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DOCKET NOS: T-01051B-02-0001

DEC 31 2002

TO ALL PARTIES:

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Enclosed please find the recommendation of Administrative Law Judge Jane Rodda. The recommendation has been filed in the form of an Opinion and Order on:

WHEATLEY v. QWEST CORPORATION  
(COMPLAINT)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

JANUARY 9, 2003

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

JANUARY 14 AND 15, 2003

For more information, you may contact Docket Control at (602)542-3477 or the Hearing Division at (602)542-4250.

BRIAN C. McNEIL  
EXECUTIVE SECRETARY

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 WILLIAM A. MUNDELL  
CHAIRMAN

3 JIM IRVIN  
COMMISSIONER

4 MARC SPITZER  
COMMISSIONER

5 JOHN T. WHEATLEY,  
6 Complainant,

7 Vs.

8 QWEST CORPORATION,  
9 Respondent

DOCKET NO. T-01051B-02-0001

DECISION NO. \_\_\_\_\_

**OPINION AND ORDER**

10 DATE OF HEARING: July 17, 2002  
11 PLACE OF HEARING: Tucson, Arizona  
12 PRESIDING OFFICER: Jane L. Rodda  
13 APPEARANCES: John T. Wheatley, in propria persona;  
14 Darcy Renfro, Fennemore Craig, P.C., on behalf of  
15 Qwest Corporation; and  
16 Jason Gellman, Staff Attorney, on behalf of the Utilities  
Division

17 **BY THE COMMISSION:**

18 On January 2, 2002, John Wheatley ("Complainant") filed with the Arizona Corporation  
19 Commission ("Commission") a formal complaint against Qwest Corporation ("Qwest"). In his  
20 Complaint, Mr. Wheatley alleges: 1) that Qwest violated A.R.S. §44-1574 when its advertisement for  
21 Everywhere Line for Business contained restrictions in less than 10 point type; 2) that Qwest violated  
22 A.A.C. R14-2-1114.B.2 when the Everywhere Line features didn't work as he expected and he was  
23 billed for scheduled greetings; and 3) that his business expansion line was essentially out of service  
24 between July 6, 2001 and August 11, 2001. For relief, Mr. Wheatley wanted his phone service to be  
25 restored to the services he received prior to subscribing to Everywhere Line, that Qwest not charge  
26 him for the time Everywhere Line was installed, that all monies paid for Everywhere Line be returned  
27 and the \$200 deactivation fee for the wireless service be waived, plus whatever he is entitled to under  
28 the Service Quality Plan Tariff and the reimbursement of his legal expenses.

1 On January 23, 2002, Qwest filed an Answer and Motion to Dismiss the Complaint.

2 By Procedural Order dated February 19, 2002, a procedural conference was set for March 6,  
3 2002, for the purpose of discussing the issues to be resolved and to set a hearing date. At the March  
4 6, 2002 procedural conference, one of the issues discussed was Mr. Wheatley's desire to have his  
5 phone service returned to the services and the features he had prior to ordering Everywhere Line for  
6 Business, but his unwillingness to allow Qwest to make these changes while he was disputing the  
7 charges. Mr. Wheatley mistakenly believed that if he allowed Qwest to change his service prior to  
8 the resolution of his formal complaint, he would be forfeiting his claims against Qwest. During the  
9 procedural conference, the parties were able to agree that Mr. Wheatley would allow Qwest to restore  
10 his service to include the features he had before adding Everywhere Line Service, including canceling  
11 his wireless service, and Mr. Wheatley would resume paying Qwest for current charges on a going-  
12 forward basis. The parties agreed that charges for past services would be determined by the hearing,  
13 except that Qwest takes the position this Commission does not have jurisdiction to adjudicate  
14 disputes involving wireless charges.<sup>1</sup>

15 A Procedural Order dated March 14, 2002, set the matter for hearing on May 1, 2002.

16 On April 25, 2002, Complainant requested a continuance of the May 1, 2002, hearing because  
17 he needed additional time to prepare. Qwest did not oppose the continuance.

18 By Procedural Order dated April 26, 2002, the matter was set for hearing on June 12, 2002.

19 On Friday, June 7, 2002, Complainant filed a Motion to postpone the hearing.

20 Qwest filed a Response on June 7, 2002, opposing an additional continuance and requesting  
21 an expedited procedural teleconference to discuss the request.

22 A telephonic procedural conference convened on Monday, June 10, 2002. Although Mr.  
23 Wheatley had received discovery from Qwest months earlier, and had been told at that time to submit  
24 any questions he had about the documents to Qwest, less than a week before hearing he had not yet  
25 reviewed the materials thoroughly and had not made arrangements to subpoena Ms. McCants, the  
26 Qwest employee he wanted to call as a witness. The Administrative Law Judge determined that Mr.

27 <sup>1</sup> As of March 4, 2002, Qwest's records showed that Mr. Wheatley owed \$824.01, comprised of \$387.07 for regulated  
28 services, \$108.80 for unregulated services (voice mail, scheduled greetings), \$327.58 for wireless services and \$.56 for  
long-distance.

1 Wheatley had sufficient time to prepare and the hearing should proceed as scheduled on June 12,  
2 2002, and that despite not including Ms. McCants on his witness list, Mr. Wheatley would be allowed  
3 to call her.

4 Complainant appeared at the time set for the June 12, 2002 hearing and stated he was not  
5 prepared to go forward with his case and requested another continuance. Qwest opposed the  
6 continuance on the grounds that the Complainant had had sufficient time to prepare for the hearing.  
7 Complainant argued he did not understand until several days earlier that he would need a subpoena to  
8 call Ms. McCants. Because Mr. Wheatley had not realized until Monday June 10, 2002, that he  
9 needed a subpoena to call the Qwest employee, and because there was not sufficient time to have the  
10 subpoena issued and served before the June 12, 2002 hearing, the Administrative Law Judge granted  
11 a continuance until July 17, 2002.

12 On July 3, 2002, Qwest filed a Motion to Dismiss all claims related to wireless charges  
13 pursuant to 47 U.S.C. § 332(c)(2) of the Federal Communications Act, and to dismiss the remaining  
14 claims for failure to prosecute under Rule 41 (b) of the Arizona Rules of Civil Procedure and for  
15 failure to adhere to Commission orders.

16 The hearing convened on July 17, 2002. The Administrative Law Judge took the Motion to  
17 Dismiss under advisement. Mr. Wheatley testified on his own behalf and called Joel Rieker and Reg  
18 Lopez of Commission Staff, Ms. Edna McCants, a former Qwest employee, and Mr. John Duffy, a  
19 current Qwest employee as witnesses. Mr. Duffy, a policy and law manager for Qwest, also  
20 provided direct testimony on behalf of Qwest.

21 Complainant requested to be allowed to file closing briefs. The parties filed closing briefs on  
22 August 28, 2002.

23 In his closing brief, Complainant argues only two issues: 1) that Qwest violated the service  
24 quality plan tariff, citing 2.1 Definition Out of Service, as he believes the evidence shows that he  
25 could not receive a call when his land line was forwarded to his cell phone; and 2) that Qwest  
26 violated A.R.S. §§ 44-1573 and -1574 because Qwest had knowledge that it was participating in  
27 charging for goods and services without the consumer's authorization.

28

1 Complaints Regarding Everywhere Line Service

2 On or around June 21, 2001, Mr. Wheatley, a Qwest business customer, ordered Qwest's  
3 Everywhere Line for Business package ("Everywhere Line"). Prior to ordering Everywhere Line,  
4 Mr. Wheatley had a business line with the CustomChoice service package and Qwest cellular service  
5 on a month to month basis. (March 6, 2002 transcript; page 5).<sup>2</sup>

6 Everywhere Line is a marketing package of regulated and unregulated services that includes  
7 the CustomChoice package of features, voice mail and wireless service at a discounted rate.  
8 CustomChoice is a regulated service that allows the customer to choose from 24 features when  
9 available. One of the features available under CustomChoice is call forwarding that permits a  
10 customer to forward business calls from a landline number to a wireless number when properly  
11 activated. Although Everywhere Line is marketed as a package for \$99.95, the components are billed  
12 separately: CustomChoice at \$54.95, Voice Mail at \$9.75, and wireless service at \$35.25.

13 On or about July 25, 2001, Mr. Wheatley contacted Qwest complaining that he was not  
14 receiving a warning ring on this landline phone prior to the call being forwarded to this wireless  
15 phone. Mr. Wheatley spoke with Edna McCants, a Qwest employee, about his problem. Ms.  
16 McCants researched the problem and discovered that the call forwarding feature was not compatible  
17 with the call transfer feature, another feature Mr. Wheatley ordered as part of the CustomChoice  
18 package. Qwest removed the call transfer feature on August 7, 2001, which resolved the warning  
19 ring problem.

20 Subsequent to the resolution of the problem with call forwarding, Mr. Wheatley claims he  
21 called Ms. McCants again to complain about another problem with his One Number service. The One  
22 Number service is not part of the CustomChoice package. The One Number service allows a call to  
23 be automatically forwarded between the landline, the wireless line and voice mail. Whenever the  
24 customer turns on the cell phone, calls to the landline will forward automatically to the cell phone.  
25 Qwest does not have service records related to Mr. Wheatley's problem with the One Number

26 \_\_\_\_\_  
27 <sup>2</sup> The features Mr. Wheatley had on June 21, 2001 include a Basic Business Line, Caller ID, Call Waiting Caller ID, Call  
28 Forwarding, Call Waiting, Custom Ringing, 3-way Conferencing, Continuous Redial, Last Call Return, and Speed  
Dialing. These services and features would have cost \$79.43 if billed on a "per item" basis. Mr. Wheatley was billed the  
CustomChoice price of \$54.95 prior to ordering Everywhere Line.

1 service. Mr. Wheatley produced notes he purports to have made contemporaneously with  
2 conversations he had with Qwest employees about the problem. Ms. McCants testified that she did  
3 not recall talking to Mr. Wheatley about the problem with his One Number service. She speculated  
4 that Qwest did not have records of the calls because Mr. Wheatley had called her directly and did not  
5 go through the business office with the complaint. Mr. Wheatley claims that if he activated call  
6 forward to his cell phone and then forgot to turn on the cell phone, he would not receive the call, and  
7 it would not be forwarded to voice mail. (July 17, 2002 transcript; p. 163). Mr. Wheatley recalls  
8 being frustrated after Qwest representatives told him that the problem must be with the cellular  
9 service and Qwest Wireless representatives told him that the problem must be with the landline  
10 phone.

11 Ms. McCants did not appear to understand or recall Mr. Wheatley's problem with the One  
12 Number service. It is not clear whether the problem with the One Number feature was ever solved.  
13 However, the evidence shows that Mr. Wheatley had both landline and cellular service throughout  
14 the period, although certain features may not have worked properly. During the repair process he  
15 was without dial tone for only about one hour.

16 Around August 11, 2001, Mr. Wheatley decided he no longer wanted the Everywhere Line  
17 service and One Number service, and wanted his service returned to the way it was before he ordered  
18 Everywhere Line and his account "zeroed" out. (July 17, 2002 transcript; p. 164). Qwest offered to  
19 credit him \$100 for services relating to the Everywhere Line package features. His total bill during  
20 the month he received the service was \$143.87, which included CustomChoice (\$54.95), security  
21 screen (\$14.68), federal and state assessments and taxes (\$13.76), voice mail (\$4.55) and scheduled  
22 greetings (.70), and wireless charges (\$54.80).<sup>3</sup> Mr. Wheatley refused the offer and did not want  
23 Qwest to alter his service while he was disputing the charges. Consequently, Qwest continued to bill  
24 Mr. Wheatley for the services and features.

25 On November 7, 2001, the Commission's Utilities Division conducted an arbitration of Mr.  
26 Wheatley's complaint in accordance with A.A.C. R14-2-212. During the arbitration, Qwest offered

27 \_\_\_\_\_  
28 <sup>3</sup> The wireless charges included the monthly service charge \$35.25, one-time charge of \$14.10, taxes \$5.80 and a credit  
for \$.35.

1 to credit his account a total of \$150 toward his \$143.87 bill. Mr. Wheatley refused this offer, wanting  
2 a credit for the entire balance owing, including amounts charged in the months after he canceled  
3 Everywhere Line. Ultimately, the Commission Staff arbitrator determined that "Qwest did not  
4 violate the provisions of the Service Quality Plan Tariff or Commission rules."

5 Sometime after the arbitration, Qwest offered a \$150 credit and waiver of the \$200  
6 deactivation fee for cellular service, which Mr. Wheatley also refused. During the March 6, 2002  
7 Procedural Conference, Mr. Wheatley stated that he refused Qwest's offers to credit his account \$150  
8 and to waive the \$200 deactivation fee because Qwest didn't offer to waive the deactivation earlier  
9 and should not be entitled to the profits it made on services that he subscribed to, and would have  
10 cancelled, but for the deactivation fee. He believed that the offers did not return him to the same  
11 position he was in before signing up for Everywhere Line service. Mr. Wheatley also believed that  
12 if he agreed to allow Qwest to put his service back to its pre-Everywhere Line status while he was  
13 disputing the charges, that he would be compromising his claim for additional credits from Qwest.

14 The Everywhere Line service, including One Number, did not work as advertised. The ability  
15 to have calls transferred between phones and voice mail is a major feature of the service. Mr.  
16 Wheatley was reasonable in wanting to cancel this package of services, although he unreasonably  
17 refused to allow Qwest to change his account after he expressed his desire to cancel Everywhere  
18 Line. Mr. Wheatley was not out of service for more than an hour during the repair process. Qwest's  
19 offer to credit his account \$100, for the cost of the Everywhere Line package was reasonable.  
20 Because the package did not work as advertised, we find that Qwest should credit Mr. Wheatley's  
21 account \$100. Qwest did not offer to waive the \$200 deactivation fee for wireless service until  
22 November 2001. If Qwest had offered to waive the deactivation fee earlier, it is likely that Mr.  
23 Wheatley would have allowed Qwest to return his service back to its pre-Everywhere status earlier  
24 and would not have incurred charges for late fees. Consequently, we find that in addition to the \$100  
25 credit, Qwest should waive the \$200 deactivation fee, if it has not already done so, and should credit  
26 Mr. Wheatley for any late fees associated with Qwest's regulated or unregulated (i.e. voicemail)  
27 services.

28 No customer can expect to receive phone service for free. Following his cancellation of

1 Everywhere Line, Mr. Wheatley continued to use his phone and should pay for such use. Mr.  
2 Wheatley did not demonstrate that after August 11, 2001, any of the features of his phone service  
3 were not working. We find no evidence that Qwest violated its tariff or Commission rule that would  
4 subject the Company to additional penalty. Our ruling herein makes no determination of the  
5 appropriate wireless charges for the same period, as discussed below.

6 Complaints regarding Scheduled Greetings

7 Mr. Wheatley claims that Qwest incorrectly represented the cost of his scheduled greetings  
8 feature. Scheduled greetings is not a feature available under the CustomChoice package. The  
9 scheduled greetings feature is a tariffed feature that cost \$3.00 per month from July 2001 through  
10 November 2001, and increased to \$4.95 thereafter. Mr. Wheatley does not dispute that he ordered it,  
11 only that he was given incorrect information from Qwest about its cost. He received a \$3.00 credit in  
12 July 2001 as part of a promotion for 30 days of free scheduled greetings.

13 Qwest claims that Mr. Wheatley continued to use the service subsequent to July 2001 until  
14 March 6, 2002, when it was removed after the procedural conference. Thus, Qwest argues, Mr.  
15 Wheatley should be required to pay for the feature.

16 Mr. Wheatley believed that the scheduled greetings feature was part of his CustomChoice  
17 package or Everywhere Line package. He recalls that he told a Qwest representative when he had the  
18 scheduled greetings feature added and heard there would be a \$3 charge, that if it was not part of the  
19 Everywhere Line package he did not want it. (March 6, 2002 transcript; p. 6).

20 Mr. Wheatley appears to have misunderstood the nature and charges associated with the  
21 scheduled greetings, and Qwest's representatives appear to have misunderstood Mr. Wheatley when  
22 he indicated that he didn't want the feature if there was a separate charge. Later, Mr. Wheatley was  
23 afraid of prejudicing his claim against Qwest and refused to allow Qwest to change the features on  
24 his phone, including scheduled greetings, until he pursued his claim against Qwest with the  
25 Commission. Between July 2001, when he ordered scheduled greetings, and March 2002, when  
26 Qwest removed them at his request, Mr. Wheatley incurred charges totaling \$26.85 associated with  
27 scheduled greetings.

28 We find that Qwest should credit Mr. Wheatley for \$26.85 for charges associated with

1 scheduled greetings. Although Mr. Wheatley was mistaken in his belief that he could not let Qwest  
2 cancel scheduled greetings without waiving a claim for past charges, he informed the Qwest  
3 representative that he was not interested in the service shortly after having signed up for it. Qwest  
4 did not present evidence to the contrary.

5 Wireless Charges

6 It is not clear at this point whether Mr. Wheatley is claiming that Qwest should credit his  
7 account for wireless charges incurred between July 2001 and March 6, 2002, when he finally agreed  
8 to allow Qwest to discontinue his wireless service. He did not mention wireless charges in his brief  
9 or during the hearing. When he subscribed to the Everywhere Line service, he received wireless  
10 service at a rate of \$32.25 per month.

11 On July 3, 2002, Qwest filed a Motion to Dismiss all claims relating to wireless charges  
12 pursuant to U.S.C. § 332(c)(3) of the Federal Communications Act ("Act") for lack of jurisdiction.  
13 Qwest asserts the problem with the Everywhere Line Service was related to the conflict between the  
14 call forwarding and call transfer features and had nothing to do with the wireless service. Qwest  
15 asserts that Mr. Wheatley would not allow it to disconnect the wireless service until the March 6,  
16 2002 Procedural Conference, and that until that time he continued to receive and use wireless service  
17 and should be responsible for the charges. Moreover, Qwest argues, this Commission has no  
18 jurisdiction over Mr. Wheatley's claims for a credit of his wireless charges, and thus, those claims  
19 must be dismissed.

20 Qwest argues the rates charged by wireless providers fall under the exclusive jurisdiction of  
21 federal regulators. Section 332 of the Act states in part, "[n]o State or local government shall have  
22 any authority to regulate the entry of or the rates charged by any commercial mobile service, except  
23 that this paragraph shall not prohibit a State from regulating the other terms and conditions of  
24 commercial mobile services." 47 U.S.C. 332 (c)(3)(A). The Act permits concurrent state regulation  
25 of "other terms and conditions," however, a party cannot claim that service quality issues take a claim  
26 out of the purview of federal regulation. See Bastien v. AT&T Wireless Services, Inc., 205 F.3d 983,  
27 988 (7<sup>th</sup> Cir. 2000) ("In practice, most consumer complaints will involve the rates charged by  
28 telephone companies or their quality of service") and AT&T v. Central Office Telephone, 524 U.S.

1 214, at 214 (S.Ct. 1998) (“Any claim for excessive rates can be couched as a claim for inadequate  
2 services and vice versa.”)

3 We find that this Commission does not have jurisdiction over Qwest Wireless LLC rates and  
4 will therefore grant Qwest’s motion to dismiss claims relating to the wireless charges.

5 Violation of A.R.S. 44-1574

6 Mr. Wheatley alleges that Qwest violated A.R.S. § 44-1574, which provides:

- 7
- 8 A. An ancillary service provider shall not use a sweepstakes, contest or  
9 entry form as authorization to change or add goods or services to a  
10 consumer’s telecommunications bill.
- 11 B. An ancillary service provider shall not use any written authorization  
12 agreement to change or add goods or services to a consumer’s  
13 telecommunications bill unless the authorization is clear, conspicuous  
14 and printed in at least ten point bold type. The authorization  
15 agreement shall be in the same language used in any promotional or  
16 inducement materials provided to the consumer.
- 17 C. An ancillary service provider shall not charge a consumer through the  
18 consumer’s telecommunications bill for goods or services without the  
19 consumer’s authorization to add the goods or services. Any person,  
20 other than a local telecommunications service provider regulated by  
21 the commission, that provides billing services for an ancillary service  
22 provider is liable under this subsection if the billing person knows or  
23 should have known through a pattern or course of conduct that the  
24 ancillary service provider, telecommunications service provider or  
25 other person is participating in charging a consumer for goods and  
26 services without the consumer’s authorization. A local  
27 telecommunications service provider that is regulated by the  
28 commission is not liable as a billing person pursuant to this section  
unless the local telecommunications service provider knows that it is  
participating in charging a consumer for goods and services without  
the consumer’s authorization.
- D. A consumer does not have to pay for any goods or services that are  
provided by an ancillary service provider and that the consumer did  
not authorize or for any goods that are not delivered or for any service  
that is not provided.
- E. If the consumer paid for any goods or services that the consumer did  
not authorize, the unauthorized ancillary service provider shall refund  
to the consumer an amount equal to all charges paid to the  
unauthorized ancillary service provider by that consumer. The  
consumer may recover reasonable attorney fees and costs incurred in  
obtaining a refund from an unauthorized ancillary service provider.
- F. Any violation of this section is an unlawful act or practice pursuant to

1 § 44-1522. The attorney general may investigate the act or practice  
2 and take appropriate action pursuant to chapter 10, article 7 of this  
3 title.

4 G. The program established by this section ends on July 1, 2009  
5 pursuant to § 41-3102.

6 Mr. Wheatley argues that Qwest is an ancillary service provider pursuant to A.R.S. §44-1571  
7 because it provides text messaging through wireless service. Mr. Wheatley believes that as an  
8 ancillary service provider subject to §44-1574, it violated the statute when it sent a letter confirming  
9 his order for wireless service (as part of the Everywhere Line package) that contained print that was  
10 not in at least ten-point bold type.

11 Qwest argues that Mr. Wheatley's claims lack both factual and legal bases because the  
12 Commission does not have jurisdiction to act under A.R.S. §44-1574; Qwest is not an ancillary  
13 service provider subject to §44-1574; and even if Mr. Wheatley's wireless service fits the description  
14 of ancillary services, A.R.S. §44-1574 does not apply to Qwest.

15 Qwest argues that the plain language of the statute and analogous statutes indicate that the  
16 Commission does not have jurisdiction to act under A.R.S. § 44-1574. Section 1574 is part of Article  
17 10 of Title 44 of the Arizona Revised Statutes entitled "Unlawful Practices in Telecommunications  
18 and Ancillary Services" and consists of § 44-1571 to § 44-1574. Sections 1572 and 1573 pertain  
19 specifically to local and long distance telecommunications service providers, respectively, and  
20 include provisions regarding unauthorized charges or additions to consumer telecommunication  
21 services. These sections specifically grant the Commission authority to act. In contrast, Qwest  
22 asserts, the legislature did not grant the Commission any power under §44-1574. Rather, §44-1574  
23 grants the attorney general the authority to investigate any violations of the section and to take  
24 appropriate action. Qwest argues the plain language of these statutes make clear that the legislature  
25 did not intend that the Commission has rulemaking or enforcement authority under §44-1574. Thus,  
26 even if the statute applied to Qwest, the Commission does not have authority to enforce it or enact  
27 rules to enact it.

28 Qwest also argues that Qwest is not an "ancillary service provider" as that term is defined in  
the statute. Pursuant to A.R.S. § 44-1571(1) an "ancillary service provider" is "any person that  
provides goods or services other than, or in addition to, telecommunications services to consumers

1 and bills consumers through a long-distance telecommunications service provider or local  
2 telecommunications service provider.” A “local telecommunications service provider” is defined in  
3 A.R.S. § 44-171(3) as

4  
5 Any individual, firm, joint venture, partnership, corporation, association,  
6 public utility, cooperative association or joint stock association, including  
7 any trustee, receiver, assignee or representative other than a provider of  
wireless, cellular, personal communication or commercial radio services,  
that offers for sale intrastate, interlata or intralata toll telecommunications  
service to an end-use customer.

8 Qwest asserts that by definition and pursuant to its Certificate of Convenience and Necessity, it is a  
9 “local telecommunications service provider.” Moreover, Qwest argues, § 44-1574 specifically does  
10 not apply to local telecommunication service providers regulated by the Commission, and no  
11 evidence indicates that Qwest knew that an ancillary or information provider had placed unauthorized  
12 services on Mr. Wheatley’s phone bill. As Mr. Wheatley admits, he authorized the services he  
13 ordered.

14 Finally, Qwest asserts, the only charges Qwest billed to Mr. Wheatley that might be  
15 considered as goods and services provided for by an ancillary service provider are for his wireless  
16 services. Qwest is not the provider of those services, but rather Qwest Wireless, LLC is the provider.  
17 Therefore, Qwest argues, assuming certain wireless services are “ancillary services” Qwest Wireless,  
18 LLC would be the ancillary service provider subject to §44-1574. Qwest, which provides the billing  
19 services for the wireless service, is exempt under the plain language of A.R.S. § 44-1574.  
20 Furthermore, Mr. Wheatley authorized the wireless services, which makes the entire application of  
21 Article 10, Title 44 moot.

22 Mr. Wheatley has not demonstrated that Qwest, as the billing agent for Qwest Wireless LLC,  
23 knew that the charges were not authorized. The evidence shows that Mr. Wheatley authorized the  
24 wireless service. Consequently, Mr. Wheatley failed to demonstrate that Qwest violated A.R.S. §44-  
25 1574. We make no determination as to whether Qwest is an ancillary service provider.

26 Mr. Wheatley refers to A.R.S. § 44-1573 in his closing brief. This statute addresses  
27 unauthorized changes to a consumer’s local or long-distance telecommunications service provider. It  
28 is not applicable to Mr. Wheatley’s complaints as set forth in his formal complaint or as presented at

1 the hearing.

2 \* \* \* \* \*

3 Having considered the entire record herein and being fully advised in the premises, the  
4 Commission finds, concludes, and orders that:

5 **FINDINGS OF FACT**

6 1. On January 2, 2002, John Wheatley filed with the Commission a formal complaint  
7 against Qwest alleging: 1) that Qwest violated A.R.S. §44-1574 when its advertisement for  
8 Everywhere Line for Business contained restrictions in less than 10 point type; 2) that Qwest violated  
9 A.A.C. R14-2-1114.B.2 when the Everywhere Line features didn't work as he expected and he was  
10 billed for scheduled greetings; and 3) that his business expansion line was essentially out of service  
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12 2. For relief, Mr. Wheatley wanted his phone service to be restored to the services he  
13 received prior to installing Everywhere Line service, that Qwest not charge him for the time  
14 Everywhere Line was installed, that all monies paid for Everywhere Line be returned and the \$200  
15 deactivation fee for the wireless service be waived, plus whatever he is entitled to under the Service  
16 Quality Plan Tariff and the reimbursement of his legal expenses.

17 3. On January 23, 2002, Qwest filed an Answer and Motion to Dismiss the Complaint.

18 4. By Procedural Order dated February 19, 2003, a procedural conference was set for  
19 March 6, 2002, for the purpose of discussing the issues to be resolved and to set a hearing date.

20 5. A Procedural Order dated March 14, 2002, set the matter for hearing on May 1, 2002.

21 6. On April 25, 2002, Complainant requested a continuance of the May 1, 2002, hearing  
22 because he needed additional time to prepare. Qwest did not oppose the continuance.

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25 8. On Friday, June 7, 2002, Complainant filed a Motion to postpone the hearing.

26 9. Qwest filed a Response on June 7, 2002, opposing an additional continuance and  
27 requesting an expedited procedural teleconference to discuss the request.

28 10. A telephonic procedural conference convened on Monday, June 10, 2002, with the

1 Administrative Law Judge deciding that the hearing would commence as scheduled and Mr.  
2 Wheatley would be allowed to subpoena the Qwest employee even though he had not included her on  
3 his witness list.

4 11. Complainant appeared at the June 12, 2002 hearing and stated he was not prepared to  
5 go forward with his case and requested another continuance. Qwest opposed the continuance on the  
6 grounds that the Complainant had had sufficient time to prepare for the hearing. Complainant  
7 argued he did not understand until several days earlier that he would need a subpoena to call the  
8 Qwest employee witnesses he desired.

9 12. The Administrative Law Judge granted the continuance until July 17, 2002.

10 13. On July 3, 2002, Qwest filed a Motion to Dismiss all claims related to wireless  
11 charges pursuant to 47 U.S.C. § 332(c)(2) of the Federal Communications Act, and to dismiss the  
12 remaining claims for failure to prosecute under Rule 41 (b) of the Arizona Rules of Civil Procedure  
13 and for failure to adhere to Commission orders.

14 14. The hearing convened on July 17, 2002. Mr. Wheatley testified on his own behalf and  
15 called Joel Rieker and Reg Lopez of Commission Staff, Ms. Enda McCants, a former Qwest  
16 employee, and Mr. John Duffy, a current Qwest employee as witnesses. Mr. Duffy, a policy and law  
17 manager for Qwest, also provided direct testimony on behalf of Qwest.

18 15. The parties filed closing briefs on August 28, 2002.

19 16. In his closing brief, Complainant argues only two issues: 1) that Qwest violated the  
20 service quality plan tariff, citing 2.1 Definition Out of Service, as he believes the evidence shows that  
21 he could not receive a call when his land line was forwarded to his cell phone; and 2) that Qwest  
22 violated A.R.S. §§ 44-1573 and -1574 because Qwest had knowledge that it was participating in  
23 charging for goods and services without the consumer's authorization.

24 17. On or around June 21, 2001, Mr. Wheatley, a Qwest business customer, ordered  
25 Qwest's Everywhere Line service. Everywhere Line has a monthly subscription cost of \$99.95, and  
26 includes Qwest's Customer Choice package, Voice Mail and Qwest wireless service.

27 18. Prior to ordering Everywhere Line, Mr. Wheatley had subscribed to Qwest's  
28 CustomChoice service package.

1           19.     Several of the features Mr. Wheatley ordered as part of his subscription to Everywhere  
2 Line were not compatible and caused the Everywhere Line service to not function properly.

3           20.     Mr. Wheatley told Qwest he desired to cancel the Everywhere Line service in August  
4 2001, and requested that his service be restored to its configuration prior to ordering the service.

5           21.     Qwest offered Mr. Wheatley a \$100 credit which he rejected because he believed it  
6 was inadequate to place him in the same position as before ordering Everywhere Line. Qwest  
7 subsequently increased its offer to a \$150 credit, but Mr. Wheatley believed that unless Qwest waived  
8 the \$200 deactivation fee associated with the wireless service, that he was not being returned to his  
9 pre-Everywhere Line status.

10          22.     Despite his stated desire to cancel the Everywhere Line service and have his service  
11 returned to its pre-Everywhere Line status, Mr. Wheatley would not allow Qwest to change his  
12 service pending resolution of his complaint by the Commission.

13          23.     Between the time Mr. Wheatley canceled the Everywhere Line service and when  
14 Qwest offered to waive the deactivation fee, Mr. Wheatley was not making payments and was  
15 incurring late charges on his outstanding balance. Mr. Wheatley wanted his entire balance  
16 outstanding to be "zeroed out."

17          24.     Because the Everywhere Line service did not work as advertised, Qwest should credit  
18 Mr. Wheatley \$100 (the cost of the package for the July/August 2001 timeframe), and for any late  
19 charges associated with its regulated and unregulated services, and should waive the \$200  
20 deactivation fee associated with the wireless portion of the package.

21          25.     When he heard there would be a charge for scheduled greetings, Mr. Wheatley told the  
22 Qwest representative that he did not want the service. Consequently, Qwest should credit Mr.  
23 Wheatley's account for all charges associated with scheduled greetings.

24          26.     Mr. Wheatley is responsible for the charges for CustomChoice and Voice Mail after  
25 he canceled Everywhere Line but refused to allow Qwest to change his service.

26          27.     To the extent Mr. Wheatley's claims against Qwest involve wireless rates, this  
27 Commission does not have jurisdiction to adjudicate such claims pursuant to Section 332 (c)(3)(A) of  
28 the Federal Communications Act.



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**ORDER**

IT IS THEREFORE ORDERED that Qwest Corporation shall credit Mr. Wheatley's account \$100 for the Everywhere Line package and waive the \$200 deactivation fee associated with the wireless portion of the package; credit his account for all amounts charged for scheduled greetings; and for any late charges associated with Qwest Corporation's regulated and unregulated services.

IT IS FURTHER ORDERED that the charges relating to wireless service shall be dismissed.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN

COMMISSIONER

COMMISSIONER

IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive Secretary of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this \_\_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_  
BRIAN C. McNEIL  
EXECUTIVE SECRETARY

DISSENT \_\_\_\_\_

JR:mlj

1 SERVICE LIST FOR: JOHN WHEATLEY v. QWEST CORPORATION

2 DOCKET NO. T-01051B-02-0001

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