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BEFORE THE ARIZONA CORPORATION COMMISSION

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**

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Arizona Corporation Commission
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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-01051B-07-0693
DOCKET NO. T-03608A-07-0693

**ARIZONA DIALTONE, INC.'S POST-
HEARING BRIEF**

23 Pursuant to the order of Administrative Law Judge Sarah Harpring, Respondent, Arizona
24 Dialtone, Inc. ("AZDT"), hereby files its Post-Hearing Brief in lieu of closing argument. AZDT
25 shall rely on the Transcript of the Arbitration Hearing,¹ the exhibits introduced at the Hearing by
26 AZDT and Petitioner, Qwest Corporation ("Qwest"), and the entire file in this matter.

I. PRELIMINARY STATEMENT

27 This Arbitration presents the question of whether Qwest may use the TRRO amendment
28 process to recover from AZDT by way of backbilling rates to which AZDT never agreed and, in
29 fact, unequivocally stated would drive it out of business. As the evidence starkly demonstrates,
30 Qwest is attempting to recover by way of backbilling: (1) the "plus \$1" default rate prescribed by
31 the TRRO for the transition year from March 11, 2005 to March 10, 2006, even though AZDT

¹ Citations to the Transcript of the Arbitration Hearing shall use the abbreviation "Tr."

1 never agreed to that rate and Qwest never filed that rate with this Commission for approval; and
2 (2) Qwest's resale rate from March 11, 2006 to the present, even though AZDT never agreed to
3 that rate either and the TRRO provides no authority whatsoever for any backbilling beyond the
4 transition year. Worse yet, Qwest flatly refused to negotiate the rates AZDT would be required to
5 pay for switching services, and instead, took inflexible negotiating positions that ultimately left
6 AZDT with two choices: (1) accept Qwest's rates and sign Qwest's form of TRRO amendment
7 mandating a true-up to those rates, which would drive AZDT out of business, or (2) refuse to sign
8 Qwest's form of TRRO amendment. Thus, Qwest's conduct also bars its backbilling claims.

9 In addition, it is beyond dispute that Qwest has at all relevant times, both during and well
10 after the transition year, continued to provide mass market local circuit switching services to
11 AZDT on an unbundled basis, including new UNE-P orders barred by the TRRO; continued to
12 bill AZDT for those switching services at the unbundled rate called for by the parties' existing
13 Interconnection Agreement ("ICA"); and continued to accept AZDT's payments at the UNE-P
14 rate, despite knowing from the very outset of the TRRO negotiations that AZDT could not and
15 therefore would not pay the higher rates Qwest is now seeking to collect. Moreover, despite the
16 parties' fundamental ongoing dispute over the rate to be charged for switching services, Qwest
17 chose to forego numerous available options for bringing this impasse to resolution, including: (1)
18 notifying AZDT that it no longer would provide switching services on an unbundled basis, as the
19 TRRO allowed Qwest to do; (2) providing notice of termination of the parties' ICA, which would
20 have led to accelerated arbitration proceedings; and (3) following through with a dispute
21 resolution procedure that Qwest itself initiated in March 2006, which again, would have resulted
22 in this arbitration occurring much sooner in time, thereby greatly reducing the alleged backbilling
23 liability at issue. Rather than availing itself of any of these options, however, Qwest instead chose
24 to continue providing switching services on an unbundled basis at the UNE-P rate month after
25 month, year after year, as the stakes of the dispute continued to grow. Now, in total disregard for
26 the choices it made, Qwest asks this Commission to order AZDT to execute a form of TRRO

1 amendment requiring AZDT to pay the “plus \$1” rate for the transition year and Qwest’s resale
2 rate thereafter, which would put AZDT out of business in short order. AZDT respectfully
3 submits that would be both an inequitable result and an abuse of the TRRO amendment process.

4 For all these reasons, AZDT requests that this Commission order the parties to execute a
5 TRRO amendment that is prospective only, i.e., that requires AZDT to pay Qwest’s resale rate
6 for switching services only from the date of execution of the TRRO amendment forward. AZDT
7 also requests that the TRRO amendment require Qwest to provide AZDT with notice of copper
8 loop replacements by certified mail rather than by email alone.

9 II. FACTUAL BACKGROUND

10 A. Introduction

11 AZDT is a telecommunications company whose primary line of business is the resale of
12 Public Access Lines (“PALs”) to independent payphone services providers.² (Tr., p.295, lns.5-
13 9). At all relevant times, AZDT has purchased PALs from Qwest for resale. (Tr., p.34, lns.4-8).
14 AZDT purchased PALs from Qwest as an unbundled network element or “UNE,” which
15 combines switching functionality with an unbundled loop. (Tr., p.34, lns.12-18). In addition to
16 being a wholesaler of PALs, Qwest also sells PALs at retail directly to payphone service
17 providers, and as such, is a competitor of AZDT in the PAL market in Arizona. (Tr., p.295,
18 ln.19 – p.296, ln.9).

19 Qwest has separate ICAs with AZDT in the states of Arizona, Colorado and Minnesota.³
20 (Tr., p.416, lns.3-13). Qwest has initiated arbitration proceedings not just in Arizona, but in
21 Colorado and Minnesota as well. (Tr., p.355, lns.12-15). However, the largest amount of the
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23 ² AZDT also resells lines to residential and commercial users, but that is a very small portion of AZDT’s
24 business, i.e., less than 10%. (Tr., p.295, lns.10-14; p.413, ln.25 – p.414, ln.5).

25 ³ The fact that Qwest and AZDT have a separate ICA for each state is relevant because it means that the
26 decision of the Colorado Public Utilities Commission, which AZDT filed as an exhibit in this proceeding at the
ALJ’s request, does not control the outcome of the TRRO/backbilling issues in Arizona. (Tr., p.416, lns.14-22).

1 backbillings, as much as 70%, is at stake here in Arizona.⁴ (Tr., p.355, lns.16-19). In addition,
2 as between the transition year (which ran from March 11, 2005 to March 10, 2006) and the post-
3 transition year period, the vast majority of the backbillings relate to the post-transition year
4 period. (Tr., p.420, ln.23 - p.421, ln.5).

5 **B. The Triennial Review Remand Order**

6 On February 4, 2005, the Federal Communications Commission ("FCC") issued what has
7 come to be known in the telecommunications industry as the Triennial Review Remand Order
8 ("TRRO"). (TRRO, Ex. Q-1). In general terms, the TRRO eliminated the prior requirement that
9 an incumbent local exchange carrier ("ILEC") such as Qwest provide mass market local circuit
10 switching services to competitive local exchange carriers ("CLECs") such as AZDT on an
11 unbundled basis. (Tr., p.34, ln.24 - p.35, ln.3). The TRRO provides for a one-year transition
12 period between March 11, 2005 and March 10, 2006 (the "transition year") for ILECs and
13 CLECs "to migrate the embedded base of unbundled local circuit switching used to serve mass
14 market customers to an alternative service arrangement." (TRRO, Ex., Q-1, at ¶226; Tr., p.35,
15 lns.4-10). However, the transition period applies only to the CLEC's embedded customer base,
16 and the TRRO expressly states that is "does not permit [CLECs] to add new UNE-P arrangements
17 using unbundled access to local circuit switching pursuant to section 252(c)(3)" of the
18 Telecommunications Act of 1996. (TRRO, Ex., Q-1, at ¶227) (emphasis added).

19 The TRRO establishes a presumptive rate for local circuit switching during the transition
20 year of the higher of: (1) the existing UNE-P rate as of June 15, 2004, plus one dollar (the "plus
21 \$1 rate"); or (2) the rate established by a state public utility commission between June 16, 2004
22 and the effective date of the TRRO, plus one dollar. (TRRO, Ex., Q-1, at ¶228; Tr., p.36,
23 lns.11-21). The parties agree that of these two alternative transition rates, the plus \$1 rate applies
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26 ⁴ The actual amounts sought have been filed under seal and are covered by a protective order, so AZDT
will not discuss them herein.

1 in this case.⁵ However, the TRRO also states that the transition mechanism is a “default process”
2 and that “carriers remain free to negotiate alternative arrangements superceding this transition
3 period.” (TRRO, Ex., Q-1, at ¶228; Tr., pp.297, ln.16 – 298, ln.1). Thus, the plus \$1 rate
4 applies only if the ILEC and CLEC do not agree on an “alternative arrangement.” (Id.). Finally,
5 the TRRO provides that “UNE-P arrangements no longer subject to unbundling shall be subject to
6 a true-up to the applicable transition rate upon the amendment of the relevant interconnection
7 agreements” (TRRO, Ex., Q-1, at ¶228, n.630; Tr., p.37, lns.5-12) (emphasis added). The
8 reference in footnote 630 to “the applicable transition rate” is a reference to whichever of the two
9 alternative rates prescribed in paragraph 228 is applicable (in this case, the plus \$1 rate). Thus,
10 the TRRO expressly ties the true-up, or what the parties in this case have referred to as
11 “backbilling,” to the one-year transition period. (Tr., p.298, lns.5-9). The TRRO is entirely
12 silent about what is to happen if the ILEC and CLEC do not enter into a TRRO amendment by the
13 end of the transition year. (Tr., p.298, ln.23 – p.299, ln.4).

14 **C. Qwest Billed AZDT for Switching Services at the UNE-P Rate and Accepted AZDT’s**
15 **Payments at the UNE-P Rate Both During and After the Transition Year**

16 There is no dispute regarding the parties’ billing history. For the transition year, Qwest
17 always provided switching services on an unbundled basis, always billed AZDT at the UNE-P
18 rate, and always accepted AZDT’s payments at the UNE-P rate. (Tr., p.342, lns.5-20). At no
19 point did Qwest bill AZDT at the plus \$1 rate it now seeks to collect.⁶ (Tr., p.330, lns.1-4;
20 p.342, lns.21-23). Similarly, for the post-transition year period, with respect to existing accounts,
21 Qwest always provided switching services on an unbundled basis, always billed AZDT at the
22 UNE-P rate, and always accepted AZDT’s payments at the UNE-P rate. (Tr., p.344, lns.5-23).

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24 ⁵ The plus \$1 rate is charged on a per line basis. (Tr., p.406, ln.24 – p.407, ln.11).

25 ⁶ While Qwest asserts that it could not bill the plus \$1 rate under the parties’ ICA, it is AZDT’s position
26 that Qwest could have billed that rate if it had made a compliance filing with this Commission. (Tr., p.342,
ln.21 – p.343, ln.3).

1 At no point did Qwest bill AZDT at Qwest' resale rate it now seeks to collect. (Tr., p.330, ln.17
2 - p.331, ln.3; p.344, lns.16-20).

3 **D. Qwest Encouraged AZDT to Place New UNE-P Orders After the TRRO Effective Date**

4 As noted above, the TRRO clearly states that it "does not permit [CLECs] to add new
5 UNE-P arrangements using unbundled access to local circuit switching" (TRRO, Ex., Q-1, at
6 ¶227) (emphasis added)). Qwest concedes that this language expressly prohibited new UNE-P
7 orders after March 11, 2005. (Tr., p.74, ln.17-21). AZDT also understood that this
8 unambiguous language meant the TRRO prohibited new UNE-P orders after the March 11, 2005
9 effective date of the TRRO, and on that basis, AZDT stopped submitting new UNE-P orders to
10 Qwest once the TRRO became effective. (Tr., p.221, lns.15-18; p.345, lns.8-15; Ex. A-1, p.2).
11 Qwest, however, encouraged AZDT to resume placing new UNE-P orders despite the clear
12 prohibition of the TRRO. (Tr., p.408, lns.7-10). In an email dated March 17, 2005, Larry
13 Christensen told Tom Bade, "we continue to accept UNE-P orders," to which Mr. Bade
14 responded, "It is good to know that Qwest is still accepting une-p orders. ... I took the Qwest
15 letter at face value and stopped une-p orders, but will resume until you tell me otherwise." (Ex.
16 A-1, pp.2-3; Tr., p.345, ln.21 - p.346, ln.14).

17 In Mr. Christensen's March 18, 2005 responsive email to Mr. Bade, he stated, "We
18 thought ... the March 4 letter was clear that Qwest would continue to accept new [UNE-P] orders.
19 ... Qwest will certainly provide advanced notice if our position changes." (Ex. A-1, p.2). In
20 May 2007, Qwest's position on accepting new UNE-P orders did, in fact, change, but Qwest did
21 not provide AZDT the "advanced notice" it promised. In a letter to Mr. Bade dated May 23,
22 2007, Mr. Christensen announced the following positions: (1) Qwest would no longer accept new
23 UNE-P orders; (2) the only UNE-P orders Qwest would accept from AZDT would be for
24 disconnection or conversion to alternative services; and (3) AZDT's only options for new service
25 orders would be resale services or a QPP agreement. (Ex. Q-12; Tr., p.246, ln.24 - p.247,
26 ln.22; p.347, ln.11 - p.348, ln.8). The May 23, 2007 letter stated that these significant changes

1 would be effective on May 25, 2007, just two days from the date of the letter. (Ex. Q-12).
2 However, the notice was even less effective than that because Qwest not only stopped accepting
3 new UNE-P orders, it also rejected previously placed UNE-P orders that were in process. (Tr.,
4 p.347, lns.19-24).

5 **E. Qwest's QPP Product**

6 Both during and after the transition year, Qwest offered AZDT a product known as "Qwest
7 Platform Plus" or "QPP" for short. The QPP product came about as the result of the FCC's
8 urging that RBOCs such as Qwest develop a product that would allow CLECs to continue to
9 provide local exchange services during a period of "great turmoil in the industry" due to evolving
10 legal issues. (Tr., p.266, ln.6 - p.267, ln.22). The QPP product was "a mediated agreement
11 between Qwest and MCI" which was "developed through a series of industry meetings, and
12 ultimately was negotiated ... over five weeks of mediated sessions between Qwest and MCI."
13 (Tr., p.41, lns.10-21; p.42, ln.18 - p.43, ln.3). However, MCI's primary business is the sale of
14 residential and commercial lines, not PALs, and Qwest concedes that the QPP product was not
15 designed with PAL resellers like AZDT in mind. (Tr., p.68, lns.8-13; p.68, ln.25 - p.69, ln.5;
16 p.303, ln.24 - p.304, ln.14). Qwest concedes that the QPP rate is significantly higher than the
17 UNE-P rate. (Tr., p.49, lns.20-22).

18 AZDT president Tom Bade participated in at least two meetings and a number of
19 conference calls regarding the negotiation of a commercial agreement between Qwest and the
20 CLEC community with the hope of reaching a commercial agreement with Qwest that would be
21 economically sound for AZDT's PAL business. (Tr., p.302, ln.17 - p.303, ln.17). Eventually,
22 Qwest negotiated directly with MCI and those negotiations yielded the QPP product. (Tr., p.302,
23 ln.17 - p.303, ln.5). However, QPP was not viable for AZDT because it was priced much higher
24 than the retail rate Qwest was charging payphone service providers, even though the equipment
25 and services AZDT was reselling were identical to what Qwest was selling at retail to payphone
26 providers. (Tr., p.304, lns.15-17; p.306, ln.6 - p.307, ln.25). Mr. Bade repeatedly told

1 Qwest's representatives, both before the TRRO effective date and in the course of the TRRO
2 negotiations, that QPP was not viable for AZDT because the QPP rate was substantially above
3 Qwest's retail rate. (Tr., p.91, lns.13-23; p.308, lns.1-18; p.381, lns.1-7).

4 Qwest aggressively pushed its QPP product on the CLEC community. For example, in a
5 letter dated January 4, 2005 addressed to AZDT (but which was sent to the CLEC community at
6 large), Qwest: (1) announced QPP as "the first commercially negotiated, market-based rate
7 agreement between a Bell Operating Company and a major CLEC [i.e., MCI];" (2) pointed out
8 that the FCC recently had signaled "the eventual elimination of the requirement for Qwest to
9 make available Mass-Market Local Circuit Switching, including UNE-P services to CLECs;" (3)
10 "in the spirit of continued cooperation with our CLEC partners," offered CLECs the opportunity
11 to sign master services agreements for QPP until January 31, 2005; and (4) stated that after
12 January 31, 2005, it might withdraw or modify QPP, "so any CLEC wishing to take advantage of
13 QPP as it is presently offered should act immediately." (Ex. A-6; Tr., p.326, ln.21 - p.327,
14 ln.20). In a follow up letter dated February 11, 2005, Qwest again offered QPP, this time "until
15 March 11, 2005 only," and stated, "Qwest will move forward under the assumption that any
16 CLEC with existing UNE-P circuits that has not signed a QPP MSA by March 11, 2005 has
17 chosen to follow the transition plan ordered in the TRO Remand [i.e., the TRRO]." (Ex. A-7;
18 Tr., p.327, ln.21 - p.329, ln.25). In fact, despite these artificial deadlines, Qwest continued to
19 make the QPP product available to CLECs after the March 11, 2005 effective date of the TRRO,
20 and QPP is still available today. (Tr., p.371, ln.13 - p.372, ln.1). In addition, despite Qwest's
21 statement that it would follow the TRRO transition plan in the absence of a signed QPP
22 agreement, and even though AZDT never signed a QPP agreement, Qwest did not bill AZDT at
23 the plus \$1 rate set forth in the TRRO. (Tr., p.329, ln.20 - p.330, ln.4).

24 Beginning in 2004 well before the TRRO was even issued and continuing into 2007, Tom
25 Bade repeatedly made efforts to convince Qwest to tailor QPP to PAL resellers like AZDT so that
26 he had a viable option for switching services. For example:

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- On May 13, 2004, well before the TRRO was even issued and in the course of negotiations between Qwest and the CLEC community regarding development of a commercial product to replace UNE-P, Mr. Bade sent an email to various Qwest and CLEC representatives stating, "I would like to raise the issue of Public Access Lines as a Data Request. These are very low usage POTS lines that don't fit the Business model. How is Qwest going to handle them business or residential? **The retail rate is often times less than residential. I know this is not an important issue to most, if not all of you, but it is our very survival.**" (Ex. A-3, p.1; Tr., p.321, ln.18 - p.322, ln.24) (emphasis added).
 - On May 18, 2004, in response to Qwest taking the position that "PAL lines in QPP are considered as business lines," Mr. Bade stated, "I was VERY disappointed to see Public Access Lines being handled as business. I would hope that Qwest will reconsider their position. PALs are the least expensive class of lines at Qwest and they are very light usage. Using Business usage would be another increase on PALs in addition to the adders. In AZ they cost less than residential lines but on average have much less usage than business or residential. **Wendy, is there any chance that Qwest would figure PALs as a third type of service?**" (Ex. A-4, p.1; Tr., 323, ln.1 - 324, ln.20) (emphasis added).
 - In an email to Qwest representative Michael Whitt dated June 2, 2004, Mr. Bade stated, "I would also like to know if you would entertain the same deal with AZ Dialtone as MCI with one change that won't, to my knowledge, affect the MCI deal. **We need PAL lines to have a res[idential] adder because the retail price is less than residential and the margins are not the same as business.** Any chance?" (Ex. A-5, p.2). In response, Mr. Whitt stated, "Regarding PAL, because of PAL application and product definition, it will likely always fall to the business categorization," thus flatly rejecting Mr. Bade's request that PALs be treated for purposes of QPP as residential rather than business lines.⁷ (Ex. A-5, p.1; Tr., p.324, ln.21 - p.326, ln.20) (emphasis added).
 - In an email to Qwest representative Cliff Dinwiddie dated February 22, 2005, Mr. Bade again requested that PALs be treated like residential lines for purposes of QPP, stating, "**We again would like to sign the commercial agreements but need to either have you classify PAL as residential for adders or allow us to move only residential bans to QPP.**"⁸ (Ex. A-8, p.1). Mr. Dinwiddie responded

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⁷ The switching component of QPP is priced at the same rate as when switching was provided on a UNE-P basis, with the higher overall QPP rate resulting from the fact that Qwest includes in that rate a business "adder." (Tr., p.308, lns. 7-11; p.310, ln.21 - p.311, p.2). Mr. Bade testified that an "adder" is a component of the QPP rate which escalates over time. (Tr., p.395, lns.7-14; p.415, lns.3-12). Mr. Bade also testified, and Qwest did not dispute, that the business adder is approximately \$8.00, which results in the QPP rate being far above what Qwest charges when it sells PALs at retail directly to payphone providers. (Tr., p.396, lns.1-3).

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⁸ Mr. Bade testified that the reference to "mov[ing] only residential bans to QPP" was a request that AZDT be allowed to sign a QPP agreement only for the small amount of residential lines AZDT serviced, but that Qwest took the position that QPP was "an all or nothing deal" such that AZDT needed to sign a QPP agreement covering the entirety of its business with Qwest, including both its residential lines and PALs. (Tr., p.331, ln.15 - p.332, ln.5; p.372, lns.2-13; p.372, ln.19 - p.373, ln.4).

1 on March 3, 2005 simply by stating, "As part of QPP, PAL receives business
2 adders." (Ex. A-8, p.1; Tr., p.331, ln.4 - p.332, ln.9) (emphasis added).

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- 4 • On March 3, 2005, Mr. Bade sent a letter to Qwest sales representative Julie
5 Archuleta stating, "Arizona Dialtone has participated in several meetings and
6 conference calls on the MCI QPP product. We have also voiced our concerns
7 verbally and in several emails. **Our position is very simple. With current
8 technology and our imbedded [sic] customer base at a CO to CO basis,⁹ we will
9 be upside down with your proposed commercial agreement.** We feel that the
10 only viable alternative is to ask the state regulatory authorities to mediate and or
11 arbitrate our interconnection agreement." (Ex. A-9; Tr., p.332, ln.16 - p.333,
12 ln.8) emphasis added).
 - 13 • Just one week after the effective date of the TRRO, in a March 17, 2005 email to
14 Larry Christensen of Qwest, AZDT's Tom Bade stated that he "would like to
15 negotiate a commercial agreement to replace UNE-P public access lines," pointed
16 out that "[a]ccording to Qwest, PAL lines are the least expensive lines to
17 provision," and asked whether "**we can negotiate a commercial agreement that
18 more accurately reflects Qwest's cost and avoided cost for this product instead
19 of lumping PAL with business, which must have a much higher cost to Qwest.**"
20 (Ex. A-1, p.3; Tr., p.315, lns.5-15) (emphasis added).
 - 21 • On September 8, 2005, approximately six months into the transition year, Mr. Bade
22 sent an email to Qwest representative Larry Christensen stating, "When we last
23 spoke some months ago, I was assured that Qwest Wholesale would be back with
24 me in a week or two on the PAL une issue. I haven't heard a word. Is anyone
25 going to follow up with me. Thanks!" (Ex. A-11, p.1; Tr., p.333, ln.15 - p.334,
26 ln.17).

15 Notwithstanding Mr. Bade's repeated requests, Qwest concedes that it made no effort at all to
16 develop a product or rate which took into account the needs of a company like AZDT whose
17 business was the resale of PALs, although Qwest admits it could have done so. (Tr., p.81, ln.1 -
18 p.82, ln.1; p.84, lns.6-14).

19 **F. The TRRO Amendment Negotiations**

20 It is undisputed that the parties agreed to negotiate an amendment to their existing ICA,
21 rather than negotiate an entirely new ICA, in order to comply with the requirements of the TRRO.
22 (Tr., p.153, lns.13-21). The parties' TRRO amendment negotiations varied somewhat different
23 between the transition year and the post-transition year period, respectively, so for discussion
24 purposes, AZDT breaks these time periods out separately.

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26 ⁹ "CO" is an abbreviation for "Central Office."
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1 **1. Negotiations During the Transition Year**

2 With respect to the transition year, Qwest took the position that AZDT would have to
3 either: (1) sign a commercial agreement for its QPP product, or (2) pay the plus \$1 rate for
4 switching services, and never offered any other rate. (Tr., p.300, ln.7 – p.301, ln.3). Qwest
5 concedes that the only alternative arrangement it offered AZDT during the transition year was
6 QPP, and that the QPP rate was higher than the UNE-P rate. (Tr., p.39, lns.12-25; p.79, ln.23 –
7 p.80, ln.1; p.244, ln.24 – p.245, ln.3). Qwest also concedes that it offered only QPP despite
8 knowing prior to the TRRO effective date that QPP was not a viable option for AZDT. (Tr.,
9 p.80, lns.2-7; p.195, lns.4-11). Qwest also admits that while AZDT repeatedly asked for a
10 solution tailored to AZDT's status as a PAL reseller, Qwest never provided any such solution.
11 (Tr., p.245, lns.8-15). Finally, Qwest took the position in the TRRO amendment negotiations
12 that the plus \$1 rate was non-negotiable. (Tr., p.80, lns.2-11; p.244, lns.4-12). Consistent with
13 that position, Qwest incorporated into its form of TRRO amendment non-negotiable language
14 obligating AZDT to pay the plus \$1 rate for the transition year, even though AZDT had not agree
15 to pay that rate.¹⁰ (Tr., p.85, lns.14-17; p.301, lns.7-10).

16 **2. Negotiations After the Transition Year**

17 For the period after the end of the transition year,¹¹ Qwest took the position that AZDT
18 would have to pay either the QPP rate or Qwest's resale rate for switching services. (Tr., p.77,
19 lns.6-15; p.302, lns.4-16). Both the QPP rate and the resale rate were substantially higher than
20 the UNE-P rate. (Tr., p.101, lns.20 – p.102, ln.5). Again, Qwest never offered any rate other
21 than QPP or resale. (Tr., p.313, lns.6-8). And once again, Qwest's form of TRRO amendment
22 included non-negotiable language requiring a backbilling for the difference between the UNE-P
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24 ¹⁰ As Qwest witness Larry Christensen put it, "the amendment that Qwest offered right off the bat
25 included the ... plus one dollar rate increase for mass market switching, as well as including a true-up back to the
26 March 11, 2005 date." (Tr., p.154, lns.8-11).

¹¹ The parties agree that the post-transition year period is defined as anytime after March 10, 2006.
(Tr., p.113, lns.16-18).

1 rate Qwest billed and AZDT paid and Qwest's resale rate, even though AZDT never agreed to
2 pay the resale rate. (Tr., p.85, lns.22-25; p.155, lns.16-22; p.313, lns.11-15; p.314, lns.6-11).
3 In fact, Qwest never proposed a form of TRRO amendment that did not require backbilling for the
4 post-transition year period. (Tr., p.314, lns.12-15). Qwest also never proposed a form of TRRO
5 amendment that was prospective only with respect to the rates AZDT would pay for switching
6 services. (Tr., p.314, ln.23 – p.315, ln.4). Qwest acknowledged at the arbitration hearing that
7 the parties' inability to agree on a form of TRRO amendment was largely a function of the fact
8 that Qwest built non-negotiable backbilling language into its form TRRO amendment with which
9 AZDT did not agree. (Tr., 92, ln.2 – p.93, ln.7).

10 Qwest's resale rate was not economically viable for AZDT because there was not enough
11 margin between the resale rate and the rate at which AZDT could sell PALs to payphone
12 providers to allow AZDT to cover its additional costs. (Tr., p.311, ln.7 – p.313, ln.1). The
13 problem was that: (1) the resale rate Qwest wanted to charge AZDT was the retail rate Qwest
14 charged payphone providers when it sold PALs directly, less a discount for avoided costs (which
15 in Arizona is 18% and amounts to a dollar or two), and (2) AZDT could not cover its additional
16 costs with that thin margin. (Tr., p.311, ln.13 – p.312, ln.17). Although AZDT repeatedly told
17 Qwest, in the words of Mr. Bade, that "the rates were upside down," Qwest's negotiating position
18 was "take it or leave it." (Tr., p.312, ln.18 – p.313, ln.5). In fact, even though Mr. Bade
19 repeatedly told Qwest's representatives in the course of the TRRO negotiations that the backbilling
20 Qwest was mandating would put AZDT out of business, in the words of Mr. Bade, "Qwest's
21 negotiating strategy never changed. It was, here it is. You got the MCI deal (i.e., QPP), you got
22 resale, or go somewhere else." (Tr., p.356, ln.21 – p.357, ln.6). Finally, although Qwest
23 accuses AZDT of seeking special treatment, Mr. Bade testified that AZDT was not looking for a
24 better rate than any other CLEC that is a PAL reseller: "I wasn't fighting for a special rate for
25 myself. I certainly would expect that it would be available to all CLECs that sell PAL lines to
26 pay phone service providers." (Tr., p.417, lns.2-9).

1 **G. Qwest Refused to Negotiate in Person**

2 AZDT's Tom Bade repeatedly requested face-to-face negotiations with Qwest to no avail
3 because "it never fit with [Qwest's] plans." (Tr., p.319, ln.17 - p.320, ln.12). Mr. Bade made
4 clear that he was willing to travel to Qwest's Denver headquarters or anywhere else at AZDT's
5 expense to negotiate the TRRO amendment. (Tr., p.229, lns.5-19; p.320, lns.13-23). On several
6 occasions, Mr. Bade put his request for a face-to-face meeting in writing. For example:

- 7
- 8 • In a letter to Qwest representative Julie Archuleta dated March 3, 2005, on the eve
9 of the effective date of the TRRO, Mr. Bade stated, "**I would be more than
10 willing to come to Denver or meet here in Phoenix to discuss this before we ask
11 for PUC assistance.**" (Ex. A-9; Tr., p.332, ln.16 - p.333, ln.14) (emphasis
12 added).
 - 13 • In an email to Qwest representative Steve Hansen dated June 5, 2006, *i.e.*,
14 approximately three months after the transition year ended and after Qwest had
15 invoked a dispute resolution procedure under the parties' ICA, Mr. Bade stated,
16 "**Why don't I come up there or you can come to Phoenix and we work this out
17 face to face?**", to which Mr. Hansen responded, "I do not think a face to face is
18 necessary at this point." (Ex. A-12, p.1; Tr., p.334, ln.18 - p.336, ln.1)
19 (emphasis added).
 - 20 • In a letter from Larry Christensen to Tom Bade dated August 14, 2007, *i.e.*, after
21 Qwest invoked this arbitration proceeding on July 20, 2007, Mr. Christensen
22 referred to Mr. Bade's willingness to travel to Denver for further TRRO
23 negotiations, but stated, "not all parties to the negotiations will be face to face
24 anyway and therefore, you may wish to reconsider whether you incur the cost of a
25 trip to Denver." (Ex. A-13; Tr., p.336, ln.4 - p.337, ln.24).
 - 26 • In an email to Sandy Sanderson of Qwest dated August 16, 2007, Mr. Bade
reiterated, "**I am willing to travel in order to expedite this process and
hopefully find a solution Qwest can live with,**" and even provided specific
meeting dates, but Qwest again rejected Mr. Bade's overture. (Ex. A-2; Tr.,
p.321, lns.1-17) (emphasis added).

21 Finally, Larry Christensen, who supervised the TRRO amendment negotiations for Qwest,
22 admitted that he felt nothing more would come out of a face-to-face meeting than a telephone call.
23 (Tr., p.225, lns.18-22). Qwest took that position even though, according to Qwest: (1) there had
24 been unsuccessful off and on TRRO negotiations for more than two years, and (2) AZDT was
25 "very unique" among Qwest's CLECs in that it was the only CLEC still receiving UNE-P
26 services as of August 2007. (Tr., p.230, ln.3 - p.231, p.5).

1 **H. Qwest Initiated and Then Abandoned Dispute Resolution in 2006**

2 In a letter from Larry Christensen to Tom Bade dated March 1, 2006, 10 days prior to the
3 expiration of the transition year, Qwest “initiat[ed] formal Dispute Resolution” pursuant to the
4 parties’ ICA, and asked AZDT to “[p]lease provide the name and contact information of your
5 designated representative” (Ex. Q-6; Tr., p.339, Ins.15-18). In a letter dated April 21, 2006
6 from AZDT’s former counsel, William Cleaveland, to Qwest Corporate Counsel, Andrew
7 Creighton, AZDT designated Mr. Bade as its representative for purposes of negotiations. (Ex. Q-
8 9, p.2; Tr., p.339, Ins.19-22). The parties then engaged in negotiations pursuant to the dispute
9 resolution procedure invoked by Qwest, which included a June 6, 2006 conference call between
10 Steve Hansen on behalf of Qwest and Tom Bade on behalf of AZDT. (Tr., p.339, ln.23 – p.340,
11 ln.5). Despite AZDT’s participation in negotiations as a part of Qwest’s dispute resolution
12 procedure, however, Qwest allowed the procedure to lapse, and as a result, there were no
13 arbitration proceedings between the parties in 2006.

14 In fact, the parties agree that no TRRO amendment negotiations at all were held for the 13-
15 month period between June 2006 and July 2007 (Tr., p.213, ln.24 – p.214, ln.9; p.341, Ins.10-
16 21). Although the parties have slightly differing explanations for why that was the case, each
17 attributes the hiatus in TRRO negotiations to the fact that the parties were awaiting a decision
18 from the District Court for the District of Arizona in an appeal taken by Qwest from a decision of
19 this Commission in favor of Covad Communications (“Covad”), which essentially held that Qwest
20 was required to continue providing network elements on an unbundled basis under § 271 of the
21 Act notwithstanding that the FCC had eliminated the § 251 unbundling requirement for certain
22 UNEs in the TRRO. (See Ex. Q-18). In a decision issued on July 18, 2007, however, the
23 District Court found that this Commission did not have authority to set rates for § 271 elements in
24
25
26

1 a § 252 arbitration. (Tr., p.116, Ins.1-10). The District Court's decision has been appealed to
2 the Ninth Circuit Court of Appeals.¹² (Tr., p.116, Ins.11-15).

3 In an email to Steven Hansen dated June 8, 2006, Mr. Bade made the following
4 suggestion:

5 Although it is always difficult to imagine how any litigation may ultimately
6 be resolved, surely we can both agree that it is likely that the Qwest/Covad
7 litigation may be dispositive of our TRRO/Section 271 UNE disputes.
8 Because similar issues are currently involved in the ongoing Qwest/Covad
9 litigation, I suggest dealing with this issue between Arizona Dialtone and
10 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.

11 (Ex. Q-11, p.3, ¶1; Tr., p.340, Ins.13-18) (emphasis added). In a responsive email dated June
12 20, 2006, Mr. Hansen took the following position on Qwest's behalf:

13 I can appreciate your position but Qwest is not willing handle the issues
14 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**.
15 Unfortunately it is now well after the end of the default transition period of
16 March 11, 2006. Arizona Dialtone is still trying to receive UNE pricing on
17 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.**

18 (Ex. Q-11, p.1, ¶1) (emphasis added). Mr. Hansen went on to state, "Given that we have not
19 moved off this issue and we are well past the transition period, **I will request that the Qwest law
20 department initiate arbitration of the attached TRO/TRRO amendment between Arizona
Dialtone and Qwest.**" (Ex. Q-11, p.2, ¶1) (emphasis added). It is undisputed that despite Mr.
21 Hansen's statements: (1) Qwest continued to provide UNE-P services to AZDT and bill for
22 services at the UNE-P rate, and continues to do so to this day (Tr., p.340, ln.14 - p.341, ln.9);
23

24
25 ¹² According to the Ninth Circuit website, the status of the appeal is that the parties recently completed
26 briefing and are awaiting oral argument.

1 and (2) Qwest did not invoke arbitration until 13 months later on July 20, 2007, two days after the
2 District Court issued its decision in the Covad case. (Ex. Q-15; Tr., p.341, lns.19-24).

3 **I. In Response to the Negotiating Impasse, AZDT Converted Its Existing Customers to**
4 **Other Carriers to the Greatest Extent Possible**

5 Faced with an absolute impasse on the rate to be paid for switching services, AZDT began
6 contacting other carriers to look for an alternative to Qwest's resale rate. (Tr., p.353, lns.17-24).
7 Those efforts resulted in AZDT converting more than half and closer to two-thirds of its
8 embedded customer base to carriers other than Qwest. (Tr., p.350, lns.15-24). Those other
9 carriers are charging AZDT a lower rate than Qwest's resale rate. (Tr., p.350, ln.25 - p.351,
10 ln.6). The only customers that AZDT has not migrated to another carrier are located in service
11 areas where no provider other than Qwest is available. (Tr., p.353, ln.17 - p.354, ln.3).
12 Nonetheless, AZDT continues to seek relationships with other carriers to further decrease its
13 relationship with Qwest. (Tr., p.353, ln.25 - p.354, ln.3).

14 **III. LEGAL ANALYSIS**

15 **A. The Parties, Through Their Conduct, Reached an Alternative Arrangement During**
16 **the Transition Year As Allowed by TRRO ¶228**

17 TRRO ¶228 describes the transition mechanism as "simply a default process" and
18 authorizes carriers to "negotiate alternative arrangements superseding this transition period."
19 TRRO ¶228. Consistent with this language, AZDT understood the TRRO as encouraging ILECs
20 and CLECs to reach alternative arrangements. (Tr., p.383, 6-8). For its part, Qwest concedes
21 that pursuant to TRRO ¶228, the plus \$1 rate was a default rate to be applied during the transition
22 year only if an alternative arrangement was not negotiated. (Tr., p.44, lns.9-16).

23 It is undisputed that at all times during the transition year, Qwest provided switching
24 services on an unbundled basis, billed those services at the UNE-P rate, and accepted AZDT's
25 payments at the UNE-P rate. (Tr., p.342, lns.5-20). This course of conduct established an
26 "alternative arrangement superceding the transition period" within the meaning of TRRO ¶228.
In this regard, AZDT's Tom Bade testified as follows:

1 Q: Do you feel that there had been promises made?

2 A: By the fact that we never agreed to pay anything more than
3 UNE-P and Qwest continued to bill at UNE-P, I thought that we
4 had an understanding, yes.

5 (Tr., p.374, Ins.12-15). Thus, it is AZDT's position that Qwest agreed to an alternative
6 arrangement by presenting bills with UNE-P rates and accepting AZDT's payments at those rates,
7 and by taking no action to bill at any rate other than the UNE-P rate. (Tr., p.386, Ins.2-15). On
8 the basis of the parties' conduct, AZDT requests this Commission to rule that Qwest is not entitled
9 to backbill AZDT for the plus \$1 rate for the transition year.

10 Even if this Commission does not accept AZDT's "alternative arrangement" argument,
11 Qwest's attempt to backbill AZDT for the plus \$1 rate for the transition year still must be denied
12 because it is barred by the filed rate doctrine. That doctrine forbids a regulated entity from
13 charging rates for its services other than those properly filed with the appropriate regulatory
14 authority. See Black's Law Dictionary 660 (8th ed. 2004). In this case, it is undisputed that
15 Qwest never filed the plus \$1 rate with the Arizona Commission. (Tr., p.224, ln.19 - p.225,
16 ln.1; p.349, Ins.20-22). In fact, Qwest never sought Commission approval for the plus \$1 rate
17 even though it is required to and does file all TRRO amendments and QPP agreements with this
18 Commission for approval.¹³ (Tr., p.274, ln.18 - p.275, ln.3). The plus \$1 rate was part of
19 UNE-P during the transition year, and there is no dispute that UNE-P is governed by § 251.¹⁴
20 (Tr., p.405, Ins.1-8). Therefore, it is AZDT's position that Qwest was required to file the plus
21 \$1 rate and obtain Commission approval for it in order to have a legal entitlement to charge and
22 collect that rate, especially because there is nothing in the TRRO which exempts the plus \$1 rate
23 from the filed rate doctrine. (Tr., p.349, ln.23 - p.350, ln.3; p.406, Ins.5-17). Thus, Qwest's

24 ¹³ Qwest testified that it files the QPP agreements with this Commission "under protest" because of its
25 believe that QPP agreements are not covered by § 252 of the Act. (Tr., p.274, ln.22 - p.275, ln.3).

26 ¹⁴ AZDT agrees that after the transition year, UNE-P switching no longer was governed by § 251, but
rather, would fall under § 271. (Tr., p.405, Ins.1-14).

1 failure to file the plus \$1 rate with this Commission provides a second and independent basis for
2 denying Qwest the right to backbill AZDT for the plus \$1 rate for the transition year.

3 **B. Qwest Cannot Backbill AZDT After the Transition Year**

4 Even if this Commission allows Qwest to backbill AZDT for the transition year, that ruling
5 would not permit or require any backbilling for the post-transition year period. To the contrary,
6 as the records show: (1) AZDT did not agree to any backbilling, (2) the TRRO provides no legal
7 authority for backbilling beyond the transition year, and (3) Qwest's conduct estops it from
8 backbilling AZDT beyond the transition year in any event.

9 **1. There Is No Legal Authority for Backbilling After the Transition Year**

10 Legal authority for this Commission to allow Qwest to backbill AZDT for the post-
11 transition year period can come from only two sources: (1) an agreement of the parties on
12 backbilling, or (2) under the TRRO as a matter of law. AZDT discusses these two potential
13 sources of legal authority separately below.

14 **a. AZDT Never Agreed to Any Backbilling**

15 At the arbitration hearing, Qwest witness William Easton conceded that AZDT never
16 agreed to any backbilling, and to the contrary, testified that Qwest had only an "expectation" of
17 backbilling based on Qwest's periodic notices to AZDT that there would be a true-up. (Tr.,
18 p.101, Ins.4-14). However, the fact that Qwest reminded AZDT on several occasions that it
19 intended to backbill AZDT once a TRRO amendment was signed does not change the outcome on
20 the backbilling issues. Qwest's notice of its intent to backbill is not an adequate substitute for
21 legal authority arising from an agreement of the parties with respect to backbilling, which never
22 was reached in this case. Put another way, while it is true that AZDT was on notice that Qwest
23 intended to backbill the additional amounts it thought were due, it is equally true that Qwest was
24 on notice that AZDT unequivocally refused to pay those amounts. Under these circumstances,
25 Qwest's notice that it intended to backbill AZDT and AZDT's corresponding notice to Qwest that
26

1 it did not agree to Qwest's rates or to backbilling at those rates cancel each other out and do not
2 provide any legal authority for backbilling in any event.

3 Qwest also argues that AZDT agreed to backbilling because it submitted a form of TRRO
4 amendment dated May 18, 2006 (Ex. Q-10) in which Qwest's proposed backbilling language had
5 not been stricken through. According to Qwest witness Larry Christensen, "[t]he structure
6 Arizona Dialtone left in the May 18 proposal demonstrates that Arizona Dialtone was fully
7 expecting that Qwest alternative services would be backbilled." (Tr., p.139, lns.17-20). That
8 argument is nothing more than an after the fact lawyer argument that disregards the relevant facts.

9 Mr. Bade, the author of the draft TRRO amendment in question, stated that the draft was
10 "an ongoing work" based on the then current status of the Covad litigation, and that he did not
11 expect the draft to stand or fall without any further negotiation based on the District's Court's
12 Covad decision. (Tr., p.338, ln.18 - p.339, ln.10). To the contrary, Mr. Bade testified
13 unequivocally that he was not committing to backbilling in the May 18, 2006 TRRO amendment,
14 and that he never agreed to backbilling. (Tr., p.339, lns.11-13; p.420, lns.16-22). The draft
15 TRRO amendment was simply that - a draft that was never meant to be executed. (Tr., p.412,
16 lns.16-18). In fact, that is why AZDT inserted language in the May 18, 2006 draft TRRO
17 amendment stating, "The following paragraphs 2.8 through 7.0 [which include the backbilling
18 provisions] do not apply to any UNEs required to be offered by Qwest under Section 271 of the
19 Act." (Q-10, p.10, ¶2.7; Tr., p.411, ln.16 - p.412, ln.18).

20 Further, Qwest "immediately rejected" the May 18, 2006 draft TRRO amendment (Tr.,
21 p.389, ln.11 - p.390, ln.24), and the parties "started over" on a TRRO amendment once the
22 Covad decision was issued. (Tr., p.393, ln.9 - p.394, ln.6). Finally, Qwest admitted that in
23 August 2007 it received a revised draft TRRO amendment from AZDT's former counsel that did
24 strike out the backbilling provisions, and that as of that date, Qwest understood that AZDT was
25 objecting to backbilling for both the transition year and the post-transition year period. (Q-16,
26 ¶¶5.1.1.3 & 5.1.1.5; Tr., p.209, lns.10-14; p.214, ln.20 - p.216, ln.1). In addition, under

1 cross-examination, Qwest conceded that AZDT was not required to announce its waiver, estoppel
2 and “alternative arrangement” theories in marking up Qwest’s draft TRRO amendment (Tr.,
3 p.216, lns.6-13), which puts to rest Qwest’s claims that AZDT never specifically raised these
4 issues prior to this arbitration.

5 In conclusion, there is no basis for this Commission to find that AZDT ever agreed to
6 Qwest’s backbilling proposals. Accordingly, if any legal authority exists for backbilling after the
7 end of the transition year, it exists, if at all, in the language of the TRRO.

8 **b. The TRRO Provides No Legal Authority for Backbilling After the**
9 **Transition Year**

10 Qwest witness William Easton, Qwest’s Director of Wholesale Advocacy, testified that
11 “The FCC prescribed a one-year transition period ... [and that] the FCC also provided for a one
12 dollar rate increase during the duration of that transition year.”¹⁵ (Tr., p.35, lns.4-10) (emphasis
13 added). Further, Mr. Easton testified that “what is required of the [TRRO] amendment is very
14 clearly laid out in the FCC’s order” (Tr., p.38, lns.7-8), and went on to explain:

15 Q: You said a moment ago that the changes to the TRRO are pretty
straightforward. Can you elaborate on what you mean by that?

16 A: Well we talked briefly when I was quoting from the order itself. I
17 mean, there’s two key elements. One, after the one-year transition
18 period, CLECs no longer have access to unbundled mass market
19 switching. The second element that was very clearly laid out in the
order is **during the one-year transition period, there’s going to be a
one dollar price increase and that rates must be trued up to reflect
that.**

20 (Tr., p.38, ln.24 – p.39, ln.9) (emphasis added). Mr. Easton further testified:

21 Q: Did the FCC specify a rate that should apply for alternate arrangements
22 for periods of time after the transition year?

23 A: No, they did not.
24
25

26 ¹⁵ Mr. Easton’s testimony regarding the requirements of the TRRO is particularly probative given that
his job responsibility is to testify on such matters in arbitration proceedings like this one. (Tr., p.67, lns.9-13).

1 (Tr., p.44, ln.24 – p.45, ln.2). Similarly, Qwest witness Larry Christensen testified that the plus
2 \$1 rate was limited to the transition year:

3 **The plus one dollar rate applied only for the one-year transition period**
4 **for which the FCC gave the CLECs the directive to transition their de-listed**
5 **services to other services. Therefore, it wouldn't apply past that one-year**
6 **period.**

7 (Tr., p.171, lns.5-9) (emphasis added). Thus, Qwest, through the testimony of both of its
8 witnesses, has conceded that the TRRO expressly limits backbilling to the transition year. (See,
9 e.g., Tr., p.46, lns.11-12 (“I would agree that the FCC only talked about backbilling with regard
10 to the transition period”)).

11 Nonetheless, Qwest claims entitlement to backbill AZDT for the post-transition year period
12 because AZDT did not convert its customers to other service arrangements during the one-year
13 transition period. (See, e.g, Tr., p.45, lns.6-10 (“It was clearly the FCC’s assumption that at the
14 end of that one-year period, whatever services were replacing UNE-P had rates associated with
15 them, and those would be the rates that would apply”)). However, Mr. Easton conceded that
16 unlike for the transition year where the TRRO prescribes the plus \$1 rate as a default rate, the
17 TRRO is completely silent as to the rate to be paid after the end of the transition year. (Tr., p.83,
18 lns.8-17). In fact, the TRRO not only fails to provide a post-transition year rate, it expressly
19 limits backbilling to the transition year. Specifically, TRRO ¶228, footnote 630, which authorizes
20 backbilling, states that the true-up shall be “to the **applicable transition rate ...**,” and that bolded
21 language is a reference to the alternative transition rates prescribed in TRRO ¶228 as the rate that
22 would apply during the transition year in the absence of an alternative arrangement. In addition,
23 while the FCC may have contemplated that CLECs would convert their customers to alternative
24 service arrangements within the transition year, the TRRO itself does not contain any language
25 providing that if a CLEC does not convert its customers to other service arrangements during the
26 transition year, the ILEC is entitled to backbill that CLEC until the conversion occurs and/or a
TRRO amendment is executed, as Qwest is attempting to do in this case. Indeed, as noted above,

1 the parties agree that the TRRO does not speak to the post-transition year period at all, and
2 therefore, does not provide any rules regarding rates to be paid by the CLEC or backbilling to
3 which the ILEC is entitled. Finally, as discussed in detail below, the fact that AZDT was unable
4 to convert its customers to alternative service arrangements within the transition year was due to
5 Qwest's inflexible negotiating positions which left AZDT with no choice but to refuse to sign
6 Qwest's non-negotiable form of TRRO amendment.

7 In addition, while Qwest premises its argument for post-transition year backbilling on the
8 fact that the TRRO anticipated CLEC conversion within the transition year, Qwest concedes that it
9 did not write AZDT a letter insisting that AZDT convert its customers, and that if AZDT failed to
10 do so, Qwest would provide notice of termination of the parties' ICA. (Tr., p.236, lns.4-10). In
11 fact, while Qwest takes the position that AZDT violated the TRRO by failing to either sign a QPP
12 agreement or convert its customers to resale, even as late as May 2007, Qwest's own lawyers
13 were not comfortable advising Qwest that it no longer had an obligation to provide UNE-P
14 services to AZDT. (Tr., p.235, lns.5-19). In other words, Qwest's attorneys had no clear legal
15 position on whether AZDT had a continuing entitlement to receive UNE-P services, and yet
16 Qwest now characterizes AZDT's conduct in continuing to place UNE-P orders as a clear-cut
17 violation of the TRRO. Obviously, if Qwest's attorneys were ambivalent, there was plenty of
18 room for good faith disagreement on this issue.

19 Finally, Qwest argues that if there is no true-up to the plus \$1 rate for the transition year
20 and the resale rate for the post-transition year period, "that would clearly be discriminatory
21 action." (Tr., p.47, lns.7-10). According to Qwest witness William Easton:

22 It would discriminate against those carriers who had stepped up to the
23 higher rates in QPP with the expectation that UNE-P would be going away.
24 It would discriminate to those carriers who complied with the FCC order,
25 switched to services such as resale services and paid the high rates
26 associated with those services, again, in the expectation that UNE-P would
not be available at the end of the one-year transition period.

(Tr., p.47, lns.10-17). There are numerous flaws in Qwest's "we can't discriminate" argument.

1 First, there is no record evidence that any CLEC ever paid the plus \$1 transition rate that
2 Qwest is now trying to collect from AZDT by way of backbilling. Qwest testified that it has
3 approximately 67 QPP customers in Arizona (Tr., p.41, ln.22 – p.42, ln.1), but did not introduce
4 evidence that any other CLEC paid the plus \$1 rate rather than enter into a QPP agreement. In
5 fact, Qwest witness William Easton testified that “[a]ll of the other carriers who were purchasing
6 UNE-P did, in fact, convert to alternative service arrangements....” (Tr., p.42, lns.10-17).
7 AZDT, for its part, is not aware of any CLEC who paid the plus \$1 rate, regardless of whether
8 the CLEC is a reseller of PALs, residential lines, or business lines. (Tr., p.343, lns.6-15).
9 Further, Qwest acknowledged that in all cases, the QPP agreements were retroactive to January 1,
10 2005 (i.e., several months before the TRRO became effective), regardless of when the QPP
11 agreement was signed. (Tr., p.259, ln.21 – p.260, ln.12; p.343, lns.16-24; p.266, lns.6-9). Due
12 to that retroactive application, the other CLEC’s QPP agreements superseded the plus \$1
13 transition rate. (Tr., p.343, ln.25 – p.344, ln.4).

14 Second, while Qwest argues that it did not offer a different QPP rate to AZDT because §
15 202 of the Act prohibits it from discriminating against any carrier with respect to rates, (Tr.,
16 p.43, lns.9-25), that argument ignores the critical distinction between AZDT as a reseller of PALs
17 on the one hand and Qwest’s other CLEC customers who were purchasing residential and
18 commercial lines on the other hand. For all its rhetoric about the other CLECs in Qwest’s 14-state
19 territory,¹⁶ it is notable that Qwest failed to offer any evidence that another CLEC whose primary
20 business is resale of PALs agreed to pay the plus \$1 rate or Qwest’s resale rate.¹⁷ In other words,

21 _____
22 ¹⁶ See, e.g., Tr., p.62, ln.23 – p.63, ln.2 (“Arizona Dialtone is the only CLEC in Arizona and the only
23 CLEC operating in any of Qwest’s 14 states that has refused to transition its UNE-P services in accordance with
the TRRO and refused to pay Qwest at the post TRRO rates paid by every other CLEC”).

24 ¹⁷ While Mr. Christensen recalled one other CLEC in Arizona who was primarily a PAL reseller like
25 AZDT (Tr., p.159, lns.4-9), he admitted that particular CLEC signed a QPP agreement rather than convert to
26 resale. (Tr., p.275, lns.12-19). Mr. Christensen also admitted that any CLEC that signed a QPP agreement
during the transition year would not have paid the plus \$1 transition rate. (Tr., p.276, lns.5-9). Thus, there is
no record evidence that any PAL reseller in Arizona paid the plus \$1 rate or the resale rate that Qwest seeks to
backbill AZDT.

1 Qwest wants this Commission to assume that there is some other PAL reseller out there who
2 would be discriminated against if Qwest is not allowed to backbill AZDT. There is no record
3 evidence that would allow this Commission to reach that conclusion.¹⁸

4 Finally, Qwest conceded that: (1) because AZDT did not sign a QPP agreement, it is not
5 similarly situated to CLECs that have signed a QPP agreement; and (2) its nondiscrimination
6 obligation did not require it to treat a CLEC that has signed a QPP agreement the same as a CLEC
7 who has refused to sign a QPP agreement. (Tr., p.70, lns.5-17; p.71, ln.20 – p.72, ln.2). That
8 means Qwest's anti-discrimination argument for why it could not provide a different rate to
9 AZDT as a PAL reseller rests on an inapt comparison of AZDT with differently situated CLECs.
10 As AZDT explained to Qwest from the very beginning, a PAL reseller is not in the same business
11 as a reseller of business or residential lines, and as a result, Qwest would not be discriminating
12 against other CLECs if this Commission does not allow the backbilling Qwest seeks. In short,
13 Qwest's anti-discrimination argument is a classic red herring that this Commission should choose
14 to ignore.¹⁹

15 **2. Qwest's Conduct Precludes It From Backbilling**

16 For all the reasons stated in the foregoing section, it is AZDT's position that this
17 Commission is without legal authority to allow Qwest to backbill AZDT for any period beyond
18 the transition year. In the absence of such legal authority, the parties' conduct is immaterial – the
19 Commission remains without authority regardless of how the parties conducted themselves in their
20 business relations and in the TRRO amendment negotiations. However, to the extent that this
21 Commission deems the parties' conduct relevant to the issue of whether Qwest should be allowed
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24 ¹⁸ In fact, Qwest witness William Easton did not know whether Qwest has an interconnection agreement
with any other PAL reseller besides AZDT. (Tr., p.127, lns.16-18).

25 ¹⁹ Qwest acknowledged that it has concerns that if no true-up is ordered in this case, other CLECs may
26 demand the same treatment as AZDT, which presumably is the real motivation behind its anti-discrimination
argument. (Tr., p.71, lns.11-19).

1 to backbill AZDT additional amounts for switching services already paid for, AZDT submits that
2 Qwest's conduct should preclude it from being allowed to backbill AZDT.

3 **a. Qwest's Billing History Precludes It From Backbilling**

4 As noted in Section II(C) above, it is undisputed that at all relevant times, both during the
5 transition year and thereafter, Qwest provided AZDT with switching service for its embedded
6 base of customers on an unbundled basis, billed for those services at the UNE-P rate, and
7 accepted AZDT's payments at the UNE-P rate. (Tr., p.78, lns.6-15). It is equally undisputed
8 that even though the TRRO prohibited new UNE-P orders after March 11, 2005, Qwest continued
9 to accept new UNE-P orders from AZDT, bill those orders at the UNE-P rate, and accept
10 AZDT's payments at the UNE-P rate, until May 23, 2007 when it abruptly stopped accepting new
11 UNE-P orders with two days' notice. (Tr., p.76, ln.19 - p.77, ln.5; Ex. Q-12) Additional facts
12 not in dispute are that Qwest kept providing UNE-P services after the end of the transition year
13 even though under the TRRO it had no obligation to do so, and continued to bill and accept
14 payment at the UNE-P rate, despite knowing that the parties were at a fundamental impasse in
15 their TRRO negotiations and despite knowing that AZDT had not agreed to a true-up. (Tr.,
16 p.100, ln.22 - p.101, ln.14). It also is undisputed that as to AZDT's embedded base of
17 customers, Qwest continues to provide UNE-P services at UNE-P rates right up to today. (Tr.,
18 p.127, lns.19-21; p.272, lns.9-12). As Tom Bade testified with regard to Qwest's continuing
19 provision of UNE-P services:

20 Q: Do you understand that the FCC order [i.e., the TRRO] no longer
21 required Qwest to provide mass market switching?

22 A: I understand that. But Qwest ignored the order and continued to do that
23 and bill, and I paid.

24 (Tr., p.376, lns.10-13). Finally, it is undisputed that the parties never reached any agreement on
25 backbilling. (Tr., p.101, lns.12-14; p.376, lns.17-22). These undisputed facts warrant the
26 conclusion that Qwest is now estopped by its conduct from backbilling for a higher rate than the
rate it billed and accepted from AZDT.

1 In addition, Qwest witness Larry Christensen testified that pursuant to the TRRO, “UNE
2 switching did not exist after March 10, 2006,” and therefore, due to the fact that AZDT had not
3 signed a QPP agreement, “resold services is what Arizona Dialtone has really been purchasing
4 from Qwest.” (Tr., p.141, ln.22 – p.142, ln.4). Thus, the question that begs to be asked is why
5 Qwest, when faced with an impasse in its TRRO negotiations with AZDT, did not bill AZDT at
6 the resale rate it thought was required, rather than at the UNE-P rate, if for no other reason than
7 to bring the billing impasse to a head sooner. Qwest’s answer is that it did not bill AZDT at
8 either the QPP rate or the resale rate because it “could not take unilateral action” under the terms
9 of the parties’ existing ICA, and could “only bill for services that had been ordered by Arizona
10 Dialtone.” (Tr., p.48, lns.15-19; p.94, lns.7-18). Certainly, Qwest could not bill AZDT at the
11 QPP rate because AZDT had not signed a QPP agreement. The terms of the parties’ existing
12 ICA, however, had a resale provision that would have allowed Qwest to bill AZDT at the resale
13 rate after the end of the transition year. (Tr., p.344, ln.24 – p.345, ln.6). Moreover, if, as Mr.
14 Christensen testified, UNE-P no longer existed after the end of the transition year and AZDT
15 really was purchasing resold services thereafter, then Qwest could and should have begun billing
16 at the resale rate once the transition year ended. However, it is undisputed that Qwest never even
17 attempted to bill AZDT at the resale rate for Qwest’s embedded base of customers.²⁰ (Tr.,
18 p.344, lns.16-20).

19 Qwest’s argument that it could not unilaterally change the way it was billing AZDT for
20 switching services also is directly contradicted by its actions taken in May 2007 regarding new
21 UNE-P orders. It is undisputed that effective May 25, 2007, Qwest abruptly stopped accepting
22

23 ²⁰ Qwest witness William Easton claimed that one reason Qwest continued to bill AZDT at the UNE-P
24 rate was that it did not know whether AZDT was going to choose Qwest’s resale rate or sign a QPP agreement.
25 (Tr., p.51, lns.7-19). That argument is fatally undercut by the undisputed fact that AZDT repeatedly told Qwest
26 that QPP was not a viable option. (Tr., p.91, lns.13-23; p.308, lns.1-18; p.381, lns.1-7). As a result, Qwest
unquestionably knew that AZDT was not going to select the QPP option, thus leaving resale as the only
remaining option. In addition, Mr. Easton admitted that the resale provision in the parties’ ICA allowed AZDT
to purchase switching services at the resale rate, but did not obligate AZDT to do so. (Tr., p.99, lns.4-12).
Finally, Qwest concedes that AZDT never did order resale services. (Tr., p.77, lns.16-18).

1 new UNE-P orders from AZDT and mandated that any new orders be processed either for resale
2 services or under a QPP agreement, thereby presenting AZDT with the same two options it
3 repeatedly had rejected in the TRRO amendment negotiations. (Ex. Q-12; Tr., p.95, Ins.3-6;
4 p.95, Ins.20-24; p.181, Ins.10-14; p.246, ln.24 - 248, ln.6). Thus, with just two days' notice,
5 Qwest stopped accepting the exact same new UNE-P orders it had been accepting from AZDT
6 ever since the March 2005 commencement of the transition year and thereafter. (Tr., p.348,
7 ln.24 - p.349, ln.7). It also is undisputed that as of May 2007, the parties had not executed a
8 TRRO amendment, the language of the parties' ICA had not been modified, and the language of
9 the TRRO itself had not changed. (Tr., p.96, Ins.3-9; p.348, Ins.15-23). Despite this lack of any
10 change in contractual authority, however, Qwest unilaterally began to treat new orders as resale
11 services and bill those orders at the resale rate. (Tr., p.278, ln.21 - p.279, ln.3). Thus, Qwest's
12 conduct demonstrates beyond dispute that Qwest did not need a change in its contractual authority
13 to begin billing AZDT at the resale rate as it now contends.

14 Qwest claims that its decision to stop accepting new UNE-P orders was made in May 2007
15 rather than at an earlier date because it was only as of May 2007 that Qwest's legal department
16 felt comfortable advising Qwest that it could refuse new UNE-P orders. (Tr., p.53, Ins.3-17;
17 p.76, Ins.9-23; p.250, Ins.1-7). That argument is undercut by the fact that the language of the
18 TRRO regarding new UNE-P orders was clear and unambiguous - the TRRO "does not permit
19 [CLECs] to add new UNE-P arrangements using unbundled access to local circuit switching ..."²¹
20 (TRRO, Ex., Q-1, at ¶227). Is Qwest really asking this Commission to believe that its lawyers
21 could not determine whether this TRRO language allowed Qwest to refuse to accept new UNE-P

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²¹ The unambiguous nature of the dispositive TRRO language also is shown by the fact that other ILECs refused to accept new UNE-P orders after the TRRO effective date, a fact which Qwest concedes. (Tr., p.146, Ins.5-10).

1 orders from AZDT as of the March 11, 2005 effective date of the TRRO? That would strain
2 Qwest's credibility past the breaking point.²²

3 Finally, while Qwest argues that AZDT could have converted its customers to resale under
4 the existing ICA, Qwest admits that "[u]ltimately, we probably would have been in dispute
5 resolution over some billing." (Tr., p.240, ln.22 – p.241, ln.4). The reason why the parties
6 would have been in dispute resolution anyway is that, as Qwest admitted, it would have continued
7 to insist on a form of TRRO amendment that required backbilling not just for the transition year,
8 but also for the post-transition year period. (Tr., p.241, ln.5 – p.242, ln.7). Thus, Qwest's
9 argument essentially posits that AZDT should have converted to resale, and thereby begin paying
10 a higher rate, without resolving any of the backbilling issues and without an executed TRRO
11 amendment. (Tr., p.241, lns.11-19). Given that Qwest continued to push the backbilling issue
12 and the substantial liability associated with it, AZDT can hardly be faulted for not converting to
13 resale when, by Qwest's own admission, that would have done nothing to resolve the core
14 backbilling issues between the parties. In conclusion, Qwest's conduct demonstrates that it could
15 had the ability to unilaterally change how it billed AZDT for switching services, which means that
16 its continuing provision of switching services at UNE-P pricing was both voluntary and binding,
17 and therefore, precludes it from backbilling AZDT.

18 **b. Qwest's Bad Faith Negotiating Tactics Preclude It From Backbilling**

19 According to Qwest, "Arizona Dialtone has refused to negotiate and sign an amendment in
20 the three years that have passed since the TRRO became effective." (Tr., p.60, lns.18-20).
21 Qwest further accuses AZDT of engaging in a "delaying strategy" through which it has "thwarted
22 national telecommunications policy" and "unlawfully evaded the financial consequences associated
23 with compliance with the TRRO" (Tr., p.61, lns.3-7). However, under cross-examination,

24 _____
25 ²² Similarly unpersuasive is Qwest's claim that it continued to accept new UNE-P orders in violation of
26 the TRRO because it was "pro-competitive" and "honoring the existing ICA." (Tr., p.53, ln.18 – p.54, ln.5).
After all, Qwest concedes that the TRRO trumped the parties' ICA (Tr., p.75, ln.23 – p.76, ln.8), which means
that Qwest did not have the option of disregarding the TRRO no matter how virtuous its motives.

1 Qwest witness Larry Christensen, the person at Qwest most familiar with the TRRO amendment
2 negotiations, admitted that as of April 2006, negotiations had been ongoing for a full year. (Tr.,
3 p.202, lns.9-21). In addition, Mr. Christensen admitted that: (1) there were no TRRO
4 amendment negotiations for the 13-month period from June 2006 to July 2007; (2) Qwest made no
5 effort to negotiate during that 13-month period; and (3) Qwest did not blame AZDT for the 13-
6 month hiatus in negotiations. (Tr., p.213, ln.25 – p.213, ln.19. Thus, Qwest’s claim that AZDT
7 “refused to negotiate and sign an amendment [for] three years” is proven false by its own
8 admissions.

9 In addition, it is undisputed that Qwest took inflexible positions in the course of the
10 TRRO amendment negotiations that left AZDT with no choice but to refuse to sign Qwest’s form
11 of TRRO amendment, thus leaving the parties at an impasse. For example:

- 12 • As discussed at length in Section II(E) above, Qwest made no effort at all to tailor
13 the QPP product or the rate associated with that product to take into account the
14 needs of a company like AZDT whose business was the resale of PALs, even
15 though Mr. Bade repeatedly told Qwest’s representatives, both before the TRRO
16 effective date and in the course of the TRRO negotiations, that QPP was not viable
17 for AZDT because the QPP rate was substantially above the retail rate at which
18 Qwest sold PALs directly to payphone providers.
- 19 • Both during the transition year and thereafter, Qwest refused to offer AZDT any
20 alternative arrangement other than QPP.
- 21 • Qwest took the position in the TRRO amendment negotiations that the plus \$1 rate
22 was non-negotiable even though the TRRO itself encouraged ILECs and CLECs to
23 fashion “alternative arrangements” in lieu of the default transition mechanism.
- 24 • Qwest never proposed a form of TRRO amendment that did not include
25 backbilling, both for the transition year, and later, for the entire post-transition year
26 period.
- Qwest took all of the above positions in the course of the TRRO amendment
negotiations despite knowing that imposition of the full backbilling liability on
AZDT would put it out of business.

27 Thus, while Qwest would like to simply point to the lack of an executed TRRO amendment
28 as proof positive that AZDT negotiated in bad faith and violated the TRRO, the truth that emerges
29 is that Qwest’s inflexible negotiating positions left AZDT with the Hobson’s choice of either: (1)

1 agreeing to Qwest's form of TRRO amendment and being driven out of business due to the
2 crushing backbilling liability, or (2) refusing to sign Qwest's non-negotiable form of TRRO
3 amendment. That was no choice at all because AZDT's very survival was at stake. AZDT
4 requests that this Commission consider and give appropriate weight to Qwest's negotiating tactics
5 in determining whether AZDT, Qwest, or both are at fault.

6 Further, as noted above, it is undisputed that Qwest has: (1) continued to provide UNE-P
7 services after the end of the transition year despite the fact that the TRRO required UNE-P to be
8 phased out by the end of the transition year period, and (2) continued to accept new UNE-P orders
9 after the TRRO effective date in direct violation of the TRRO itself. These choices by Qwest sent
10 AZDT mixed messages²³ and exacerbated the backbilling issues in this case. AZDT submits that
11 to the extent that this Commission weighs the equities, Qwest should be held accountable for its
12 choices to continue providing UNE-P services and continue accepting new UNE-P orders when,
13 by Qwest's own admission, it had no legal obligation to do so.

14 Finally, AZDT is willing to enter into a TRRO amendment that obligates AZDT to pay
15 Qwest's resale rate on a going forward basis. AZDT took that position in a letter sent to Qwest in
16 March 2008 (Ex. Q-17) and reiterated that position at the arbitration hearing. (Tr., p.354, ln.4-7;
17 p.394, lns.15-18). Qwest has chosen to mischaracterize AZDT's willingness to move forward as
18 a concession that AZDT's prior refusal, in the course of the TRRO negotiations, to agree to
19 Qwest's resale rate was in bad faith. In fact, there is a completely logical explanation for what
20 Qwest misperceives as a fundamental inconsistency. As AZDT explained at the arbitration
21 hearing, AZDT's customers using Qwest-supplied lines are not profitable for AZDT. (Tr.,
22 p.354, lns.16-18). As a result, AZDT could not bear Qwest's resale rate until a substantial
23 portion of AZDT's customers were migrated to lower-cost carriers, which made those customers

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25 ²³ As Mr. Bade explained, after he received Steven Hansen's June 20, 2006 email flatly refusing to
26 continue providing UNE-P services pending the Covad case, he waited to see what Qwest would do next, but
Qwest did nothing until July 2007 when it invoked this arbitration two days after the District Court's decision in
the Covad case was issued. (Tr., p.341, lns.10-24).

1 profitable to AZDT, and which now subsidize the unprofitable customers still serviced with
2 Qwest-supplied lines.²⁴ (Tr., p.354, ln.8-15; p.396, lns.12-23; p.397, lns.17-24). Those
3 conversions began in July 2007, which is as soon as AZDT could act after the District Court's
4 issuance of its decision in the Covad case, which rejected the § 271 theory for UNE-Ps on which
5 AZDT previously (and rightfully) had relied.²⁵ (Tr., p.396, ln.24 – p.397, ln.4). As a result of
6 those customer conversions, AZDT now is able to bear the resale rate for its remaining Qwest-
7 supplied customers, even at a loss, because its only options are to pay Qwest's resale rate or drop
8 those customers. (Tr., p.354, ln.23 – p.355, ln.2). If AZDT were solely focused on its self-
9 interest as Qwest accuses, it obviously would drop these unprofitable customers.

10 **c. Qwest's Failure to Avail Itself of Opportunities to Resolve the Impasse**
11 **on Rates Precludes It From Backbilling**

12 Qwest not only continued to provide switching services to AZDT at UNE-P pricing despite
13 knowing that AZDT flatly refused to agree to any backbilling, it also failed to take advantage of
14 several opportunities to bring the negotiating impasse with AZDT to a head sooner, thus
15 exacerbating the backbilling issues by increasing the amounts allegedly due. In addition to
16 changing its billing practices as already discussed above, Qwest's opportunities to resolve the
17 TRRO/backbilling issues sooner included: (1) the right to provide notice of termination of the
18 ICA, which could have ripened into an arbitration; and (2) the chance to continue with a dispute
19 resolution procedure initiated in March 2006, which Qwest instead allowed to lapse in deference
20 to its pending appeal in the Covad case.

21 _____
22 ²⁴ Mr. Bade testified, and Qwest did not dispute, that with respect to both PAL and POTS lines, the
23 other carriers' rates are less than Qwest's UNE-P rate (Tr., p.378, lns.18-22; p.379, lns.21-24), and less than
the plus \$1 transition rate. (Tr., p.382, lns.4-8). Mr. Bade also testified that these other carriers' rates are not a
special PAL rate, but rather, a market rate. (Tr., p.380, lns.13-19).

24 ²⁵ AZDT had inserted language in the draft TRRO amendment obligating Qwest to provide UNE-P
25 services to the extent required by § 271 in reliance on the ACC's decision in the Covad case, as well as ¶1.2 of
26 the parties' existing ICA, which states that the purpose of the ICA is to fulfill Qwest's obligations under various
sections of the Act, including § 271. (Q-3, p.1, ¶1.2; Tr., p.400, ln.2 – p.401, ln.23; p.419, ln.9 – p.420,
ln.5).

1 **i. Qwest’s Failure to Provide Notice of Termination of the ICA**

2 The parties’ ICA had an initial two-year term which expired on August 12, 2003, and
3 thereafter, the contract was on a month-to-month basis. (Q-3, p.11, ¶5.2.1; Tr., p.104, ln.12 –
4 p.105, ln.7). The ICA provided that either party could provide 160 days’ written notice of
5 termination, which would commence a 160-day window leading to an accelerated § 252
6 arbitration on a nine-month timeframe. (Q-3, p.11, ¶5.2.2; Tr., p.104, ln.22 – p.105, ln.22;
7 p.237, ln.17 – p.238, ln.21). Therefore, in the event such notice had been given, the parties
8 either would have negotiated a new agreement within the 160-day window or entered arbitration.
9 (Tr., p.105, ln.23 – p.106, ln.7). In other words, had Qwest invoked the termination provision
10 of the ICA, this arbitration unquestionably would have occurred much sooner in time, perhaps as
11 much as two years sooner, thereby minimizing the backbilling liability at issue. Nonetheless,
12 Qwest admits that it never considered providing notice of termination even though it felt AZDT
13 was delaying implementation of a TRRO amendment. (Tr., p.103, lns.16-19; p.106, ln.17 –
14 p.107, ln.8). When asked why Qwest did not simply provide notice of termination of the ICA,
15 Qwest witness William Easton candidly admitted that “maybe the way things have turned out, that
16 would have been the way to go.” (Tr., p.1-6, ln.24 – p.107, ln.8).

17 **ii. Qwest’s Failure to Follow Through with Dispute Resolution**

18 Qwest admits that as the March 2006 end of the transition year approached, it was
19 “concerned” that it did not yet have an executed TRRO amendment with AZDT, especially
20 because by that point, all of Qwest’s other CLECs either had executed or agreed to execute a
21 TRRO amendment, or had converted to agreed to convert to resale, and also because Qwest had
22 yet to receive a draft TRRO amendment from AZDT. (Tr., p.157, ln.22 – p.158, ln.5; p.158,
23 lns.18-25; p.211, ln.22 – p.213, ln.3). As a result, Qwest “felt that we had no alternative but to
24 initiate dispute resolution under the [ICA],” which Qwest did in a letter dated March 1, 2006
25 from Larry Christensen to Tom Bade. (Q-6; Tr., p.159, ln.15 – p.160, ln.5). Qwest now argues
26

1 that its March 2006 invocation of dispute resolution proves it “was diligent in pursuing its
2 contractual obligation[s].” (Tr., p.137, lns.22-24). The facts prove otherwise.

3 Preliminarily, Qwest claims that AZDT denied its request for dispute resolution (Tr.,
4 p.141, lns.5-7), but that is demonstrably wrong. As noted above, AZDT designated Mr. Bade as
5 its representative for purposes of negotiations, a fact which Qwest ultimately conceded. (Ex. Q-9,
6 p.2; Tr., p.198, lns.6-17; p.339, lns.19-22), In addition, Qwest conceded that the parties did, in
7 fact, engage in negotiations pursuant to the dispute resolution procedure invoked by Qwest,
8 including a June 6, 2006 conference call between Steve Hansen on behalf of Qwest and Tom Bade
9 on behalf of AZDT. (Tr., p.200, lns.13-22; p.339, ln.23 – p.340, ln.5).

10 More significantly, it is undisputed that Qwest allowed its March 2006 dispute resolution
11 procedure to lapse rather than push forward with negotiations and/or an eventual arbitration. In
12 an email dated June 8, 2006, two days after the parties’ June 6, 2006 telephonic negotiating
13 session, AZDT suggested as an “interim resolution” that the parties agree to await the District
14 Court’s decision in the Covad case, and that Qwest continue to provide UNE-P services to AZDT
15 while the Covad case was pending. (Q-11, p.3, ¶1; Tr., p.175, lns.1-18). Qwest representative
16 Steve Hansen’s June 20, 2006 email response was unequivocal – “Qwest will not continue to
17 provide Arizona Dialtone with services under UNE-P until Qwest’s matter with Covad is
18 resolved.” (Q-11, p.1, ¶1). Further, Qwest stated both in Mr. Hansen’s June 20 email and at the
19 arbitration hearing that it did not have a legal obligation to continue providing UNE-P services.
20 (Q-11, p.1, ¶1 (Qwest “is not obligated nor willing to continue to provide UNE-P services”); Tr.,
21 p.177, lns.10-14 (“Certainly, we didn’t feel we had an obligation under the law to [continue
22 providing UNE-P]”)).²⁶

23
24 ²⁶ Qwest’s position on whether it was obligated to continue providing UNE-P services after the
25 transition year changes depending on the issue. When addressing Mr. Bade’s proposed “interim resolution,”
26 Qwest takes the position that it had no obligation to continue providing UNE-P services. When the issue is why
Qwest did not begin billing the resale rate, however, Qwest takes the position that “for those [UNE-P] services
that had already been ordered under the contract, we felt we had the ongoing contractual obligation to provide
those.” (Tr., p.185, lns.15-19).

1 Despite Qwest's abject refusal to defer the TRRO negotiations until the Covad decision was
2 issued and its belief that it was not obligated to continue providing UNE-P services, that is exactly
3 what Qwest did. Qwest admits that the parties did not come to a resolution within 160 days of the
4 March 1, 2006 invocation of dispute resolution, and that under the ICA that entitled Qwest to
5 invoke arbitration, but that Qwest did not do so. (Tr., p.213, lns.4-20). Qwest now attempts to
6 defend its decision not to push forward with arbitration by suggesting that it made a legal
7 determination that arbitrating with AZDT in 2006 in the face of the unfavorable ACC decision in
8 the Covad case likely would end up with the same result – an order requiring Qwest to continue to
9 provide UNE-P services at TELRIC pricing. (Tr., p.179, lns.5-22; p.262, ln.25 – p.263, ln.24).
10 In other words, Qwest decided not to arbitrate because it was going to lose.²⁷ Due to this strategic
11 decision, there were no TRRO amendment negotiations for the 13-month period between June
12 2006 and July 2007 when the Covad decision finally was issued. (Tr., p.213, ln.25 – p.214,
13 ln.9). Notwithstanding Qwest's strategic decision not to negotiate or arbitrate, Qwest now is
14 seeking to recover backbillings for that same 13-month period. AZDT respectfully submits that
15 because Qwest chose to forego multiple opportunities to bring its TRRO amendment issues with
16 AZDT to a head sooner, that fact also must be taken into account in resolving the backbilling
17 issues raised by Qwest's Petition for Arbitration.

18 **C. Qwest Should Be Required to Provide Notice of Copper Loop Replacements By**
19 **Certified Mail Rather Than By Email Alone**

20 AZDT inserted language in the draft TRRO amendment that would require Qwest to
21 provide specific notice of which loops would be impacted when Qwest replaced a copper loop
22 with a fiber loop, and AZDT also requested that the notice be provided by certified mail rather
23 than by email only. (See AZDT's Proposed Interconnection Agreement Language, Ex. A, at p.8,
24 ¶3.1.6.3). Qwest initially objected to the content of the notice that AZDT was requesting, but the

25 ²⁷ Qwest witness Larry Christensen also testified, "it was not a good use of resources to initiate
26 arbitration where the outcome was dependent upon another court case." (Tr., p.179, lns.20-22).

1 parties have now resolved that issue. (Tr., p.358, ln.23 – p.359, ln.1; p.410, lns.5-19). The
2 remaining issue is the method(s) by which Qwest will provide notice.

3 AZDT wants the notice to be sent by certified mail, rather than by email alone, to make
4 sure it is aware of any copper loop replacements. As Mr. Bade explained, he receives a lot of
5 emails from Qwest, and in the past, he has not received emails that Qwest has sent. (Tr., p.358,
6 lns.9-17; p.363, lns.10-24). As Mr. Bade further explained, the copper loop replacements will
7 affect AZDT's customers, so he wants to be sure he has adequate notice. (Id.). Thus, the issue
8 for AZDT is the reliability of email, or, more precisely, the lack thereof. (Tr., p.410, lns.18-22).
9 For its part, Qwest objects to providing notice by certified mail because "it's not a requirement of
10 the FCC that we provide certified mail" and "it's additional work for Qwest" (Tr., p.122,
11 lns.6-10). Given the obvious importance of notice in question, AZDT submits that the issue
12 should be resolved in a manner that best ensures that the notice is actually received, not in the
13 manner that is easiest and least expensive for Qwest. Accordingly, AZDT requests that the
14 ultimate form of TRRO amendment require Qwest to provide AZDT with notice of copper loop
15 replacements by certified mail, in addition to email.

16 IV. CONCLUSION

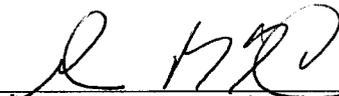
17 For all the foregoing reasons, AZDT requests that this Commission: (1) deny Qwest's
18 backbilling claims in their entirety, and (2) order the parties to execute a form of TRRO
19 amendment which contains no backbilling language and which obligates AZDT to pay Qwest's
20 resale rate for local circuit switching services only from the date of execution of the TRRO
21 amendment forward.

22 In the alternative, if this Commission allows Qwest to backbill AZDT for the plus \$1 rate
23 for the transition year, AZDT submits that backbilling must be limited to the transition year only
24 because AZDT never agreed to any backbilling and the TRRO provides no legal authority
25 whatsoever for backbilling after the end of the transition year.

1 Finally, to the extent that this Commission takes the parties' conduct into account in
2 resolving the post-transition year backbilling issues (which AZDT submits is unnecessary because
3 there is no legal authority for post-transition year backbilling), AZDT submits that Qwest should
4 be barred from backbilling due to its conduct, namely: (1) continuing to provide UNE-P services
5 (including new UNE-P order) at UNE-P pricing long after the TRRO allowed it to discontinue
6 doing so; (2) taking inflexible negotiating positions that precluded any truly negotiated form of
7 TRRO amendment, thus necessitating this arbitration; and (3) failing to take advantage of multiple
8 opportunities to resolve the issues sooner, which would have dramatically reduced the backbilling
9 liability at issue.²⁸

10 **RESPECTFULLY SUBMITTED** this 20th day of May, 2008.

11 **CHEIFETZ IANNITELLI MARCOLINI, P.C.**

12
13 By 

14 Claudio E. Iannitelli, Esq.
15 Glenn B. Hotchkiss, Esq.
16 Matthew A. Klopp, Esq.
17 Attorneys for Arizona Dialtone, Inc.
18
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20
21

22 ²⁸ AZDT attaches hereto as Exhibit A its May 14, 2008 Response to Qwest's Application for Rehearing,
23 Reargument or Reconsideration of the Colorado Public Utilities Commission's April 16, 2008 Initial Commission
24 Decision (the "Application"), in rebuttal to Qwest's previous filing of the Application with this Commission. In
25 the interests of full disclosure, Qwest has filed a Motion to Strike AZDT's Response on the basis that there is no
26 authority to file it under the applicable Colorado rules. AZDT will respond to Qwest's Motion to Strike in due
course. For now it suffices to say that: (1) AZDT has not yet filed its appeal from the Colorado decision, and
therefore cannot file that appeal with this Commission, because Qwest's filing of the Application precludes an
appeal until the Application has been ruled upon, and (2) if this Commission is going to consider the Application,
in fairness, it must consider the Response as well.

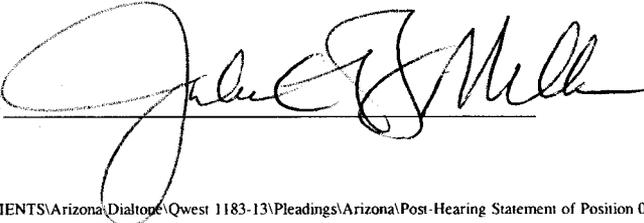
1 ORIGINAL and 13 copies of the foregoing
hand-delivered this 20 day of May, 2008, to:

2 Docket Control
3 ARIZONA CORPORATION COMMISSION
4 1200 West Washington Street
Phoenix, AZ 85007

5 COPY of the foregoing mailed
this 20 day of May, 2008, to:

6 Norman G. Curtright, Esq.
7 Qwest Corporation
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13
14 By: 

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Exhibit *A*

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**

**ARIZONA DIALTONE, INC.'S RESPONSE TO QWEST CORPORATION'S
APPLICATION FOR REHEARING, REARGUMENT OR RECONSIDERATION OF
DECISION NO. C08-0414**

Arizona Dialtone, Inc. ("AZDT"), hereby responds to the Application for Rehearing, Reargument or Reconsideration of Decision No. C08-0414 (hereinafter, the "Motion") filed by Petitioner, Qwest Corporation ("Qwest"). This Response is supported by the attached Memorandum of Points and Authorities, which is incorporated by reference herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Qwest's Motion is flawed and must be denied for two reasons: (1) contrary to Qwest's contentions, this Commission did not set rates in allowing Qwest to backbill the "plus \$1" rate from the end of the TRRO-mandated transition year to July 19, 2007, but rather, resolved the backbilling issues raised by Qwest's Petition for Arbitration based on what it deemed fair and reasonable in light of the record evidence; and (2) Qwest's remaining arguments merely repeat the same arguments Qwest already has made, and which the Commission already has considered in rendering its Initial Commission Decision dated April 16, 2008 (the "Decision"), such that Qwest's request that this Commission reweigh the evidence and reach a different result is without merit. In addition, Qwest's continuing negative rhetoric toward AZDT, as well as its veiled threats should the Decision be upheld, are inappropriate and do not support reconsideration in any event. For all these reasons, AZDT respectfully submits that Qwest's Motion should be denied in its entirety.

II. LEGAL ARGUMENT

A. The Commission Did Not Impermissibly Set Rates in Resolving the Backbilling Issues Presented by Qwest's Petition for Arbitration

In Section I of the Motion, Qwest first argues that as a matter of law, this Commission's Decision allowing Qwest to backbill AZDT for the "plus \$1" rate from March 10, 2006 to July 19, 2007 violates the Telecommunications Act of 1996 (the "Act") because it "sets rates for network elements (unbundled switching) that Qwest is no longer required to provide under Section 251(c)(3) during that time period." (Motion, p.4). According to Qwest, the effect of the Decision is to "set the rates for ... Section 271 switching elements in an ICA arbitrated under Section 252." (*Id.*). Qwest's claim that this Commission is "setting rates" by allowing Qwest to backbill at the "plus \$1" rate for a portion of the post-transition year period is a complete fiction. This Commission did not "set rates" at all, but rather, decided whether, based on the relevant facts, Qwest should be allowed to backbill AZDT beyond the end of the transition year established by the TRRO.

In its Petition for Arbitration, Qwest asked this Commission to rule on its request for backbilling both during the transition year and for the post-transition year period. (Petition for Arbitration, ¶20, Issue 4). Now that the Commission has done so in a fashion that gives Qwest some, but not all, of the backbilling relief it seeks, Qwest accuses the Commission of impermissibly setting rates in a § 252 arbitration. Thus, Qwest sets up a false dichotomy – either the Commission must award Qwest all of the backbilling relief it seeks, or the Commission is engaging in improper rate-setting. The Commission should summarily reject Qwest's argument as a blatant mischaracterization of the Commission's function in this arbitration proceeding.

In making its rate-setting argument, Qwest relies heavily on the decision of the United States District Court in Qwest Corporation v. Arizona Corporation Commission, 496 F.Supp.2d 1069 (D. Ariz. 2007) ("Covad"), which involved an appeal by Qwest of a decision made by the Arizona Corporation Commission ("ACC") in favor of Covad Communications,

Inc. As a preliminary matter, the Covad case governed the issues between Qwest and Covad (and by extension, the issues between Qwest and AZDT) in Arizona, not Colorado. In other words, the Covad case has no controlling effect on this Commission's determination.

Moreover, Qwest's reliance on the District Court's decision in Covad to support its rate-setting argument is misplaced in any event. The key holdings in the Covad decision are: (1) the ACC could not impose § 271 unbundling requirements into an ICA being arbitrated pursuant to § 252; (2) the ACC could not require Qwest to provide network elements on an unbundled basis under § 251 where the FCC already had ruled that those elements need not be provided on an unbundled basis; and (3) the ACC could not mandate TELRIC pricing for unbundled elements under § 271. Covad, 496 F.Supp.2d at 1077-79. Nowhere did the District Court address a backbilling issue under the TRRO. Indeed, the words "backbilling" and "true-up" do not even appear in the decision. Thus, while the ACC may have engaged in improper rate-setting in the Covad case, that fact does not support Qwest's argument in this case because determining an entitlement to backbilling under TRRO § 228 on the one hand, and setting a rate for unbundled network elements on the other hand, are not one and the same thing as Qwest would have this Commission believe.¹

For this same reason, the other cases Qwest cites at pages 7-8 of its Motion are not on point. None of those cases are backbilling cases. Instead, they stand for the proposition that a state commission cannot set rates for § 271 elements because that is a function reserved for the FCC.² This is a proposition of law which AZDT does not dispute, but once again, resolving

¹ Qwest's reliance on the District Court's decision in Covad also is questionable because that decision has been appealed to the Ninth Circuit Court of Appeals. The status of the appeal is that the parties recently completed briefing and are awaiting oral argument.

² See, e.g., Verizon New England, Inc. v. Maine Public Utilities Comm'n, 509 P.3d 1, 12 (1st Cir. 2007) (§ 271 does not allow state commissions to require RBOC to provide network elements at TELRIC pricing as a condition of RBOC's entry into long distance market); Illinois Bell Telephone Co. v. Hurley, 2008 WL 239149, slip op. at p.23 (N.D. Ill. January 28, 2008) (state statutes purporting to allow Illinois Commerce Commission to determine which network elements must be provided on unbundled basis and to set rates for such services are preempted by the Telecommunications Act of 1996); Michigan Bell Telephone Co. v. Lark, 2007 WL 2868633, slip op. at p.6 (E.D. Mich. September 26, 2007) (state

the backbilling issues presented by Qwest and setting rates are two completely different functions.

As the record in this matter reflects:

- Qwest claimed entitlement under the TRRO to backbill AZDT for the post-transition year period at the difference between the UNE-P rate it billed and AZDT paid and its resale rate;
- AZDT argued that the TRRO provided no authority for backbilling after the end of the transition year, and also that Qwest could not backbill AZDT in any event due to the fact that it billed AZDT and accepted AZDT's payments at the UNE-P rate knowing fully well that AZDT objected to and refused to pay Qwest's resale rate; and
- The Commission chose a middle ground result, apparently based on the equities of the case, allowing Qwest to backbill AZDT for the period from March 10, 2006 to July 19, 2007, but only at the "plus \$1" rate rather than Qwest's resale rate.

AZDT respectfully suggests that in reaching this middle ground result, the Commission did not set a rate, but rather, evaluated the parties' conduct in light of the requirements of the TRRO and resolved the backbilling issues accordingly. As a result, Qwest's rate-setting argument, which posits that the Commission had no authority to allow any form of backbilling except that demanded by Qwest, is without any merit and must be rejected.

B. Qwest's Argument That Backbilling for the "Plus \$1" Rate from March 10, 2006 to July 19, 2007 Is Unjust and Unwarranted Would Require This Commission to Reweigh the Evidence

1. Qwest's Motion Asks the Commission to Reweigh the Evidence

Qwest next argues that the portion of the Decision allowing Qwest to backbill AZDT at the "plus \$1 rate, rather than at Qwest's resale rate, from March 10, 2006 to July 19, 2007 is "unjust and unwarranted" because it is premised on a factual finding that Qwest was partially at fault in the TRRO amendment negotiations. (Motion, p.9). That argument fails for the simple reason that Qwest is asking this Commission to reweigh the very same evidence the

commission does not have authority to require parties to include § 271 terms and conditions in their ICA); BellSouth Telecommunications, Inc. v. Kentucky Public Service Comm'n, 2007 WL 2736544, slip op. at p.7 (E.D.Ky. September 18, 2007) (state commission had no authority under § 271 to order that ILEC continue providing switching and transport elements at TELRIC pricing).

Commission already has fully considered in rendering its Decision and reach a different result, which is the paradigm of an unsuccessful motion for reconsideration.

First, there can be no doubt that Qwest is asking the Commission to reweigh the evidence, as proven by the fact that Qwest frames its arguments in terms of what “the evidence” shows. For example, Qwest argues:

[T]he evidence showed that although Qwest was ultimately unsuccessful in negotiations due to AZDT’s clear foot-dragging and bad faith negotiation tactics, Qwest certainly negotiated in good faith through the relevant time period, and it was solely AZDT who failed to negotiate in good faith and who frustrated Qwest’s efforts. The evidence further showed Qwest’s actions (or inactions) throughout this time period did not demonstrate bad faith, but to the contrary, showed good faith in attempting to work with AZDT to try to resolve the ICA issues with AZDT.

(Motion, pp.9-10) (emphasis added). As the emphasized language clearly shows, Qwest takes issue with how the Commission weighed the evidence and the factual findings the Commission made based on that evidence.

The Decision itself makes clear that the Commission considered in the first instance each and every factual argument Qwest now repeats in its Motion. The Commission first made detailed findings of fact regarding the history of the parties’ TRRO amendment negotiations. (Decision, ¶¶16-32). The Commission then noted at great length the parties’ differing positions on these facts. (Decision, ¶¶33-54). On the basis of these findings, and in light of the parties’ respective positions, the Commission made the core finding of fact 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.” (Decision, ¶55). For purposes of this Response only, AZDT submits that there is sufficient evidence to support this core finding that both parties were at fault in the TRRO amendment negotiations, such that Qwest’s position that it acted in good faith, while AZDT acted in bad faith, is contradicted by the record evidence. The Commission need go no further to reject Qwest’s arguments that ask the Commission to reweigh the evidence and reach a different result.

2. Qwest's Motion Repeats Fact-Specific Arguments This Commission Already Has Rejected in Making Detailed Findings of Fact

In Section II of its Motion at pages 9-22, Qwest makes a number of fact-specific arguments regarding how this Commission should interpret Qwest's various actions and inactions in the course of the TRRO amendment negotiations. It suffices to say that Qwest made each and every one of these arguments in its Post-Hearing Statement of Position, which means that the Commission already has considered these same arguments in rendering the Decision. Accordingly, AZDT will address these arguments only so far as necessary to demonstrate that they are contradicted by the Commission's factual findings.

First, Qwest argues that its failure to provide notice of termination of the parties' ICA demonstrates its good faith, and that it should not be punished for adhering to the terms of the parties' contract. (Motion, pp.10-13). The Commission found that the initial term of the ICA had expired, that Qwest had stated in an email that the ICA was effective only on a month-to-month basis, that either party had a contractual right to provide 160 days' written notice of termination, and that neither party did so. (Decision, ¶17 & n.7, ¶20). Based on these factual findings, the Commission found that Qwest could have chosen to terminate the parties' ICA, but instead, continued to process UNE-P orders and bill at UNE-P rates. (Decision, ¶59). Thus, the relevant point, which the Commission clearly understood, is that Qwest could have brought the billing dispute to a head sooner by providing notice of termination of the ICA, and that by failing to do so, Qwest was partially at fault for the ongoing impasse over the rates to be paid by AZDT for switching services.³ Thus, Qwest's insistence in characterizing its failure to provide notice of termination of the ICA as an act of good faith misses the point.

³ Qwest concedes that it "could have legally filed this arbitration proceeding earlier than it did in December 2007," but claims that even had it done so, the Commission still would not have issued its order regarding the form of TRRO amendment until "well after March 2006." (Motion, p.13, n.4). Qwest's excuses aside, it is clear that had Qwest timely invoked arbitration once it realized the parties were, in the words of the Commission, "at loggerheads" regarding the rate AZDT would pay for switching services, this arbitration would have occurred as much as two years sooner and the amounts Qwest would be seeking by way of backbilling would have been substantially less.

In a related argument, Qwest claims the Commission also is punishing Qwest for agreeing to await the decision in Covad rather than either: (1) continuing to negotiate a TRRO amendment, or (2) providing notice of termination of the ICA, while the Covad case was on appeal to the District Court in Phoenix. (Motion, pp.11-12 & n.3). According to Qwest, it would have been “futile” either to continue negotiating or to provide notice of termination because that would have resulted in litigation before this Commission of the same issues being litigated in the Covad case. (Motion, p.12 & n.3). On this issue, the Commission found that although it initially rejected AZDT’s suggestion that the parties suspend TRRO amendment negotiations pending the District Court ruling in Covad, Qwest effectively adopted that suggestion by continuing to provide UNE-P services at the UNE-P rate and allowing a previously invoked dispute resolution procedure to close without initiating an arbitration action, with the net result being that there were no TRRO amendment negotiations for the 13-month period between June 2006 and July 2007. (Decision, ¶¶24, 30). In making these findings, the Commission is not “punishing” Qwest, it is simply (and quite correctly) making the point that Qwest’s acquiescence in the 13-month hiatus in negotiations must be taken into account in ruling on the backbilling issues.

Second, Qwest argues that its continuing provision of UNE-P services to AZDT at UNE-P rates demonstrates its good faith because Qwest gave AZDT “the benefit of the doubt” by continuing to honor the parties’ ICA. (Motion, pp.13-14). In support, Qwest quotes paragraph 227 and footnote 630 of the TRRO. (Motion, p.14). However, neither of those provisions state or even suggest that Qwest was required to continue providing UNE-P services at UNE-P rates after the end of the transition year. In fact, Qwest was not obligated by the ICA to continue providing UNE-P pricing because, as Qwest concedes, the ICA already contained a provision for resale services. (Motion, p.12). Moreover, given that Qwest has repeatedly accused AZDT of violating the TRRO by not converting to an alternative arrangement within the transition year, it is simply not credible for Qwest to now claim that it was giving AZDT the “benefit of the doubt” in continuing to provide UNE-P services despite

AZDT's failure to transition its embedded base of customers. Finally, Qwest's claim that the Decision allows AZDT to "profit" from its negotiating strategy is truly ludicrous. As the Commission found, both during the transition year and thereafter, Qwest took non-negotiable positions regarding the services and rates it would offer AZDT (Decision, ¶56), which left AZDT with the Hobson's choice of agreeing to Qwest's form of TRRO amendment and being driven out of business due to the crushing backbilling liability or refusing to sign Qwest's non-negotiable form of TRRO amendment. Simply put, the issue for AZDT was survival, not profit.

In related arguments, Qwest claims that the fact that it billed AZDT at the UNE-P rate and accepted AZDT's payments at that rate, also demonstrate that it acted in good faith. (Motion, pp.14-15). As the Commission found, the billing history is not in dispute – "[f]rom the effective date of the TRRO to the present, Qwest ... continued to provide 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." (Decision, ¶55). Faced with this course of conduct, Qwest now attempts to recast itself as a benevolent negotiator that gave AZDT "the benefit of the doubt." In fact, as noted above, the truth (as found by this Commission) is that Qwest took inflexible, "take it or leave it" negotiating positions regarding the services and rates it offered AZDT, which is inconsistent with the TRRO-imposed obligation to negotiate in good faith.⁴ In addition, while Qwest once again claims that it is being punished for having negotiated in good faith, the reality is that the Commission simply is

⁴ Qwest takes issue with AZDT's "take it or leave it" characterization of Qwest's inflexible negotiating strategy, claiming that such characterizations "have no legal significance" and are "inappropriate attempts to appeal to emotion and to engender sympathy." (Motion, p.19, n.12). In fact, such characterizations are simply a shorthand way of stating that Qwest refused to negotiate in good faith, a fact that this Commission has found to be true and which is of critical legal significance.

holding Qwest responsible for its inflexible negotiating strategy, coupled with its choice to continue billing at the UNE-P rate and accepting AZDT's payments at that rate.⁵

Third, Qwest contends that it showed good faith by continuing to accept new UNE-P service orders after the effective date of the TRRO and until May 2007 when intervening court decisions supposedly made clear that ILECs no longer had an obligation to accept new UNE-P service orders.⁶ (Motion, pp.16-17). Once again, the facts as found by this Commission belie Qwest's contention, namely, that the TRRO barred new UNE-P service orders during the transition year, but that Qwest advised AZDT in March 2005 that it would continue accepting such orders and, in fact, did continue to process new UNE-P orders which it billed at the UNE-P rate. (Decision, ¶¶13, 18, 59). Moreover, Qwest's contention that the self-executing nature of the prohibition on new UNE-P orders was not clear until sometime in 2007 ignores the unequivocal language of the TRRO amendment - "This transition period ... does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3)" TRRO, ¶227. Thus, as the Commission understood, Qwest continued accepting new UNE-P service orders despite that fact that under the TRRO it had no obligation to do so, which not only sent AZDT mixed signals, but also exacerbated the ultimate backbilling issues.

Fourth, Qwest argues that it had no obligation to offer any other rates than those actually offered to AZDT, and that these rates were the only rates the parties could have lawfully agreed to for alternative services. (Motion, pp.17-19). Qwest further argues that the finding of fact that Qwest's refusal to negotiate on rates evidences its lack of good faith is "just

⁵ Qwest also argues that its "benefit of the doubt" negotiating strategy was an attempt to avoid burdening this Commission with an "unnecessary arbitration" of issues that the parties should have been able to negotiate themselves. (Motion, p.16). This argument might have some merit if Qwest had demonstrated any flexibility in the TRRO amendment negotiations, but as noted above, Qwest never would negotiate either the switching service or the rate it offered to AZDT.

⁶ Once again, Qwest resorts to rhetoric in attacking the Commission's findings of fact. See e.g., Motion, p.16 ("the Commission should not punish Qwest by allowing a foot-dragging CLEC to be rewarded monetarily because of its successful bad faith negotiations tactics").

plain wrong.” (Motion, p.17). In support, Qwest cites its QPP product as an “alternative arrangement” which it offered AZDT, and notes that TRRO footnote 633 mentions QPP. Once again, however, Qwest ignores the Commission’s pertinent findings of fact, which are: (1) the TRRO expressly authorized ILECs and CLECs to negotiate “alternative arrangements” superceding the default rate prescribed by TRRO § 228;⁷ (2) AZDT told Qwest at the very beginning of the transition year in March 2005 that the QPP rate for a Public Access Line (“PAL”) provider like AZDT should be lower than the business rate and in line with the residential rate; and (3) the only “alternative arrangement” Qwest offered AZDT was QPP (which was not designed for a PAL reseller like AZDT) even though AZDT had advised Qwest that it could not pay the QPP rate. (Decision, ¶¶14-15, 19, 31). What these findings make clear is that: (1) QPP was not the only possible “alternative arrangement,” (2) AZDT repeatedly asked Qwest for a PAL-specific alternative arrangement at a just and reasonable market-based rate, and (3) Qwest could have chosen to offer a different arrangement or rate tailored to AZDT’s PAL business, but chose not to do so, and instead, offered AZDT only the “one size fits all” QPP product that AZDT already had told Qwest was not viable for AZDT.⁸ Qwest confirms its “we only did what we had to” negotiating strategy by stating that it had no obligation to offer any rate other than the resale rate or QPP rate.⁹ (Motion, p.19).

⁷ Qwest’s claim that TRRO ¶228 authorized an alternative service arrangement, not an alternative to the “plus \$1” transition rate” (Motion, p.18), is contradicted by the fact that the “transition mechanism” which TRRO § 228 said could be superseded consists of: (1) the transition year to convert the CLEC’s embedded customer base, and (2) the “plus \$1” transition rate as a default in the absence of an agreement on an “alternative arrangement.” TRRO § 228. In addition, had AZDT accepted Qwest’s QPP product, that service would have been billed at a different (and higher) rate than the “plus \$1” transition rate in any event.

⁸ By flatly refusing to provide any sort of PAL-specific arrangement or rate, Qwest discriminated against AZDT and the other Colorado-based PAL resellers.

⁹ Qwest’s statement that AZDT had the option of purchasing switching services from other carriers (Motion, p.18, n.11), is refuted by the Commission’s findings that AZDT did, in fact, migrate approximately two-thirds of its customers to other carriers as soon as practically possible, and that AZDT has been unable to migrate the remaining one-third of its customer base because there are no alternative

Qwest also is wrong in arguing that it could not offer any different rate to AZDT than rates it offered other CLECs without violating its duty to discriminate against one carrier in favor of another carrier. Qwest was aware before the TRRO ever became effective that AZDT's primary line of business was resale of PALs, not commercial or residential lines, and, as the Commission found, from the outset of the TRRO amendment negotiations, AZDT sought to have PAL lines priced at or near the lower residential rate rather than the higher commercial rate. (Decision, ¶¶19-20). The PAL-specific nature of AZDT's business is critical because it means that Qwest would not have been discriminating against other CLECs by offering AZDT an alternative arrangement or rate that took into account AZDT's status as a PAL reseller so long as other PAL resellers received the same rate. Nonetheless, it is undisputed that Qwest refused to take the PAL nature of AZDT's business into account, and instead, only offered AZDT the same alternative arrangement -- QPP -- that AZDT had already told Qwest would not work for its PAL reseller business. As a result, Qwest's characterization of the rates that it could have offered to AZDT as a "question of law" which the Commission got "wrong" is incorrect.

Finally, Qwest argues that its failure to terminate the ICA, follow through with dispute resolution, or initiate arbitration sooner is evidence of its good faith, and that "the failure to reach agreement was solely at the hands of AZDT." (Motion, pp.20-22). Once again, Qwest is simply rearguing the facts already found against it. AZDT already has addressed Qwest's failure to provide notice of termination of the ICA above, so it will not repeat that analysis here. With respect to dispute resolution, the Commission found that Qwest initiated a dispute resolution procedure in March 1, 2006, but subsequently allowed it to lapse without allowing it to ripen into an arbitration proceeding. (Decision, ¶¶21, 24). Qwest now argues that it would have been futile to continue to negotiate regarding a TRRO amendment because the ACC's Covad decision in effect between June 2006 and July 2007 required Qwest to provide

carriers from whom AZDT can purchase PALs for resale in certain areas. (Decision, ¶32). Qwest did not introduce any contradictory evidence on this point, so AZDT's testimony stands unrefuted.

switching services on an unbundled basis at TELRIC pricing pursuant to § 271 of the Act. (Motion, pp.20-21). In other words, what Qwest is saying is that it chose not to negotiate in the face of an unfavorable decision from the ACC. Having made that strategic choice, however, Qwest cannot now avoid responsibility for it. In addition, Qwest never explains why the ACC's decision in Covad prohibited it from moving forward with dispute resolution in Colorado. In fact, Qwest could have done so.

With respect to arbitration, the Commission found that Qwest did not allow its March 1, 2006 invocation of dispute resolution pursuant to the parties' ICA to ripen into an arbitration, and also that Qwest did not request arbitration of this matter until July 2007 after the District Court decision in the Covad case had been issued. (Decision, ¶¶24, 28-30). Qwest now argues that in light of the ACC's decision in Covad, arbitration would have been futile (Decision, p.21), which argument already has been addressed above. Qwest also argues that it began the § 252 negotiation process just two days after the Covad decision was issued (Decision p.21), but the salient point here is not that Qwest waited too long after the decision was issued, but rather, that it chose to forego arbitration while the decision was pending. Finally, Qwest argues that based on a form of TRRO amendment provided by AZDT, it was led to believe that if the ACC's Covad decision was overturned, AZDT would agree to Qwest's backbilling language. (Decision, p.21). However, the Commission clearly rejected this last argument, finding that the parties agreed to disregard AZDT's May 18, 2006 draft TRRO amendment and start over with negotiations after the Covad decision was issued. (Decision, ¶23).

The common denominator with respect to Qwest's failure to provide notice of termination of the ICA, failure to follow through with dispute resolution, and failure to initiate arbitration sooner is that Qwest had options which, had Qwest exercised them, would have brought the parties' negotiating impasse to a head much sooner. Thus, the point is not that Qwest's failures evidence its lack of good faith, but rather, that Qwest made strategic choices (such as not to negotiate in the face of the unfavorable ACC decision in Covad) for which it is

accountable. The implications are twofold: (1) Qwest cannot simply blame AZDT and absolve itself for the unsuccessful three-year TRRO amendment negotiations as it has repeatedly tried to do, and (2) Qwest should not be able to recover by way of backbilling for periods of time when Qwest itself chose to forego options for accelerating a decision on the backbilling issues. The Commission's middle ground result appropriately acknowledge these implications.

C. Qwest's Argument That AZDT Failed to Negotiate in Good Faith Already Has Been Accepted in Part by This Commission

In Section III of its Motion, Qwest reargues what it believes to be AZDT's bad faith negotiating strategy. This is a curious and pointless argument for Qwest to make given that the Commission quite obviously found both Qwest and AZDT at fault for the parties' unsuccessful TRRO amendment negotiations. (See, e.g., Decision, ¶55 ("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)(3) of the Act.")). Further, it is apparent that this Commission already has taken into account AZDT's fault in rendering its decision because it allowed backbilling at the "plus \$1" rate from March 10, 2006 through July 19, 2007 and backbilling at the resale rate thereafter. (Decision, ¶61). Had the Commission not factored in its findings that AZDT was at fault, it presumably would not have allowed any backbilling after the end of the transition year.

One point that Qwest makes in this section of its Motion requires a specific response – that AZDT's willingness to agree to Qwest's resale rate on a prospective basis is a concession that the resale rate was appropriate all along. (Motion, p.22). Qwest's argument ignores that AZDT has migrated two-thirds of its customers to other carriers, a fact that the Commission found to be true, and which Qwest failed to refute. (Decision, ¶32). The impact of that migration of customers is that while AZDT could not have borne the Qwest's wholesale rate (i.e., the resale rate) for 100% of its customer base,¹⁰ it now can bear that rate for the

¹⁰ AZDT's inability to pay Qwest's wholesale rate for its entire customer base is exacerbated by the fact that the Qwest's wholesale rate is the same as the retail rate at which Qwest sells PALs directly to

remaining one-third of its customers serviced by Qwest-supplied lines. Moreover, as Qwest is aware, and as the Commission found, there is no alternative carrier in the areas where these remaining customers are located. (Decision, ¶32). Therefore, AZDT's only alternative to agreeing to Qwest's resale rate on a going forward basis is to not service these customers at all, a decision which AZDT wishes to avoid, if possible. For these reasons, the fact that AZDT will agree to Qwest's resale rate on a prospective basis is not a concession that AZDT's prior negotiating positions were taken in bad faith.

D. Qwest's Public Policy Arguments Are Misguided

In Section IV of the Motion, Qwest repeats certain policy arguments already made in its Post-Hearing Statement of Position, which this Commission presumably already has considered in rendering its Decision. First, Qwest argues that the Decision rewards AZDT for its alleged bad behavior by providing it a "two-thirds victory." (Motion, p.23). The problem with this argument, aside from the fact that it ignores the Commission's core finding that both parties were at fault, is that it is based on the faulty premise that Qwest otherwise would have been entitled to all of the backbilling it seeks. That is not the case, however, because as AZDT contended, there is no legal authority under the TRRO for any backbilling after the end of the transition year (which the Commission did not dispute in its Decision).

Second, Qwest posits that if the Decision is left intact, that "could well forever change the willingness of other CLECs in Colorado ... to negotiate in good faith in order to amend their ICAs to comply with changes in law that are in Qwest's favor." (Motion, p.23). As noted above, this is a transparent scare tactic without any record evidence to support it. In addition, Qwest ignores the fact that the Decision is so specific to the unique facts of this case that it will have little, if any, value as precedent in future Commission proceedings.

payphone providers due to the fact that the resale discount for avoided costs in Colorado is zero. This is true even though the 1996 Act requires state commissions to determine the wholesale rate by "excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." 47 U.S.C. § 252(d)(3).

Third, Qwest repeats its implied threat that if the Decision stands, “Qwest will now feel compelled to unilaterally and immediately begin billing rate changes, to transition services to other Qwest alternatives, or to disconnect services, in order to avoid financial losses” (Motion, p.24). Once again, if, as Qwest has repeatedly claimed, AZDT is unique among all of the CLECs in Qwest’s 14-state territory, there is no reason for Qwest to change its procedures for dealing with other CLECs on the basis of its dealings with AZDT. For the same reason, the result in this case does not threaten to unleash a torrent of Commission proceedings as Qwest implies. (Motion, p.24).

Fourth, Qwest argues that the Decision essentially rewards AZDT for not transitioning its customers to alternative services within the one-year transition period as required by the TRRO. (Motion, pp.24-25). Of course, this argument ignores the fact that Qwest never offered AZDT a rate that have would have allowed AZDT to avoid a crushing backbilling liability and thereby stay in business. In addition, it is clear that the Commission has taken into account AZDT’s failure to convert its customer during the transition year by allowing backbilling beyond the transition year. Therefore, the Commission has not “rewarded” AZDT at all, but rather, has balanced the equities in the manner it deems appropriate. That delicate balancing is a subject uniquely unsuitable for a motion for reconsideration.

E. AZDT’s Planned Appeal Is Irrelevant to the Issue of Reconsideration

Finally, in Section V of its Motion, Qwest notes that AZDT has indicated that it plans to appeal the Decision. AZDT has not filed a motion for reconsideration because it is obvious that the Decision was carefully and thoroughly considered in the first instance, which means that a motion for reconsideration would insult this Commission’s efforts. That is why AZDT intends to proceed straight to appeal once Qwest’s Motion is adjudicated. The basis for the anticipated appeal is that there is no legal authority for any backbilling after the end of the transition year because: (1) the TRRO does not authorize any backbilling after March 10, 2006; (2) AZDT never agreed to any backbilling; and (3) Qwest continued to provide UNE-P services, continued to bill those services at the UNE-P rate, and continued to accept AZDT’s

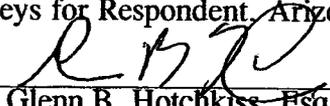
payments at the UNE-P rate despite knowing that the parties were at an impasse on the rate/backbilling issues.¹¹ The fact that AZDT plans to appeal on that basis, however, has no relevance whatsoever to the issues raised by Qwest's Motion. Instead, it appears that in mentioning AZDT's planned appeal, Qwest is attempting to prejudice the Commission against AZDT, especially because Qwest mischaracterizes AZDT's planned exercise of its right of appeal as "just another attempt by AZDT to delay compliance with the Decision" (Motion, p.25). Qwest is confident that this Commission will disregard AZDT's planned appeal in ruling on the Motion, and instead, will restrict its consideration to the evidence offered and admitted at the March 5, 2008 arbitration hearing.¹²

III. CONCLUSION

For all the foregoing reasons, AZDT requests that this Commission deny Qwest's Motion in its entirety.

DATED this 4th day of May, 2008.

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¹¹ As the record will reflect, the recommendation of Commission Staff was to not allow any backbilling after the end of the transition year, so presumably Staff agreed with AZDT's arguments on this point.

¹² Qwest also points out that AZDT recently notified Qwest that it disagrees with Qwest's calculations of the amounts AZDT would owe under the Decision. (Motion, p.25). What Qwest does not tell this Commission is that it was AZDT who first requested this calculation from Qwest, and that AZDT subsequently provided Qwest with its own calculations. If AZDT were merely seeking to delay paying the amounts owed pursuant to the Decision as Qwest suggests, it quite obviously would not proactively initiate a discussion regarding the parties' respective calculations of the amounts due.

CERTIFICATE OF SERVICE

COPY of the foregoing transmitted by facsimile
this 14 day of May, 2008, to:

COLORADO PUBLIC UTILITIES COMMISSION
1560 Broadway, Suite 250
Denver, CO 80203

ORIGINAL and 7 copies of the foregoing
sent overnight delivery via FedEx this 14 day of May, 2008, to:

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