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BEFORE THE ARIZONA CORPORATION COMMISSION

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

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AZ CORP COMMISSION  
DOCKET CONTROL

Arizona Corporation Commission  
**DOCKETED**  
MAY 20 2008

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**IN THE MATTER OF QWEST CORPORATION'S PETITION FOR ARBITRATION AND APPROVAL OF AMENDMENT TO INTERCONNECTION AGREEMENT WITH ARIZONA DIALTONE, INC. PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996 AND APPLICABLE STATE LAWS**

**DOCKET NO. T-01051B-07-0693  
T-03608A-07-0693**

**QWEST CORPORATION'S  
CLOSING BRIEF**

Pursuant to the order of the Administrative Law Judge in this arbitration, Qwest Corporation ("Qwest") submits its Closing Brief.

**INTRODUCTION AND SUMMARY OF POSITION**

In this arbitration the Arizona Corporation Commission ("Commission") serving as arbitrator under Section 252 of the Communications Act of 1934, as amended, must adopt Qwest's recommended language, to fulfill the requirements of federal law. By adopting Qwest's language, the Commission gives effect to the national telecommunications policy declared by the Federal Communications Commission ("FCC") over three years ago in the *Triennial Review Order* ("TRO")<sup>1</sup> and the *Triennial Review Remand Order* ("TRRO")<sup>2</sup> decisions issued by the

<sup>1</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local*

1 Federal Communications Commission ("FCC"). The Commission will also send a clear message  
2 that when it comes to implementing changes in the law, gamesmanship and delaying tactics will  
3 not be tolerated.

4 This arbitration stems from a dispute between Qwest and Arizona Dialtone primarily over  
5 the implementation of the FCC's decision to bar the unbundling of mass market switching  
6 services, including UNE-P, under Section 251 of the Act. Qwest has tried to resolve this dispute  
7 by amending the parties' interconnection agreement ("ICA") in accordance with the change in  
8 law provisions, or through discussions, as Qwest has done successfully with every other CLEC  
9 in the State of Arizona and in the thirteen other states in which Qwest serves as an ILEC.  
10 However, contrary to the parties' interconnection agreement and the *TRRO*, Arizona Dialtone  
11 has refused to transition from UNE-P services to alternative services, and refused to pay Qwest  
12 the rates legally prescribed for the transition period, or the rates Qwest is permitted to charge for  
13 alternative services arrangements.

14 Despite Qwest's repeated, good faith efforts, Arizona Dialtone has (1) refused to take any  
15 actions required by the *TRRO* and (2) attempted to shift the economic consequences of the *TRRO*  
16 back onto Qwest. By that strategy Arizona Dialtone has unilaterally and unlawfully assumed an  
17 unfair advantage over CLECs that dutifully complied with the change of law, and evaded the  
18 financial consequences associated with compliance. Indeed, the end game for AZDT now is to  
19 finally accomplish the transition of its circuits off of UNE-P, but to pocket the savings for the  
20 period of noncompliance.

21  
22 *Exchange Carriers, Implementation of the Local Competition Provisions of the*  
23 *Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced*  
24 *Telecommunications Capability, Report and Order on Remand and Further Notice of*  
*Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (Triennial Review Order), corrected by*  
*Triennial Review Order Errata, 18 FCC Rcd 19020 (2003).*

25 <sup>2</sup> *In the Matter of Unbundled Access to Network Elements, Review of the Section 251*  
26 *Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand, 20 FCC Rcd*  
*2533 (2005) (Triennial Review Remand Order).*

1 AZDT raises a number of weak theories and defenses in an attempt to deflect attention  
2 from its failings and to justify its refusal to switch from UNE-P. However, AZDT's defenses are  
3 not supported by either the law or the facts. AZDT's desired outcome in this arbitration would  
4 inevitably require the Commission to order the continuation of the UNE-P rate during the  
5 transition period. Such Commission action would amount to impermissible sanctioning of  
6 continued UNE-P, and result in preferential treatment for AZDT, since AZDT is the only carrier  
7 that never transitioned off UNE-P. More fundamentally, however, such action would be beyond  
8 the Commission's authority, which since the effective date of the *TRRO* has not extended to the  
9 setting of rates for UNE-P. For that same reason, the Commission has no authority to approve or  
10 disapprove either the "plus \$1" rate ordered by the FCC for the transition period following the  
11 *TRRO*, or its applicability for purposes of true-up. Therefore, AZDT's claim that Qwest is not  
12 entitled to the transition rate for the transition period because the Commission never approved it,  
13 is incorrect.

14 AZDT's claims that Qwest had a "take it leave it" negotiation style that was not good  
15 faith. Upon examination, it is clear that AZDT's view of good faith for Qwest boils down to the  
16 notion that Qwest had a duty to provide a rate that would make AZDT business plan profitable,  
17 which assuredly is not the law. AZDT's insistence on a special rate would have required Qwest  
18 to provide AZDT services at rates that were not provided to any other CLEC, and required  
19 Qwest to violate its duty of nondiscrimination.

20 Qwest requests that the Commission enforce the *TRRO* with respect to the  
21 interconnection arrangements between Qwest and Arizona Dialtone, and order Arizona Dialtone  
22 to immediately sign the *TRRO* Amendment with Qwest's wording, which is materially the same  
23 as Qwest proffered to all CLECs in Arizona nearly three years ago, and which Arizona Dialtone  
24 has unjustifiably and wrongfully refused to sign.

25  
26

DISCUSSION

This brief is organized according the Joint Statement of Issues In Dispute filed by the parties on May 16, 2008.

ISSUE I: WHETHER THE FORM OF TRRO AMENDMENT TO BE EXECUTED BY QWEST AND AZDT SHOULD CONTAIN LANGUAGE ALLOWING QWEST TO BACK BILL AZDT FOR THE DIFFERENCE BETWEEN THE UNE-P RATE AZDT PAID FOR SWITCHING SERVICES AND THE DEFAULT "PLUS \$1" TRANSITION RATE SET FORTH IN THE TRRO AND FCC REGULATIONS, FOR THE PERIOD FROM MARCH 11, 2005 TO MARCH 10, 2006.

A. The TRRO and the Implementing Regulations Prescribe the Very Path that Qwest Followed During the Transition Period. True-Up Back Billing Is a Feature of the FCC's Transition Plan, and Should Be Ordered As Part of the ICA As a Matter of Legal Compliance.

In the TRRO, which became effective March 11, 2005,<sup>3</sup> the FCC declared that mass market switching would no longer be subject to Section 251 unbundling:

Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide.<sup>4</sup>

....  
Based on the evidence of deployment and use of circuit switches, packet switches, and softswitches, and changes in incumbent LEC hot cut processes, we determine not only that competitive LECs are not impaired in the deployment of switches, but that it is feasible for competitive LECs to use competitively deployed switches to serve mass market customers throughout the nation. Further, regardless of any potential impairment that may still exist we exercise our "at a minimum" authority and conclude that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling.<sup>5</sup>

The FCC codified its decision into the agency's rules.<sup>6</sup>

<sup>3</sup> TRRO, ¶235.

<sup>4</sup> Id. ¶199

<sup>5</sup> Id. ¶204.

<sup>6</sup> "An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications' carriers for the purpose of serving

1 The removal of mass market switching from the list of elements required to be unbundled  
2 was effective on March 11, 2005. However, the FCC provided for a transition plan to migrate  
3 the embedded base of customers to an alternative service arrangement. The FCC recognized that  
4 eliminating unbundled access to mass market switching on a flash cut basis “could substantially  
5 disrupt service to millions of mass market customers, as well as the business plans of  
6 competitors.”<sup>7</sup>

7 The directive to CLECs was unmistakably clear: “We require competitive LECs to  
8 submit the necessary orders to convert their mass market customers to an alternative service  
9 arrangement within twelve months of the effective date of this Order.”<sup>8</sup> The most essential fact  
10 in this arbitration is that AZDT never submitted any orders to convert their embedded base of  
11 customers to any other service arrangement, and therefore AZDT was, and remains, in stark  
12 violation of the *TRRO*.

13 The FCC’s requirement that the CLECs must submit orders to convert is important in this  
14 arbitration. The FCC put the burden squarely on the CLECs. The FCC went on to discuss why  
15 it was extending twelve months for the transition:

16  
17 We believe that the twelve-month period provides adequate time for both  
18 competitive LECs and incumbent LECs to perform the tasks necessary to an  
19 orderly transition, which could include deploying competitive infrastructure,  
20 negotiating alternative access arrangements, and performing loop cut overs or  
21 other conversions. Consequently carriers have twelve months from the effective  
22 date of this order to modify their interconnection agreement, including completing  
23 any change of law processes. By the end of the twelve month period, requesting  
24 carriers must transition the affected mass market local circuit switching UNEs to  
25 alternative facilities or arrangements.<sup>9</sup>

26 The FCC embodied the 12 month deadline in the agency’s regulations.<sup>10</sup>

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end-user customers using DS0 capacity loops.” 47 C.F.R. §51.319(d)(2)(i).

<sup>7</sup> *Id.*, ¶226.

<sup>8</sup> *Id.*, ¶227. (Emphasis added).

<sup>9</sup> *Id.*, ¶227. (Emphasis added).

<sup>10</sup> “Each requesting telecommunications carrier shall migrate its embedded base of end user customers off of the unbundled local circuit switching element to an alternative arrangement

1 Having declared mass market switching “non-impaired” and having determined that a  
2 twelve month transition period is necessary, the FCC also stated that during the transition period  
3 the rate should be priced at “the rate at which the requesting carrier leased UNE-P on June 15,  
4 2004 plus one dollar.”<sup>11</sup> This rate was also embodied in the FCC’s regulations:

5 (iii) Notwithstanding paragraph (d)(2)(i) of this section, for a 12 month period  
6 from the effective date of the Triennial Review Remand Order, an incumbent LEC shall  
7 provide access to local circuit switching on an unbundled basis for a requesting carrier to  
8 serve its embedded base of end-user customers. The price for unbundled local circuit  
9 switching in combination with unbundled DS0 capacity loops an shared transport  
10 obtained pursuant to this paragraph shall be the higher of: (A) the rate at which the  
11 requesting carrier obtained that combination of network elements on June 15, 2004 plus  
12 one dollar, or (B) the rate the state public utility commission establishes, if any, between  
13 June 16, 2004, and the effective date of the Triennial Review Remand Order, for that  
14 combination of network elements , plus one dollar.<sup>12</sup>

15 Then, important to this arbitration, the FCC provided:

16 UNE-P arrangements no longer subject to unbundling shall be subject to true-up  
17 to the applicable transition rate upon the amendment of the relevant  
18 interconnection agreements, including any applicable change of law processes.<sup>13</sup>

19 The transition plan laid down by the FCC is exactly the process Qwest announced to  
20 CLECs and followed. On March 4, 2005, before the effective date of the *TRRO*, Qwest sent all  
21 CLECs including AZDT a letter via email, stating the requirements of the *TRRO* and Qwest’s  
22 intentions to comply. In AZDT’s case, it was sent to Tom Bade of AZDT. (Ex. Q1, Tr. 144:  
23 14-25). The March 4, 2005 notice informed AZDT of the change of law and Qwest’s intent to  
24 negotiate an amendment to the parties’ interconnection agreement (“ICA”) reflecting the FCC’s  
25 orders. (Testimony of Larry Christensen, Tr. 14-18). That notice described Qwest’s intentions  
26 about how it would proceed to implement the *TRRO*. (*Id.*, Tr. 145: 1-8). The notice states:

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within 12 months of the effective date of the Triennial Review Remand Order.” 47 C.F.R.  
§51.319(d)(2)(ii).

<sup>11</sup> *Id.*, ¶228. The FCC stated that the applicable rate would be the higher of the “plus \$1” rate or  
such rate the state public utility commission establishes, if any, between June 16, 2004, and  
effective date of this Order. The Arizona Corporation Commission did not establish a rate  
during that period, so the “plus \$1” rate is applicable.

<sup>12</sup>47 C.F.R. §51.319(d)(2)(iii).

<sup>13</sup> *Id.*, fn. 630.

1 Prior to the effective date of a new or amended ICA incorporating the changes  
2 require by the [TRRO], the terms, conditions, and pricing of your existing ICA will  
govern. At the time your ICA Amendment is executed:

3 All existing impacted UNEs will be subject to the transition periods established in  
4 the Remand Order. ICA Amendments will include a “true up” to the FCC-mandated  
5 transitional rate (\$1.00 per port for UNE Switching, including UNE-P), retroactive to  
6 March 11, 2005. (Exhibit Q4, p. 1). (Emphasis in original).

7 Qwest’s transition plan aligned directly with the FCC’s TRRO and the implementing  
8 regulations. The “plus \$1” transition rate is the rate prescribed by the FCC, and the back billing  
9 is the true-up process prescribed by the FCC, for the transition period.

10 AZDT’s President Thomas Bade claimed at the hearing that he never received the March  
11 4, 2005 letter at the time. (Tr. 361:23-24). In the final analysis, however, if or when Mr. Bade  
12 became aware of Qwest’s intention to back bill the “plus \$1” for the transition period is not  
13 legally significant, because the TRRO orders that the true-up to the “plus \$1” applies when the  
14 parties have not agreed. Advance notice of intention to apply the default mechanism provided  
15 for by law is not necessary.

16 Regardless, AZDT cannot credibly claim that it was not aware of the true-up to the FCC  
17 mandated rate for the transitional period. AZDT’s own Exhibit A1 reflects a March 17, 2005  
18 communication from Qwest to Mr. Bade, in which Qwest’s March 4 communication is  
19 specifically brought to Mr. Bade’s attention by Mr. Christensen. (“I am sure you have seen the  
20 notice Qwest sent out March 4 indicating how Qwest would operate after March 11, the effective  
21 date of the FCC Order,” Exhibit A1, p. 3; emphasis added). On May 18, 2005, Larry  
22 Christensen wrote to Mr. Bade, “We thought the second bullet point of the March 4 letter was  
23 clear that Qwest would continue to receive orders.” (*Id.*, p. 2; emphasis added). Qwest’s witness  
24 testified that Mr. Bade responded to the March 4 communication. (Testimony of Larry  
25 Christensen, Tr. 148: 1-2). It was clear to Mr. Christensen that Mr. Bade had received the March  
26 4 notice. (Testimony of Larry Christensen Testimony 149: 19-21). Besides the actual notice,  
which is proven by the record, Mr. Bade was also on constructive notice about the true-up to the

1 FCC mandated transitional rate. He testified repeatedly that he was familiar with the *TRRO* and  
2 specifically that he was aware that the *TRRO* authorized a true-up. (Testimony of Thomas Bade,  
3 Tr. 297:9—298:19; Tr. 408: 11-16).

4 At the hearing AZDT produced another contemporaneous communication from Qwest,  
5 dated February 11, 2005, that shows Qwest's intent. (Ex. A7). As Mr. Bade testified, he  
6 understood Qwest's position to be that if he did not sign up for the QPP service his arrangement  
7 would be the "plus \$1" transition rate. (Testimony of Thomas Bade, Tr. 329: 1-25). Qwest also  
8 included the back billing in its proposed *TRRO* amendment. "[T]he amendment that Qwest  
9 offered right of the bat included the . . . plus one dollar rate increase for mass market switching,  
10 as well as including a true-up back to the March 11, 2005 date." (Testimony of Larry  
11 Christensen, Tr. 154: 8-11). Mr. Bade agreed that Qwest was consistent in all of its drafts of  
12 *TRRO* Amendments that there should be a back billing. (Cross examination of Thomas Bade,  
13 Tr. 361:1-7). Mr. Bade testified that Qwest never told AZDT it was not subject to back billing  
14 (*Id.*, Tr. 387; 19-22).

15 The record establishes that AZDT was aware of the *TRRO* provisions for back billing to  
16 true up to the "plus \$1," and that AZDT was noticed multiple times of Qwest's intention to apply  
17 that true-up. Regardless, true-up back billing applies, as the default mechanism established by  
18 the FCC.

19  
20 **B. The ICA's Change of Law Provision Obligates the Parties to Amend the ICA to Reflect**  
21 **the *TRRO*, And Accordingly, Qwest's Back Billing Language for the Transition Period,**  
22 **Which Is Consistent With the *TRRO*, Should Be Approved As a Matter of Contract**  
23 **Requirement**

24 The ICA between Qwest and AZDT (Ex. 3) contains section 2.2, which addresses  
25 changes of law. That section "obligates the parties to negotiate and amend their agreement to  
26 comply with the changes of law." (Testimony of Larry Christensen, Tr. 136: 3-8). Section 2.2  
provides:

To the extent that the Existing Rules are changed, vacated, dismissed, stayed or modified,

1 then this Agreement and all contracts adopting all or part of this Agreement shall be  
2 amended to reflect such modification or change of the Existing Rules. Where the Parties  
3 fail to agree upon such an amendment within sixty (60) days from the effective date of  
4 the modification or change of the Existing Rules, it shall be resolved in accordance with  
5 the Dispute Resolution provision of this Agreement.

6 The *TRRO* was a “change of law” requiring that the parties must amend the ICA pursuant  
7 to section 2.2. (Testimony of Larry Christensen, Tr. 136: 1-8). Qwest asked AZDT to  
8 commence change of law negotiations “numerous times,” “the first time being March 4, 2005,  
9 when Qwest communicated to all CLECs announcing its intent associated with the *TRRO*, and  
10 that was just a week before the effective date of the order.” (Testimony of Larry Christensen, Tr.  
11 143: 14-18).

12 However, AZDT never negotiated a change of law amendment, despite the  
13 straightforward nature of the changes. “[W]hat is required of the amendment is very clearly laid  
14 out in the FCC’s order.” (Testimony of Qwest Witness William Easton, Tr. 38: 3-8). The  
15 changes required by the *TRRO*, should have been incorporated into the ICA by amendment per  
16 the terms of the ICA, and in addition to violating the FCC’s order by not implementing the  
17 *TRRO*, AZDT breached the ICA by not amending the agreement to reflect the change of law.

18 C. AZDT Refused to Execute a *TRRO* Amendment Claiming It Was Not Obligated To Sign  
19 Qwest’s Form; But In Reality What AZDT Objected To Was the *TRRO*.

20 AZDT has argued that it was not required to sign Qwest’s form of *TRRO* Amendment.  
21 Qwest agrees with that as a general proposition, but asserts that it has every right to insist that the  
22 form of the *TRRO* change of law amendment that is signed should align with the provisions of  
23 the *TRRO*. Qwest’s form of amendment offered at the beginning of the transition period matches  
24 with the *TRRO*’s provisions, and Qwest’s language in the form of *TRRO* amendment that is  
25 currently before the Arbitrator<sup>14</sup> is likewise harmonious with the *TRRO*, and should be approved.  
26 Indeed, AZDT does not disagree that Qwest’s proposal is not consistent with the *TRRO*; rather

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<sup>14</sup> The current form of Amendment before the parties and the Arbitrator is AZDT’s draft filed April 3, 2008, showing the parties’ respective language proposals.

1 AZDT asserts various defenses to the applicability of the language.

2       There is substantial evidence that AZDT was not negotiating in good faith during the  
3 transition period to accomplish the dictates of the *TRRO*. Mr. Christensen stated that at the  
4 outset of the transition period AZDT had been provided a copy of Qwest's proposed form of  
5 *TRRO* amendment. (Testimony of Larry Christensen, TR. 153:22-25—154:1-11). Throughout  
6 the entire 12 months of the transition period, AZDT never returned any counter-proposal draft  
7 despite Qwest's requests. (Testimony of Larry Christensen, Tr. 156:3-9). After having lain  
8 back for nearly the full 12 months, and only after Qwest had initiated dispute resolution under  
9 the ICA to resolve the change of law (Letter from Larry Christensen to Tom Bade, "RE:  
10 Initiation of Dispute Resolution on Triennial review Remand Order Amendment," dated March  
11 1, 2006, Exhibit Q6), did AZDT declare that the changes Qwest sought to embody in the  
12 amendment were not even required by the *TRRO*. AZDT's then-counsel stated by letter dated  
13 March 3, 2006 (Exhibit Q7):

14           In your letter to Mr. Bade, you state that you are "initiating formal Dispute Resolution"  
15 procedures set out in the current Arizona Dialtone / Qwest Interconnection Agreement.  
16 These dispute resolution procedures have no application to the ongoing discussions  
17 regarding Qwest's draft of proposed new interconnection agreement provisions that you  
18 attribute to the *TRRO*.

19       In the same letter in which AZDT refused to enter dispute resolution, AZDT went on to deny that  
20 the *TRRO* mandated the changes:

21           Additionally, the proposed *TRRO* Amendment that Qwest has drafted seems to imply  
22 that somehow the modifications contained in it are mandated by the *TRRO* currently on  
23 review in the Washington DC courts. While the *TRRO* is quite a lengthy document, I  
24 have been searching it for the mention of such a mandate to implement the changes in the  
25 Amendment, but I have been unable to find one.

26       Clearly, this denial of the *TRRO* rejected the essence of the Order itself—it was a refusal of the  
Order's core findings that mass market switching was removed from the Section 251 list of  
UNEs. AZDT's denial made 51 weeks into the 52 weeks the FCC gave to CLECs to transition  
away from UNE-P constituted blatant bad faith, and is evidence of a decision to disregard of the

1 *TRRO*'s requirements. As AZDT said in its March 3, 2006 letter, "In any event, the *TRRO*  
2 Amendment that Qwest has drafted is significantly contrary to Arizona Dialtone's business  
3 plan[.]" Therein is the most succinct statement of AZDT's position. AZDT believes that it  
4 should not be required to comply with federal law, because it is contrary to AZDT's business  
5 plan. Then, even more inflammatory, on April 21, 2006, AZDT stated there was not "any  
6 possible reasoning for why Arizona Dialtone would voluntarily consent to [a *TRRO*  
7 amendment]. (Exhibit Q9, p.2).

8 Further proof that AZDT flouted the legal obligation to convert, is that that AZDT did not  
9 take the steps it could have taken without negotiating a *TRRO* amendment. No amendment to  
10 the ICA was required for AZDT to transition to resale service, because resale was already  
11 included in the ICA. (Testimony of Larry Christensen, Tr. 168:18-24). The rate for resale  
12 (which is an 18% discount from retail) was already established by the Commission. (Tr. 153:8-  
13 12). Qwest did not insist on back billing as a pre-condition to AZDT transitioning to resale at  
14 any time. (Testimony of Larry Christensen, Tr. 240:22—241:19).

15 As discussed below, AZDT's attempts to excuse its noncompliance with the *TRRO* by  
16 arguing that the higher wholesale rates for PAL would make it unprofitable. However, AZDT  
17 has other customers, who are not PAL customers. (Testimony of Thomas Bade, Tr. 377:20).  
18 Most telling of AZDT's flagrant disregard of the *TRRO*, is that AZDT did not even convert its  
19 non-PAL customer lines to resale until July, 2007, and after. (*Id.* Tr. 378, 379).

20 Of all the CLECs Qwest interconnects to in its 14 state region, that subscribed to UNE-P,  
21 AZDT stood alone in its non-compliance. (Testimony of William Easton, Tr. 62:23—63:2).

22  
23 D. AZDT's Claimed Financial Unprofitability Does Not Excuse Compliance with the Law.

24 At the hearing AZDT showed that it had repeatedly informed Qwest that increased  
25 wholesale rates in the market it was serving prevented AZDT from operating profitably. But, the  
26 underlying economics of AZDT's business, however severe they may be, do not excuse

1 compliance with the *TRRO*. The FCC specifically explained that its findings on non-impairment  
2 were national, and the FCC did not provide for exemptions due to particular carriers'  
3 circumstances or for particular markets. The FCC did not provide any exemptions, and in fact as  
4 discussed below, did not grant AZDT's request for a temporary waiver.

5         The FCC took care to state in its ruling that it had considered a number of factors in  
6 reaching its decision, including claims from a number of commenters that "allege that  
7 competitive LECs are impaired in specific circumstances due to unique characteristics of the  
8 particular customer markets or . . . because of the competitive carrier's size,"<sup>15</sup> both of which are  
9 reasons AZDT has stated in this proceeding for why it did not transition from UNE-P. The  
10 FCC's order did not provide for any exceptions on the basis of the size of the CLEC or on the  
11 basis of the peculiarities of its particular market niche. The FCC stated, "[T]hese commenters'  
12 claims are at odds with our impairment standard, which evaluates impairment based on a  
13 'reasonably efficient competitor,' not based on the individualized circumstances of a particular  
14 requesting carrier."<sup>16</sup>

15         Indeed, the FCC specifically considered the market for lines for payphone customers  
16 served by CLECs such as AZDT. A trade organization representing those CLECs claimed that  
17 the FCC's rule would produce a negative margin in some states. The FCC noted that those PAL  
18 providers "conceded that it is possible to serve payphone service providers using competitive  
19 switches in a least some markets. . . . Thus, we conclude that these data do not support a finding  
20 of impairment with respect to any particular market."<sup>17</sup>

21         Prior to the effective date of the *TRRO*, AZDT itself applied to the FCC for an  
22 exemption, or a temporary waiver from the *TRRO* from the FCC. AZDT's request was not  
23 granted. (Cross examination of Thomas Bade, Tr. 377:3-15). There is no evidence that AZDT  
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25 <sup>15</sup> *TRRO* ¶222.

26 <sup>16</sup> *Id.*

<sup>17</sup> *Id.*, fn. 611.

1 sought reconsideration. In this arbitration after AZDT has helped itself to the waiver the FCC  
2 did not grant, AZDT essentially asks this Commission to rule on the same complaints and  
3 theories. There is neither jurisdictional basis nor any good cause for this Commission to act  
4 where the FCC has already refused.

5  
6 E. AZDT's Unprofitability Did Not Create a Duty for Qwest to Negotiate A PAL-Specific  
Rate, and Qwest's Refusal to Do So Is Not Bad Faith

7 AZDT has been candid that the issue in this arbitration is the rate for services. AZDT's  
8 witness Thomas Bade testified at some length that he informed Qwest that AZDT could not pay  
9 higher rates. AZDT states that it is not attacking the reasonableness of any of the rates Qwest  
10 had to offer as alternatives for UNE-P, which were the business QPP rate and the resale rates.  
11 (Tr. 317:14-16). On the other hand, AZDT does apparently seek to argue that Qwest's refusal  
12 to negotiate a QPP rate specifically for wholesale PAL, was an unreasonable refusal to negotiate.  
13 Qwest submits that it would be illogical to conclude that refusal to negotiate a PAL-specific rate  
14 is bad faith, if Qwest's existing rates are lawful. Further, an arbitration ruling by this  
15 Commission that directly or indirectly finds that Qwest should have negotiated a PAL-specific  
16 Section 271 rate would be beyond this Commission's authority. Qwest Corporation v. Arizona  
17 Corporation Commission, 496 F. Supp. 2d 1069 (D. Ariz. 2007).

18 The FCC was well aware that its decision to remove UNE-P from the list of Section 251  
19 UNEs would have the effect of substantially increasing the costs to CLECs and that is part of the  
20 reason why the FCC provided for a transition year. The FCC limited the rate during that year to  
21 the UNE-P rate plus \$1 "to mitigate rate shock." (Testimony of William Easton, Tr. 46:5; see  
22 also Exhibit Q1, ¶ 228). Even though the FCC knew that its decision would have the effect of  
23 increasing rates to CLECs, nowhere in the *TRRO* does the FCC state that the ILECs are obligated  
24 to negotiate a rate that affords profit for every business model a CLEC may operate under. By  
25 the *TRRO*, the FCC eliminated UNE-P from the list of section 251 UNEs. The FCC purposely  
26

1 did not make any exceptions for PAL lines providers, and acknowledged that rates for CLECs to  
2 obtain mass market switching from ILECs were going to go up. The FCC did not order ILECs  
3 to assume the financial consequence of that decision for any CLECs. Accordingly, it would be  
4 illogical and constitute legal error to impute to the ILEC any duty to negotiate a rate that would  
5 keep the CLEC whole. The FCC did not order that, and AZDT's belief that the FCC intended  
6 for the ILECs to assume the economic consequence in whole or in part, in the context of  
7 negotiations for alternative service arrangements, is merely wishful thinking.<sup>18</sup>

8         The ultimate question about the rates for the alternative services is governed not by what  
9 AZDT can pay and still make profit, but rather by the legal standard that must be applied by the  
10 agency which has jurisdiction. For the Section 271 rates, the elements are governed by the "just  
11 and reasonable, and nondiscriminatory rate standard of sections 201 and 202 of the  
12 Communications Act of 1934," and the agency having jurisdiction is the FCC.<sup>19</sup> Whether a  
13 section 271 rate is "just and reasonable" is a fact-specific examination that the FCC will  
14 undertake in the context of a section 271(d)(6) enforcement proceeding. In determining whether  
15 a rate is "just and reasonable," the FCC stated that "A BOC might demonstrate that the rate at  
16 which it offers a section 271 network element is reasonable by showing that it has entered into  
17 arms-length agreements with other, similarly situated purchasing carriers to provide the element  
18 at that rate."<sup>20</sup> Qwest has entered QPP agreements with 67 CLECs in Arizona. (Testimony of  
19 William Easton, Tr. 41:24-25—42:1-3). None of those QPP agreements provide PAL-specific  
20 rates.

21         Regardless, AZDT does not prove a compelling case for its request that there should be a  
22

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23 <sup>18</sup> Indeed, it is apparent that AZDT seeks for Qwest to assume the all of the economic  
24 consequence of the TRRO. He would not agree even to pay one dollar more per line per month.  
(Cross examination of Thomas Bade, Tr. 382:1-3).

25 <sup>19</sup> See *TRO* at ¶¶ 656-64; *USTA v. FCC*, 359 F.3d at 588-90 (D.C. Cir. 2004) ("*USTA II*").

26 <sup>20</sup> *TRO*, ¶664.

1 special PAL rate, or that the residential QPP rate should be used for lines that are used for PAL  
2 applications. AZDT stands as the solitary CLEC seeking a special QPP PAL rate. AZDT  
3 introduced several communications that were sent by it during the workshops in which Qwest  
4 forged the landmark agreement with MCI in the wake of the *TRO*. (Exhibits A3 and A4). As  
5 evidenced by the email addresses on those communications, and as confirmed by Mr. Bade,  
6 these communications were sent to a large number of CLECs as well as to the direct Qwest  
7 addressees. (Cross examination of Thomas Bade, Tr. 368:3-9). AZDT explained, "MCI and  
8 other companies did do public access lines," (Testimony of Thomas Bade, Tr. 322: 9-10), and  
9 Mr. Bade's purpose can only be interpreted as an attempt to enlist the support of those other  
10 CLECs to AZDT's cause of PAL-specific rates. However, those other CLECs did not see fit to  
11 take up the cause of PAL-specific rates and, as shown above, 67 CLECs have entered the QPP  
12 agreement in Arizona. This is powerful evidence that Qwest's QPP rates are just and reasonable.

13 This also raises the distinct possibility that AZDT's business model is fundamentally,  
14 fatally flawed. It cannot seriously be argued that Qwest must bear the burden of such a  
15 deficiency. No law requires Qwest to assume the burden of AZDT's poor business plan, in  
16 whole or in part.<sup>21</sup>

17 AZDT's attempts to show that Qwest refused to negotiate an alternative service  
18 arrangement in good faith are unsupported and ironic. The evidence shows that Qwest was  
19 recognized as a leader in the industry in forging resolution of the dilemma CLECs found  
20 themselves in with the FCC's *TRO* order. MCI stated, "MCI and Qwest today announced a  
21 landmark agreement . . . This is a historic day for our industry. Qwest and MCI proved that two  
22 companies, that are direct competitors, can embrace the principals of a free-market economy and  
23 reach a commercial services agreement that will allow them, together, to serve customers well."  
24 (Exhibit Q2). Qwest established a process for the entire CLEC industry to participate in the

25 \_\_\_\_\_  
26 <sup>21</sup> The FCC's impairment determination is made with regard to "a reasonably efficient competitor." *TRRO* ¶22.

1 establishment of alternative service arrangements. (Testimony of William Easton, 42:18—43:8).  
2 Qwest's pro-completive actions were recognized by the FCC (*Id.*, Tr. 40:18-22).

3         Without limiting Qwest's arguments stated above, it must be noted that AZDT's claims  
4 that a PAL-specific QPP rate would be appropriate are questionable at best. AZDT does not  
5 successfully make its case for a "third category," or inclusion of PAL as a residential service.  
6 First, under the UNE-P regime, the rate Qwest charged was the same whether the service was  
7 UNE-P POTS or UNE-P PAL. (Testimony of Larry Christensen, Tr. 257:18—258:6). Under the  
8 UNE-P regime, the distinction between UNE-P POTS and UNE-P PAL was without a  
9 difference, because the rate was the same. Second, the record is clear that there is not any  
10 physical difference between a loop and a switch port when they are utilized in a POTS  
11 application or when they are used in a PAL application. Nor is there any difference between the  
12 costs between those facilities because of the nature of the end user. (Testimony of William  
13 Easton, Tr. 129:18—130:1). Qwest and the CLEC community agreed on the major QPP  
14 classifications of use as being business and residential. (*Id.* Tr. 129:1-10) But, within the  
15 business category there is no further classification made. Between the two classes, business and  
16 residential, PAL is clearly a business classification of service. "I don't know of any pay phones  
17 inside of a residence." (Cross examination of Thomas Bade, Tr. 370: 8-9). Not even AZDT  
18 makes distinctions between PAL and other business services, as is evidenced by the fact that its  
19 Intrastate Telecommunications Services Tariff No. 3 on file with the Arizona Corporation  
20 Commission has only two classifications of service--business and residential. In fact, PAL lines,  
21 which Mr. Bade states are his primary service offering, are not even mentioned in the AZDT  
22 tariff. A copy of AZDT's Intrastate Telecommunications Services Tariff No. 3 which is on file  
23 with the Arizona Corporation Commission is attached hereto as Closing Brief Exhibit I. Last,  
24 AZDT has transitioned most of its circuits now to other carriers. Those other carriers do not  
25 make any distinctions based on whether their platform services are used to connect payphones or  
26 for other purposes. (Cross examination of Thomas Bade, Tr. 380:13-19).

1 F. AZDT's Insistence on Negotiating a PAL-Specific Rate in the *TRRO* Amendment  
2 Negotiations Was Unreasonable.

3 AZDT claims that the circumstances regarding PAL retail rates presented a special  
4 circumstance that would justify a different wholesale rate for lines which are used in a PAL  
5 application. In part, AZDT dwells on this point apparently because it seeks to show that Qwest's  
6 refusal to negotiate a special PAL rate is evidence of lack of good faith. AZDT fails in that  
7 regard because it does not establish that Qwest is obligated to negotiate special wholesale rates  
8 for each end user application.

9 For the transition period, the fact that no other rate was negotiated necessarily results in  
10 the application of the "plus \$1" rate, which is the default established by the FCC. With respect  
11 to the QPP rate, whether for the transition period or the post transition period, AZDT apparently  
12 believes that its business plan justifies why it would not / could not agree to pay a higher rate.  
13 AZDT's recourse should have been to complain against the QPP rate in the proper forum, but it  
14 did not do so. Accordingly, AZDT's remonstrations against the QPP rate, and the lack of a PAL-  
15 specific QPP rate, are not well taken. AZDT's claims in that regard, and its continued insistence  
16 on a PAL -specific rate in the context of the TRRO negotiations were misplaced and  
17 unreasonable, and show AZDT's lack of good faith.

18  
19 G. Qwest Is Limited By Law With Respect to Its Ability To Offer Special Rates, And May  
20 Not Legally Offer Preferential Rates

21 AZDT acknowledges that Qwest had informed it during the course of the *TRRO*  
22 discussions that with regard to the discount rate for resale services, Qwest was bound by the  
23 order of the Commission in the wholesale cost docket. Likewise, AZDT acknowledges that  
24 Qwest had informed it that Qwest was bound by regulatory principles which forbid Qwest from  
25 offering preferences, or rates which are discriminatory in relation to the charges assessed to other  
26 carrier customers. (Cross examination of Thomas Bade, Tr. 365:21-25). The evidence is clear

1 that Qwest believes it is bound by law to refrain from providing a resale discount different from  
2 the Commission ordered discount rate, and to refrain from discrimination in rates and charges.  
3 (Testimony of William Easton, Tr. 47:9-25; 98:5-12; Testimony of Larry Christensen, Tr.  
4 267:23—268:6). There is not any evidence in the record supporting an allegation that Qwest was  
5 making up its concerns, and AZDT does not appear to make such a claim. Therefore, in light of  
6 what are indisputably legitimate concerns, it can not be argued that Qwest's reluctance to  
7 negotiate different rates than those it has in place with 67 other CLECs who have signed QPP  
8 agreements constituted bad faith.

9  
10 H. Contrary to AZDT's Assertion, the Parties Never Operated Under an "Alternative  
Arrangement."

11 AZDT argues that the parties had an "alternative arrangement" within the meaning of  
12 *TRRO* ¶228 during the transition year, which arrangement precludes Qwest from assessing the  
13 "plus \$1" rate, and back billing to true up for that rate increase. AZDT points to the sentence of  
14 ¶228 which states, "of course, the transition mechanism adopted here is simply a default process,  
15 and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements  
16 superseding this transition period." (Emphasis added). AZDT argues that Qwest's conduct in  
17 continuing to bill during the transition period at the UNE-P rate, and acceptance of such  
18 payments from AZDT, evidences an "alternative arrangement" which supersedes the "plus \$1."  
19 AZDT's argument makes no sense because as shown above, the *TRRO* clearly provides that  
20 ILECs were to continue to provide UNE-P and to charge the UNE-P rate until a change of law  
21 amendment was entered, at which time, the "plus \$1" rate would be back billed. As shown  
22 above, Qwest was following the transition plan, not instituting a substitute arrangement.  
23 Certainly Qwest did not "negotiate" an alternative arrangement with AZDT under which AZDT  
24 would, after March 11, 2005, receive its UNE-P service at the UNE-P rate.

25 AZDT cannot identify any documentary evidence, and does not allege any declaration by  
26 Qwest, to support AZDT's claim that Qwest agreed to provide its platform services at the UNE-P

1 rate, either as an alternative service arrangement or as an alternative arrangement to the “plus \$1”  
2 default rate. All AZDT can point to is the bare fact that Qwest billed during the transition period  
3 at the UNE-P rate. (Cross examination of AZDT witness Thomas Bade, Tr. 386: 2-15). AZDT  
4 testified that Qwest never told AZDT it would not be subject to back billing. (Id., Tr. 387: 19-  
5 22).

6 The insurmountable obstacle for AZDT’s theory is that the *TRRO* clearly obligated  
7 Qwest to continue to operate under the ICA as it existed then, and to provide service under the  
8 ICA, at the ICA’s then stated rates, until the ICA was amended. (Testimony of William Easton,  
9 Tr. 49:6-11). As noted above, the FCC established a twelve month transition period during  
10 which carriers were to complete their change of law processes. During that time, ILECs were  
11 obligated to continue to provide combined loop and switching services. The FCC clearly  
12 provided for a back billing mechanism to recover the difference between the rate that was billed  
13 and the “applicable transition rate:”

14 UNE-P arrangements no longer subject to unbundling shall be subject to true-up to the  
15 applicable transition rate upon the amendment of the relevant interconnection  
agreements, including any applicable change of law processes.<sup>22</sup>

16 Obviously, such language would not have been necessary at all, if the FCC had intended for  
17 ILECs to begin charging the “plus \$1” rate immediately. Had that been its intention the FCC  
18 could have simply ordered the rate change to be billed starting with the effective date of the  
19 *TRRO*, without necessity for a true-up occurring upon the amendment of the relevant  
20 interconnection agreements.

21 Qwest’s action in continuing to bill at UNE-P rate under the ICA is completely consistent  
22 with the *TRRO*, and Qwest understanding of the *TRRO*. Qwest’s understanding about the FCC’s  
23 decision upholding the integrity of the ICAs is important. Qwest believes that the FCC  
24 purposefully refrained from mandating the *TRRO* changes into effect without changing existing  
25

26 <sup>22</sup> *TRRO*., fn. 630.(Emphasis added).

1 ICAs. (Testimony of William Easton, Tr. 38: 1-23). Qwest firmly believed that the *TRRO*  
2 required carriers to negotiate an amendment to their respective ICAs before the ILEC could  
3 implement the *TRRO*. (Testimony of William Easton, Tr. 75—76. Indeed, the *TRRO* states in at  
4 least eight places that during the transition periods the FCC established, the parties shall amend  
5 their ICAs, including completing the appropriate change of law processes.<sup>23</sup> Qwest's view that  
6 the FCC consciously refrained from overruling the ICAs by fiat is consistent with Qwest's  
7 understanding of the central role ICAs play in the scheme of the Telecommunications Act of  
8 1996. (Testimony of William Easton, Tr. 38: 9-23). Qwest's continued providing of UNE-P,  
9 with billing at the contract rate, is completely identical with the *TRRO* and Qwest's  
10 understanding of the *TRRO*'s requirements.

11         Additionally, AZDT's argument that Qwest entered into an alternative arrangement  
12 makes no contextual sense. AZDT's argument necessarily assumes that Qwest voluntarily  
13 agreed to continue UNE-P, indefinitely. (Cross examination of Thomas Bade, Tr. 383: 9-15).  
14 However, the *TRRO* marked the end of mass market switching as a UNE, and the corresponding  
15 end of UNE-P. UNE-P rates were a low TELRIC based rate (Testimony of William Easton, Tr.  
16 49: 12-22.) , and there is no rational basis for concluding that Qwest agreed to continue to  
17 provide a service at a disadvantageous rate that is no longer required. AZDT's "alternative  
18 arrangement" theory is utterly inconsistent with normal commercial motives.

19         That Qwest did not enter into any alternative arrangement to provide platform services to  
20 AZDT at the UNE-P rate is further evidenced by the March 4, 2005 notice (Ex. Q4) which  
21 expressly stated that there would be a true-up. Even if for argument's sake it is assumed that  
22 Qwest had agreed by word or by actions that it would continue to provide platform services at  
23 the UNE-P rate, then the true-up language in the March 4, 2005 letter to Mr. Bade would have  
24 made no sense, because there would not be any difference between what was billed and what  
25 was ultimately to be recovered via true up. Indeed, at the hearing Mr. Bade produced an even

26 <sup>23</sup> *TRRO*, ¶143, f.n. 406, f.n.408, ¶196, f.n. 523, f.n. 524, ¶227, f.n. 630

1 earlier communication from Qwest, dated February 11, 2005. (Ex. A7). As Mr. Bade testified,  
2 he understood Qwest's position to be that if he did not sign up for the QPP service his  
3 arrangement would be the "plus \$1" transition rate. (Testimony of Thomas Bade, Tr. 329: 1-  
4 25). Further, Qwest repeated its intention to back bill AZDT for the difference between the  
5 billed rate and the "plus \$1 rate" many times. "From the very beginning of the *TRRO* transition  
6 period to today, Qwest has communicated a consistent message to Arizona Dialtone. That is,  
7 that the UNE-P has to be transitioned to another service, and that Arizona Dialtone could  
8 continue using UNE-P in the meantime but here would be backbilling." (Testimony of Larry  
9 Christensen, Tr. 136: 14-19). The overwhelming weight of the evidence is contrary to AZDT's  
10 assertion that Qwest had entered into an alternative arrangement that extended the UNE-P rate  
11 without liability for true up.

12 AZDT will likely argue that since it told Qwest that it could not pay any higher rates, that  
13 Qwest should have known that AZDT would not pay any true up to a higher rate--and therefore,  
14 Qwest must be deemed to have agreed to the lower rate because it billed at the UNE-P rate. But,  
15 the record does not establish that AZDT had declared to Qwest at any time during the transition  
16 period that AZDT could not pay even the "plus \$1" rate. "He did not bring that up during the  
17 one-year transition time period." (Testimony of Larry Christensen, Tr. 197: 5-7).

18 Similarly, AZDT asserts, "By the fact that we never agreed to pay anything more than  
19 UNE-P and Qwest continued to bill at UNE-P, I thought that we had an understanding." (Cross  
20 examination of Thomas Bade, Tr. 374:13-15). The legal question raised is one of simple  
21 contract law. Was there an offer, acceptance, and consideration? The only evidence AZDT  
22 brings to those questions is (1) the claim that AZDT said it could not pay more; and (2) Qwest's  
23 continued billing at the UNE-P rate. In contract analysis, whether there is an enforceable  
24 contract requires a finding that there was an offer communicated, and the offer was an expression  
25 of a promise, undertaking or commitment to enter into a contract. There must be certainty and  
26 definiteness in the essential terms, and there must be a communication of these elements to the

1 offeree. The only evidence AZDT brings to the issue of whether there was an offer is AZDT's  
2 doubtful claim that it said during the transition period that it could not pay the "plus \$1" rate or  
3 any higher rate than UNE-P. AZDT does not provide any information about the essential terms  
4 of the alleged offer, and in fact, there is no expression of any undertaking or commitment to  
5 enter into a contract. The bare assertion that AZDT could not pay more is not even an offer to  
6 continue to pay the old rate. Further, there is no consideration, since under the existing ICA,  
7 Qwest was already providing the UNE-P services at the UNE-P rates, and AZDT's alleged  
8 "alternative arrangement" is not different from what was already bargained in the existing ICA.

9 Last, in the absence of a written agreement memorializing the understanding, the  
10 Commission should consider extrinsic evidence. The various communications from Qwest to  
11 AZDT, which consistently include the back billing of the "plus \$1" rate, demonstrate that the  
12 parties never reached the understanding that AZDT claims. The Commission should also take  
13 into account that not once in the many written communications between the companies  
14 throughout this long dispute, leading up to the initiation of arbitration, did AZDT or any of its  
15 representatives ever deny liability for back billing of the "plus \$1" transition rate on the grounds  
16 that the companies had established an "alternative arrangement." Specifically, the March 3,  
17 2006 letter from AZDT's counsel is remarkable for what it does not say. In that letter, which  
18 was sent only seven days before the end of the transition period, AZDT did not raise the claim  
19 that the parties "had an understanding." The fact that AZDT did not assert its "alternative  
20 arrangement" argument is powerful evidence that the theory is an after-the-fact theory,  
21 unsupported by the true events, devised to cover its otherwise naked non-compliance.

22  
23 I. Qwest's Continued Provision of Platform Services to AZDT During the Transition  
24 Period, With Billing at the UNE-P Rate, Does Not Estop Qwest From Collecting Any  
25 Other Rate, And Does Not Constitutes a Waiver of Qwest's Rights To Collect Any Other  
26 Rate.

1 AZDT asserts an affirmative defense of “estoppel,” which operates when one party (here,  
2 allegedly Qwest), adopts a position inconsistent with its previous acts, and the other party (here,  
3 allegedly AZDT) reasonably relies on the prior conduct and is consequently injured by that  
4 reliance. *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50, 156 P.3d 1149, 1155  
5 (App. 2007). Estoppel does not apply in this case because as shown above Qwest’s billing at the  
6 UNE-P rate during the transition period was announced by Qwest, consistent with the *TRRO*, as  
7 subject to true-up. There was no change in position by Qwest, because Qwest consistently  
8 demanded the true-up, before, during, and after the transition period. Further, in the face of the  
9 true-up language in the *TRRO*, and the announcement by Qwest of its intention to back bill the  
10 difference in the rates, it would not have been justifiable for AZDT to rely on the UNE-P rate.  
11 The fact that AZDT told Qwest that AZDT could not pay higher rates does not demonstrate that  
12 Qwest was honoring a request by AZDT. Qwest has shown that the reason it billed at the old  
13 rate was because of the FCC’s decision. Last, AZDT did not forego any other benefit or better  
14 rate in the interim in reliance on Qwest’s billing, so it cannot be said that AZDT was harmed.

15 Waiver is another type of affirmative defense asserted by AZDT, closely related to the  
16 doctrine of estoppel. Waiver of a right requires a clear showing of intent to waive that right.  
17 *Goglia v. Bodnar*, 156 Ariz. 12, 19, 749 P.2d 921, 928 (App. 1987). Unless the party claiming  
18 the defense of waiver can show by clear and convincing evidence that there was an intention to  
19 waive rights, the defense of waiver must fail. *Schnepp v. State ex rel Dept. of Econ. Sec.*, 183  
20 Ariz. 24, 28, 899 P.2d 185, 189 (App. 1995); *Mohave County v. Mohave-Kingman Estates, Inc.*  
21 120 Ariz. 417, 421, 586 P.2d 978, 982 (1978). “Doubtful cases will be decided against waiver.”  
22 *Goglia*, 156 Ariz. at 19, 749 P.2d at 928. Qwest’s mere act of billing at the UNE-P rate is scant  
23 evidence of intent to relinquish the right to true-up to the transition rate the FCC provided for,  
24 even if AZDT informed Qwest that AZDT did not agree to the transition rate. The record is  
25 clear that Qwest was billing at the ICA rate, subject to future true-up to the FCC ordered  
26 transition rate, because that is what the FCC intended for ILECs to do pending change of law

1 amendments to the ICAs. Qwest believed it was following the *TRRO* and did not intend to  
2 waive any rights. (Testimony of William Easton, Tr. 51:7—52:13), and the record is clear that it  
3 did not.

4 Last, the Commission should note that before its Answer to the Petition for Arbitration,  
5 AZDT never stated, complained or alleged that Qwest's claim for back billing of the "plus \$1"  
6 rate should be barred because of unfair change of position by Qwest, surprise, or the like. Those  
7 reactions would be expected to have been made at the time, and the lack of any such  
8 contemporaneous complaints in this long-running, well documented dispute, are evidence that  
9 AZDT's defenses of estoppel and waiver are groundless.

10

11 J. Qwest's Continued Acceptance of New UNE-P Orders And Billing For Them At the  
12 UNE-P Rate During the Transition Year, Despite the Ban Issued By the FCC, Does Not  
13 Bar Qwest From Collecting The Higher "Plus \$1" Rate.

14

15 At the same time Qwest determined that the *TRRO* required it to continue to operate  
16 under the existing ICAs, pending amendment of the ICAs to reflect the *TRRO* and subject to  
17 true-up to the FCC's "plus \$1" rate, Qwest also determined that for the same reasons it must  
18 continue to honor new orders for UNE-P pending amendment, and that such new orders would  
19 also be subject to true-up. "Qwest was again honoring its interconnection agreement which  
20 allowed for that." (Testimony of William Easton, Tr. 53:25—54:5; Exhibit Q-4). As noted  
21 above, Qwest's conclusion regarding its continued obligations, including the obligation to accept  
22 new UNE-P orders, was based on language in the FCC's order regarding the transition year,  
23 which was provided among other reasons, to give the carriers time to amend their agreements.  
24 Qwest's interpretation was the same as a number of state utility commissions that were asked to  
25 decide the question, as is evidenced by the record cited in the court decisions Qwest provided to  
26 the ALJ in this arbitration on May 5, 2008 (BellSouth v. MCIMetro, U.S. Dist. Lexis 9394  
(2005) affirmed by 425 F.3d 964(11<sup>th</sup> Cir. 2005); BellSouth v. Cinergy, 2006 U.S. Dist. Lexis

1 11535, at \*25 (2006); and BellSouth v. Mississippi PSC, 368 F. Supp. 2d 557 (2005) ). In the  
2 Cinergy case, the court identified four state commissions that had ruled that ILECs must  
3 continue to accept new UNE-P orders pending ICA amendment (Cinergy, at p. 8 of the LEXIS  
4 print provided to the ALJ).

5 On the basis of the decisions being made by state commissions at the time, and on the  
6 basis of Qwest's analysis of the *TRRO*, Qwest's decision to continue accepting new UNE-P  
7 orders pending contract amendment was entirely reasonable. Further, it is undisputed that  
8 Qwest's held a good faith belief that it was required to continue to accept those orders.  
9 Therefore, while in hindsight Qwest may have taken a less pro-competitive position during the  
10 transition period to deny new UNE-P orders as some of the larger and more aggressive BOCs  
11 did, it cannot be said that Qwest knowingly relinquished a right, and it cannot be said that Qwest  
12 should be estopped from recovering the back billing, for all of the same reasons that are stated  
13 above.

14  
15 K. AZDT's Contention That Qwest Cannot Back Bill the FCC's "Plus \$1" Rate During the  
16 Transition Period Unless That Rate is Filed and Approved By the Arizona Corporation  
17 Commission Is Wrong Because The FCC Declared Switching Unimpaired and No  
18 Longer Subject to Unbundling Under Section 251, Thus Ending the State Commission's  
19 Authority

20 AZDT seeks language in the *TRRO* Amendment declaring that "Qwest has no approved  
21 back-billing tariff and Qwest has not been approved by any state PUC to retroactively increase  
22 its rates or to back-charge CLEC any amounts for mass market switching or other services."  
23 (Section 2.3 of AZDT's proposed *TRRO* Amendment, filed April 4, 2008; cross examination of  
24 Thomas Bade, Tr. 387: 6-18). AZDT testified that the state "needed to approve the \$1" "because  
25 we're talking about UNE-P." (*Id.*). AZDT is mistaken, because from and after the effective date  
26 of the *TRRO*, March 11, 2005, the UNE-P was declared non-impaired by the FCC. As of the  
effective date of the *TRRO*, mass market switching, including UNE-P, was not a Section 251  
service. "Because unbundled local circuit switching will no longer be made available pursuant

1 to section 251(c)(3), we establish a transition plan to migrate the embedded base of unbundled  
2 local circuit switching used to serve mass market customers to an alternative service  
3 arrangement.” (TRRO ¶226, emphasis added). The FCC was clear that UNE-P arrangements  
4 were no longer available for unbundling as of March 11, 2005, and that the true-up to the  
5 transition rate applied: “UNE-P arrangements no longer subject to unbundling shall be subject to  
6 true-up to the applicable transition rate.” (TRRO fn. 630). From effective date of the TRRO  
7 forward the states had no jurisdiction to set rates. State utility regulatory commissions only have  
8 the authority under Section 252 to set rates for Section 251 unbundled network elements. Qwest  
9 Corporation v. Arizona Corporation Commission, 496 F. Supp. 2d 1069 (D. Ariz. 2007).

10 The FCC held that it adopted “the proposal that the switching during the transition period  
11 be priced at the higher of the rate at which the requesting carrier leased UNE-P on June 5, 2004  
12 plus one dollar, or (2) the rate the state public utility commission establishes if any between June  
13 16, 2004, and the effective date of this Order, for UNE-P plus one dollar.” TRRO ¶228.

14 Clearly, the FCC established the rate and it was effective immediately. Removal of the UNE  
15 from the list of Section 251 UNEs took the matter out of the hands of the state commissions, and  
16 nothing remained for the states to do.

17  
18 L. Qwest’s Negotiations With AZDT For An Appropriate TRRO Amendment Were  
Reasonable and In Good Faith

19 Throughout this controversy, during the transition period and thereafter, Qwest has  
20 negotiated in good faith. AZDT’s allegations that Qwest had a “take it or leave” attitude are  
21 merely AZDT’s flawed perspective on Qwest’s reluctance to grant AZDT a special price. As  
22 shown above, Qwest does not have freedom to price services differently for different carriers.  
23 Qwest’s adherence to the nondiscrimination duty cannot be used against it to show bad faith in  
24 negotiations. So too, “take it or leave it” is AZDT’s skewed perspective on Qwest’s response to  
25 AZDT’s insistence that Qwest is obliged to provide a rate that makes AZDT profitable. That  
26 assuredly is not the law, however, and Qwest does not have a duty to negotiate rates on that

1 basis.

2 In attempting to prove that Qwest did not show good faith in negotiations, AZDT showed  
3 that in several communications to Qwest AZDT offered to meet personally with Qwest personnel  
4 in Denver, at AZDT's expense to negotiate. However, the fact that Qwest declined in-person  
5 meetings does not evidence lack of good faith. The evidence shows that Qwest never refused to  
6 have a conference. (Cross Examination of Thomas Bade, Tr.366:4-6). Further, the evidence  
7 shows that telephone conferences are standard for interconnection negotiations. (Testimony of  
8 Larry Christensen, Tr.156:16-25—157:1-21). Qwest has conducted approximately six thousand  
9 interconnection negotiations with CLECs, and it is rare to have face-to-face meetings. (*Id.*). For  
10 the AZDT matter, Qwest assigned one of its most experienced negotiators. (Testimony of Larry  
11 Christensen, Tr. 151:1-13).

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14 ISSUE II. WHETHER THE FORM OF *TRRO* AMENDMENT TO BE EXECUTED BY  
15 QWEST AND AZDT SHOULD INCLUDE LANGUAGE ALLOWING QWEST  
16 TO BACK BILL AZDT FOR THE DIFFERENCE BETWEEN THE UNE-P  
RATES AZDT PAID AND THE CORRESPONDING RESALE RATES, FOR  
THE PERIOD FROM MARCH 11, 2006 TO THE PRESENT.

17 A. By Not Transitioning From UNE-P By the End of the Transition Period, AZDT Violated  
18 the FCC's Order. That Violation Has Persisted Every Day, and Is Still Substantially  
19 Ongoing. Back Billing of the Resale Rate After the Transition Period Is Fair and Just  
20 Because AZDT Already Agreed to Resale In It's ICA, and the Parties Have Not Entered  
Into Any Other Alternative Service Arrangements.

21 As demonstrated in Section I above, AZDT violated the FCC's order by not transitioning  
22 to alternative arrangements by the end of the twelve month transition period the FCC provided.  
23 AZDT continues to violate the *TRRO* even to this day, and violates the *TRRO* every day that it  
24 does not place an order to transition its service to an alternative service arrangement. The  
25 question therefore, is what should happen when a CLEC refuses to convert during the transition  
26

1 period or thereafter?

2 AZDT argues for the illogical result that AZDT should continue to receive the benefit of  
3 the TELRIC UNE-P rate because the *TRRO* does not specify a rate, and does not provide for  
4 back billing for when a CLEC has not transitioned from UNE-P. Although it is certainly true  
5 that the *TRRO* does not address post-transition period hold-overs, it is not reasonable to conclude  
6 that the lack of such provisions means that AZDT is entitled to the UNE-P rate. As Qwest  
7 witnesses note, the agency expected that all carriers would be in compliance with its order.  
8 “There was no need for the FCC to specify rates beyond the transition period.” (Testimony of  
9 William Easton, Tr. 44:24—46:18).

10 AZDT should have placed orders to convert by the end of the transition period. The  
11 proper result in this arbitration is to put the parties in the place they would have been in had  
12 AZDT complied. Since the parties have an agreement in place for resale of service, and AZDT  
13 and Qwest have not entered into any other alternative service arrangements, the service AZDT  
14 could have used, and should have transitioned to, is resale. (Testimony of Larry Christensen,  
15 Tr. 168:18-24). The FCC-provided “plus \$1” transition rate expired with the transition period,  
16 so clearly the “plus \$1” transition rate is no longer effective as a default rate.<sup>24</sup>

17 In fact, since May, 2007, AZDT has ordered resale service for new orders (Testimony of  
18 Thomas Bade, Tr. 347). AZDT has stated that it is now willing to place orders to transition its  
19 services to resale. “AZDT remains willing to convert its remaining customers to Qwest’s resale  
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21 <sup>24</sup> As the Commission is aware, the Colorado P.U.C. issued an Initial Decision which purports to  
22 extend the “plus \$1” transition rate after the end of the transition period. (*In the Matter of Qwest*  
23 *Corporation’s Petition For Arbitration With Arizona Dialtone, Inc., Pursuant to Section 252(B)*  
24 *of the Communications Act of 1934, As Amended By the Telecommunications Act of 1996,*  
25 *Decision No. C08-0414, Colo. P.U.C., April 18, 2008). This action violates the Act because it*  
26 *impermissibly sets rates for network elements (unbundled switching) that Qwest is no longer*  
*required to provide under section 251(c)(3). The state commissions do not have the authority to*  
*set the rates for those section 271 switching elements in an ICA arbitrated under section 252.*  
*Qwest Corporation v. Arizona Corporation Commission, 496 F. Supp.2d 1069 (D. Ariz. 2007).*  
*Qwest is seeking reconsideration of the Colorado P.U.C. arbitration decision.*

1 rate within 30 days of execution of a TRRO amendment, and would be willing to have this  
2 obligation written into a TRRO amendment.” (Arizona Dialtone, Inc.’s Opposition to Qwest  
3 Corporation’s Motion for Judgment on the Pleadings, p. 12). That proves that resale is available,  
4 and since AZDT can and has ordered resale, it could have done so earlier.

5 Back billing to recover the resale rate is fair and just, because without back billing AZDT  
6 will have evaded compliance and reaped substantial gain at the expense of Qwest, and to the  
7 detriment of law-abiding competitors.

8 B. Qwest’s Continued Provision of Switching Services to AZDT During the Post-Transition  
9 Period, With Billing at the UNE-P Rate, Does Not Estop Qwest From Collecting Any  
10 Other Rate, And Does Not Constitute a Waiver of Qwest’s Rights To Collect Any Other  
11 Rate.

12 AZDT raises again the affirmative defenses of estoppel and waiver, this time in the  
13 context of the post transition period. Here too, the defenses fail, for the same reasons discussed  
14 above in Section I. I, regarding the transition period.

15 Estoppel does not apply in the post-transition period, because as shown above Qwest  
16 announced that its billing at the UNE-P rate during the post-transition period was subject to true-  
17 up. Qwest’s demand for back billing for the post-transition period was made contemporaneous  
18 with the end of the transition period, when it became apparent that AZDT was not going to  
19 transition by March 10, 2006. (Testimony of Larry Christensen, Tr. 155:16—156:2). Qwest  
20 presented a draft that contained back billing language on April 14, 2006, (Tr. 249), and Qwest  
21 consistently asked for back billing for the post transition period thereafter.<sup>25</sup> AZDT admits that  
22 Qwest never sent a draft TRRO Amendment that did not contain provisions for back billing.  
23 (Testimony of Thomas Bade, Tr. 314:12—315:4).

24 There was no change in position by Qwest. In the face of early announcement by Qwest

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25 <sup>25</sup> Qwest notes that the April 14, 2006 TRRO Amendment draft was sent even before AZDT  
26 declared it could not see “any possible reasoning why Arizona Dialtone would voluntarily  
consent to [a TRRO Amendment].” (Ex. Q9, p. 2, April 21, 2006).

1 of its intention to back bill the difference in the rates, AZDT was not justified in relying on the  
2 UNE-P rate that was billed. And, AZDT did not forego any other benefit or better rate in the  
3 interim in reliance on Qwest's billing, so it cannot be said that AZDT was harmed. For these  
4 reasons, the defense of estoppel is not available.

5 Nor is the defense of waiver available to AZDT. Under the holdings cited above in  
6 Section I. I of this Brief, the doctrine of waiver requires a clear showing of an intent to waive a  
7 known right. Unless the party claiming the defense of waiver can show by clear and convincing  
8 evidence that there was an intention to waive rights, the defense of waiver should fail. Doubtful  
9 cases will be decided against waiver. Here again, the facts do not support a waiver, because the  
10 record is clear that Qwest consistently said that the resale rate (or the QPP rate if AZDT agreed  
11 to QPP), was the applicable rate. Qwest did not waive its right to that rate; it expressly reserved  
12 the right to that rate *via* true-up, and AZDT was aware of that.

13 AZDT's issue regarding whether Qwest "had the right" to bill the resale rate, but did not  
14 do so, misses the mark, because Qwest reserved the right to receive the resale rate. As Qwest  
15 witnesses testified, Qwest continued to honor the TRRO's directive that the carriers should  
16 amend their ICAs. Accordingly, Qwest did not believe it could unilaterally transition AZDT's  
17 services to resale. (Testimony of William Easton, Tr. 51:1-24). For purposes of legal analysis of  
18 whether it waived its rights, the question that must be decided is what Qwest's intentions were.  
19 The evidence shows that Qwest's policy of continuing to honor the ICA pending negotiation of  
20 an amendment was driven by Qwest's understanding of the requirements of the TRRO. Qwest  
21 believed that it could not unilaterally force AZDT to convert its circuits and therefore, even if  
22 Qwest was wrong in that belief as a legal matter (which Qwest does not concede), Qwest's  
23 position cannot be categorized as an intentional waiver of its rights.

24 AZDT will argue that Qwest's decision in May, 2007 to reverse its position that it would  
25 not take new orders for UNE-P without an amendment belies Qwest's claim that it was  
26 constrained from taking unilateral action. However, Qwest's witnesses explained that the May

1 2007 reversal was the result of legal advice received at that time, examining court decisions  
2 rendered after Qwest adopted its initial position in March 2005. (Testimony of William Easton,  
3 Tr. 53:8-17). Rather than belying Qwest's position, the May, 2007 reversal of position  
4 underscores that Qwest believed it was obligated to continue to bill at the UNE-P rate pending  
5 negotiations and that such belief was reasonable. The May, 2007 reversal of policy applied only  
6 to the acceptance of new orders, and left intact the policy that Qwest would bill at the UNE-P  
7 rate for the embedded base pending negotiation of a TRRO amendment. (Testimony of Larry  
8 Christensen, Tr. 181:15-21). The BellSouth court decisions Qwest relied on at the time  
9 (described in the May 31, 2007 letter from Qwest's counsel, Exhibit Q14), and which Qwest  
10 provided to the ALJ on May 5, were limited to the question of the whether ILECs were obligated  
11 to continue to provision new UNE-P orders, and accordingly, Qwest reversed its policy only with  
12 respect to taking new UNE-P orders. It is evident that Qwest continues to believe that it may not  
13 take unilateral action with respect to the embedded base of UNE-P, and such belief is reasonable.

14 The suggestion by AZDT that Qwest could have simply billed resale is especially  
15 disingenuous. AZDT's President testified that if Qwest had billed the resale rate, he would have  
16 disputed it. (Cross examination of Thomas Bade, Tr. 375:25—375:3). Thus, AZDT's  
17 testimony supports Qwest's view that it could not act unilaterally to change AZDT's circuits  
18 over to resale.

19  
20 C. AZDT Essentially Argues for Laches, But That Theory Does Not Apply

21  
22 AZDT likely will argue that Qwest chose to forego the option of providing notice of  
23 termination of the parties' ICA, chose to forego the option of unilaterally switching AZDT to  
24 resale service, and chose to forego the option of following through with dispute resolution, each  
25 of which AZDT implies were available for bringing this impasse to resolution. AZDT argues  
26 that Qwest's inactions in those areas should somehow absolve AZDT from the consequences of

1 noncompliance with federal law. AZDT does not identify what legal theory it relies on to give it  
2 that windfall, and indeed there is no legal theory that permits such an inequitable result.

3 AZDT's arguments in this regard are reminiscent of the doctrine of laches. For laches to  
4 apply, AZDT must show that Qwest knew of its rights and unreasonably delayed in enforcing its  
5 rights, thereby causing injury or prejudice to AZDT. *In re Paternity of Gloria*, 194 Ariz. 201,  
6 979 P.2d 529, 531 (App. 1998). Delay, without the other elements, is insufficient to give rise to  
7 laches. *Id.* The courts will only permit the defense to prevent injustice. *Beltran v. Razo*, 163  
8 Ariz. 505, 507, 788 P.2d 1256, 1258 (App. 1990). If there was unreasonable delay, which  
9 Qwest denies, AZDT did not suffer any injury or prejudice because of it. In fact, AZDT was  
10 benefited by the alleged delay because it has been billed at the lower rate. Had Qwest invoked  
11 sooner any of the options AZDT claims were available, the worst that could have happened from  
12 AZDT's perspective is that it would have been ordered to pay a higher rate that much sooner.

13 Regardless, the evidence shows that Qwest did not act unreasonably in the course of  
14 action it followed. AZDT claims that Qwest could have terminated the agreement to end the  
15 dilemma. However, protections contained in the ICA against unilateral terminations would have  
16 made it impossible for Qwest to stop doing business by terminating the ICA, contrary to the  
17 insinuations made by AZDT. (Cross examination of William Easton, Tr. 103:16—105:22).  
18 Termination of the agreement would simply have triggered a series of events that inevitably  
19 would have led the parties to arbitrating the same issues as are before this Commission now, and  
20 which are the same issues that were then actively on appeal to the federal court from the Covad  
21 arbitration. (Cross examination of Larry Christensen, Tr. 238:7—239:9).

22 AZDT claims that Qwest could have begun billing for alternative services arrangements.  
23 However, the evidence shows that AZDT would have refused to pay such billings had they been  
24 rendered. (Cross examination of Thomas Bade, Tr. 375:25—375:3). Indeed, one of AZDT's  
25 main defenses to liability for the higher rate is that AZDT never agreed to it. Unilateral billing  
26 by Qwest would have led the parties back this Commission on the same issues that are the

1 subject of this arbitration, only it would have been at the time the issues were still before the  
2 federal court in the Covad arbitration appeal.

3 Similarly, AZDT claims that Qwest could have pursued dispute resolution, or arbitration,  
4 both of which were previously begun and not pursued. AZDT does not explain why this is an  
5 argument that cuts against Qwest more than it cuts against AZDT in balancing the equities. In  
6 fact, AZDT was the originator of the first Section 252 notice for negotiations that could have led  
7 to arbitration. (Ex. Q9). For every time Qwest did not follow up on opening a proceeding,  
8 neither did AZDT.

9 The longest period of inactivity in the negotiations between the companies was the  
10 thirteen months that elapsed between June 20, 2006, and the decision by the federal district court  
11 in the Covad arbitration appeal on July 17, 2007. The evidence shows that there was not  
12 agreement between the companies to stand down while the Covad decision was pending before  
13 the federal court. "We did not enter into any interim agreements." (Testimony of Larry  
14 Christensen, Tr. 177: 13-22; Tr. 179: 3-4). Rather, both companies saw that the court's decision  
15 would likely be dispositive of the Section 271 theory that AZDT had raised at the very end of the  
16 transition period. (Testimony of Larry Christensen, Tr. 179: 7-22). Qwest sensibly decided, on  
17 its own and not as part of an agreement with AZDT, to await the result of the Covad court case.  
18 Qwest's decision to await the outcome of the Covad decision was entirely reasonable, and there  
19 is not any reason to penalize Qwest for that delay. On the other hand, by not transitioning from  
20 UNE-P, and as a result of its's decision that it would await the outcome of the Covad arbitration  
21 appeal, AZDT was assuming the risk for the mounting back billing liability.

22  
23 D. The History of Negotiations Shows That AZDT's Claimed Defenses to Liability for  
24 True-Up to the Resale Rate Are After-the-Fact Invention of Legal Argument, Not  
Supported by the Record.

- 25 1. AZDT Proposed Back Billing to True-Up to the "Plus \$1" Transition Rate for the  
26 Transition Period and to the Resale Rate for the Post-Transition Period.

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AZDT's various defenses to back billing liability for both the "plus \$1" transition rate and the resale rate for the post-transition period are belied by the fact that AZDT offered a TRRO Amendment that contained those very provisions. The context of that offer further demonstrates that AZDT was fully cognizant that back billing would be the appropriate result if the federal court in Arizona ruled against Covad in the appeal of the Covad / Qwest section 252 arbitration in which the Commission decided to impose non-impaired UNEs at TELRIC, under the theory that Qwest was obligated to provide those unbundled network elements under another section of the Act, Section 271.<sup>26</sup> (See, A.C.C. Decision No. 68440, Exhibit Q18).

On March 3, 2006, AZDT first surfaced the notion that the "changes are not mandated in the TRRO, and instead, the continued offering of une switching is mandatory under other applicable provisions of the Telecommunications Act of 1996 and other mandatory laws and regulations." (Exhibit Q7, p.2). This was following the Commission's Decision Number 68440, which was entered February 2, 2006. AZDT stated, "We believe that under the circumstances, it would be appropriate to let the Qwest/Covad regulatory and litigation process play out and then the two companies can revisit these issues after we both know if the Qwest/Covad Interconnection Agreement is available for opt-in, or know whether further issues may be further resolved in that process." (*Id.*) AZDT repeated its reliance on the Covad section 271 UNE theory in its letter to Qwest dated April 7, 2006, (Exhibit Q8, p.1), and in its letter of April 22, 2006. (Exhibit Q8, p.1).

Then, on May 18, 2006, AZDT for the first time provided a mark-up of Qwest's proposed form of TRRO Amendment. (Testimony of Larry Christensen, Tr. 171:10-15). That proposal from AZDT was transmitted to Qwest on May 18, 2006 (the "May 18 AZDT proposal"). (Exhibit Q10). The May 18 AZDT proposal is important because it sets out how AZDT proposed to

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<sup>26</sup> A.C.C. Decision No. 68440 was reversed by the Arizona federal district court. *Qwest Corporation v. Arizona Corporation Commission*, 496 F. Supp.2d 1069 (D. Ariz. 2007).

1 accomplish, by contract language, its Covad Arbitration Section 271 theory. The May 18 AZDT  
2 proposal was an offer to contract made by AZDT, that it would sign if accepted by Qwest.  
3 (Examination of Thomas Bade by ALJ Harpring, Tr. 422:25). Thus the May 18 draft is strong  
4 evidence of AZDT's position on the issues in this dispute at that time.

5 It is necessary to quote relevant portions of AZDT's proposed amendment:

6 2.3 After execution of this Amendment, except for UNEs required to be  
7 offered under Section 271 of the Act, Qwest shall back bill the FCC ordered rate  
8 increases to March 11, 2005, for . . . Mass Market Switching Services pursuant to  
9 Transition rate increases identified in Section . . . 5.1.1.3. (May 18 AZDT  
10 proposal, Exhibit Q10, p.1; emphasis added).

11 That language is quite clear. AZDT was willing to agree to back billing of the transition  
12 rate (the "plus \$1), which is stated in section 5.1.1.3, except for UNEs required to be offered  
13 under Section 271. The effect is also quite clear: If UNEs are not required to be offered under  
14 section 271, the back billing provisions apply.

15 AZDT's proposed amendment also inserted new language in section 2.7:

16 The following paragraphs 2.8 through 7.0 do not apply to any UNEs required to  
17 be offered by Qwest under Section 271 of the Act.

18 Among the paragraphs covered by this clause are those which provide for back billing to  
19 true-up to the "plus \$1" transition rate (5.1.1.3) and back billing to true-up to the resale rate for  
20 the post transition period (5.1.1.5.3). AZDT's language, rather than deleting those back billing  
21 provisions, leaves them intact. So, those provisions would be effective if UNEs are not required  
22 to be offered by Qwest under Section 271.

23 The communications from AZDT to Qwest both before and after the May 18 AZDT  
24 proposal, show that what AZDT means by using the phrase "UNEs required to be offered by  
25 Qwest under Section 271," in the May 18 AZDT proposal was an obligation such as that which  
26 the Commission had imposed on Qwest in the Covad Arbitration, which Qwest was seeking

1 review of at the federal district court. “[U]nder the circumstances it would be appropriate to let  
2 the Qwest/Covad regulatory and litigation process play out.” (Exhibit. 7, p.2); “Surely we can  
3 both agree that it is likely that the Qwest/Covad litigation may be dispositive of our  
4 TRRO/Section 271 UNE disputes.” (Exhibit 11, e-mail from Tom Bade to Steve Hansen, June 8,  
5 2006).

6           Accordingly, the obvious intent of the May 18 AZDT proposal was to set up an  
7 amendment that would allow for two different outcomes of the Covad litigation. One outcome  
8 would be if Covad prevailed, Qwest would be required to include Section 271 UNEs and the  
9 prices of such UNEs in its interconnection agreements. In that event, the back billing  
10 provisions would not apply. The other outcome would be that Qwest prevailed in the Covad  
11 litigation, in which case Section 271 UNEs would not be included in the interconnection  
12 agreement. In that event, the back billing provisions would apply. That is the plain meaning of  
13 the May 18 AZDT proposal and it is how Qwest interpreted it. (Testimony of Larry Christensen,  
14 Tr. 173:15—174:13).

15           AZDT’s May 18, 2006 proposal shows that AZDT did not object to the rate for the  
16 transition period, or to the rate for resale, or for back billing to true up to either of those rates. If  
17 AZDT believed that there was some alternative arrangement that the parties had established,  
18 certainly AZDT would have reflected that in the draft. If AZDT believed that Qwest had  
19 relinquished its rights to recover the higher rate, certainly AZDT would have struck the back  
20 billing language. If AZDT’s position was that Qwest had misled AZDT by billing at the old rate,  
21 it is highly unlikely AZDT would have made the May 18 AZDT proposal.

22           AZDT’s Covad / Section 271 theory was the only argument AZDT made in objection to  
23 Qwest’s TRRO Amendment, including the transition period and post transition period true-ups,  
24 from March 3, 2006 (Exhibit Q7) until after the court ruled against Covad (July 18, 2007) and  
25 Qwest issued its request for negotiation (Exhibit Q15, July 20, 2007). It was only after the  
26 court ruled against it’s hoped-for Section 271 theory, did AZDT present legal objections to back

1 billing. On August 9, 2007, AZDT proffered a new draft (Exhibit Q16), asserting for the first  
2 time its proposed language preventing Qwest from back billing. (Exhibit Q16, Amendment  
3 Section 2.3, p. 10).

4 AZDT's new-found theory is a legal argument, contrary to the proposal AZDT made in  
5 its May 18 proposal a year and three months earlier. In the May 18, 2006 proposal, AZDT  
6 offered back billing, and indeed proposed that AZDT would be the beneficiary of a retroactive  
7 credit:

8 For all UNEs that Qwest is required to offer under Section 271 of the Act, instead  
9 of back billing CLEC the FCC rate increase to March 11, 2005, as provided in Paragraph  
10 2.3 above, Qwest shall instead refund to CLEC any amounts above the newly established  
11 rates that CLEC paid for all such UNE's back to March 11, 2005. (Exhibit Q10,  
12 Amendment Section 2.3, p. 10).

13 AZDT obviously believes that true-ups are legitimate in the circumstances present here.

14 2. AZDT's Unlawful Failure to Transition Its Services to Alternative  
15 Arrangements Is a Willful Violation.

16 AZDT's refusal to convert its circuits pursuant to the requirements of the *TRRO*  
17 and its ICA are willful violations committed for its pecuniary benefit, and not because of  
18 any supportable legal justification. The refusal of AZDT to sign Qwest's form of *TRRO*  
19 after the court ruling in the Covad case, discussed above, is powerful evidence that  
20 AZDT elects noncompliance at every turn.

21 The evidence shows that AZDT began a massive transition of its circuits to other  
22 providers, immediately upon the court's ruling in the Covad case. Mr. Bade testified that  
23 his company has shifted nearly two-thirds of its circuits to other providers (Tr. 350:19-  
24 23), however, he admits that the transition did not ramp up until after July, 2007, (Tr.  
25 379:13-17). It is no coincidence that AZDT did not convert to any other until the court  
26

1 ruled against AZDT's hoped-for section 271 theory. This testimony, which is  
2 corroborated by Qwest's data (Testimony of Larry Christensen, Tr. 192:7-22),  
3 demonstrates that it was possible for AZDT to convert to other providers. Indeed, Mr.  
4 Bade testified that the overall rate from those other providers is a little lower than  
5 Qwest's UNE-P rate, and that the features from the other carriers are better. (Cross  
6 examination of Thomas Bade, Tr. 379:22—380:10). A reasonable inference to be drawn  
7 from these facts is that AZDT could have converted to other providers earlier than it did.

8 As discussed above, AZDT could have placed orders for resale at any time,  
9 without an amendment. In fact, AZDT did not do so, and even failed to convert the  
10 UNE-POTS services, which AZDT had never complained about. AZDT has stated  
11 during this arbitration that it is now willing to convert to resale. (Arizona Dialtone, Inc.'s  
12 Opposition to Qwest Corporation's Motion for Judgment on the Pleadings, p. 12). Yet,  
13 when asked to do, AZDT once again refused, claiming that it "will only convert its  
14 remaining UNE-P services to Qwest's resale rate within a specified period of time after  
15 execution of a TRRO amendment." (Exhibit Q17, p. 1). AZDT's response shows that it  
16 will wring every drop of money it can out of its noncompliance until such time as it is  
17 ordered by this Commission to convert.

18  
19 **III. WHETHER THE FORM OF TRRO AMENDMENT TO BE EXECUTED BY**  
20 **QWEST AND AZDT SHOULD INCLUDE LANGUAGE REQUIRING QWEST**  
21 **TO PROVIDE NOTICE OF COPPER LOOP REPLACEMENTS TO AZDT BY**  
22 **CERTIFIED MAIL, RATHER THAN BY ELECTRONIC MAIL.**

23 AZDT's request for notice by certified mail is not required by law, and is  
24 unreasonable. It should be denied.

25 This Commission has recognized that Qwest's copper loop retirement notices  
26 comply with the applicable requirements set forth in the TRO:

We also find that Qwest's proposed notice provisions comply with applicable

1 requirements. As set forth in the *TRO*, an ILEC must provide notice of planned  
2 modifications to its network by either filing a public notice to the FCC, or through  
3 industry publications or an accessible internet site. (*TRO* ¶¶ 273 and 288).  
4 Qwest's proposed form of notice would list planned copper retirement on Qwest's  
5 website, through a public filing with the FCC, and by an e-mail notice to CLECs.  
6 Qwest has also agreed to provide additional notices that may be required by  
7 Arizona law. . . .

8  
9 Based on the record and applicable rules and regulations, we find that  
10 Qwest's proposed copper retirement proposal, including notices requirements, is  
11 reasonable and should be adopted. (Exhibit Q18, Arizona Corporation  
12 Commission Decision No. 68440, pp. 11-12).

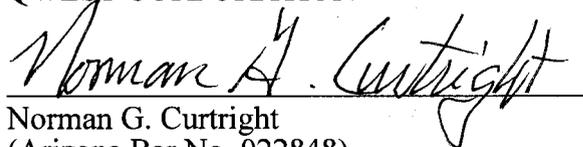
13 AZDT does not dispute the content of the notice; what it seeks is a special,  
14 expensive, manual process requiring Qwest to send the notice to AZDT by certified mail  
15 instead of by e-mail. AZDT's basis for that requirement is that Mr. Bade "receive[s] so  
16 many e-mails from Qwest and often times I don't receive them;" Tr. 358: 13-17). Mr.  
17 Bade does not claim that Qwest has been at fault for his non-receipt of e-mails. He cites  
18 only one instance in which Qwest had difficulty transmitting an e-mail to him. (Tr.  
19 362:15-19). Mr. Bade has trouble sending and receiving emails as a general matter,  
20 although he states that characterizing the problem as chronic would be "a little harsh."  
21 (Tr. 364: 3-9). In any event, Mr. Bade agrees that he has trouble with his email  
22 periodically. (Tr. 409: 23-24).

23 Qwest respectfully suggests that there is not any reason stated by AZDT that  
24 would justify a requirement for certified mailing of notices rather than e-mailing them.  
25 The problems AZDT experiences with e-mailing appear to be a near-chronic problem on  
26 its system, and that does not justify changing the notice practice that Qwest follows for  
all of the other CLECs. Further, certified mailing is a time-consuming, more expensive  
process that would be burdensome. Such notice is not required by the FCC (Testimony  
of William Easton, Tr57:9-23), and is not required by this Commission. The  
Commission should reject AZDT's request for special treatment.

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RESPECTFULLY SUBMITTED this 20th day of May, 2008.

QWEST CORPORATION



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ORIGINAL and 13 copies hand-delivered  
for filing this 20th day of May, 2008, to:

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

Sarah Harpring, Administrative Law Judge  
Hearing Division  
ARIZONA CORPORATION COMMISSION  
1200 W. Washington  
Phoenix, AZ 85007

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1200 W. Washington Street  
Phoenix, AZ 85007

Maureen A. Scott, Esq.  
Legal Division  
ARIZONA CORPORATION COMMISSION  
1200 W. Washington Street  
Phoenix, AZ 95007

1 Copy of the foregoing hand served and mailed  
this 20th day of May, 2008, to:

2

Tom Bade

3 President—Arizona Dialtone, Inc.

6115 S. Kyrene Rd, Suite 103

4

Tempe, AZ 85283

5

Glenn B. Hotchkiss, Esq.

Cheifetz, Iannitelli Marcolini P.C.

6

1850 North Central Avenue, 19<sup>th</sup> Floor

Phoenix, Arizona 85004

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A handwritten signature in cursive script, appearing to read "Rose Kravitz", is written over a horizontal line.

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**QWEST CORPORATION'S CLOSING BRIEF EXHIBIT I**

Arizona DialTone, Inc. d/b/a  
Touch Home Phone Service  
7170 W. Oakland St.  
Chandler, Arizona 85226

COMPETITIVE LOCAL EXCHANGE CARRIER

Arizona Tariff No. 3  
Original Sheet 1

**ORIGINAL**

*Cancels and Replaces Arizona DialTone, Inc.  
Arizona Tariff No. 2 in its Entirety*

ARIZONA DIALTONE, INC. D/B/A

TOUCH HOME PHONE SERVICE

INTRASTATE TELECOMMUNICATIONS SERVICES

THIS TARIFF CONTAINS THE DESCRIPTIONS, REGULATIONS AND RATES APPLICABLE TO THE FURNISHING OF  
INTRASTATE COMMON CARRIER COMMUNICATIONS SERVICES PROVIDED BY  
ARIZONA DIALTONE, INC D/B/A TOUCH HOME PHONE SERVICE WITH PRINCIPAL OFFICES AT  
7170 W. OAKLAND STREET, CHANDLER, ARIZONA 85226

THIS TARIFF APPLIES FOR SERVICES FURNISHED WITHIN THE STATE OF ARIZONA

THIS TARIFF IS ON FILE WITH THE ARIZONA CORPORATION COMMISSION AND COPIES MAY BE INSPECTED DURING  
NORMAL BUSINESS HOURS AT THE COMPANY'S PRINCIPAL PLACE OF BUSINESS

**This tariff (No. 3) cancels and replaces in its entirety Arizona DialTone, Inc. Intrastate Telecommunications  
Services Tariff No. 1 currently on file with the Arizona Corporation Commission.**

ADMINISTRATIVELY  
APPROVED FOR FILING

Issued: May 22, 2003  
Issued By:

Thomas W. Bade, President  
7170 West Oakland Street  
Chandler, Arizona 85226

Effective: June 21, 2003

AZL0305

Arizona DialTone, Inc. d/b/a  
Touch Home Phone Service  
7170 W. Oakland St.  
Chandler, Arizona 85226

COMPETITIVE LOCAL EXCHANGE CARRIER

Arizona Tariff No. 3  
1<sup>st</sup> Revised Sheet 2  
Replaces Original Sheet 2

# ORIGINAL

## CHECK SHEET

This tariff contains pages 1 to 27 inclusive, each of which is effective as of the date shown on the corresponding page. Pages of this tariff are presented in the following versions:

<u>PAGE</u>	<u>REVISION</u>
1	Original
2	1 <sup>st</sup> Revised*
3	Original
4	Original
5	Original
6	Original
7	Original
8	Original
9	Original
10	Original
11	Original
12	Original
13	Original
14	Original
15	Original
16	Original
17	Original
18	1 <sup>st</sup> Revised*
19	Original
20	Original
21	Original
22	1 <sup>st</sup> Revised*
22.1	Original*
23	Original
24	Original
25	Original
26	Original
27	Original

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Issued: December 3, 2003  
Issued By:

Thomas W. Bade, President  
7170 West Oakland Street  
Chandler, Arizona 85226

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**ORIGINAL**

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**EXPLANATION OF SYMBOLS**

When changes are made in any tariff sheet, a revised sheet will be issued canceling the tariff sheet affected. Changes will be identified on the revised sheet(s) through the use of the following symbols:

- (D) - Delete or Discontinue.
- (I) - Change Resulting in an Increase to a Customer's Bill.
- (M) - Moved from another Tariff Location.
- (N) - New.
- (R) - Change Resulting in a Reduction to a Customer's Bill.
- (T) - Change in Text or Regulation, but No Change in Rate or Charge

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Issued: May 22, 2003  
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Thomas W. Bade, President  
7170 West Oakland Street  
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# ORIGINAL

## SECTION 1 - TECHNICAL TERMS AND ABBREVIATIONS

**Authorized User:** A person, firm, corporation, or any other entity authorized by the Customer to communicate utilizing the Carrier's service under terms and conditions of this price list. The Customer remains responsible for payment of services.

**Billed Party** - The person or entity responsible for payment of the Company's service. The Billed Party is the Customer in whose name service is registered with the Company.

**Called Station** - The terminating point of a call.

**Calling Station** - The originating point of a call.

**Carrier** - The facilities-based telecommunications provider whose services are being resold to the Customer by the Company.

**Commission** - The Arizona Corporation Commission.

**Company** - Arizona DialTone, Inc., d/b/a Touch Home Phone Service, the issuer of this tariff.

**Customer** - The person who orders or uses service and is responsible for payment of charges and compliance with tariff regulations.

**Monthly Recurring Charges** - The monthly charges to the Customer for services, facilities and equipment, which continue for the agreed upon duration of the service.

**Nonrecurring Charge ("NRC")** - A charge assessed on a one-time basis or "per occasion" basis.

**Service Commencement Date** - The first day following the date on which the Company notifies the Customer that the requested service or facility is available for use, unless extended by the Customer's refusal to accept service which does not conform to standards set forth in the Service Order or this tariff, in which case the Service Commencement Date is the date of the Customer's acceptance. The Company and Customer may mutually agree on a substitute Service Commencement Date.

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Chandler, Arizona 85226

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Arizona DialTone, Inc. d/b/a  
Touch Home Phone Service  
7170 W. Oakland St.  
Chandler, Arizona 85226

COMPETITIVE LOCAL EXCHANGE CARRIER

Arizona Tariff No. 3  
Original Sheet 5

**ORIGINAL**

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**SECTION 1 - TECHNICAL TERMS AND ABBREVIATIONS, CONT'D.**

**Telecommunications** - The transmission of voice communications or, subject to the transmission capabilities of the service, the transmission of data, facsimile, signaling, or any other form of intelligence.

**User or End User** - A Customer, or any person or entity which makes use of services provided to a Customer under this Tariff regardless of whether such person or entity is so authorized by Customer.

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# ORIGINAL

## SECTION 2 - RULES AND REGULATIONS

### 2.1 APPLICATION OF TARIFF

- 2.1.A** This tariff contains the rates applicable to local exchange telecommunications services offered by Arizona DialTone, Inc., d/b/a Touch Home Phone Service, within the State of Arizona. Service is furnished subject to transmission, atmospheric and like conditions.
- 2.1.B** The telecommunications services of the Company are not part of a joint undertaking with any other entity providing telecommunications channels, facilities, or services. However, services under this tariff are conditioned upon the continued availability of the various services provided to the Company by its underlying carriers.
- 2.1.C** The rates and regulations contained in this tariff apply only to services provided through Company's contracted Carrier, and do not apply, unless otherwise specified, to the lines, facilities, or services provided by any other local exchange telephone company or other common carrier for use in accessing the services of the Company.

### 2.2 UNDERTAKING OF COMPANY

- 2.2.A** The Company undertakes to provide telecommunications services to Customers for their lawful and direct transmission and reception of voice, data, and other types of communications in accordance with the terms and conditions set forth in this tariff.
- 2.2.B** All service is subject to the availability of necessary and suitable facilities and to the provisions of this tariff. The Company or its designee may act as the Customer's agent for ordering access connection facilities provided by other carriers or entities, when authorized by the Customer, to allow connection of a Customer's location to a service provided by the Company. The Customer shall be responsible for all charges due for such service arrangement, and shall pay for such service arrangement in advance.

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**SECTION 2 - RULES AND REGULATIONS, CONT'D.**

**2.2 UNDERTAKING OF COMPANY, CONT'D.**

- 2.2.C** The Company's services are provided on a monthly basis unless otherwise provided, and are available twenty-four (24) hours per day, seven (7) days per week.
- 2.2.D** The Company shall not be responsible for any construction, installation, operation or maintenance of any Customer-provided communications equipment. Where such equipment is connected to service furnished pursuant to this tariff, the responsibility of the Company shall be limited to furnishing of services under this tariff and to the maintenance and operation of such services in the proper manner.
- 2.2.E** The Company assumes no liability with respect to the construction, operation, or maintenance of Customer-provided station equipment at the Customer's premises, excepting such liability directly due to negligence of Company's employees or agents.
- 2.2.F** The Carrier may, upon notification of the Customer, at a reasonable time, make such test and inspections as may be necessary to determine that the requirements of this tariff are being complied with in the installation, operation, and maintenance of Customer-provided equipment and in the wiring of the connection of Customer channels to Carrier-owned facilities. The Carrier may temporarily suspend services, without liability to Company or Carrier, while making such tests and inspections, and thereafter until any violations of such requirements are corrected.
- 2.2.G.** The Company may take such action as necessary to protect its operations, personnel, and services, and will promptly notify the Customer by registered mail in writing of the need for protective action. In the event that the Customer fails to advise the Company within ten (10) days after such notice is received that corrective action has been taken, the Company may take whatever additional action is deemed necessary, including the suspension of service, to protect its operations, personnel, and services from harm.

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**SECTION 2 - RULES AND REGULATIONS, CONT'D.**

**2.3 LIMITATIONS**

**2.3.A** The Company does not undertake to transmit messages, but mediates the use of its Carrier's facilities when available, and will not be liable for errors in transmission or for failure to establish connections.

**2.3.B** Neither the Company nor the Customer may assign or transfer its rights or duties in connection with the services and facilities provided by the Company without the written consent of the other party, except that the Company may assign its rights and duties to a) any subsidiary, parent company or affiliate of the Company; b) pursuant to any sale or transfer of substantially all the assets of the Company; or c) pursuant to any financing, merger or reorganization of the Company.

When service in an existing location is continued for a new Customer, the existing telephone number may be retained by the new Customer only if the former Customer consents in writing, and if all charges against the account are paid or assumed by the new Customer. All regulations and conditions contained in this tariff shall apply to all such permitted assignees or transferees, as well as all conditions of service.

**2.3.C** Company reserves the right to disconnect service without incurring liability when necessitated by conditions beyond the Company's control or when the Customer is using the service in violation of either the provisions of this tariff or the laws, rules, regulations, or policies of the jurisdiction of the Calling Station or the Called Station, or the laws of the United States including the rules, regulations, and policies of the Federal Communications Commission.

**2.4 USE**

**2.4.A** Services may be used for the lawful transmission of communications by the Customer consistent with the provisions of this tariff.

**2.4.B** Service may not be used for any unlawful purpose. The use of the Company's services to make calls which might be reasonably be expected to frighten, abuse, torment, or harass another or in such a way as to unreasonably interfere with use by others is prohibited.

**2.4.C** The use of the Company's services without payment for service, as well as any attempt to avoid payment for service by fraudulent means, devices, or schemes, false or invalid numbers, or false calling or credit cards, or other fraudulent means, is prohibited.

**2.4.D** The Company's services are available for use twenty-four (24) hours per day, seven (7) days per week.

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**SECTION 2 - RULES AND REGULATIONS, CONT'D.**

**2.5 LIABILITIES OF THE COMPANY**

**2.5.A** The Company shall not be liable for any failure of performance hereunder due to causes beyond its control, including but not limited to: acts of God, fires, flood or other catastrophes; any law order, regulation, directive, action, or request of the United States Government or any other government, including state and local governments having jurisdiction over the Company, or of any department, agency, commission, bureau, corporation, or other instrumentality of any one or more of said governments or of any civil or military authority; national emergencies; insurrections; riots; wars; or labor difficulties.

**2.5.B** The Company shall not be liable for any act or omission of any other entity furnishing to the Customer facilities, equipment, or services used with the Company's services. The Company shall not be liable for any damages or losses due to the failure of Customer-provided equipment, facilities, or services. Company is not liable for any act or omission of any other company or companies furnishing a portion of the service. No agents or employees of connection, concurring, or other participation carriers or companies shall be deemed to be agents or employees of the Company without written authorization.

**2.5.C** Company shall not be liable for and Customer shall indemnify and hold Company harmless from any and all losses, claims, demands, suits, or other action or liability whatsoever, whether suffered, made, instituted, or asserted by the Customer or by any other party or persons, for any personal injury to, or death of, any person or persons, and for any loss,

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**SECTION 2 - RULES AND REGULATIONS, CONT'D.**

**2.5 LIABILITIES OF THE COMPANY, CONT'D.**

damage, defacement, or destruction of the premises of the Customer or any other property, whether owned by the Customer or by others, caused or claimed to have been caused directly or indirectly by the installation, operation, failure to operate, maintenance, removal, presence, condition, location, or use of equipment, wiring, or services provided by Company or Carrier where such installation, operation, failure to operate, maintenance, condition, location, or use is not the direct result of Company's negligence.

**2.5.A** In addition to and not in limitation of all other provisions in this paragraph 2.5 with respect to Customer indemnification of the Company, Company shall be indemnified and held harmless by the Customer against:

- (1). Claims for libel, slander, infringement of copyright or unauthorized use of any trademark, trade name, or service mark arising out of the material, data, information, or other content transmitted via Company's services.
- (2). Claims for patent infringement arising from combining or connecting Carrier's facilities with apparatus and systems of the Customer; and
- (3). All other claims arising out of any act or omission of the Customer in connection with any service provided by company.

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**SECTION 2 - RULES AND REGULATIONS, CONT'D.**

**2.5 LIABILITIES OF THE COMPANY, CONT'D.**

**2.5.B** The Company shall not be liable for damages or adjustment, refund, or cancellation of charges unless the Customer has notified the Company in writing, or any dispute concerning charges, or the basis of any claim for damages, within a reasonable period of time after the invoice is rendered or a debit is effected by the Company for the call giving rise to such dispute or claim. Any such notice must set forth sufficient facts to provide the Company with a reasonable basis upon which to evaluate the Customer's claim or demands. If notice of a dispute concerning the charges is not received, in writing, within a reasonable period of time after an invoice is rendered or a debit is effected, such invoice shall be deemed to be correct, accepted, and binding upon the Customer.

**2.6 OBLIGATIONS OF THE CUSTOMER**

**2.6.A** The Customer shall provide the personnel, power, and space required to operate all facilities associated equipment installed on the premises of the Customer.

**2.6.B** The Customer shall be responsible for providing Carrier personnel access to premises of the Customer at any reasonable hour for the purpose of testing the facilities or equipment of the Carrier.

**2.6.C** The Customer will be liable for damages to the facilities of the Carrier caused by negligence or willful acts of any officers, employees, agents, or contractors of the Customer.

**2.6.D** The Customer is responsible for pre-payment of all charges for services to be rendered by the Company. Customer may authorize others to use the services provided by the Company, but Customer remains responsible to the Company for payment of all charges for services used by others pursuant to this paragraph, with or without the Customer's knowledge. Customer is responsible for notifying the Company immediately of any unauthorized use or service.

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**SECTION 2 - RULES AND REGULATIONS, CONT'D.**

**2.7 RESTORATION OF SERVICE**

The use and restoration of service in emergencies shall be in accordance with Part 64, Subpart D of the Federal Communications Commission's Rules and Regulations, which specify the priority system for such activities.

**2.8 PAYMENTS AND BILLING**

**2.8.A** Service is provided on a monthly basis and billed in advance. The minimum service period is one month, except for Customer's second invoice, which shall be pro-rated for the portion of the month in which service was initiated that Customer received services, calculated according to the following formula:

Second Invoice Amount =  $A \times B / C$

A = number of days of service received by customer

B = flat monthly charge for services

C = number of days in calendar month in which service  
was initiated

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**SECTION 2 - RULES AND REGULATIONS, CONT'D.**

**2.8 PAYMENTS AND BILLING, CONT'D.**

- 2.8.B** The Customer is responsible for the payment of all charges for services furnished by the Company.
- 2.8.C** Customer bills are due and payable no later than 7 days after the posted due date on their invoice.
- 2.8.D** Customer bills are payable by cashier's check, money order, or electronic funds transfer only. Cash, business or personal checks may be accepted but acceptance does not waive future payments.
- 2.8.E** Company may appoint an agent to provide billing and collection services.
- 2.8.F** Customer questions, complaints, and disputes regarding billing or service provided by the Company may be referred to Arizona DialTone, Inc., d/b/a Touch Home Phone Service, customer service department in writing at 7170 W. Oakland Street, Chandler, AZ 85226, by phone at 1-480-785-3943 or 1-800-736-3261.
- 2.8.G** In the event that the Company incurs fees or expenses, including attorney's fees, collecting, or attempting to collect, any charges owed to the Company, the Company may charge the Customer, and the Customer will pay, all such fees and expenses reasonably incurred. Collection fees on overdue charges apply in addition to all applicable late payment charges and shall begin to accrue when the Account is assigned to an outside collection agency.

**2.9 CANCELLATION BY CUSTOMER**

- 2.9.A** The minimum service period after initiation of service is one calendar month. Customers may cancel by providing written or verbal notice during the last calendar month of service. The Customer shall remain liable for any charges incurred prior to the time that such cancellation becomes effective.

**2.10 CANCELLATION BY COMPANY**

- 2.10.A** Service may be discontinued or temporarily suspended by the Company, without notice to the customer, when the Company deems it necessary to take such action to prevent unlawful use of its service. The Company will restore service as soon as it can be provided without undue risk. Charges for reconnection of blocked or suspended service are included in Section 4.
- 2.10.B** Without incurring liability, the Company may discontinue the provision of service to a Customer or to a particular Customer location, or may withhold the provision of ordered or contracted services:

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**SECTION 2 - RULES AND REGULATIONS, CONT'D.**

**2.10 CANCELLATION BY COMPANY, CONT'D.**

**2.10.B Cont'd.**

- (1) Upon seven (7) days' written notice, for nonpayment of any sum due the company on the first of the calendar month;
- (2) For violation of any of the provisions of this tariff or any applicable service contract;
- (3) For violation of any law, rule, regulation, or policy of any governing authority having jurisdiction over the Company's services;
- (4) By reason of any order of decision of a court, public service commission, or federal regulatory body or other governing authority prohibiting the Company from furnishing its services; or
- (5) In the event that the Company's underlying Carrier(s) no longer provide the Company with services necessary for the Company to provide the services offered herein.

**2.11 INTERCONNECTION**

**2.11.A** Services furnished by Company may be interconnected with services or facilities of other authorized communications common carriers and with private systems, subject to the technical limitations established by Company or Carrier. Any special interface of equipment or facilities necessary to achieve computability between the facilities of Company and other participating carriers shall be provided at the Customer's expense.

**2.11.B** Interconnection between the facilities or services of other carriers shall be under the applicable terms and conditions of the other carrier's tariffs. The Customer is responsible for taking all necessary legal steps for interconnection Customer provided terminal equipment or communications equipment with Company's facilities. The Customer shall secure all licenses, permits, rights-of-way, and other such arrangements necessary for interconnection.

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**SECTION 2 - RULES AND REGULATIONS, CONT'D.**

**2.12 NOTICES AND COMMUNICATIONS**

**2.12.A** The Company shall designate on the service order an address to which the Customer shall mail or deliver all notices and other communications, except that Company may designate a separate address on each bill for service to which the Customer shall mail payment on that bill.

**2.12.B** Except as otherwise stated in this tariff, all notices or other communications required to be given pursuant to this tariff will be in writing. Notices and other communications of either party, and all bills mailed by the Company, shall be presumed to have been delivered to the other party on the third business day following placement of the notice, communication or bill with the U.S. Mail or a private delivery service, prepaid and properly addressed, or when actually received or refused by the addressee, whichever occurs first.

**2.12.C** The Company or the Customer shall advise the other party of any changes to the addresses designated for notices, other communications or billing, by following the procedures for giving notice set forth herein.

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# ORIGINAL

## SECTION 3 - DESCRIPTION OF SERVICE

### 3.1 SERVICES OFFERED

3.1.A Arizona DialTone, Inc., d/b/a Touch Home Phone Service offers local exchange service to residential and business customers.

3.1.B Arizona DialTone, Inc., d/b/a Touch Home Phone Service offers call forwarding, call waiting, caller ID, and other custom features which are available at a flat rate through Carrier.

### 3.2 MINIMUM CALL COMPLETION RATE

A Customer can expect a call completion rate (number of calls completed per number of calls attempted) of at least 99% during peak use periods.

## SECTION 4 - RATES AND CHARGES

### 4.1 BASIC MONTHLY SERVICE

4.1.A Residential Service – Basic monthly exchange service shall be charged at a calendar month flat rate of \$19.99 with a maximum rate of \$49.99.

4.1.B Business Service – Basic monthly exchange service shall be charged on a calendar month for either Flat or Measured service which consists of a base cost and a measured cost for non flat rate service.

	<u>Base Cost</u>	<u>Measured Minute</u>	<u>Measured Message</u>
Flat rate	\$18.99 to \$99.99	N/A	N/A
Measured rate	\$15.66 to \$49.99	\$0.05 first minute \$0.015 subsequent	\$0.08

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**SECTION 4 - RATES AND CHARGES, CONT'D.**

**4.1 BASIC MONTHLY SERVICE, CONT'D.**

**4.1.B Business Service, Cont'd.**

Measured service is only offered where available and is not available from all of the underlying carriers in all areas. Certain charges by the various Incumbent Local Exchange Carriers (ILEC) are billed to Arizona Dialtone and are re-billed to the customer as a customer accommodation. These ILEC charges include conversion, end user line charge, class of service change charge, rural surcharge, installation, repairs, blockings, screening, PIC-C, number portability, information calls, IXC and other charges. Discounts, such as time of day, etc., are also passed onto the customer.

**4.1.C Competitive Response Discount.** The company usually bills at the ILEC tariff rate and may, from time to time, offer to customers a discount in a competitive situation or for prepayment or quick payment of service.

**4.1.D Prepaid Residential Local Exchange Service**

**(1) General**

Prepaid Residential Local Exchange Service is provided to residential customers for inbound and outbound calling within a local exchange calling area. Service is offered on a prepaid basis only. The Service allows Customers unlimited calling each month within the local exchange calling area. No long distance service is provided. Service is provided where facilities are available.

Prepaid Residential Local Exchange Service is available in several package options as described in Section 4.2.A(3) following, which include a group of selected features. Features may also be ordered separately.

All charges must be paid prior to activation. Monthly charges must be paid in order for service to continue uninterrupted. Monthly charges include all taxes and surcharges. The minimum service period for this service is one (1) month.

Customers are billed a one-time activation charge for each Prepaid Account and a monthly recurring charge for local service.

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**SECTION 4 - RATES AND CHARGES, CONT'D.**

**4.1 BASIC MONTHLY SERVICE, CONT'D.**

**4.1.D Prepaid Residential Local Exchange Service**

(2) **Payment Methods for Prepaid Service**

Bills are due and payable as specified on the bill. Bills may be paid by mail or in person at the business office of the Company or an agency authorized to receive such payment. All charges for service are payable only in United States currency.

(3) **Prepaid Residential Service Options**

a. **Basic Prepaid Residential Service**

With Basic Prepaid Residential Service, the Customer receives unlimited local calling.

b. **Prepaid Residential Service - Essentials Package**

With the Essentials Package, the Customer receives unlimited local calling, plus Call Forward, Call Waiting, Speed Dial 30, Three-Way Calling, Caller ID, Call Waiting - ID, Repeat Dial (unlimited usage), Return Call (unlimited usage), Anonymous Call Rejection.

c. **Prepaid Residential Service - Essentials Plus Package**

With the Essentials Plus Package, the Customer receives all service and features included in the Essentials Package, plus voice mail with enhance call forwarding.

d. **Prepaid Residential Service - Touch Select Package**

With the Touch Select Package, the customer receives unlimited local calling, plus Caller ID, Call Waiting, Call Waiting-ID, Call Forward.

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**SECTION 4 - RATES AND CHARGES, CONT'D.**

**4.1 BASIC MONTHLY SERVICE, CONT'D.**

**4.1.D Prepaid Residential Local Exchange Service, Cont'd.**

**(4) Calling Features**

The following features are available either individually or as part of a package as specified in Paragraph (3) preceding.

**Anonymous Call Rejection:** Permits the end-user to automatically reject incoming calls when the call originates from a telephone number which has blocked delivery of its calling number. When active, calls from private numbers will be routed to a special announcement then terminated. The feature may be turned on or off by the end-user by dialing the appropriate feature control code.

~~Call Forward: Permits the Customer to automatically transfer all incoming calls to another telephone number of their choice and restore it to normal operation at their discretion. Calls may only be forwarded to other telephone numbers within the same local exchange calling area.~~

**Call Forwarding Busy Line/Don't Answer:** allows the Customer to choose to reroute incoming calls to another preselected telephone number for both busy and don't answer conditions. The Customer must activate and deactivate this feature.

**Call Waiting:** Notifies the Customer, engaged in a call, of an incoming call through a tone signal. Customers may place the first call on hold and answer the waiting call by operation of the switchhook, and may alternate between the two calls. A three-way conference cannot be established through this service.

**Call Waiting ID:** Allows a Customer who subscribes to both Caller ID and Call Waiting to see the name and number of an incoming caller while engaged in a call. Information is displayed on a specialized CPE not provided by the Company.

**Caller ID:** Permits the end-user to view a Directory Number of the calling party on incoming telephone calls. Information is displayed on a specialized CPE not provided by the Company. The feature also provides the date and time of each incoming call. It is the responsibility of the Customer to provide the necessary CPE.

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## SECTION 4 - RATES AND CHARGES, CONT'D.

### 4.1 BASIC MONTHLY SERVICE, CONT'D.

#### 4.1.D Prepaid Residential Local Exchange Service, Cont'd.

##### (4) Calling Features, Cont'd.

Enhanced Call Forwarding: Provides end-user control for call forwarding capabilities via dial-accessed voice prompt menus. Customers may forward calls to a primary local or long distance location. The end-user may specify a secondary location for routing of calls that go unanswered or reach a busy signal at the forward-to location. This secondary location may be another telephone number, pager or voice messaging service. Other Capabilities included with this feature include:

Speed Forwarding;  
Priority Screening;  
Ring Control; and  
Timed Forwarding.

It is the responsibility of the Customer to subscribe to the telephone number, pager or voice messaging service used as the secondary location.

Privacy ID: Works with Caller ID to handle incoming calls identified as "private", "out of area", or "unavailable." When unidentified callers dial the subscriber's number, they will receive a voice message stating that the called party does not accept calls from unidentified callers. They will then receive a prompt to state their name or the company they represent, which information must be provided before the call will attempt to connect. The subscriber's Caller ID CPE will display the platform number and the name of the service. When the subscriber picks up the phone, a recording will identify the caller. At that point, the subscriber may: 1) accept the call, deny the call, or opt to play a "sales call refusal" message. Calls received by voice mail or answering machines will be recognized as answered, and will be completed.

Repeat Dial: Permits the end-user to have calls automatically re-dialed when the first attempt reaches a busy number. The line is checked every 45 seconds for up to 30 minutes and alerts the Customer with a distinctive ringing pattern when the busy number and the Customer's line are free. The Customer can continue to make and receive calls while the feature is activated. The following types of calls cannot be reached using Repeat Dial:

Calls to 800 Service numbers  
Calls to 900 Service numbers  
Calls preceded by an interexchange carrier access code  
International Direct Distance Dialed calls  
Calls to Directory Assistance  
Calls to 911

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**SECTION 4 - RATES AND CHARGES, CONT'D.**

**4.1 BASIC MONTHLY SERVICE, CONT'D.**

**4.1.D Prepaid Residential Local Exchange Service, Cont'd.**

**(4) Calling Features, Cont'd.**

**Return Call:** Allows the Customer to return a call to the last incoming call whether answered or not. Upon activation, it will re-dial the number automatically and continue to check the number every 45 seconds for up to 30 minutes if the number is busy. The Customer is alerted with a distinctive ringing pattern when the busy number is free. When the Customer answers the ring, the call is then completed. The calling party's number will not be delivered or announced to the call recipient under any circumstances.

**Selective Call Rejection:** Enables the Customer to reject calls by dialing a code and the telephone number(s) of the call or calls to be rejected. Up to 16 numbers may be designated for rejection at any one time. Call attempts to the Customer from any of the designated numbers will be prevented from terminating to the Customer, and will instead be connected to an announcement informing the caller that the call is not presently being accepted by the called party. A Customer may also reject future calls from the most recent call received by dialing a code after completing the call.

**Speed Dial 30:** Permits the Customer to place calls to other telephone numbers by dialing a one or two digit code rather than the complete telephone number. The feature is available with a thirty (30) code list. The Customer has the ability to add or remove telephone numbers and codes to/from the speed calling list without assistance from the Company.

**Signal Ring:** Permits the user to determine the source of an incoming call via a distinctive ring.

**Three Way Calling:** Permits the end-user to add a third party to an established connection. When the third party answers, a two-way conversation can be held before adding the original party for a three-way conference. The end-user initiating the conference controls the call and may disconnect the third party to reestablish the original connection or establish a connection to a different third party. The feature may be used on both outgoing and incoming.

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**SECTION 4 - RATES AND CHARGES, CONT'D.**

**4.1 BASIC MONTHLY SERVICE, CONT'D.**

**4.1.D Prepaid Residential Local Exchange Service, Cont'd**

(5) Rates and Charges

	<u>Minimum</u>	<u>Maximum</u>	
a. Monthly Line and Package Rates			
Basic Rate Prepaid Residential Service	\$15.00	\$45.00	
Essentials Package	\$20.00	\$55.00	
Essential Package Plus	\$25.00	\$60.00	
Touch Select Package	\$20.00	\$55.00	(N)
b. Features (when ordered separately)			
Anonymous Call Rejection	\$ 1.00	\$10.00	
Call Waiting	\$ 1.00	\$10.00	
Call Waiting ID	\$ 1.00	\$10.00	
Caller ID	\$ 1.00	\$10.00	
Three Way Calling	\$ 1.00	\$10.00	
Return Call (*69)	\$ 1.00	\$10.00	
Repeat Dial (*66)	\$ 1.00	\$10.00	
Call Forward	\$ 1.00	\$10.00	
Call Forward/Busy/No Answer	\$ 1.00	\$10.00	
Signal Ring	\$ 1.00	\$10.00	
Selective Call Rejection	\$ 1.00	\$10.00	
Enhanced Call Forward	\$ 1.00	\$10.00	
Privacy ID	\$ 1.00	\$10.00	
Speed Dial 30	\$ 1.00	\$10.00	

\* Material previously found on this page now appears on Original Page 22.1, Section 4.

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**SECTION 4 - RATES AND CHARGES, CONT'D.**

**4.1 BASIC MONTHLY SERVICE, CONT'D.**

**4.1.D Prepaid Residential Local Exchange Service, Cont'd**

(5) Rates and Charges, Cont'd

c. Miscellaneous and Non-Recurring Charges

Service Activation Charge		
New Service-First Line	\$35.00	\$75.00
Each Additional Line	\$20.00	\$60.00
Transfer from another Carrier		
First Line	\$ 0.00	\$35.00
Each Additional Line	\$ 0.00	\$35.00
Change of Service Charge	\$ 5.00	\$25.00
Telephone Number Change Charge	\$10.00	\$30.00
Move Charge	\$20.00	\$60.00
Reconnection Charge, per Line (after disconnect)	\$30.00	\$75.00
Late Charge	\$ 1.00	\$10.00

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*\*\* Material now found on this page previously appeared on Original Page 22, Section 4.*

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## SECTION 4 - RATES AND CHARGES, CONT'D.

### 4.2 CUSTOM CALLING OPTIONS

4.2.A Calling options shall be available for a \$20 initiation fee and a flat monthly rate of:

Caller I.D.	\$12.00
Call Waiting	8.00
Call Forwarding	5.00
3-Way	5.00
Unpublished number	5.00 (\$15.00 set-up fee)
International Blocking	0.00 (\$30.00 set-up fee)
Incoming and Outgoing fraud	2.00 to 3.00

Any features not listed will be available at a flat rate of \$2.00 to 5.00 based on ILEC charges.

4.2.B Service packages are available with a \$20.00 set-up fee and are listed below:

**PKG #1 - (\$10.00 to \$30.00/month)**

Caller I.D., Call Waiting, 3-Way Calling, Speed Dial, Selective Call Fwd.

**PKG #2 - (\$10.00 to \$20.00/month)**

Call Waiting, 3-Way Calling, Speed Dial, Selective Call Fwd.

**PKG #3 - (\$5.00 to \$15.00/month)**

Call Waiting, Call Forwarding, 3-Way Calling, Speed Dial

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**SECTION 4 - RATES AND CHARGES, CONT'D.**

**4.3 INITIATION FEE**

Unless otherwise specified, Touch Home Phone Service, shall charge a flat fee of \$5.00 to \$89.99 for initiation or conversion of basic local services. Charges are billed by the ILEC and re-billed to customer as a customer accommodation.

**4.4 PROMOTIONS**

The Company may, from time to time, engage in special promotional offerings or trial service offerings limited to certain dates, times, and/or locations in order to attract new Customers or increase usage by existing Customers. In such cases, the Company will notify the Commission in writing prior to initiating the promotion.

**4.5 DEPOSITS**

**4.5.A** Touch Home Phone Service, normally does not require *deposits* from Customers, however, the Company may, in order to safeguard its interest, require an applicant to make a suitable deposit to be held by the Company as a guarantee of the payment of charges.

**4.5.B** For Intrastate telecommunications service, a deposit will be required under the following conditions:

1. Applicant has had no previous interstate or intrastate telecommunications service; or
2. Applicant does not have verifiable credit with any Touch Home Phone Service, affiliate anywhere within the region in the same or similar business; or
3. Applicant has had previous verifiable interstate or intrastate telecommunications service with any Touch Home Phone Service, affiliate anywhere with the region but has an outstanding and unpaid bill for interstate or intrastate telecommunications service; or has not established satisfactory credit. Satisfactory credit for an Intrastate telecommunications service customer is defined as twelve consecutive months of service without a suspension of service for nonpayment or with no more than one notification of intent to suspend service for nonpayment.

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4. Applicant for nonresidential service will be given credit for previous nonresidential service only if the applicant is same business entity to which such service was previously accorded.
- 4.5.C An initial deposit or an additional deposit will be required of an existing customer when high risk is indicated and existing security is insufficient. Such requirement will be imposed when a payment history includes a suspension of service for nonpayment during the previous twelve month period.
- 4.5.D The Company reserves the right to provide for installment payment of the deposit if the circumstances warrant.
- 4.5.E Any deposit required of an existing customer is due and payable within ten days after the requirement is imposed. This requirement shall be in writing and the payment date shall be on or after the due and payable date for the current bill. If said deposit or installment thereof, as appropriate, is not paid within the aforementioned time frame, the Company may suspend service of the Customer without further notice. The following are exceptions to this provision:
1. In the event service is suspended for a Customer for nonpayment, an initial or additional deposit shall be required prior to the restoration of service if existing security is insufficient.
  2. In the event prior indebtedness or prior unsatisfactory credit has been determined subsequent to the initial establishment of service due to misrepresentation of the facts by the Customer, a deposit shall be due and payable within five days upon verbal notification and written confirmation or within ten days when notification can only be provided in writing. The ten day period shall be measured from the mailed date of the written notice. If said deposit is not paid within the aforementioned time frame, the Company may suspend service to the Customer without further notice.
- 4.5.F The amount of the deposit shall be the estimated charges for the interstate and intrastate telecommunications service which will accrue for a 2-month period. All applicants and existing Customers shall be treated uniformly for the determination and application of deposits.
- 4.5.G When it is determined that a deposit is required under the conditions specified above, the applicant or Customer may, in lieu of or in addition to making the

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**SECTION 4 - RATES AND CHARGES, CONT'D.**

**4.5 DEPOSITS, CONT'D.**

**4.5.G Cont'd.**

deposit, arrange for an acceptable third party to guarantee payment of its charges by executing on its behalf a Guarantee of Payment Agreement with the Company. An acceptable third party guarantor for interstate and intrastate telecommunications service is a current nonresidential Customer with at least two years' continuous service, whose payment history for the most recent twelve month period is satisfactory.

**4.5.H** The fact that a deposit has been made in no way relieves the Customer from complying with the Company's regulations as to advance payments, or the prompt payment of bills on presentation.

**4.5.I** The deposit will bear simple interest computed from the date of its receipt by the Company to the date the deposit is refunded, or service is terminated, or annually upon request of the Customer. In the event that a deposit is retained during time periods having different rates of interest, the interest accrued on the deposit will be calculated using the interest rate applicable to each time period. Interest will not accrue on any deposit after the date on which reasonable effort has been made to return it to the Customer.

**4.5.J** The rates of interest paid will be established annually by the Arizona Corporation Commission.

**4.5.K** When service is terminated, the amount of the initial or additional deposit, with any interest due, will be credited to the Customer's account and any credit balance which may remain will be refunded. After an existing customer has established satisfactory credit, the amount of the deposit, with any interest due, will be either credited to the account or at the option of the Customer, refunded. Satisfactory credit for an interstate or intrastate telecommunications service Customer is defined as twelve consecutive months of interstate or intrastate telecommunications service without suspension of nonpayment and with no more than one notification of intent to suspend service for nonpayment.

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Arizona DialTone, Inc. d/b/a  
Touch Home Phone Service  
7170 W. Oakland St.  
Chandler, Arizona 85226

COMPETITIVE LOCAL EXCHANGE CARRIER

Arizona Tariff No. 3  
Original Sheet 27

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**SECTION 4 - RATES AND CHARGES, CONT'D.**

**4.6 TAXES**

All state and local taxes (i.e. gross receipts tax, sales tax, municipal utilities tax, Federal, State and Local fees and charges) are added to quoted rates.

**4.7 RECONNECTION OF BLOCKED, SUSPENDED, OR TERMINATED SERVICE**

In the event that service to a Customer is blocked, suspended, or terminated pursuant to the provisions of this tariff, there will be a charge of \$50 to restore service.

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