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ORIGINAL OPEN MEETING AGENDA ITEM

BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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IN THE MATTER OF 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 OF STAFF'S PUBLIC INTEREST REPORT**

AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively, "AT&T") hereby provide their comments on Staff's Supplemental Report on Qwest's Compliance with Public Interest and Track A dated August 19, 2003 ("Staff Report").

I. INTRODUCTION

What stands out in Staff's Report is the recurring problems Qwest Corporation ("Qwest") has with legal authority. There were the two complaints filed by the Arizona Attorney General, Staff Report ¶ 32; the Section 252(e) proceeding, *id.,* at ¶¶ 33 & 44, which identified illegal preferences under Arizona law and violations of Commission rules; the Section 271 sub-docket, *id.*, ¶ 45; the Show Cause proceeding, *id.,* at 46; and the accounting problems under investigation by the Securities and Exchange Commission *id.,* at ¶ 44. The Staff Report does not mention the criminal indictments of Qwest management employees and continuing investigations by the U.S. Department of Justice. Although a number of these issues have been resolved, or are in the process of being

resolved, the question that must be asked is whether it is in the public interest to allow Qwest to enter another telecommunications market. Staff dismisses these issues by reference to settlements by the Arizona Attorney General and the Global Settlement and concludes that it is in the public interest for Qwest to enter the in-region, interLATA long distance market. AT&T disagrees.

The Staff Report also fails to adequately address a number of issues raised by AT&T. One of the issues Staff does not address explicitly is the on-going bad acts and anticompetitive behavior by Qwest. Only recently Qwest attempted to change the process for obtaining DS-1 loops by making it more cumbersome and lengthy and by adding a new fee, and it was only after the competitive local exchange carriers ("CLECs") identified the process failures to Qwest and Staff and several CLECs filed complaints that Qwest decided to back off and revert to the old process.[1] Qwest claims it was merely requiring its employees to follow an ignored, existing policy but the change had a dramatic effect on the CLECs' businesses.

Quite simply, there is a failure by Qwest to demonstrate its commitment to comply with the requirements of federal law, State law and regulations and to competition generally. When Qwest's Section 272 compliance was thrown into doubt, Qwest responded with new procedures. When its Section 252(e) failings were raised, it put in place more procedures. When the Show Cause case raised problems with wholesale rate changes, even more new procedures were put in place. When its change management process was shown to be inadequate, Qwest completely redesigned the process. Staff relies on recitals in the Settlement Agreement as insurance that Qwest will

[1] The fact that the issue was raised in the Arizona Section 271 proceeding may have had something to do with it also.

comply with the law in the future. The promises are illusory and lack any consideration because Qwest has always been obligated, and remains legally obligated, to follow the law. Nor does Staff explain why the Settlement Agreement will change Qwest's behavior when the *law* has not done so in the past.

II. ARGUMENTS

A. Global Settlement

In the Staff Report, Staff makes reference to the Global Settlement. Staff Report ¶¶ 48-50. The Staff Report states that the Agreement is intended to settle all matters related to the Sections 252(e) proceeding, the Show cause proceeding and the Section 271 sub-docket and, apparently based on the recitals contained in the Agreement, Staff believes it provides assurances that Qwest will not engage in similar conduct in the future. *Id.*, ¶ 53.

Staff's Report explains the allegations raised in each of the three proceedings but fails to summarize Staff's conclusions. It is relevant to the public interest what Staff did conclude with respect to each of these cases.

1. Section 252(e) Proceeding

In the Section 252(e) proceeding, Staff concluded that:

(a) Qwest failed to comply with the following statutes and regulations: 47 U.S.C. § 252(e), Ariz. Adm. Code R14-2-1112, R14-2-1307, R14-2-1308, R14-2-1506 and R14-2-1508 (Kalleberg Direct at 2);

(b) "The decision to enter into a unique and discriminatory relationship with Eschelon was an intentional and willful decision by Qwest" (*Id.* at 23);

(c) "The relationship between McLeod, U S WEST and later, Qwest, was unique and discriminated against other CLECs who could not view and possibly opt-in to the agreements between the parties since they were not publicly filed" (*Id.* at 35);

(d) "The decision to enter into a unique and discriminatory relationship with McLeod was an intentional and willful decision by Qwest" (*Id.* at 39);

(e) "Staff has determined that with regard to the Eschelon and McLeod agreements and non-participation clauses contained in unfiled agreements, Qwest's actions were intentional, willful, and contrary to Commission rule and processes" (*Id.* at 76);

(f) "The signal must be sent that Qwest's actions are highly egregious and unacceptable and the negative impact of these actions must be remedied" (*Id*).

2. Section 271 Sub-Docket

In the Section 271 sub-docket Staff found and concluded that:

(a) "Information gathered by Staff shows that Qwest attempted to silence two of its largest wholesale competitors, among others, during critical timeframes of the Commission proceedings" (Section 271 sub-docket – Staff Report and Recommendation (May 6, 2003) at 2);

(b) "Qwest used the [Eschelon] agreement on several occasions to keep Eschelon from appearing in Section 271 workshops and Change Management Process ('CMP') proceedings where it would have brought issues to the Commission's attention which would have entered into the Commission's

ultimate determination as to whether Qwest met certain Section 271 checklist requirements" (*Id*);

(c) "The evidence shows that Qwest intentionally prevented the carriers from raising issues that would have reflected adversely on Qwest's compliance with Section 271 requirements. These actions by Qwest could have disadvantaged competitors, and interfered with the integrity of the Commission's processes." *Id.,* at 3.

3. Show Cause Proceeding

In the Show Cause proceeding, the Staff concluded that:

(a) "six months is clearly an excessive and unreasonable amount of time for the implementation of the wholesale rates ordered by Decision No. 64922" (Rowell Direct at 8);

(b) "the five-month average indicates that Qwest's wholesale rate change system as a whole is unreasonably slow and inefficient"(*Id.,* at 9);

(c) "Implementing the wholesale rates for states that had pending 271 applications ahead of the Arizona rates would have been the result of a conscious decision on the part of Qwest's management" (*Id.,* at 11);

(d) "in spite of the Commission's order to implement the Arizona rates immediately, Qwest diverted resources to the implementation of rates for the nine states listed in Table 2" (*Id.,* at 15).

By simply referring to the Settlement Agreement in the Staff Report and suggesting the Agreement resolves the issues, the Commission is denied the opportunity to review the conclusions reached by Staff with respect to each of these proceedings. By

ignoring its own previous findings and conclusions Staff's report minimizes the seriousness of the findings of Staff's earlier reports and recommendations. Staff findings and recommendations raise serious public interest issues regarding Qwest's qualifications to enter the in-region, interLATA market.

B. Non-Participation Clauses

"[T]he Section 271 sub-docket was specifically set up to examine the issue of Qwest's interference with the Arizona Section 271 process and proceeding, through the use of non-participation and/or non-opposition with certain CLECs." Section 271 sub-docket – Staff Report and Recommendation (May 6, 2003) at 2. Staff found information that showed that "Qwest attempted to silence two of its largest wholesale competitors, among others, during critical timeframes of the Commission proceeding." *Id.* Furthermore, Staff found that Qwest used the clauses "to keep Eschelon from appearing in Section 271 workshops and Change Management Process ("CMP") proceedings where it could have brought issues to the Commission's attention which would have entered into the Commission's ultimate determination as to whether Qwest met certain requirements." *Id.* Staff also concluded that "[t]he evidence shows that Qwest intentionally prevented the carriers from raising issues that would have reflected adversely on Qwest's compliance with Section 271 requirements. These actions by Qwest could have disadvantaged competitors, and interfered with the integrity of the Commission's processes." *Id.*, at 3. Strong words. Yet Staff suggests these findings are no longer relevant to the public interest determination because Qwest has entered into a Settlement Agreement.

One example that affected all CLECs is insightful. Qwest paid UNE-P credits to Eschelon pursuant to the terms of one of the secret agreements because Eschelon was not receiving records from Qwest that documented all the calls being made by Eschelon's customers.[2] The provision of call detail was and continues to be a Section 271 requirement.

The contracts with Eschelon go back to November 15, 2000. On December 21, 2001, Cap Gemini Telecom Media & Networks U.S., Inc. ("CGE&Y") issued its Final Report of the Qwest OSS Test, Version 1.0. According to CGE&Y, there was no problem with the adequacy of Qwest's DUF records. However, in early 2002 it was brought to the attention of CGE&Y that Qwest's provision of Daily Usage Files ("DUF") was suspect. CGE&Y did additional testing in January 2002. Qwest initially failed the test. *See* Incident Work Order 2129; Final Report of Qwest OSS Test, Version 3.0 (May 3, 2002), §2.4.5. It took corrective action and multiple retests for Qwest to pass.

If Eschelon had been allowed to participate, evidence of inadequate DUF records would have surfaced in late 2000. For over two years Qwest's inability to provide adequate DUF records went unquestioned even though the issue remained unremedied. The problem with Qwest's DUF records, the fact the Eschelon was silenced from bringing the issue to the attention of the Commission, and the fact that the CLECs were unaware of the incomplete DUF records during the period raises serious public interest concerns. Yet the damages suffered by the CLECs because of Qwest's actions were not addressed anywhere in either the Section 271 proceeding or the Show Cause proceeding.

[2] The UNE-P credit was a $13 per month per UNE-P line, later raised to $16 per month, to compensate Eschelon for its inability to bill interexchange carriers for all switched access because the records provided by Qwest to Eschelon were inadequate. Docket No. RT-00000F-02-0271, Joint Ex. 1, Nos. 4 and 5.

Nor does Staff suggest anywhere that the Global Settlement or remedies are meant to address this past harm to CLECs.

Staff held a supplemental workshop on July 30-31, 2002, "in order to give parties to the Qwest Section 271 proceeding in Arizona, who were precluded from actively participating in the process through unfiled agreements with Qwest, and who believed there were unresolved issues resulting form this non-participation, an opportunity to voice the issues, and for Qwest to respond. Staff draft Order, July 30-31 Workshop, ¶ 4. The draft Order addresses 14 disputed issues. Some of the issues may not go as far back as November 2000, but it does demonstrate a significant number of issues were raised by several of the CLECs that were prevented from participating. The Staff Report on public interest makes no reference of the July 30-31 Workshop, and AT&T can only speculate that the Settlement Agreement is intended to resolve the issues raised in the July 30-31 workshop as well.

The Commission should consider whether it is in the public interest to permit Qwest to enter the in-region, interLATA market when Qwest tried to subvert the process used to determine whether Qwest met the legal requirements that would permit it to enter that very same market

C. Access Charges

Qwest has stated publicly that its rates for intrastate, interLATA call may be as low as $.05 per minute. The average rate for switched access in Arizona is $.033. This means that the cost to AT&T for an intrastate call is $.066 for a call requiring AT&T to pay originating and terminating switched access. This is above the rate Qwest proposes

to charge. This does not include any other tariffed rates for services and non-tariff costs that Qwest must impute per Commission rules. R14-2-1310(C).

In the Opinion and Order dismissing an access complaint filed by MCI, the Commission recognized U S WEST's access charges were not set at economic cost. The Commission dismissed the case because it believed it could not change Qwest's rates for access without reviewing the impact on Qwest's overall rate of return.[3] However, the Commission stated: "We find that the pricing of access charges should be taken into consideration as part of any request by U S WEST to enter into Arizona's interLATA toll market. Opinion and Order, Decision No. 60596 (Jan. 14, 1998).

On September 5, 2000, the Staff initiated an investigation of the cost of telecommunications access. Docket No. 00000D-00-0672. This case was suspended indefinitely at the request of Staff. Staff correctly notes that the intrastate access charge issue has not been resolved. Staff Report, at 11, n. 6.

In the Commission's decision approving the Settlement Agreement between Staff and Qwest regarding Qwest Price Cap Plan, the Commission addressed AT&T's argument that the price floor for services was ambiguous. Staff argued the Commission should address concerns regarding the Commission's imputation rules in a separate proceeding and not as part of the review of the Plan itself.[4]

Among other things, the Commission ordered Staff to open a docket "to investigate and rectify possible ambiguities involving the pricing of telecommunications

[3] Qwest is now under price caps. Opinion and Order, Decision No. 63487 (March 30, 2001). Qwest recently filed a petition to renew the Plan, with modifications. Docket No. T-01051B-03-0454.
[4] The Settlement Agreement entered into between Qwest and Staff failed to reduce Qwest's access rates to economic cost.

services and imputation in particular."[5] Opinion and Order, Decision No. 63487 (March 30, 2001). This docket has not been initiated.

Very high access rates still are a problem in Arizona, and allowing Qwest in the interLATA market will only make matters worse. The switched access rates of Qwest and its proposed rate will put A&T and other carriers in a price squeeze. Until switched access rates are lowered or the appropriate price floor for Qwest's services is established, it is not in the public interest to allow Qwest in the in-region, interLATA market.

D. Wholesale Rate Changes

In the Show Cause proceeding Staff found that Qwest's wholesale rate change process is unreasonable and discriminatory. Staff proposed that Qwest be required to change its wholesale rate changes within 30 days. Staff indicated this problem has Section 271 implications. *See* AT&T's Comments on Staff's Draft Order on Qwest's OSS at 2-7.

Staff failed to address the Section 271 implications in either the OSS Staff Reports or the public interest Staff Report. Staff, therefore, has failed to explain how the Staff's recent 60 day proposal contained in the Settlement Agreement meets the FCC's requirements for billing accuracy.

There is no question that the bills received by the CLECs from Qwest are inaccurate until the wholesale rate changes are implemented. The FCC has addressed billing accuracy and explained why bills must be accurate.

> Inaccurate or untimely bills can impede a competitive LEC's ability to compete in many ways. First, a competitive LEC's must spend additional monetary and personnel resources reconciling bills and pursuing bill corrections. Second, a competitive LEC

[5] The Commission also held that originating access would be considered an essential facility for purposes of the imputation rule until the investigation is complete.

> must show improper overcharges as current debts on its balance sheet until the charges are resolved, which can jeopardize its ability to attract investment capital. Third, competitive LECs must operate with a diminished capacity to monitor, predict and adjust expenses and prices in response to competition. Fourth, competitive LECs may lose revenue because they generally cannot, as a practical matter, back-bill end users in response to an untimely wholesale bill from an incumbent LEC.[6]

Staff has not responded to the FCC's concerns and explained why they are inapplicable to untimely wholesale rate changes or why the 60 days Staff has accepted for Qwest to make wholesale rate changes addresses the FCC's concerns.[7]

III. CONCLUSION

It is AT&T's position that the Commission should comprehensively review Qwest's past conduct as a corporation generally, its conduct in regulatory proceedings before the Commission and specifically its conduct in the Section 271 proceedings. The FCC has emasculated the public interest analysis by focusing on each act of the Company in isolation and discounting its relevance or significance. It is hard to imagine what it would take for the FCC to find an application not in the public interest. However, the Arizona Corporation Commission is entitled under the Act to make its recommendation regarding Qwest's compliance with the competitive checklist and its fitness to enter into the in-region, interLATA market. The Commission should make its position known whether or not Qwest files its application with the FCC prior to rendering its final recommendation and regardless of the fact that the FCC has essentially eliminated the state's role in the public interest determination.

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[6] *In the Matter of Application of Verizon Pennsylvania 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 Pennsylvania,* CC Docket No. 01-138, Memorandum Opinion and Order, FCC 01-269 (rel. Sept. 19, 2001), ¶ 23.

[7] AT&T believes the issue raised by AT&T has OSS implications. Staff disagrees, believing the parties can raise the issue in the public interest phase. In any event the issues raised by the FCC apply without a doubt to the failure of Qwest to make timely wholesale rate changes.

It is AT&T's position it is not in the pubic interest for Qwest to enter into the in-region, interLATA market in Arizona. Furthermore, Qwest should not be allowed into the interLATA market until access rates are reduced to economic cost and Qwest is prevented from squeezing its competitors out of the long distance market.

Respectfully submitted this 29th day of August, 2003.

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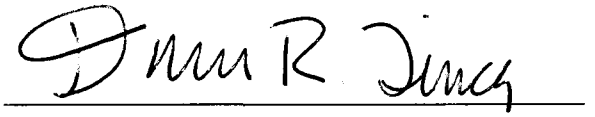
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