

ORIGINAL



RECEIVED

47

BEFORE THE ARIZONA CORPORATION COMMISSION

2008 FEB 22 P 4: 20

1
2 **MIKE GLEASON**
3 **Chairman**
4 **WILLIAM MUNDELL**
5 **Commissioner**
6 **JEFF HATCH-MILLER**
7 **Commissioner**
8 **KRISTIN MAYES**
9 **Commissioner**
10 **GARY PIERCE**
11 **Commissioner**

AZ CORP COMMISSION
DOCKET CONTROL

Arizona Corporation Commission

DOCKETED

FEB 22 2008

DOCKETED BY	nr
-------------	----

T-01051B-07-0693

12 **IN THE MATTER OF QWEST**
13 **CORPORATION'S PETITION FOR**
14 **ARBITRATION AND APPROVAL OF**
15 **AMENDMENT TO INTERCONNECTION**
16 **AGREEMENT WITH ARIZONA**
17 **DIALTONE, INC. PURSUANT TO**
18 **SECTION 252(B) OF THE**
19 **COMMUNICATIONS ACT OF 1934, AS**
20 **AMENDED BY THE**
21 **TELECOMMUNICATIONS ACT OF 1996**
22 **AND APPLICABLE STATE LAWS**

DOCKET NO. T-03608A-07-0693

ARIZONA DIALTONE, INC.'S
OPPOSITION TO QWEST
CORPORATION'S MOTION FOR
JUDGMENT ON THE PLEADINGS

23 Pursuant to the Procedural Order dated February 6, 2008, Arizona Dialtone, Inc.
24 ("AZDT") hereby files its Opposition to the Motion for Judgment on the Pleadings (the
25 "Motion") filed by Qwest Corporation ("Qwest"). This Opposition is supported by the attached
26 Memorandum of Points and Authorities, which is incorporated by reference herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

27 Qwest asks this tribunal to conclude that AZDT has made fatal admissions in its Answer
28 which entitle Qwest as a matter of law to the relief requested in its Complaint. In fact, while
29 AZDT has admitted to a degree the impact of the Triennial Review Remand Order ("TRRO"),
30 including the requirement to negotiate a TRRO amendment, the core issues regarding the rates
31 AZDT must pay for local circuit switching services for the one-year transition period from March

1 11, 2005 to March 10, 2006 and thereafter have not been conceded and remain in dispute.
2 Moreover, because Qwest has adopted a “take it or leave it” negotiating strategy by insisting that
3 the rates applicable retroactive to March 11, 2005 must be included in the TRRO amendment, the
4 parties have been unable to reach agreement on the form of TRRO amendment.

5 AZDT believes that a TRRO amendment which is forward looking only is appropriate, and
6 consistent with that position, has proposed that its existing customers be converted to Qwest’s
7 resale rate within 30 days of execution of such an amendment. With respect to the backbilling
8 issues (which AZDT acknowledges must be resolved, but which need not be included in the
9 TRRO amendment), AZDT’s position is that: (1) for the one-year transition period from March
10 11, 2005 to March 10, 2006, the parties’ conduct established an “alternative arrangement” within
11 the meaning of TRRO paragraph 228 which should be enforced, and which bars Qwest’s current
12 attempt to collect the TRRO default “plus \$1.00” rate; and (2) for the period following the
13 transition year to the present date, the TRRO neither adopts a rate for local circuit switching
14 services nor mandates a true-up as Qwest contends, and as a result, the parties’ conduct once
15 again establishes an enforceable agreement to provide local circuit switching services at the
16 existing unbundled rate. For these reasons, AZDT submits that Qwest is not entitled to judgment
17 as a matter of law. Therefore, AZDT requests that Qwest’s Motion for Judgment on the
18 Pleadings be denied in its entirety and that this matter be set for hearing.

19 II. LEGAL ARGUMENT

20 A. Standard of Review

21 A motion for judgment on the pleadings requires the court to take into consideration the
22 allegations of both the complaint and the answer, and to assume the truth of material allegations of
23 both pleadings. Neiderhiser v. Henry’s Drive-In, Inc., 96 Ariz. 305, 308, 394 P.2d 420, 422
24 (1964). While well-pleaded allegations of fact will be taken as true, conclusions of law are not
25 admitted for purposes of a motion for judgment on the pleadings. Shannon v. Butler Homes,
26 Inc., 102 Ariz. 312, 315, 428 P.2d 990, 993 (1967). In addition, all of the moving party’s

1 allegations which have been denied in the answer are taken as false, such that the motion for
2 judgment on the pleadings may be granted only if the moving party is clearly entitled to judgment
3 as a matter of law. Food for Health Co., Inc. v. 3839 Joint Venture, 129 Ariz. 103, 106, 628
4 P.2d 986, 989 (App. 1981). Accordingly, a motion for judgment on the pleadings should be
5 granted only if, upon examination of the entire record, it is determined that there are no disputed
6 issues of fact, which, if true, could affect final judgment. Brown v. White, 4 Ariz.App. 255,
7 257, 419 P.2d 385, 387 (App. 1966). Thus, where defendant properly raises issues of fact in its
8 answer, a motion for judgment on the pleadings by plaintiff must be denied. Dons Club v.
9 Anderson, 83 Ariz. 94, 98, 317 P.2d, 534, 536 (1957). Finally, where, as here, matters outside
10 the pleadings are considered, the motion is more properly treated as a motion for summary
11 judgment rather than a motion for judgment on the pleadings. Crook v. Anderson, 115 Ariz. 402,
12 403, 565 P.2d 908, 909 (App. 1977). As will be shown below, Qwest cannot meet the standard
13 for granting either a motion for judgment on the pleadings or a motion for summary judgment,
14 and therefore, its Motion must be denied as a matter of law.

15 **B. Qwest Misconstrues the Admissions Made By AZDT**

16 Qwest's Motion is premised on supposed "admissions" made by AZDT in its Answer to
17 Qwest's Complaint. However, a close examination of what AZDT actually admitted reveals that
18 Qwest has misconstrued AZDT's admissions for purposes of bolstering its Motion. Moreover,
19 AZDT's actual admissions are wholly insufficient to justify granting the Motion. Accordingly,
20 AZDT begins its legal analysis by refuting the supposed "admissions" Qwest argues in the
21 Motion.

22 First, Qwest claims that AZDT has admitted that "Arizona Dialtone has refused to sign the
23 TRRO amendment for nearly 3 years" (Motion, p.2, lns.10-11). This assertion presumes that
24 AZDT was required as a matter of law to sign the form of TRRO amendment that Qwest
25 propounded to AZDT, and that AZDT had no legal right to negotiate the terms of the TRRO
26 amendment or to refuse to sign a form of amendment with which it did not agree. Nowhere does

1 Qwest provide this tribunal with any authority for the proposition that AZDT was required by law
2 to sign Qwest's form of TRRO amendment, as opposed to a negotiated form of TRRO
3 amendment. Moreover, AZDT is willing to sign an appropriate form of TRRO amendment, but
4 has been unable to do so due to Qwest's insistence on retrospective application of the TRRO
5 amendment to require AZDT to pay approximately \$1.3 million dollars for previously provided
6 switching services. (Complaint, ¶11 & Exhibit D).

7 Second, Qwest asserts AZDT has admitted that "Qwest repeatedly requested Arizona
8 Dialtone to enter into negotiations to implement the TRRO." (Motion, p.3, lns.2-3). The point
9 of this assertion appears to be that AZDT refused to negotiate regarding the terms of the TRRO,
10 but that is demonstrably incorrect. As shown by the written testimony of Qwest representative
11 Larry Christensen filed in parallel proceedings between Qwest and AZDT currently pending
12 before the Colorado Public Utilities Commission: (1) AZDT agreed to amend the terms of the
13 existing ICA between the parties to include the terms of a TRRO amendment rather than negotiate
14 an entirely new agreement (Affidavit of Thomas Bade ("Bade Aff."), attached hereto as Exhibit
15 A, at ¶7); (2) AZDT did engage in negotiations through its authorized representative (Bade Aff.,
16 Exhibit A, ¶7); (3) AZDT provided Qwest with a redlined version of Qwest's form of TRRO
17 amendment which incorporated AZDT's requested revisions to Qwest's form of TRRO
18 amendment (Bade Aff., Exhibit A, ¶7); and (4) Qwest (not AZDT) stopped negotiations for a full
19 year while the Covad Litigation was pending, allowed the arbitration window pursuant to a prior
20 request for negotiations to close, and did not resume negotiations until the decision of the United
21 State District Court for the District of Arizona in the Covad Litigation had been rendered. (Bade
22 Aff., Exhibit A, ¶8). Thus, Qwest's implication that AZDT refused to negotiate, or that the
23 passage of time without a signed TRRO amendment is due to AZDT's alleged refusal to negotiate,
24 is simply incorrect.

25 Third, Qwest argues that AZDT has admitted that it "agrees with Qwest about the impact
26 and meaning of the TRRO, and the effective dates of the TRRO." (Motion, p.2, lns.16-17).

1 Qwest reaches this conclusion from the fact that AZDT admitted the allegations of paragraphs 7
2 and 8 of Qwest's Complaint. (Motion, p.3, lns.7-9). However, a closer examination of the
3 allegations contained in paragraphs 7 and 8 of the Complaint reveals that AZDT's admissions of
4 those allegations are not dispositive of the issues in dispute. In paragraph 7, Qwest simply alleged
5 that: (1) the TRRO established new rules regarding ILECs' unbundling obligations; (2) the TRRO
6 was effective March 11, 2005; (3) pursuant to the TRRO, ILECs no longer have an obligation to
7 provide mass market local circuit switching on an unbundled basis; and (4) the TRRO establishes
8 a one-year transition period during which CLECs are entitled to continued access to local circuit
9 switching on an unbundled basis with respect to their embedded base of customers. (Complaint,
10 ¶7). There is nothing controversial about these allegations, which is why AZDT admitted them.
11 However, these allegations do not address the fundamental issues still in dispute, i.e., the rates
12 that AZDT is required to pay for the one-year transition period and thereafter, which means that
13 AZDT's admission does not in any way dictate the outcome in these proceedings. The fact that
14 AZDT admitted the allegations of paragraph 8 is similarly unhelpful because in that paragraph
15 Qwest simply quotes language from the TRRO and the implementing regulations to the effect that
16 CLECs are not entitled to obtain local circuit switching on an unbundled basis for new customers
17 during the one-year transition period. (Complaint, ¶8). Qwest accurately quotes the TRRO and
18 FCC regulations, which is why these allegations were admitted. Once again, however, AZDT's
19 admission is not dispositive of the core pricing issues yet to be resolved.

20 Fourth, Qwest claims that in light of AZDT's admissions, "it is now clear that Arizona
21 Dialtone does not contest the provisions of the TRRO Amendment as it was proposed to them by
22 Qwest." (Motion, p.3, lns.17-19). That is an incorrect reading of AZDT's Answer. In fact, as
23 explained in detail below, AZDT continues to contest the pricing provisions that Qwest has built
24 into its form of TRRO amendment.¹

25 _____
26 ¹ As explained in AZDT's contemporaneously filed Response to Qwest's Motion for an Order Awarding
Qwest's Requested Relief Regarding the Proposed TRO/TRRO Amendment, with the exception of the TRRO

1 From these mistaken interpretations of AZDT's Answer, Qwest ultimately concludes that
2 AZDT has now admitted that its "pre-litigation objections to the TRRO Amendment were
3 wrong." (Motion, p.3, lns.16-17). In fact, while the issues have been narrowed to some degree
4 by the decision in the Covad Litigation (as AZDT predicted would be the case), the fundamental
5 issues regarding the rate AZDT is required to pay Qwest for mass market local circuit switching
6 during the one-year transition period and thereafter, as incorporated in Qwest's form of TRRO
7 amendment, remain unresolved. AZDT next addresses those issues.

8 **C. Qwest Is Not Entitled to Judgment on the Pleadings**

9 The remaining issues in dispute involve the rate AZDT is required to pay for local circuit
10 switching from the March 11, 2005 effective date of the TRRO through the present date. Those
11 issues are somewhat different for the one-year transition period under the TRRO and after that
12 one-year transition period, so AZDT addresses these two time periods separately below.

13 **1. The One-Year Transition Period**

14 The TRRO creates a one-year transition period from March 11, 2005 to March 10, 2006
15 (the "transition period"), and essentially states that the rate to be paid for switching services
16 during that one-year period is the rate as of June 15, 2004, plus \$1.00 (hereinafter, the "transition
17 rate"). (TRRO, ¶¶227-28). The TRRO also requires CLECs to convert their existing customers
18 to alternative service arrangements during the transition period, and further states that CLECs are
19 not entitled to receive the transition rate for new service orders placed during the transition
20 period. (TRRO, ¶227). Finally, the TRRO provides for a "true-up" to the transition rate upon
21 execution of a TRRO amendment. (TRRO, ¶228, n.630).

22 It is undisputed that at all times during the transition year, Qwest billed AZDT for local
23 circuit switching at the then existing unbundled rate, and that AZDT paid Qwest for local circuit
24 switching at that rate. (Bade Aff., Exhibit A, at ¶5). In addition, while the TRRO purported to

25 language regarding pricing, the remaining issues regarding the TRRO Amendment language are no longer in
26 dispute.

1 prohibit placement of new orders for local circuit switching at the unbundled rate, Qwest in fact
2 encouraged AZDT to continue placing new service orders, knowingly accepted such orders, and
3 billed those new service orders at the unbundled rate in disregard of the TRRO. (Bade Aff.,
4 Exhibit A, ¶5).

5 Qwest's position is that the TRRO mandates that AZDT must pay the "plus \$1.00"
6 transition rate for the one-year transition period. However, Qwest ignores the following language
7 of the TRRO regarding the transition rate, "Of course, the transition mechanism adopted here is
8 simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate
9 alternative arrangements superceding this transition period." (TRRO, ¶228) (emphasis added). It
10 is AZDT's position that by continuing to provide AZDT with local circuit switching services at
11 the existing unbundled rate during the transition period, contrary to its threats to discontinue doing
12 so and with full knowledge that AZDT objected to the transition rate, and by accepting AZDT's
13 payment for switching services at the unbundled rate, Qwest effectively entered into "alternative
14 arrangements superceding [the] transition period" within the meaning of TRRO paragraph 228.
15 On this basis, AZDT has asserted the affirmative defenses of payment, waiver, estoppel, and
16 accord and satisfaction. (Answer, ¶27).

17 In its Motion, Qwest addresses its arguments primarily to AZDT's estoppel and waiver
18 defenses. Essentially, Qwest claims that: (1) an estoppel defense will not lie because AZDT
19 could not have justifiably relied on the billing history during the transition year as the basis for
20 entitlement to switching services at the unbundled rate, and (2) a waiver defense will not lie
21 because Qwest put AZDT on notice of its intent to back bill AZDT at the transition rate. Qwest
22 further argues that it had no contractual authority to bill at any rate other than the unbundled rate.
23 None of these arguments entitle Qwest to judgment at the pleadings stage.

24 First, the essential element of equitable estoppel is conduct inconsistent with a later-adopted
25 position. Thomas & King, Inc. v. City of Phoenix, 208 Ariz. 203, 210, ¶27, 92 P.3d 429, 436
26 (App. 2004). In this case, the fact that Qwest put AZDT on notice of the true-up contemplated by

1 the TRRO for the transition period is rendered meaningless by Qwest's subsequent conduct in: (1)
2 continuing to provide switching services to AZDT, billing for those services at the existing
3 unbundled rate, and accepting AZDT's payments at that rate, despite the fact that AZDT
4 previously had stated that it would not pay the transition rate, thereby placing Qwest on
5 unequivocal notice that the parties had a fundamental disagreement on price; and (2) continuing to
6 provide switching services at the unbundled rate even after threatening to discontinue service.
7 (Bade Aff., Exhibit A, at ¶¶5, 9). In other words, AZDT had a right to justifiably rely that
8 contrary to its initial position, Qwest would provide services at the unbundled rate, such that
9 Qwest is now estopped from charging the transition rate. Moreover, because the TRRO
10 characterizes the transition rate/true-up as a "default process" and authorizes "alternative
11 arrangements" for the transition period (TRRO, ¶228), AZDT was legally justified in its belief
12 that the transition rate would not apply. At the very least, there is an issue of fact sufficient to
13 preclude a judgment on the pleadings regarding whether the parties through their conduct entered
14 into an "alternative arrangement" for the transition period, such that Qwest should be estopped
15 from now collecting the transition rate.

16 Second, Arizona law defines waiver as the voluntary and intentional relinquishment of a
17 known right. Waugh v. Lennard, 69 Ariz. 214, 223, 211 P.2d 806, 812 (1949). By voluntarily
18 billing AZDT at the existing unbundled rate and accepting payment at that rate, each of which are
19 intentional acts, Qwest waived its right to come back later and seek to collect a higher rate.
20 Qwest's argument that it billed AZDT for switching services during the transition period at the
21 unbundled rate not because it agreed to that rate, but rather, because it had no contractual right to
22 do otherwise, is belied by its conduct. At various times, including during the transition period,
23 Qwest threatened to discontinue services if AZDT did not sign Qwest's form of TRRO
24 amendment. (Bade Aff., Exhibit A, at ¶9). Notably, on May 23, 2007, Qwest provided AZDT
25 with just two days notice that as of May 25, 2007, the only orders for switching services it would
26 accept would be for disconnection or conversion to alternative services, with all other orders

1 treated as orders for resale or Qwest Platform Plus (“QPP”). (Bade Aff., Exhibit A, at ¶9). At
2 the time Qwest made this abrupt change in its billing for switching services, the parties had not
3 agreed on the rate AZDT would pay for such services, and AZDT had not signed a TRRO
4 amendment. In other words, Qwest unilaterally changed the way it billed AZDT for switching
5 services despite the fact it lacked the very same contractual authority it now claims was necessary
6 to bill at the higher resale rate, which fatally undercuts Qwest’s current argument that it had no
7 choice but to bill at the unbundled rate pursuant to the ICA.² To the contrary, the fact that Qwest
8 did not convert its billing practices during the transition period, despite being on notice that
9 AZDT disputed the transition rate, and instead, continued to bill AZDT at the unbundled rate and
10 accept AZDT’s payments at that rate, further reinforces that the parties agreed to an alternative
11 rate for the transition period as the TRRO expressly authorized them to do, and that Qwest waived
12 its right to charge AZDT the transition rate set forth in the TRRO.

13 **2. March 11, 2006 to Date**

14 There is no dispute that the transition period ended on March 10, 2006. Unlike for the
15 transition period, however, the TRRO does not mandate any specific rate that an ILEC must (or
16 may) charge a CLEC after the transition period ends, thus leaving that issue completely open for
17 negotiations between the ILEC and the CLEC.³ In addition, the TRRO does not answer the
18 question of what happens when the ILEC and the CLEC are not able to negotiate a TRRO

19 ² Moreover, the fact that Qwest unilaterally began billing new accounts at the higher resale rate
20 conclusively refutes Qwest’s claim that “Arizona Dialtone’s refusal to enter into a TRRO Amendment left Qwest
21 in an impossible dilemma” (Motion, p.6, lns.13-14). Qwest had multiple options to address the billing
22 impasse, including discontinuing services or unilaterally billing at the resale rate it insisted was appropriate, but
23 Qwest instead continued to bill AZDT at the unbundled rate, even for new accounts, all the way until May 2007,
24 and continues to bill AZDT at the unbundled rate for existing customer accounts to this day. Having failed to
25 avail itself of obvious options to break the impasse, Qwest cannot now be heard to complain that it was caught in
26 “an impossible dilemma.”

³ While the TRRO apparently contemplates that CLECs will convert their embedded base of end user
customers to an alternative service arrangement within the one-year transition period, it is completely silent on
what rate can be charged for those customers not converted by the end of the transition period.

1 amendment within the one-year transition period, as was the case here. In other words, the
2 TRRO simply does not answer the question of what rate a CLEC must pay for switching services
3 after the transition period ends, i.e., from March 11, 2006 to date.

4 Nonetheless, Qwest asserts that the true-up process contemplated by the TRRO applies not
5 just to the transition period, but also to the post-transition period to date, and requires AZDT to
6 pay either Qwest's resale rate or its Qwest Platform Plus ("QPP") rate. (Complaint, ¶26 &
7 Exhibit D). That assertion is directly contradicted by the language of the TRRO, which states,
8 "UNE-P arrangements no longer subject to unbundling shall be subject to true-up to the applicable
9 transition rate upon the amendment of the relevant interconnection agreements" (TRRO,
10 ¶228, n.630) (emphasis added). The phrase "applicable transition rate" is a reference to the
11 provision in paragraph 228 of the TRRO, which states that the transition rate is the higher of: (1)
12 the rate as of June 15, 2004, plus \$1.00; or (2) the rate established by a state commission between
13 June 16, 2004 and the date of the TRRO, plus \$1.00. (TRRO, ¶228). Thus, the TRRO
14 specifically ties the true-up process to the transition rate applicable during the one-year transition
15 period, and does not provide any authority for a true-up process for any period of time subsequent
16 to the transition period.

17 It is AZDT's position that by insisting that the TRRO amendment include language
18 requiring a true-up to Qwest's resale rate for the post-transition period, despite the fact that the
19 TRRO does not suggest, let alone require, the true-up process for any period of time other than
20 the one-year transition period, Qwest is essentially misusing and abusing the TRRO amendment
21 process to bootstrap a resale rate to which AZDT has not agreed. As noted above, while Qwest
22 eventually converted orders for new services to the resale rate in May 2007 (thus demonstrating
23 its ability to unilaterally change the pricing for switching services), at all times prior to that date,
24 Qwest continued to accept new service orders and bill those accounts at the unbundled rate,
25 despite being on notice that AZDT did not agree to the resale rate or the QPP rate. (Bade Aff.,
26 Exhibit A, at ¶10). Thus, it is AZDT's position that Qwest should be bound by its choice to

1 continue billing at the unbundled rate despite the fact that it could have unilaterally begun billing
2 at a higher rate as it eventually did in May 2007. It is for this reason that AZDT has asserted
3 affirmative defenses of payment, waiver, estoppel, and accord and satisfaction applicable to the
4 post-transition year period.

5 In addition, the commercial rate that Qwest proposes as a replacement for the unbundled
6 rate, and which Qwest insists be written into the TRRO amendment for retrospective application
7 back to March 11, 2006, is an above market rate in that it is higher than the rate AZDT currently
8 is paying for identical switching services for its customer serviced by other CLECs. (Bade Aff.,
9 Exhibit A, at ¶13). Thus, it appears that Qwest is manipulating the TRRO amendment process in
10 an attempt to obtain from AZDT through a TRRO amendment a rate it cannot obtain from AZDT
11 in the open market. Moreover, because AZDT is Qwest's only real competitor in the Public
12 Access Lines ("PAL") product market, if AZDT is forced to exit that market due to an above
13 market resale rate, Qwest will have virtually no competition, which could cause Qwest to raise its
14 PAL rates. (Bade Aff., Exhibit A, at ¶14). Finally, AZDT believes that Qwest's resale rate
15 should be lower, not higher, than the rates AZDT is charged by other CLECs providing switching
16 services for the simple reason that AZDT is leasing underutilized capacity on Qwest's network.
17 (Bade Aff., Exhibit A, at ¶15).

18 **D. AZDT's Current Position**

19 Qwest wants this tribunal to believe that AZDT has flatly refused to sign a TRRO
20 amendment with the hope of delaying indefinitely the higher prices for switching services arising
21 from the fact that those services no longer are required to be offered on an unbundled basis.⁴ To
22 the contrary, AZDT has never flatly refused to sign a TRRO amendment as Qwest has asserted in
23

24 ⁴ Qwest also invokes national telecommunications policy to accuse AZDT of "gamesmanship." (Motion,
25 p.7, ln.18 - p.8, ln.4). With all due respect to the importance of the issues herein, this matter simply involves a
26 good faith dispute regarding the appropriate rate for local circuit switching in light of the TRRO, and does not
implicate or threaten national telecommunications policy.

1 these proceedings. (Bade Aff., Exhibit A, at ¶16). Rather, AZDT is willing to sign an
2 appropriate form of TRRO amendment that, with respect to local circuit switching rates, is
3 prospective only and does not unfairly require AZDT to pay substantial sums of money for prior
4 periods of time. (Bade Aff., Exhibit A, at ¶16). More specifically, AZDT believes that the
5 parties' billing history during the transition period and thereafter should control, and that a true-up
6 for the post-transition period is without any legal authority because the TRRO neither mandates
7 nor mentions a true-up for any period of time other than the one-year transition period.

8 In recognition of the TRRO's command to convert customers to alternative service
9 arrangements, AZDT already has migrated roughly 50% of its customers to other CLECs. (Bade
10 Aff., Exhibit A, at ¶16). In addition, AZDT remains willing to convert its remaining customers
11 to Qwest's resale rate within 30 days of execution of a TRRO amendment, and would be willing
12 to have this obligation written into a TRRO amendment, provided that Qwest has the capacity to
13 accept and process the orders for conversion within this time frame. (Bade Aff., Exhibit A, at
14 ¶16).

15 Finally, with respect to the billing issues referenced in paragraph 27 of its Answer (which,
16 in turn, incorporates by reference paragraph 18(b) of AZDT's Response to Qwest's Petition for
17 Arbitration), AZDT concedes those issues cannot be decided in these proceedings.⁵ AZDT had
18 hoped to consolidate the Complaint and Arbitration proceedings, and to join the ongoing billing
19 disputes between the parties in a single forum and proceeding, but now that consolidation has been
20 denied, AZDT accepts that the billing issues will have to be decided in a separate proceeding.

21 **III. CONCLUSION**

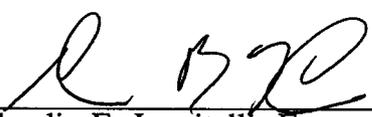
22 For all the foregoing reasons, AZDT requests that Qwest's Motion for Judgment on the
23 Pleadings be denied in its entirety.

24
25 ⁵ It is important to note that the billing issues referenced by AZDT in its Answer are separate and apart
26 from the true-up process discussed herein, also known as "backbilling." As set forth herein, the true-
up/backbilling issues must be resolved as part of the final form of TRRO amendment.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

RESPECTFULLY SUBMITTED this 22 day of February, 2008.

CHEIFETZ IANNITELLI MARCOLINI, P.C.

By 
Claudio E. Iannitelli, Esq.
Glenn B. Hotchkiss, Esq.
Matthew A. Klopp, Esq.
Attorneys for Arizona Dialtone, Inc.

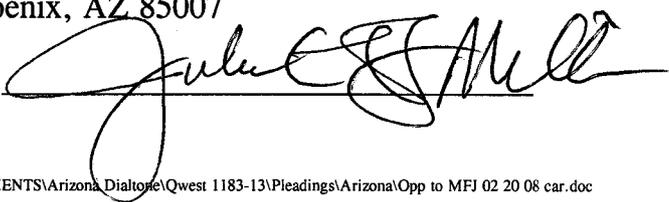
ORIGINAL and 13 copies of the foregoing
hand-delivered this 22 day of February, 2008, to:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

COPY of the foregoing transmitted by email
and mailed this 22 day of February, 2008, to:

Norman G. Curtright, Esq.
Qwest Corporation
20 East Thomas Road, 16th Floor
Phoenix, AZ 85012

Maureen A. Scott, Esq.
Legal Division
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, AZ 85007

By: 

N:\CLIENTS\Arizona Dialtone\Qwest 1183-13\Pleadings\Arizona\Opp to MFJ 02 20 08 car.doc

Exhibit *A*

1 AFFIDAVIT OF THOMAS BADE

2 STATE OF ARIZONA)
3 County of Maricopa) ss.
4

5 Thomas Bade, being first duly sworn upon his oath, deposes and says:

6 1. I am over the age of 18, of sound mind, and make this Affidavit based on my personal
7 knowledge of the facts contained herein.

8 2. I am the president of Arizona Dialtone, Inc. ("AZDT"), the respondent in this matter.
9 AZDT has a business address of 6115 South Kyrene Road, Suite 103, Tempe, Arizona 85283.

10 3. I have been affiliated with AZDT since 1997. AZDT primarily engages in the resale
11 of Public Access Lines ("PAL") to payphone providers with retail locations.

12 4. I am the individual within AZDT charged with primary day-to-day responsibility for
13 negotiating an amendment to AZDT's Interconnection Agreement ("ICA") with Qwest Corporation
14 ("Qwest"), consistent with the requirements of the Triennial Review Remand Order ("TRRO"). My
15 general understanding of the TRRO is that it removed the previous legal requirement that Incumbent
16 Local Exchange Carriers ("ILECs") such as Qwest provide mass market local circuit switching
17 (among other services) to Competitive Local Exchange Carriers ("CLECs") such as AZDT on an
18 unbundled basis and encouraged ILECs to provide CLECs with a market-based alternative.

19 5. I received a first draft of the Qwest's proposed form of TRRO amendment via email
20 on July 13, 2005. While the parties thereafter negotiated the form of TRRO amendment and related
21 issues, Qwest continued to bill AZDT for local circuit switching services at the existing unbundled
22 rate, and AZDT continued to pay Qwest for local circuit switching services at that rate. In addition,
23 Qwest continued to accept new orders for switching services and bill those orders at the unbundled
24 rate, and in fact, encouraged AZDT to continue placing new orders, even though, to my
25 understanding, the TRRO prohibited new orders for switching services during the one-year transition
26 period between March 11, 2005 and March 11, 2006.

1 6. In a letter dated March 1, 2006, Qwest invoked the dispute resolution procedures of
2 the existing ICA and designated Steve Hansen as its authorized representative to negotiate and
3 resolve the TRRO issues. I was designated as AZDT's authorized representative. In an email to Mr.
4 Hansen dated June 8, 2006 (a true and correct copy of which is attached hereto as Exhibit 1), I stated
5 my opinion that certain issues between AZDT and Qwest likely would be resolved by an appeal of
6 an administrative decision of the Arizona Corporation Commission then pending in the United States
7 District Court in litigation between Qwest and Covad Communications (the "Covad Litigation").
8 Therefore, I suggested as an "interim resolution" that the parties agree to continue their then current
9 arrangement for switching services until the Covad Litigation was resolved, and then reassess their
10 positions after the District Court issued its decision. In a responsive email dated June 20, 2006 (See
11 Exhibit 1 hereto), Mr. Hansen stated, "Qwest will not continue to provide Arizona Dialtone with
12 services under UNE-P until Qwest's matter with Covad is resolved." Notwithstanding Mr. Hansen's
13 statement that Qwest would not continue to provide AZDT with switching services at the unbundled
14 rate pending resolution of the Covad Litigation, in fact, Qwest continued to do so for the more than
15 one full year while the Covad Litigation remained pending.

16 7. The suggestion that AZDT refused to negotiate with Qwest regarding a TRRO
17 amendment is incorrect. As stated in the written testimony of Qwest representative Larry
18 Christensen filed with the Colorado Public Utilities Commission (a true and correct copy of which is
19 attached hereto as Exhibit 2): (1) AZDT agreed to amend the terms of the existing Interconnection
20 Agreement ("ICA") between the parties to include the terms of a TRRO amendment rather than
21 negotiate an entirely new agreement; (2) AZDT did engage in negotiations through its authorized
22 representative (me); and (3) AZDT provided Qwest with a redlined version of Qwest's form of
23 TRRO amendment which incorporated AZDT's requested revisions to Qwest's form of TRRO
24 amendment. (See Testimony of Larry Christensen, Exhibit 2 hereto, at p.4, lns.12-16; p.5, lns.13-17;
25 p.7, lns.11-15).

26 8. Mr. Christensen's filed testimony also demonstrates that Qwest: (1) stopped

1 negotiating with AZDT while the Covad Litigation remained pending, (2) allowed the arbitration
2 window to close without initiating arbitration proceedings under § 252 of the Act, and (3) did not
3 resume negotiations with AZDT until the United States District Court for the District of Arizona
4 issued its opinion in the Covad Litigation on July 18, 2007 reversing the administrative decision of
5 the Arizona Corporation Commission. (See Testimony of Larry Christensen, Exhibit 2 hereto, at
6 p.8, lns.1-22). As a result, there were no negotiations for the more than one full year between June
7 2006 and July 2007, and Qwest continued billing AZDT for switching services at the unbundled
8 rate.

9 9. On various occasions both during the one-year transition period and thereafter, Qwest
10 threatened to discontinue services if AZDT did not sign Qwest's form of TRRO amendment. For
11 example, on May 23, 2007, Qwest provided AZDT with just two days notice that as of May 25,
12 2007, the only UNE-P orders it would accept would be for disconnection or conversion to alternative
13 services, with all other orders treated as orders for resale or Qwest Platform Plus ("QPP"). A true
14 and correct copy of Qwest' May 23, 2007 letter to AZDT is attached hereto as Exhibit 3.

15 10. From the beginning, Qwest has adopted a take it or leave style of negotiation. The
16 key issues in the negotiation of the TRRO amendment – the prices AZDT would be required to pay
17 for switching services during the transition period and thereafter – were never really subject to
18 negotiation. With respect to the proposed TRRO amendment, Qwest took the position that AZDT
19 was required to pay the "plus \$1.00" rate for the transition period, and was required to pay Qwest's
20 resale rate or its QPP rate thereafter, even though AZDT never agreed to those rates, I had repeatedly
21 made clear that AZDT would not pay those rates, and even though Qwest had invoiced AZDT, and
22 AZDT had paid Qwest, for switching services at the existing unbundled rate.

23 11. The first time I realized that Qwest was seeking to collect approximately \$1.7 million
24 from AZDT for previously provided switching services was when Qwest provided AZDT with
25 spreadsheets of the amounts it claimed were owed in approximately December 2007. In fact, I
26 believe that what I received are the spreadsheets attached as exhibits to Qwest's Complaints filed

1 with the Colorado, Arizona and Minnesota Commissions.

2 12. It is AZDT's belief that as a precondition of collecting the transition rate, Qwest was
3 required to submit a compliance filing with each State commission for approval of the transition rate.
4 AZDT does not believe Qwest did so in Arizona, Colorado or Minnesota, the three states where
5 AZDT has an ICA with Qwest.

6 13. The commercial rate that Qwest proposes as a replacement for the UNE-P rate, and
7 which Qwest proposes be written into the TRRO amendment for retrospective application, is an
8 above market rate in that it is higher than the rate AZDT is paying for identical services with respect
9 to that portion of its customers serviced by other CLECs providing switching services.

10 14. AZDT is Qwest's only real competitor in the Public Access Lines ("PAL") product
11 market, which means that if AZDT is forced to exit that market due to an above market resale rate,
12 Qwest will have virtually no competition, which could cause Qwest to raise its PAL rates.

13 15. AZDT believes that Qwest's resale rate should be lower, not higher, than the rates
14 AZDT is charged by other CLECs providing switching services for the simple reason that AZDT is
15 leasing underutilized capacity on Qwest's network.

16 16. AZDT has never flatly refused to sign a TRRO amendment as Qwest has asserted in
17 these proceedings. Rather, AZDT is willing to enter into a TRRO amendment that, with respect to
18 local switching rates, is prospective only and does not compel AZDT to pay substantial sums of
19 money for prior periods of time. In addition, AZDT already has migrated roughly 50% of its
20 customers to other CLECs, and with respect to its remaining customers, AZDT has offered to
21 convert those customers to Qwest's resale rate within 30 days of execution of a TRRO amendment,
22 and would be willing to have this obligation written into the TRRO amendment, provided that Qwest
23 has the capacity to accept and process the orders for conversion within this time frame.

24 Further Affiant sayeth naught.

Thomas Bade

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

ACKNOWLEDGED, SUBSCRIBED AND SWORN TO before me this 21st day of
February, 2008, by Thomas Bade.



Carrie Ranges

My Commission Expires:

7-23-2010

N:\CLIENTS\Arizona Dialtone\Qwest 1183-13\Pleadings\Arizona\Bade Affidavit 02 21 08 car.doc

Exhibit

“1”

From: Hansen, Steve (Wholesale)
Sent: Tuesday, June 20, 2006 12:04 PM
To: 'Tom Bade'
Subject: RE: Tuesday Phone Meeting TRP/TRRO

Tom,

I meant to attach the amendment as well.

Steve

From: Hansen, Steve (Wholesale)
Sent: Tuesday, June 20, 2006 12:00 PM
To: 'Tom Bade'
Subject: RE: Tuesday Phone Meeting TRP/TRRO

Tom,

I can appreciate your position but Qwest is not willing to handle the issues between our companies as a one off or on an interim basis. Hence is not obligated nor willing to continue to provide UNE-P services. Unfortunately it is now well after the end of the default transition period of March 11, 2006. Arizona Dialtone is still trying to receive UNE pricing on its services with no end in sight. It has become unacceptable. Qwest will not continue to provide Arizona Dialtone with services under UNE-P until Qwest's matter with Covad is resolved.

I must point out that Qwest believes that the Arizona Commission's arbitration order in the Covad matter violates the Telecommunications Act and impermissibly conflicts with federal policy. That is demonstrated by the fact that all 12 of the other state commissions in Qwest's territory that addressed these very same network unbundling issues in Section 252 arbitrations between Qwest and Covad have rejected Covad's network unbundling demands as unlawful. These rulings confirm that state commissions do not have authority in a Section 252 arbitration or under state law to impose network unbundling that the FCC has determined is not required under Section 251.

I must also point out that your reliance on Section 271 of the Act is also misplaced. Section 271 does not grant state commissions any decision-making authority and, specifically, does not authorize state commissions to impose network unbundling obligations or to set prices under that section for network elements. Most important, Qwest is not required to use cost-based rates for elements for which the unbundling obligation arises under Section 271, not Section 251. For these non-impaired elements, Qwest is permitted to charge market-based rates, consistent with the Act's goals of eliminating unnecessary regulation and promoting facilities-based competition. The QPP

rates and the tariff based resale rates Qwest has provided to Arizona Dialtone as replacements for the UNE-P services are just and reasonable rates. I know you feel different but I will assume we must agree to disagree.

Given that we have not moved off of this issue and we are well past the transition period, I will request that the Qwest law department initiate arbitration of the attached TRO/TRRO amendment between Arizona Dialtone and Qwest. I believe this is the only way to move off the issue and have a third party resolve the matter as it is not moving forward despite letters and conversations. Please note that matters not pertaining to the TRO/TRRO should not be included in the resolve of this matter. I am willing to continue to discuss those issues, but they are not pertinent to the TRO/TRRO issue and need to be treated separately.

I understand that you have been in contact with Ken Beck to discuss matters, but I have also had a conversation with Ken that the TRO/TRRO matters should not be discuss with him. I know we are at the crossroads and Qwest must move forward. It is my intent to do so.

I hope this clarifies Qwest's position on the UNE-P once and for all. I am not intending to be obstinate, but I must remain firm on our position.

Regards,

Steve

From: Tom Bade [mailto:tombade@arizonadialtone.com]
Sent: Thursday, June 08, 2006 12:11 PM
To: Hansen, Steve (Wholesale)
Subject: Tuesday Phone Meeting TRP/TRRO

Dear Steve,

Our phone conversation Tuesday was productive and had many positive elements. I have thought a lot about our conversation and would like to think out loud, if you will, and suggest a possible solution to our dilemma.

While there are obvious differences between Qwest and Arizona Dialtone on the issues of the TRRO impact and the Covad Decision on Section 271 requirements, I believe we now both better understand the other's position.

As you pointed out, the difficulties for Qwest that are presented by the pending litigation against Covad and the Arizona Corporation Commission in Federal Court and the potential for impacting Qwest's relationship with other

CLECs further complicate any resolution of these issues through an Interconnection Agreement compromise.

Although it is always difficult to imagine how any litigation may ultimately be resolved, surely we can both agree that it is likely that the Qwest/Covad litigation may be dispositive of our TRRO/Section 271 UNE disputes. Because similar issues are currently involved in the ongoing Qwest/Covad litigation, I suggest dealing with this issue between Arizona Dialtone and Qwest on an interim basis. As an interim resolution, Qwest and Arizona Dialtone could agree to continue with the current status of services under UNE-P until the Qwest/Covad litigation is resolved, and at that time, both parties can reassess the situation and most likely agree on modified interconnection terms in accordance with whatever the state of the law may be at that time.

Of course, with Arizona Dialtone's emphasis in pay phone lines, Covad and Arizona Dialtone predominately deal with different services. As a result, even after a Covad decision from the courts, there may still be some remaining issues on pricing or provisioning that remain separate and unique and would need to be resolved. But, on the issue of whether the TRRO trumps all or part of the Section 271 checklist UNE requirements, the Covad/Qwest litigation could potentially provide a compelling answer in a relatively efficient and reasonably prompt time.

As I understand from our conversation, by dealing with these issues in an interim dispute resolution manner, instead of as an TRO/TROO Amendment could allow Qwest to avoid the concerns with its other agreements with other CLECs.

Additionally, I appreciate your agreeing to discuss and explore with Ken Beck the issues I raised regarding Qwest's billing operator services, long distance, internet service provider traffic and other services to the CLEC (DUF, Discounts and etc.). As I explained, Arizona Dialtone has agreed that, in return for clearing the outstanding billings, we will stop our refusal to pay these charges in the future. But we continue to believe that Qwest should not be billing these services to the CLEC unless they are ordered, and Arizona Dialtone has never ordered them or in the case ISP traffic should be billed at \$0.00 MOU. Surely you don't truly believe that 0% on finished PAL in Colorado is FCC compliant and reflects the Qwest avoided cost. I believe we can work through the other items, as well, that we marked up.

We are looking forward to your feedback on these issues that we discussed on our phone conversation and I want to continue to address the other issues listed in Part I(2) of our markup of the proposed TRRO Amendment.

Again, I believe we made progress, and I believe we should continue negotiations in the expectations of ultimately reaching a mutually agreeable resolution.

Tom

Exhibit *“2”*

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 07B-514T

**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**

TESTIMONY OF LARRY CHRISTENSEN

ON BEHALF OF

QWEST CORPORATION

FEBRUARY 5, 2008

TABLE OF CONTENTS

I.	IDENTIFICATION OF WITNESS	1
II.	PURPOSE OF TESTIMONY	2
III.	TRIENNIAL REVIEW ON REMAND ORDER (“TRRO”)	3
IX.	CONCLUSION	10

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

I. IDENTIFICATION OF WITNESS

Q. PLEASE STATE YOUR NAME, OCCUPATION AND BUSINESS ADDRESS.

A. My name is Larry Christensen. I am employed by Qwest Corporation (“Qwest”) as a Director – Legal Issues in Wholesale Marketing. My business address is 1801 California Street, Room 2430, Denver, Colorado 80202.

Q. PLEASE GIVE A BRIEF DESCRIPTION OF YOUR EDUCATIONAL BACKGROUND AND TELEPHONE COMPANY EXPERIENCE.

A. I graduated from the University of Minnesota with a Bachelor of Electrical Engineering degree in 1969. Over the ensuing years, I have attended numerous college and telecommunications courses.

For more than 38 years, I have worked for Qwest and its predecessors and affiliates, covering my entire career. During that time I have worked in many different departments within the various organizations. I have worked in outside plant and staff engineering positions, marketing staff, product management and product strategy. In my product positions, I was directly involved in the development of interconnection products and strategies that came about as the result of the passage of the Telecommunications Act of 1996 (“Act”).

1 Since 2001, I have served as the Director – Legal Issues. In that role, my
2 responsibilities include supervision of a team of negotiators and support personnel
3 who are responsible for negotiating and administering wholesale contracts between
4 Qwest and its wholesale customers, the vast majority of which have been section
5 252 Interconnection Agreements with competitive local exchange carriers
6 (“CLECs”). I am also directly involved in negotiations of commercial agreements,
7 including Qwest Platform Plus (“QPP”) which I discussed with Arizona Dialtone,
8 and some interconnections agreements.

9
10 **Q. HAVE YOU TESTIFIED PREVIOUSLY IN COLORADO?**

11 A. Yes. However, that testimony dealt with intrastate private line competition
12 approximately twenty years ago. I have not testified in Colorado since.

13
14 **II. PURPOSE OF TESTIMONY**

15
16 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

17 A. The purpose of my testimony is to provide background on the interconnection and
18 commercial agreement negotiations process between Arizona Dialtone and Qwest
19 under section 252 of the Act. I will not be addressing the additional issues that
20 Arizona Dialtone raised as part of its response to the petition since the parties did
21 not negotiate those issues and the ALJ ruled in the prehearing conference that the
22 issues will not be addressed in the arbitration.

1 **III. TRIENNIAL REVIEW ON REMAND ORDER (“TRRO”)**

2 **Q. WHEN DID QWEST FIRST NOTIFY ARIZONA DIALTONE OF ITS**
3 **INTENT TO MODIFY THE PARTIES’ INTERCONNECTION**
4 **AGREEMENT TO INCLUDE THE TERMS AND CONDITIONS OF THE**
5 **FCC’S TRIENNIAL REVIEW ON REMAND ORDER (“TRRO”)?**

6 A. On March 4, 2005, Qwest issued an email communication to all CLECs that have
7 interconnection agreements with Qwest and that required an interconnection
8 agreement amendment to reflect the changes in law in their agreements as a result
9 of the *TRRO* decision. Mr. Thomas Bade was the Arizona Dialtone recipient of that
10 email. A true and correct copy of Qwest’s March 4, 2005 email is attached hereto
11 as Exhibit LTC1 to this testimony, and is incorporated by this reference. On March
12 17, 2005, Mr. Bade and I exchanged emails to clarify a point of the March 4th
13 notice and to set up a March 29, 2005 call to discuss Qwest’s QPP offer.

14
15 **Q. WHAT WAS THE DISCUSSION ABOUT THE QPP SERVICE OFFER?**

16 A. Mr. Bade had reviewed the QPP offer, but did not believe that the rate that Qwest
17 was proposing should apply to the PAL (Public Access Line) services that his
18 company provided. He thought that the rate either should be lower than the
19 business port rate or that his company should be able to purchase the service at the
20 residential port rate. Qwest did not agree that his suggestion was appropriate.

1 **Q. WHEN DID QWEST CONTACT ARIZONA DIALTONE DIRECTLY TO**
2 **INITIATE NEGOTIATIONS OF THE *TRO/TRRO* AMENDMENT?**

3 A. On June 17, 2005, Sandy Sanderson of my Qwest interconnection negotiation team
4 sent Mr. Bade an email that requested the parties replace their existing
5 interconnection agreement with one that was compliant with the FCC's Triennial
6 Review Order ("*TRO*") and the *TRRO*. After not receiving any response from Mr.
7 Bade, Mr. Sanderson called Mr. Bade on July 13, 2005. Mr. Bade indicated that he
8 did not recollect the initial June 17, 2005 email and thus Qwest resent it to him that
9 day. A true and correct copy of Qwest's June 17, 2005 email is attached hereto as
10 Exhibit LTC2 to this testimony, and is incorporated by this reference.

11
12 **Q. DID THE PARTIES NEGOTIATE THE ENTIRE REPLACEMENT**
13 **INTERCONNECTION AGREEMENT?**

14 A. No. Because Mr. Bade said he was concerned about the time and cost of
15 negotiating the entire agreement, the parties agreed that they would just amend the
16 existing agreement to include the terms and conditions of the *TRO/TRRO*.

17
18 **Q. DID MR. BADE INDICATE THAT ARIZONA DIALTONE HAD**
19 **ADDITIONAL CONCERNS ABOUT BILLING ISSUES UNDER THE**
20 **EXISTING INTERCONNECTION AGREEMENT?**

21 A. Yes, Mr. Bade indicated that he believed Arizona Dialtone was being improperly
22 billed for certain long distance and operator services calls, and further indicated that
23 he wanted to "negotiate" the disputed billing.

1 **Q. WHAT WAS QWEST'S RESPONSE TO MR. BADE'S CONCERNS?**

2 A. Qwest's response to Mr. Bade was to explain that the interconnection agreement
3 negotiation team was not the correct group to address his billing concerns. We
4 directed him to our billing and service management organizations to address those
5 issues.

6
7 **Q. DID MR. BADE CONTINUE TO DISCUSS HIS BILLING DISPUTES AS**
8 **PART OF THESE NEGOTIATIONS?**

9 A. No, he did not do so at that time. Mr. Bade began working with the appropriate
10 Qwest personnel, and these billing issues were not brought up as part of the
11 *TRO/TRRO* amendment negotiations for a number of months.

12
13 **Q. HOW WOULD YOU CHARACTERIZE THE NEGOTIATIONS OF THE**
14 ***TRO/TRRO* AMENDMENT?**

15 A. I would say, based on the negotiations telephone calls I was a participant in and also
16 the direct feedback I was getting from the Qwest negotiators, that Mr. Bade was a
17 reluctant participant and that the negotiations went slowly and with little progress.
18 Qwest representatives explained the impacts of the changes in law and identified
19 the options that Arizona Dialtone had with respect to transitioning its UNE-P (UNE
20 Platform) PAL and POTS (Plain Old Telephone Service) lines if Arizona Dialtone
21 wished to utilize other Qwest service offerings. These options included
22 transitioning either to the resold PAL and POTS services or to QPP. Mr. Bade,
23 however, consistently brought up his concerns about the increased prices that

1 Arizona Dialtone would have to pay for either of those services, since he claimed
2 these prices would significantly impact his company's profit margins. Mr. Bade
3 was very resistant to rate increases and made many arguments about why Arizona
4 Dialtone should not have to pay a higher rate. Qwest explained that the resale
5 discounts had been set by state commissions and that the QPP rate had been
6 established by Qwest in negotiations with other major CLECs. Thus, Qwest was
7 not in a position to negotiate a different rate for Arizona Dialtone, especially since
8 all other CLECs who had UNE-P services had already executed QPP agreements
9 and Qwest is under nondiscrimination obligations. In fact, there are currently 37
10 CLECs purchasing more than 67,000 QPP lines in Colorado.

11
12 **Q. DID ARIZONA DIALTONE ACTUALLY PROVIDE COUNTER**
13 **LANGUAGE TO THE *TRO/TRRO* AMENDMENT WITH QWEST IN 2005**
14 **OR EARLY 2006?**

15 A. No, it did not. Qwest asked a number of times for a redlined version of what
16 language Arizona Dialtone would change, but received no actual language.

17
18 **Q. DID QWEST INITIATE DISPUTE RESOLUTION WITH ARIZONA**
19 **DIALTONE FOR ITS FAILURE TO NEGOTIATE?**

20 A. Yes. On March 1, 2006, I sent Mr. Bade a notice that Qwest was initiating dispute
21 resolution pursuant to the provisions of the Interconnection Agreement. The notice
22 named Steve Hansen, Vice President – Carrier Relations, as Qwest's representative

1 to negotiate the dispute. A true and correct copy of Qwest's March 1, 2006 letter is
2 attached hereto as Exhibit LTC3 to this testimony, and is incorporated by this
3 reference.

4
5 **Q. WHAT HAPPENED THEN?**

6 A. There were a number of exchanges between counsel for Qwest and counsel for
7 Arizona Dialtone between March 3, 2006 and May 2, 2006 arguing whether the
8 dispute resolution process was appropriate and whether Arizona Dialtone was under
9 any obligation to execute an amendment.

10
11 **Q. DID ARIZONA DIALTONE EVER PROVIDE THE QWEST CONTRACT
12 NEGOTIATORS WITH A REDLINE OF THE TRO/TRRO AMENDMENT?**

13 A. Yes, it did. On May 18, 2006, as part of the dispute resolution process, Arizona
14 Dialtone finally provided Qwest with a redlined version of the *TRO/TRRO*
15 amendment, including the issues that are part of this arbitration.

16
17 **Q. DID MR. BADE AND MR. HANSEN ATTEMPT TO RESOLVE THE
18 DISPUTED LANGUAGE?**

19 A. Yes, they had two telephone calls attempting to resolve the dispute; the primary call
20 happening on June 6, 2006. Unfortunately, they were unsuccessful as spelled out in
21 an exchange of emails provided as Exhibit LTC4. A true and correct copy of the
22 exchange of emails referenced in this answer is attached hereto as Exhibit LTC4 to
23 this testimony, and is incorporated by this reference.

1 **Q. DID THE PARTIES REACH AGREEMENT IN NEGOTIATIONS WITHIN**
2 **THE WINDOW OF ARBITRATION SET FORTH IN THE ACT?**

3 A. No, they did not. Negotiations essentially stopped shortly after the Arizona
4 Corporation Commission ("ACC") issued its order in Decision No. 98840 and after
5 the dispute resolution initiated by Qwest did not result in an agreement on
6 amendment language. The ACC decision essentially ruled that the current TELRIC
7 (Total Element Long Run Incremental Cost) rate was appropriate pricing for
8 Section 271 elements until a new rate was established by the Commission. Qwest
9 decided that there was no reason to continue to argue over the amendment issues
10 since the key change of law impacting Arizona Dialtone was the FCC decision that
11 Qwest was not required to provide CLECs like Arizona Dialtone the switch port at
12 TELRIC rates. Qwest allowed the arbitration window as defined in Section 252 of
13 the Act to close without initiating arbitration action.

14
15 **Q. WHAT CAUSED THE NEGOTIATIONS TO START AGAIN?**

16 A. The U.S. District Court for the District of Arizona in Case No. CV 056-1030 PHX-
17 ROS reversed the ACC's Decision No. 98840 on July 18, 2007. Qwest
18 subsequently reopened negotiations via a letter from Qwest counsel Andrew
19 Creighton to Arizona Dialtone's counsel William Cleaveland on July 20, 2007. A
20 true and correct copy of Qwest's July 20, 2007 letter to Arizona Dialtone's counsel
21 Mr. Cleaveland is attached hereto as Exhibit LTC5 to this testimony, and is
22 incorporated by this reference.

1 **Q. WERE NEGOTIATIONS SUCCESSFUL BETWEEN THE PARTIES?**

2 A. No, they were not. The parties' made absolutely no progress in reaching an
3 agreement on the *TRO/TRRO* amendment issues, which has led Qwest to file this
4 arbitration action.

5
6 **Q. HAS QWEST BEEN CLEAR ABOUT ITS INTENT TO BACK BILL OR
7 "TRUE UP" BACK TO THE EFFECTIVE DATE OF THE *TRRO* ORDER?**

8 A. Qwest has been very clear in its intent that Arizona Dialtone is obligated to pay,
9 through a back-billing or "true up" process, amounts back to the *TRRO*'s March 11,
10 2005 effective date. The initial email notification that Qwest sent to Arizona
11 Dialtone included the notice about true up billing to the March 11, 2005 effective
12 date. In addition, the amendment language that Qwest has provided to Arizona
13 Dialtone has consistently included language about billing true ups to the March 11,
14 2005 date. Qwest has never agreed to waive the true up with Arizona Dialtone, or
15 with any other CLEC for that matter.

16
17 **Q. WHY IS IT IMPORTANT FOR THE COMMISSION TO CONCUR WITH
18 THE QWEST LANGUAGE FOR TRUE UP BILLING?**

19 A. It is important for the Commission to adopt Qwest's language for several reasons.
20 First, the FCC was clear in its *TRRO* order, at paragraph 228 and footnote 630, that
21 the UNE-P rates were to increase one dollar for the one-year transition interval
22 ending March 10, 2006 and that true up billing was appropriate in these
23 circumstances. Qwest should be allowed to bill Arizona Dialtone its lowest cost

1 service alternative subsequent to March 10, 2006. That is the date the FCC ordered
2 all transitions to alternative services to be completed. Secondly, the Commission
3 should establish the precedent and policy that does not allow either party to obtain a
4 financial gain by delaying the execution of changes in law. If the Commission were
5 to rule in favor of Arizona Dialtone on this true up issue, it would establish an
6 improper incentive for parties who have a financial disadvantage from a change of
7 law to delay executing amendments to reflect such changes in law, whether a CLEC
8 or Qwest. Such a ruling would be bad policy, would encourage gamesmanship and
9 delay, and would lead to additional disputes and arbitrations.

10
11 **IX. CONCLUSION**

12 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

13 A. Yes.

Exhibit

“3”





Larry Christensen
Director – Interconnection Agreements
1801 California Street, Room 2430
Denver, CO 80202
303-896-4686
larry.christensen@qwest.com

VIA EMAIL & OVERNIGHT MAIL

May 23, 2007

Tom Bade
President - Arizona Dial Tone
7170 W Oakland Street
Chandler, AZ 85226
480-705-9461
tombade@arizonadialtone.com

Mr. Bade:

This notice is to advise Arizona Dial Tone that any orders it places for new local switching as an unbundled network element (“UNE”) under its interconnection agreements with Qwest will be rejected beginning Friday, May 25, 2007. Federal Communications Commission (“FCC”) Rule 51.319(d)(2)(iii) provides: “Requesting carriers may not obtain new local switching as an unbundled network element.” That rule was self-executing as of March 11, 2005 under the Triennial Review Remand Order (“TRRO”). The only Local Service Requests (“LSRs”) Qwest will accept from Arizona Dial Tone for its UNE Platform (“UNE-P”) services are for disconnection or conversion to alternative services. All other LSRs would be orders for new local switching as a UNE. Please note that Arizona Dial Tone may order Resale services or enter into the Qwest Platform Plus™ (QPP™) agreement for alternative service arrangements.

Despite repeated good faith attempts by Qwest, Arizona Dial Tone is the *only* CLEC in Qwest’s territory that has refused to transition its UNE-P services in accordance with the Triennial Review Order (“TRO”) and TRRO changes in law. Qwest again encourages Arizona Dial Tone to contact us to bring your interconnection agreement into compliance with the changes in law.

Qwest reminds Arizona Dial Tone that retroactive billing will apply to all Arizona Dial Tone UNE-P lines that were in service after March 11, 2005. The retroactive billing will include the FCC’s \$1.00/port mandated transition period rate increase from March 11, 2005 through March 10, 2006. It will also include rate differences, beginning March 10, 2006, between UNE-P service and any Qwest alternative service to which Arizona Dial Tone transitions. Arizona Dial Tone’s liability for this retroactive billing continues to grow.

Sincerely,

Larry Christensen