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Arizona Corporation Commission

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IN THE MATTER OF INVESTIGATION OF
THE COST OF TELECOMMUNICATIONS
ACCESS

DOCKET NO. T-00000D-00-0672

**QWEST MEMORANDUM
REGARDING CONSTITUTIONAL
REQUIREMENTS FOR CHANGING
ACCESS RATES AND COMMENT
ON PROCEDURAL SCHEDULE**

INTRODUCTION

Qwest Corporation ("Qwest") hereby files this Memorandum Regarding Constitutional Requirements for Changing Access Rates and Comment on Procedural Schedule ("Memorandum") in the above-referenced docket. This Memorandum responds to Assistant Chief Administrative Law Judge ("ACALJ") Nodes' request that the parties brief legal issues on the provisions of the Arizona Constitution that require the Arizona Corporation Commission ("Commission") to determine the fair value of a public service corporation's property when setting regulated rates in this proceeding. Art. XV, §§ 3 and 14 of the Arizona Constitution require that the Commission ascertain the fair value of the property of any public service corporation in conjunction with setting rates for intrastate telecommunications service. This requirement applies to either increase or decrease in some or all of a utility's rates, as much as it does to a full rate case. In determining fair value and setting rates, the Commission must also consider the effect the rate change will have on the public service corporation's authorized rate of return. In order to comply with the Arizona Constitution, the Commission may only restructure intrastate access in a

1 revenue neutral manner, or in the context of a rate case with a finding of fair value rate
2 base and reasonable rate of return thereon.

3 Finally, this Memorandum also briefly addresses the procedural schedule offered
4 jointly by AT&T and Commission Staff ("Staff"), in addition to providing Qwest's
5 proposed schedule.

6 DISCUSSION

7 **1. Constitutional Requirements**

8 The Commission cannot lower Qwest's access line rates in Arizona without: 1) a
9 determination of fair value and an assessment of the impact of such rate change on
10 Qwest's rate of return; or 2) structuring the rate change so that it is revenue-neutral.
11 Otherwise, the order would result in ratemaking without a finding of fair value – a
12 practice not permitted under Arizona law. The Arizona Constitution gives the
13 Commission the authority to prescribe "just and reasonable rates and charges" to be made
14 and collected by public service corporations. Ariz. Const. art. XV, § 3. The Constitution
15 also dictates, to some degree, what process the Commission must use in determining such
16 rates. For example, the Commission must, "to aid it in the proper discharge of its duties,
17 ascertain the fair value of the property within the State of every public service corporation
18 doing business therein." Ariz. Const. art. XV, § 14.

19 Article XV, §§ 3 and 14, of the Arizona Constitution prohibit the Commission from
20 either increasing or decreasing a public service corporation's rates on a piecemeal basis
21 without first conducting a fair value determination and then setting rates that allow a
22 reasonable return on that rate base. Scates v. Arizona Corp. Comm'n, 118 Ariz. at 534, 537,
23 578 P.2d at 615, 618; Simms v. Round Valley Light & Power Co., 80 Ariz. 145, 294 P.2d
24 378 (1956).

25 The scope of this constitutional limitation on the Commission's authority was
26 discussed in both Simms and Scates. In Simms, a power company challenged the

1 Commission's authority to reduce its rates without first determining fair value. On appeal,
2 one of the questions before the Court was whether the Commission, prior to reducing rates,
3 was required to find the fair value of the company's properties being used to serve the
4 public as a basis for calculating reasonable rates. Id. at 148, 294 P.2d at 379. The Arizona
5 Supreme Court held that, indeed, the Commission must first find and use fair value as the
6 basis for setting rates:

7
8 [U]nder our constitution as interpreted by this court, the commission is
9 required to find the fair value of the company's property and use such finding
10 as a rate base for the purpose of calculating what are just and reasonable rates.
11 . . . While our constitution does not establish a formula for arriving at fair
12 value, it does require such value to be found and used as the base in fixing
13 rates. The reasonableness and justness of the rates must be related to this
14 finding of fair value.

15 Id. at 151, 294 P.2d at 382 (emphasis added).

16 In Scates, 118 Ariz. at 531, 578 P.2d at 612, the Arizona Court of Appeals
17 considered whether Article XV, §§ 3 and 14, of the Arizona Constitution prohibits the
18 Commission from increasing some of a public service corporation's rates without first
19 conducting a fair value determination and then setting rates that allow a reasonable return on
20 that rate base. In that case, Mountain Bell applied for and was granted permission to
21 increase charges for installation, moving, and changing of telephones within Arizona. Id. at
22 533, 578 P.2d at 614.

23 On appeal, the Arizona Court of Appeals reversed the Commission's decision,
24 finding that because the Commission failed to determine the fair value of the company's
25 rate base and to consider the effect of the increase on rate of return, its decision did not
26 satisfy Article XV, §§ 3 and 14. Id. at 537, 578 P.2d at 618. See also Residential Utility
Consumer Office v. Arizona Corp. Com'n, 199 Ariz. 588, 591, 20 P.3d 1169, 1172
(Ariz.App 2001) ("When setting rates for public utilities, the Commission should focus on

1 the principle that ‘total revenue, including income from rates and charges, should be
2 sufficient to meet a utility’s operating costs and to give the utility and its stockholders a
3 reasonable rate of return on the utility’s investment.’”)

4 Since Simms and Scates, the Arizona Supreme Court has clarified that although not
5 required to *use* fair value as the exclusive rate basis for setting rates, the Commission must
6 nevertheless ascertain the fair value of the corporation’s property and at least consider it in
7 determining what rates will be sufficient to allow a reasonable regulated rate of return to a
8 public service corporation. See, e.g., U.S. West Communications, Inc. v. Arizona
9 Corporation Commission, 201 Ariz. 242, 246, 34 P.3d 351, 355 (2001) (“Thus, fair value, in
10 conjunction with other information, may be used to insure that both the corporation and the
11 consumer are treated fairly.”)

12 Two narrow exceptions exist to the constitutional requirement of a fair value
13 determination prior to changing rates, neither of which applies here. The first exception is
14 an automatic adjustment clause that permits rates to adjust automatically to reflect changes
15 in specific operating costs. Such clauses are designed to ensure that the public service
16 corporation’s rate of return does not change. Scates, 118 Ariz. at 535, 578 P.2d at 616.
17 No automatic adjustment clause is applicable in this case.

18 The other exception is that the Commission may only set rates outside a rate case
19 “in limited situations where an emergency exists.” Scates, 118 Ariz. at 535, 578 P.2d at
20 616. When the Commission establishes rates outside a rate case, such rates are interim in
21 nature and the Commission must follow “appropriate safeguards to insure that rates will
22 not become permanent until there is adequate inquiry into whether they are just and
23 reasonable.”¹ Id. There is no contention that an emergency exists here justifying a

24 ¹ The Arizona Attorney General has defined when an emergency exists for purposes of
25 changing a rate. See Op. Att’y Gen. 71-17 (1971). An emergency exists “when sudden
26 change brings hardship to a company, when the company is insolvent, . . . when the
condition of the company is such that its ability to maintain service pending a formal rate

1 reduction in Qwest's access line rates.

2 Scates did leave undetermined whether the fair value finding requirement could be
3 established short of a full rate hearing. Id. at 537 (“We do not decide in this case, for
4 example, whether the Commission could have referred to previous submissions with
5 some updating or whether it could have accepted summary financial information.”)
6 Indeed, Commission Staff suggested at the October 14, 2003 Procedural Conference to
7 “explore options in this proceeding short of a full-blown rate case that could be used to
8 effectuate any rate changes within the context of this case.” See October 14, 2003,
9 Transcript of Procedural Conference at 30. Indeed, if the Commission were to utilize
10 some process or mechanism that does not ultimately affect Qwest's revenue (i.e. a
11 revenue-neutral restatement of Qwest's rates) requirement, a fair value finding required
12 by the Arizona Constitution is negated since the Company's rate of return will not
13 change.

14 **2. Alternatives for Commission to Consider**

15 Qwest's current Price Cap Plan (“Settlement”) calls for a \$15 million reduction in
16 access rates, \$5 million a year for three years. This Settlement between Qwest and the
17 Commission provides no further reductions in access rates. Given the legal constraints
18 imposed on the Commission by Scates, any further reductions in access rates must be
19 accomplished in a revenue-neutral manner, or within the context of a rate proceeding (i.e.
20 the adoption of a revised price cap plan in a procedure to set rates).

21 One alternative is to accomplish a revenue-neutral resetting of Qwest's access rates
22 through a reduction of those rates to interstate levels, and the implementation of an end-
23 user charge to offset the revenue loss of the rate reduction. Another alternative is to use
24 this proceeding to identify issues salient to access reform, including an analysis of current

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26 determination is in serious doubt,” or when the Commission cannot “grant permanent rate
relief within a reasonable time.”

1 access rates of all parties, and develop policies and procedures that can be implemented
2 through rate proceedings to effectuate the rate changes.

3 **3. Proposed Procedural Schedule**

4 Qwest opposes Staff and AT&T's proposal to bifurcate this proceeding into two
5 separate inquiries; one into Qwest's access line rates, and one for all other parties.
6 Certainly, any bifurcation that results in lowering Qwest's access line charge while leaving
7 those of the other parties intact would be inequitable. As previously recognized by the
8 Commission in Decision No. 63487², access rate "reform" cannot be achieved exclusive of
9 other public policy issues that permeate the telecommunications industry as a whole.

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While we agree that achieving parity between intrastate and interstate switched access rates is a laudable goal, there are many other public policy issues that impact our ability to reach that goal, such as the desirability of imposing End User Common Line Charge. Such decision concerning the structure of toll service charges should occur in a generic docket as it affects more than just Qwest.

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Decision No. 63487 at 12.

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In ordering this generic docket on the cost of telecommunications access, the Commission recognized that its goals are best served by utilizing other public policy issues as regulatory tools to establish parity in switched access rates for all telecommunications providers. As the Residential Utility Consumers Office ("RUCO") opined, "We do see this is as a proceeding that is meant to examine the issues on a global basis. And we see that there can be inefficiency that would result in bifurcating the issue." Tr. at 20.

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Despite the inefficiency in conducting two separate proceedings that will address

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² *In the Matter of the Application of US West Communications, Inc. for a Hearing to Determine the Earnings of the Company, the Fair Value of the Company for Ratemaking Purposes, to Fix Just and Reasonable Rate of Return Thereon and to Approve Rate Schedules Designed to Develop Such Return*, Docket No T-01051B-99-0105.

1 interrelated issues, Staff nevertheless contends that bifurcation is necessary to expedite this
2 matter in light of the Commissioners' discussion during their discussion of Qwest's § 271
3 application. However, Qwest supports the schedule proposed by Staff and AT&T for Phase
4 I as the procedural timeline to address the access rates of all parties, not just Qwest. This
5 accelerated schedule dovetails with the expiration of Qwest's current price cap plan, and
6 allows the Commission flexibility in developing a mechanism to effectuate any rate change
7 consistent with the constitutional limitations discussed herein. While each party may focus
8 on different issues, they are nonetheless interrelated and should be resolved in a
9 consolidated manner to avoid a duplication of effort, provide for an equitable application
10 and remain consistent with Arizona law.

11 With slight modification to Staff and AT&T's proposed schedule for Phase I as
12 discussed above, the following deadlines would apply:

- 13 • November 20, 2003: Qwest, ICO and Intervenor's Direct Testimony
- 14 • December 18, 2003: Staff Testimony
- 15 • January 19, 2004: Rebuttal Testimony
- 16 • February 2, 2004: Staff Rebuttal
- 17 • February 23, 2004 (Week): Hearing
- 18 • March 22, 2004: Briefs
- 19 • April 15, 2004: Reply Brief

20 However, to the extent that the Assistant Chief Administrative Law Judge chooses to
21 grant Staff and AT&T's request to bifurcate the issues, Qwest would propose the following
22 schedules in the two phases of the proceeding.

23 The first phase of the docket should address access charges for Qwest and the
24 CLECs. If Qwest's rates are reduced without a contemporaneous resetting of the CLEC's
25 access rates, Qwest will face the very real possibility of paying the CLECs significantly
26 more in originating and terminating access than the CLECs pay Qwest for performing the

1 exact same functions.

2 Phase I (Qwest and CLECs):

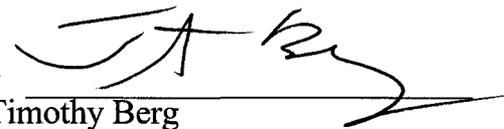
- 3 • November 20, 2003: Qwest, CLECs and other Intervenors Direct Testimony
- 4 • December 18, 2003: Staff Direct Testimony
- 5 • January 19, 2004: Rebuttal Testimony
- 6 • February 2, 2004: Staff Rebuttal
- 7 • Week of February 23, 2004: Hearing
- 8 • March 22, 2004: Opening Briefs
- 9 • April 15, 2004: Reply Briefs

10 Phase 2 (Independents):

- 11 • April 5, 2004: Independents and Intervenors Direct
- 12 • May 10, 2004: Staff Direct Testimony
- 13 • June 11, 2004: Rebuttal Testimony
- 14 • Week of July 19, 2004: Hearing
- 15 • August 20, 2004: Opening Briefs
- 16 • September 3, 2004: Reply Briefs

17 DATED this 3rd day of November, 2003.

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- 1 Accipiter Communications, Inc.
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2 Phoenix, AZ 85027
- 3 South Central Utah Telephone Association, Inc.
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4 Escalante, UT 84726-000
- 5 Southwestern Telephone Co., Inc.
PO Box 5158
6 Madison, WI 53705-0158
- 7 Centruytel
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8 Monroe, LA 71211-4065
- 9 Table Top Telephone Co, Inc.
600 N. Second Avenue
10 Ajo, AZ 85321-0000
- 11 Citizens Utilities Rural Co. Inc.
Citizens Communications Co. of Arizona
12 4 Triad Center, Suite 200
Salt Lake City, UT 84180
- 13 Valley Telephone Cooperative, Inc.
14 752 E. Malley Street
PO Box 970
15 Willcox, AZ 85644
- 16 Copper Valley Telephone, Inc.
PO Box 970
17 Willcox, AZ 85644
- 18 Verizon California Inc.
One Verizon Way – CA500GCF
19 Thousand Oaks, CA 91362-3811
- 20 Midvale Telephone Exchange
PO Box 7
21 Midvale, ID 83645
- 22 AT&T Communications of the Mountain States, Inc.
111 W. Monroe, Ste. 1201
23 Phoenix, AZ 85003
- 24 Navajo Communications Co., Inc.
4 Triad Center, Suite 200
25 Salt Lake City, UT 84180

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- 1 Brooks Fiber Communications of Tucson, Inc.
201 Spear Street, 9th Floor
2 San Francisco, CA 94105
- 3 Caprock Telecommunications Corporation
15601 N. Dallas Parkway, Ste. 700
4 Dallas, TX 75248
- 5 Citizens Long Distance Co.
5600 Headquarters Drive
6 Plano, TX 75024
- 7 Citizens Telecommunications Co. of the White Mountains, Inc.
4 Triad Center, Ste. 200
8 Salt Lake City, UT 84180
- 9 Max-Tel Communications, Inc.
105 N. Wickham
10 PO Box 280
Alvord, TX 76225
- 11 Comm South Companies, Inc.
12 2909 N. Buckner Blvd., Ste. 200
Dallas, TX 75228
- 13 MCI WorldCom Communications
14 201 Spear Street, 9th Floor
San Francisco, CA 94105
- 15 Covad Communications Co.
16 4250 Burton Drive
Santa Clara, CA 95054
- 17 MCIMetro
18 201 Spear Street, 9th Floor
San Francisco, CA 94105
- 19 Cox Communications
20 20401 N. 29th Avenue
Phoenix, AZ 85027
- 21 Metropolitan Fiber Systems of Arizona, Inc.
22 201 Spear Street, 9th Floor
San Francisco, CA 94105
- 23 Digital Services Corp.
24 211 N. Union Street, Ste. 300
Alexandria, VA 22314
- 25
- 26

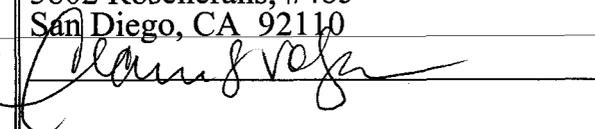
- 1 Mountain Telecommunications Inc.
2540 E. 6th Street
- 2 Tucson, AZ 85716
- 3 e.Spire
131 National Business Parkway, Ste. 100
- 4 Annapolis Junction, MD 20701
- 5 North County Communications Corporation
3802 Rosencrans, Ste. 485
- 6 San Diego, CA 92110
- 7 Electric Lightwave, Inc.
4 Triad Center, Ste. 200
- 8 Salt Lake City, UT 84180
- 9 One Point Communications
Two Conway Park
- 10 150 Field Drive, Ste. 300
Lake Forest, IL 60045
- 11 Eschelon Telecom of Arizona, Inc.
12 730 Second Avenue South, Ste. 1200
Minneapolis, MN 55402
- 13 RCN Telecom Services, Inc.
14 105 Carnegie Center
Princeton, NJ 08540
- 15 Global Crossing Local Services, Inc.
16 180 South Clinton
Rochester, NY 14646
- 17 Reflex Communications, Inc.
18 83 South King Street, Ste. 106
Seattle, WA 98104
- 19 Global Crossing Telemanagement, Inc.
20 180 South Clinton
Rochester, NY 14646
- 21 Rhythm Links, Inc.
22 9100 E. Mineral Circle
Englewood, CO 80112
- 23 Intermedia Communications, Inc.
24 One Intermedia Way
Tampa, FL 33647-1752
- 25
- 26

- 1 Sprint Communications Company, L.P.
6860 W. 115th, MS:KSOPKD0105
- 2 Overland Park, KS 66211
- 3 Jato Operating Corporation
6200 Syracuse Way, Ste. 200
- 4 Englewood, CA 80111
- 5 TCG Phoenix
111 West Monroe St., Ste. 1201
- 6 Phoenix, AZ 85004
- 7 Level 3 Communications, LLC
1025 Eldorado Blvd.
- 8 Broomfield, CO 80021
- 9 The Phone Company/Network Services of New Hope
6805 Route 202
- 10 New Hope, PA 18938
- 11 Verizon Select Services Inc.
6665 MacArthur Blvd, HQK02D84
- 12 Irving, TX 75039
- 13 IG2, Inc.
80-02 Kew Garden Road, Ste. 5000
- 14 Kew Gardens, NY 11415
- 15 Winstar Wireless of Arizona
1577 Spring Hill Road, 2nd Fl.
- 16 Vienna, VA 22182
- 17 Independent Network Services Corp. (FN)
2600 N. Central Avenue, Ste. 1750
- 18 Phoenix, AZ 85004
- 19 XO Arizona Inc.
3930 Watkins, Ste. 200
- 20 Phoenix, AZ 85034
- 21 360 Networks (USA) Inc.
12101 Airport Way
- 22 Broomfield, CO 80021
- 23 Main Street Telephone Company
200 Ithan Creek Avenue
- 24 Villanova, PA 19085
- 25
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- 1 Allcom USA
2151 E. Convention Ctr Way, Ste. 207-A
- 2 Ontario, CA 91764-4483
- 3 Alliance Group Services, Inc.
1221 Post Road East
- 4 Westport, CT 06880
- 5 Net-Tel Corporation
11921 Freedom Drive
- 6 Reston, VA 20190
- 7 Nextlink Long Distance Svcs.
3930 E. Watkins, Ste. 200
- 8 Phoenix, AZ 85034
- 9 Archtel, Inc.
1800 West Park Drive, Ste. 250
- 10 Westborough, MA 01581
- 11 GST Net, Inc.
4001 Main Street
- 12 Vancouver, WA 98663
- 13 One Point Communications
Two Conway Park, #300
- 14 Lake Forest, IL 60045
- 15 Communique Telecommunications, Inc.
4015 Guasti Road
- 16 Ontario, CA 91761
- 17 Opex Communications, Inc.
500 E. Higgins Rd., Ste. 200
- 18 Elk Grove Village, IL 60007
- 19 Enhanced Communications Network, Inc.
37 Winthrop Place
- 20 Hazlet, NJ 07730
- 21 Pac-West Telecomm, Inc.
1776 W. March Lane, #250
- 22 Stockton, CA 95207
- 23 Ernest Communications, Inc.
6475 Jimmy Carter Blvd., Ste. 300
- 24 Norcross, GA 30071
- 25 RCN Telecom Services, Inc.
105 Carnegie Center
- 26 Princeton, NJ 08540

- 1 Single Billing Services, Inc.
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2 El Monte, CA 91731
- 3 Special Accounts Billing Group
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4 Inverness, IL 60067
- 5 Joan S. Burke
Osborne Maledon
6 2929 N. Central Ave., 21st Fl.
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- 7
8 Teligent Services, Inc.
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10 Michael Patten
Roshka, Heyman & DeWulf
Two Arizona Center
11 400 Fifth Street, Ste. 100
Phoenix, AZ 85004
- 12
13 Tess Communications, Inc
12050 Pecos Street, Ste. 300
Westminster, CO 80234
- 14
15 Touch America
130 N. Main Street
Butte, MT 59701
- 16
17 VYVX, LLC
One Williams Center, MD 29-1
Tulsa, OK 74172
- 18
19 Western CLEC Corporation
3650 131st Avenue SE, Ste. 400
Bellevue, WA 98006
- 20
21 Williams Local Network, Inc.
One Williams Center, MD 29-1
Tulsa, OK 74172
- 22
23 Main Street Telephone Company
200 Ithan Creek Avenue
Villanova, PA 19085
- 24
25 North County Communications Corporation
3802 Rosencrans, #485
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