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BEFORE THE ARIZONA CORPORATION COMMISSION

MIKE GLEASON
Chairman
WILLIAM MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
KRISTIN MAYES
Commissioner
GARY PIERCE
Commissioner

T-01051B-07-0693

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 NOTICE OF LATE FILED EXHIBIT

NOTICE IS HEREBY GIVEN that on this date, at the request of Administrative Law Judge Sarah Harpring, Arizona Dialtone, Inc. has filed the Initial Commission Decision dated April 16, 2008 of the Public Utilities Commission of the State of Colorado in Docket No. 07B-514T in that matter styled "In The Matter of Qwest Corporation's Petition for Arbitration with Arizona Dialtone, Inc. Pursuant to Section 252(B) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996" (the "Decision") in the form attached hereto as Exhibit A. Arizona Dialtone, Inc. asks that the Decision be admitted as Exhibit A-14 in this matter.

DATED this 9th day of May, 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 9 day of May, 2008, to:

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

COPY of the foregoing mailed this 9 day of May, 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: _____

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Exhibit A

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APR 2 1 2008

CHEIFETZ IANNITELLI
MARCOLINI,P.C.

Decision No. C08-0414

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 07B-514T

IN THE MATTER OF QWEST CORPORATION'S PETITION FOR ARBITRATION WITH ARIZONA DIALTONE, INC. PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996.

INITIAL COMMISSION DECISION

Mailed Date: April 18, 2008
Adopted Date: April 16, 2008

Appearances:

Alex M. Duarte, Esq., Portland, Oregon, and David W. McGann, Esq., Denver, Colorado, for Qwest Corporation; and

Glenn B. Hotchkiss, Esq., Cheifetz Iannitelli Marcolini, P.C., Phoenix, Arizona, for Arizona Dialtone, Inc.

TABLE OF CONTENTS

I. BY THE COMMISSION 2
A. Statement of the Case 2
II. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION 4
A. Issue 4 (TRRO Amendment Attachment 1, Sections 2.3, 5.1.1.4, and 5.1.1.5). 5
(1) The Triennial Review Remand Order. 5
(2) History of Qwest/AZDT TRRO Negotiations. 7
(3) Qwest's Position. 13
(4) AZDT's Position 17
(5) Commission Resolution of Issue 4. 21
III. ORDER 23
A. The Commission Orders That: 23
B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING April 16, 2008 24

A-14

I. BY THE COMMISSION

A. Statement of the Case

1. On December 19, 2007, Qwest Corporation (Qwest) filed a Petition for Arbitration (Petition) with the Colorado Public Utilities Commission (Commission) pursuant to 4 *Code of Colorado Regulations* 723-2-2560 and § 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (Act), 47 U.S.C. § 252(b). The Petition requests that the Commission arbitrate one unresolved issue in connection with a proposed amendment to an Interconnection Agreement (ICA) between Qwest and Arizona Dialtone, Inc. (AZDT).[1]

2. Public notice of the Petition was given on December 26, 2007. AZDT filed its Response to the Petition on January 18, 2008.

3. On January 3, 2008, we referred this matter to an Administrative Law Judge (ALJ) for hearing and for an Initial Commission Decision pursuant to § 40-6-109(6), C.R.S. *See,* Decision No. C08-0004. At that time we noted that § 252(b)(4)(C) of the Act required that this arbitration proceeding be concluded on or before April 20, 2008. As a result of that timeline, we found that the due and timely execution of our functions required that the recommended decision of the ALJ be omitted and that we render an initial decision.

4. The ALJ held a pre-hearing conference in this matter on January 28, 2008. *See,* Decision No. R08-0060-I. Discussion centered around the desirability of consolidating this proceeding with the related formal complaint proceeding initiated by Qwest against AZDT in Docket No. 07F-520T, the possibility of the parties jointly waiving the nine-month deadline for

[1] The Commission approved the Qwest/AZDT ICA on January 25, 2002. *See,* Decision No. C02-0078 in Docket No. 01T-471.

issuance of a Commission decision in this arbitration proceeding, the desirability of staying Docket No. 07F-520T pending the issuance of an administratively final decision in this arbitration proceeding, and the establishment of a procedural schedule governing this proceeding.

5. After hearing comment and argument from the parties in connection with these issues, the ALJ determined that this proceeding should not be consolidated with Docket No. 07F-520T, that the scope of this proceeding should be limited to resolving the issues set forth in paragraph 20 of the Petition, and that Docket No. 07F-520T should be stayed pending the issuance of an administratively final decision in this matter. The ALJ also approved a procedural schedule governing this case which, among other things, established deadlines for the submission of prepared testimony and set the matter for hearing on March 10, 2008. *See,* Decision No. R08-0093-I. The procedural schedule was subsequently modified by, among other things, re-scheduling the hearing for March 5, 2008. *See,* Decision No. R08-0175-I.

6. On February 28, 2008, the parties submitted their Joint Disputed Issues Matrix. That filing indicated that Issue Nos. 1, 2, 3, and 5 identified in paragraph 20 of the Petition had been resolved. As a result, Issue No. 4 is the only remaining issue to be resolved by the Commission.

7. The hearing commenced as scheduled on March 5, 2008. The parties appeared through their respective counsel. As a preliminary matter the Verified Motion to Appear *Pro Hac Vice* submitted by AZDT requesting that its out-of-state counsel, Glenn B. Hotchkiss, Esq., be allowed to appear in this matter was granted. Also, the adoption by Qwest witness Larry R. Brotherson of the pre-filed direct and rebuttal testimony originally submitted by Qwest witness William R. Easton was approved without objection by AZDT.

8. During the course of the hearing Qwest presented testimony from two witnesses, Larry Christensen, Qwest's Director-Legal Issues in Wholesale Marketing, and Larry R. Brotherson, Qwest's Director-Wholesale Advocacy.[2] AZDT presented testimony from one witness, its President, Thomas Bade. Exhibits 1 through 21 were marked for identification, offered, and admitted into evidence.

9. On March 17, 2008, the parties submitted their respective Post-Hearing Statements of Position.

II. FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DISCUSSION

10. Under the Act, parties seeking to implement or amend an ICA relating to telecommunications services are required to engage in good faith negotiations in an attempt to informally and voluntary resolve interconnection issues. This Commission's authority to arbitrate issues arises only when the parties are unable to resolve them on their own. Qwest and AZDT began negotiating the terms of an amendment to their ICA (hereinafter, the TRRO Amendment) in March 2005. *See,* Exhibit 8. As indicated above, such negotiations resulted in the resolution of several issues. However, the parties now request that we resolve outstanding Issue No. 4 as summarized in the Issues Matrix.

11. In arbitrating the TRRO Amendment, the Commission seeks to do so consistent with the provisions of § 251 of the Act. Applying these criteria, the Commission will order the following resolution to the issue still in dispute:

[2] As indicated previously, Mr. Brotherson adopted the pre-filed direct and rebuttal testimony submitted in this matter by Qwest witness William R. Easton. *See,* Exhibits 7 through 10 and 14.

A. Issue 4 (TRRO Amendment Attachment 1, Sections 2.3, 5.1.1.4, and 5.1.1.5).[3]

Statement of the Issue: Whether back billings to March 10, 2005 of the FCC ordered rate for embedded switching UNEs during the transition period, and back billing to March 10, 2006 of Commission approved resale PAL service rates, are impermissible as violations of the doctrine against retroactive ratemaking or as untariffed charges.[4]

(1) The Triennial Review Remand Order.

12. In February 2005, the Federal Communications Commission (FCC) issued its Triennial Review Remand Order (TRRO).[5] The TRRO established new rules applicable to Incumbent Local Exchange Carriers' (ILECs) unbundling obligations regarding mass market local circuit switching, high-capacity loops, and dedicated interoffice transport. Effective on March 11, 2005, it, along with implementing regulations, provided that ILECs no longer had an obligation to provide Competitive Local Exchange Carriers (CLECs) with unbundled access to mass market local circuit switching, including in those instances where mass market local circuit switching is a component of Unbundled Network Element Platform (UNE-P). *See,* TRRO ¶ ¶ 235, 199 and 47 *Code of Federal Regulations* (C.F.R.) § 51.319(d).

13. In furtherance of this change, the FCC adopted a transition plan requiring CLECs to submit orders to convert their UNE-P customers to alternative arrangements within 12 months of the effective date of the TRRO; *i.e.,* by March 10, 2006 (hereinafter, the transition period). *See,* TRRO ¶¶ 199, 226, 227. In this regard, the FCC stated as follows:

> We believe that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which would include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or

[3] The section numbers referred to in the parenthetical relate to the specific parts of the TRRO Amendment wherein the parties propose different contractual language. The language proposed by each party is set forth in the Joint Disputed Issues Matrix.

[4] The statement of the issue to be resolved is taken from the Joint Disputed Issues Matrix.

[5] In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, 20 FCC Rcd 2533 (2005).

> other conversions. Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. By the end of the twelve month period, requesting carriers must transition the affected mass market local circuit switching UNEs to alternative facilities or arrangements. *See,* TRRO ¶ 227.
>
> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LECs must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. *See,* TRRO ¶ 233.

The TRRO provided that the transition period would apply only to a CLEC's embedded customer base and did not permit the addition of new customers using unbundled access to local circuit switching during that period. *See,* TRRO ¶¶ 199, 227.

14. In the absence of alternative arrangements that ILECs and CLECs might negotiate on a commercial basis, the TRRO provided that during the transition period CLECs would continue to have access to UNE-P priced at the higher of: (a) the rate at which the requesting carrier leased UNE-P on June 15, 2004 plus one dollar (hereinafter, the transition rate); or (b) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of the TRRO for UNE-P plus one dollar.[6] *See,* TRRO ¶ 228. In this regard, the FCC stated that "UNE-P arrangements no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes." *See,* TRRO ¶ 228, footnote 630.

[6] As indicated below, on June 15, 2004, the parties' ICA established a rate for AZDT's purchase of UNE-P PAL and UNE-P POTS from Qwest.

15. In the event carriers had problems implementing the required transition during the transition period, the FCC indicated that they would be free to petition for a waiver of such requirements pursuant to 47 C.F.R. § 1.3. It also recognized that the transition mechanism set forth in the TRRO was simply a "default" process and that "...carriers remain free to negotiate alternative arrangements superseding this transition period...." *See,* TRRO ¶ 228.

(2) History of Qwest/AZDT TRRO Negotiations.

16. Qwest is a Colorado-based ILEC within the meaning of § 251(b) of the Act. AZDT is an Arizona-based CLEC providing local exchange and interexchange telecommunications services in Colorado. AZDT specializes as a reseller of Public Access Lines (PALs), which it buys from Qwest and resells to retail payphone providers who operate such payphones in Colorado and other states.

17. As indicated above, the Qwest/AZDT ICA was approved by the Commission on January 25, 2002. It provides for an initial two-year term and is still in effect.[7] Under the ICA, AZDT purchases from Qwest an unbundled network service known as UNE-P PAL, which connects payphones, and UNE-P POTS.[8] A number of such circuits were in place in Colorado on the March 11, 2005, effective date of the TRRO. Local circuit switching is a component of UNE-P.

18. On March 4, 2005, Qwest sent an email to AZDT advising it generally of the requirements set forth in the TRRO. *See,* Exhibit 2. The email provided notice of Qwest's intent to negotiate an amendment to the parties' ICA before implementing the changes required by the

[7] Upon expiration of the initial term, § 5.2.1 of the ICA provides that the agreement will "...continue in force and effect until terminated by either Party on one hundred sixty (160) days written notice." Neither Qwest nor AZDT have terminated the ICA.

[8] UNE-P PAL stands for "Unbundled Network Element - Platform Public Access Line" and UNE-P POTS stands for "Unbundled Network Element - Platform Plain Old Telephone Service."

TRRO. It advised AZDT that the terms, conditions, and pricing contained in the ICA would remain in effect until such an amendment was agreed to, that AZDT would be subject to a "true-up" at the transition rate retroactive to March 11, 2005, that Qwest would continue to process new, conversion, and change service order requests to the extent required by the ICA, and that any such new services would also be subject to the TRRO's true-up provisions.

19. On March 29, 2005, Mr. Christensen of Qwest and Mr. Bade of AZDT had a conference call to discuss the possibility of AZDT transitioning from UNE-P PAL to Qwest's Platform Plus (QPP) offer.[9] Mr. Bade indicated he had reviewed the QPP offer but did not believe the QPP rate should apply to the PAL services that AZDT provided. He thought that Qwest's rate should be either lower than the business port rate or that AZDT should be able to purchase the service at the residential port rate.

20. On June 17, 2005, Qwest sent AZDT another email suggesting that Qwest and AZDT replace their existing ICA with one that was compliant with the TRRO or, as another option, to enter into the TRRO Amendment. *See,* Exhibit 3. That email indicated that the Qwest/AZDT ICA had expired and, as a result, was effective only on a month-to-month basis. After failing to receive a response, the subject email was resent to AZDT on July 13, 2005. AZDT responded the next day, indicating that it needed time to review the newly proposed ICA. AZDT also identified other areas of concern it had with its relationship with Qwest and again objected to the rates proposed by Qwest for its QPP offering.

[9] QPP is a contract offering based on a commercial agreement that Qwest had negotiated with other CLECs in response to the TRRO decision to eliminate mass market switching and UNE-P as unbundled network elements after the transition period expired in March 2006. (Ex. 1, Christensen, p. 6; Ex. 7, Easton, p. 5; Ex. 11, Christensen, p. 5.)

21. On March 1, 2006, ten days prior to the end of the one-year TRRO transition period, Qwest sent correspondence to AZDT advising that it was initiating the dispute resolution provisions of the parties' ICA as a result of the inability to negotiate a satisfactory TRRO Amendment. *See,* Exhibit 4. AZDT's legal counsel responded to this correspondence on March 3, 2006, contending that the subject dispute resolution procedures were not applicable to the TRRO Amendment issues and that the changes contained in the amendment were not mandated by the TRRO. *See,* Exhibit 17. By this correspondence, AZDT also advised Qwest that the TRRO Amendment was "significantly contrary to its business plan." It suggested that the parties suspend negotiations pending the outcome of Qwest's appeal of an Arizona Corporation Commission (ACC) order issued in connection with an ICA arbitration proceeding involving Qwest and Covad Communications (hereinafter, the Covad litigation).[10]

22. Shortly prior to the end of the one-year TRRO transition period, AZDT filed a request with the FCC to waive the implementation provisions of the TRRO. *See,* Exhibit 21. In support of that request, AZDT stated that it had been unable to find any economic alternatives to UNE-P switching for its payphone customer's lines. Apparently, the FCC failed to act on AZDT's waiver request.

23. On April 21, 2006, AZDT expressed interest in resolving other areas of dispute with Qwest that were generally unrelated to the TRRO issues. Regarding those issues and Qwest's proposed TRRO Amendment, AZDT's counsel opined that he was unsure why there would be "any possible reasoning for [sic] why [AZDT] would voluntarily consent to it." *See,*

[10] The subject order (ACC Decision No. 98840) generally held that the ACC had authority to include § 271 obligations or conditions in ICAs, or to include in Qwest's ICAs an obligation to provide unbundled network elements at the current Total Element Long Run Incremental Cost rate under Arizona law, even though Qwest was not required to provide them under § 251.

Exhibit 18. After a number of exchanges between the parties' counsel between March and May 2006 concerning the applicability of the dispute resolution process set forth in the ICA, on May 18, 2006, AZDT provided Qwest with a redlined version of the TRRO amendment. *See,* Exhibits 19 and 20. Apparently, however, the parties subsequently agreed that this version should be disregarded and that all TRRO issues would be subject to renegotiation.

24. On June 8, 2006, AZDT renewed its suggestion that Qwest continue to provide it with UNE-P at the rates set forth in the ICA pending the outcome of the Covad litigation. *See,* Exhibit 5. Qwest formally rejected this suggestion on June 20, 2006, when it advised AZDT that it was "...not obligated nor willing to continue to provide UNE-P services..." and that it "...will not continue to provide Arizona Dialtone with service under UNE-P until Qwest's matter with Covad is resolved." *See,* Exhibit 5. Notwithstanding this advisement, Qwest effectively adopted AZDT's suggestion by continuing to provide it with UNE-P services at the rate called for in the ICA for such services. As a result, it allowed the 135/160 day arbitration petition "window" afforded by § 252(b)(1) of the Act to close without initiating an arbitration action.

25. On May 23, 2007, Qwest advised AZDT that, pursuant to the TRRO, "...any new 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." Qwest further advised that "[T]he 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." The correspondence containing these notices also advised AZDT that "...retroactive billing will apply to all Arizona Dial Tone UNE-P lines that were in service after March 11, 2005." In this regard, Qwest indicated that such billing would include the transition rate from March 11, 2005 through March 10, 2006, and the rate differences, beginning March 10,

2006, between UNE-P service and any Qwest alternative service to which AZDT transitions." *See,* Exhibit 16.

26. AZDT's counsel responded on May 24, 2007. He reaffirmed AZDT's request that the *status quo* be maintained pending the outcome of the Covad litigation and indicated that "[I]t would be inappropriate at best for Qwest to now blatantly flaunt its distain for the Arizona Corporation Commission's Decision by now cutting off section 271 mandated unbundled services to Arizona Dialtone." Should that occur, AZDT's counsel stated that his client would "...take all appropriate measures to protect its rights and its business, which would be significantly harmed by any such refusal to act by Qwest." *See,* Exhibit 12.

27. Qwest responded to AZDT counsel's May 24, 2007, correspondence on May 31, 2007. In reaffirming its disagreement with the ruling of the ACC in its Decision No. 98840, Qwest stated that "...the FCC's ban on new UNE-P orders under Rule 51.319(d)(2)(iii) adopted under the TRRO was self-executing as of March 11, 2005." It further stated that "Arizona Dialtone's interconnection agreements also do not require Qwest to provision new orders for Section 271 unbundled switching" and "[T]herefore, Arizona Dialtone does not have any ability to order new Section 251(c)(3) or Section 271 unbundled switching under the parties' interconnection agreements." The Qwest response also reasserted its claim for additional compensation for the transition period and subsequent periods. *See,* Exhibit 13.

28. On July 20, 2007, Qwest provided AZDT with a copy of the July 18, 2007, United States District Court order reversing ACC Decision No. 98840.[11] The correspondence transmitting the order included a *bona fide* request that AZDT resume negotiations concerning

[11] *Qwest v. Arizona Corporation Commission, et al.*, Case No. CV 056-1030 PHX-ROS (USDC- D. Az., July 18, 2007).

the TRRO Amendment. In the absence of successful negotiations, Qwest indicated that it would petition applicable state commissions for arbitration of the TRRO Amendment under § 252 of the Act. *See,* Exhibit 6.

29. The parties' failure to reach agreement in connection with Qwest's proposed TRRO Amendment subsequent to Qwest's July 20, 2007, correspondence led to the filing of the instant Petition on December 19, 2007.

30. The above chronology establishes that there were no active TRRO negotiations between Qwest and AZDT in the 13 months between June 2006 (when AZDT suggested that such negotiations be suspended pending the result of the Covad Litigation) and July 2007 when the Covad decision was issued. From the effective date of the TRRO to the present, Qwest made no effort to terminate the ICA, continued to provide unbundled UNE-P services to AZDT, continued to bill AZDT for such services at the unbundled rate called for by the ICA, and continued to accept AZDT's payments at the UNE-P rate. Also, from the effective date of the TRRO until May 25, 2007, Qwest continued to accept new orders from AZDT for local circuit switching.

31. During the course of their negotiations concerning the TRRO Amendment, Qwest took the position that the transition rate called for by the TRRO during the transition period was non-negotiable and, therefore, it offered AZDT no other rate. Similarly, during the course of these negotiations, the only options Qwest offered AZDT for local circuit switching after expiration of the transition period (post-transition period) were to purchase such services at Qwest's resale rate, or to enter into a new commercial agreement for QPP. At all times AZDT took the position, and advised Qwest, that it was financially unable to pay the transition rate, the resale rate for local switching, or the rate requested by Qwest for QPP.

32. During the course of their negotiations concerning the TRRO amendment, AZDT migrated approximately two-thirds of its customer base to other carriers. It has been unable to migrate the remaining one-third of its customers to other carriers since there is no alternative carrier from whom it can purchase PALs for resale in certain areas it serves.

(3) Qwest's Position.

33. If adopted, the TRRO Amendment language proposed by Qwest would authorize it to back bill AZDT for: (a) the difference between the transition rate and the UNE-P rates paid by AZDT during the transition period, and (b) the difference between the UNE-P rates paid by AZDT during the post-transition period and Qwest's month-to-month local exchange resale service alternatives for UNE-P PAL and UNE-P POTS. *See,* Confidential Exhibit 9.[12]

34. In support of its position, Qwest points out that the TRRO clearly orders the one-year transition period for embedded discontinued UNEs to start on its effective date, March 11, 2005, and absolutely bars new orders for mass market switching UNEs after that date. It contends that the back billing it proposes for the transition period and the post-transition period is not prohibited by the doctrine regarding retroactive ratemaking since the rates in each instance were determined or approved prior to the time they were to apply. In addition, it contends that AZDT had prior notice that Qwest intended to assess these rates. It also contends that AZDT refused to negotiate different rates, thereby precluding any regulatory filing of an agreement for alternative rates. It points out that back billing clauses substantially similar to those it proposes have been a part of TRRO amendments signed by numerous other CLECs and approved by the Commission.

[12] Confidential Exhibit 9 sets forth the amount Qwest contends it is owed by AZDT through December 31, 2007. Confidential Exhibit 10 illustrates the amount Qwest contends AZDT owes it for services during the post-transition period through December 31, 2007, had AZDT elected to accept Qwest's QPP service offering.

35. Qwest states that the FCC determined in the TRRO that the rate for embedded services during the transition period should be the rate at which the requesting carrier obtained that combination of network elements on June 15, 2004 plus one dollar. *See,* TRRO ¶ 228. Regarding the post-transition period, Qwest contends that the TRRO clearly provides that the rates for alternative service arrangements apply with respect to any UNE-P not transitioned by March 10, 2006. It believes that AZDT's failure to meet the requirement imposed by the TRRO to transition its UNE-P customers by March 10, 2006, obligates it to pay the alternative services arrangement rate offered by Qwest after March 11, 2006. *See,* TRRO ¶ 227.

36. Qwest disputes AZDT's contention that its conduct in continuing to charge the UNE-P rate constitutes a waiver of the TRRO's provisions and effectively establishes an "alternative arrangement" as contemplated by paragraph 228 of the TRRO. In this regard, Qwest points out that the TRRO did not specify rates beyond the transition period in light of its requirement that CLECs establish alternative service arrangements by the end of that period. As a result, it contends that specified rates for these alternative service arrangements were to take effect upon the completion of the transition period. It believes that AZDT's unwillingness to comply with the TRRO's requirement to establish new serve arrangements does not entitle it to continue to receive the subject services at pre-TRRO rates.

37. While acknowledging that it notified AZDT that it would continue to process new, conversion, and change service order requests for the impacted UNEs during the transition period, Qwest disagrees with AZDT's contention that it encouraged this practice. Instead, Qwest believed it had an obligation under the ICA to continue to process orders while the parties negotiated an amendment pursuant to the ICA's change of law provisions. As a result, Qwest believed it would not be appropriate to unilaterally stop accepting orders. At the same time,

Qwest contends that it made it clear that any new services would be subject to a rate true-up once the TRRO Amendment was executed.

38. Qwest also believes that the TRRO's failure to address the issue of what happens when parties are unable to negotiate a TRRO amendment within the transition period does not entitle AZDT to continue receiving pre-TRRO rates. It submits that the FCC did not feel the need to address this issue since the TRRO clearly provided that the transition period was ample time for the parties to agree to a TRRO amendment and for CLECs to transition their existing UNE-P volumes to an alternative service. In this regard, Qwest again points out that it has been able to reach agreement concerning TRRO issues with all other CLECs who were purchasing unbundled switching. Qwest contends that it is not logical that the FCC intended to reward a CLEC who refused to comply with the provisions of the TRRO or who delayed entering into a TRRO amendment by allowing it to receive services at the lower pre-TRRO rates.

39. Qwest also disputes AZDT's argument that it is not entitled to a true-up of rates beyond the transition period in light of the TRRO's provision for a true-up of rates only with regard to that period. It believes that the TRRO's failure to address rates for the post-transition period is irrelevant. It submits that the FCC intended, and ordered, that alternative service arrangements be in place at the end of the transition period. As a result, there was no need for the FCC to address the need for a true-up beyond this period since those services would logically be billed at rates governed separately by tariff, catalogue, price list, or other agreement. Qwest contends that AZDT's refusal to comply with the TRRO has created the need for a post-transition period true-up. It believes it is entitled to be compensated by AZDT on the basis of the same rates that all other carriers have been paying Qwest since the end of the transition period.

40. Qwest contends that the parties did not successfully negotiate any alternative service arrangements referred to in paragraph 228 of the TRRO as alleged by AZDT. In this regard, it submits that its QPP offering constituted the "alternative arrangement" contemplated by the TRRO and that AZDT could have chosen (and still could choose) to purchase QPP services retroactive to January 1, 2005, thereby superseding the transition period. Qwest emphasizes that it never negotiated an alternative arrangement with AZDT that would allow it and only it to continue paying UNE-P rates without a true-up. Since Qwest and AZDT were unable to reach agreement on alternative service arrangements, Qwest contends that the "default" transition rate provided for by paragraph 228 of the TRRO must apply to services rendered during the transition period.

41. Also, Qwest submits that the alternative arrangement AZDT contends was put into place would have been a very significant departure from Qwest's position with every other CLEC in all its 14 ILEC states. If such an arrangement had been negotiated, even on an interim basis, Qwest states that it most surely would have documented the terms and conditions of such an agreement and amended the ICA to reflect the same. It would then have filed the amendment with the Commission in compliance with § 252 of the ACT. In this regard, Qwest states that it has a policy against entering into non-written agreements.

42. Qwest also disputes AZDT's argument that it has negotiated TRRO issues in bad faith and is "misusing and abusing the TRRO amendment process to bootstrap a resale rate to which [AZDT] has not agreed." To the contrary, it contends that AZDT could have converted its circuits to alternative service at any time without signing a TRRO Amendment and that its failure to do so was motivated by a desire to continue receiving the benefit of UNE-P at existing unbundled rates. As such, Qwest submits that it is this strategy, not its failure to negotiate in

good faith, that has caused AZDT's back-billing liability to escalate over time. Qwest contends that AZDT's strategy constitutes a misuse of the TRRO amendment process. Qwest states that it was under no obligation to negotiate rates for UNE-P that were different than the transition rate or the rate it seeks to access for the post-transition period and, in addition, to do so would have violated its duty of non-discrimination.

43. In response to AZDT's argument that the rates in Qwest's commercial agreement are higher than those charged by other CLECs that serve it, Qwest points out that AZDT is free to purchase services from other carriers should those other carriers better meet its needs. However, it believes that AZDT is not entitled to continue to purchase Qwest services at pre-TRRO rates.

(4) AZDT's Position.

44. If adopted, the TRRO Amendment language proposed by AZDT would require it to pay Qwest's resale rate for switching services on a prospective basis only (from the date of execution of the TRRO Amendment forward) and would not authorize Qwest to back bill AZDT as described in paragraph 33 above.

45. In support of its position, AZDT points out that at all times during the transition period and thereafter, Qwest billed it for local circuit switching at the then existing unbundled rate, and that it paid Qwest for local circuit switching at that rate. In addition, while the TRRO prohibited the placement of new orders for local circuit switching at the unbundled rate, Qwest encouraged AZDT to continue placing new service orders, knowingly accepted such orders, and billed those new service orders at the unbundled rate.

46. Regarding the transition rate, AZDT points out that paragraph 228 of the TRRO provides that "the transition mechanism adopted here is simply a default process, and pursuant to

section 252(a)(1), carriers remain free to negotiate alternative arrangements superceding this transition period." It is AZDT's position that by continuing to provide it with local circuit switching services at the existing unbundled rate during the transition period and thereafter, contrary to its threats to discontinue doing so and with full knowledge that AZDT objected to the transition rate, and by accepting AZDT's payment for switching services at the unbundled rate, Qwest effectively entered into "alternative arrangements superceding [the] transition period" within the meaning of this provision of the TRRO.

47. In this regard, AZDT refers to the May 23, 2007, notice provided by Qwest that, as of May 25, 2007, the only orders for switching services it would accept would be for disconnection or conversion to alternative services, with all other orders treated as orders for resale or QPP. AZDT states that at the time Qwest made this change in its billing for switching services, the parties had not agreed on the rate AZDT would pay for such services, and AZDT had not signed a TRRO amendment. According to AZDT, this constitutes a unilateral change by Qwest in the way it billed AZDT for switching services despite the fact that Qwest lacked the same contractual authority it now claims was necessary to bill at the higher resale rate. AZDT submits that this fatally undercuts Qwest's argument that it had no choice but to bill at the unbundled rate pursuant to the ICA.

48. AZDT contends that Qwest's failure to convert its billing practices during the transition period, despite being on notice that AZDT disputed the transition rate, and instead, continued to bill AZDT at the unbundled rate and accept AZDT's payments at that rate, further reinforces that the parties agreed to an alternative rate for the transition period as the TRRO expressly authorized them to do. According to AZDT, this constitutes either a waiver by Qwest of its right to charge AZDT the transition rate or estopps Qwest from collecting that rate.

49. Separate and apart from whether the TRRO authorizes Qwest to collect the transition rate, AZDT questions Qwest's ability to legally do so in the absence of making a compliance filing with the Commission implementing that rate. AZDT submits that the filed rate doctrine, which forbids a regulated entity from charging rates for its services other than those properly filed with the appropriate regulatory authority, should preclude Qwest from collecting the transition rate.

50. With respect to the post-transition period, AZDT points out that the TRRO does not mandate any specific rate that an ILEC must (or may) charge a CLEC after the transition period ends, thus leaving that issue completely open for negotiation. In addition, AZDT points out that the TRRO does not deal with the issue of what happens when the ILEC and the CLEC are not able to negotiate a TRRO amendment within the one-year transition period, as was the case here. Therefore, AZDT submits that the TRRO does not answer the question of what rate a CLEC must pay for switching services after the transition period ends; *i.e.,* from March 11, 2006 forward.

51. AZDT submits that Qwest's assertion that the true-up process contemplated by the TRRO also applies to the post-transition period and requires AZDT to pay either Qwest's resale rate or its QPP rate, is directly contradicted by the language in footnote 630 of paragraph 228 of the TRRO. This portion of the TRRO states that "UNE-P arrangements no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements ...." Thus, in AZDT's opinion, the TRRO specifically ties the true-up process to the transition rate applicable during the transition period, and does not provide any authority for a true-up process for the post-transition period.

52. It is AZDT's position that by insisting that the TRRO Amendment include language requiring a true-up to Qwest's resale rate for the post-transition period, despite the fact that the TRRO does not suggest, let alone require, the true-up process for any period of time other than the transition period, Qwest is essentially misusing and abusing the TRRO amendment process to bootstrap a resale rate to which AZDT has not agreed. Consistent with its position regarding the transition period, AZDT contends that Qwest's conduct during the post-transition period bars it from back billing it for the rate it now seeks to assess for that period. In this regard, it is again AZDT's position that by continuing to provide it with local circuit switching services at the existing unbundled rate during the post-transition period with full knowledge that AZDT objected to the post-transition rate Qwest proposed, and by accepting AZDT's payment for switching services at the unbundled rate, Qwest either waived its right to back bill at the rate it now seeks for that period or should be estopped from collecting that rate.

53. AZDT contends that Qwest refused to negotiate the rates AZDT would have to pay for switching services subsequent to the effective date of the TRRO in good faith and, instead took an inflexible negotiating posture that left AZDT with only two unacceptable choices; namely, either accept Qwest's rates and sign the TRRO Amendment mandating a true-up to those rates (which AZDT contends would have put it out of business), or refuse to sign the TRRO Amendment. In noting that Qwest and AZDT are direct competitors in the PAL market, AZDT contends that this type of negotiating tactic constitutes a misuse of the TRRO process in that it effectively seeks to drive a competitor out of business.

54. AZDT also contends that the commercial rate that Qwest proposes as a replacement for the unbundled rate, and which Qwest insists be written into the TRRO Amendment for retrospective application back to March 11, 2006, is an above market rate

since it is higher than the rate AZDT is currently paying for identical switching services for its customers serviced by other CLECs. Thus, it appears to AZDT that Qwest is manipulating the TRRO Amendment process in an attempt to obtain from AZDT through a TRRO amendment a rate it cannot obtain from AZDT in the open market.

(5) Commission Resolution of Issue 4.

55. We order the parties to adopt Qwest's proposed language for §§ 2.3, 5.1.1.4, and 5.1.1.5 of the proposed ICA amendement, in part. We find that neither Qwest nor AZDT followed the directives of the TRRO and neither party negotiated in good faith as required by § 251(c)(1) of the Act. From the effective date of the TRRO to the present, Qwest made no effort to terminate the ICA, continued to provide unbundled UNE-P services to AZDT, continued to bill AZDT for such services at the unbundled rate called for by the ICA, and continued to accept AZDT's payments at the UNE-P rate. Also, from the effective date of the TRRO until May 25, 2007, Qwest continued to accept new orders from AZDT for local circuit switching.

56. Further, during the course of their negotiations concerning the TRRO Amendment, Qwest took the position that the transition rate called for by the TRRO during the transition period was non-negotiable and, therefore, it offered AZDT no other rate. Similarly, during the course of these negotiations, the only options Qwest offered AZDT for local circuit switching after expiration of the transition period (post-transition period) were to purchase such services at Qwest's resale rate, or to enter into a new commercial agreement for QPP.

57. AZDT, on the other hand, took the position, and advised Qwest, that it was financially unable to pay the transition rate, the resale rate for local switching, or the rate requested by Qwest for QPP. In direct conflict with the TRRO, AZDT continued to submit

orders for UNE-P products during the transition and post-transition period and converted none of its affected local circuit switching UNEs to alternative facilities or arrangements.

58. The TRRO is clear that upon its effective date carriers had 12 months to modify their ICAs in order to transition any affected mass market local circuit switching UNEs to alternative facilities or arrangements. *See* TRRO ¶ 227. Further, the default rate during this 12-month transition was prescribed to be the UNE-P rate plus one dollar. However, the TRRO does not contemplate what should happen if carriers fail to reach agreement after the transition period is over. It is Qwest's position that it should be allowed to back bill for the post-transition period since AZDT refused to enter into an alternative arrangement and since it notified AZDT throughout the negotiation process that it intended to back bill.

59. As indicate above, Qwest clearly contributed to the failure to reach an agreement to modify the ICA. At any time during the transition period or after, when it was clear that the carriers were at loggerheads, Qwest could have chosen to: 1) terminate the ICA; 2) follow through with dispute resolution; or 3) pursue arbitration. Qwest took none of these actions, but instead continued to process new UNE-P orders, bill at UNE-P rates, and suspended negotiations for a 15-month period.

60. AZDT and Qwest effectively suspended negotiations on the TRRO amendment from June 2006 through July 2007 pending the outcome of the Covad litigation. This suspension caused further delay in the conversion of circuits and certainty of rates.

61. As such, we find it appropriate to approve language for the back billing of the plus one dollar rate during the transition period of March 11, 2005 through March 10, 2006. Further, we find it illogical to revert back to the ICA UNE-P rate for the post-transition period, and therefore, approve language that allows for back billing of the plus one dollar rate for

March 10, 2006 through July 19, 2007. As for the remaining time period, July 20, 2007 through the present, we find that AZDT should have realized the legal ramifications of the District Court order reversing ACC Decision No. 98840 and at that time entered into a negotiated ICA amendment rather than forcing this matter to proceed to arbitration. Therefore, we approve language that allows Qwest to back bill for the difference between the UNE rate and the month-to-month resale service rate from the date of the District Court decision to the present.

62. We approve the following language to be part of the parties' ICA amendment:

> Section 2.3 After execution of this Amendment, Qwest shall back bill the FCC ordered rate increases to March 11, 2005 for existing Mass Market Switching Service pursuant to Transition rate increases identified in Section 5.1. Such back billing shall not be subject to billing measurements and penalties.
>
> Section 5.1.1.4 Use between March 11, 2005 and July 19, 2007 – The price for the unbundled local circuit switching in combination with unbundled DS0 capacity loops and shared transport obtained under this Agreement, effective March 11, 2005 and July 19, 2007 shall be the rate at which the requesting carrier obtained that combination of network elements on July 15, 2004 plus one dollar. Effective upon execution of this Amendment, CLEC will be billed the one dollar increase for all lines that were in service during this period.
>
> Section 5.1.1.5 Use after July 20, 2007 – For any and all UNE-P services leased by CLEC from Qwest after July 20, 2007, effective upon execution of this Amendment, CLEC is subject to back billing to July 20, 2007 for the difference between the rate for the UNE and a rate equal to the Qwest month-to-month local exchange resale service alternatives identified in Section 5.1.1.6.1.

63. We expect the actual dollar amounts owed to Qwest to comply with this TRRO Amendment language to be decided in Docket No. 07F-520T.

III. ORDER

A. The Commission Orders That:

1. The issues presented in the Petition for Arbitration filed by Qwest Corporation on December 19, 2007, are resolved as set forth in the above discussion.

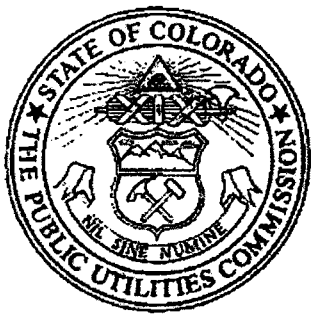
2. Within 30 days of the final Commission decision in this docket, Qwest Corporation and Arizona Dialtone, Inc. shall submit a complete amendment to their interconnection agreement for approval or rejection by the Commission, pursuant to the provisions of 47 U.S.C. § 252(e) of the Telecommunications Act of 1996.

3. The 20-day period provided for in § 40-6-114(1), C.R.S., within which to file applications for rehearing, reargument, or reconsideration, begins on the first day following the Mailed Date of this Decision.

4. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING April 16, 2008.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RON BINZ

JAMES K. TARPEY

MATT BAKER

Commissioners

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