

ORIGINAL



0000110008

BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

Arizona Corporation Commission

DOCKETED

MAY 28 2002

2002 MAY 28 P 4: 21

AZ CORP COMMISSION
DOCUMENT CONTROL

DOCKETED BY	<i>msc</i>
-------------	------------

IN THE MATTER OF US WEST COMMUNI-
CATIONS, INC.'S COMPLIANCE WITH
§ 271 OF THE TELECOMMUNICATIONS
ACT OF 1996

Docket No. T-00000A-97-238

**QWEST'S RESPONSE TO TOUCH AMERICA'S COMMENTS
ON STAFF'S MAY 1, 2002 REPORT ON QWEST'S COMPLIANCE
WITH PUBLIC INTEREST AND TRACK A**

Qwest Corporation ("Qwest"), through undersigned counsel, hereby responds to "Touch America's Comments on Staff's May 1, 2002 Report on Qwest's Compliance with Public Interest and Track A," dated May 15, 2002 ("Touch America's Comments").¹

DISCUSSION

Following issuance by the Staff of its Proposed Report on Qwest's Compliance with Public Interest and Track A ("Staff Report"),² Touch America has filed comments taking issue with Staff's findings. Touch America has demonstrated no basis for submitting these belated

¹ Touch America's Comments on Staff's May 1, 2002 Report on Qwest's Compliance with Public Interest and Track A, *In the Matter of U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. T-0000A97-0238 (May 15, 2002) ("Touch America's Comments").

² Staff's Proposed Report on Qwest's Compliance with Public Interest and Track A, *In the Matter of U S WEST Communications, Inc.'s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. T-00000A-97-0238 (May 1, 2002) ("Staff Report").

comments. While it previously provided Staff with copies of the FCC complaints that are the focus of these comments,³ Touch America has never entered any appearance in this long-standing docket, nor filed any prior explanation of why these FCC complaints are relevant to it. The Commission should not tolerate Touch America's decision to surface in this proceeding until only *after* Staff has made findings with which Touch America disagrees.

In any event, Touch America's Comments add nothing to the complaints it has filed before the FCC, and provide no basis for Staff to alter its conclusions. Staff determined in its Staff Report that because "[b]oth Complaints are currently pending with the FCC and no ruling has yet been rendered," it "[could not] conclude at this time that granting Qwest 271 relief is inconsistent with the public interest."⁴ Touch America offers no reason for Staff to reconsider its judgment with regard to these FCC complaints: it simply argues that they are "moving forward."⁵ Indeed, the fact that the FCC has set a briefing schedule in one case, and ordered supplemental briefing on Qwest's motion to dismiss or stay in the other,⁶ simply underscores that there still have been no "conclusive FCC findings regarding these allegations."⁷

Indeed, Touch America's complaints before the FCC do not involve local competition issues at all. Rather, they allege that Qwest's in-region dark fiber and lit fiber capacity IRU transactions (1) amount to the provision of in-region interLATA services in violation of section 271, and (2) violate the terms of the FCC's U S WEST-Qwest merger orders regarding

³ See Staff Report at ¶¶ 322, 327.

⁴ Staff Report at ¶ 330.

⁵ Touch America's Comments at 2.

⁶ See Federal Communications Commission Letter Order, *Touch America, Inc. v. Qwest Communications International Inc.*, File No. EB-02-MD-003 (Apr. 26, 2002).

⁷ Staff Report at ¶ 330.

divestiture of such services.⁸ The FCC has made clear that disputes arising from BOC merger orders that are currently being considered in its complaint dockets are best resolved in those other pending dockets, not imported into the consideration of section 271 applications.⁹ In its most recent section 271 order, the FCC also expressly rejected the idea that the section 271 process should “resolve all complaints, *regardless of whether they relate to local competition*, as a precondition to granting a section 271 application.”¹⁰ Touch America’s complaints have demonstrated no relationship to such local competition issues, involve a dispute about the scope of the FCC’s own merger orders, and should not be smuggled into this wholly separate 271 application proceeding. Additionally, in this same section 271 order, the FCC rejected an attempt by intervenors to address issues in a section 271 docket that are already pending before the FCC in another docket because they relate to “open issues before [the] Commission” in another proceeding.¹¹

⁸ Touch America also mentions other pending proceedings in federal district court in Colorado, which Touch America describes as involving overbilling by Qwest. *See* Touch America’s Comments at 3. Since Qwest has moved to dismiss the foregoing divestiture complaint before the FCC in light of the overlapping issues with this federal court proceeding, and the FCC has sought further briefing on that question (reflected in the order attached to Touch America’s Comments), this matter is even less appropriate for consideration in this case. Moreover, the “services” for which Qwest has allegedly overbilled again have nothing to do with issues of local competition.

⁹ *See* Memorandum Opinion and Order, *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd 14147 ¶ 79 (2001) (noting that concerns with “Verizon’s compliance with the conditions of the Bell Atlantic/GTE merger . . . [should] be appropriately addressed in the Commission’s” merger audit proceedings, not the public interest inquiry).

¹⁰ Memorandum Opinion and Order, *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, FCC 02-147, CC Docket No. 02-35, ¶ 305 (rel. May 15, 2002) (“*BellSouth Georgia/Louisiana Order*”) (emphasis added).

¹¹ *BellSouth Georgia/Louisiana Order* at ¶ 208.

As Qwest has demonstrated to the FCC, the FCC previously approved the Qwest transactions at issue,¹² in light of Qwest's formal Divestiture Compliance Report detailing the aspects of its plans for complying with section 271 prior to the merger. That report specifically stated that Qwest was not planning to unwind any pre-existing sales of IRUs "both for the conveyance of dark fiber and for the conveyance of lit fiber capacity," and that it "intend[ed] to continue selling similar telecommunications facilities in the future."¹³ As the FCC subsequently concluded: "Based upon the description of the customers, services and assets being transferred to Touch America," the "proposed divestiture . . . will ensure that Qwest will not provide prohibited in-region interLATA services."¹⁴ Qwest has also demonstrated to the FCC in response to Touch America's complaints that the sale of IRUs constitutes the conveyance of network facilities, not the provisioning of "telecommunications services." As the FCC has held, "the one-time transfer of ownership and control of an interLATA network is not an interLATA service, which means it falls entirely outside the section 271/272 framework that governs interLATA services."¹⁵ In addition, Qwest has demonstrated to the FCC that the provisioning of a "network element" — defined in the Act as "a facility or equipment used in the provision of a

¹² See Answer of Defendants Qwest Communications International Inc., Qwest Corporation, and Qwest Communications Corporation, *Touch America, Inc. v. Qwest Communications International Inc.*, FCC File No. EB-02-MD-003 (Mar. 4, 2002).

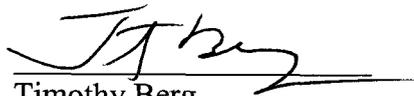
¹³ Divestiture Compliance Report, *Qwest Communications International Inc. and U S WEST, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, FCC CC Docket No. 99-272, at 28-30 (filed Apr. 14, 2000).

¹⁴ Memorandum Opinion and Order, *Qwest Communications International Inc. and U S WEST, Inc.*, 15 FCC Rcd 11909 ¶¶ 5, 13 (2000).

¹⁵ See, e.g., Second Order on Reconsideration, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 12 FCC Rcd 8653 ¶ 54 n.110 (1997).

telecommunications service”¹⁶ — does not itself constitute the provision of “telecommunications.”¹⁷ The FCC is reviewing these matters to determine whether Qwest’s interpretation of the FCC’s own orders, and the provisions of federal law, are reasonable. The Staff appropriately concluded that such questions are most appropriately resolved by the FCC, and Touch America has advanced no reasons why that conclusion was incorrect.

Respectfully submitted this 28th day of May 2002.



Timothy Berg
Theresa Dwyer
FENNEMORE CRAIG
3003 North Central Avenue, Suite 2600
Phoenix, AZ 85012
Phone: 602-916-5000
Fax: 602-916-5999

John Munn
Qwest Corporation
1801 California Street, Suite 4900
Denver, CO 80202
(303) 672-5823

ATTORNEYS FOR QWEST CORPORATION

ORIGINAL +10 copies filed this 28th day of May, 2002:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
Phoenix, AZ 85007

¹⁶ 47 U.S.C. § 153(29).

¹⁷ Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776 ¶ 157 (1997), *aff'd sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

COPY delivered this 28th day of May, 2002:

Maureen A. Scott
Legal Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
Phoenix, AZ 85007

Ernest G. Johnson, Director
Utilities Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
Phoenix, AZ 85007

Lyn Farmer, Chief Administrative Law Judge
Jane Rodda, Administrative Law Judge
Hearing Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington
Phoenix, AZ 85007

Caroline Butler
Legal Division
ARIZONA CORPORATION COMMISSION
1200 W. Washington St.
Phoenix, AZ 85007

COPY mailed this 28th day of May, 2002:

Eric S. Heath
SPRINT COMMUNICATIONS CO.
100 Spear Street, Suite 930
San Francisco, CA 94105

Thomas Campbell
LEWIS & ROCA
40 N. Central Avenue
Phoenix, AZ 85004

Joan S. Burke
OSBORN MALEDON, P.A.
2929 N. Central Ave., 21st Floor
PO Box 36379
Phoenix, AZ 85067-6379

Thomas F. Dixon
WORLD COM, INC.
707 N. 17th Street #3900
Denver, CO 80202

Scott S. Wakefield
RUCO
2828 N. Central Ave., Ste. 1200
Phoenix, AZ 85004

Michael M. Grant
Todd C. Wiley
GALLAGHER & KENNEDY
2575 E. Camelback Road
Phoenix, AZ 85016-9225

Michael Patten
ROSHKA, HEYMAN & DEWULF
400 E. Van Buren, Ste. 900
Phoenix, AZ 85004-3906

Bradley S. Carroll
COX COMMUNICATIONS
20402 North 29th Avenue
Phoenix, AZ 85027-3148

Daniel Waggoner
DAVIS, WRIGHT & TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101

Traci Grundon
DAVIS, WRIGHT & TREMAINE
1300 S.W. Fifth Avenue
Portland, OR 97201

Richard S. Wolters
Maria Arias-Chapleau
AT&T Law Department
1875 Lawrence Street, #1575
Denver, CO 80202

Gregory Hoffman
AT&T
795 Folsom Street, Room 2159
San Francisco, CA 94107-1243

David Kaufman
E.SPIRE COMMUNICATIONS, INC.
343 W. Manhattan Street
Santa Fe, NM 87501

Diane Bacon, Legislative Director
COMMUNICATIONS WORKERS OF AMERICA
5818 N. 7th St., Ste. 206
Phoenix, AZ 85014-5811

Philip A. Doherty
545 S. Prospect Street, Ste. 22
Burlington, VT 05401

W. Hagood Bellinger
5312 Trowbridge Drive
Dunwoody, GA 30338

Joyce Hundley
U.S. DEPARTMENT OF JUSTICE
Antitrust Division
1401 H Street N.W. #8000
Washington, DC 20530

Andrew O. Isar
TELECOMMUNICATIONS RESELLERS ASSOC.
4312 92nd Avenue, NW
Gig Harbor, WA 98335

Raymond S. Heyman
ROSHKA, HEYMAN & DEWULF
400 N. Van Buren, Ste. 800
Phoenix, AZ 85004-3906

Thomas L. Mumaw
SNELL & WILMER
One Arizona Center
Phoenix, AZ 85004-0001

Charles Kallenbach
AMERICAN COMMUNICATIONS SVCS, INC.
131 National Business Parkway
Annapolis Junction, MD 20701

Gena Doyscher
GLOBAL CROSSING SERVICES, INC.
1221 Nicollet Mall
Minneapolis, MN 55403-2420

Andrea Harris, Senior Manager
ALLEGIANCE TELECOM INC OF ARIZONA
2101 Webster, Ste. 1580
Oakland, CA 94612

Gary L. Lane, Esq.
6902 East 1st Street, Suite 201
Scottsdale, AZ 85251

Kevin Chapman
SBC TELECOM, INC.
300 Convent Street, Room 13-Q-40
San Antonio, TX 78205

M. Andrew Andrade
TESS COMMUNICATIONS, INC.
5261 S. Quebec Street, Ste. 150
Greenwood Village, CO 80111

Richard Sampson
Z-TEL COMMUNICATIONS, INC.
601 S. Harbour Island, Ste. 220
Tampa, FL 33602

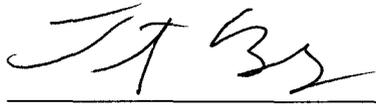
Megan Doberneck
COVAD COMMUNICATIONS COMPANY
7901 Lowry Boulevard
Denver, CO 80230

Richard P. Kolb
Vice President of Regulatory Affairs
ONE POINT COMMUNICATIONS
Two Conway Park
150 Field Drive, Ste. 300
Lake Forest, IL 60045

Janet Napolitano, Attorney General
OFFICE OF THE ATTORNEY GENERAL
1275 West Washington
Phoenix, AZ 85007

Steven J. Duffy
RIDGE & ISAACSON, P.C.
3101 North Central Ave., Ste. 1090
Phoenix, AZ 85012

Teresa Tan
WorldCom, Inc.
201 Spear Street, 9th Floor
San Francisco, CA 94105



PHX/1305431.1/67817.150

PHX/1305857.1/67817.150