POST-HEARING BRIEF OF MOUNTAIN TELECOMMUNICATIONS, INC.

Mountain Telecommunications, Inc. (MTI), an intervenor in this proceeding, hereby submits this post-hearing brief and states as follows:

INTRODUCTION

In this expedited proceeding, the Commission has before it several issues involving the rates charged by Qwest Corporation (Qwest) for transport and for local interconnection service
as part of that company’s implementation of Commission Decision No. 64922. MTI is a telecommunications carrier certificated by the Commission to provide service, including local telecommunications service, in Arizona. MTI is a competitive local exchange carrier or a “CLEC.” MTI purchases from Qwest certain components of Qwest’s network on an unbundled network element basis as it is statutorily entitled to do pursuant to Section 251(c)(3) of the Communications Act of 1934, as amended.

Among the network elements which MTI purchases from Qwest is dedicated transport. Notwithstanding the fact that the Phase II Order became effective on June 12, 2002, it was not until many months later that Qwest’s unbundled network element customers became aware of the rates that Qwest planned to charge based upon its implementation of that order. Indeed, as explained by MTI witness Michael Lee Hazel, MTI did not receive invoices based on Qwest’s implementation of the Phase II Order until January 2003 – nearly seven months after that order’s effective date. Those bills received in January 2003 were for December 2002. As explained by Mr. Hazel, it was not until later in 2003 that Qwest rendered to MTI invoices based on the higher transport rates retroactively back to June 2002.

When MTI finally began to receive invoices based on Qwest’s implementation of the Phase II Order, it was shocked to learn that the charges to it for transport had risen dramatically. According to Mr. Hazel, MTI’s Vice President – Network, those transport rate changes increased

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1 Decision No. 64922, In the Matter of the Investigation Into Qwest Corporation’s Compliance With Certain Wholesale Pricing Requirements For Unbundled Network Elements And Resale Discounts (Phase II), issued June 12, 2002 (“Phase II Order”).
2 47 U.S.C. § 251(c)(3).
3 Direct Testimony of Michael Lee Hazel, MTI Exhibit 1, at 2.
4 Tr. at 209-210.
the charges to MTI by seventy-eight percent! These included significant increases in the prices for DS-1 facilities and even greater increases in the charges for DS-3 facilities.

On January 8, 2003, upon learning of these unanticipated and very substantial increases in transport prices, MTI filed with the Commission an application to intervene in this proceeding. Simultaneously with the filing of its intervention application, MTI filed a motion for injunction in which it asked the Commission to enjoin Qwest from charging unjust and unreasonable rates for unbundled network elements, specifically for transport. In response to MTI's filings, Staff submitted data requests to MTI and Qwest. Based on the responses which were provided and Staff's analysis of those responses, on March 7, 2003, Staff filed a response to motions of MTI, Qwest and Time Warner. In its Response, Staff stated that it had determined that Qwest's combining of transport and entrance facility charges into one rate had produced "an unexpected and unreasonable increase for some customers, which was not intended by the Phase II Order." Based upon that conclusion, Staff recommended that the Commission reopen the record of Phase II on its own motion pursuant to A.R.S. § 40-252, and that it grant relief under either of two suggested options, pending further review of transport pricing in Phase III. Under Staff's Option 1, the Commission would reinstate the prior Interconnection Entrance Facility and Direct Trunked Transport rates so that transport customers would pay only for the facilities which they are actually leasing from Qwest (i.e., the rates in effect prior to the Phase II Order). Under Staff's Option 2, the Commission would require Qwest to deduct the Entrance Facility rate from the new combined rate for those transport facilities which did not include entrance facilities.

5 MTI Exhibit 1 at 3. Based on MTI's then-current usage of transport service, these higher rates increased MTI's monthly transport costs by approximately $55,000.
6 Staff Response to Motions of MTI, Qwest and Time Warner, at 2.
7 Id., at 3.
Significantly, none of the parties to this proceeding dispute Staff’s conclusion that Qwest’s combining of entrance facilities and transport into one rate has resulted in rates far higher than those anticipated in Phase II for those companies, including intervenor MTI, which do not use entrance facilities. The only differences among the parties involve how to remedy the improper and unanticipated charges. On April 11, 2003, following a prehearing conference and submission of a Joint Stipulation by MTI, Qwest, AT&T, Time Warner, and Staff, Administrative Law Judge Dwight D. Nodes issued a Procedural Order scheduling a hearing to be held on May 28, 2003. The following two issues regarding transport rates were designated for hearing:

1. Should Staff’s Option 1 (the transport rates prior to this Cost Docket) or Staff’s Option 2 (the transport rates adopted in Decision No. 64922 minus the entrance facility charges where no entrance facility is provided) be adopted as the rates for DS1 and DS3 transport effective until the reconsideration of these rates in Phase III of the Cost Docket?

2. Are the revised rates that are determined as a result of the expedited hearing effective as of June 12, 2002 or from the effective date of the Order adopting the revised rates?8

As will be described in this post-hearing brief, the record compiled in this expedited proceeding strongly supports a conclusion that Qwest’s rates for dedicated transport should be adjusted based on Staff Option 1 and that the adjustment to those rates should be effective as of June 12, 2002.

8 Docket No. T-00000A-00-0194, Procedural Order, issued April 11, 2003 at 1. In addition, the ALJ designated for hearing an issue involving the rates for analog ports. MTI has not participated in the analog port portion of this expedited proceeding and will not brief that issue.
I. STAFF OPTION 1 IS THE MORE APPROPRIATE MEANS FOR ADJUSTING THE TRANSPORT RATES AND SHOULD BE ADOPTED

Of the parties which have addressed this issue, MTI and Staff support Option 1. Only Qwest has expressed a preference for Option 2. The record contains several reasons why Option 1 is the more appropriate solution. The first reason why Option 1 is the superior solution is its comparative simplicity. As explained by Staff witness William Dunkel, "the simplest way and the cleanest way is to simply go to the rates that were in effect previous to this, and in Phase III deal with the complexities that were created by the HAI model in this area."\(^9\) In contrast to the straightforward and simple approach of reinstating the prior rates, Staff Option 2 as Qwest would implement that option would involve a series of complex formulae which are set forth in a series of equations described by Qwest witness Teresa K. Million in her direct testimony.\(^10\) Staff witness Dunkel describes the complexity of Qwest's formulaic approach as follows: "... as you saw in Qwest's attempts to implement Option 2, they had these complex calculations where they're trying to split the costs among the entrance facility, transport, and I think they were using their own cost model to split it. That's again, as you get more complex, you get into more issues you could argue about, and we're trying to do a simple proceeding here, and do the complex discussion in Phase III."\(^11\) Mr. Dunkel correctly notes that Option 1 is the "simplest way to do it and a fair way to do it."\(^12\)

While Qwest professes to have a preference for Staff Option 2, its own witness seems to doubt whether it will be able to implement that option. In response to a question as to how

\(^9\) Tr. at 32.
\(^10\) Direct Testimony of Teresa K. Million, Qwest Exhibit 1 at 2-3.
\(^11\) Tr. at 32.
\(^12\) Id.
Option 2 would be implemented, Ms. Million offered the following less than comforting explanation:

My understanding of Staff Option 2 is that we would continue to use the rates for transport produced by the HAI model, but that we would make an adjustment to remove the entrance facilities from the transport rate. And while we cannot do that with the HAI model itself, because we can't or we haven't at this point been able to unravel the HAI model enough to determine how much is entrance facilities versus how much is actually transport facilities. What we can do is establish what the traditional relationship between entrance facilities and transport is.13

When asked how long it would take Qwest to implement its preferred option – Option 2 – Ms. Million candidly admitted that she had “no idea.”14

There is another reason why Staff Option 1 should be adopted: the rates which would be implemented pursuant to that option are unquestionably lawful rates. This important point was noted by Staff witness Dunkel in his direct testimony where he noted that the rates in effect prior to the Phase II Order “had been previously approved by the Commission.”15 In contrast, no determination of lawfulness has been made with respect to the rates that might result from Qwest’s future implementation of Option 2 if it were ordered to implement that option.

In short, based on its relative simplicity, suitability for expeditious implementation, and on the fact that the resulting rates already have been determined by the Commission to be lawful rates, Staff Option 1 is the superior remedy to the excessive transport rates which resulted from the combining of entrance facility and transport into one rate. Option 1 should be adopted by the Commission.

13 Tr. at 74-75 (emphasis added).
14 Tr. at 76.
15 Direct Testimony and Schedules of William Dunkel, Staff Exhibit 1, at 3.
II. THE ADJUSTED TRANSPORT RATES ORDERED IN THIS PROCEEDING SHOULD BE EFFECTIVE AS OF JUNE 12, 2002 – THE EFFECTIVE DATE OF THE PHASE II ORDER

The second transport issue before the Commission in this expedited proceeding involves whether any adjustment to the transport rates ordered by the Commission should be effective as of June 12, 2002 – the effective date of the Phase II Order, or whether the effectiveness of the adjusted rates should be deferred to the date of an order issued in this proceeding. Among the parties who have addressed this all-important effective date issue, MTI and Staff are in agreement that the rates should be adjusted as of June 12, 2002. Only Qwest – for predictable and self-serving reasons – has asserted that the adjustment to the transport rates should not become effective until such time as the Commission has issued an order in this proceeding.16 Based upon sound principles of law, public policy, and fundamental fairness, the transport rates should be adjusted as of June 12, 2002.

No one disputes the conclusion articulated by Staff in its March 7, 2003 Response to the Motions of MTI, Qwest, and Time Warner, that Qwest’s combination of entrance facilities and transport into one combined rate has produced an “unexpected and unreasonable rate increase for some customers, which was not intended by the Phase II Order.” Stated simply, Qwest’s transport rates following its delayed implementation of the Phase II Order were the result of a misunderstanding by the parties and by the Commission as to how certain of Qwest’s customers obtain unbundled transport. In this regard, Staff witness Dunkel notes correctly that those customers did not learn about Qwest’s new and much increased transport rates until receiving their first Qwest bills based on the new rates – about six months after the effective date of the

16 As described at page 9 of this brief, during the hearing, Qwest appears to have retreated from that position.
Indeed, MTI witness Hazel testified that MTI had attempted to elicit information from Qwest about the new transport rates several months prior to those first bills but those efforts were unsuccessful.\(^1\)

If the Commission’s correction of the transport rates does not take effect until an order is issued in this expedited proceeding, Qwest will enjoy an unwarranted and unlawful economic windfall for the entirety of the period between June 12, 2002 and whenever that order is issued. Specifically, it will receive compensation which includes the costs of entrance facilities which it has not provided to customers for the entirety of that period. Qwest failed to implement transport rates based on the Phase II Order for more than six months following that order’s effective date. It has now been more than a full year since that order took effect and it may be several more months or longer until an order in this expedited proceeding is adopted. If, as Qwest has asserted, it should not be required to implement rates which correct the misunderstanding reflected in the Phase II Order until such time as a subsequent order makes that correction, then Qwest will benefit from its own prolonged delay in rendering bills based on the rates it developed as part of its implementation of the Phase II Order. As Qwest’s own witness candidly acknowledged during the hearing, if Qwest’s view were to prevail, there would be nothing to stop it in future matters from delaying implementation of the rates ordered by the Commission for 12 months, 18 months, 24 months, or longer.\(^2\)

In this regard, the Commission’s attention is directed to the opinion of the Arizona Court of Appeals in Mountain States Telephone and Telegraph Co. v. Arizona Corporation Commission, 604 P.2d 1144 (Ariz. Ct. App. 1979). There, in affirming the Commission’s order

\(^1\) Tr. at 27.
\(^2\) MTI Exhibit 1 at 5.
\(^3\) Tr. at 87.
that Mountain States (predecessor to Qwest) refund excess rates, the court of appeals articulated how, absent a requirement to make such rate adjustment effective retroactively, the carrier would have the incentive and the ability to perpetuate the collection of excessive rates through litigation: “If there is no possibility of refund, each day spent in litigation would redound to the permanent financial benefit of the utility and give it every incentive for delay.”

During cross-examination, Qwest’s own witness conceded that such a delayed correction and resulting windfall to Qwest would not be appropriate. When asked by the Administrative Law Judge whether it would not be appropriate to apply the corrected rates retroactively if the original rates were based on a “misunderstanding underlying the Commission’s decision,” Ms. Million responded as follows:

... if it is determined that this was a mistake, and that it was something that wasn’t intended by the Commission’s order, and the Commission feels like it’s necessary to go back and make that right, then yes, I believe that you’re going to have to do that back to the time that it was effective.

Ms. Million’s statement captures very succinctly what this proceeding is about. It is about making something right, i.e., rectifying an effect of a prior Commission order that was not anticipated at the time that order was adopted. She is absolutely correct that in such circumstances, the correction should be made back to the time that the initial order was effective. Qwest’s initial opposition to correcting the result of the misunderstanding embodied in the Phase II Order as of the date of that order seems to be predicated on some general concern about legal prohibitions against retroactive ratemaking.

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20 604 P.2d at 1146.
21 Tr. at 82.
22 It should be borne in mind that the Commission, in establishing rates for unbundled network elements, including transport, is acting pursuant to authority contained in the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (47 U.S.C. §
objection is nothing more than a “red herring.” First, if, as MTI and Staff have recommended, Staff Option 1 is adopted, the rates which would replace Qwest’s transport rates based on its implementation of the Phase II Order would be those rates which were approved by the Commission and in effect prior to the Phase II Order. Reinstatement of lawfully approved rates on an interim basis pending a thorough examination of transport pricing in Phase III would not constitute retroactive ratemaking. Indeed it would not constitute ratemaking at all. Those rates already have been “made,” having been expressly found by the Commission in prior proceedings to be lawful rates.

Further, it should be noted that the Phase II Order did not establish rates for transport. In fact, the order does not even mention or identify any specific rates. All that the Phase II Order states regarding transport rates is that the HAI model be used for development by Qwest of transport rates, subject to re-examination in Phase III based on a full record, including wire center data – data that were not even available to the Commission or to the parties in Phase II.\(^\text{23}\) Indeed, the Commission’s express statement that the transport rates to be derived from Qwest’s implementation of the HAI model are to be subject to further examination in Phase III based on information not yet even available to the parties belies any assertion that the transport rates which resulted from the Phase II Order were in any sense intended to be “final” rates not subject to adjustment retroactively as well as prospectively. In Pueblo Del Sol Water Co. v. Arizona Corporation Commission, 772 P.2d 1138 (Ariz. Ct. App. 1988), the court explained that retroactive ratemaking occurs only when the Commission requires refunds of charges fixed by a

\(^{151 \text{ et seq.},}\) specifically Section 252(d) (47 U.S.C. § 252(d)). See AT&T v. Iowa Utilities Board, 525 U.S. 366 (1999). Thus, the Commission’s role in approving prices for unbundled network elements is not subject to the provisions of the Arizona Constitution governing public utility rates or to the case law which is based upon that constitutional authority to set rates for public service corporations.

\(^{23}\) Phase II Order at 79.
formal finding which has become final. As noted above, there is nothing final about the transport rates which were established based on the HAI model. At the time that the Phase II Order was adopted, neither the Commission nor Qwest even knew what rates would result from Qwest’s use of the model; and the Commission and all the parties clearly understood that whatever rates would result from Qwest’s use of the HAI model would be subject to further examination in Phase III.

Moreover, it is important to recognize that the relief proposed by Staff is for the Commission to reopen this proceeding pursuant to Arizona Revised Statutes § 40-252. Section 40-252 states as follows:

The Commission may at any time, upon notice to the corporation affected, and after opportunity be heard as upon a complaint, rescind, alter, or amend any order or decision made by it. When the order making such rescission, alteration or amendment is served upon the corporation affected, it is effective as an original order or decision. In all collateral actions or proceedings, the orders and decisions of the Commission which have become final shall be conclusive. (emphasis added)

It is axiomatic that when a Commission order is about rates to be charged, the power granted by the legislature to the Commission to rescind, alter, or amend any order encompasses rates which result from that order. An important aspect of Section 40-252 is that it codifies the Commission’s power to correct mistakes or, as in the instant case, to rectify decisions which resulted from misunderstandings. This authority specifically granted the Commission would be hollow authority if it did not include the power to rescind, alter or amend such rates resulting from such mistakes or misunderstandings as of the time that they were ordered. As MTI witness Hazel testified:

It is undisputed that the assumption [the assumption in the cost studies that there is one entrance facility for each transport rate] was incorrect. It was incorrect on June 12, 2002; it is incorrect
today; it will be incorrect on the day the Commission issues an order following this expedited hearing. Given that this proceeding is about correcting a mistake or a misunderstanding, the only appropriate correction is to have the correction revert back to when it was initially made.24

Finally, Qwest has suggested that adjustment of the transport rates effective June 12, 2002 would somehow violate unidentified provisions of unspecified interconnection agreements.25 This unsupported assertion that adjustment to the transport rates to correct a misunderstanding embodied in the Phase II Order would somehow violate Commission-approved interconnection agreements was discredited by MTI witness Hazel who explained as follows:

There are provisions in the MTI-Qwest agreement (approved by the Commission) that state that the agreement is based on existing law and that if there are changes in the law, the agreement is to be amended to reflect those changes. In my opinion, changing the rates charged pursuant to an interconnection agreement to conform with current Commission pricing orders is fully consistent with that agreement.26

During cross-examination, Ms. Million admitted that she could not identify any interconnection agreement which prohibits rate adjustments to implement a Commission order, but that she had examined the interconnection agreement between Qwest and MTI and concluded that the agreement was silent on such rate adjustments and retroactivity.27 Thus, Qwest’s assertion that adjustment of the transport rates effective June 12, 2002 to correct the misunderstanding reflected in the Phase II Order is unsupported and unsupportable.

As described in the preceding paragraphs, the transport rates which resulted from Qwest’s delayed implementation of the Phase II Order were based on a misunderstanding as to

24 MTI Exhibit 2 at 5.
25 Qwest Exhibit 1 at 6-7.
26 MTI Exhibit 2 at 7.
27 Tr. at 93.
its customers' use of entrance facilities. That misunderstanding resulted in certain customers becoming subject to very substantial rate increases and in being charged for facilities which they are not using. Principles of fairness, public policy and the law all compel that the rates be adjusted to rectify that misunderstanding effective June 12, 2002 – the effective date of the Phase II Order.
CONCLUSION

For the reasons set forth in this post-hearing brief, MTI respectfully urges the Commission to issue an order adopting Staff Option 1 and to make that order and the resulting transport rate adjustments effective as of June 12, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Post-Hearing Brief of Mountain Telecommunications, Inc. on all parties of record in these proceedings by mailing a copy thereof, properly addressed with first class postage prepaid to the following:

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