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BEFORE THE ARIZONA CORPORATION COMMISSION  
Arizona Corporation Commission

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COMMISSIONERS

MIKE GLEASON, Chairman  
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KRISTIN K. MAYES  
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AZ CORP COMMISSION  
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IN THE MATTER OF QWEST CORPORATION'S  
PETITION FOR ARBITRATION AND 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.

DOCKET NO. T-01051B-07-0693

DOCKET NO. T-03608A-07-0693

PROCEDURAL ORDER

**BY THE COMMISSION:**

On December 17, 2007, Qwest Corporation ("Qwest") filed with the Arizona Corporation Commission ("Commission") a Petition for Arbitration under 47 U.S.C. § 252(b) and Arizona Administrative Code ("A.A.C.") R14-2-1505 ("Petition"). In its Petition, Qwest requested that the Commission resolve issues related to the Interconnection Agreement ("ICA") between Qwest and Arizona Dialtone, Inc. ("Arizona Dialtone"). According to Qwest, the issues derive from Arizona Dialtone's refusal to enter into an amendment to the current ICA ("ICA Amendment") that would implement changes related to unbundled access to mass market local circuit switching, changes that Qwest asserts are mandated by federal law, specifically the Federal Communications Commission's ("FCC's") Triennial Review Remand Order<sup>1</sup> ("TRRO") and 47 C.F.R. § 51.319(d). Qwest asserts that Arizona Dialtone has refused to transition its UNE-P services as required by the TRRO and federal regulations and has refused to enter into the ICA Amendment to implement TRRO-mandated changes. Qwest asks that the Commission arbitrate each disputed issue included in its Petition, resolve each issue in Qwest's favor, find that its proposed ICA Amendment is consistent with the applicable law, issue an order adopting its ICA Amendment, and grant such other relief as is fair and justified.

<sup>1</sup> *In re* Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 20 F.C.C.R. 2533 (2005)(Order on Remand).

1 Also on December 17, 2007, Qwest filed a Complaint against Arizona Dialtone, requesting  
2 that the Commission (1) declare that the ICA requires Arizona Dialtone to compensate Qwest at the  
3 transitional rate for UNE-P PAL and POTS for embedded services for a one-year transition period  
4 that began March 11, 2005, and at the rate for alternative services for new orders thereafter; (2)  
5 compel Arizona Dialtone to pay such charges to Qwest; (3) compel Arizona Dialtone to pay late  
6 payment charges on the amounts ordered to be paid; (4) compel Arizona Dialtone to execute the ICA  
7 Amendment and to comply with its obligations thereunder; and (5) award such other relief, including  
8 but not limited to appropriate fines or penalties, as the Commission deems just and reasonable.<sup>2</sup>

9 A joint procedural conference for the Arbitration matter and the Complaint matter was held  
10 on January 14, 2008, at the Commission's offices in Phoenix, Arizona. Qwest and Arizona Dialtone  
11 each appeared through counsel. Staff did not appear. Because it was Qwest, an incumbent local  
12 exchange carrier ("ILEC"), rather than Arizona Dialtone, a competitive local exchange carrier  
13 ("CLEC") that requested negotiation in the Arbitration matter, and 47 U.S.C. § 252(b)(1) allows a  
14 party to a negotiation to petition for arbitration within a specified period after an ILEC receives a  
15 request for negotiation, Qwest and Arizona Dialtone were both asked to state their positions on (1)  
16 Qwest's authority to petition for arbitration under 47 U.S.C. § 252 and (2) the applicability of the 47  
17 U.S.C. § 252 timelines. As a full discussion of these issues was not possible at the procedural  
18 conference, Qwest and Arizona Dialtone were directed to file briefs on those issues by January 28,  
19 2008.

20 Also at the procedural conference, Qwest and Arizona Dialtone were asked to state their  
21 positions on consolidating the Arbitration matter and the Complaint matter. Neither Qwest nor  
22 Arizona Dialtone objected to consolidating the two matters. The issue of consolidation was taken  
23 under advisement.

24 In light of the issue regarding Qwest's authority to petition for arbitration under 47 U.S.C. §  
25 252, Qwest and Arizona Dialtone were also asked whether they objected to suspending the timelines  
26 under 47 U.S.C. § 252, assuming that they apply. Qwest objected to a suspension of the timelines,  
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28 <sup>2</sup> The Complaint matter was assigned Docket No. T-03608A-07-0694 et al.

1 while Arizona Dialtone did not. As a result of Qwest's objection, the hearing in the Arbitration  
2 matter was tentatively scheduled for February 11, 2008. Counsel for Qwest and Arizona Dialtone  
3 indicated that this date appeared to be acceptable, and counsel for Qwest was instructed to make a  
4 filing as soon as possible if that should prove to be incorrect upon further inquiry. Counsel for Qwest  
5 was also instructed that requesting a different hearing date would likely result in suspension of the 47  
6 U.S.C. § 252 timelines.

7 On January 16, 2008, a Procedural Order was issued directing Qwest and Arizona Dialtone to  
8 file the briefs discussed at the procedural conference. Staff was also requested to file such a brief.  
9 The Procedural Order also scheduled a hearing in the Arbitration matter to commence on February  
10 11, 2008; requested Staff to appear and participate in the hearing; and directed Qwest and Arizona  
11 Dialtone to share equally the costs for transcription, including expedited transcripts, if the hearing  
12 were to go forward on the Arbitration matter alone or on both matters, if consolidated. The issue of  
13 consolidation was not decided, pending resolution of the issues concerning Qwest's authority to  
14 petition for arbitration under 47 U.S.C. § 252 and the applicability of the 47 U.S.C. § 252 timelines.

15 On January 17, 2008,<sup>3</sup> Arizona Dialtone filed its response to Qwest's Petition. In its response,  
16 Arizona Dialtone did not object to or dispute the bulk of Qwest's Petition. However, Arizona  
17 Dialtone asserted that, in addition to the issues raised by Qwest, the Arbitration matter should resolve  
18 the "true up" of rates sought by Qwest in the Complaint matter and Arizona Dialtone's ongoing  
19 billing and pricing disputes with Qwest.

20 On January 28, 2008, Qwest filed its brief as requested. In its brief, Qwest asserted that it has  
21 the authority to petition for arbitration because the FCC has interpreted 47 U.S.C. § 252(a) and (b), in  
22 the context of amendments to interconnection agreements, to permit ILECs to initiate requests for  
23 negotiation. In support, Qwest quoted a footnote from the FCC's Triennial Review Order ("TRO")<sup>4</sup>.  
24 Qwest also asserted that a number of state commissions have independently concluded that ILECs  
25 may initiate requests for negotiation under 47 U.S.C. § 252 and, in support, cited a procedural order  
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27 <sup>3</sup> This was six days after the deadline for response under 47 U.S.C. § 252(b)(3).

28 <sup>4</sup> *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16978, 17405 n.2087 (2003)(Report and Order & Order on Remand & Further Notice of Proposed Rulemaking).

1 of the Alabama Public Service Commission<sup>5</sup> (“Alabama PSC”) and an order of the Public Utility  
2 Commission of Oregon<sup>6</sup> (“Oregon PUC”). Finally, Qwest stated, because the FCC has “conclusively  
3 settled” that, in the context of amendments to interconnection agreements, an ILEC has the authority  
4 to petition for arbitration under 47 U.S.C. § 252(b)(1) after making a request for negotiations, the  
5 timeliness in 47 U.S.C. § 252 apply to the Arbitration matter.

6 On January 28, 2008, Staff filed its brief as requested. In its brief, Staff asserted that the  
7 ability of an ILEC to request arbitration under 47 U.S.C. § 252 is “quite well settled,” citing the same  
8 footnote from the TRO that Qwest had cited and a couple of court cases<sup>7</sup>. Staff went on to assert that  
9 Arizona Dialtone apparently desires to use the ICA Amendment as leverage to get other changes  
10 made to its ICA or to obtain rulings on how its existing ICA should be interpreted and that the billing  
11 dispute issues raised by Arizona Dialtone would more appropriately be resolved through a complaint  
12 filed by Arizona Dialtone. Staff questioned whether an arbitration proceeding is the appropriate  
13 vehicle to resolve the parties’ issues, as Arizona Dialtone does not appear to object to the substance  
14 of the ICA Amendment on a prospective basis. Regarding the issue of the 47 U.S.C. § 252 timeliness,  
15 Staff stated that it believes the timeliness do apply to the proceeding if it goes forward as an  
16 arbitration, at least with respect to the issues raised in the Arbitration matter. In addition, Staff stated  
17 that it does not support consolidation of the Arbitration matter and the Complaint matter, as  
18 arbitration proceedings address issues on a prospective basis, whereas complaint proceedings  
19 typically address issues pertaining to disputes regarding existing ICAs. Staff asserted that mixing  
20 complaint and arbitration proceedings will ultimately lead to confusion.

21 On January 29, 2008, Arizona Dialtone filed its brief. In its brief, Arizona Dialtone stated  
22 that it had been unable to identify any legal authority regarding whether a request for negotiations by  
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24 <sup>5</sup> *In re* Arbitration of the Interconnection Agreement Between Bellsouth Telecommunications, Inc. and Now  
25 Communications, Inc., Pursuant to the Telecommunications Act of 1996, Docket 27461 (Alabama Public Service  
26 Commission June 23, 2000)(Procedural Order) (“Alabama Procedural Order”).

26 <sup>6</sup> *In re* Petition of Qwest Corporation for Arbitration of Interconnection Rates, Terms, Conditions, and Related  
27 Arrangements with Beaver Creek Cooperative Telephone Company, Order No. 02-148 (Public Utility Commission of  
28 Oregon March 7, 2002)(Order) (“Oregon Order”).

27 <sup>7</sup> Staff cited *U.S. West Communications v. Sprint Communications Co.*, 275 F.3d 1241 (10<sup>th</sup> Cir. 2002) and *Illinois Bell  
28 Telephone Co. v. Illinois Commerce Commission et al.*, 2007 WL 2815924 (N.D. Ill. 2007). Neither of these cases dealt  
with a scenario such as the one at hand, where an ILEC actually requested the negotiations that led to the petition for  
arbitration.

1 an ILEC is sufficient to trigger the right to petition for arbitration before a state commission under 47  
2 U.S.C. § 252(b). Thus, Arizona Dialtone turned to statutory construction to determine whether  
3 Qwest had authority to petition the Commission. Using the plain language of the statute, Arizona  
4 Dialtone determined that a request for negotiations made by an ILEC to a CLEC would appear to be  
5 insufficient to trigger a right to arbitration. However, by applying the principle of statutory  
6 construction that a statute will be construed to avoid “absurd” results,<sup>8</sup> Arizona Dialtone concluded  
7 that Qwest should be authorized to petition the Commission for arbitration. Arizona Dialtone stated  
8 that it does not oppose arbitration in this matter so long as the Arbitration matter and Complaint  
9 matter are consolidated and the consolidated matters are set for hearing on a normal timeline rather  
10 than the accelerated timeline required for arbitration. Arizona Dialtone specifically requested that the  
11 Commission consolidate the Arbitration matter and the Complaint matter and set the consolidated  
12 matters for hearing in or after April 2008. Arizona Dialtone did not speak specifically to whether it  
13 believes the arbitration timelines of 47 U.S.C. § 252 apply by law.

14 On January 30, 2008, Qwest filed a Motion for Judgment on the Pleadings in the Complaint  
15 matter.

16 On January 31, 2008, a Procedural Order was issued ordering that Qwest had the authority to  
17 petition the Commission for arbitration under 47 U.S.C. § 252(b)(1) and that the Arbitration matter  
18 may proceed before the Commission; that the hearing in the Arbitration matter, at which Staff is  
19 requested to appear and participate, shall commence on February 11, 2008; and that Qwest and  
20 Arizona Dialtone shall equally share the costs for transcription of the hearing in the Arbitration  
21 matter and shall arrange and pay to have expedited transcripts prepared and provided to the  
22 Commission’s Hearing Division. The Procedural Order did not consolidate the Arbitration matter  
23 and the Complaint matter.

24 Later on January 31, 2008, Qwest filed a Request for Procedural Conference in the  
25 Arbitration matter and a Request for Procedural Conference in the Complaint matter. Qwest stated  
26 that it desires a procedural conference because of its Motion for Judgment on the Pleadings in the  
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28 <sup>8</sup> Arizona Dialtone cited *Arpaio v. Steinle*, 201 Ariz. 353, 355 (App. 2001) for this principle.

1 Complaint matter.

2 In light of Qwest's dual requests, the imminence of the hearing in the Arbitration matter, and  
3 the overlapping nature of the Arbitration matter and the Complaint matter, it is appropriate to hold a  
4 procedural conference as to both the Arbitration matter and the Complaint matter.

5 IT IS THEREFORE ORDERED that a **procedural conference** to discuss Qwest's Motion for  
6 Judgment on the Pleadings in the Complaint matter and any other relevant issues in the Arbitration  
7 matter and the Complaint matter shall commence on **February 6, 2008, at 10:00 a.m.**, or as soon  
8 thereafter as is practicable, at the Commission's offices, 1200 West Washington, Phoenix, Arizona  
9 85007. **Staff is requested to appear at and participate in the procedural conference.**

10 IT IS FURTHER ORDERED that all parties must comply with Rules 31 and 38 of the Rules  
11 of the Arizona Supreme Court and A.R.S. § 40-243 with respect to the practice of law and admission  
12 *pro hac vice*.

13 IT IS FURTHER ORDERED that the Ex Parte Rule (A.A.C. R14-3-113—Unauthorized  
14 Communications) applies to this proceeding and shall remain in effect until the Commission's  
15 Decision in this matter is final and non-appealable.

16 IT IS FURTHER ORDERED that the Arbitrator may rescind, alter, amend, or waive any  
17 portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

18 DATED this 1st day of February, 2008.

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22 SARAH N. HARPRING  
23 ARBITRATOR  
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1 Copies of the foregoing mailed/delivered  
this 1<sup>ST</sup> day of February, 2008, to:

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6 Attorney for Qwest Corporation

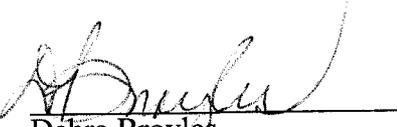
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