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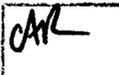
Arizona Corporation Commission

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AUG 22 2002

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

Docket No. T-00000A-97-238

QWEST'S OPPOSITION TO AT&T'S MOTION FOR STAY OF PROCEEDING OR, IN THE ALTERNATIVE, TO REOPEN THE RECORD REGARDING THE PUBLIC INTEREST

Qwest Corporation ("Qwest"), through undersigned counsel, hereby responds to AT&T's "Motion for Stay of Proceeding or, in the Alternative, to Reopen the Record Regarding Public Interest," dated August 12, 2002 ("AT&T's Motion").¹

INTRODUCTION AND SUMMARY

AT&T's Motion asks the Commission to stay these proceedings indefinitely while the Federal Communications Commission ("FCC") considers two complaints filed by interexchange carrier Touch America in FCC dockets wholly separate from the section 271 proceedings.² The

¹ Motion for Stay of Proceeding or, in the Alternative, to Reopen the Record Regarding Public Interest, *In the Matter of U S WEST Communications, Inc.'s Compliance with § 271 of the Telecommunications Act of 1996*, Docket No. T-0000A97-0238 (Aug. 12, 2002) ("AT&T's Motion").

² *Touch America v. Qwest Communications Int'l, Inc. et al.*, FCC File No. EB-02-MD-003; *Touch America v. Qwest Communications Int'l, Inc. et al.*, FCC File No. EB-02-MD-004.

two complaints have nothing to do with the competitiveness of the local exchange market in Arizona or any other state; instead, they allege that sales of capacity by Qwest Communications Corporation (“QCC”) on its long-distance fiber network (in the form of infeasible rights of use, or “IRUs”) violate the FCC orders approving the merger between Qwest’s parent and U S WEST, Inc., and amount to the provision of in-region interLATA “services” within the meaning of 47 U.S.C. § 271(a). AT&T alternatively asks this Commission to duplicate the FCC’s work by reopening the public interest record to conduct its own separate investigation into Touch America’s allegations.

The Commission Staff has already reviewed these Touch America complaints, acknowledged that they “are currently pending with the FCC” (and hence “consist[] only of allegations”), and determined that it “cannot conclude at this time that granting Qwest 271 relief is inconsistent with the public interest.”³ While Staff did say it would later examine the FCC’s eventual resolution of these complaints,⁴ it made clear that the complaints did not present any “absolute” issue for the public interest inquiry,⁵ and it certainly did *not* suggest that the public interest determination (let alone the entire section 271 process) had to await a ruling from the FCC on this wholly unrelated matter.

While AT&T repeatedly makes vague references to the separate investigations of the Securities and Exchange Commission and the Department of Justice, the FCC is the only agency considering the proper classification of Qwest Communications Corporation’s (“QCC’s”) lit-fiber IRUs under the Telecommunications Act.

³ See 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 (June 20, 2002), at ¶ 330 (“Staff Report”).

⁴ *Id.*

⁵ *Id.* at 383.

AT&T now contends that a recent press release by Qwest's parent, Qwest Communications International, Inc. ("QCII"), concedes the truth of Touch America's FCC allegations by "admit[ting] that [QCC's] so-called 'lit capacity IRUs' are not facilities but are in fact services,"⁶ and asks that this entire proceeding be brought to a halt. In fact, AT&T's supposed "admission" is a gross distortion of what the press release actually says, manufactured by means of creative editing. Nothing in the release constitutes any kind of concession concerning the issues still under review by the FCC, much less warrants revisiting Staff's conclusions. There is no basis at all for delaying these proceedings pending resolution of Touch America's FCC complaints, since those complaints — apart from being meritless — have absolutely nothing to do with whether the local market in Arizona is open to competition. Nor is there any reason for this Commission to accept AT&T's invitation to conduct a wasteful and duplicative investigation of matters that AT&T concedes are already under consideration elsewhere.

DISCUSSION

1. AT&T's suggestion that Qwest or its parent has now somehow conceded the merits of Touch America's allegations is patently false. The supposed "concession" is a single, misleadingly paraphrased half-sentence taken out of context from a QCII press release dated July 28, 2002.⁷ The press release announced that, as part of its ongoing review of its accounting policies and practices, QCII had determined that it had misapplied its own policies for booking revenue from optical capacity sales in some cases, which could require the company to adjust its

⁶ AT&T's Motion at 4.

⁷ Press Release, Qwest Communications International, Inc., "Qwest Communications Provides Current Status of Ongoing Analysis of Its Accounting Policies and Practices" (July 28, 2002) ("Press Release").

financial statements once the review process was complete. The adjustments, if they are required, would “correct the period in which the revenue was recognized with respect to some transactions,” and would “reverse the recognition of revenue with respect to other transactions.”⁸

One paragraph of the release describes the potential impact these adjustments could have on the company’s financials:

On an after-tax basis, the gross margin of all optical capacity sales was approximately \$140 million and \$290 million in 2000 and 2001, respectively. Any adjustment of all revenue for optical capacity sales may have a material affect [*sic*] on operating income, net income or earnings per share. *Depending upon the ultimate determination of the appropriate accounting treatment, any decreases in these amounts in the periods in which they have been recorded would be partially offset by the amounts that would be recognized over the lives of the agreements if the optical capacity asset sales were instead treated as operating leases or service contracts.*⁹

AT&T misleadingly truncates and paraphrases this last sentence to state, “More particularly, Qwest admits that, in some instances, the ‘optical capacity asset sales’ *should have been* ‘instead treated as operating leases or services contracts.’”¹⁰ Read in full and in context, it obviously says no such thing. Far from somehow conceding, as AT&T suggests, that “‘lit-capacity IRUs’ are not facilities but are in fact services” for purposes of section 271(a),¹¹ the sentence in the press release specifically refers to “optical capacity *asset* sales,” notes that the accounting treatment of these sales has yet to be determined, and identifies two of several possible outcomes that would require the sales revenues to be booked differently. Nothing in the press release speaks to the legal classification of IRUs under the Telecommunications Act at all, as opposed to their potential accounting treatment. AT&T never explains how a change in the

⁸ *Id.* at 1.

⁹ *Id.* at 2 (emphasis added).

¹⁰ AT&T’s Motion at 4.

¹¹ *Id.*

accounting treatment of an asset transaction could possibly transform the underlying asset into a “service” within the meaning of the federal Telecommunications Act. Indeed, none of the relevant FCC precedent distinguishing facilities from services turns on the accounting treatment of the transaction in question.

2. Moreover, as Qwest briefed in full to the FCC¹² and summarized for the Commission,¹³ there is no merit to Touch America’s and AT&T’s suggestion that QCC’s sales of lit-fiber capacity involve the improper provision of in-region interLATA services, and nothing in QCII’s July 28 press release changes that fact. Most notably, in the course of reviewing the QCII-U S WEST merger, the FCC considered QCC’s IRU transactions under section 271 and permitted them to continue. QCII’s Divestiture Compliance Report expressly described QCC’s practice of conveying capacity on its network to third parties “in the form of IRU contracts, both for the conveyance of dark fiber and for the conveyance of lit fiber capacity.” QCII stated its legal position that capacity IRUs constitute “telecommunications facilities and not services” and made clear that it “intend[ed] to continue selling similar telecommunications facilities in the future.”¹⁴ Based on this Divestiture Compliance Report, the FCC concluded that the merger would “proceed in compliance with the requirements of Section 271,” and expressly found that

¹² See Brief on Legal Permissibility of Qwest IRUs, *Touch America v. Qwest Communications International, Inc., Qwest Corporation, and Qwest Communications Corporation*, File No. EB-02-MD-003 (filed Aug. 2, 2002); Reply Brief on Legal Permissibility of Qwest IRUs, *Touch America v. Qwest Communications International, Inc., Qwest Corporation, and Qwest Communications Corporation*, File No. EB-02-MD-003 (filed Aug. 16, 2002).

¹³ See 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, *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 28, 2002), at 2-5.

¹⁴ Divestiture Compliance Report, *Qwest Communications Int’l, 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*, CC Dkt. No. 99-272, at 28-30 (filed Apr. 14, 2000).

the divestiture outlined in the Report “will ensure that Qwest will not provide prohibited in-region interLATA services.”¹⁵

This conclusion was fully consistent with other FCC precedent finding that the conveyance of rights to use specific network capacity is not itself the provision of “services” as used in section 271(a) of the 1996 Act. For example, the FCC has held that sales of capacity on a satellite transponder do not involve the provision of “telecommunications” (and hence cannot involve the provision of “telecommunications services”) by the satellite operator.¹⁶ Similarly, when a customer acquires lit capacity in a submarine cable, either by term lease or IRU, that customer is deemed “facilities-based” and not a reseller of services.¹⁷ The FCC has defined UNEs, including lit fiber transport capacity, as a “network element”¹⁸ — that is, as “a facility or equipment used in the provision of a telecommunications service.”¹⁹ And when a CLEC provides local services using UNEs, the CLEC is deemed a “facilities-based” carrier for purposes of section 271(c)(1)(A) analysis, not a reseller of services.²⁰ The FCC has long made clear that the transfer of such a network facility does not constitute the provision of “services” within the meaning of section 271(a): “the one-time transfer of ownership and control of an interLATA

¹⁵ Memorandum Opinion and Order, *Qwest Communications Int’l Inc. and U S WEST, Inc.*, 15 FCC Rcd 11909, 11912, 11915-16 ¶¶ 5, 13 (2000).

¹⁶ See Fourth Order on Reconsideration, *Federal-State Board on Universal Service*, 13 FCC Rcd 5318, 5479 ¶¶ 290-91 (1997).

¹⁷ See Report and Order, *Market Entry and Regulation of Foreign-Affiliated Entities*, 11 FCC Rcd 3873, 3923 ¶ 130 (1995); 47 C.F.R. §§ 63.09(a), 63.11(b)(2).

¹⁸ See Third Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3842-43 ¶¶ 322-23 (1999).

¹⁹ 47 U.S.C. § 153(29). The FCC has further made clear that a carrier does not provide “telecommunications” (and hence cannot be providing “telecommunications service”) when it leases network elements to another carrier. First Report and Order, *Federal-State Joint Bd. on Universal Service*, 12 FCC Rcd 8776, 8864-65 ¶ 157 (1997), *aff’d sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

network is not an interLATA service, which means it falls entirely outside the Section 271/272 framework that governs interLATA services.”²¹ Nothing in the July 28 press release suggests that the FCC’s prior evaluation was wrong or even has any bearing on the underlying legal question.

3. In any event, this entire dispute is — and continues to be — irrelevant to the section 271 process. First, the FCC has made clear that disputes arising from alleged violations of federal telecommunications law that are currently being considered in the FCC’s complaint dockets are best resolved in those other pending dockets, and not in connection with section 271 applications.²² This is especially true where, as here, the dispute involves a BOC’s compliance with its FCC-imposed merger conditions.²³ Second, the FCC has repeatedly rejected AT&T’s suggestion that the section 271 process must resolve — or await the resolution elsewhere of — “all complaints, *regardless of whether they relate to local competition*, as a precondition to granting a section 271 application.”²⁴ The FCC reiterated this position in its most recent section 271 order, stating unequivocally that allegations that “do not relate to the openness of the local

²⁰ *Id.*

²¹ 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, 8683, n.110 (1997), *aff’d on other grounds sub nom. Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997). Under the precedent noted above, transfer of rights to use a network facility for less than its useful life also is not the provision of “telecommunications.” See cases cited in notes 15-19 *supra*.

²² See, e.g., Memorandum Opinion and Order, *In the Matter of Joint Application by BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd 9018, 9139 ¶ 208 (2002) (stating that the section 271 process should not be used to litigate “open issues before [the] Commission” in other dockets, given “the time constraints and specialized nature of the section 271 process”) (“*BellSouth Georgia/Louisiana Order*”).

²³ See Memorandum Opinion and Order, *Application of Verizon New York Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd 14147, 14182-83 ¶ 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).

²⁴ *BellSouth Georgia/Louisiana Order* ¶ 305 (emphasis added).

telecommunications markets to competition” — like Touch America’s allegations regarding QCC’s sales of capacity on its long-distance fiber network — present no reason to “deny or delay [an] application under the public interest standard.”²⁵

4. For these reasons, every state commission (or commission-appointed fact-finder) to rule on Touch America’s FCC complaints about QCC’s sales of IRUs has refused to find them reason to deny Qwest’s section 271 applications. Just this week, for example, the administrative law judge considering public interest issues in Minnesota (where AT&T filed an identical motion to this one) declared that “Touch America’s complaints have no relationship to local competition issues . . . and should not be considered as part of this § 271 proceeding.”²⁶ The Colorado Public Utilities Commission similarly declined to “indulge” Touch America’s effort to “leverage collateral disputes into [the section 271] process.”²⁷ And the Washington Utilities and Transportation Commission ruled that “[i]t does not make sense for this Commission to initiate a parallel investigation [to the FCC’s] on the issue, given that the issue arises out of the FCC’s

²⁵ Memorandum Opinion and Order, *Application by Verizon New Jersey Inc. et al. for Authorization To Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, FCC 02-189 ¶ 190 (rel. June 24, 2002).

²⁶ See Findings of Fact, Conclusions of Law, and Recommendation, *In the Matter of a Commission Investigation into Qwest’s Compliance with Section 271(d)(3)(C) of the Telecommunications Act of 1996 That the Requested Authorization Is Consistent with the Public Interest, Convenience and Necessity*, OAH Docket No. 6-2500-14488-2, PUC Docket No. P-421/CI-01-1373 (Aug. 20, 2002), at 22. The ALJ further acknowledged that “[t]he FCC has determined that disputes arising from BOC merger orders that are currently being considered in its complaint dockets are best resolved in those other pending dockets, and not in connection with section 271 applications.” *Id.* The ALJ was ruling on the underlying public interest issues, not the AT&T motion itself, which he certified to the full commission. See Order Certifying Motion to Commission, PUC Docket No. P-421/CI-96-1114, OAH Docket No. 12-2500-14473-2; PUC Docket No. P-421/CI-01-1373, OAH Docket No. 6-2500-14488-2 (Aug. 13, 2002).

²⁷ Commission Decision Regarding OSS, Section 272, Public Interest, Track A, Change Management Process, and Data Reconciliation and Commission Decision Regarding the Commission’s Recommendation to the Federal Communications Commission Concerning Qwest Corporation’s Compliance with Section 271, *In the Matter of the Colorado Public Utilities Commission’s Recommendation to the Federal Communications Commission Regarding Qwest Corporation’s Provision of In-Region, Inter-LATA Services in Colorado*, Docket No. 02M-260T (June 13, 2002), at 42.

merger order and another proceeding would cause duplication of effort and cost by all parties involved.”²⁸ All other state commissions to have considered this matter have agreed.²⁹ Indeed, AT&T’s gambit was tried once before by Touch America itself, which filed motions in the thirteen Qwest states other than Arizona seeking to reopen the public interest records to conduct additional investigation of its allegations. Not a single state granted the motion,³⁰ and the chairman of the Colorado commission even declared that “were this a regular commission

²⁸ 39th Supplemental Order; Commission Order Approving SGAT and QPAP, and Addressing Data Verification, Performance Data, OSS Testing, Change Management, and Public Interest, *In the Matter of the Investigation Into U S West Communications, Inc.’s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. UT-003022 (July 1, 2002), at 84.

²⁹ See, e.g., Commission Final Decision on Qwest Corporation’s Compliance with Section 271, *In the Matter of U S WEST Communications, Inc.’s Motion for an Alternative Procedure to Manage its Section 271 Application*, Case No. USW-T-00-31 (Jul. 8, 2002), at 7-8 (Idaho); Final Report on Qwest’s Compliance with the Public Interest Requirement, *In the Matter of the Investigation into Qwest Corporation’s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. D2000.5.70 (July 8, 2002), at 46 (“As [Touch America’s] complaint is before the FCC, the FCC is the proper regulatory agency to decide the complaint”) (Montana); Transcript of Special Meeting, *U S WEST Communications, Inc. Section 271 Compliance Investigation*, Case No. PU-314-97-193 (June 12, 2002), at 2-3 (North Dakota).

³⁰ See, e.g., Order Denying Petition to Intervene and Motion to Reopen Proceedings, *In re: U S WEST Communications, Inc. n/k/a/ Qwest Corporation*, Docket Nos. INU-00-2, SPU-00-11 (July 8, 2002) (Iowa); E-mail Order Denying Touch America, Inc.’s Motion To Reopen Issues and Petition To Intervene, *In the Matter of a Commission Investigation Into Qwest’s Compliance with Section 271(d)(3)(C) of the Telecommunications Act of 1996 That the Requested Authorization Is Consistent with the Public Interest, Convenience and Necessity*, Docket No. P-421/CI-01-1373 (June 20, 2002) (Minnesota); Notice of Commission Action, *In the Matter of the Investigation into Qwest Corporation’s Compliance with Section 271 of the Telecommunications Act of 1996*, Utility Division Docket No. D2000.5.70 (June 20, 2002) (Montana); Motion To Intervene and To Reopen 271 Proceedings Denied, *In the Matter of Qwest Corporation, Denver, Colorado, Filing Its Notice of Intention To File Section 271(c) Application with the FCC and Request for Commission To Verify Qwest Corporation’s Compliance with Section 271(c)*, Application No. C-1830 (June 12, 2002) (Nebraska); Ruling Denying Petition To Intervene, *In the Matter of the Investigation into the Entry of Qwest Corporation into In-Region InterLATA Services under Section 271 of the Telecommunications Act of 1996*, Docket No. UM 823 (June 13, 2002) (Oregon); Order Denying Motion To Reopen Record; Order Denying Petition To Intervene; Order Extending Briefing Schedule TC01-165, *In the Matter of the Analysis of Qwest Corporation’s Compliance with Section 271(c) of the Telecommunications Act of 1996*, Docket No. TC 01-165 (June 27, 2002), at 2 (South Dakota); 35th Supplemental Order Denying Petition for Intervention, Motion To Reopen, *In the Matter of: U S WEST Communications, Inc.’s Compliance with Section 271 of the Telecommunications Act of 1996*, Docket No. UT-003022 (June 27, 2002) (Washington); Order Denying Touch America Petition To Intervene and Motion To Reopen Issues, *In the Matter of the Application of Qwest Corporation Regarding Relief Under Section 271 of the Federal Telecommunications Act of 1996, Wyoming’s Participation in a Multi-State Section 271 Process, and Approval of its Statement of Generally Available Terms*, Docket No. 700000-TA-00-599, Record No. 5924 (June 27, 2002) (Wyoming).

Colorado APA administrative docket, [he] would seriously discuss sanctions” for Touch America’s attempt “to try and cause delays.”³¹

CONCLUSION

AT&T’s attempt to delay this proceeding while the FCC considers complaint allegations unrelated to any question of whether the Arizona local exchange market is open is entirely groundless, as is its alternative request for this Commission to conduct a wasteful and duplicative investigation of its own. AT&T’s motion should therefore be denied.

DATED this 22nd day of August, 2002.



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³¹ Hearing Transcript, *In the Matter of the Colorado Public Utilities Commission’s Recommendation to the Federal Communications Commission Regarding Qwest Corporation’s Provision of In-Region, Inter-LATA Services in Colorado*, Docket No. 02M-260T (June 13, 2002), at 42:6-12 (statement of Chairman Raymond Gifford).

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A handwritten signature in black ink, appearing to read "Dan Schulz", is written over a horizontal line.

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