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ORIGINAL EXCEPTION

BEFORE THE ARIZONA CORPORATION COMMISSION

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- 1
- 2 MARC SPITZER
Chairman
- 3 WILLIAM MUNDELL
Commissioner
- 4 JEFF HATCH-MILLER
Commissioner
- 5 MIKE GLEASON
Commissioner
- 6 KRISTIN MAYES
Commissioner
- 7

Arizona Corporation Commission

DOCKETED

MAR 26 2004

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AZ CORP COMMISSION
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8 IN THE MATTER OF THE QWEST
9 CORPORATION'S COMPLIANCE WITH
10 SECTION 252(e) OF THE
11 TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. RT-00000F-02-0271

11 IN THE MATTER OF U S WEST
12 COMMUNICATIONS, INC.'S
13 COMPLIANCE WITH § 271 OF THE
14 TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-00000A-97-0238

14 ARIZONA CORPORATION COMMISSION,
15
16 Complainant,
17 v.
18 QWEST CORPORATION,
19
20 Respondent.

DOCKET NO. T-01051B-02-0871

**QWEST CORPORATION'S
EXCEPTIONS TO AMENDED
RECOMMENDED OPINION AND
ORDER**

20 Qwest Corporation ("Qwest"), through its undersigned counsel, respectfully
21 submits these exceptions in response to the amended Recommended Opinion and Order
22 filed on March 10, 2004 in the above-referenced dockets ("March 10 Recommended
23 Order").

24 First, Qwest maintains that the Settlement Agreement originally the subject of
25 these consolidated proceedings fairly resolves these three dockets and benefits the
26 industry as a whole, as well as Arizona ratepayers. Qwest therefore renews its earlier

1 exceptions to the original Recommended Opinion and Order filed on December 1, 2003
2 (“December 1 Recommended Order”), except as specifically modified herein. As
3 amended, the March 10 Recommended Order is still procedurally defective because it
4 purports to resolve two of the three dockets at issue on their merits, rather than returning the
5 parties to their pre-settlement positions as required by the express terms of the Settlement
6 Agreement. Further, as outlined in Qwest’s previous exceptions, the March 10
7 Recommended Order still reaches unfounded conclusions concerning Qwest’s conduct,
8 orders management initiatives and penalties that are beyond the Commission’s authority,
9 and awards credits to CLECs without any showing of eligibility or actual harm. None of
10 these actions are supported by substantial evidence in the record, and all are contrary to law.

11 The Settlement Agreement specifically provides:

12 Each provision of this Agreement is in consideration and
13 support of all other provisions, and expressly conditioned
14 upon acceptance and approval by the Commission without
15 change. Unless the Parties to this Agreement otherwise
16 agree, in the event that the Commission does not accept and
17 approve this Agreement according to its terms, then it shall be
deemed withdrawn by the Parties and the Parties shall be free
to pursue their respective positions in the Litigation without
prejudice.

18 Agreement § 19. Qwest and Staff jointly gave notice of the Settlement Agreement and
19 requested a hearing on the sole issue of whether the Agreement should be approved.
20 Under the express terms of the Settlement Agreement, both Qwest and Staff were entitled
21 to resume their prior litigation positions if the Agreement was rejected.

22 Like its predecessor, the March 10 Recommended Order uses, in large part, the
23 terms of the original Settlement Agreement, which resolved all three dockets. Unlike the
24 Settlement Agreement, however, the March 10 Recommended Order actually resolves
25 only two of those three dockets. Accordingly, the Recommended Order now provides
26 that a hearing will be held in the 271 docket, but nevertheless orders the same relief and

1 provides for a penalty in the same amount as the December 1 Recommended Order. This
2 use of selected Settlement Agreement terms against Qwest is even more inequitable than
3 the December 1 Recommended Order, because it implements the unfavorable terms of
4 the Settlement Agreement but still leaves Qwest exposed to additional liability. In effect,
5 the March 10 Recommended Order penalizes Qwest for pointing out that Qwest has not
6 waived its right to a hearing in the 271 docket.

7 In particular, partial resolution of the consolidated docket on these terms shows
8 that the recommended penalty amount is arbitrary – the penalty has stayed the same even
9 though the alleged conduct covered by the penalty is substantially different. As Qwest
10 previously noted, the penalty set out in the December 1 Recommended Order was
11 improperly based on the assumption that the Commission has the authority to assess
12 criminal contempt sanctions, and to do so on a daily basis for the length of any violation.
13 *See, e.g.,* Qwest’s Exceptions Regarding Recommended Opinion And Order Filed
14 December 1, 2003 And Request For Hearing (“Qwest’s Exceptions”) at 33-37 (Dec. 19,
15 2003). Even if the Commission had the authority to assess such a penalty, the March 10
16 Recommended Order makes it clear that the amount assessed is unsupported by the
17 evidence. *See, e.g.,* Qwest’s Exceptions at 15-25. The penalty imposed in both versions
18 of the Recommended Order remains \$11 million, the same amount of cash payments and
19 voluntary contributions that Qwest agreed to pay under the Settlement Agreement.
20 Settlement Agreement at 3. The figures identified in the December 1 Recommended
21 Order as support for the total amount of the penalty demonstrate that approximately
22 one-third of the penalty was attributable to the 271 docket. December 1 Recommended
23 Order at 41. Nevertheless, the March 10 Recommended Order assesses the same penalty,
24 even though any reference to the allegations in the 271 docket has been deleted.

25 The penalty amount set forth in the March 10 Recommended Order is not
26 supported by substantial evidence and is based on an impermissible incorporation of the

1 amounts set forth in the Settlement Agreement into an order rejecting that Agreement.
2 Arizona law favors settlement of disputes. *See, e.g., United Bank of Arizona v. Sun*
3 *Valley Door & Supply, Inc.*, 149 Ariz. 64, 68, 716 P.2d 433, 437 (App. 1986). By
4 incorporating the cash payment and voluntary contribution amounts from the Settlement
5 Agreement into a penalty, the Commission would violate Qwest's rights that were
6 expressly recognized in the Agreement, and would discourage such settlements in the
7 future. Moreover, the Commission has no precedent or procedure for using the terms of a
8 settlement in this manner. If the Settlement Agreement is rejected, the issues in the
9 Litigation should be resolved according to the Commission's Rules of Practice and
10 Procedure as in any other contested docket, without reference to the proposed Settlement.

11 For the reasons stated above and in Qwest's prior exceptions, the Commission
12 should reject the March 10 Recommended Order and approve the Settlement Agreement
13 between Staff and Qwest. Alternatively, the Commission should refrain from entering an
14 order in this consolidated docket until all proceedings have been completed. The
15 December 1 Recommended Order was fundamentally flawed, not least in that it
16 established penalties not authorized by law, not based on substantial evidence, and not
17 allocated based on specific alleged conduct. The situation would only be made worse by
18 the March 10 Recommended Order, which is essentially attempts to justify imposing the
19 penalties outlined in the December 1 Recommended Order even though hearings in the
20 consolidated dockets have not been completed.

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23
24
25
26

DATED this 26th day of March 2004.

Norman Curtright
QWEST CORPORATION
4041 N. Central Avenue
Phoenix, AZ 85012
(602) 630-2187

Peter S. Spivack
Cynthia Mitchell
Douglas R. M. Nazarian
Martha L. Russo
HOGAN & HARTSON, L.L.P.
555 13th Street N.W.
Washington, D.C. 20002
(202) 637-5600

-and-

FENNEMORE CRAIG, P.C.

By 
Timothy Berg
Theresa Dwyer
Al Arpad
3003 N. Central Ave, Suite 2600
Phoenix, Arizona 85012
(602) 916-5421
Attorneys for Qwest Corporation

ORIGINAL and 17 copies of the
foregoing filed this 26th day of March 2004:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing hand-delivered
this 26th day of March 2004 to:

1 Lyn Farmer, Chief Administrative Law Judge
Jane Rodda, Administrative Law Judge
2 ARIZONA CORPORATION COMMISSION
Legal Division
3 1200 West Washington
Phoenix, Arizona 85007

4 Chris Kempley, Chief Counsel
5 Maureen Scott, Counsel
Michelle Finical
6 ARIZONA CORPORATION COMMISSION
Legal Division
7 1200 West Washington
Phoenix, Arizona 85007

8 Ernest G. Johnson
9 Director, Utilities Division
ARIZONA CORPORATION COMMISSION
10 1200 West Washington
Phoenix, Arizona 85007

11
12 COPY of the foregoing mailed
this 26th day of March 2004 to:

14 Michael M. Grant
15 Todd C. Wiley
16 GALLAGHER & KENNEDY
2575 E. Camelback Road
17 Phoenix, AZ 85016-9225

18 Curt Huttzell
19 State Government Affairs
Electric Lightwave, Inc.
20 4 Triad Center, Suite 200
Salt Lake City, UT 84180

22 Brian Thomas
23 TIME WARNER TELECOM, INC.
520 SW 6th Avenue, Suite 300
Portland, OR 97204

25 Eric S. Heath
26 SPRINT COMMUNICATIONS CO.
100 Spear Street, Suite 930

Thomas Campbell
LEWIS & ROCA
40 N. Central Avenue
Phoenix, AZ 85004

Andrew O. Isar
TELECOMMUNICATIONS RESELLERS
ASSOC.
4312 92nd Avenue, NW
Gig Harbor, WA 98335

Raymond Heyman
Michael Patten
ROSHKA, HEYMAN & DEWULF
400 E. Van Buren, Ste. 900
Phoenix, AZ 85004-3906

Thomas F. Dixon
WORLD COM, INC.
707 N. 17th Street #3900

1 San Francisco, CA 94105

2 Joan S. Burke
3 OSBORN MALEDON, P.A.
4 2929 N. Central Ave., 21st Floor
5 PO Box 36379
6 Phoenix, AZ 85067-6379

6 Scott S. Wakefield
7 RUCO
8 1110 W. Washington, Suite 220
9 Phoenix, AZ 85007

9 Rod Aguilar
10 AT&T
11 795 Folsom Street, #2104
12 San Francisco, CA 94107-1243

11 Daniel Waggoner
12 Greg Kopta
13 Mary Steele
14 DAVIS, WRIGHT & TREMAINE
15 2600 Century Square
16 1501 Fourth Avenue
17 Seattle, WA 98101

16 Diane Bacon, Legislative Director
17 COMMUNICATIONS WORKERS OF
18 AMERICA
19 5818 N. 7th St., Ste. 206
20 Phoenix, AZ 85014-5811

20 Diane Peters
21 GLOBAL CROSSING
22 180 South Clinton Avenue
23 Rochester, NY 14646

23 Traci Grundon
24 Mark P. Trincherro
25 DAVIS, WRIGHT & TREMAINE
26 1300 S.W. Fifth Avenue
27 Portland, OR 97201

26 Mark DiNuzio

Denver, CO 80202

Kevin Chapman
SBC TELECOM, INC.
1010 N. St. Mary's, Room 13K
San Antonio, TX 78215-2109

Richard S. Wolters
AT&T LAW DEPARTMENT
1875 Lawrence Street, #1575
Denver, CO 80202

Joyce Hundley
U.S. DEPARTMENT OF JUSTICE
Antitrust Division
1401 H Street N.W. #8000
Washington, DC 20530

Mark N. Rogers
EXCELL AGENT SERVICES, LLC
P.O. Box 52092
Phoenix, AZ 85072-2092
Andrea Harris, Senior Manager

ALLEGIANCE TELECOM INC OF
ARIZONA
2101 Webster, Ste. 1580
Oakland, CA 94612

Douglas Hsiao
Jim Scheltema
BLUMENFELD & COHEN
1625 Massachusetts Ave. NW, Ste. 300
Washington, DC 20036

Kimberly M. Kirby
DAVIS DIXON KIRBY LLP
19200 Von Karman Avenue

1	COVAD COMMUNICATIONS COMPANY	Paul Masters
2	7901 Lowry Boulevard	ERNEST COMMUNICATIONS INC.
3	Denver, CO 80230	6475 Jimmy Carter Blvd., Ste. 300 Norcross, GA 30071
4	Karen Clauson	
5	Dennis D. Ahlers	Jon Poston
6	Ray Smith	ACTS
7	ESCHELON TELECOM	6733 E. Dale Lane
8	730 Second Avenue South, Ste. 1200	Cave Creek, AZ 85331
9	Minneapolis, MN 55402	
10	Steven J. Duffy	Lynda Nipps
11	RIDGE & ISAACSON, P.C.	Allegiance Telecom, Inc.
12	3101 North Central Ave., Ste. 1090	845 Camino Sure
13	Phoenix, AZ 85012	Palm Springs, CA 92262
14	Rex Knowles	Gary L. Lane, Esq.
15	XO	6902 East 1 st Street, Suite 201
16	111 E. Broadway, Suite 100	Scottsdale, AZ 85251
17	Salt Lake City, Utah 84111	
18	Debroah Harwood	Mike Allentoff
19	INTEGRA TELECOM OF ARIZONA, INC.	GLOBAL CROSSING SERVICES, INC.
20	19545 NW Von Newmann Drive, Suite 200	1080 Pittsford Victor Road
21	Beaverton, OR 97006	Pittsford, NY 14534
22	Bob McCoy	Gena Doyscher
23	WILLIAMS LOCAL NETWORK, INC.	GLOBAL CROSSING SERVICES, INC.
24	4100 One Williams Center	101 N. Wacker Drive, #220
25	Tulsa, OK 74172	Chicago, IL 60606-7301
26	Mark Dioguardi	W. Hagood Bellinger
	TIFFANY AND BOSCO, P.A.	4969 Village Terrace Drive
	1850 North Central, Suite 500	Dunwoody, GA 30338
	Phoenix, AZ 85004	
	Richard M. Rindler	Philip A. Doherty
	Morton J. Posner	545 S. Prospect Street, Ste. 22
	SWIDER & BERLIN	Burlington, VT 05401
		David Kaufman

1 3000 K. Street NW, Ste. 300
2 Washington, DC 20007

3 Penny Bewick
4 New Edge Networks, Inc.
5 PO Box 5159
6 Vancouver, WA 98668

7 Dennis Doyle
8 ARCH COMMUNICATIONS GROUP
9 1800 West Park Drive, Suite 250
10 Westborough, MA 01581-3912

11 Gerry Morrison
12 MAP MOBILE COMMUNICATIONS,
13 INC.
14 840 Greenbrier Circle
15 Chesapeake, VA 23320

16 John E. Munger
17 MUNGER CHADWICK
18 National Bank Plaza
19 333 North Wilmot, #300
20 Tucson, AZ 85711

21 *Jeanne Ruben*

22 1528444/67817.295

23
24
25
26

E.SPIRE COMMUNICATIONS, INC.
1129 Paseo de Peralta
Santa Fe, NM 87501

Charles Kallenbach
AMERICAN COMMUNICATIONS
SVCS, INC.
131 National Business Parkway
Annapolis Junction, MD 20701

Richard P. Kolb
Vice President of Regulatory Affairs
ONE POINT COMMUNICATIONS
Two Conway Park
150 Field Drive, Ste. 300
Lake Forest, IL 60045

METROCALL, INC.
6677 Richmond Highway
Alexandria, VA 22306

Nigel Bates
ELECTRIC LIGHTWAVE, INC.
4400 NE 77th Avenue
Vancouver, WA 98862

David Kaufman
ESPIRE Communications
1129 Paseo De Peralta
Santa Fe. NM 87501