as a result of Qwest's misconduct. A subsequent meeting among those participants was held July 14. During that meeting, it was made clear to the other participants by Qwest that the compensation portions of the proposed

¹ For example, Staff witness Ernest Johnson testified that "numerous" meetings were held between him and Qwest (Exhibit S-1 at p. 3 line 14). However, during cross-examination he conceded that he met on only three such occasions with Qwest (Tr. 406 at lines 22-23).

agreement would not be changed to reflect any of the objections noted by the CLEC participants. In short, the deal that had been struck between Qwest and Staff during those private meetings held between April and June would not be changed. Although those other participants were invited to “sign on” to the proposed agreement as signatories, not a single CLEC participant in any of the three dockets has done so.

In considering whether to approve the proposed settlement agreement, the Commission should keep in perspective what it is being asked to do and by whom. It is being asked to approve a settlement of three very important proceedings, each of which involved active participation by multiple parties affected by Qwest’s conduct which is the subject of those proceedings, by approving a settlement agreement which has been negotiated and drafted by only two of those parties – Qwest (the alleged wrongdoer in each of the three proceedings) and Staff. The only input which any of the CLEC parties have been allowed to have in this settlement process has been to review the proposal after it was negotiated and then to discuss the proposal at several post-negotiation meetings. With the exception of Qwest and Staff, all Parties to the three dockets have been effectively left out of the settlement process. *Given this exclusion, the refusal of any other party to any of the three dockets to become signatories to the Qwest-Staff agreement can hardly be surprising.*²

Staff witness, Ernest Johnson, stated during the hearing that these proceedings “are not about CLECs or CLEC assertions of economic harm or compensatory damages. These cases are about Qwest and its inappropriate corporate behavior.”³ MTI has great respect for Mr. Johnson and for Staff and for their diligence in these proceedings. However, it respectfully disagrees with that assessment of the three dockets. MTI concurs that these proceedings are about Qwest

² In addition to each of the CLEC parties, the Residential Utility Counsel’s Office (RUCO) also refused to sign on to the agreement and has opposed approval of the proposed agreement in this proceeding.

³ Tr. 328.

and its inappropriate behavior, but they are no less about the consequences of that wrongful behavior and the damages to Qwest's competitors and to competition in Arizona which has resulted from that inappropriate corporate behavior.

By excluding CLEC party participation in the settlement negotiation process until after Qwest (the alleged wrongdoer) and Staff had "cut their deal," the real victims of Qwest's conduct had no say in crafting the agreement which was intended, *inter alia*, to provide compensation to the victims of Qwest's wrongdoing. Moreover, that exclusion reflects an Orwellian view of the regulatory process that in Commission docketed proceedings, "all parties are equal, but some are more equal than others." It is possible that if CLEC parties had been notified of the settlement discussions at the outset and allowed to participate in those discussions from their inception that the resulting Outline of Principles might have been substantially similar to what Qwest and Staff negotiated between them and later presented to those other parties as a "done deal." It is also possible that timely participation by other parties in those discussions might have produced a proposed agreement materially different from the proposed agreement now before the Commission. Unfortunately, neither the Commission nor the parties will ever know. The uncontroverted fact is that those parties were neither notified of the negotiations nor given "seats at the table." Given that much of the three proceedings focused on Qwest's wrongful behavior and how that behavior impacted competitors and competition, exclusion of those CLEC parties from the settlement process until after Qwest and Staff had developed their own Outline of Principles was unwarranted, unnecessary and wholly inappropriate.

It is especially ironic that one of the three proceedings which the proposed settlement agreement would resolve, if approved, is the so-called Unfiled Agreements Proceeding. During that proceeding, the Commission compiled an extensive record about Qwest's efforts to "silence" certain CLECs during the Section 271 process by entering into secret agreements which offered those competitors favorable pricing in exchange for their silence. MTI has no

desire to reiterate the details of those secret agreements. However, the notion that the Commission would even seriously consider resolving a secret agreements case by approving a secret agreement should be troublesome to all parties. Because the process which led to the proposed settlement agreement was so flawed, secretive and exclusionary, MTI respectfully urges the Commission to reject the proposed settlement agreement and to order all parties to each of the three dockets to promptly commence open negotiations seeking a comprehensive resolution which reflects the views and interests of all affected parties. In order to facilitate such a settlement process, MTI further recommends that the Commission establish a time limit for such negotiations to be completed and to result in a settlement agreement acceptable to all the parties which would be presented to the Commission for its consideration and approval. If no agreement among the parties is reached by the end of that period, then the Commission should direct the Administrative Law Judges assigned to each of the three cases to prepare Recommended Opinions and Orders resolving the issues presented in each proceeding based upon the evidentiary record compiled in each proceeding.

II. The Proposed Compensation Amounts Are Insufficient And Uncertain

Section V of the proposed settlement agreement provides that Qwest will issue one-time "discount credits" to eligible CLECs equal to ten percent of the prices paid by those eligible CLECs for services obtained from Qwest pursuant to Sections 251(b) and 251(c) of the Communications Act of 1934, as amended (47 U.S.C. §§ 251(b) and 251(c)) during the period between January 1, 2001 and June 30, 2002. Amounts to be paid to eligible CLECs under this provision would not be unlimited. The total amount of CLEC discount credits to be paid by Qwest would be capped at \$8,910,000.00. There is also a "minimum" amount of \$8,100,000.00 to be paid by Qwest. If the amounts claimed by eligible CLECs under this provision are less

than \$8,100,000.00, the difference between the amounts paid to CLECs and that amount would be added to the Voluntary Contribution amount committed to by Qwest.

While \$8,100,000.00 may sound like a substantial amount, based on the record compiled in this proceeding, it does not appear that Qwest's compensation to eligible CLECs will be anywhere close to that amount. In its testimony, Arizona Dialtone, an eligible CLEC, included an exhibit which indicates that the amount which it would receive (according to Qwest's calculations) would be \$319,000.00.⁴ During the hearing, another eligible CLEC, Time Warner Telecom, introduced into the record a data request response provided to it by Qwest which indicates that Time Warner Telecom's total compensation under the discount credit provision would be \$26,877.⁵ Following the hearing, eligible CLEC MTI submitted a data request to Qwest in which it inquired as to what its compensation would be under the discount credit provision according to Qwest's information. On September 24, 2003, Qwest provided a response to MTI's data request in which it stated that MTI's total compensation would be \$237,889.⁶ The record in this proceeding contains no other information regarding CLEC levels of compensation under the discount credit provision. The total amount of discount credit compensation which would be paid to Arizona Dialtone, Time Warner Telecom, and MTI would be (according to Qwest's records) \$583,766 – an amount far below the \$8,100,000.00 “minimum” set forth in the proposed agreement. Of the other CLECs which operated in Arizona during the period between January 1, 2001 and June 30, 2002, two are ineligible to receive discount credits under the terms of the proposed agreement (Eschelon and McLeod). Of the remaining \$7,516,234.00 (\$8,100,000.00 - \$583,766.00) ostensibly committed to CLEC discount credits under the proposed agreement, what amounts would go to other eligible CLECs (e.g.,

⁴ Exhibit AZD-1. TR 117.

⁵ Exhibit TW-2. Tr 169.

⁶ Because Qwest's response was not received until after completion of the hearing, MTI had no opportunity to introduce the response into evidence. Accordingly, a copy of that response is attached to this brief.

AT&T, WorldCom, Electric Lightwave, XO Communications and perhaps a few others) is speculative. Of the other eligible CLECs, only AT&T chose to actively participate in this proceeding. The absence of any other eligible CLECs from this proceeding suggests that no other eligible CLECs anticipate receipt of significant amounts under the proposed agreement.

With only \$583,766 of a "minimum" CLEC discount credit minimum amount of \$8,100,000 accounted for on the record, it would appear that much of the amount labeled in the proposed settlement agreement as CLEC discount credits may, in reality, be additional Voluntary Contribution amounts paid by Qwest rather than compensation to those CLECs who have suffered damage as a result of Qwest's wrongful conduct. To the extent that discount credit amounts nominally intended to compensate CLECs become part of the Voluntary Contribution portion of Qwest's financial obligation under the proposed settlement agreement, the amount of economic burden to Qwest could be significantly reduced. Unlike discount credit payments, voluntary contributions paid to charitable organizations would entitle Qwest to tax deductions. By reducing the amount of those charitable contributions from its net income, Qwest could enjoy *substantial relief*. Similarly, portions of the funds initially intended as discount credits but which instead are allocated to infrastructure investments also would produce important tax benefits for Qwest as investment tax credits. Unless and until the Commission is able to determine how much the proposed settlement agreement will actually cost Qwest, net of taxes, it will not be able to determine the actual amount which the agreement will cost Qwest. Neither will the Commission be able to determine whether that amount bears any reasonable relationship with the degree of Qwest's wrongdoing which is before the Commission in each of the three proceedings.

Since so much of the record in the three docketed proceedings has focused on Qwest wrongdoing which caused economic harm to its competitors, the public interest compels that the Commission determine what amounts of compensation will, in fact, be paid to the CLEC victims of that wrongdoing before approving the proposed agreement. Accordingly, MTI respectfully

urges the Commission to direct the presiding Administrative Law Judge to compile an evidentiary record which will enable the Commission to determine the amounts of compensation which will be paid to eligible CLECs under any proposed settlement agreement.

Conclusion

For the reasons described in this post-hearing brief, the settlement agreement proposed by Qwest and Staff in this proceeding should not be approved by the Commission.

Respectfully submitted,

MOUNTAIN TELECOMMUNICATIONS, INC.



Mitchell F. Brecher
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Its Attorneys

Dated: October 15, 2003

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Attachment

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Monica Luckritz
Manager – Public Policy



September 24, 2003

Mitchell F. Brecher
GREENBERG TRAURIG, LLP
800 Connecticut Avenue, N. W.
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Washington, DC 20006

Dear Mr. Brecher:

RE: Qwest Corporation
Docket Nos. RT-00000F-00-0271; T-00000A-97-0238 and
T-01051B-02-0871

Enclosed please find Qwest Corporation's responses to MTI 01-001 in Mountain Telecommunications, Inc.'s first set of data requests in the Global Settlement proceeding. Portions of these responses may be proprietary and are provided pursuant to the terms of the Protective Agreement.

If you have questions, please contact me.

Very truly yours,

Monica Luckritz
(20)

Enclosures

Arizona
RT-00000F-02-0271, T00000A-97-0238 and
T-01051B-02-0871
MTI 01-001

INTERVENOR: Mountain Telecommunications, Inc.

REQUEST NO: 001

Please calculate and disclose to Mountain Telecommunications Inc. ("MTI") the credits MTI would be eligible to receive under the proposed Settlement Agreement. Provide calculations of each type of credit as well as the aggregate credits that would be due under the proposed Settlement Agreement. MTI asks that the answer to this data request be redacted if the data request and corresponding response is forwarded to other CLEC parties.

RESPONSE:

Assuming MTI satisfies the criteria for eligibility, its credit under Section 3 of the Settlement Agreement would be approximately \$235,417. Under Section 4 our records show MTI's credit to be \$2,472. Our records indicate no purchases of UNE-P by MTI, thus no credit is owed under Section 5. The total credit amount \$237,889.

Respondent: Arturo Ibarra

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Post-hearing Brief of Mountain Telecommunications, Inc. on all parties of record in this proceeding by mailing a copy thereof, properly addressed with first class postage prepaid on the following:

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Dated at Washington, D.C. this 15th day of October, 2003.


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