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

) Docket No. T-00000A-97-0238
)
) AT&T'S COMMENTS ON STAFF'S
) FINAL REPORT ON QWEST'S
) COMPLIANCE WITH PUBLIC
) INTEREST AND TRACK A
)

AT&T Communications of the Mountain States, Inc. and TCG Phoenix
(collectively "AT&T") hereby file their Comments on Staff's Final Report on Qwest's
Compliance with Public Interest and Track A, dated May 1, 2002 (the "Staff Report").

I. INTRODUCTION

While concurring with some of the ancillary conclusions found in the Staff
Report, AT&T strongly disagrees with Staff's ultimate conclusion that a grant of section
271 authority to Qwest at this time is in the public interest. On the contrary, AT&T
concludes that such a grant of section 271 authority is entirely premature.

AT&T's comments in this regard relate to the following specific issues:

a. While Staff concludes that Qwest has satisfied its Track A compliance
obligations, Staff's own supporting statistics relating to competitive local
exchange carrier ("CLEC") provisioning of residential service reveal that
only a *de minimis* number of residential customers are served by new
entrants. As a result, Qwest is not in compliance with its Track A
obligations.

b. Although Staff mentions the parties' positions relating to the price
squeeze issue, the Staff Report fails to analyze or otherwise address the
issue. The Staff Report also fails to address the issue of insufficient
margins with respect to UNE-P pricing.

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c. The Staff Report improperly brushes aside substantial and *undenied* allegations of continual, on-going anticompetitive behavior on Qwest's part. In addition, the Staff Report ignores *specific findings* by an independent tribunal of a continual pattern of bad faith and deliberate deceit on Qwest's part.

d. Recent revelations that Qwest has failed and refused to file interconnection agreements should cause this Commission to pause in its deliberation of the public interest analysis.

e. Staff's perception that the working relationship between Qwest and the new entrants has improved to the point of being acceptable is incorrect.

f. Staff's insistence that a grant of section 271 authority to Qwest be subject to certain conditions is a good start, but does not go far enough.

AT&T will address each of these items separately. AT&T also believes a number of other conclusions raised by Staff are not supportable.

II. ARGUMENTS

A. **Qwest Is Not In Compliance With Track A**

Facing a dispute between and among the parties relating to the accuracy of Qwest's data in connection with market penetration of new entrants, the Staff wisely decided to engage in its own investigation of the matter. To this end, Staff conducted a survey of some 39 service providers operating within the state, with an eye to determining, *inter alia*, how many business and residential access lines are served by CLECs in Qwest's service territory. The results of this survey show that only 3 percent of Arizona's residential access lines are served by CLECs.¹ Indeed, this is more than six years after passage of the Telecommunications Act of 1996. Thus, in absolute terms, only three percent of the residential local exchange market is competitive.

¹ Staff Report at 19.

The Staff Report demonstrates that resale is not a viable option for new entrants seeking to establish themselves in the local exchange market. The survey conducted by Staff indicates that only two CLECs serve residential customers through resale, and that *less than one-half of one percent* of Arizona residential customers are served by these resellers. In fact, the Staff Report explains, “there are 9,575 residential resale customers, almost all of which are served by *one* CLEC.”²

Thus, of the three avenues offered to CLECs for market entry under the Act -- namely resale, purchase of UNEs, and the construction of separate facilities -- two avenues, resale and UNE purchase, are ineffective in allowing new entrants into the residential local exchange market in Arizona. Quite simply, this is contrary to the letter and spirit of the Act.

By any measure, only a *de minimis* number of residential customers is currently being served by CLECs in the state of Arizona. Qwest therefore is not in compliance with Track A, and its section 271 application should be denied until such time as it can demonstrate that the number of residential customers served by CLECs is something greater than *de minimis*.

B. The Staff Report Fails To Address Either The Price Squeeze Issue, Or The Inadequate Margins Available Through The Purchase And Sale Of UNE-P

Although the Staff Report mentions each of the parties’ positions regarding the price squeeze issue, Staff fails to analyze or otherwise address the issue. In addition, the Staff Report fails to examine the question of available margins associated with the purchase of UNE-P.

² Staff Report at 20 (emphasis added).

AT&T addressed the price squeeze issue at length in this proceeding. The issue received additional attention as a result of the decision in *Sprint Communications, L.P. v. FCC*, 274 F.3d 549, 2001 WL 1657297 (D.C. Cir.). The court in *Sprint v. FCC, supra*, held specifically that the FCC should have given more thorough consideration to the question of what margins might be available to CLECs. In this context, Judge Williams wrote:

In fact, the Commission gave appellants' claim rather a brush-off. First the Commission said that under its reading of the Act, the "profitability" considerations raised by appellants were "irrelevant" because the Act directed it to assure that the rates were cost-based, "not [to determine] whether a competitor can make a profit by entering the market." [Citation omitted.] This, of course, is unresponsive. The issue is not guarantees of profitability, but whether the UNE pricing selected here *doomed* competitors to failure.³

However, the Staff Report omits any examination of the issue.

AT&T believes that, at a minimum, until such time as AT&T's price squeeze arguments have been addressed, the section 271 application should be held in abeyance.

C. The Staff Report Improperly Ignores On-Going Bad Acts And Anticompetitive Behavior On The Part Of Qwest

The Staff Report ignores the substantial evidence on the record relating to Qwest's continual and persistent bad acts and anticompetitive behavior. On the one hand, the Staff Report dismisses the use of "allegations" to establish a pattern of behavior; and, on the other hand, the Staff Report also dismisses the use of adjudicated decisions to establish such a pattern of behavior, on the grounds that such matters are "closed."⁴ This approach essentially creates a Catch-22 for anyone attempting to establish what CLECs witness every day: the continuing pattern of anticompetitive

³ *Sprint Communications* at 554 (emphasis in original).

⁴ Staff Report at 73 and 75.

behavior in which Qwest engages. From the outset, AT&T urges the Commission to abandon this logical bind which the Staff has imposed on the new entrants in this matter.

Several considerations become important in this context. First of all, in this proceeding, Qwest has never denied any of the allegations which AT&T has brought before the Commission in this docket. So rather than being “mere” allegations, these assertions are better characterized as “unrefuted.” Second, AT&T has not “saved up” these allegations to spring them at this moment. Instead, these are matters which have come to light in a variety of forums, and in a variety of ways. AT&T is reporting to the Commission now because they have become relevant to these proceedings. Third, there are specific instances in which an independent fact finder has determined that the wrongful behavior by Qwest was part of a pattern, that this pattern was on-going, and that it continued at least until the day the decision was written.⁵

Moreover, the number and intensity of the investigations into Qwest’s various activities is only accelerating. New proceedings relating to secret agreements have been initiated in Arizona, Washington, Iowa, New Mexico, and Wyoming. The Securities and Exchange Commission has initiated a well-publicized investigation into Qwest’s accounting practices. The Arizona Attorney General has commenced a consumer fraud suit against Qwest, and the Attorney General argues Qwest should not get section 271 relief until the suit is resolved. Each of these proceedings reflects directly on the ethics

⁵ See for example, the decision of the Minnesota Commission in the AT&T UNE testing complaint; and the opinion of the Washington commission on the NID padlocking episodes. On April 11, 2002, the Minnesota Public Utilities Commission issued a notice advising the parties that on April 9, 2002, “the Commission concluded that Qwest had knowingly and intentionally violated its interconnection agreement with AT&T and state and federal law in its dealings with AT&T regarding UNE-P testing and that Qwest engaged in anti-competitive behavior in its dealings with AT&T and UNE-P testing.” Notice of Opportunity to File Supplements to Record, Docket No. P-421/C0I-391 (Minn. PUC April 11, 2002). *AT&T v. Qwest*, Docket No. UT-003120, Second Supplemental Order Granting Motion to Amend Answer, Denying Emergency Relief and Denying Motion For Summary Determination (Wash. UTC April 5, 2001).

of Qwest management. Under these circumstances, a grant of section 271 authority to this Company at this time is simply not in the public interest.

D. Recent Revelations That Qwest Has Failed And Refused To File Certain Interconnection Agreements Should Cause This Commission To Halt Consideration Of Qwest's 271 Application

As previously stated, on the one hand, the Staff Report refuses to consider allegations of wrong doing on Qwest's part; and on the other hand, the Staff Report also refuses to consider specific findings of misconduct by Qwest. The Staff has initiated an independent investigation to analyze agreements Qwest has not filed with the Commission for approval under section 252(e) of the Act. As pointed out in AT&T's Motion to Supplement the Record, the failure to file interconnection agreements is a violation of section 252(e) of the Act, and the FCC has stated that it is interested in violations of FCC and state rules⁶ and regulations as part of its public interest analysis.⁷ The Staff agreed with AT&T that any party should be free to raise in the public interest phase of the section 271 proceeding, "any ultimate determination that Qwest violated Section 252(e) of the Act in not filing some of these agreements with it."⁸

AT&T recommends that the Commission stay any final determination on the public interest portion of Qwest's section 271 application until a determination is made whether any of the agreements filed with the Commission on May 9, 2002, should have been filed for Commission approval under section 252(e) of the Act. A stay in the public interest portion of Qwest's section 271 application is necessary and appropriate because

⁶ Ariz. Adm. Code, R14-2-1506.

⁷ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (rel. Aug. 19, 1997), ¶ 397.

⁸ Staff's Response to AT&T's Motion to Require Qwest to Supplement the Record at 3.

of the direct relationship between the existence of these unfiled agreements and Qwest's unsupported assertions that it provides interconnection on a nondiscriminatory basis.

E. Staff's Perception That The Working Relationship Between Qwest And The CLECs Has Improved To The Point Of Being Acceptable Is Incorrect

AT&T takes issue with Staff's conclusion that the working relationship between Qwest and the CLECs is improving.⁹ While numerous examples *may* be cited by Staff as evidence to show that the relationship between CLECs and Qwest has improved, AT&T would caution the Commissioners from reaching a wrong impression. Qwest continues to take positions and initiate practices that strain the relationship between Qwest and the CLECs. The filing of a Local Service Freeze Tariff is just one example.

F. Staff Does Not Adequately Address AT&T's Access Issue

AT&T raised the issue of Qwest's high access charges and the affect of failing to reduce Qwest's switched access charges to forward-looking cost before Qwest obtains section 271 relief.¹⁰ AT&T explained that Qwest can reduce long distance rates to imputed costs, leave no margins to the interexchange carriers, and still receive 7 cent profit on every minute of access (based on the federal CALLS rate as a surrogate for forward-looking economic cost).

Staff states this matter is being addressed in the access proceeding, Docket No. T-00000D-00-0672.¹¹ However, Staff notes, this proceeding has been continued *indefinitely*, even though all interested parties have or should have responded to Staff's recommended procedural order under the terms of the Procedural Order. There is no reason for this case to be continued indefinitely. However, as long as it is, there is no

⁹ Staff Report at 89.

¹⁰ See Staff Report, ¶¶ 78-79 and 98.

¹¹ *Id.*, ¶ 299.

action being taken on AT&T's concerns that Qwest can squeeze competitors out of the long distance market if Qwest receives section 271 relief.

AT&T believes the Commission should address and respond to AT&T's public interest concerns that AT&T has raised regarding Qwest's high access charges before section 271 relief is granted.

III. CONCLUSION

AT&T believes that a grant of section 271 authority to Qwest at this time is only premature. AT&T urges the Commission to halt consideration of the public interest portion of Qwest's section 271 application until the matters addressed by AT&T herein are resolved.

Respectfully submitted this 14th day of May 2002.

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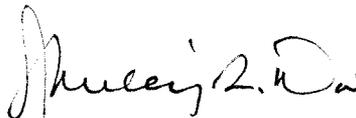
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