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OPEN MEETING ITEM



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EXECUTIVE DIRECTOR

COMMISSIONERS
MIKE GLEASON - Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE



ARIZONA CORPORATION COMMISSION

DATE: JULY 15, 2008

DOCKET NOS: T-01051B-07-0693 and T-03608A-07-0693

TO ALL PARTIES:

Enclosed please find the recommendation of Administrative Law Judge Sarah Harpring. The recommendation has been filed in the form of an Opinion and Order on:

QWEST CORPORATION and
ARIZONA DIALTONE, INC.
(ARBITRATION)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

JULY 24, 2008

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

JULY 29, 2008 and JULY 30, 2008

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

BRIAN C. McNEIL
EXECUTIVE DIRECTOR

Arizona Corporation Commission
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ARIZONA CORPORATION COMMISSION
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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

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

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

DOCKET NO. T-01051B-07-0693

DOCKET NO. T-03608A-07-0693

DECISION NO. _____

OPINION AND ORDER

11 DATE OF HEARING: May 1 and 7, 2008
12 PLACE OF HEARING: Phoenix, Arizona
13 ARBITRATOR: Sarah N. Harpring
14 APPEARANCES: Mr. Norman G. Curtright, Qwest Corporation Legal
15 Department, on behalf of Qwest Corporation;
16 Mr. Glenn B. Hotchkiss, Chiefetz, Iannitelli &
17 Marcolinni, P.C., on behalf of Arizona Dialtone, Inc.;
18 and
19 Ms. Maureen A. Scott, Staff Attorney, Legal Division,
20 on behalf of the Utilities Division of the Arizona
21 Corporation Commission.

20 **BY THE COMMISSION:**

21 **Procedural Background**

22 On December 17, 2007, Qwest Corporation ("Qwest") filed with the Arizona Corporation
23 Commission ("Commission") a Petition for Arbitration under 47 U.S.C. § 252(b) ("§ 252(b)") and
24 Arizona Administrative Code ("A.A.C.") R14-2-1505. In its Petition, Qwest requested that the
25 Commission resolve issues related to the Interconnection Agreement ("ICA") between Qwest and
26 Arizona Dialtone, Inc. ("AZDT"), which Qwest asserted derived from AZDT's refusal to enter into
27 an amendment to the current ICA ("ICA amendment") that would implement changes related to
28

1 unbundled access to mass market local circuit switching, changes that Qwest asserted were mandated
2 by federal law, specifically the Federal Communications Commission's ("FCC's") Triennial Review
3 Remand Order¹ ("TRRO") and 47 C.F.R. § 51.319(d).

4 Also on December 17, 2007, Qwest filed a Complaint against AZDT based on the same set of
5 facts ("Complaint matter").² The Complaint matter has not been consolidated with this matter.

6 A joint procedural conference for this matter and the Complaint matter was held on January
7 14, 2008, at the Commission's offices in Phoenix, Arizona. Qwest and AZDT appeared through
8 counsel. Because it was Qwest, an incumbent local exchange carrier ("ILEC"), rather than AZDT, a
9 competitive local exchange carrier ("CLEC"), that requested negotiation in this matter, and §
10 252(b)(1) allows a party to a negotiation to petition for arbitration within a specified period after an
11 ILEC receives a request for negotiation, Qwest and AZDT were both asked to state their positions on
12 Qwest's authority to petition for arbitration under § 252 and the applicability of the § 252 timelines in
13 this matter. Qwest and AZDT were directed to file briefs on those issues by January 28, 2008.
14 Qwest and AZDT were also asked to state their positions on consolidating this matter and the
15 Complaint matter and on suspending the timelines under § 252, assuming that they apply. Neither
16 Qwest nor AZDT objected to consolidating the two matters. AZDT did not object to suspending the
17 timelines, but Qwest did object. As a result of Qwest's objection, the hearing in this matter was
18 tentatively scheduled for February 11, 2008.

19 On January 16, 2008, a Procedural Order was issued directing Qwest and AZDT to file the
20 briefs discussed at the procedural conference and requesting Staff to file a brief as well; scheduling
21 the hearing in this matter to commence on February 11, 2008; requesting Staff to appear and
22 participate in the hearing; and directing Qwest and AZDT to share equally the costs for transcription.
23 The issue of consolidation was not decided, pending resolution of the issues concerning Qwest's
24 authority to petition for arbitration and the applicability of the § 252 timelines.

25 On January 17, 2008, AZDT filed its response to Qwest's Petition.³

26 _____
27 ¹ Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local
Exchange Carriers, 20 F.C.C.R. 2533 (2005) (Order on Remand).

28 ² The Complaint matter was assigned Docket Nos. T-03608A-07-0694 et al.

³ This was six days after the deadline for response under § 252(b)(3).

1 On January 28 and 29, 2008, Qwest, AZDT, and Staff filed their briefs.

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

4 On January 31, 2008, a Procedural Order was issued ordering that Qwest had the authority to
5 petition the Commission for arbitration under § 252(b)(1); that this matter could proceed before the
6 Commission; and that the hearing in this matter, at which Staff was requested to appear and
7 participate, would commence on February 11, 2008. The Procedural Order did not consolidate this
8 matter and the Complaint matter.

9 Later on January 31, 2008, Qwest filed Requests for Procedural Conference in this matter and
10 the Complaint matter, because of its Motion for Judgment on the Pleadings in the Complaint matter.

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

15 On February 4, 2008, Qwest filed in this matter a Motion for an Order Awarding Qwest's
16 Requested Relief Regarding the Proposed TRO/TRRO Amendment Based upon the Statements and
17 Admissions of Arizona Dialtone, Inc., and Denying Arbitration of Alleged Billing Disputes ("Motion
18 for Requested Relief").

19 On February 6, 2008, a joint procedural conference was held in this matter and the Complaint
20 matter at the Commission's offices in Phoenix, Arizona. Qwest, AZDT, and Staff appeared through
21 counsel. At the procedural conference, it was agreed that AZDT and Staff should have an
22 opportunity to respond to Qwest's Motion for Judgment on the Pleadings and Motion for Requested
23 Relief and that Qwest should have an opportunity to reply to those responses, and a schedule for
24 those filings was established. It was also agreed that it would be appropriate to vacate the February
25 11, 2008, hearing in this matter and to suspend the § 252 timelines for the amount of time needed for
26 the Commission to rule on both of Qwest's Motions. A Procedural Order in this matter was issued
27 later that day vacating the February 11, 2008, hearing date; directing AZDT and Staff to file
28 responses to Qwest's Motion for Requested Relief by February 22, 2008; requiring Qwest to file a

1 reply to those responses by February 29, 2008; and suspending the timeline under § 252 for 45 days.

2 On February 22, 2008, AZDT filed its Opposition to Qwest's Motion for Requested Relief,
3 and Staff filed its Comments on Qwest's Motion for Requested Relief.

4 On February 29, 2008, Qwest filed a Reply in Support of its Motion for Requested Relief.

5 On March 27, 2008, a Procedural Order was issued scheduling oral argument in this matter
6 for April 17, 2008; stating that the oral argument would be changed to an evidentiary hearing if either
7 Qwest or AZDT stated that it desired to present testimony; requiring Qwest and AZDT each to file,
8 by April 3, 2008, documents indicating whether any genuine issue of material fact existed in this
9 matter, whether any legal issue other than those identified in the Procedural Order needed to be
10 resolved in this matter, and whether the party desired to present testimony; requiring AZDT to file
11 updated ICA amendment language; and requiring Qwest to file copies of cited public utilities
12 commission ("PUC") orders from other jurisdictions.

13 On March 31, 2008, Qwest filed a Motion requesting that the oral argument scheduled for
14 April 17, 2008, be moved to April 16, 2008, due to counsel's travel plans.

15 On April 1, 2008, a Procedural Order was issued rescheduling the oral argument in this matter
16 for April 16, 2008.

17 On April 3, 2008, AZDT filed a Statement of Issues in Dispute and Request to Present
18 Testimony along with updated ICA amendment language, and Qwest filed a Statement Regarding
19 Lack of Material Issues of Fact and copies of the cited PUC orders.

20 On April 4, 2008, a Procedural Order was issued requiring that the oral argument scheduled
21 for April 16, 2008, proceed as an evidentiary hearing, with oral argument to be provided as to legal
22 issues.

23 On April 9, 2008, AZDT filed a Motion to Continue requesting that the April 16, 2008,
24 evidentiary hearing be moved to May 1, 2008, due to a scheduling conflict with a Colorado Public
25 Utilities Commission ("Colorado PUC") weekly public meeting at which the Colorado PUC was
26 expected to render a Decision in a parallel arbitration proceeding.

27 On April 10, 2008, a Procedural Order was issued rescheduling the evidentiary hearing in this
28 matter to May 1, 2008, and extending the timeframe for the Commission's decision in this matter by

1 30 days.

2 On April 28, 2008, Qwest filed a Motion in Limine to Bar Testimony at May 1, 2008, Hearing
3 (“Motion in Limine”).

4 On May 1, 2008, the evidentiary hearing commenced at the Commission’s offices in Phoenix,
5 Arizona, with a duly authorized Administrative Law Judge of the Commission presiding as
6 Arbitrator. Qwest, AZDT, and Staff appeared through counsel, and testimony was obtained from
7 Qwest witnesses William Easton and Larry Christensen. It was agreed that a second day of hearing
8 was needed and should be held on May 7, 2008, and that, rather than providing oral argument, the
9 parties would submit closing briefs by May 20, 2008. It was also agreed that the timeframe for the
10 Commission’s decision in this matter should be extended to allow for consideration of a
11 Recommended Opinion and Order at the Open Meeting on July 29 and 30, 2008. At the hearing,
12 Qwest’s Motion for Requested Relief was denied; Qwest’s Motion in Limine was denied; and the
13 Arbitrator announced that Issues 16, 17, and 18 from AZDT’s April 3, 2008, Statement of Issues in
14 Dispute⁴ were not properly before the Commission under § 252 because they had not been raised in
15 either the Petition or AZDT’s Response. The Arbitrator also requested that Qwest file copies of two
16 unreported U.S. District Court decisions referenced in its Exhibit Q-14.

17 On May 5, 2008, a Procedural Order was issued scheduling the second day of hearing for
18 May 7, 2008, and extending the timeframe for the Commission’s decision in this matter by 36 days.
19 Also on that date, Qwest filed copies of the unreported court decisions requested by the Arbitrator.

20 On May 7, 2008, the second day of hearing proceeded at the Commission’s offices in
21

22 ⁴ Those issues were stated as follows:

23 16. Whether the rate for “alternative service arrangements” that Qwest proposes as a
24 replacement for the unbundled rate during the post-transition period is an above-market rate
because it is higher than the rate that AZDT is paying other carriers for identical switching
services;

25 17. Whether awarding Qwest the relief it seeks herein will drive AZDT out of the Public
Access Lines (“PAL”) product market, thereby lessening competition in that market; and

26 18. Whether AZDT has transitioned its embedded base of PAL customers to other
carriers to the extent possible given that Qwest has a monopoly position in certain geographic
areas.

27 (AZDT Statement of Issues in Dispute and Request to Present Testimony at 3-4.) These issues were
28 excluded from consideration, as not properly before the Commission, because § 252(b)(4)(a) requires a
State Commission to limit its consideration in an arbitration to the issues set forth in the petition and any
response.

1 Phoenix, Arizona, before the same Arbitrator. Qwest, AZDT, and Staff appeared through counsel,
2 and testimony was obtained from AZDT witness Thomas Bade. At the hearing, the parties were
3 requested to file a joint issues statement by May 14, 2008, and closing briefs by May 20, 2008.
4 AZDT was also asked to file, as late-filed exhibits, a copy of the Colorado PUC Decision in the
5 parallel arbitration case, which had been entered on April 16, 2008, and a copy of its writ of certiorari
6 regarding the Colorado PUC Decision.⁵ Qwest was requested to file its motion for reconsideration of
7 the Colorado PUC Decision.

8 On May 9, 2008, Qwest filed a copy of its Application for Rehearing, Reargument or
9 Reconsideration of the Colorado PUC Decision. On the same date, AZDT filed, as Late-Filed
10 Exhibit A-14, a copy of the Colorado PUC Decision.

11 On May 16, 2008, Qwest and AZDT filed a Joint Statement of Issues in Dispute.

12 On May 20, 2008, Qwest filed its Closing Brief, Staff filed Staff's Brief, and AZDT filed its
13 Post-Hearing Brief.

14 On June 4, 2008, AZDT filed notice that Qwest's Application for Rehearing, Reargument or
15 Reconsideration had been denied by the Colorado PUC on that date.

16 On June 26, 2008, Qwest filed a Notice of Supplemental Authority including a copy of a
17 decision issued by the U.S. Court of Appeals for the 8th Circuit on June 20, 2008.

18 On July 3, 2008, AZDT filed a Response to Qwest's Notice of Supplemental Authority.

19 * * * * *

20 Pursuant to § 252(b)(4)(C), the Commission hereby resolves the issues presented for
21 arbitration.

22 **DISCUSSION**

23 **The Parties and Dispute**

24 Qwest is an ILEC in Arizona within the meaning of 47 U.S.C. § 251(b) ("§ 251(b)"). AZDT
25 is a CLEC authorized to provide competitive resold local exchange and interexchange
26 telecommunications services in Arizona pursuant to a Certificate of Convenience and Necessity
27

28 ⁵ To date, AZDT has not filed a copy of its writ of certiorari regarding the Colorado PUC Decision.

1 issued by the Commission in Decision No. 63669 (May 24, 2001). The ICA between Qwest and
 2 AZDT was approved by the Commission in Decision No. 64190 (November 8, 2001).⁶ The ICA
 3 had an initial two-year term, which expired in August 2003, and now operates on a month-to-month
 4 basis. Under the ICA, AZDT purchases both UNE-P⁷ Public Access Line (“PAL”) and UNE-P Plain
 5 Old Telephone Service (“POTS”) services from Qwest. Most of AZDT’s business is in the resale of
 6 PAL lines to independent payphone service providers.

7 The issues presented for arbitration result primarily from the changes adopted by the FCC in
 8 the TRRO regarding the availability of unbundled mass market local circuit switching and the impact
 9 of those changes upon the ICA between Qwest and AZDT. Specifically, the issues pertain to
 10 AZDT’s purchase of UNE-P services from Qwest. The dispute between Qwest and AZDT arose
 11 mostly because AZDT did not transition its embedded UNE-P customers by the end of the TRRO’s
 12 one-year transition period, Qwest continued to allow new orders for UNE-P services after the
 13 effective date of the TRRO, Qwest has billed AZDT at the UNE-P rate for the services provided and
 14 has accepted payment from AZDT at that rate, and the parties disagree over the payment that AZDT
 15 ultimately must make for the services obtained after the effective date of the TRRO. The other issue
 16 in dispute is the notice that Qwest must provide to AZDT in the event of copper loop retirement.

17 The ICA

18 The ICA between Qwest and AZDT states the following regarding changes of law, under
 19 Section 2.0, “Interpretation and Construction”:

20 2.2 The provisions in this Agreement are based, in large part, on the
 21 existing state of the law, rules, regulations and interpretations thereof, as
 22 of the date hereof (the “Existing Rules”). . . . To the extent that the
 23 Existing Rules are changed, vacated, dismissed, stayed or modified, then
 24 this Agreement and all contracts adopting all or part of this Agreement
 25 shall be amended to reflect such modification or change of the Existing
 26 Rules. Where the Parties fail to agree upon such an amendment within
 27 sixty (60) days from the effective date of the modification or change of the
 28 Existing Rules, it shall be resolved in accordance with the Dispute
 Resolution provision of this Agreement.

(Tr. Ex. Q-3 at 2.)

⁶ The parties also have separate ICAs in Colorado and Minnesota.

⁷ UNE-P stands for unbundled network element platform, which is a combination of unbundled local circuit switching, ILEC loops, and shared transport. (TRRO ¶200.)

1 Regarding dispute resolution, the ICA states that if any claim, controversy, or dispute between
 2 the parties arises, and the parties do not resolve it in the ordinary course of their dealings, then it shall
 3 be resolved in accordance with the dispute resolution process set forth in the ICA. (Tr. Ex. Q-3 at 21-
 4 22.) The dispute resolution process requires, upon the written request of either party, that each party
 5 designate a vice-presidential level employee to negotiate in good faith to resolve the dispute. (*Id.* at
 6 22.) The parties may, by mutual agreement, use other procedures such as mediation to assist in the
 7 negotiations. (*Id.*) If the dispute is not resolved within 30 calendar days after it is referred to the
 8 vice-presidential level representatives, either party may demand that the dispute be settled by binding
 9 arbitration before a panel of three arbitrators knowledgeable about the telecommunications industry
 10 and using the then-current rules of the American Arbitration Association. (*Id.*)

11 The ICA also states the following in the section regarding UNE combinations:

12 9.23.1.2. Qwest will offer to CLEC UNE Combinations on rates,
 13 terms and conditions that are just, reasonable and non-discriminatory in
 14 accordance with the terms and conditions of this Agreement and the
 15 requirements of Section 251 and Section 252 of the Act, and applicable
 16 FCC rules, and other applicable laws. . . .

17 9.23.1.2.1. Changes in law, regulations or other “Existing
 18 Rules” relating to UNEs and UNE Combinations, including
 19 additions and deletions of elements Qwest is required to unbundle
 20 [sic] and/or provide in a UNE Combination, shall be incorporated
 21 into this Agreement pursuant to the Interpretation and Construction
 22 Section of this Agreement.

23 (*Id.* at 172.)

24 The ICA does not contain any specific references to UNE-P PAL. (*See id.*) Rather, the ICA
 25 states that the following UNE-P products are available: UNE-P POTS, UNE-P ISDN, UNE-P DSS,
 26 UNE-P PBX, and UNE-P Centrex. (*Id.* at 173.)

27 The ICA also requires Qwest to offer to AZDT for resale at wholesale rates any service that
 28 Qwest provides at retail to subscribers who are not telecommunications carriers. (*Id.* at 26.) The

1 discounts to be provided for resale services are included in Exhibit A to the ICA.

2 Upon expiration of its original term, the ICA allows either party to terminate the ICA by
3 providing 160 days' written notice to the other party. (*Id.* at 11.) The date of the termination notice
4 is to serve as the starting point for the 160-day negotiation window under § 252. (*Id.*)

5 The TRO and TRRO

6 In the Triennial Review Order⁸ ("TRO"), which was released on August 21, 2003, the FCC
7 found, on a nationwide basis, that CLECs were impaired without unbundled mass market local circuit
8 switching. (TRO ¶¶7, 459.) However, the FCC also recognized that there may not be impairment in
9 some markets and required State Commissions to make more specific inquiries and to determine
10 whether making unbundled switching available on a rolling basis, rather than indefinitely, might cure
11 the impairment. (*Id.*) The FCC amended 47 C.F.R. § 51.319(d)(2) to require ILECs to provide
12 access to unbundled mass market local circuit switching except in markets where a State Commission
13 (1) had found that CLECs were not impaired or (2) had found that impairment would be cured by
14 implementing transitional unbundled local circuit switching and had required implementation of such
15 transitional access. (TRO App. B.) The FCC required State Commissions to make initial reviews
16 within nine months after the TRRO's effective date and required ILECs to continue providing
17 unbundled local circuit switching in all locations pending completion of State Commission
18 proceedings. (TRO ¶527.)

19 Pursuant to petitions filed by numerous entities, the TRO was reviewed by the U.S. District
20 Court for the D.C. Circuit in USTA II,⁹ issued in March 2004. In USTA II, the D.C. Circuit Court
21 held that, in the TRO, the FCC had unlawfully subdelegated to State Commissions its statutory duty
22 to determine which network elements ILECs were required to make available to CLECs on an
23 unbundled basis and that the FCC's nationwide impairment determination was inconsistent with the
24 court's prior decision in USTA I¹⁰. The D.C. Circuit Court vacated the FCC's decision to order

25 _____
26 ⁸ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the
27 Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering
28 Advanced Telecommunications Capability, 18 F.C.C.R. 16978 (2003) (Report and Order on Remand and
Further Notice of Proposed Rulemaking), *corrected by* Errata, 18 F.C.C.R. 19020 (2003).

⁹ United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

¹⁰ United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002).

1 unbundling of mass market switches and vacated and remanded the FCC's finding of national
2 impairment for mass market switches.¹¹

3 In the TRRO, which was released on February 4, 2005, with an effective date of March 11,
4 2005, the FCC reexamined ILECs' obligations to offer unbundled mass market local circuit switching
5 in light of USTA II. (TRRO ¶199.) As a result, in the TRRO, the FCC eliminated the § 251
6 unbundling requirement for mass market local circuit switching nationwide and adopted a transition
7 plan requiring CLECs to submit orders to convert their embedded UNE-P customers to alternative
8 arrangements within 12 months of the effective date of the TRRO. (*Id.*) The FCC prohibited CLECs
9 from adding new customers using unbundled access to local circuit switching, but allowed CLECs,
10 during the 12-month transition period, to have access to UNE-P services priced at TELRIC¹² plus one
11 dollar, until the CLECs' embedded UNE-P customers were successfully migrated to the CLECs' own
12 switches or to alternative access arrangements negotiated by the carriers. (*Id.*) Further, the FCC
13 stated that the 12-month transition period did not supersede any alternative arrangements that carriers
14 had voluntarily negotiated on a commercial basis. (*Id.*)

15 In the TRRO, the FCC specifically found that CLECs are not impaired in the deployment of
16 switches, that it is feasible for CLECs to use competitively deployed switches to serve mass market
17 customers throughout the nation, and that a nationwide bar on unbundling in the context of mass
18 market local circuit switching is justified because the availability of unbundled switching combined
19 with unbundled loops and shared transport poses a disincentive to CLEC investment. (TRRO ¶204.)
20 The FCC also found that the availability of UNE-P, in particular, had been a disincentive to CLECs'
21 investing in infrastructure, although it had originally been conceived as a tool to enable a transition to
22 facilities-based competition, which is favored by the FCC. (TRRO ¶218.)

23 Regarding the TRRO transition plan for mass market unbundled local circuit switching, the
24 FCC stated:

25 We require [CLECs] to submit the necessary orders to convert their mass
26 market customers to an alternative service arrangement within twelve

27 ¹¹ The D.C. Circuit Court stayed the vacatur until the later of (1) the denial of petitions for rehearing or rehearing en
28 banc or (2) 60 days after the date of the order. Three writs of certiorari to the D.C. Circuit were denied on October 12,
2004.

¹² TELRIC stands for total element long run incremental cost.

1 months of the effective date of this Order. This transition period shall
 2 apply only to the embedded customer base, and does not permit [CLECs]
 3 to add new UNE-P arrangements using unbundled access to local circuit
 4 switching pursuant to section 251(c)(3) except as otherwise specified in
 5 this Order. . . . We believe that the twelve-month period provides adequate
 6 time for both [CLECs] and [ILECs] to perform the tasks necessary to an
 7 orderly transition, which could include deploying competitive
 infrastructure, negotiating alternative access arrangements, and performing
 loop cut overs or other conversions. Consequently, carriers have twelve
 months from the effective date of this Order to modify their
 interconnection agreements, including completing any change of law
 processes. By the end of the twelve month period, requesting carriers
 must transition the affected mass market local circuit switching UNEs to
 alternative facilities or arrangements.

8 (TRRO ¶227 (footnotes omitted).)

9 Regarding the pricing to be employed during the transition period, the FCC stated:

10 We do, however, adopt the *Interim Order and NPRM's* proposal that
 11 unbundled access to local circuit switching during the transition period be
 12 priced at the higher of (1) the rate at which the requesting carrier leased
 13 UNE-P on June 15, 2004 plus one dollar, or (2) the rate the state public
 14 utility commission establishes, if any, between June 16, 2004, and the
 15 effective date of this Order, for UNE-P plus one dollar. We believe that
 16 the moderate price increases help ensure an orderly transition by
 17 mitigating the rate shock that could be suffered by [CLECs] if TELRIC
 18 pricing were immediately eliminated for these network elements, while at
 19 the same time, these price increases, and the limited duration of the
 20 transition, provide some protection of the interests of [ILECs] in those
 situations where unbundling is not required. We expect [ILECs] to meet
 hot cut demand, and to work to prevent unnecessary customer disruption.
 To the extent that specific problems arise, carriers are free to petition for
 waiver of this requirement with respect to their particular circumstances.
 Of course, the transition mechanism adopted here is simply a default
 process, and pursuant to section 252(a)(1), carriers remain free to
 negotiate alternative arrangements superseding this transition period. The
 transition mechanism adopted today also does not replace or supersede
 any commercial arrangements carriers have reached for the continued
 provision of UNE-P or for a transition to UNE-L.

21 (TRRO ¶228 (footnotes omitted).) The FCC also stated, in a footnote to the first sentence of this
 22 paragraph, that "UNE-P arrangements no longer subject to unbundling shall be subject to true-up to
 23 the applicable transition rate upon the amendment of the relevant interconnection agreements,
 24 including any applicable change of law processes." (TRRO ¶228 n.630.) As an example of a
 25 commercial arrangement for the continued provision of UNE-P, the FCC specifically cited the Qwest
 26 Platform Plus ("QPP") offering. (TRRO ¶228 n.633.)

27 Regarding the implementation of the TRRO's changes for unbundling, the FCC further stated:

28 We expect that [ILECs] and [CLECs] will implement the Commission's

1 findings as directed by section 252 of the Act. Thus, carriers must
 2 implement changes to their interconnection agreements consistent with our
 3 conclusions in this Order. We note that the failure of an [ILEC] or a
 4 [CLEC] to negotiate in good faith under section 251(c)(1) of the Act and
 5 our implementing rules may subject that party to enforcement action.
 6 Thus, the [ILEC] and [CLEC] must negotiate in good faith regarding any
 7 rates, terms, and conditions necessary to implement our rule changes. We
 8 expect that parties to the negotiating process will not unreasonably delay
 9 implementation of the conclusions adopted in this Order. We encourage
 10 the state commissions to monitor this area closely to ensure that parties do
 11 not engage in unnecessary delay.

12 (TRRO ¶233 (footnotes omitted).)

13 Finally, to implement its determinations regarding mass market unbundled local circuit
 14 switching, the FCC adopted the following regulatory language at 47 C.F.R. § 51.319(d)(2):

15 (2) DS0 capacity (i.e., mass market) determinations.

16 (i) An incumbent LEC is not required to provide access to local
 17 circuit switching on an unbundled basis to requesting
 18 telecommunications carriers for the purpose of serving end-user
 19 customers using DS0 capacity loops.

20 (ii) Each requesting telecommunications carrier shall migrate its
 21 embedded base of end-user customers off of the unbundled local
 22 circuit switching element to an alternative arrangement within 12
 23 months of the effective date of the Triennial Review Remand Order.

24 (iii) Notwithstanding paragraph (d)(2)(i) of this section, **for a 12-
 25 month period from the effective date of the Triennial Review
 26 Remand Order, an incumbent LEC shall provide access to local
 27 circuit switching on an unbundled basis** for a requesting carrier to
 28 serve its **embedded** base of end-user customers. The price for
 unbundled local circuit switching in combination with unbundled DS0
 capacity loops and shared transport obtained pursuant to this paragraph
 shall be the higher of: (A) the rate at which the requesting carrier
 obtained that combination of network elements on June 15, 2004 plus
 one dollar, or (B) the rate the state public utility commission
 establishes, if any, between June 16, 2004, and the effective date of the
Triennial Review Remand Order, for that combination of network
 elements, plus one dollar. **Requesting carriers may not obtain new
 local switching as an unbundled network element.**

(TRRO App. B (boldface added).)

The Dealings Between Qwest and AZDT

The dealings between Qwest and AZDT that resulted in this arbitration began after the
 decision in USTA II and before the TRRO, at a time of some uncertainty regarding how access to
 unbundled mass market local circuit switching would ultimately be treated by the FCC. During this
 time, beginning in April 2004, Qwest engaged in mediated negotiations with MCI and other CLECs
 to reach an alternative arrangement known as QPP, designed to replace UNE-P. (Tr. Ex. Q-2.) It

1 was within the context of these QPP negotiations that Qwest and AZDT originally began discussions
2 related to an ICA amendment.

3 On May 13, 2004, in an e-mail sent to a number of Qwest employees and CLEC
4 representatives, Mr. Bade asked how Qwest intended to treat PAL lines—whether as business or
5 residential lines—and stated that AZDT’s survival depended on it. (Tr. Ex. A-3.)

6 On May 17, 2004, Wendy Moser of Qwest informed Mr. Bade and the CLEC representatives
7 via e-mail that the QPP would treat PAL lines as business lines. (Tr. Ex. A-4.) On May 18, 2004,
8 Mr. Bade sent a reply e-mail to Ms. Moser and the CLEC representatives expressing disappointment
9 that Qwest would be handling PAL lines as business lines and asking whether Qwest would
10 reconsider and perhaps treat PAL lines as a third type of service. (*Id.*)

11 On June 1, 2004, a press release was issued announcing that Qwest and MCI had reached a
12 commercial agreement for wholesale services, the QPP, which would replace the UNE-P that MCI
13 currently purchased. (Tr. Ex. Q-2.) The press release stated that all of Qwest’s wholesale customers
14 had been invited, in April 2004, to participate in the mediated negotiations that led to the QPP. (*Id.*)

15 On June 2, 2004, Mr. Bade sent Michael Whitt of Qwest an e-mail asking whether Qwest
16 would allow AZDT to have the same deal as MCI, but altered so that PAL lines would have a
17 residential adder.¹³ (Tr. Ex. A-5.) Mr. Whitt responded on June 3, 2004, that Qwest was still
18 considering the last joint CLEC proposal and intended to provide a response as soon as possible and
19 that PAL lines would likely always fall to the business category. (*Id.*)

20 On December 15, 2004, the FCC adopted the TRRO.

21 On January 4, 2005, Qwest sent Mr. Bade a letter stating that QPP Master Services
22 Agreements (“MSAs”) were available for signature until January 31, 2005, at the same terms,
23 conditions, and rates provided to date; that executed MSAs needed to be received by Qwest by
24 January 31, 2005; and that Qwest might withdraw or modify the QPP offering after that date. (Tr.
25 Ex. A-6.) Qwest explained in the letter that the TRRO had been adopted on December 15, 2004; that
26 Qwest would no longer be required to provide UNE-P services to CLECs; but that QPP was offered

27 _____
28 ¹³ According to testimony at the evidentiary hearing, a residential adder essentially results in a discount from business service rates. See Tr. at 395, line 8 through Tr. at 396, line 5; Tr. at 414, line 9 through Tr. at 415, line 12.

1 as a functionally equivalent UNE-P replacement product. (*Id.*)

2 On February 4, 2005, the FCC released the TRRO.

3 On February 11, 2005, Qwest sent Mr. Bade a letter stating that the TRRO had eliminated
4 Qwest's obligation to provide UNE-P services and had adopted a 12-month transition plan that
5 included rate increases for existing UNE-P lines, a moratorium on new UNE-P services, and a
6 requirement to convert UNE-P services to alternative arrangements by March 11, 2006. (Tr. Ex. A-
7 7.) Qwest also stated that the TRRO did not alter Qwest's efforts to negotiate commercial
8 arrangements with CLECs desiring a functionally equivalent UNE-P replacement product, that Mr.
9 Bade had not yet signed a QPP MSA, and that QPP MSAs were available for signature only until
10 March 11, 2005. (*Id.*) Qwest stated that it would assume that any CLEC with existing UNE-P
11 circuits that had not signed a QPP MSA by March 11, 2005, had chosen to follow the transition plan
12 ordered in the TRRO. (*Id.*)

13 On February 22, 2005, and again on March 2, 2005, Mr. Bade sent Clifford Dinwiddie of
14 Qwest an e-mail stating that Mr. Bade would like to sign the commercial agreements but needed for
15 Qwest either to classify PAL lines as residential for adders or allow AZDT to move only residential
16 accounts to QPP. (Tr. Ex. A-8.) On March 3, 2005, Mr. Dinwiddie responded that PAL receives
17 business adders under QPP. (*Id.*)

18 On March 3, 2005, Mr. Bade sent Julie Archuleta of Qwest a letter stating that AZDT had
19 participated in several meetings and conference calls on QPP, had voiced its concerns verbally and in
20 several e-mails, and would be "upside down" with QPP. (Tr. Ex. A-9.) Mr. Bade stated that the only
21 viable alternative was to ask the state regulatory authorities to mediate and/or arbitrate the ICAs, but
22 also offered to travel to Denver or meet in Phoenix to discuss the situation before requesting public
23 utility commission assistance. (*Id.*) Mr. Bade stated that, in the meantime, AZDT would continue
24 with its existing ICAs. (*Id.*)

25 On March 4, 2005, Steve Hansen of Qwest sent Mr. Bade a letter stating that the TRRO had
26 caused uncertainty among CLECs regarding Qwest's implementation plan; that Qwest intended to
27 negotiate ICA amendments conforming to the TRO and TRRO before implementing the changes
28 from the TRO and TRRO; that the terms, conditions, and pricing of existing ICAs would govern until

1 new or amended ICAs became effective; and that ICA amendments would include a “true-up” to the
2 FCC-mandated transitional rate for UNE switching, including UNE-P, retroactive to March 11, 2005.
3 (Tr. Ex. Q-4.) Mr. Hansen also stated that Qwest would continue to process new, conversion, and
4 change service orders for impacted UNEs to the extent required by AZDT’s existing ICAs and that
5 any new services provisioned after March 11, 2005, would be subject, at a minimum, to the same
6 price true-up provisions applicable to pre-existing UNEs. (*Id.*) Mr. Hansen also stated that Qwest
7 reserved the right to modify its policy upon written notice if intervening events led to a different
8 interpretation of the TRRO requirements, but that such changes would be prospective only and would
9 not disrupt the use of any UNE that was operational at the time of the policy change. (*Id.*)

10 On March 17, 2005, Linda Miles of Qwest e-mailed Mr. Bade regarding a conversation held
11 that day and referred Mr. Bade to Mr. Dinwiddie to discuss QPP and to Mr. Christensen to discuss
12 any other type of Qwest commercial agreement. (Tr. Ex. A-11.) The same day, Mr. Bade e-mailed
13 Mr. Christensen stating that it appeared the QPP was nonnegotiable and requesting to negotiate a
14 commercial agreement to replace UNE-P PAL lines without treating them as business lines. (*Id.*) In
15 a reply sent that day, Mr. Christensen stated that he had seen Mr. Bade’s March 3, 2005, letter to Ms.
16 Archuleta and had been working on a reply to it; proposed that he and Mr. Bade instead talk by phone
17 the week of March 28, 2005; stated that he was sure Mr. Bade had seen Qwest’s March 4, 2005, letter
18 indicating its implementation plan for the TRRO; and stated that because Qwest continued to accept
19 UNE-P orders, he did not think that an agreement needed to be completed within the next 10 days.
20 (*Id.*) That same day, Mr. Bade responded that it was good to know that Qwest continued to accept
21 UNE-P orders and that he had taken “the Qwest letter” at face value and had stopped UNE-P orders,
22 but would resume them until Mr. Christensen told him otherwise. (*Id.*) Mr. Bade stated that he
23 would rather remain a Qwest customer, if financially feasible. (*Id.*)

24 On March 18, 2005, Mr. Christensen sent Mr. Bade a reply e-mail stating that Qwest had
25 thought the second bullet of the March 4, 2005, letter was clear that Qwest would continue to accept
26 UNE-P orders and apologizing if Mr. Bade did not think so and was inconvenienced. (Tr. Ex. A-11.)
27 Mr. Christensen also stated that Qwest would “certainly provide advance notice” if its position
28 changed. (*Id.*) Mr. Christensen also offered a March 29, 2005, call time. (*Id.*) Mr. Bade sent a reply

1 e-mail agreeing to the call time that same day, and Mr. Christensen confirmed the call time via
2 another e-mail on March 21, 2005. (*Id.*)

3 On June 17, 2005, and again on July 13, 2005, Sandy Sanderson of Qwest sent Mr. Bade an e-
4 mail stating that Qwest was updating expired ICAs that were operating on a month-to-month basis
5 and that AZDT's ICA was in this group. (Tr. Ex. Q-5.) Mr. Sanderson stated that Qwest was
6 requesting that AZDT consider opting into a current ICA or Qwest's TRO/TRRO-compliant template
7 agreement, which was attached. (*Id.*) Mr. Bade responded on July 14, 2005, that he would like a
8 meeting to discuss the agreement and that AZDT objected to the lack of a resale discount for PAL
9 lines, which Mr. Bade stated was a failure by Qwest to follow FCC rules.¹⁴ (*Id.*)

10 On September 8, 2005, and again on September 13, 2005, Mr. Bade sent Mr. Christensen an
11 e-mail stating that when they last spoke, he had been told that Qwest Wholesale would get back to
12 him in a week or two regarding the PAL UNE issue, but that he had not heard anything. (Tr. Ex. A-
13 11.) Mr. Christensen replied on September 13, 2005, that he had forwarded the issue to another
14 person and that he would check on the status. (*Id.*)

15 On February 2, 2006, in an ICA arbitration matter between DIECA Communications, Inc.,
16 dba Covad Communications Company, and Qwest, the Commission issued Decision No. 68440
17 ("Covad Decision"). In the Covad Decision, the Commission determined that the Commission had
18 the authority (1) to require Qwest, in the context of an ICA arbitration, to unbundle certain network
19 elements under 47 U.S.C. § 271 ("§ 271") and the Arizona rules pertaining to competitive
20 telecommunications services and (2) to establish just and reasonable rates for those unbundled
21 network elements.

22 On March 1, 2006, Mr. Christensen sent Mr. Bade a letter stating that because Qwest had
23 attempted to negotiate an ICA amendment with AZDT without success and had not received any
24 proposed ICA amendment from AZDT, Qwest was initiating formal dispute resolution pursuant to
25 the ICA, with Mr. Hansen to serve as the designated Qwest representative. (Tr. Ex. Q-6.) Mr.
26 Christensen requested that Mr. Bade provide the name and contact information for AZDT's
27

28 ¹⁴ Mr. Bade did not cite any FCC rules that were allegedly violated.

1 designated representative so that a call could be set up to discuss the dispute. (*Id.*)

2 On March 3, 2006, AZDT's former counsel, William Cleaveland, sent Mr. Christensen a
3 letter stating that AZDT "explicitly object[ed] to the application of any of the Dispute Resolution
4 provisions in the existing [ICA] to any discussions of the so-called TRRO Amendment" proposed by
5 Qwest. (Tr. Ex. Q-7.) Mr. Cleaveland stated that the proposed amendments themselves constituted
6 an ICA that would be subject to different dispute resolution processes, including arbitration by the
7 State Commission. (*Id.*) Mr. Cleaveland also questioned whether the changes were mandated by the
8 TRRO and stated that AZDT could not agree to Qwest's proposed ICA amendment because it was
9 "significantly contrary to [AZDT's] business plan." (*Id.*) Mr. Cleaveland also stated that AZDT
10 viewed the issues in the ICA amendment more along the lines of the Covad Decision, believed that
11 continued offering of UNE switching was mandatory under the Telecommunications Act and other
12 applicable laws and regulations, and believed that it would be appropriate to revisit the issues after
13 Qwest's challenge to the Covad Decision ("Covad litigation") was completed and it was known
14 whether the Qwest and Covad ICA would be available for opt-in and whether the issues had been
15 further resolved through that process. (*Id.*)

16 March 10, 2006, was the last day of the TRRO transition period.

17 On April 7, 2006, Mr. Cleaveland sent a letter to Andrew Creighton, Qwest Corporate
18 Counsel, to confirm a telephone conversation of the day before regarding the ICA amendment. (Tr.
19 Ex. Q-8.) In the letter, Mr. Cleaveland stated that he and Mr. Creighton had agreed that the ICA
20 amendment issues would not be the subject of a dispute resolution process and instead would be
21 resolved through arbitration before the appropriate State Commission, if the parties were unable to
22 resolve them reasonably promptly through negotiation. (*Id.*) Mr. Cleaveland stated that AZDT was
23 not opposed to negotiating the ICA, explained that AZDT believed Qwest would violate § 271 if it
24 stopped providing unbundled services such as switching, and referred Qwest to the Covad Decision.
25 (*Id.*) Mr. Cleaveland also stated that Qwest's position, as explained by Mr. Creighton, was that any
26 modification of the ICA had to be limited to § 252 concerns, that the TRRO required AZDT to agree
27 to Qwest's ICA amendment or something similar, and that AZDT should provide a redline of
28 proposed changes for the parties to address. (*Id.*) Mr. Cleaveland agreed to provide a list of all of the

1 issues that AZDT believed should be addressed in a new or modified ICA. (*Id.*)

2 On April 21, 2006, Mr. Cleaveland sent Mr. Creighton a letter listing all of the issues that
3 AZDT believed should be addressed in negotiations over a revised ICA. (Tr. Ex. Q-9.) Mr.
4 Cleaveland stated that Mr. Bade would be contacting Mr. Hansen to set up direct negotiations. (*Id.*)
5 Among the issues identified was “Qwest’s requested ‘TRRO’ amendment and conflicts with existing
6 SGAT/tariff and other provisions, with the FCC’s TRRO, and with § 271; and also, any possible
7 reasoning for why Arizona Dialtone would voluntarily consent to it.” (*Id.*) Mr. Cleaveland stated
8 that the letter should be considered the CLEC’s request for interconnection for purposes of triggering
9 the window for arbitration under § 252(b)(1) and requested that Mr. Creighton confirm the timing or
10 state whether another date should be used. (*Id.*)

11 On May 18, 2006, Mr. Bade sent Mr. Hansen an e-mail, copied to Mr. Christensen, that
12 included an attached redline draft of the ICA amendment that Mr. Bade stated “better reflect[ed]
13 AZDT’s] position and would make a good place to resolve [Qwest and AZDT’s] disputes.” (Tr. Ex.
14 Q-10.) Within the redline draft, Mr. Bade had added, among other things, a statement that Qwest
15 remained obligated to offer certain UNEs under § 271, language limiting the TRO and TRRO
16 modifications to UNEs offered under § 251, and language stating that UNEs would be ordered and
17 provided pursuant to § 271. (*Id.*) Mr. Bade had not deleted language regarding backbilling of FCC-
18 ordered rate increases to March 11, 2005, but had added the qualifying language “except for UNEs
19 required to be offered under Section 271 of the Act.” (*Id.*) Mr. Bade had also added language
20 requiring Qwest to establish just and reasonable rates for UNEs required to be offered under § 271
21 and requiring Qwest to refund to AZDT any amounts over those just and reasonable rates that AZDT
22 had paid for those UNEs back to March 11, 2005. (*Id.*) Mr. Bade had also added language making
23 the majority of the ICA (paragraphs 2.8 through 7.0) inapplicable to UNEs required to be offered by
24 Qwest under § 271. (*Id.*) This “inapplicable” language included the paragraphs concerning transition
25 of unbundled local circuit switching, including UNE-P services, which set forth the “plus \$1”
26 transition rate for unbundled local circuit switching provided during the transition period; stated that
27 AZDT could not obtain new local switching as a UNE; stated that Qwest would convert PAL services
28 not transitioned by March 10, 2006, to the equivalent Qwest local exchange resale services; and

1 stated that AZDT would be subject to backbilling for the difference between the rates for the UNEs
2 and the rates for the Qwest alternative service arrangements to March 11, 2006. (*Id.*)

3 On June 5, 2006, Mr. Hansen sent Mr. Bade and Mr. Christensen an e-mail notice of a phone
4 call the next day. (Tr. Ex. A-12.) Mr. Bade replied to the e-mail the same day suggesting that Mr.
5 Bade travel to Mr. Hansen's office or that Mr. Hansen come to Phoenix so that they could work
6 things out face to face and stating that he thought their discussions were to be one on one. (*Id.*) On
7 June 6, 2006, Mr. Hansen replied, stating that Mr. Christensen would be removed from the call and
8 that he did not think that a face-to-face meeting was necessary. (*Id.*)

9 On June 8, 2006, Mr. Bade sent Mr. Hansen an e-mail concerning the June 6 phone
10 conversation. (Tr. Ex. Q-11.) Mr. Bade suggested that, because the Covad litigation would likely be
11 dispositive of the TRRO and § 271 UNE issues, Qwest and AZDT could agree to continue with the
12 current status of services under UNE-P until after the Covad litigation was resolved. (*Id.*) Mr. Bade
13 also expressed appreciation for Mr. Hansen's agreeing to discuss other issues raised by Mr. Bade and
14 stated that they had made progress and should continue negotiations in the expectation of ultimately
15 reaching a mutually agreeable resolution. (*Id.*)

16 On June 20, 2006, Mr. Hansen sent Mr. Bade an e-mail response stating that Qwest was not
17 willing to handle the issues between Qwest and AZDT on an interim basis and was not obligated or
18 willing to continue providing UNE-P services. (Tr. Ex. Q-11.) Mr. Hansen stated that AZDT's
19 continued attempts to receive UNE pricing on its services with no end in sight was unacceptable and
20 that Qwest would not continue to provide AZDT with UNE-P services pending resolution of the
21 Covad litigation. (*Id.*) Mr. Hansen stated that he would request the Qwest law department to initiate
22 arbitration of the ICA amendment between AZDT and Qwest. (*Id.*)

23 Despite Mr. Hansen's firm language, Qwest continued to allow AZDT to place new orders for
24 UNE-P services, and to pay the UNE-P rate for embedded UNE-P services, until May 25, 2007.

25 On May 23, 2007, Mr. Christensen sent Mr. Bade a letter notifying AZDT that any orders for
26 new local switching as a UNE under the ICA would be rejected beginning on May 25, 2007. (Tr. Ex.
27 Q-12.) Mr. Christensen stated that Qwest would only accept local service requests for UNE-P
28 services if they were for disconnection or conversion to alternative services. (*Id.*) Mr. Christensen

1 stated that AZDT could order resale services or enter into the QPP for alternative service
2 arrangements. (*Id.*) Mr. Christensen also reminded Mr. Bade that retroactive billing would apply to
3 all AZDT UNE-P lines that were in service after March 11, 2005, at the “plus \$1” rate for the
4 transition period and at the difference between the UNE-P rate and “any Qwest alternative service to
5 which Arizona Dial Tone transitions” for the post-transition period. (*Id.*)

6 On May 24, 2007, Mr. Cleaveland sent Mr. Christensen a letter stating that the outcome of the
7 Covad litigation would likely be dispositive of the parties’ issues, that the Covad Decision remained a
8 valid Commission Order until overturned, and that Qwest must abide by the Covad Decision. (Tr.
9 Ex. Q-13.) Mr. Cleaveland also stated that AZDT disputed owing any retroactive billing payments to
10 Qwest. (*Id.*) Finally, Mr. Cleaveland requested that Qwest continue to timely provision services
11 requested under § 271. (*Id.*)

12 On May 31, 2007, Mr. Creighton sent Mr. Cleaveland a response letter stating that the FCC’s
13 ban on new UNE-P orders under 47 C.F.R. § 51.319(d)(2)(iii), adopted in the TRRO, was self-
14 executing as of March 11, 2005, and citing caselaw supporting that position. (Tr. Ex. Q-14.) Mr.
15 Creighton also stated that the ICA did not require Qwest to provision new orders for § 271 unbundled
16 switching and that Qwest did not agree with AZDT’s assertions regarding Qwest’s obligations under
17 the Covad Decision. (*Id.*) Mr. Creighton stated that AZDT could enter into the QPP agreement for
18 unbundled switching or could order resale POTS and PAL under its existing ICA. (*Id.*)

19 On July 17, 2007, the U.S. District Court for the District of Arizona issued an order in the
20 Covad litigation (“Covad Order”),¹⁵ holding that the Commission does not have the authority to
21 impose § 271 unbundling requirements in ICAs and does not have the authority to set prices for § 271
22 elements.

23 On July 20, 2007, Mr. Creighton sent Mr. Cleaveland a letter stating that it was to serve as
24 Qwest’s request to AZDT under § 252 to negotiate an ICA amendment consistent with the TRO, the
25 TRRO, and the Covad Order. (Tr. Ex. Q-15.) With the letter, Mr. Creighton included the last draft
26 of the ICA amendment and a copy of the Covad Order. (*Id.*)

27
28 ¹⁵ Qwest Corp. v. Arizona Corp. Comm’n, 496 F. Supp. 2d 1069 (D. Ariz. 2007).

1 On August 9, 2007, Mr. Cleaveland sent Mr. Creighton a letter along with a new redline
2 version of the ICA amendment. (Tr. Ex. Q-16.) Mr. Cleaveland stated that AZDT had removed all
3 of the previous comments related to § 271 and, as a result, had added other comments. (*Id.*) Mr.
4 Cleaveland also stated that Mr. Bade was available to meet with Mr. Sanderson and any other Qwest
5 executives to discuss and further negotiate any remaining differences. (*Id.*) In the redline version,
6 AZDT had deleted all of the backbilling language for UNE services, had inserted a statement that
7 Qwest PAL lines would be priced less than the rate for residential lines in the commercial UNE-P
8 replacement agreement,¹⁶ and had inserted a statement that Qwest had no approved backbilling tariff
9 and had not been approved by any PUC to retroactively increase its rate or to backbill AZDT any
10 amounts for mass-market switching or other services. (*Id.*) Regarding mass market unbundled local
11 circuit switching, including UNE-P services, AZDT had also changed the transition period references
12 so that there would be a 12-month transition period after the effective date of the ICA amendment,
13 during which time AZDT would pay the UNE-P rate or a rate established by the Commission
14 between June 16, 2004, and the effective date of the ICA amendment. (*Id.*) For UNE-P POTS,
15 AZDT had added language stating that if AZDT did not transition within 12 months after the
16 effective date of the ICA amendment, Qwest would convert services to the equivalent Qwest local
17 exchange business or residential flat rate resale services at no cost to AZDT or, if measured services
18 were unavailable, to the equivalent Qwest local exchange flat rate resale services. (*Id.*) For UNE-P
19 PAL, AZDT had added language stating that if AZDT did not transition within 12 months after the
20 effective date of the ICA amendment, Qwest would convert services to the equivalent Qwest local
21 exchange measured resale services at no charge to AZDT or, if measured services were unavailable,
22 to the equivalent Qwest local exchange measured resale services. (*Id.*) AZDT had also added
23 language requiring Qwest to promptly file for a resale PAL percentage discount rate of 15.7% in
24 Colorado. (*Id.*) Finally, regarding copper loop retirement, AZDT had added language requiring
25 Qwest to provide AZDT, by certified mail, notice that included identification of the specific loops
26 and subloops applicable to AZDT. (*Id.*)

27
28 ¹⁶ This appears to be a reference to the QPP.

1 On August 14, 2007, Mr. Christensen sent Mr. Bade a letter responding to Mr. Cleaveland's
2 letter and to AZDT's new redline version of the ICA amendment. (Tr. Ex. A-13.) Mr. Christensen
3 stated that Qwest would be able to accept and/or work with Mr. Bade on some of the changes, but
4 that there were apparently some significant fundamental issues remaining. (*Id.*) Mr. Christensen
5 stated that Mr. Sanderson would soon contact Mr. Bade to set up a negotiations conference call, as
6 the Qwest participants were located in Denver, Seattle, and Minneapolis. (*Id.*)

7 On August 16, 2007, Mr. Bade sent Mr. Sanderson an e-mail stating that he was willing to
8 travel to expedite the process and hopefully find a solution that Qwest could live with. (Tr. Ex. A-2.)

9 On December 17, 2007, Qwest filed the Petition in this matter and the Complaint in the
10 Complaint matter.

11 On March 18, 2008, during the pendency of these proceedings, AZDT's current counsel sent
12 Qwest's current counsel what appears to be a response to a March 12, 2008, letter from Mr.
13 Christensen to Mr. Bade. (Tr. Ex. Q-17.) In the letter, AZDT's counsel stated that Mr. Christensen
14 had misstated AZDT's position in this matter regarding AZDT's willingness to convert its remaining
15 UNE-P services to Qwest's resale rate and that AZDT was only willing to make the conversions after
16 execution of an ICA amendment, in compliance with the terms of the ICA amendment. (*Id.*)

17 On April 16, 2008, the Colorado PUC issued an Initial Commission Decision¹⁷ finding that
18 neither Qwest nor AZDT had followed the directives of the TRRO or negotiated in good faith as
19 required by § 251(c)(1) and ordering the parties to adopt Qwest's proposed language for §§ 2.3,
20 5.1.1.4, and 5.1.1.5 of the proposed ICA amendment, in part. (Late-Filed Ex. A-14 ¶¶55.) The
21 Colorado PUC also found that Qwest had "clearly contributed to the failure to reach an agreement to
22 modify the ICA," because it could have terminated the ICA, followed through with dispute
23 resolution, or pursued arbitration, but instead had continued to process new UNE-P orders and to bill
24 at UNE-P rates and had suspended negotiations for a 13-month period. (*Id.* ¶¶59-60.) The Colorado
25 PUC approved language for backbilling of the "plus \$1" rate for services provided during the
26 transition period and during the post-transition period until July 19, 2007. (*Id.* ¶ 61.) For the period
27

28 ¹⁷ Colorado PUC Decision No. C08-0414 (April 16, 2008).

1 from July 20, 2007, through the present, the Colorado PUC stated that AZDT should have realized
 2 the legal ramifications of the Covad Order and entered into a negotiated ICA amendment at that time
 3 rather than forcing the matter to proceed to arbitration. (*Id.*) Thus, for that period, the Colorado PUC
 4 approved language allowing Qwest to backbill for the difference between the UNE rate and the
 5 month-to-month resale service rate. (*Id.*)

6 **Resolution of the Issues Presented for Arbitration**¹⁸

7
 8 **Issue I: Whether the form of TRRO Amendment to be executed by Qwest and AZDT should**
 9 **contain language allowing Qwest to back bill AZDT for the difference between the UNE-P rate**
 10 **AZDT paid for switching services and the default “plus \$1” transition rate set forth in the**
 11 **TRRO and FCC regulations, for the period from March 11, 2005 to March 10, 2006.**

12 **The sub-issues are:**

- 13 A. Qwest’s claim that back billing of the default “plus \$1” transition rate is the
 14 lawful rate and is appropriate to apply as a true-up under the TRRO and the
 15 FCC’s regulations.
 16 B. Qwest’s claim that back billing for the transition period is justified under the
 17 “change of law” and “dispute resolution” provisions of the ICA.
 18 C. AZDT’s claim that back billing is not appropriate because Qwest and AZDT
 19 were operating under an “alternative arrangement” within the meaning of
 20 TRRO ¶228. Within this claim the parties will address the allegations and
 21 associated legal claims set out in Section I, paragraphs 3 through 7 in AZDT’s
 22 Statement of Issues filed in this docket on April 4, 2008,¹⁹ although the parties do
 23 not necessarily expect that their discussions of those issues will be organized
 24 according to the listing in those paragraphs.
 25 D. AZDT’s claim that back billing is not appropriate because neither the “plus \$1
 26 rate” nor the retroactive application of that rate have been filed with or approved
 27 by the Arizona Corporation Commission.
 28 E. The parties may argue bad faith or refusal to negotiate in the context of the
 foregoing sub-issues.

The parties have proposed the following ICA amendment language related to this issue:

Qwest’s Proposed Language	AZDT’s Proposed Language
<p>2.3 After execution of this Amendment, Qwest shall back bill the FCC ordered rate increases to March 11, 2005, for existing Mass Market Switching Services pursuant to Transition rate increases identified in Section 5.1. Such back billing shall not be subject to billing measurements and penalties.</p>	<p>2.3 Qwest and CLEC agree that Qwest has no approved back-billing tariff and Qwest has not been approved by any state PUC to retroactively increase its rates or to back-charge CLEC any amounts for Mass Market Switching or other Services.</p>

¹⁸ The issues and sub-issues are stated as provided in the Joint Statement of Issues in Dispute filed on May 16, 2008.

¹⁹ In Section I, Paragraphs 3 through 7 of its Statement of Issues in Dispute and Request to Present Testimony, AZDT raised, in relation to Qwest’s collecting a rate other than the unbundled rate for services provided during the transition year, the theories of alternative arrangement, bar to collection, estoppel, waiver, and Qwest’s being bound by the ICA to collect only the unbundled rate.

1 5.1.1.4. Use between March 11, 2005 and
 2 March 10, 2006 – The price for the unbundled
 3 local circuit switching in combination with
 4 unbundled DS0 capacity loops and shared
 5 transport obtained under the Agreement,
 6 effective March 11, 2005 through March 10,
 7 2006 shall be the rate at which the requesting
 carrier obtained that combination of network
 elements on June 15, 2004 plus one dollar.
 Effective upon execution of this Amendment,
 CLEC will be billed the one dollar increase for
 all lines that were in service during this period.

None

8 **Qwest's Position**

9 According to Qwest, the TRRO required CLECs to convert their embedded base of UNE-P
 10 customers to other service arrangements within 12 months after the effective date of the TRRO,
 11 established that the rate to be applied during this transition period was “the rate at which the
 12 requesting carrier leased UNE-P on June 15, 2004 plus one dollar” (“the ‘plus \$1’ rate”), and
 13 established that UNE-P arrangements no longer subject to unbundling were subject to “true-up” to
 14 the “plus \$1” rate upon amendment of the relevant ICAs. Qwest points out that the “plus \$1” rate
 15 itself was included in 47 C.F.R. § 51.319(d)(2)(ii) and that it is the default rate to apply because no
 16 other rate was negotiated between Qwest and AZDT.

17 Qwest believes that it followed the transition plan established by the FCC in the TRRO,
 18 which Qwest states required ICA amendments for implementation. Qwest also asserts that ICA §
 19 2.2, the “change of law” section, required the parties to amend the ICA because the TRRO
 20 constituted a change of law pursuant to that section. According to Qwest, AZDT breached both the
 21 TRRO and the ICA by not amending the ICA to reflect the change of law.

22 Qwest asserts that AZDT failed to negotiate in good faith during the transition period because
 23 AZDT never returned a counterproposal to Qwest's proposed ICA amendment during this time and
 24 waited until almost the end of the transition period to assert that the changes requested by Qwest were
 25 not required by the TRRO. According to Qwest, AZDT believes that it should not be required to
 26 comply with federal law because doing so would be contrary to AZDT's business plan. Qwest points
 27 out that AZDT could have converted its embedded customers to resale service without an ICA
 28

1 amendment, because resale service is included in the ICA, but failed to do so. Qwest states that
2 AZDT took issue with entering an ICA amendment only because AZDT asserts that it cannot afford
3 to pay higher rates. Qwest asserts that the “most essential fact in this arbitration is that AZDT never
4 submitted any orders to convert their embedded base of customers to any other service arrangement,”
5 although the FCC had placed the burden on CLECs to do so. (Qwest Closing Br. at 5.)

6 Qwest seems to characterize AZDT’s position that it was unreasonable for Qwest to refuse to
7 negotiate a special QPP rate for wholesale PAL as an attack on the reasonableness of Qwest’s rates
8 for UNE-P alternatives. Qwest asserts that, under the Covad Order, the Commission lacks the
9 authority to find, directly or indirectly, that Qwest should have negotiated a PAL-specific § 271 rate.
10 Qwest also asserts that its rates are just and reasonable, as evidenced by 67 Arizona CLECs’ QPP
11 agreements, none of which provide PAL-specific rates. Qwest points out that none of those CLECs
12 took up AZDT’s cause for PAL-specific rates, although AZDT attempted to obtain their support via
13 e-mails sent in May 2004. According to Qwest, AZDT’s argument that PAL lines should have been
14 categorized in the QPP as residential service or a third category is not persuasive because there is no
15 difference in the facilities used for UNE-P PAL versus UNE-P POTS, Qwest has charged AZDT the
16 same rate for PAL as for POTS, PAL is a business service, AZDT’s own tariff does not distinguish
17 between PAL and other business services, and the other carriers to which AZDT has transitioned
18 customers do not distinguish between PAL and other services. Qwest also asserts that it is bound by
19 law to refrain from providing a resale discount different from the discount rate ordered by the
20 Commission in the wholesale cost docket and that Qwest is not free to price services differently for
21 different carriers, as doing so would be discriminatory. Qwest also states that it has no legal duty to
22 negotiate rates for AZDT that would make AZDT profitable. Further, as to AZDT’s attempt to show
23 Qwest bad faith because Qwest did not agree to face-to-face meetings, Qwest states that it never
24 refused to have a telephonic conference, that telephonic conferences are the norm in ICA
25 negotiations, and that Qwest assigned one of its most experienced negotiators to work with AZDT.

26 In response to AZDT’s assertion that the parties had an “alternative arrangement,” within the
27 meaning of TRRO ¶228, for the transition year, which precludes Qwest from assessing a true-up,
28 Qwest states that its continuing to bill at the UNE-P rate and accepting payment at the UNE-P rate

1 during the transition period was required by the TRRO, as an ICA amendment had not yet been
2 executed. Qwest states that it would not and did not negotiate an alternative arrangement with AZDT
3 to allow AZDT to receive UNE-P services at the UNE-P rate after the effective date of the TRRO.
4 Qwest's position is that the TRRO required it to continue providing UNE-P service at the UNE-P
5 rate, subject to true-up, until the ICA was amended, because that is what the ICA required. Further,
6 Qwest argues, AZDT's argument is not supported by contract law because there was neither an offer
7 nor consideration. Qwest also states that AZDT's alternative arrangement argument is an "after-the-
8 fact" theory, because none of AZDT's many written communications to Qwest before this matter
9 included an assertion that an alternative arrangement had been established.

10 Qwest states that estoppel could not apply because Qwest has consistently maintained that
11 there would be a true-up and thus has not changed its position, and AZDT could not have justifiably
12 relied on Qwest's continued billing at the UNE-P rate in light of the TRRO and Qwest's notifications
13 regarding a true-up. Qwest states that AZDT has also failed to show that Qwest intended to waive its
14 right to true-up to the transition rate, which is a necessary element of waiver.

15 Regarding AZDT's assertion that Qwest is barred from collecting the true-up to the "plus \$1"
16 rate because it continued to accept new UNE-P orders, billed for at the UNE-P rate, after the effective
17 date of the TRRO, Qwest states that it held a good faith belief that the TRRO could only be
18 implemented through an ICA amendment. In support of this position, Qwest cites several court cases
19 showing that a number of PUCs had interpreted the TRRO in this manner.²⁰ Qwest asserts that it
20 should not be determined that Qwest knowingly relinquished a right to true-up through its conduct.

21 Regarding AZDT's assertion that Qwest is not authorized to the true-up because the
22 Commission has not approved a Qwest backbilling tariff and Qwest thus may not retroactively
23

24 ²⁰ Qwest cited *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, U.S. Dist. Lexis 9394 (N.D.
25 Ga. 2005) (granting BellSouth a preliminary injunction to prevent enforcement of a Georgia Public Service Commission
26 order requiring BellSouth to process new orders for switching as a UNE), affirmed by 425 F.3d 964 (11th Cir. 2005);
27 *BellSouth Telecomms., Inc. v. Cinergy Communications Co.*, 2006 U.S. Dist. Lexis 11535 at *25 (E.D. Ky. 2006)
28 (granting BellSouth a preliminary injunction to prevent enforcement of two Kentucky Public Service Commission orders
and holding that the orders are preempted as they pertain to switching because the TRRO ban on unbundling for new
orders was effective immediately for switching and certain loops and transport); *BellSouth Telecomms., Inc. v. Mississippi
Pub. Serv. Comm'n*, 368 F. Supp. 2d 557 (2005) (granting BellSouth a preliminary injunction to prevent enforcement of a
Mississippi Public Service Commission order requiring BellSouth to continue to process new orders for UNE-P
switching).

1 increase its rates, Qwest asserts that the TRRO removed mass market local circuit switching,
 2 including UNE-P, from the list of unbundled services under § 251, thereby ending the Commission's
 3 authority to regulate its pricing. Qwest cites the Covad Order in support of its position that the
 4 Commission only has the authority under § 252 to set rates for § 251 unbundled network elements.
 5 Further, Qwest asserts that the FCC made it clear in the TRRO that the true-up to the "plus \$1" rate
 6 applied and that the "plus \$1" rate was effective immediately, without any action from State
 7 Commissions.

8 AZDT's Position

9 AZDT requests that the Commission order the parties to execute an ICA amendment that is
 10 prospective only, requiring AZDT to pay Qwest's resale rate for switching services from the date of
 11 execution of the ICA amendment onward and not requiring any true-up.

12 It is AZDT's position that Qwest agreed to an alternative arrangement, within the meaning of
 13 TRRO ¶228, by presenting bills with UNE-P rates, accepting AZDT's payments at those rates, and
 14 not taking action to bill at any rate other than the UNE-P rate. AZDT believes that the TRRO
 15 encouraged ILECs and CLECs to reach alternative arrangements to the default transition process
 16 described therein and that Qwest's billing conduct, in the face of AZDT's never having agreed to pay
 17 more than UNE-P rates, indicated that the parties had reached an understanding.

18 Alternatively, AZDT asserts that Qwest must be denied the true-up for the transition period
 19 because it is barred by the "filed rate doctrine," which "forbids a regulated entity from charging rates
 20 for its services other than those properly filed with the appropriate regulatory authority."²¹ AZDT
 21 argues that UNE-P was still governed by § 251 during the transition period, that the "plus \$1" rate is
 22 part of UNE-P, that the TRRO did not exempt the "plus \$1" rate from the filed rate doctrine, and that
 23 Qwest was thus required to file the "plus \$1" rate with the Commission and to obtain Commission
 24 approval for it in order to be legally entitled to charge and collect it. Because Qwest never filed the
 25 "plus \$1" rate with the Commission, AZDT argues, Qwest is legally prohibited from charging the

26 _____
 27 ²¹ AZDT Post-Hearing Br. at 17. AZDT did not present any evidence or argument specifically referencing the "filed rate
 28 doctrine" in its prior pleadings or at the arbitration hearing and cited only *Black's Law Dictionary* (8th ed. 2004) in
 support of the doctrine's applicability in this matter.

1 “plus \$1” rate for the transition period.

2 **Staff's Position**

3 Staff believes that Qwest is legally entitled to backbilling of the “plus \$1” rate for the
4 transition period, pursuant to the TRO and TRRO and under the change-of-law provisions of the ICA.
5 Staff also believes that the procedure to implement the TRO and TRRO was the § 252 process
6 utilizing the change-of-law provisions of the ICA.

7 Staff asserts that the TRRO gave Qwest the right to charge the “plus \$1” rate during the
8 transition period and that AZDT’s refusal to sign the ICA amendment does not change this. Staff
9 does not agree that Qwest’s charging the “plus \$1” rate would be retroactive ratemaking, because the
10 FCC established the rate on February 4, 2005, and established that it would apply from March 11,
11 2005, through March 10, 2006.

12 Staff also does not agree that Qwest lacks authority to charge the “plus \$1” rate because the
13 rate has not been approved by the Commission. Staff states that the “plus \$1” rate was tied to the rate
14 set by the Commission and that it would have been specifically approved when the ICA amendment
15 was submitted to the Commission for approval.

16 Finally, Staff does not agree that Qwest and AZDT were operating under an alternative
17 arrangement. Staff states that TRRO ¶228 clearly contemplated a meeting of the minds with respect
18 to forming an alternative arrangement—that both parties would have a common understanding of
19 what the arrangement constituted. Staff states that the correspondence between Qwest and AZDT
20 does not establish the requisite meeting of the minds. Staff also states that the record does not
21 establish that AZDT had a reasonable expectation of continuing to receive UNE-P at UNE-P rates
22 once the transition period began.

23 **Resolution**

24 The rate to be assessed for the UNE-P services provided to AZDT by Qwest during the
25 transition period is the “plus \$1” rate. It is appropriate for that issue to be resolved through language
26 in the ICA amendment, as it should have been resolved through language in an ICA amendment
27 several years ago. The TRRO clearly establishes that the “plus \$1” rate is the default rate to be
28 assessed for UNE-P services provided during the transition period, if an ILEC and CLEC have

1 neither negotiated an alternative arrangement that would supersede the default transition process nor
2 reached a commercial arrangement for the continued provision of UNE-P or for transition to UNE-L.
3 (TRRO ¶228.)

4 The evidence shows that AZDT and Qwest attempted to negotiate an arrangement for the
5 continued provision of UNE-P functionality, with Qwest offering the QPP MSA and AZDT offering
6 to enter into a modified version of the QPP MSA that provided a discount for wholesale PAL, but
7 that AZDT and Qwest failed to reach any agreement. As Staff stated, there was no “meeting of the
8 minds” between AZDT and Qwest as to the terms of any agreement.

9 The evidence does not establish that AZDT and Qwest entered into an alternative
10 arrangement. The TRRO contemplated that any such alternative arrangement would be entered
11 through negotiation, and as stated above, Qwest and AZDT failed to reach any agreement through
12 negotiation. AZDT asserts that the alternative arrangement was created through conduct rather than
13 negotiation, because Qwest continued to provide UNE-P services, continued to accept new orders for
14 UNE-P services, billed for those services at UNE-P rates, and accepted AZDT’s payments of UNE-P
15 rates, all while Qwest knew that there was disagreement as to the appropriate rate. AZDT’s
16 argument, essentially, is that Qwest entered an alternative arrangement by allowing the status quo to
17 continue. AZDT’s argument is not reasonable, however, in light of AZDT’s actual knowledge before
18 and during the transition period that the TRRO called for a true-up and that Qwest intended to assess
19 a true-up. While Mr. Bade testified that Qwest’s intention to charge a true-up did not really “hit” him
20 until late 2006, (Tr. at 407, lines 12-18), Mr. Bade knew before the transition period began that the
21 TRRO called for a true-up, (Tr. at 408, lines 11-16), and knew or should have known in March 2005
22 of Qwest’s intent to assess a true-up, (*see* Tr. at 407, lines 20-22; Tr. Ex. Q-4; Tr. Ex. A-11).
23 Although Mr. Bade testified that he did not receive Qwest’s March 4, 2005, letter in which it first
24 announced its intent to assess a true-up, (Tr. at 361, line 20 through Tr. at 363, line 9; Tr. at 407, line
25 24 through Tr. at 408, line 6), it is difficult to believe that this testimony is accurate. Transcript
26 Exhibit Q-4 is the March 4, 2005, Qwest letter specifically addressed to Mr. Bade, and Mr. Bade
27 received two e-mails from Mr. Christensen specifically referencing the March 4, 2005, letter, one
28 dated March 17, 2005, and one dated March 18, 2005. If Mr. Bade had not actually received the

1 March 4, 2005, letter prior to that time, one would expect him to ask for it to be re-sent, particularly
2 because Mr. Christensen described it as “the notice sent out March 4 indicating how Qwest would
3 operate after March 11.” (*See* Tr. Ex. A-11.) Yet Mr. Bade did not do that and actually referred to
4 his understanding of “the Qwest letter” in one of his response e-mails, in a context strongly indicating
5 that he was referring to the March 4, 2005, letter. (*See id.*) As Qwest points out, one can also
6 question when AZDT formed its belief that an alternative arrangement had been entered, as AZDT
7 never asserted that an alternative arrangement had been created in any of the correspondence between
8 the parties admitted as evidence in this matter. If AZDT had sincerely held that belief prior to the
9 petition in this matter, one would expect that AZDT would have expressed it previously.

10 In its closing brief, AZDT asserted the “filed rate doctrine” in support of its position that
11 Qwest lacks legal authority to charge the “plus \$1” rate for services provided during the transition
12 period because Qwest never filed the “plus \$1” rate with the Commission. AZDT’s argument is that,
13 during the transition year, the “plus \$1” rate was part of UNE-P and thus was still governed by § 251.
14 It is unfortunate that AZDT did not assert this doctrine by name until after the evidentiary hearing in
15 this matter, as this oversight may have foreclosed Qwest and Staff from responding adequately to the
16 doctrine’s applicability. If we believed that the facts supported a decision in favor of AZDT on the
17 basis of the filed rate doctrine, we would be inclined to order additional briefing or oral argument to
18 address the doctrine. However, as we believe that the doctrine does not support AZDT’s position in
19 this matter and that the arguments underlying the doctrine have essentially been asserted by AZDT,
20 albeit using different terminology,²² we will resolve it here. AZDT’s argument that the doctrine
21 applies, and its prior arguments related to retroactive ratemaking and untariffed changes, are
22 premised upon AZDT’s assertion that UNE-P was still governed by § 251 during the transition
23 period, an assertion with which we cannot agree. The TRRO clearly removed UNE-P from § 251’s
24 unbundling requirements as of the effective date of the TRRO, not as of the expiration of the
25 transition period, as evidenced by the TRRO’s absolute prohibition on obtaining new local switching
26 as an unbundled network element, (*see, e.g.*, 47 C.F.R. § 51.319(d)(2)(iii)), and numerous statements

27 ²² AZDT previously argued that a true-up would violate the doctrine against retroactive ratemaking and would be an
28 unfiled rate or untariffed change, arguments that also rest on the principle that only a rate that has been filed with the
Commission in advance may be charged by a public service corporation.

1 that no § 251 unbundling requirement would be imposed for mass market local circuit switching,
2 (*see, e.g.*, TRRO ¶199).

3 The filed rate doctrine “is a form of deference and preemption, which precludes interference
4 with the rate setting authority of an administrative agency.”²³ The filed rate doctrine prohibits the
5 charging of a rate other than the rate adopted by the administrative agency with authority.²⁴ AZDT’s
6 argument is based on the assumption that the administrative agency whose ratemaking authority the
7 doctrine protects in this context is the Commission. Under the current state of the law, we cannot
8 agree with AZDT on this point. As of the effective date of the TRRO, the FCC became that agency.
9 And because the FCC established the rate to be paid during the transition period in the TRRO, and
10 the Covad Order has established that this Commission is prohibited from setting the rate for UNE-P
11 services under § 271,²⁵ the filed rate doctrine would actually seem to prohibit this Commission from
12 setting an alternate rate to be applied during the transition period.

13 We also note, in spite of AZDT’s failure to assert these arguments in its Post-Hearing Brief,
14 that AZDT’s prior arguments regarding the lack of a backbilling tariff and the true-up’s being a
15 retroactive rate increase do not persuade us that Qwest is not entitled to a true-up to the “plus \$1” rate
16 for the UNE-P services provided during the transition period. As Staff points out, the “plus \$1” rate
17 was established by the FCC in the TRRO before it became effective, and the existing UNE-P rate to
18 which the “plus \$1” is added was approved by the Commission at a time when the Commission had
19 authority over UNE-P pricing under § 251. Qwest’s charging the “plus \$1” rate for services provided
20 as of the effective date of the TRRO is not retroactive rate making, as both components comprising
21 the rate (the existing UNE-P rate and the “plus \$1”) had been established by the appropriate
22 regulatory authority before the services were provided.

23 For the foregoing reasons, we adopt Qwest’s proposed language for ICA §§ 2.3 and 5.1.1.4.

24 ...

25 ...

26 ...

27 ²³ *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1225 (9th Cir. 2007).

28 ²⁴ *See id.*

²⁵ While the Commission is appealing the Covad Order, we must comply with its requirements, as it is the current law.

1 **Issue II:** Whether the form of TRRO Amendment to be executed by Qwest and AZDT should
 2 include language allowing Qwest to back bill AZDT for the difference between the UNE-P rates
 3 AZDT paid and the corresponding resale rates, for the period from March 11, 2006 to the
 4 present.

5 **The sub-issues are:**

- 6 A. Qwest's claim that back billing for periods of time after the transition period is
 7 appropriate because AZDT violated the FCC's order and regulations by not
 8 transitioning from UNE-P to resold service or Qwest's QPP service by the end of
 9 the transition period or thereafter, and that violation continues to the present.
 10 Because of that ongoing violation, Qwest claims that it is entitled to recover the
 11 rate for resold service by way of back billing.
- 12 B. Qwest's claim that back billing for the post-transition period is justified under
 13 the "change of law" and "dispute resolution" provisions of the ICA.
- 14 C. AZDT's claim that such back billing is inappropriate because Qwest has not filed
 15 for and does not have authorization from the Arizona Corporation Commission
 16 to apply the resale rate by way of a back billing. Within this claim the parties
 17 will address the allegations and associated legal claims set out in Section I,
 18 paragraphs 10 through 14 in AZDT's Statement of Issues filed in this docket on
 19 April 4, 2008,²⁶ although the parties do not necessarily expect that their
 20 discussions of those issues will be organized according to the listing in those
 21 paragraphs.
- 22 D. The parties may argue bad faith or refusal to negotiate in the context of the
 23 foregoing sub-issues.

24 The parties have proposed the following ICA amendment language related to this issue:

Qwest's Proposed Language	AZDT's Proposed Language
5.1.1.5 Use after March 10, 2006 – For any and all UNE-P services leased by CLEC from Qwest after March 10, 2006, effective upon execution of this Amendment, CLEC is subject to back billing to March 11, 2006 for the difference between the rate for the UNE and a rate equal to the Qwest month-to-month local exchange resale service alternatives identified in Section 5.1.1.6.1.	None

25 **Qwest's Position**

26 Qwest asserts that AZDT violated the TRRO by not transitioning its UNE-P customers to
 27 alternative arrangements by the end of the transition period, a violation that continues to this day.
 28 Qwest acknowledges that the TRRO does not address "post-transition period hold-overs," but states
 that it is not reasonable to conclude that the TRRO's silence means that AZDT is entitled to the

²⁶ In Section I, Paragraphs 10 through 14 of its Statement of Issues in Dispute and Request to Present Testimony, AZDT raised, for the post-transition period, whether the TRRO mandates a rate, estoppel, waiver, Qwest's being bound by the ICA to collect only the unbundled rate, and what rate AZDT should have to pay.

1 UNE-P rate. According to Qwest, the FCC did not need to specify rates beyond the transition period
2 because it expected that all carriers would comply with the TRRO. Qwest argues that the proper
3 result in this matter would be to put the parties in the positions they would have been in had AZDT
4 complied with the TRRO by transitioning its UNE-P customers by the end of the transition period.
5 Qwest argues that because the ICA includes resale services, and AZDT did not enter into an
6 alternative service arrangement, the service that AZDT could have and should have transitioned its
7 UNE-P customers to is resale. Qwest states that the "plus \$1" rate expired with the transition period
8 and thus cannot serve as a default rate for the post-transition period, in spite of the Colorado PUC
9 decision to the contrary. Qwest also points out that AZDT has been placing new orders for resale
10 services since May 2007 and has stated that it is now willing to transition its remaining UNE-P
11 customers to resale. Qwest believes that backbilling to recover the resale rate is fair and just because
12 otherwise AZDT will have evaded compliance and reaped substantial gain at the expense of Qwest
13 and to the detriment of law-abiding competitors.

14 Qwest asserts that estoppel does not apply for the post-transition period because Qwest
15 announced at the end of the transition period that it would be assessing a true-up for the post-
16 transition period, Qwest always included provisions for backbilling in its draft ICA amendments,
17 Qwest never changed its position on the issue, AZDT could not have justifiably relied on the UNE-P
18 rate that was billed, and AZDT did not forgo another benefit or better rate in reliance on Qwest's
19 billing at the UNE-P rate.

20 Qwest also asserts that waiver does not apply for the post-transition period because there was
21 no clear showing of Qwest's intent to waive a known right. Qwest asserts that Qwest has
22 consistently said that the rate would be either the resale rate or the QPP rate and has expressly
23 reserved its right to one of those rates via true-up. According to Qwest, AZDT's argument that
24 Qwest had the right to bill the resale rate but failed to do so "misses the mark" because Qwest
25 reserved the right to receive the resale rate and continued to honor the ICA pending negotiation of an
26 ICA amendment, as Qwest believed it was required to do under the TRRO. Qwest states that it
27 believed it could not unilaterally force AZDT to transition its circuits and that, even if Qwest's
28 position was legally incorrect, it was not an intentional waiver of Qwest's rights. Qwest argues that

1 its change of position in May 2007 does not alter this because the change resulted from legal advice
2 received by Qwest at that time, which was based on a court decision addressing only whether ILECs
3 were obligated to continue to accept new UNE-P orders. Qwest states that it still holds the
4 reasonable belief that it may not take unilateral action with respect to the embedded base of UNE-P
5 customers, which is why it continues to bill for those customers at the UNE-P rate. Qwest adds that
6 AZDT's suggestion that Qwest could have simply billed at the resale rate is disingenuous because
7 Mr. Bade testified that he would have disputed such charges.

8 Qwest characterizes as reminiscent of the doctrine of laches AZDT's argument that Qwest
9 should be precluded from backbilling because it did not provide notice of termination of the ICA, did
10 not unilaterally switch AZDT to resale service, and did not follow through with dispute resolution.
11 Qwest states that for the doctrine of laches to apply, AZDT would have to show that Qwest knew of
12 its rights and unreasonably delayed in enforcing its rights, thereby causing injury or prejudice to
13 AZDT. Qwest states that delay alone is insufficient to give rise to laches and that the doctrine is
14 applied only to prevent injustice. Qwest denies that there was unreasonable delay and also asserts
15 that any delay actually benefited AZDT because AZDT was being billed at the UNE-P rate during
16 that time. Furthermore, Qwest states that its conduct was reasonable. Qwest asserts that providing
17 notice of terminating the ICA or unilaterally billing AZDT at the resale rate would have resulted in
18 the parties' appearing before the Commission at a time when the issues were actively on appeal to the
19 federal court because of the Covad Decision. Qwest also asserts that, while Qwest did not pursue
20 dispute resolution when Qwest initially invoked it, AZDT also did not follow through by petitioning
21 for arbitration after AZDT had initiated negotiations under § 252.²⁷ Qwest points out that the longest
22 delay in negotiations, between June 20, 2006, and July 17, 2007, resulted from both companies'
23 knowledge that the Covad litigation would likely be dispositive regarding the availability of UNE-P
24 under § 271, although the parties had not agreed to the delay. Qwest states that its decision to await
25 the outcome of the Covad litigation was reasonable and that it should not be penalized for that delay.
26 Qwest also states that AZDT assumed the risk for the backbilling liability when it chose to await the

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²⁷ It appears that Qwest is referencing AZDT's request to negotiate a commercial agreement to replace UNE-P PAL lines, sent in an e-mail from Mr. Bade to Mr. Christensen on March 17, 2005. (Tr. Ex. A-11.)

1 outcome of the Covad litigation without having transitioned its customers from UNE-P.

2 Qwest also argues that AZDT's actions show that AZDT does not actually believe that there
3 is no legal authority for a post-transition-period true-up. Qwest bases this argument primarily on
4 AZDT's May 2006 redline version of the ICA amendment ("proposal"), which would have required a
5 true-up to the "plus \$1" rate for the transition period and a true-up to the resale rate for the post-
6 transition period if executed, unless Qwest was obligated to provide UNE-P services under § 271.
7 Qwest states that this was the first language proposal that AZDT provided and that it followed
8 AZDT's March 2006 assertion that Qwest was required to continue offering UNE switching under §
9 271 and the Covad Decision. Qwest argues that AZDT's proposal was an offer to contract that Mr.
10 Bade testified he would have signed if Qwest had accepted it. Thus, per Qwest, AZDT's proposal is
11 strong evidence of AZDT's position at that time. Per Qwest, AZDT's proposal would have
12 accommodated two different outcomes of the Covad litigation—the first requiring Qwest to include §
13 271 UNEs and their prices in its ICAs (consistent with the Covad Decision) and the second not
14 requiring Qwest to include those UNEs in its ICAs (consistent with Qwest's appeal of the Covad
15 Decision) and requiring AZDT to pay the backbilling. Qwest asserts that AZDT's proposal shows
16 that AZDT did not object to the "plus \$1" rate for the transition period, to the resale rate for the post-
17 transition period, or to backbilling. Qwest also states that if AZDT had believed at that time that an
18 alternative arrangement had been established or that Qwest had relinquished its rights to backbilling,
19 AZDT's proposal would have reflected that. Qwest asserts that from March 3, 2006, until the Covad
20 Order and Qwest's subsequent request for negotiation in July 2007, AZDT's only argument against
21 Qwest's ICA amendment was that Qwest was required to provide UNE-P under § 271. Qwest asserts
22 that it was only in August 2007, after the Covad Order, that AZDT first provided new proposed
23 language that would prevent Qwest from backbilling. Thus, Qwest argues, AZDT obviously believes
24 that true-ups are legitimate and lawful.

25 Qwest further asserts that AZDT's failure to transition its UNE-P customers in compliance
26 with the TRRO and the ICA was a willful violation committed for pecuniary benefit and without
27 legal justification. Qwest characterizes AZDT's refusal to sign Qwest's form of ICA amendment
28 after the Covad Order as powerful evidence that AZDT has chosen not to comply. Qwest also points

1 to AZDT's "massive transition" of most of its UNE-P customers to other providers, which began
2 immediately after the Covad Order, as proof that AZDT could have transitioned to other providers
3 sooner. Qwest adds that AZDT could have placed resale orders at any time without an ICA
4 amendment, but did not do so and even failed to transition its UNE-P POTS customers to resale,
5 although AZDT has not complained about the rates for POTS. Finally, Qwest points out that AZDT
6 has stated that it is now willing to transition its customers to resale, but only after execution of an
7 ICA amendment. According to Qwest, "AZDT's response shows that it will wring every drop of
8 money it can out of its noncompliance until such time as it is ordered by this Commission to
9 convert."²⁸

10 AZDT's Position

11 AZDT asserts that the Commission lacks legal authority to order that Qwest may backbill
12 AZDT for the UNE-P services received during the post-transition-year period. According to AZDT,
13 the Commission's authority to order post-transition-period backbilling may come from only one of
14 two sources: (1) an agreement between the parties as to backbilling or (2) the TRRO. AZDT asserts
15 that neither provides the Commission such authority.

16 According to AZDT, the evidence does not support a finding that AZDT ever agreed to
17 backbilling. While AZDT concedes that it was on notice that Qwest intended to backbill additional
18 amounts, AZDT states that Qwest was equally on notice that AZDT unequivocally refused to pay
19 those additional amounts. AZDT also acknowledges that, in May 2006, it submitted to Qwest a
20 redline version of an ICA amendment in which Qwest's proposed backbilling language was not
21 stricken. AZDT asserts, however, that the redline version was only "an ongoing work" based on the
22 then-current status of the Covad litigation and was never meant to be executed. AZDT points out
23 that, after the Covad Order, it provided Qwest a revised redline version in which the backbilling
24 language was all stricken. AZDT argues that, because there was no agreement as to backbilling for
25 the post-transition-year period, any legal authority for backbilling for the post-transition-year period
26 would have to come from the TRRO itself.

27
28 ²⁸ Qwest's Closing Br. at 38.

1 On that point, AZDT asserts that the TRRO did not establish a rate that should apply and did
2 not address backbilling for periods of time after the transition year. According to AZDT, Qwest has
3 conceded that the “plus \$1” rate did not apply after the transition year and that the TRRO only
4 addressed backbilling as to the transition year. AZDT asserts that the TRRO does not contain any
5 language allowing an ILEC to backbill a CLEC for services provided after the transition year when
6 the CLEC did not transition its UNE-P customers to other service arrangements during the transition
7 year.

8 AZDT also asserts that it was unable to transition its customers to alternative service
9 arrangements within the transition year because of Qwest’s “inflexible negotiating positions which
10 left AZDT with no choice but to refuse to sign Qwest’s non-negotiable form of TRRO
11 amendment.”²⁹

12 AZDT also argues that, although Qwest now characterizes AZDT’s conduct in continuing to
13 place new UNE-P orders as a clear-cut violation of the TRRO, Qwest’s own attorneys were not
14 comfortable enough to advise Qwest that it was no longer obligated to provision new UNE-P orders
15 until May 2007. According to AZDT, this shows that there was “plenty of room for good faith
16 disagreement” on that issue.³⁰

17 AZDT also characterizes as “flawed” Qwest’s argument that a failure to order a true-up to the
18 resale rate for the post-transition-year period would discriminate against CLECs who transitioned to
19 QPP or to resale services with the expectation that UNE-P would be unavailable. According to
20 AZDT, providing AZDT a different QPP rate would not be discriminatory because AZDT’s primary
21 business is reselling PAL, while Qwest’s other CLEC customers purchase residential and commercial
22 lines rather than PAL. AZDT states that Qwest failed to provide any evidence that another CLEC
23 whose primary business is reselling PAL had agreed to pay Qwest’s resale rate or had paid that resale
24 rate. AZDT states that the evidence only shows that one other PAL reseller entered into a QPP
25 agreement rather than converting to resale. According to AZDT, Qwest wants the Commission to
26 assume that there is another PAL reseller who would be discriminated against if Qwest is not

27 _____
28 ²⁹ AZDT Post-Hearing Br. at 22.

³⁰ *Id.*

1 permitted to backbill AZDT; AZDT asserts that there is no evidence that would allow the
2 Commission to reach that conclusion. AZDT also states that Qwest has conceded that AZDT is not
3 similarly situated to CLECs who have signed QPP agreements and that Qwest is not required to treat
4 a CLEC who has signed a QPP agreement the same as a CLEC who has refused to sign a QPP
5 agreement. Because AZDT, as a PAL reseller, is “not in the same business as a reseller of business
6 or residential lines,” AZDT argues, “Qwest would not be discriminating against other CLECs” if the
7 post-transition-year backbilling is disallowed.³¹ According to AZDT, Qwest’s anti-discrimination
8 argument is a “classic red herring”—motivated by Qwest’s fear that if no true-up is ordered in this
9 matter, other CLECs may demand the same treatment as AZDT—and should be ignored.

10 AZDT states that the parties’ conduct is immaterial because the Commission lacks the legal
11 authority to allow Qwest to backbill AZDT for any period after the transition year. In the event that
12 the Commission determines that the parties’ conduct is relevant, however, AZDT asserts that Qwest’s
13 conduct should preclude it from being allowed to backbill AZDT for this period.

14 AZDT first argues that Qwest is estopped by its conduct from backbilling for a higher rate
15 than the rate billed to and accepted from AZDT because Qwest continued to provide AZDT with
16 UNE-P services for its embedded customers, accepted new UNE-P orders from AZDT until May
17 2007, billed for the services to embedded and new customers at the UNE-P rate, and accepted
18 AZDT’s payments at the UNE-P rate. AZDT asserts that Qwest should have billed AZDT at the
19 resale rate after the transition year ended because Qwest testified that UNE switching did not exist
20 after the effective date of the TRRO and that AZDT actually was purchasing resale services, which
21 are included in the ICA. AZDT disputes Qwest’s argument that it could not unilaterally change the
22 way it was billing AZDT because of Qwest’s abrupt change of position on accepting new UNE-P
23 orders in May 2007. AZDT asserts that Qwest’s change of position in May 2007 shows that Qwest
24 did not need an ICA amendment to begin billing AZDT at the resale rate. AZDT also does not accept
25 Qwest’s assertions that there was ambiguity concerning whether the TRRO allowed new UNE-P
26 orders and that Qwest continued to accept new UNE-P orders because it was being pro-competitive

27

28 ³¹ *Id.* at 24.

1 and honoring the existing ICA. Ultimately, AZDT argues, Qwest's conduct shows that Qwest had
2 the ability to unilaterally change how it billed AZDT for switching services and that its continued
3 provision of switching services at UNE-P pricing was voluntary and binding and precludes Qwest
4 from backbilling AZDT.

5 Next, AZDT asserts that Qwest's bad faith negotiating tactics preclude it from backbilling
6 AZDT. AZDT states that Qwest took inflexible positions during negotiations, which left AZDT with
7 no choice but to refuse to sign Qwest's ICA amendment. Specifically, AZDT asserts, Qwest made no
8 effort to tailor the QPP product or its rates to the needs of a PAL reseller like AZDT, although Mr.
9 Bade had repeatedly told Qwest that QPP was not viable for AZDT because of the rates; Qwest
10 refused to offer AZDT an alternative arrangement other than QPP; Qwest took the position that the
11 "plus \$1" rate was non-negotiable; and Qwest never proposed an ICA amendment that did not
12 include backbilling.³² AZDT requests that the Commission consider Qwest's negotiating tactics in
13 determining whether AZDT, Qwest, or both are at fault. AZDT also argues that, to the extent the
14 Commission weighs the equities, Qwest should be held accountable for choosing to continue
15 providing UNE-P services and to continue accepting new UNE-P orders when, by its own admission,
16 it was not legally obligated to do so.

17 AZDT also states that it is willing to sign an ICA amendment obligating it to pay Qwest's
18 resale rate prospectively and that it informed Qwest of this by letter in March 2008 and at hearing.
19 AZDT explains that it is willing to do this now because it has migrated so many of its customers to
20 lower cost carriers. AZDT explains that it began to migrate its customers in July 2007, after the
21 Covad Order rejected the theory upon which AZDT had previously, and rightfully, relied.

22 AZDT also argues that Qwest should be precluded from backbilling because it failed to avail
23 itself of opportunities to resolve the parties' dispute. AZDT asserts that Qwest exacerbated the
24 backbilling issue by continuing to provide switching services at UNE-P pricing, by failing to provide
25 notice to terminate the ICA, and by failing to follow through with a dispute resolution procedure

26 _____
27 ³² We note that AZDT also included in its Post-Hearing Brief language related to AZDT Issue 17, which was determined
28 not to be properly before the Commission under § 252 because it had not been raised in either the petition or response.
The language essentially had to do with the profitability and viability of AZDT's operations. This portion of AZDT's
argument has been omitted.

1 initiated by Qwest in March 2006. According to AZDT, if Qwest had invoked the ICA termination
2 provision, this arbitration would have occurred much sooner, possibly even two years sooner, thereby
3 minimizing the backbilling liability at issue. AZDT also asserts that Qwest should have followed
4 through with the ICA dispute resolution process that it initiated in March 2006. AZDT states that
5 Qwest's claim that AZDT denied Qwest's request for dispute resolution is "demonstrably wrong," as
6 AZDT designated Mr. Bade as its representative for purposes of negotiations, and the parties actually
7 engaged in negotiations, including a June 6, 2006, conference call between Mr. Hansen and Mr.
8 Bade. AZDT also asserts that, although Qwest refused AZDT's suggestion that they wait to resolve
9 the dispute until after the Covad litigation and that Qwest provide AZDT with UNE-P services in the
10 meantime, that is precisely what Qwest did. AZDT states that Qwest chose not to invoke arbitration
11 because it had made a legal determination that arbitrating with AZDT in 2006, after the Covad
12 Decision, would likely result in an order for Qwest to continue providing UNE-P services at TELRIC
13 pricing. AZDT states that this strategic decision by Qwest resulted in no ICA amendment
14 negotiations from June 2006 to July 2007, when the Covad Order was issued. AZDT argues that
15 Qwest's choice to forgo its opportunities to resolve its issues with AZDT sooner must be taken into
16 account in resolving the backbilling issues.

17 **Staff's Position**

18 Staff's position is that AZDT is obligated to pay Qwest post-transition-period rates for the
19 post-transition-year period. Staff states that the parties do not have an alternative arrangement in
20 place, as there was clearly no meeting of the minds. Staff also states that allowing Qwest to backbill
21 AZDT would not be retroactive ratemaking, as there is no indication that AZDT had a reasonable
22 expectation that it could continue to obtain UNE-P at existing rates after the TRO and TRRO or even
23 the Covad Decision, which required an expedited rate hearing to determine "just and reasonable
24 rates" under the FCC's new pricing standard. In addition, Staff states that AZDT knew from
25 communications with Qwest that it could choose either resale or QPP to obtain wholesale service in
26 the future. Thus, according to Staff, AZDT was on notice from the start that its rates would increase
27 to one of those levels. Staff states that the record establishes that Qwest waited until the Covad Order
28 because AZDT was relying at least in part on the Covad Decision in not entering into an ICA

1 amendment. Staff states that it is inappropriate for AZDT to have used the Covad litigation as a
2 reason to delay and then to assert that it is being subjected to retroactive ratemaking.

3 Staff also states that the Covad Order found that the Commission could not address § 271
4 network elements and rates in an arbitration and that, although the Covad Order is being appealed,
5 the Commission must abide by it unless and until it is overturned. Staff states that because the
6 parties' ICA contains the resale rate approved by the Commission, and the record establishes that
7 AZDT has elected the resale option rather than QPP, Qwest's position that the resale rate should
8 apply for the post-transition-year period is reasonable.

9 Staff also argues that absolving AZDT of its liability in this case would only encourage
10 carriers to delay in implementing future changes of law, in the hope that they could avoid adverse or
11 unfavorable consequences.

12 Finally, Staff states that the Commission should ameliorate the impact of the backbilling upon
13 AZDT because the dispute has gone on for some time, the amounts at issue are not insignificant, and
14 Qwest shares some responsibility for the delay. Staff states that the Commission should require
15 Qwest to allow AZDT to pay the agreed upon outstanding amounts over a long period of time so as to
16 avoid financially imperiling AZDT.

17 **Resolution**

18 The ICA amendment to be executed by Qwest and AZDT should include language allowing
19 Qwest to backbill AZDT for the difference between the UNE-P rates AZDT paid and Qwest's resale
20 rates for the services provided to AZDT from March 11, 2006, to the present. The ICA amendment
21 should also include language allowing AZDT to pay the backbilling amount in equal periodic
22 installments, without interest, over a period of 29 months, which is approximately equivalent to the
23 period from March 11, 2006, to the effective date of this Order. This is the best means to bring the
24 parties into compliance with the requirements of the TRRO without unduly punishing either one of
25 them for their joint delay in implementing the TRRO, which lasted far longer than it should have due
26 to the actions of both parties.

27 In its Post-Hearing Brief, AZDT directly challenges the Commission's legal authority to order
28 a true-up for the post-transition-year period. AZDT states that such authority could come only from

1 the TRRO itself or from an agreement between AZDT and Qwest. AZDT does not cite any legal
 2 authority for this argument. Nor is this argument consistent with AZDT's prior position in its
 3 Response and at hearing that the Commission had jurisdiction to arbitrate this dispute and the true-up
 4 issues.³³ We note that AZDT's raising this argument in its Post-Hearing Brief has placed Qwest and
 5 Staff at something of a disadvantage because they were not afforded an opportunity to evaluate and
 6 respond to it. If we believed that the law necessitated a finding in AZDT's favor based on this
 7 argument, we would be inclined to allow for additional hearing, briefing, or oral argument
 8 specifically on this argument. However, as we disagree with AZDT's position as to the
 9 Commission's lack of authority to resolve this issue, and believe that the argument must be resolved
 10 in this Decision,³⁴ we address the Commission's authority here.

11 The Commission is cognizant that, under the Covad Order, it does not currently have the
 12 authority either to impose § 271 requirements into ICAs or to set the prices for § 271 elements and
 13 that mass market local circuit switching is now regulated by the FCC under § 271. However, as the
 14 court recognized in the Covad Order, State Commissions have the authority to enforce ICAs and to
 15 resolve open issues by imposing conditions that meet the requirements of § 251.³⁵ The FCC has
 16 determined that, in addition to their express authority to mediate, arbitrate, and approve ICAs under §
 17 252, State Commissions have inherent authority to interpret and enforce existing ICAs.³⁶ The FCC
 18 has also determined that State Commissions have authority to review and approve agreements that
 19 resolve disputes between ILECs and CLECs over billing or other matters, so long as those

20 _____
 21 ³³ We note that AZDT had a very different position on the Commission's authority in its Response, in which it stated
 22 that "AZDT also does not object to this Commission exercising its jurisdiction to arbitrate the disputes between the
 23 parties," (AZDT's Response at 1), and that "(1) the true-up issue is within the scope of the instant arbitration; (2) the
 24 Commission has jurisdiction to arbitrate the true-up issue . . . ; and (3) it would be far more efficient for the Commission
 25 to address all issues currently pending before it in this arbitration rather than address only the TRO and TRRO issues in
 this arbitration while reserving the true-up issues for separate proceedings before the Commission," (*Id.* at 3-4). At
 hearing, AZDT agreed that the permissibility of backbilling at the resale rate for the post-transition period was an
 appropriate issue to be arbitrated before the Commission. *See* Tr. at 12, line 15 through Tr. at 17, line 4; Tr. at 23, lines 7-
 10. AZDT apparently believed both at the time of its Response and at hearing that the Commission had authority to
 resolve the parties' true-up issues through this arbitration.

26 ³⁴ Because AZDT's argument suggests that the Commission lacks subject matter jurisdiction, it must be addressed. Lack
 of subject matter jurisdiction may be raised at any time and may not be waived or avoided by the parties' acquiescence.
See In re Baxter's Estate, 22 Ariz. 91, 99 (1920).

27 ³⁵ 496 F. Supp. 2d at 1077.

28 ³⁶ Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation
 Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, 15 F.C.C.R. 11277, 11279-80 (2000)
 (Memorandum Opinion and Order).

1 agreements also contain ongoing obligations relating to § 251(b) or (c).³⁷

2 It is clear that the ICA amendment at issue contains ongoing obligations relating to the
3 provision of resale services, which are governed by § 251(b) and (c), and that the ICA amendment
4 thus falls under the Commission's jurisdiction. It is equally clear that the Commission is being asked
5 to resolve a dispute that requires it to interpret and enforce the parties' existing ICA, something
6 which the Commission has inherent authority to do. Thus, we have the authority to resolve the issue
7 and to determine, under the existing ICA, whether and to what extent a true-up for the post-transition-
8 year-period services is appropriate.

9 Although the FCC was silent in the TRRO concerning what was to occur if a CLEC did not
10 transition its embedded UNE-P customers by the end of the transition period and clearly did not
11 anticipate that any new orders for UNE-P service would be placed or accepted after the effective date
12 of the TRRO, it would be wholly inconsistent with the FCC's obvious intentions if we were to allow
13 AZDT to escape a true-up for the services received during the post-transition-year period. With the
14 TRRO, the FCC forbade CLECs to continue obtaining UNE-P services at TELRIC prices. Allowing
15 AZDT to avoid a true-up for the services received after the transition year, which AZDT ordered as
16 UNE-P and for which it was billed at UNE-P prices, both in violation of the TRRO, would effectively
17 approve AZDT's having obtained UNE-P services at TELRIC prices for years after the FCC forbade
18 that in the TRRO. Such a result would frustrate the FCC's purposes in adopting the TRRO and
19 would reward AZDT for its noncompliance.

20 In the TRRO, the FCC declared in no uncertain terms that in the absence of an alternative
21 arrangement for the continued provision of UNE-P, new orders for unbundled mass market local
22 circuit switching were no longer available as of March 11, 2005, and no orders for unbundled mass
23 market local circuit switching were available as of March 11, 2006.³⁸ As the parties did not enter into
24 an alternative arrangement for the continued provision of UNE-P, the inescapable result is that, as
25 Qwest has asserted, AZDT could not have been purchasing UNE-P services after March 11, 2006,

26 _____
27 ³⁷ Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain
28 Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1), 17 F.C.C.R. 19337, 19342-43 (2002)
(Memorandum Opinion and Order).

³⁸ See TRRO ¶¶ 226-28; 47 C.F.R. § 51.319(d)(2)(iii).

1 regardless of the fact that it was placing new orders for UNE-P services, regardless of Qwest's
2 continued billing for services at UNE-P rates, and regardless of Qwest's misguided decision to
3 continue taking new orders for UNE-P services until an ICA amendment was entered (ultimately only
4 until May 2007). Because the services obtained by AZDT after March 10, 2006, could not have been
5 UNE-P services, regardless of what the parties may have been calling them at the time, it is necessary
6 to determine what they were. For that, we must look to the parties' ICA. The parties' ICA authorizes
7 AZDT to purchase resale services from Qwest and, absent the no-longer-available UNE-P services,
8 does not provide another means for AZDT to receive the services that it did. Therefore, that is
9 precisely what AZDT did—purchase resale services—whether it was aware of it at the time or not.
10 As a result, the price that AZDT must pay for those services is the resale rate authorized under the
11 parties' ICA and already approved by this Commission.

12 This conclusion is consistent with the FCC's statement that the "plus \$1" rate was intended to
13 "mitigat[e] the rate shock that could be suffered by [CLECs] if TELRIC pricing were immediately
14 eliminated for these network elements,"³⁹ which strongly indicates that the FCC believed the price to
15 be paid after the transition year would be higher than either the TELRIC price or the "plus \$1" rate.
16 In the absence of mandatory TELRIC pricing, mandatory default transition-year pricing, or a
17 negotiated alternative service arrangement such as QPP, what remains for Qwest and AZDT is the
18 ICA's resale pricing. Logic dictates that the FCC believed that alternative arrangement pricing
19 (whether through a negotiated alternative service arrangement or a migration to other services
20 available per an ICA) would apply after the transition period. Nothing else would be consistent with
21 the FCC's intention to eliminate TELRIC pricing for UNE-P and the FCC's apparent belief that an
22 interim reduced rate (the "plus \$1" rate) was necessary to mitigate rate shock. Our conclusion that
23 the resale rate, the only available alternative arrangement rate in this matter, applies is also consistent
24 with those of at least two other State Commissions that have considered the issue, both of which
25 determined that ILECs were entitled to receive alternative arrangement rates for former UNE services
26 retroactive to March 11, 2006.⁴⁰

27 ³⁹ TRRO ¶228.

28 ⁴⁰ See, e.g., Order Establishing Generic Docket to Consider Change-of-Law to Existing Interconnection Agreements,
2006 Miss. PUC LEXIS 680 at *52-53, *59-61 (October 20, 2006) (finding that an ILEC was entitled to the rates

1 Although it is not necessary for our decision, we also note that we are not persuaded by
2 AZDT's argument that Qwest's nondiscrimination argument is mere posturing. Qwest's argument in
3 this regard appears to be that AZDT and the other CLECs receiving UNE-P services were in the same
4 position when Qwest began negotiating the QPP in anticipation of the elimination of UNE-P services
5 by the FCC and that AZDT's status as a PAL reseller did not merit special pricing for AZDT. The
6 evidence establishes that the mass market local circuit switching services and functionality purchased
7 by AZDT for PAL were the same as those purchased by CLECs that are not PAL resellers. Thus,
8 contrary to AZDT's assertions, it was not inappropriate for Qwest to compare it to the other Arizona
9 CLECs, and it is arguable that Qwest would have been discriminating against those other CLECs if it
10 had provided special pricing to AZDT for the same services and functionality just because AZDT is
11 primarily a PAL reseller.⁴¹

12 We also note that while the evidence establishes that Qwest took an inflexible negotiating
13 position regarding the availability of discounts for the services that AZDT purchases from Qwest for
14 PAL, the evidence also establishes that AZDT itself took an inflexible negotiating position regarding
15 the prices that it was willing to pay for those services. The parties were at an impasse from the
16 beginning because Qwest would accept nothing other than QPP or resale pricing, and AZDT would
17 accept nothing other than discounted rates for PAL.⁴² Mr. Bade's willingness to travel long distances
18 to meet with Qwest representatives does not change the fact that his negotiating position was
19 inflexible. We also have some concern about the sincerity of Mr. Bade's negotiating posture
20 regarding the May 2006 redline version of the ICA amendment, as Mr. Bade initially testified that it
21 was merely a "negotiating device" that he did not expect to be signed,⁴³ and AZDT subsequently
22

23 applicable to alternative arrangements ordered by CLECs, retroactive to March 11, 2006); Order Nos. U-28131 and U-
24 28356, 2006 La. PUC LEXIS 250 at *6, *45 (July 25, 2006) (finding that the new rates applicable to delisted UNEs are
retroactive to the date the transition period ends, even if the ICA amendment including them isn't effective until later).

25 ⁴¹ See Decision No. 66949 at 51 (April 30, 2004) (finding, among other things, that Qwest had impermissibly
26 discriminated against other CLECs and harmed competition in Arizona by providing discounts and escalation procedures
to Eschelon Telecom, Inc. and McLeodUSA, Inc.). AZDT should have been aware that Qwest had good reason to be
27 concerned about discriminatory conduct toward CLECs, as AZDT entered an appearance in the matter that led to
Decision No. 66949.

28 ⁴² AZDT proposed several means of lowering the rates, including classifying PAL as residential or classifying PAL as a
third category.

⁴³ Tr. at 412, lines 1-25.

1 argued that it was never meant to be executed.⁴⁴ As both AZDT and Qwest created the impasse that
 2 they quickly reached in their negotiations, and both failed to take action to bring the impasse to an
 3 end earlier through dispute resolution, arbitration, or any other means, it would be unreasonable to
 4 order that Qwest alone should suffer the consequences.

5 Regarding AZDT's argument that estoppel should apply to keep Qwest from collecting the
 6 true-up, we note that AZDT could not have reasonably relied on Qwest's billing at the UNE-P rate as
 7 an indication that AZDT would never be required to pay Qwest anything other than the UNE-P rate.
 8 To the contrary, AZDT was aware before the TRRO became effective that the TRRO called for a
 9 true-up and eliminated UNE-P services at TELRIC pricing. In light of that, and Qwest's repeated
 10 assertions that a true-up would be required, any belief by AZDT that a true-up would not ultimately
 11 be demanded by Qwest was unreasonable and therefore not a basis for success on its estoppel
 12 argument. We also note that it would be inappropriate to adopt AZDT's argument that Qwest's
 13 allowing the status quo to continue pending the outcome of the Covad litigation merits estoppel when
 14 it was AZDT that originally suggested that the status quo be maintained pending the outcome of the
 15 Covad litigation.

16 Finally, we note that AZDT's argument that Qwest's failure to take action to resolve the
 17 dispute earlier should result in disallowing Qwest a true-up also must fail. As noted above, AZDT
 18 was equally responsible for the delay in resolving the parties' dispute. Like Qwest, AZDT had an
 19 opportunity to issue a notice of termination for the ICA. Also, like Qwest, AZDT had an opportunity
 20 to invoke arbitration after its own March 2005 request for negotiations. Because both parties caused
 21 the delay, it would be inappropriate to hold only Qwest responsible.

22 Consequently, for the foregoing reasons, we adopt Qwest's proposed language for ICA §
 23 5.1.1.5, modified by adding language allowing AZDT to pay the backbilling amount in equal periodic
 24 installments, without interest, over a period of 29 months.

25 ...

26 ...

27 ...

28 ⁴⁴ AZDT Post-Hearing Br. at 19.

1 **Issue III: Whether the form of TRRO Amendment to be executed by Qwest and AZDT should**
 2 **include language requiring Qwest to provide notice of copper loop replacements to AZDT by**
 3 **certified mail, rather than by electronic mail.**

4 The parties have proposed the following ICA amendment language related to this issue:

Qwest's Proposed Language	AZDT's Proposed Language ⁴⁵
<p>5 3.1.6.3 Retirement of Copper Loops or Copper 6 Subloops and Replacement with FTTH/FTTC 7 Loops. In the event Qwest decides to replace 8 any copper loop or copper Subloop with a 9 FTTH/FTTC Loop, Qwest will: (i) provide 10 notice of such planned replacement on its web 11 site (www.qwest.com/disclosures); (ii) provide 12 by e-mail notice of such planned retirement to 13 CLEC, and (iii) provide public notice of such 14 planned replacement to the FCC. Such notices 15 shall be in addition to any applicable state 16 Commission notification that may be required. 17 Any such notice provided to the FCC shall be 18 deemed approved on the ninetieth (90th) Day 19 after the FCC's release of its public notice of 20 the filing, unless an objection is filed pursuant to the FCC's rules. In accordance with the FCC's rules: (i) a CLEC objection to a Qwest notice that it plans to replace any copper Loop or copper subloop with a FTTH/FTTC Loop shall be filed with the FCC and served upon Qwest no later than the ninth (9th) business day following the release of the FCC's public notice of the filing and (ii) any such objection shall be deemed denied ninety (90) Days after the date on which the FCC releases public notice of the filing, unless the FCC rules otherwise within that period.</p>	<p>5 3.1.6.3 Retirement of Copper Loops or Copper 6 Subloops and Replacement with FTTH/FTTC 7 Loops. In the event Qwest decides to replace 8 any copper loop or copper Subloop with a 9 FTTH/FTTC Loop, Qwest will: (i) provide 10 notice of such planned replacement on its web 11 site (www.qwest.com/disclosures); (ii) provide 12 by e-mail and certified mail notice of such 13 planned retirement to CLEC, including 14 identification of the specific loop(s) and 15 subloop(s) that are applicable to CLEC, and 16 (iii) provide public notice of such planned 17 replacement to the FCC. Such notices shall be 18 in addition to any applicable state Commission 19 notification that may be required. Any such 20 notice provided to the FCC shall be deemed approved on the ninetieth (90th) Day after the FCC's release of its public notice of the filing, unless an objection is filed pursuant to the FCC's rules. In accordance with the FCC's rules: (i) a CLEC objection to a Qwest notice that it plans to replace any copper Loop or copper subloop with a FTTH/FTTC Loop shall be filed with the FCC and served upon Qwest no later than the ninth (9th) business day following the release of the FCC's public notice of the filing and (ii) any such objection shall be deemed denied ninety (90) Days after the date on which the FCC releases public notice of the filing, unless the FCC rules otherwise within that period.</p>

21 **Qwest's Position**

22 Qwest states that AZDT's request for notification by certified mail is not required by law, is
 23 unreasonable, and should be denied. Qwest points out that the Commission recognized in the Covad
 24 Decision that Qwest's proposed copper-loop-retirement notice provisions complied with applicable
 25 requirements and adopted them.

26 According to Qwest, what AZDT seeks is a special, expensive, manual process requiring

27 ⁴⁵ The boldface is added to emphasize the differences. The stricken language is stricken because the parties reached an
 28 agreement on this portion of the issue at the time of the hearing, and it is thus no longer in dispute. The parties did not
 provide a copy of the language on which they agreed.

1 Qwest to send AZDT notice by certified mail rather than e-mail because Mr. Bade periodically has
2 trouble receiving e-mails. Qwest states that this is not sufficient justification for a requirement that
3 Qwest provide CLECs notice by certified mail, which is a time-consuming, more expensive process
4 that would be burdensome and is not required by the FCC or this Commission.

5 **AZDT's Position**

6 AZDT states that it inserted into the draft ICA amendment language that would require Qwest
7 to provide specific notice of which loops would be impacted when Qwest replaced a copper loop with
8 a fiber loop and to provide notice by certified mail as well as e-mail. AZDT states that Qwest
9 originally objected to the content of the notice requested by AZDT, but that the parties have resolved
10 that issue. Thus, the only remaining issue is the method by which notice is to be provided.

11 AZDT asserts that notice should be provided by certified mail to ensure that AZDT is aware
12 of any copper loop replacements. AZDT states that Mr. Bade receives numerous e-mails from Qwest
13 and has not always received e-mails that Qwest has sent. Mr. Bade wants to be sure that he has
14 adequate notice because he believes that the copper loop replacements will affect AZDT's customers.
15 AZDT asserts that e-mail is not sufficiently reliable and that the issue should be resolved in a manner
16 that best ensures that notice is actually received, not in the manner that is the easiest and cheapest for
17 Qwest.

18 **Staff's Position**

19 Staff states that Qwest made a significant concession on this issue at hearing by agreeing to
20 identify the circuits impacted by any copper loop replacements and to provide that information to
21 AZDT. Staff believes that the provision of this information in an electronic form should be
22 acceptable.

23 **Resolution**

24 The ICA amendment should not include language requiring Qwest to provide AZDT notice of
25 copper loop replacements by certified mail.

26 Although we understand that e-mail is not a perfect means of communication, we also believe
27 that the record suggests AZDT's problems with receiving e-mails may be at least partially of its own
28 creation and, in any event, are within its control. For example, the record establishes that Mr. Bade

1 used at least three different e-mail addresses during the period of the parties' dispute, that he has used
2 all of them to receive e-mail from Qwest at one time or another, and that he is well aware that he has
3 problems with e-mail periodically. (Tr. at 362, line 23 through Tr. at 363, line 3; Tr. at 409, lines 8-
4 24.) Because Mr. Bade knows that he has periodic problems receiving e-mail, Mr. Bade should
5 either take action to correct those problems or be vigilant in checking the other means of notice
6 provided by Qwest, which include notices posted on Qwest's website and public notices filed with
7 and then released by the FCC.

8 The TRO clarified that, prior to retiring any copper loop or copper subloop that has been
9 replaced with a fiber-to-the-home loop, an ILEC must provide notice of the retirement in accordance
10 with the FCC's regulations.⁴⁶ The FCC's regulations have since been amended to also require notice
11 when a copper loop or subloop has been replaced with a fiber-to-the-curb loop.⁴⁷ The FCC
12 regulations now require compliance with the network disclosure requirements set forth in 47 U.S.C. §
13 251(C)(5), which imposes a duty to provide "reasonable public notice of changes"; 47 C.F.R. §§
14 51.325 through 51.335; and any applicable state requirements.⁴⁸ The requirements for the methods of
15 notice are found in 47 C.F.R. § 51.329, which allows an ILEC either to (1) file a public notice with
16 the FCC or (2) provide public notice through industry fora, industry publications, or the ILEC's
17 publicly accessible website. If the ILEC chooses the second option, the ILEC also must file a
18 certification with the FCC that identifies the proposed changes, states that public notice has been
19 made in compliance with the FCC regulations, and states where and how the change information can
20 be obtained. The FCC does not require ILECs to provide notice directly to individual CLECs, such
21 as through the e-mails that Qwest has been providing.

22 In light of the fact that Qwest's notice provisions comply with the FCC's requirements, as the
23 Commission has previously determined in the Covad Decision, and the evidence suggesting that
24 AZDT may have contributed to its e-mail problems through using multiple e-mail addresses and is
25 well aware that the e-mail problems exist, it is not appropriate to require Qwest to provide notice via
26 certified mail. AZDT is responsible for ensuring that any problems with the reliability of its e-mail

27 ⁴⁶ TRO ¶281.

⁴⁷ See 47 C.F.R. § 51.319(a)(3)(iv)(A) and (B).

28 ⁴⁸ *Id.*

1 system are addressed and should not expect others with whom it has business dealings to make
2 special accommodations because it apparently has not yet done so. Qwest is responsible for ensuring
3 that it complies with the FCC's requirements for providing reasonable notice, and the evidence
4 indicates that it has done so.

5 Thus, for the foregoing reasons, we adopt Qwest's proposed language for ICA § 3.1.6.3,
6 modified to reflect the parties' agreement, reached during the pendency of this matter, as to the
7 contents of the notice.

8 * * * * *

9 Having considered the entire record herein and being fully advised in the premises, the
10 Commission finds, concludes, and orders that:

11 **FINDINGS OF FACT**

12 1. On December 17, 2007, Qwest filed with the Commission a Petition for Arbitration
13 under § 252(b) and A.A.C. R14-2-1505. In its Petition, Qwest requested that the Commission resolve
14 issues related to the ICA between Qwest and AZDT, which Qwest asserted derived from AZDT's
15 refusal to enter into an ICA amendment that would implement changes mandated by the TRRO and
16 47 C.F.R. § 51.319(d).

17 2. Also on December 17, 2007, Qwest filed a Complaint against AZDT based on the
18 same set of facts. The Complaint matter has not been consolidated with this matter.

19 3. On January 14, 2008, a joint procedural conference was held in this matter and the
20 Complaint matter. During the procedural conference, Qwest and AZDT were directed to file briefs
21 regarding Qwest's authority to petition for arbitration under § 252 and the applicability of the § 252
22 timelines in this matter. Staff was also requested to file such a brief.

23 4. On January 17, 2008, AZDT filed its response to Qwest's Petition.

24 5. On January 28 and 29, 2008, Qwest, AZDT, and Staff filed their briefs.

25 6. On January 31, 2008, a Procedural Order was issued ordering that Qwest had the
26 authority to petition the Commission for arbitration under § 252(b)(1); that this matter could proceed
27 before the Commission; and that the hearing in this matter would commence on February 11, 2008.

28 7. On January 31, 2008, Qwest filed a Request for Procedural Conference.

1 8. On February 1, 2008, a Procedural Order was issued scheduling a joint procedural
2 conference in this matter and the Complaint matter for February 6, 2008.

3 9. On February 4, 2008, Qwest filed a Motion for Requested Relief.

4 10. On February 6, 2008, a joint procedural conference was held in this matter and the
5 Complaint matter. As a result, a Procedural Order was issued in this matter later that day vacating
6 the February 11, 2008, hearing date; directing AZDT and Staff to file responses to the Motion for
7 Requested Relief; requiring Qwest to file a reply to those responses; and suspending the timeline
8 under § 252 for 45 days.

9 11. On February 22, 2008, AZDT filed its Opposition to Qwest's Motion for Requested
10 Relief, and Staff filed its Comments on Qwest's Motion for Requested Relief.

11 12. On February 29, 2008, Qwest filed a Reply in Support of its Motion for Requested
12 Relief.

13 13. On March 27, 2008, a Procedural Order was issued scheduling oral argument in this
14 matter for April 17, 2008; stating that the oral argument would be changed to an evidentiary hearing
15 if either Qwest or AZDT stated that it desired to present testimony and requiring Qwest and AZDT to
16 make certain filings.

17 14. On March 31, 2008, Qwest filed a Motion requesting to have the oral argument moved
18 to April 16, 2008. This Motion was granted by a Procedural Order issued on April 1, 2008.

19 15. On April 3, 2008, AZDT filed a Statement of Issues in Dispute and Request to Present
20 Testimony ("Statement of Issues in Dispute") along with updated ICA amendment language, and
21 Qwest filed a Statement Regarding Lack of Material Issues of Fact along with copies of requested
22 PUC orders.

23 16. On April 4, 2008, a Procedural Order was issued requiring that the oral argument
24 scheduled for April 16, 2008, proceed as an evidentiary hearing, with oral argument to be provided as
25 to legal issues.

26 17. On April 9, 2008, AZDT filed a Motion to Continue requesting that the evidentiary
27 hearing be moved to May 1, 2008, due to a scheduling conflict with the parallel arbitration
28 proceeding before the Colorado PUC. This Motion was granted by a Procedural Order issued on

1 April 10, 2008, which also extended the Commission's timeframe by 30 days.

2 18. On April 28, 2008, Qwest filed a Motion in Limine.

3 19. On May 1, 2008, the evidentiary hearing commenced at the Commission's offices in
4 Phoenix, Arizona, with a duly authorized Administrative Law Judge of the Commission presiding as
5 Arbitrator. Qwest, AZDT, and Staff appeared through counsel, and testimony was obtained from
6 Qwest witnesses Mr. Easton and Mr. Christensen. At the hearing, Qwest's Motion for Requested
7 Relief was denied; Qwest's Motion in Limine was denied; and the Arbitrator announced that Issues
8 16, 17, and 18 of AZDT's April 3, 2008, Statement of Issues in Dispute were not properly before the
9 Commission under § 252 because they had not been raised in either the Petition or AZDT's
10 Response. It was agreed that a second day of hearing was needed and should be held on May 7,
11 2008, and that, rather than providing oral argument, the parties would submit closing briefs by May
12 20, 2008. It was also agreed that the timeframe for the Commission's decision should be extended to
13 allow consideration of a Recommended Opinion and Order at the Open Meeting on July 29 and 30,
14 2008.

15 20. On May 5, 2008, a Procedural Order was issued scheduling the second day of hearing
16 for May 7, 2008, and extending the Commission's timeframe by 36 days.

17 21. On May 7, 2008, the second day of hearing proceeded at the Commission's offices in
18 Phoenix, Arizona, before the same Arbitrator. Qwest, AZDT, and Staff appeared through counsel,
19 and testimony was obtained from AZDT witness Mr. Bade. At the hearing, the parties were
20 requested to file a joint issues statement by May 14, 2008, and closing briefs by May 20, 2008.
21 AZDT and Qwest were also asked to file late-filed exhibits.

22 22. On May 9, 2008, Qwest filed a copy of its Application for Rehearing, Reargument or
23 Reconsideration of the Colorado PUC Decision, and AZDT filed a copy of the Colorado PUC
24 Decision.

25 23. On May 16, 2008, Qwest and AZDT filed a Joint Statement of Issues in Dispute.

26 24. On May 20, 2008, Qwest, AZDT, and Staff each filed their briefs.

27 25. Section 252(b)(4)(A) limits the Commission's authority in an arbitration under 252(b)
28 to considering the issues set forth in the Petition and the Response.

ORDER

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IT IS THEREFORE ORDERED that the Commission hereby adopts and incorporates as its Order the resolution of the issues contained in the above Discussion.

IT IS FURTHER ORDERED that Qwest Corporation and Arizona Dialtone, Inc. shall prepare and sign an interconnection agreement amendment incorporating the terms of the Commission's resolutions.

IT IS FURTHER ORDERED that the signed interconnection agreement amendment shall be submitted to the Commission for its review within 30 days after the effective date of this Decision.

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1 IT IS FURTHER ORDERED that Arizona Dialtone, Inc. shall transition all of its remaining
2 service lines ordered as and billed as UNE-P to alternative arrangements, either with Qwest or
3 otherwise, within 14 days after the effective date of this Decision.

4 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

5 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.
6
7

8 CHAIRMAN _____ COMMISSIONER

9
10 COMMISSIONER _____ COMMISSIONER _____ COMMISSIONER

11 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
12 Director of the Arizona Corporation Commission, have
13 hereunto set my hand and caused the official seal of the
14 Commission to be affixed at the Capitol, in the City of Phoenix,
15 this _____ day of _____, 2008.

16 _____
17 BRIAN C. McNEIL
18 EXECUTIVE DIRECTOR

19 DISSENT _____

20 DISSENT _____
21 SNH:db

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SERVICE LIST FOR: QWEST CORPORATION and ARIZONA DIALTONE, INC.

DOCKET NOS.: T-01051B-07-0693 and T-03608A-07-0693

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