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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

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Arizona Corporation Commission

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AZ CORP COMMISSION
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ARIZONA CORPORATION
COMMISSION
Complainant.

v.

QWEST CORPORATION
Respondent.

DOCKET NO. T-01051B-02-0871

AT&T'S BRIEF

AT&T Communications of the Mountain States, Inc. ("AT&T") hereby files its brief in the above referenced proceeding.

I. INTRODUCTION

This proceeding was initiated by the Arizona Corporation Commission in response to Staff's Memorandum dated November 26, 2002. Basically, Staff's Memorandum stated that Qwest Corporation's ("Qwest") failure to timely implement the Commission's Phase II Opinion and Order, Decision No. 64922, was intentional and unreasonable. Also, Qwest is able to implement retail rate changes in one billing cycle, or 30 days; and, according to Staff, Qwest's average implementation time is 93 business days. Accordingly, Qwest's process to make wholesale rate changes was unreasonable and discriminatory. Therefore, Staff recommended that the Commission issue a

Complaint and Order to Show Cause. Staff provided a proposed order along with its Memorandum.

At an Open Meeting held on December 2, 2002, the Commission approved the Complaint and Order to Show Cause. Decision No. 65450 was released on December 12, 2002. The Commission essentially adopted Staff's proposed order.¹

Decision No. 65450 contains 3 counts. The Commission ordered Qwest to appear and show cause:

- 1(a). Why its failure to implement the rates required by Decision No. 64922 is not unreasonable;
- 1(b). Why its implementation of rates in the 9 other states with pending 271 applications at the FCC ahead of Arizona is not unreasonable;
- 1(c). Why its failure to notify the Commission of the delay and seek relief from the Order is not unreasonable;
- 2(a). Why it should not be held in contempt of a Commission Order and assessed fines for failure to implement the rates approved by Decision No. 64922 within a reasonable amount of time;
- 2(b). Why it should not be held in contempt of a Commission Order and assessed fines for deliberately delaying implementation of the wholesale rate changes in Arizona until it had implemented the wholesale rate changes in at least 9 other states in which it has 271 applications pending at the FCC;
- 2(c). Why it should not be held in contempt of the Commission for attempting to discourage parties from notifying the Commission of its failure to comply with Decision No. 64922; and
3. Why it should not be required to implement billing systems and process changes that will enable wholesale rates to be implemented within 30 days.

¹ The Commission inserted an additional paragraph at paragraph 32 and renumbered the previous paragraph 32 along with all remaining paragraphs.

II. ARGUMENTS

A. Counts I and II

After reading Staff's prefiled testimony, AT&T did not see any reason to prefile any testimony regarding Counts I and II. AT&T supports Staff's position on these Counts. AT&T believes Staff's findings and conclusions are supported by the record, and AT&T also believes Staff's proposed fines are more than reasonable, and arguably too low. The evidence provides adequate justification for Staff to have recommended even greater fines.

Staff recommended total fines for Counts I and II in the amount of \$189,000. This total is based on a calculation of \$1500 times 126 days. For Count I, Staff is recommending a fine of \$94,500 (\$750 x 126). For Count II, Staff is also recommending a fine of \$94,500 (\$750 x 126). Staff Ex. 1 at 16. Staff noted that a maximum of \$630,000 could be assessed (\$5,000 x 126 days) for each count. *Id.* at 15-16.²

The 126 days is calculated from August 11, 2002, to December 15, 2002. *Id.* at 16. Staff arrived at the August 11 date by crediting Qwest sixty calendar days from June 12, 2002, the effective date of the Phase II Order.³ According to Staff, "Qwest has indicated that sixty days are normally scheduled to implement cost docket decisions." *Id.*

² See also Staff Ex. 1 at 14, 11. 14-18 and at 15-16 1. 23, and 11. 1-2. For both counts a maximum fine of \$1,260,000 could be assessed.

³ Decision No. 64922, the Phase II Order, was released on June 12, 2002, and was effective immediately.

at 14.⁴ The December 15 date is the date Qwest supposedly completed the implementation process associated with Decision No. 64922.⁵ *Id.* at 7.

Staff's proposed fines represent 15% of the maximum allowable fines. AT&T believes the fines proposed by Staff may be too low for a number of reasons. First, Qwest arguably should have been given credit for only 30 calendar days, the time interval which Staff proposes for Qwest to implement wholesale rates.⁶ *Id.* at 20. This would add another 30 days to the 126 days proposed by Staff for calculating the fines.

Second, Staff argued that "[t]he level of fines being recommended by Staff includes consideration of, and is mitigated by, Qwest's efforts to retroactively remedy this situation thru credits and interests as applicable." *Id.* at 14.⁷ To "retroactively remedy thru credits" simply means that Qwest gave the competitive local exchange carriers ("CLECs") credits back to effective date of the Phase II Order.⁸ In other words, Qwest simply paid CLECs in December 2002 and January 2003 the funds the CLECs were due, based on Staff's proposal, in July 2002, and based on Qwest's target date, in September 2002. AT&T has to question whether paying the new rates more than 6 months after the Phase II Order justifies mitigating the fines.

Staff also reduced the size of the fines because 1) "Qwest acknowledges that its failure to notify the Commission of the delay in implementing Decision No. 64922 was

⁴ However, *see id.* at 5: "Qwest stated in data responses that its overall implementation time for wholesale rate changes is approximately 60 business days, or approximately 3 months." When asked why Staff picked 60 calendar days, Staff's witness replied: "Again, looking at the evidence before us, we felt that 60 calendar days was reasonable, 60 business days was probably excessive." TR 15 (June 13, 2003).

⁵ As Staff witness Rowell noted, "Rates for the various affected CLECs were implemented on the next billing cycle." *Id.* at 7. The CLECs did not receive credits and interest on December 15, the date of implementation.

⁶ *See* TR 13 for factors Staff used in picking 30 calendar days.

⁷ Qwest paid interest in the amount of 6% on the unpaid balance. TR 87. *See also id.* at 16.

⁸ "Q. So it's the fact that they fulfilled the legal obligation in and of itself that mitigates the fines somewhat? A. Yes." TR 16

inappropriate,” 2) “Qwest indicated that they are re-examining their rate implementation process with the intent of making improvements ...”, and 3) “only one CLEC (AT&T) has come forward regarding this issue.” *Id.* at 16-17. Although Qwest’s acknowledgment that the delay was inappropriate is commendable, it does not fully compensate CLECs for the fact that they were denied use of the money during the period the new wholesale rates were being implemented.⁹

Qwest also may have been re-examining the implementation process, but Qwest’s witness testified the new process improvements has only reduced the implementation process to 90 calendar days,¹⁰ far short of Staff’s proposed 30 calendar days.¹¹ The fact that AT&T was the only one that complained may be due to a number of reasons, some of which may not be benign.

AT&T believes the mitigating factors enumerated by Staff do little to overcome the more damaging findings and conclusions of Staff:

1. “Staff believes that six months is clearly an excessive and unreasonable amount of time for the implementation of the wholesale rates ordered by Decision No. 64922.” *Id.* at 8.
2. “Staff can only conclude that any decision to implement one states’ rates ahead of others [Arizona] would have had to come from Qwest’s management. 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.
3. “Qwest, by prioritizing recent wholesale rate changes region-wide in accordance with its 271 applications pending at the FCC, acted intentionally and deliberately to further delay implementation of a

⁹ Staff’s witness testified he did factor in to his proposed level of fines the fact that the CLECs did not have use of the money during the 6 month period. TR 16-17.

¹⁰ TR 91.

¹¹ TR 13.

Commission Order which required Qwest to implement the new wholesale rates in Arizona, effective immediately.” Decision No. 645450, ¶ 27.¹²

4. “Staff submits that Qwest’s failure to implement the wholesale rate changes required by Decision No. 64922 was in part deliberate and violates state law since Qwest acted unilaterally to delay implementation of the Commission’s Order without Commission approval.” *Id.*, ¶ 21.
5. “In addition, another contributing factor is that Qwest has structured its systems and processes such that implementation of wholesale rate changes is a cumbersome, manual process requiring more time that is reasonable or necessary.” *Id.*, ¶ 22.
6. Qwest has not provided any persuasive justification for the disparate process used for the implementation of its retail and wholesale rate changes, and Staff believes that Qwest’s process is unreasonable. Decision No., 65450, ¶ 25.
7. “Qwest’s wholesale rate change process is unreasonable when compared with its retail rate change process.” *Id.*, ¶ 35
8. “The inability of Qwest to make wholesale rate changes in a reasonable amount of time and to change accurate rates to CLECs creates an unlevel playing field and results in discriminatory treatment by Qwest relative to how it treats its retail customers. ... The preceding issues have implications for application for 271 relief as well.” *Id.*, ¶ 36.

The new wholesale rates were implemented in Arizona on December 15, 2002.

Qwest received approval for its 9-state application on December 23, 2002. Qwest’s witness acknowledged that delaying the voluntary rate reductions for the states in the 9-state 271 application could have conceivably delayed approval of its 9-state application. TR 95. Furthermore, Qwest’s witness acknowledged that if the Federal Communications Commission (“FCC”) rejected its application, Qwest would have remained unable to sell long distance in the 9 states and this would have delayed receipt of revenues from in-region, interLATA services. TR 95-96.

¹² Staff’s witness testified that Staff agrees with each of the factual assertions, findings and conclusions contained in the Decision. TR 11-12.

In the first four months of sales in the 9-state region, Qwest obtained 530,000 long distance customers. That is more than 125,000 new customers a month. AT&T Ex. 4.¹³ It is obvious Qwest's management had a strong incentive to make the voluntary rate reductions related to the 9-state 271 application before the changes were made in Arizona.

AT&T does not question Staff's motives for the level of fines proposed by Staff. It is AT&T's intent simply to show that Staff's fines are at the low end of the maximum level of fines allowed by law and that the facts permit the Commission to assess a greater amount of fines if it desires.

B. Count III

Count III of the Decision alleges that "Qwest's wholesale rate change process is unreasonable when compared with its retail rate change process." Decision No. 65450, ¶ 35. This "creates an unlevel playing field and results in discriminatory treatment by Qwest relative to how it treats its retail customers." *Id.*, ¶ 36.

Given the importance of this issue, Qwest should be required to make changes to its wholesale billing rate change systems and processes to ensure comparability with its retail billing rate systems and processes. Staff believes that Qwest wholesale systems and processes should be designed to enable the implementation of wholesale rate changes within 30 business days. *Id.*, at ¶ 38.

Staff's witness testified that Qwest has already acknowledged that their current wholesale rate implementation process is inadequate." Staff Ex. 1 at 19. Staff recommends in its testimony that "Qwest be ordered to implement billing and systems process changes that will allow it to implement wholesale rate changes within 30 days."

¹³ TR 96. The 530,000 customers were obtained in the first months of 2003. AT&T Ex. 4.

Id., at 20.¹⁴ Staff recommends that Qwest have 4 months from the date of a decision in this docket to make the necessary process changes. *Id.*

Qwest's witness discussed a number of product enhancements that Qwest has taken to speed implementation process for future cost dockets. Qwest Ex. 12-14. However, during cross-examination, Qwest's witness testified that after implementation of these enhancements, Qwest can implement wholesale rate changes in 90 calendar days, although "Qwest is continuing to try and shave time off that." TR 90-92. After all Qwest's enhancements, Qwest can implement a retail change in one billing cycle, approximately 30 calendar days, versus 90 calendar days for wholesale rate changes. Qwest's process currently exceeds Staff's recommendation by a factor of three.

AT&T's witness identified the problems and inadequacies with Qwest's wholesale billing systems and processes to change wholesale rates. AT&T Ex. 1 at 2-5. However, there is little need to explain the inadequacies at length because Qwest acknowledges the inadequacies of its systems and the need to shorten the implementation cycle for wholesale rate changes. The ultimate question is what is the appropriate length of time should be for Qwest to implement wholesale rate changes.

Generally, the billing at issue is the billing Qwest does for network elements, interconnection and resale provided to competitive local exchange carriers. The FCC has provided guidance on the standards local exchange carriers must meet when providing network elements to CLECs.

... , we conclude that the phrase "nondiscriminatory access" in section 251(c)(3) means at least two things: first, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal

¹⁴ On cross-examination Staff's witness made it clear that wholesale rate changes should be made in 30 calendar days. TR 13.

between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be at least equal-in-quality to that which the incumbent LEC provides to itself.¹⁵

... , we conclude that incumbent LECs must provide carriers purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LECs operations and support systems. Moreover, the incumbent must provide access to these functions under the same terms and conditions that they provide these services to themselves or their customers.¹⁶

*... if competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly competing. Thus providing nondiscriminatory access to these support systems functions, which would include access to the information such systems contain, is vital to creating opportunities for meaningful competition.*¹⁷

It is apparent that Qwest must provide access to network elements on a nondiscriminatory basis. This includes the function of billing. AT&T believes this requires parity. AT&T Ex. 1 at 1. Since retail changes are made in 30 calendar days, Qwest should be required to make wholesale rate changes in 30 calendar days. This is the time Staff adopted. Staff Ex. 1 at 20. Even assuming for the sake of argument that “in substantially the same time and manner” does not mean strict equality, Qwest’s

¹⁵ *In the Matter of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, and *Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket 95-185, First Report and Order, FCC 96-325 (rel. Aug. 8, 1996), ¶ 312 (“First Report and Order”).

¹⁶ *Id.*, ¶ 316 (footnotes omitted).

¹⁷ *Id.*, ¶ 518 (emphasis added).

proposal for 90 calendar days is much greater than 30 calendar days and cannot be considered to be “in substantially in the same time and manner.”

Qwest suggested through cross-examination of AT&T’s witness that the standard is whether the CLEC obtains billing sufficiently timely to provide the CLEC a meaningful opportunity to compete.¹⁸ Qwest may be right; however, AT&T maintains that 90 calendar days fails this standard, based on statements made by the FCC and the evidence in this proceeding.

In the *Pennsylvania 271 Order*, the FCC states:

As an initial matter, we note that, while we agree with Verizon that the appropriate standard to apply to the wholesale billing function is the “meaningful opportunity to compete” standard, we disagree with Verizon’s assertion that we should dismiss any problems that competitive LECs experience with their wholesale bills because the wholesale bill does not directly affect a competitive LEC’s ability to bill its end-user customers. Rather, we agree with the competitive LECs that the BOC must demonstrate that it can produce a readable, auditable and accurate wholesale bill in order to satisfy its nondiscrimination requirements under checklist item 2.¹⁹

The FCC explained why inaccurate bills can impede a CLEC’s ability to compete.

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

¹⁸ See TR 75-78 and Qwest Ex. 2, ¶ 39.

¹⁹ *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), ¶ 22 (“*Pennsylvania 271 Order*”) (footnotes omitted).

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.²⁰

All these reasons apply in the instant case.

As stated earlier, Qwest's goal is to *implement* wholesale rate changes in 90 days. CLECs will not see the changes until the next billing cycle. Thus, a CLEC will not see the changes until its first bill *after* implementation, which will exceed 90 days. Ninety days simply is too long a time to provide carriers a meaningful opportunity to compete.

In the *Pennsylvania 271 Order*, the FCC discusses timeliness of Verizon's wholesale bills. The FCC stated that, "Performance data indicate that any delay associated with BOS BDT bills was temporary, associated with on-going improvements to the billing process and not indicative of a larger, systemic problem with delivering timely bills."²¹ Although timeliness of accurate bills is not the same as timeliness of rate changes, the FCC's language is relevant because untimely implementation of rate changes means that CLECs are being billed the wrong rates.

Unlike the reference in the *Pennsylvania 271 Order*, Qwest's problem is not temporary. Qwest has implemented fixes that only reduce the implementation time to 90 days. Future changes may only shave off additional time without achieving parity with the time it takes Qwest to implement retail rate changes. Also, unlike the reference in the *Pennsylvania 271 Order*, Qwest's billing problem is systemic. Qwest's process for implementing CLEC rate changes is systemically longer than for implementing retail rate changes.

²⁰ *Id.*, ¶ 23.

²¹ *Id.*, ¶ 30.

Ninety days is simply too long for implementation of wholesale rate changes. This means a CLEC possibly will have to wait 4 billing cycles to see the credits and new rates on its bill. While Qwest did provide interest on the six months of overcharges that it made to CLECs, AT&T can find no rule, requirement or contractual provision that would obligate Qwest to pay interest on future overcharges. AT&T believes Qwest's largesse in providing interest on the overcharges related to this proceeding was more a function of the show cause proceeding than an indication of Qwest's future practices. For all the reasons identified by the FCC, this denies the CLECs a meaningful opportunity to compete and wholesale rate changes clearly are not being made in substantially the same time and manner as retail rate changes.²²

Staff's recommendation that Qwest implement wholesale rate changes in 30 calendar days is reasonable, supportable and should be adopted by the Commission.

Respectfully submitted this 15th day of July, 2003.

**AT&T COMMUNICATIONS
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²² It should be noted that Decision No. 65450 states that rate change issues "have implications for application for 271 relief as well." Decision No. 65450 ¶ 36. In an Joint Stipulation Re: Procedural Schedule dated February 3, 2003, "[t]he parties also agree[d] that to the extent any 271 related issues are raised by this complaint, that they will be handled within the Section 271 Docket itself." The discussion of the FCC's orders is intended to assist the Commission in picking a reasonable time for Qwest to implement wholesale rate changes. However, it should be noted that the questions being addressed – the time permitted an incumbent local exchange carrier to make rate changes – has not been addressed directly in any section 271 order.

CERTIFICATE OF SERVICE
(T-01051B-02-0871)

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