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BEFORE THE ARIZONA CORPORATION COMMISSION ²⁵ Arizona Corporation Commission

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COMMISSIONERS

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- 3 MIKE GLEASON, Chairman
- 4 WILLIAM A. MUNDELL
- 5 JEFF HATCH-MILLER
- 6 KRISTIN K. MAYES
- 7 GARY PIERCE

AZ CORP COMMISSION
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8 IN THE MATTER OF QWEST CORPORATION'S
 9 PETITION FOR ARBITRATION AND APPROVAL
 10 OF AMENDMENT TO INTERCONNECTION
 11 AGREEMENT WITH ARIZONA DIALTONE, INC.
 12 PURSUANT TO SECTION 252(b) OF THE
 13 COMMUNICATIONS ACT OF 1934, AS
 14 AMENDED BY THE TELECOMMUNICATIONS
 15 ACT OF 1996 AND APPLICABLE STATE LAWS.

DOCKET NO. T-01051B-07-0693

DOCKET NO. T-03608A-07-0693

PROCEDURAL ORDER

BY THE COMMISSION:

12 On December 17, 2007, Qwest Corporation ("Qwest") filed with the Arizona Corporation
 13 Commission ("Commission") a Petition for Arbitration under 47 U.S.C. § 252(b) and Arizona
 14 Administrative Code ("A.A.C.") R14-2-1505 ("Petition"). In its Petition, Qwest requested that the
 15 Commission resolve issues related to the Interconnection Agreement ("ICA") between Qwest and
 16 Arizona Dialtone, Inc. ("Arizona Dialtone"), which Qwest asserts derive from Arizona Dialtone's
 17 refusal to enter into an amendment to the current ICA ("ICA Amendment") that would implement
 18 changes related to unbundled access to mass market local circuit switching, changes that Qwest
 19 asserts are mandated by federal law, specifically the Federal Communications Commission's
 20 ("FCC's") Triennial Review Remand Order¹ ("TRRO") and 47 C.F.R. § 51.319(d).

21 Also on December 17, 2007, Qwest filed a Complaint against Arizona Dialtone, requesting
 22 that the Commission (1) declare that the ICA requires Arizona Dialtone to compensate Qwest at the
 23 transitional rate for UNE-P PAL and POTS for embedded services for a one-year transition period
 24 that began March 11, 2005, and at the rate for alternative services for new orders thereafter; (2)
 25 compel Arizona Dialtone to pay such charges to Qwest; (3) compel Arizona Dialtone to pay late
 26 payment charges on the amounts ordered to be paid; (4) compel Arizona Dialtone to execute the ICA

27 _____
 28 ¹ *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 Amendment and to comply with its obligations thereunder; and (5) award such other relief, including
2 but not limited to appropriate fines or penalties, as the Commission deems just and reasonable.²

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

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

18 In light of the issue regarding Qwest's authority to petition for arbitration under 47 U.S.C. §
19 252, Qwest and Arizona Dialtone were also asked whether they objected to suspending the timelines
20 under 47 U.S.C. § 252, assuming that they apply. Qwest objected to a suspension of the timelines,
21 while Arizona Dialtone did not. As a result of Qwest's objection, the hearing in the Arbitration
22 matter was tentatively scheduled for February 11, 2008. Counsel for Qwest and Arizona Dialtone
23 indicated that the date appeared to be acceptable, and counsel for Qwest was instructed to make a
24 filing as soon as possible if that should prove to be incorrect upon further inquiry. Counsel for Qwest
25 was also instructed that requesting a different hearing date would likely result in suspension of the 47
26 U.S.C. § 252 timelines.

27
28 ² The Complaint matter was assigned Docket No. T-03608A-07-0694 et al.

1 On January 16, 2008, a Procedural Order was issued directing Qwest and Arizona Dialtone to
2 file the briefs discussed at the procedural conference. Staff was also requested to file such a brief.
3 The Procedural Order also scheduled a hearing in the Arbitration matter to commence on February
4 11, 2008; requested Staff to appear and participate in the hearing; and directed Qwest and Arizona
5 Dialtone to share equally the costs for transcription, including expedited transcripts, if the hearing
6 were to go forward on the Arbitration matter alone or on both matters, if consolidated. The issue of
7 consolidation was not decided, pending resolution of the issues concerning Qwest's authority to
8 petition for arbitration under 47 U.S.C. § 252 and the applicability of the 47 U.S.C. § 252 timelines.

9 On January 17, 2008,³ Arizona Dialtone filed its response to Qwest's Petition. In its response,
10 Arizona Dialtone did not object to or dispute the bulk of Qwest's Petition. However, Arizona
11 Dialtone asserted that, in addition to the issues raised by Qwest, this matter should resolve the "true
12 up" of rates sought by Qwest in the Complaint matter and Arizona Dialtone's ongoing billing and
13 pricing disputes with Qwest.

14 On January 28 and 29, 2008, Qwest, Arizona Dialtone, and Staff filed their briefs.

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

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

24 Later on January 31, 2008, Qwest filed a Request for Procedural Conference in this matter
25 and a Request for Procedural Conference in the Complaint matter. Qwest stated that it desired a
26 procedural conference because of its Motion for Judgment on the Pleadings in the Complaint matter.

27
28 ³ This was six days after the deadline for response under 47 U.S.C. § 252(b)(3).

1 On February 1, 2008, Procedural Orders were issued in this matter and the Complaint matter
2 scheduling a joint procedural conference for February 6, 2008, at the Commission's offices in
3 Phoenix, Arizona, to discuss Qwest's Motion for Judgment on the Pleadings in the Complaint matter
4 and any other relevant issues in this matter and the Complaint matter.

5 Late on February 4, 2008, in this matter, Qwest filed a Motion for an Order Awarding
6 Qwest's Requested Relief Regarding the Proposed TRO/TRRO Amendment Based upon the
7 Statements and Admissions of Arizona Dialtone, Inc., and Denying Arbitration of Alleged Billing
8 Disputes ("Motion"). Qwest requested expedited consideration of the Motion. In the Motion, Qwest
9 requested that the Commission issue an order compelling Arizona Dialtone to execute an ICA
10 Amendment reflecting the FCC's TRO and TRRO rulings, based on statements and admissions made
11 by Arizona Dialtone in this matter. Alternatively, Qwest requested an order regarding the scope of
12 issues to be brought forward for hearing on February 11, 2008.

13 On February 6, 2008, a joint procedural conference was held in this matter and the Complaint
14 matter at the Commission's offices in Phoenix, Arizona. Qwest, Arizona Dialtone, and Staff
15 appeared through counsel. At the procedural conference, it was agreed that Arizona Dialtone and
16 Staff should be afforded an opportunity to file responses to Qwest's Motions and that Qwest should
17 have the opportunity to file replies to those responses, and a schedule for those filings was agreed
18 upon. It was also agreed that it would be appropriate to vacate the hearing in this matter scheduled
19 for February 11, 2008, and to suspend the 47 U.S.C. § 252 timelines for the amount of time needed
20 for the Commission to rule on both of Qwest's Motions. Qwest, Arizona Dialtone, and Staff agreed
21 to a 45-day suspension of the timelines, but were put on notice that 45 days may ultimately prove to
22 be an insufficient amount of time. They were also put on notice that an Order granting either of
23 Qwest's Motions could only be accomplished through a Recommended Order to be considered by the
24 Commission at an open meeting. In the Complaint matter, Qwest was instructed to file a substantive
25 (not fully redacted) version of Exhibit D to its Complaint. Staff stated that it would provide a draft
26 protective order to Qwest and Arizona Dialtone for the information to be included therein. Qwest
27 was also directed to provide an explanation concerning the reference to Exhibit A included in the
28 ICA Amendment included as Appendix D to its Petition, as the ICA Amendment does not appear to

1 have an Exhibit A.

2 On February 6, 2008, a Procedural Order was issued vacating the February 11, 2008, hearing
3 date in this matter, directing Arizona Dialtone and Staff to file responses to Qwest's Motion in this
4 matter by February 22, 2008; requiring Qwest to file a reply to the responses and an explanation
5 concerning the reference to Exhibit A in the ICA Amendment by February 29, 2008; and suspending
6 the timeline under 47 U.S.C. § 252 for 45 days.

7 On February 22, 2008, Arizona Dialtone filed its Opposition to Qwest's Motion. Arizona
8 Dialtone asserted that the Motion should be decided using the same standard as for a motion for
9 summary judgment and that Qwest had failed, as a matter of law, to meet the standard for receiving a
10 judgment on the pleadings or a summary judgment. Arizona Dialtone asserted that there is still a
11 fundamental issue in dispute—the rates that Arizona Dialtone is required to pay for mass market local
12 circuit switching during the one-year transition period and thereafter. Arizona Dialtone also stated
13 that Issues 1, 2, and 3 of Qwest's Petition are no longer in dispute. As to Issue 5, Arizona Dialtone
14 stated that the billing disputes it raised in its Response to Qwest's Petition, which are separate and
15 distinct from the true-up or back-billing issues, cannot be decided in this matter.

16 Regarding Issue 4, Arizona Dialtone asserted that what remains in dispute is the rate that
17 Arizona Dialtone is required to pay for local circuit switching from the March 11, 2005, effective
18 date of the TRRO through the present date. For the one-year transition period, Arizona Dialtone
19 stated that Qwest effectively entered into an alternative arrangement superseding the transition
20 period, within the meaning of TRRO ¶ 228, by continuing to provide Arizona Dialtone with local
21 circuit switching services at the existing unbundled rate during the transition period, contrary to its
22 threats to discontinue doing so and with full knowledge that Arizona Dialtone objected to the
23 transition rate, and by accepting Arizona Dialtone's payments for switching services at the unbundled
24 rate. Arizona Dialtone asserted that, at the very least, there is an issue of fact sufficient to preclude a
25 judgment on the pleadings regarding whether the parties through their conduct entered into an
26 alternative arrangement for the transition period and, if so, whether Qwest should be estopped from
27 now collecting the transition rate. For the period after the one-year transition period, Arizona
28 Dialtone asserted that the TRRO does not mandate any specific rate that an ILEC must or may charge

1 a CLEC, which leaves that issue completely open for negotiations. Arizona Dialtone stated that its
2 position is that Qwest should be bound by its choice to continue billing at the unbundled rate despite
3 the fact that it could have unilaterally begun billing at a higher rate, as it did in May 2007. Arizona
4 Dialtone also asserted that the commercial rate that Qwest proposes as a replacement for the
5 unbundled rate, and that Qwest desires to have written into the ICA Amendment for retrospective
6 application back to March 11, 2006, is an above-market rate in that it is higher than the rate Arizona
7 Dialtone is currently paying for identical switching services for its customers serviced by other
8 CLECs. Arizona Dialtone also stated that it is willing to sign an ICA Amendment that, with respect
9 to local circuit switching rates, is prospective only and does not require Arizona Dialtone to pay
10 substantial sums of money for prior periods of time. Finally, Arizona Dialtone related that it had
11 already migrated roughly 50% of its customers to other CLECs and stated that it is willing to convert
12 its remaining customers to Qwest's resale rate within 30 days of executing an ICA Amendment and
13 would be willing to have this obligation written into an ICA Amendment, provided that Qwest has
14 the capacity to accept and process the orders for conversion within that time frame.

15 Also on February 22, 2008, Staff filed its Comments on Qwest's Motion. In its Comments,
16 Staff asserted that the issues raised by Qwest in its Petition would be more appropriately handled
17 through the ICA change of law provision and the Complaint matter. Staff stated that resolving one
18 proceeding will necessarily resolve the other and that the parties should stipulate to dismissal of this
19 matter and resolve the TRRO-related issues in the Complaint matter. Staff recommended that the
20 billing dispute issues be severed from this matter and that Arizona Dialtone be given a fixed amount
21 of time to indicate whether it desires to pursue the billing dispute issues at this time and, if so, to
22 more clearly delineate the issues and identify whether those issues are most appropriately handled
23 through a new complaint proceeding or arbitration. Staff identified two TRRO-related issues that it
24 believes should be addressed in the Complaint matter—the back-billing issue and the appropriate
25 transition period for elements no longer required under 47 U.S.C. § 251—and stated that, with those
26 issues excised and resolved in the Complaint matter, there is no reason for Arizona Dialtone not to
27 sign the proposed ICA Amendment, especially if the ICA Amendment is the same as that signed by
28 other carriers in Arizona. Staff further opined that Qwest is entitled under the ICA's change of law

1 provision to have the ICA reflect the status of current FCC rulings and existing law. Staff also asked
2 that Qwest, in its Reply to Staff's Comments, identify any differences between Qwest's standard
3 TRRO Amendment and the ICA Amendment it has asked Arizona Dialtone to sign. In conclusion,
4 Staff stated that the outstanding TRRO-related issues should be resolved in the Complaint matter and
5 that other issues not related to the TRRO should be resolved in a separate proceeding or separate
6 phase of this matter, if Arizona Dialtone so desires after it has delineated those issues in more detail.

7 On February 28, 2008, Qwest filed a Notice of Filing to explain that there is no Exhibit A to
8 Appendix D to its Petition and that the reference to Exhibit A referenced therein should be considered
9 omitted.

10 On February 29, 2008, Qwest filed a Reply in Support of its Motion. In its Reply, Qwest
11 incorporated by reference its Reply filed in the Complaint matter. In addition, Qwest stated that the
12 only issue remaining is the back-billing for the one-year transition period and for the period from
13 March 11, 2006, to the present. Qwest stated that it has demonstrated that, as a matter of law, the
14 parties' ICA should contain the back-billing language. Qwest stated that because back-billing
15 provisions have been included in the TRRO Amendments signed with other CLECs, in recognition
16 that the change of law was recognized retroactively, the back-billing provision should be inserted in
17 this matter. Qwest also stated that Staff's Comments regarding which docket should be used for
18 certain types of relief should be made in a procedural argument rather than in the context of Qwest's
19 Motion, but that regardless of which docket the back-billing issue is resolved in, Qwest is clearly
20 entitled to have the relief granted expeditiously because the TRRO contemplated timely
21 implementation of the changes.

22 In this matter, Qwest has essentially moved for summary judgment as to the relief requested
23 in its Petition. In its Petition, Qwest requested that the Commission resolve the issues identified in
24 Section V therein by ordering Qwest and Arizona Dialtone to incorporate Qwest's positions into the
25 ICA Amendment for execution by Qwest and Arizona Dialtone and by approving the ICA
26 Amendment. That Motion is under advisement.

27 After reviewing the record in this matter, it is not clear whether there are any genuine issues
28 of material fact remaining. There are, however, several legal issues that must be resolved. Arizona

1 Dialtone has raised two legal issues: (1) whether Qwest's continuing to provide Arizona Dialtone
2 with local circuit switching services at the existing unbundled rate and accepting payments for
3 switching services at the unbundled rate during the transition period, contrary to Qwest's threats to
4 discontinue doing so and with knowledge that Arizona Dialtone objected to the transition rate,
5 created an alternative arrangement under ¶ 228 of the TRRO such that Qwest should be estopped
6 from collecting the transition rate and determined to have waived its right to collect the transition
7 rate; and (2) whether the TRRO dictates the rate to be applied for switching services rendered to
8 Arizona Dialtone by Qwest after the expiration of the transition period and authorizes Qwest to assess
9 a true-up for that period.⁴ Qwest has raised the following legal issue: whether, as a matter of law, the
10 ICA Amendment should contain the back-billing language.

11 In addition, in light of Arizona Dialtone's statements that Issues 1, 2, 3, and 5 of Qwest's
12 Petition are no longer in dispute, it is unlikely that the language included as Arizona Dialtone's
13 position in Exhibit D to Qwest's Petition, the ICA Amendment, is an accurate reflection of Arizona
14 Dialtone's current position.

15 Therefore, it is appropriate to schedule oral argument in this matter. It is also appropriate to
16 permit Arizona Dialtone and Qwest to make filings regarding whether any genuine issue of material
17 fact exists in this matter, whether any legal issue other than those identified above needs to be
18 resolved in this matter, and whether the parties desire to present testimony in this matter. It is also
19 appropriate to require Arizona Dialtone to file proposed ICA Amendment language that accurately
20 reflects its current position and to require Qwest to file copies of the public utility commission orders
21 cited in footnote 15 of its Motion. If either Arizona Dialtone or Qwest indicates in its filing that a
22 genuine issue of material fact exists in this matter or that it desires to present testimony, the oral
23 argument scheduled herein will be changed to an evidentiary hearing.

24 **IT IS THEREFORE ORDERED that oral argument in this matter is scheduled to**
25 **commence on April 17, 2008, at 10:30 a.m., or as soon thereafter as is practicable, at the**
26 **Commission's offices in Phoenix, Arizona. The oral argument may be changed to an evidentiary**

27 ⁴ In support of its position on this issue, Qwest included citations to orders from other public utility commissions.
28 Motion at 10 n.15. Qwest did not, however, provide copies of those orders or sufficient information to obtain copies
other than through Lexis, to which the Commission does not subscribe.

1 hearing, as discussed above.

2 IT IS FURTHER ORDERED that **Arizona Dialtone and Qwest shall each file, by April 3,**
3 **2008,** a document indicating whether any genuine issue of material fact exists in this matter, and, if
4 so, identifying such factual issue; whether any legal issue other than those identified above needs to
5 be resolved in this matter and, if so, identifying such legal issue; and whether the party desires to
6 present testimony in this matter.

7 IT IS FURTHER ORDERED that **Arizona Dialtone shall file, by April 3, 2008, ICA**
8 **Amendment language that accurately reflects its current position** in this matter.

9 IT IS FURTHER ORDERED that **Qwest shall file, by April 3, 2008, copies of the public**
10 **utility commission orders cited in footnote 15 of its Motion.**

11 IT IS FURTHER ORDERED that Qwest and Arizona Dialtone shall share equally the costs
12 for transcription and shall arrange and pay to have expedited transcripts ("dailies") prepared and
13 provided to the Commission's Hearing Division for the oral argument or hearing scheduled in this
14 matter.

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

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

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

23 DATED this 27th day of March, 2008.

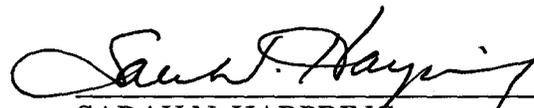
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SARAH N. HARPRING
ARBITRATOR

1 Copies of the foregoing mailed/delivered
2 this 27th day of March, 2008, to:

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