

Before the
FEDERAL COMMUNICATIONS CORPORATION
Washington, D.C. 20554

In the Matter of)	
)	
Accipiter Communications, Inc.)	
)	
and)	
)	
Qwest Corporation)	CC Docket No. 96-45
)	
Joint Petition for Waiver of the)	
Definition of "Study Area" of the)	
Appendix-Glossary of Part 36 of the)	
Commission's Rules)	

JOINT PETITION FOR WAIVER

Pursuant to Section 1.3 of the Commission's Rules, Accipiter Communications, Inc., dba Zona Communications, ("Accipiter") and Qwest Corporation ("Qwest") (collectively, "Petitioners"), by their attorneys, request a waiver of the definition of "study area" contained in the Appendix-Glossary of Part 36 of the Commission's Rules.¹

Petitioners request this waiver in order to extend Accipiter's existing study area in Arizona to include an area referred to as the Lake Pleasant 5000 property and three and one half sections north of that property in northern Maricopa County, Arizona, and to remove the same area from Qwest's Arizona study area.² Petitioners further request that

¹ This Petition is unrelated to the Joint Petition filed by Accipiter and Qwest on June 20, 2006 which remains pending before the Commission. *See*, DA 06-1423.

² The legal description of the area to be added to Accipiter's study area is: Township 6 North, Range 2 West, Gila and Salt River Base and Meridian, Sections 4-9, 17, and 18 and Township 7 North, Range 2 West, Gila and Salt River Base and Meridian, Sections 31-33 and the western 1/2 of Section 34.

an area comprising 2 ¾ sections, and referred to as the “Qwest extension area,” be removed from Accipiter’s existing study area and added to Qwest’s Arizona study area.³

I INTRODUCTION AND SUMMARY

Qwest is a price cap incumbent local exchange carrier that owns and operates approximately 1, 877,000 access lines in Arizona. Accipiter is a cost study ILEC that owns and operates approximately 366 access lines. Qwest has no facilities or customers in the area to be transferred to Accipiter. Accipiter has no facilities or customers in the area to be transferred to Qwest, although Qwest does have one customer served by its facilities in that area. On December 17, 2008, the Arizona Corporation Commission (“ACC”) approved modifications to the Certificate of Convenience and Necessity of Accipiter and service area of Qwest as described above, subject to the condition that each carrier submit revised service area maps and charge customers for [intrastate] service according to its existing tariffs.⁴ Petitioners are in compliance with these conditions.

Because Qwest has no customers in the area to be transferred to Accipiter, Accipiter will not provide the anti-slamming notice required by Section 64.1120 of the Commission’s Rules. Because the one customer in the portion of Accipiter’s area to be

³ The area to be added to Qwest’s study area is described as: Township 3 North, Range 2 West, Gila and Salt River Base and Meridian, Sections 29 and 32, the western ½ of Section 28 and the southeastern ¼ of Section 31.

⁴ *Joint Application of Accipiter Communications, Inc. and Qwest Corporation for Accipiter to Extend Its Certificate of Convenience and Necessity and To Delete a Portion of Its Certificate of Convenience and Necessity in Favor of Qwest and for Qwest To Extend Its Service Area and Delete a Portion of Its Service Area in Favor of Accipiter*, Opinion and Order, Decision No. 70641, Dec. 17, 2008. (“ACC Order”)

transferred to Qwest is already a Qwest customer, no anti-slamming notice will be provided.⁵

II WAIVER OF THE DEFINITION OF STUDY AREA IS WARRANTED

Part 36 of the Commission's Rules "freezes" the definition of "study area" to the boundaries that were in existence on November 15, 1984. Although the rule was adopted to prevent a carrier from segregating territories artificially to maximize high cost support,⁶ the Commission has recognized "that changes that result from the purchase or sale of exchanges in arms-length transactions" do not necessarily raise the concerns that prompted the freeze.⁷ Although not a sale, the mutual transfers of territory are arms-length transactions.

The Commission has recognized that failure to waive the rule in the case of transfer of exchanges would produce an absurd result, forcing the transferor to continue to include exchanges in its study area for which it has no costs, and preventing the transferee from including in its study area exchanges it actually serves.⁸ Such a result would not serve the Commission's policy objective of ensuring that carrier's actual costs are reflected in their accounting so that they can accurately set just, reasonable and non-

⁵ Transfer of the service areas in question will have no effect on Qwest's price cap indices because there will be no change in the network costs that comprise the basis for its current price caps.

⁶ See, *MTS and WATS Market Structure, Amendment of Part 67 of the Rules and Establishment of a Joint Board*, Recommended Decision & Order, 57 RR 2d 267, para. 65 (1984).

⁷ See, *Alltel Corporation Petition for Waiver of Section 36.125(f), Sections 36.154(e)(1) and (2) and the Definition of "Study Area" contained in Part 36, Appendix-Glossary of the Commission's Rules*, Memorandum Opinion and Order, 5 FCC Rcd 7505, para. 7 (Com. Carr. Bur. 1990).

⁸ *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Notice of Proposed Rulemaking, 5 FCC Rcd 5974, 5975-76 (1990).

discriminatory rates. Logically, the same principles should apply to the changes hereby proposed to the Accipiter and Qwest study areas.

Further, the proposed study area revisions meet the three criteria the Commission has established for approval of such waiver petitions: (1) the transfer of the areas between the two carriers will not adversely impact the Universal Service Fund (“USF”); (2) the relevant state commission does not object to the changes in the study areas; and (3) the public interest will be served by granting the waiver.⁹

A. The Changes in Study Area Boundaries will not adversely affect the Universal Service Fund

To evaluate whether a study area boundary change adversely impacts the USF, the Commission analyzes whether a study area waiver will result in an annual aggregate shift in high cost support in an amount equal to or greater than one percent of the total high-cost support fund for the year. Although Section 54.305 of the Commission’s rules is not applicable to this Petition because there is no transfer of customers or facilities,¹⁰ the mutual transfers of partial study areas will produce no such adverse impact.

At the present time there are no customers or facilities in the area to be added to Accipiter’s study area. Most of this area, referred to as Lake Pleasant 5000, is owned by a developer who plans to build a residential and business community with approximately 8,500 homes. However, because of the present state of the housing and credit markets, the developer does not have a firm timetable and Accipiter does not expect any construction will

⁹ *U.S. West Communications, Inc. and Eagle Telecommunications, Inc., Petition for Waiver of the Definition of “Study Area” Contained in Part 36, Appendix-Glossary of the Commission’s Rules*, Memorandum Opinion and Order, 10 FCC Rcd 1771, 1774, para. 14 (1995).

¹⁰ *M&L Enterprises, Inc., d/b/a Skyline Telephone Company, Petition for Waiver of Sections 36.611, 36.612 and 69.2 of the Commission’s Rules*, Order, 19 FCC Rcd 6761, para. 16 (2004) (“*Skyline*”).

be completed during 2009 that would require it to deploy working loops to subscribers.

There will, therefore, be no increase in USF to Accipiter in the current year. Accipiter notes that when development actually does occur, the much higher density of the developed area than Accipiter's existing subscriber base will ultimately reduce its overall average cost per loop substantially.

There will also be no impact on the USF as a result of the transfer of a portion of Accipiter's study area to Qwest. Qwest already serves the one subscriber in the area over its own facilities so that Section 54.305 is not applicable. The only USF Qwest currently receives is interstate access support of less than \$0.50 per line per month.¹¹ The addition of one line to Qwest's study area will therefore not have a measurable impact on the USF.

B. The State Commission Does Not Object to Grant of the Petition

The ACC Order states at page 16: "IT IS FURTHER ORDERED that the Commission does not object to the Federal Communications Commission's granting a waiver of the Study Area boundary freeze to allow Accipiter Communications, Inc. and Qwest Corporation to modify their respective Study Areas to reflect the transfer of the extension areas granted herein."

C. The Public Interest Will Be Served By Grant of the Waiver

The ACC Order agrees with the ACC staff that rearrangement of their respective service territories by Accipiter and Qwest would promote the availability of "communications services in an efficient, widespread manner and with adequate facilities at reasonable charges."¹² This conclusion is based, *inter alia*, on the record evidence that Accipiter has facilities in its existing service area that can efficiently be extended into the area being transferred from Qwest, where

¹¹ Universal Service Administrative Company, Second Quarter 2009, Appendices HC01A and HC05.

¹² ACC Order at paras. 50, 56.

Qwest does not. The ACC staff concluded that it should be less costly for Accipiter to serve the area than Qwest.

To serve its existing area Accipiter is planning to construct this year an interexchange fiber optic cable route that will pass within a mile of Lake Pleasant 5000 development. When the access road for the development is constructed Accipiter will be able to readily extend its facilities into the development. Similarly, in the area to be transferred to Qwest, Accipiter has no facilities, but Qwest has a 100 pair cable traversing the area.¹³

When development of the area begins, Accipiter will construct fiber-to-the-home facilities to provide basic telephone service, custom calling, CLASS features, long distance and broadband Internet access. Accipiter will provide high-capacity data circuits to business customers. The combination of more efficient provision of high quality service, and more logical service areas supports the conclusion that grant of the Petition will serve the Public Interest.

III CONCLUSION

Good cause having been shown, Petitioners respectfully request that this Joint Petition be granted on an expedited basis in order that the parties may rationally and timely continue their planning and be in position to providing efficient and effective high quality service to the area as it develops.

¹³ The area is mostly county land and little or no development is expected in the near future.

Respectfully submitted

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