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BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

	DOCKET NO. T-00000A-97-0238
IN THE MATTER OF U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996	**AT&T'S REPLY TO QWEST'S OPPOSITION TO AT&T'S MOTION TO STAY, OR IN THE ALTERNATIVE, TO REOPEN THE RECORD REGARDING THE PUBLIC INTEREST**

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively "AT&T") hereby reply to Qwest's Opposition to AT&T's Motion for Stay of Proceeding or, in the alternative, to Reopen the Record Regarding the Public Interest.

I. INTRODUCTION

A review of Qwest's Opposition only serves to confirm that AT&T's Motion should be granted. Qwest's Opposition does not resolve the most important issue – that Qwest is providing in-region, interLATA services in violation of the Telecommunications Act of 1996 ("Act").[1] Qwest argues that the issue of the accounting classification of indefeasible rights of use ("IRUs") has nothing to do with whether the local market in Arizona is open to

[1] Qwest notes that Qwest Communications Corporation ("QCC") provides the lit-fiber IRUs. Opposition at 1, n. 2. However, section 271(a) of the Act prohibits the RBOC and its affiliates from providing in-region, interLATA service until authority is obtained.

competition. Qwest's focus is misplaced. The issue is whether Qwest is violating a fundamental provision of section 271 of the Act.[2]

II. DISCUSSION

Qwest suggests that AT&T has taken portions of the press release out of context. The press release quoted by Qwest states, in part:

> 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 amounts that would be recognized over the lives of the agreements *if the optical capacity sales were instead treated as operating leases or service contracts.*[3]

The Press Release is clear that if the IRUs are not booked as optical asset sales, the IRUs will be booked as operating leases or service contracts. This is the point AT&T is making – if they are not asset sales, Qwest is providing a telecommunication service.

Qwest suggests that "[n]othing in the press release speaks of the legal classification of IRUs under the Telecommunications Act at all, as opposed to their potential accounting treatment." Opposition at 4. Qwest is arguing form over substance. If it claims that the optical sales are services for accounting purposes, it does not matter what label you attach to the sales, Qwest is providing services in violation of the Act. Qwest suggests that it can book

[2] Section 272 is implicated as well. Qwest acknowledged in its Application filed at the FCC for Idaho, Montana, North Dakota, Wyoming and New Mexico that "[t]he lease agreement for fiber optical capacity was not accounted for, billed (including interest charges) or posted to the website during the examination period." *See* Qwest's Application, Exhibit JLB-272-17, Affidavit of Judith L. Brunsting (http://www.qwest.com/about/policy/ldReentry/Fed271/month1/brief.html). Were the assets transferred to QCC by Qwest transferred on an arm-length basis? Have the transfers been reduced to writing for public inspection? Have the same terms been offered to other carriers on a nondiscriminatory basis?

On August 29, 2002, the Federal Communications Commission released a Notice (DA 02-2129) in WC Docket Nos. 02-148 and 02-189 in response to a Qwest *ex parte*, wherein Qwest revises certain declarations in its section 271 applications addressing compliance with section 272. The FCC seeks comment on Qwest's statements regarding its ability to certify that its financial statements are accounted for in accordance with Generally Accepted Accounting Principles ("GAAP").

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

a service as a service but call it something else to avoid the legal prohibitions of the Act. This is nonsense.

An analogy may help to explain the issue more clearly. Suppose an employer classifies a person working for it as an independent contractor instead of an employee. Generally, the employer is not required to withhold taxes for an independent contractor. The federal government may audit the employer and argue that the person is an employee subject to withholding taxes. The government will look at certain criteria when determining how to classify the person, for example, does the employer direct or control the person's work or is the person responsible for providing a final product. If the government classifies the person as an "employee," the employer must collect and remit the taxes, regardless of whether the employer classifies the person as an independent contractor. For purposes of the statute, the government defines what an "employee" is.

In the present case, Qwest claims there is an asset sale, not the provision of a service. Under the Act, Qwest cannot provide in-region, interLATA service until it complies with section 271. Is Qwest providing a "service" as defined by the Act? The FCC has to make a determination. It has to look at the facts. If Qwest treats the IRUs as services for accounting purposes, this is one fact the FCC can use to find that Qwest is providing a service instead of having sold an asset. If the FCC decides the IRUs are the provision of in-region, interLATA service, for *purposes of the Act,* it is a service, no matter what Qwest wants to call it.

Qwest suggests that because the FCC reviewed the IRUs in the context of the merger, the FCC considered the IRU transactions under section 271 and permitted them to continue. Opposition at 5. But the FCC's review was conducted before the Press Release and the Touch America complaint. The FCC reviewed the merger based on Qwest's representations at the time of the merger. Even Qwest acknowledges that the FCC is reviewing the issue again. *Id.* at 1, n. 2.

Qwest argues that Qwest's capacity sales, or IRUs, are "fully consistent with other FCC precedent findings that the conveyance of rights to use specific network capacity is itself not the provision of 'services' as used in Section 271(a) of the 1996 Act." *Id.* at 6. Qwest's observation that the FCC considers a UNE based CLEC to be a facilities-based provider is inapplicable.[4] If, as Qwest claims, the issue is whether there is, in fact, a conveyance of rights to use "specific network capacity," this is a question of fact.

Qwest argues the issue is irrelevant to section 271 because Qwest alleges: 1) that disputes arising from alleged violation of the Act are being considered in complaint dockets, not in section 271 proceedings; 2) the FCC has rejected arguments that the section 271 process must await the resolution of all complaints; and 3) allegations that do not relate to the openness of the local markets to competition present no reason to deny an application under the public interest standard. *Id.* at 7-8. None of the reasons Qwest provides are determinative for one very important reason: the issue is not whether Qwest has violated the merger guidelines or whether Touch America has filed a complaint, but whether Qwest is providing in-region, interLATA services in violation of the Act. This issue is fundamental to Qwest's application.

Qwest suggests that other states have decided not to look at this issue. That is their decision. Even Staff's review preceded the Press Release and the FCC's decision to review the treatment of the IRUs.

[4] But if Qwest is correct and the Commission considers IRUs to be comparable to UNEs, then Qwest has a duty to make them available pursuant to sections 251 and 252 of the Act.

AT&T's Motion is based, in part, on Qwest's public statements that it may reclassify the accounting treatment of its capacity sales and that the FCC is looking into the matter. The questions raised are questions of fact. This Commission has a number of options: 1) wait for the FCC to make its finding and conclusions; 2) review the facts and make its own finding and conclusions; or 3) ignore the matter and make its findings and conclusions on Qwest's compliance with section 271. Only the last option places the Commission in the position of recommending that Qwest be granted in-region, interLATA long distance authority while Qwest is in violation of the statute prohibiting it from providing the very same service. It would make a mockery of the whole section 271 process if the Commission grants section 271 authority at the same time Qwest is violating the prohibition.

AT&T respectfully requests that its Motion be granted.

Dated this 3rd day of September, 2002.

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(T-00000A-97-0238)

I certify that the original and 10 copies of AT&T's Reply to Qwest's Opposition to AT&T's Motion to Stay, or in the Alternative, to Reopen the Record Regarding the Public Interest were sent by overnight delivery on September 3, 2002 to:

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