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**IN THE MATTER OF THE FORMAL
COMPLAINT OF QWEST CORPORATION
AGAINST ARIZONA DIALTONE, INC. TO
ENFORCE ITS INTERCONNECTION
AGREEMENT**

**DOCKET NO. T-01051B-07-0694
T-03608A-07-0694**

**QWEST CORPORATION'S MOTION
FOR JUDGMENT ON THE
PLEADINGS**

Pursuant to Arizona Administrative Code R14-3-106(K) and Rule 12(c), Arizona Rules of Civil Procedure, Qwest Corporation ("Qwest") hereby requests that the Commission issue an order granting Qwest the relief requested in its Complaint, based on the pleadings. This Motion is supported by the pleadings and the following Memorandum of Points and Authorities.

I. Introduction and Background

Qwest's Complaint states that Arizona Dialtone violated the terms of the parties' Interconnection Agreement ("ICA") by refusing to enter into a change of law amendment reflecting the provisions of the FCC's Triennial Remand Order ("TRRO"), and by refusing even to follow the dispute resolution processes provided in the ICA for when there is a disagreement over the change of law. The Complaint states that the failure of Arizona Dialtone to comply with

1 the provisions of the TRRO is also a violation of the parties' ICA. Qwest asks that Arizona
2 Dialtone's failure to amend its conduct in conformity with the ICA and the *TRRO* should be
3 remedied by an order compelling Arizona Dialtone to execute the TRRO Amendment that other
4 CLECs have signed in Arizona. That amendment provides for back-billing of amounts
5 applicable back to the dates established by the FCC's order for transition and for conversions
6 from UNE-P services to alternative services providing comparable functionality. The TRRO
7 Amendment is consistent with the *TRRO*, and an order requiring Arizona Dialtone to sign the
8 TRRO Amendment and comply with its terms is entirely appropriate to rectify Arizona
9 Dialtone's compliance lapses.

10 Arizona Dialtone has refused to sign of the TRRO amendment for nearly 3 years from the
11 effective date of the *TRRO* and from when the first request was made. Now, however, the
12 Answer filed by Arizona Dialtone in this Complaint declares that it has been willing to sign a
13 TRRO Amendment so long as that amendment addresses not only the impact of the *TRO* and
14 *TRRO* in the Interconnection Agreement between Qwest and AZDT but also some billing
15 disputes.¹ By reason of the admissions and statements made by Arizona Dialtone in its January
16 22, 2008 Answer to Qwest's Complaint, Arizona Dialtone agrees with Qwest about the impact
17 and meaning to the *TRRO*, and the effective dates of the *TRRO*.

18 The "billing disputes" allegation, even if true, is not a defense to the matters raised in the
19 Complaint. Arizona Dialtone's Answer interposes certain other affirmative defenses to liability
20 for back-billing that are groundless as a matter of law. An order in favor of Qwest on its
21 Complaint should be approved promptly.

22
23 **II. Arizona Dialtone Now Agrees with Qwest Regarding the Legal Impact of the *TRRO***
24 **and the Implementing Regulations**

25
26

¹ Answer, ¶¶ 10, 15.

1 Qwest stated in its Complaint, and Arizona Dialtone admits,² that from the effective Date
2 of the TRRO on March 11, 2005 to the time Qwest filed these actions, Qwest repeatedly
3 requested Arizona Dialtone to enter into negotiations to implement the *TRRO*. Throughout this
4 long-standing impasse, Arizona Dialtone asserted various excuses, which it has now abandoned.
5 Indeed, Arizona Dialtone now states in its Answer that it “has been willing to sign a TRRO
6 Amendment”³ and “admits that it is obligated to negotiate a TRRO amendment.”⁴

7 By its failure to deny the statements in Qwest’s Complaint, paragraphs 7 and 8, Arizona
8 Dialtone admits Qwest’s statements regarding the legal impact of the *TRRO* and the
9 implementing regulations, including the fact that under the TRRO CLECs were required to
10 convert all UNE-P services to alternatives by the end of the specified transition period. Arizona
11 Dialtone has abandoned its pre-complaint position that it was not required to sign the TRRO
12 Amendment based on its theory that the *TRRO* did not mandate the changes.⁵

13
14 **III. Arizona Dialtone’s Admissions Resolve the Complaint**

15
16 Arizona Dialtone’s Answer essentially admits that Arizona Dialtone’s pre-litigation
17 objections to the TRRO Amendment were wrong. With these statements and admissions by
18 Arizona Dialtone, it is now clear that Arizona Dialtone does not contest the provisions of the
19 TRRO Amendment as it was proposed to them by Qwest. As stated by the Commission Staff in

20 ² Answer, ¶ 10.

21 ³ See, fn. 1, supra.

22 ⁴ Answer, ¶ 14.

23 ⁵ Arizona Dialtone’s pre-litigation position was stated in the March 3, 2006, letter from William D. Cleaveland, counsel for Arizona Dialtone, to Qwest, which letter appears as Exhibit C to Qwest’s Complaint. The letter states:

24 Additionally, the proposed TRRO Amendment that Qwest has drafted
25 seems to imply that somehow the modifications contained in it are mandated by
26 the TRRO currently on review in the Washington DC courts. While the TRRO is
quite a lengthy document, I have been searching it for any mention of such a
mandate to implement the changes in the Amendment, but I have been unable to
find one.

1 the parallel proceeding involving the same operative facts:

2 [T]he TRRO's implementation arguably should have been accomplished by the
3 Change of Law provisions in the parties' existing ICA. Again, AZDT does not
4 appear to have any real issue with Qwest's TRRO Amendment. AZDT simply
5 seeks to use the TRRO Amendment to resolve other "billing disputes" as well.
6 However, if AZDT has "billing issues" with Qwest regarding its existing ICA, the
7 appropriate remedy for AZDT is to file a complaint with the Commission.⁶

8
9 The existence of "billing disputes," even if true, does not present a defense to Arizona Dialtone's
10 obligation to enter into the TRRO Amendment.

11
12 **IV. Arizona Dialtone's Defenses to Back-Billing Under the TRRO Amendment Are**
13 **Legally Insufficient**

14 Arizona Dialtone was obliged by the *TRRO* to convert from UNE-P by March 11, 2006,
15 and obliged to pay Qwest according to a true-up. Arizona Dialtone's pleadings have shifted the
16 back-billing issue from whether they are obligated to pay back-billing, to claims of affirmative
17 defenses. Those claims are, (a) Qwest "knowingly processed" orders for new UNE-P services
18 during the one-year transition period and thereafter, and that Arizona Dialtone paid Qwest for the
19 UNE-P services at the rates invoiced by Qwest, such that Qwest should now be estopped from
20 collecting additional amounts from Arizona Dialtone for those services,⁷ and (b) that Arizona
21 Dialtone's unexplained "billing disputes" should serve as a setoff against their liability for the
22 back-billing. Each of these attempts at affirmative defenses to the back-billing are legally
23 incorrect. And as stated above, they do not create a bar to an order affirming Qwest's
24 entitlement to the TRRO Amendment and back-billing under that Amendment.

25 ⁶ Commission Staff's Brief, *In the Matter of Qwest Corporation's Petition for Arbitration and*
26 *Approval of Amendment to Interconnection Agreement with Arizona Dialtone, Inc. Pursuant to*
Section 252(b) of the Communications Act of 1934 as Amended by the Telecommunications Act
of 1996 and Applicable State Laws, Ariz. Corp. Comm'n. Docket Nos. T-01051B-07-0693 and
T-03608A-07-0693

⁷ Complaint Answer, ¶ 9

1 **a. The Estoppel Theory Does Not Pertain, Because the *TRRO* Expressly**
2 **Provided for a True-up, and because Arizona Dialtone Had Notice of**
3 **the Temporary Nature of the Charges and the Necessity of a**
4 **Subsequent True-up.**

5 Arizona Dialtone raises the affirmative defenses of waiver and estoppel to the back-
6 billing, alleging that “Qwest knowingly processed orders for new UNE-P services during the
7 one-year transition period and thereafter, and that AZDT paid Qwest for the UNE-P and POTS
8 services at the rates invoiced by Qwest, such that Qwest should now be estopped from collecting
9 additional amounts from AZDT for those services.”⁸ That theory is a flawed application of the
10 legal theory of estoppel and cannot prevent the *TRRO* Amendment from being ordered by the
11 Commission, with its backbilling provisions intact.

12 An essential element of the theory of estoppel as a defense to a liability is whether the
13 party claiming estoppel has justifiably relied on the action of the other party. The Arizona
14 Supreme Court stated, with regard to the different variations of the estoppel theory: “We need
15 not here state all of the elements of these complimentary principles of estoppel. It suffices for our
16 purposes to state that both forms require a justifiable right to rely on the part of the representee or
17 promisee.”⁹ In this case Qwest notified Arizona Dialtone as early as March 4, 2005 that Qwest
18 intended to negotiate ICA amendments reflecting the new requirements of both the *TRO* and
19 *TRRO*, and specifically stated that in the meantime Qwest would continue to process service
20 orders request for impacted UNEs under existing ICA, subject to price true-up.¹⁰ Arizona
21 Dialtone admits to Qwest’s averments concerning the March 4, 2005 notice.¹¹

22 The FCC provided for a one-year transition period, and specifically envisioned that true-
23 ups would be necessary when *TRRO* amendments were negotiated: “UNE-P arrangements no
24 longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the

25 ⁸ Answer to Complaint, ¶ 9, 27.

26 ⁹ *Trollope v. Koerner*, 470 P.2d 91 (Ariz. 1970), citing *Waugh v. Lennard*, 211 P.2d 806 (Ariz. 1949) (“The binding thread in all the classes of cases which have been enumerated is the justifiable reliance of the promisee and the hardship involved in refusal to enforce the promise”).

¹⁰ See, ¶10, Complaint.

¹¹ Answer ¶ 10.

1 amendment of the relevant interconnection agreement, including any applicable change of law
2 processes.”¹² This underscores the FCC’s recognition that there were existing ICAs, which
3 contain change of law processes, that must be taken into account. In the face of the FCC’s
4 expressions of respect for the processes contained in ICAs, Qwest could not unilaterally begin
5 billing at a different rate. Qwest did not waive its rights to back bill, however, and in fact, as
6 noted above, expressly reserved those rights. For Arizona Dialtone to argue that Qwest
7 somehow waived its rights by continuing to perform under the ICA until an amendment was
8 finalized does not speak to waiver or estoppel; rather it exposes Arizona Dialtone’s scheme to
9 “game” the process in an effort to avoid the higher rate for as long as it could. Arizona Dialtone
10 did not justifiably rely on the fact that Qwest filled orders, and continued to bill under the UNE-P
11 regime. Nor did Arizona Dialtone take any action or change its position to its detriment based on
12 any actions or promises from Qwest; rather, Arizona Dialtone refused to act, not to its detriment,
13 but to its benefit. Arizona Dialtone’s refusal to enter into a TRRO Amendment, left Qwest in an
14 impossible dilemma that could not have been intended by the FCC, and which this Commission
15 should resolve by ordering that the parties enter into Qwest’s proposed TRRO Amendment, with
16 the back-billing provisions intact.

17 Arizona Dialtone also raises affirmative defenses of “payment” and “accord and
18 satisfaction.” These defenses do not apply either. Arizona Dialtone did not pay the full
19 amounts that are to become due under the TRRO Amendment. The amount they paid will be
20 insufficient to cover the back-bill. Nor has there been any agreement by Qwest to accept some
21 lesser or different amounts in satisfaction of the liability that Arizona Dialtone has racked up by
22 its noncompliance.

23 **b. Arizona Dialtone’s Unexplained “Billing Disputes” Do Not Entitle It to a**
24 **Setoff Against the Back-Billing**

25
26

¹² *TRRO*, fn. 630.

1 Arizona Dialtone claims as an affirmative defense that it is entitled to a setoff “based on
2 the billing disputes” referenced, but not explained in the Complaint.¹³ This is just another
3 attempt by Arizona Dialtone to postpone the back-billing as long as it can. The TRRO
4 Amendment, and the back-billing that it contemplates, bear no relationship to the billing
5 disputes.¹⁴ Arizona Dialtone does not have a right to setoff because of an unfiled, unliquidated
6 claim. Arizona Dialtone’s procedural path to pursue a billing dispute is to notify Qwest of the
7 dispute under the processes provided in the ICA, and if that dispute is not resolved it could then
8 file a complaint with the Commission, seeking enforcement of the ICA. Instead, Arizona
9 Dialtone seeks to arbitrate the billing disputes,¹⁵ which, even if successful, would only result in
10 favorable contract provisions applied into the future.

11 Should Arizona Dialtone bring a complaint regarding its claimed billing disputes, and
12 prevail, the Commission should then issue its order requiring Qwest to fulfill its contractual
13 obligations. There is no reason to hold the long-delayed TRRO Amendment, however.

14
15 **V. PUBLIC POLICY REQUIRES PROMPT RESOLUTION OF THIS**
16 **COMPLAINT**

17
18 In the *TRO*, the FCC admonished all parties to “avoid gamesmanship.”¹⁶ In the *TRRO*,
19 the FCC again admonished all parties not to delay in implementing the *TRRO*:

20 We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good
21 faith under section 251(c)(1) of the Act and our implementing rules may subject that
22 party to enforcement action. Thus, the incumbent LEC and competitive LEC must
negotiate in good faith regarding any rates, terms, and conditions necessary to implement

23 ¹³ Answer ¶27.

24 ¹⁴ Qwest notes that Arizona Dialtone is not claiming that the “billing disputes” arise out of a
25 calculation of the back-bill or the elements of the rate; rather they are described as a “setoff”
26 which implies a distinctly different part of the interconnection relationship is the subject of the
“billing disputes.”

¹⁵ Answer ¶27, incorporating by reference Arizona Dialtone’s request for inclusion of their
billing disputes in arbitration.

¹⁶ *TRO*, ¶ 706.

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our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.¹⁷

The Commission can best fulfill its role in this matter by issuing an order finding in favor of Qwest on the pleadings in this matter.

VI. CONCLUSION

For the reason stated above, this proceeding should be resolved by the Commission issuing its order finding in favor of Qwest and providing the relief requested in the Complaint.

RESPECTFULLY SUBMITTED this 30th day of January, 2008.

QWEST CORPORATION



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¹⁷ TRRO, ¶ 233.

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