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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

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Arizona Corporation Commission

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8 IN THE MATTER OF QWEST CORPORATION'S  
9 COMPLIANCE WITH SECTION 252(e) OF THE  
10 TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. RT-00000F-02-0271

11 IN THE MATTER OF US WEST  
12 COMMUNICATIONS, INC.'S COMPLIANCE  
13 WITH SECTION 271 OF THE  
14 TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-00000A-97-0238

STAFF COMMENTS

15 **I. Introduction and Executive Summary**

16 On November 20, 2002, Qwest Corporation ("Qwest") filed a Motion to  
17 Reconsider the Arizona Corporation Commission's ("ACC" or "Commission") November  
18 7, 2002 Procedural Order issued in the above-referenced Dockets. In its Motion, Qwest  
19 requested that one aspect of the Procedural Order be changed – the requirement that Phase  
20 A of the Section 252(e) investigation be concluded prior to resolution of the Public  
21 Interest portion of the Section 271 case. On December 2, 2002, the Residential Utility  
22 Consumer Office ("RUCO") and AT&T Communications of the Mountain States, Inc. and  
23 TCG Phoenix (collectively "AT&T") filed Responses opposing the Qwest Motion. In  
24 order to assist the Administrative Law Judge and Commission in their consideration of  
25 Qwest's Motion, Staff files the following Comments on the submissions of the parties.

26 It is Staff's position that with the separation of 271 related issues arising out of the  
27 252(e) proceeding into the 271 proceeding itself and a separate sub-docket to the 271  
28 proceeding, that the 252(e) enforcement proceeding and the 271 proceeding could proceed  
independently of one another. Nonetheless, it is important in Staff's opinion, that Qwest  
acknowledge its mistakes and past improper conduct, and that it provide concrete

1 assurances to the ALJ and Commission that such conduct will not occur in the future and  
2 that safeguards have been put in place to prevent any such reoccurrences before any final  
3 recommendation is made in the Section 271 proceeding. In Staff's opinion, Qwest has not  
4 yet offered adequate assurances and measures to the Commission to alleviate the concerns  
5 raised by the Commission. Until Qwest does so, the Commission may not believe that it  
6 is in the public interest to allow Qwest's 271 application to proceed to the FCC before the  
7 conclusion of the 252(e) enforcement Docket.

8 Staff would submit that there is really no need to make a final decision on whether  
9 252(e) must conclude before the Commission makes its final 271 recommendation at this  
10 point in time. The ALJ and Commission should consider amending the current Procedural  
11 Order to defer a decision on whether to proceed with the 271 application prior to  
12 conclusion of the 252(e) enforcement Docket. If Qwest comes forward with adequate  
13 assurances, the Commission can at that time decide whether its concerns have been  
14 sufficiently addressed by Qwest to allow the Commission to proceed with the Company's  
15 271 application before conclusion of the 252(e) enforcement proceeding.

16 **II. Discussion**

17 Staff supports and has always shared RUCO's and the CLEC's position that there  
18 be a thorough investigation of relevant issues in the 252(e) proceeding. When Staff filed  
19 its initial report on Qwest's compliance with Section 252(e), it had limited evidence and  
20 comments before it on which to base its conclusions. In its Supplemental Report, Staff  
21 acknowledged that additional proceedings were necessary given the additional facts put  
22 into evidence by Eschelon, McLeod and RUCO, and given the additional facts brought to  
23 light by Staff's further discovery in both Dockets as a result of comments made at the  
24 subsequent Procedural Conference. Staff, at the request of Administrative Law Judge  
25 Rodda, also proposed a procedural process for both Dockets in its Supplemental Report.

26 Staff's proposed procedural process in both Dockets was adopted by the  
27 Administrative Law Judge in her November 7, 2002 Procedural Order. The process  
28 adopted includes two phases to the 252(e) enforcement proceeding. Phase A will address

1 compliance issues involving Qwest. Phase B will address CLEC specific opt-in issues  
2 and complaints as they may arise. Issues which CLECs were precluded from raising in  
3 the 271 proceeding because of non-participation clauses in their settlement agreements  
4 with Qwest were addressed in a special 271 workshop held specifically for that purpose.  
5 Staff reports on the issues raised in that workshop will be issued soon. In addition, a  
6 separate 271 sub-Docket has now been opened to address allegations that Qwest interfered  
7 with the 271 regulatory process before the Commission.

8 It is important to keep this separation of issues in mind when addressing whether it  
9 is necessary for the Commission to conclude the 252(e) Phase A enforcement Docket  
10 before the Commission can make its recommendation on Qwest's Section 271 application.  
11 It is apparent in the arguments presented by some of the parties, that they have not taken  
12 several important procedural developments and rulings into account.

13 For instance, AT&T argues that the natural and logical procedural response to  
14 allegations that Qwest entered into secret interconnection agreements to quiet opposition  
15 and participation in its Section 271 application, is to stay the Section 271 proceeding  
16 entirely, so that this claim can be investigated. This fails to take into account the fact that  
17 a sub-Docket to the Section 271 proceeding has been set up specifically to deal with the  
18 participation issue and that the Staff has recommended that the Commission not make its  
19 final recommendation on Qwest's application until the sub-Docket has concluded.

20 AT&T relies upon the Commission's April 18, 2002 Procedural Order and a  
21 Protective Order subsequently entered into by the Parties in arguing that commitments  
22 were made to AT&T that the Section 271 proceeding would not conclude until the 252(e)  
23 investigation was completed. To put AT&T's arguments in context, the April 18, 2002,  
24 Procedural Order was one of the Commission's initial Procedural Orders on the 252(e)  
25 issue and rejected AT&T's motion to conduct the 252(e) examination within the 271  
26 Docket itself. In the Protective Order, it was agreed that parties could use confidential  
27 information filed in the 252(e) Docket in the 271 proceeding.

28

1 To be fair, Staff can understand how AT&T might interpret certain language  
2 appearing in the April 18, 2002 Procedural Order in support of its position. On the other  
3 hand, AT&T's reliance on one of the Commission's first Procedural Orders entered in the  
4 252(e) case fails to give due consideration to the events of the last eight months, including  
5 other significant rulings of the Administrative Law Judge which Staff submits cannot be  
6 ignored in arriving at a fair interpretation of what Staff believes was intended. First, and  
7 perhaps most important, is the fact that the Commission has subsequently separated out  
8 the 271 related issues to be addressed within the context of that case and a sub-Docket.  
9 Staff has recommended, and the ALJ agreed, that those issues must be resolved before the  
10 Commission makes its final 271 recommendation. In Staff's opinion, it is important that  
11 findings be entered and conclusions reached on these issues before the Commission's  
12 gives its final recommendation on Qwest's application to the FCC. It is also important  
13 that parties be able to use such findings and conclusions in their arguments in the Public  
14 Interest phase of the 271 case, as provided for by the Commission in its last Procedural  
15 Order.

16 Second, at the time that the April 18, 2002, Procedural Order was entered, the  
17 process envisioned by the Parties was a several month investigation by the Staff, with the  
18 ultimate result being a Staff Report containing Staff's findings and recommendations.  
19 The only parties which filed comments during this initial phase of the investigation were  
20 Qwest, AT&T, Time Warner and RUCO. The positions of the parties at that time related  
21 largely to Qwest's interpretation of the Federal Act. The Staff had no concrete evidence  
22 that any wrongdoing had occurred at that time. Since that time, additional facts were  
23 presented by Eschelon, McLeod and RUCO which resulted in the need for a more  
24 extensive investigation in the form of an enforcement proceeding, which was  
25 subsequently ordered by the ALJ. In relying upon the provisions of the original  
26 Procedural Order, Staff believes that AT&T has also failed to take this important  
27 procedural ruling into account. An enforcement proceeding by its nature, is specifically  
28 designed to address past wrongdoing and impose penalties and other remedies

1 commensurate with the degree of culpability found. Presumably, the penalties and  
2 remedies adopted by the Commission in the enforcement proceeding will be in  
3 furtherance of and serve the public interest, making this same exercise now unnecessary in  
4 the context of the 271 proceeding.

5 Both RUCO and AT&T also argue that the Commission's recommendation in the  
6 Public Interest Phase of the 271 proceeding will somehow be undermined unless the  
7 Commission first concludes the 252(e) enforcement Docket. Staff disagrees. RUCO also  
8 states that Staff is being inconsistent since in its preliminary 271 Public Interest report it  
9 recommended to the Commission that it not rely on mere "allegations" of misconduct  
10 alone in making its overall Public Interest determination. Again, this does not take into  
11 account the nature and purpose of the 252(e) enforcement Docket that the Commission  
12 has since opened and the fact that remedies in furtherance of the public interest will be  
13 adopted in that case. In addition, the abundant discovery that has already been done in the  
14 252(e) Docket together with the findings of the Minnesota Public Utilities Commission  
15 ("MPUC") entered after its own extensive investigation and contested case proceeding  
16 into these same issues, rise to a much higher level, in Staff's opinion, than mere  
17 "allegations".

18 Under the current process, the parties can utilize any of the significant facts and  
19 information discovered in the 252(e) enforcement proceeding, in making their arguments  
20 in the Public Interest phase of the 271 proceeding. In addition, the parties will use the  
21 results of the Staff's workshop in the 271 proceeding and the sub-Docket, in making their  
22 arguments in the Public Interest phase of the 271 proceeding. Under such a process, all  
23 parties will have ample opportunity to present their arguments, in Staff's opinion, on  
24 whether Qwest's application for 271 authority is in the public interest. The question of  
25 the effect of the nonparticipation clauses on the Commission's evaluation of whether  
26 Qwest has opened its local market to competition, has been made a part of the Section 271  
27 Docket itself. Therefore, the Commission's Section 271 deliberations cannot conclude  
28

1 and a recommendation cannot be made without prior full consideration of this important  
2 issue.

3         Given all of the various dockets now opened to examine and address the various  
4 issues, Staff finds little merit in arguments that the integrity of the 271 process will be  
5 adversely affected unless the Commission holds the 271 proceeding in abeyance pending  
6 resolution of the 252(e) enforcement proceeding. To allege that the Commission is  
7 somehow “cutting corners” in the 271 process, or that the Section 271 decision will be  
8 vulnerable to collateral attack unless the 252(e) enforcement proceeding concludes first  
9 again fails to consider the significant procedural rulings discussed above, and the nature  
10 and purpose of the 252(e) enforcement proceeding.

11         Notwithstanding the above Comments, and the fact that Staff believes that the two  
12 proceedings are now both structured in a manner that would allow the Commission to  
13 proceed forward to conclusion of the 271 proceeding, Staff recommends that the  
14 Commission not do so unless the following conditions are met. The Commission has not  
15 received any acknowledgement by Qwest to-date that it has done anything wrong nor has  
16 it received adequate assurances from the Company that would prevent the same pattern of  
17 conduct toward the Commission and the CLECs. This conduct is now the subject of three  
18 separate enforcement proceedings: 1) the wholesale rate change OSC, 2) the 252(e)  
19 enforcement proceeding, and, 3) the 271 sub-Docket. If there is any single factor, in  
20 Staff’s opinion, that should result in delay by the Commission in going forward with the  
21 271 proceeding before the conclusion of the 252(e) Phase A enforcement case, it is the  
22 apparent lack of understanding by Qwest of the Commission’s concerns about Qwest’s  
23 conduct and the failure by the Company to give the Commission adequate assurances that  
24 it will change its conduct. By adequate assurances, Staff means a list of measures that it  
25 has implemented or agrees to implement which are designed to address concerns about  
26 Qwest’s behavior. If Qwest provided adequate assurances, the Commission could then  
27 move ahead with considering the remaining 271 issues, in Staff’s opinion.

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1 Staff would submit that there is really no need to make a final decision on whether  
2 252(e) must conclude before the Commission makes its final 271 recommendation at this  
3 point in time. The ALJ and Commission should consider amending the current Procedural  
4 Order to defer a decision on whether to proceed with the 271 application prior to  
5 conclusion of the 252(e) Phase A enforcement Docket. This will give the Commission  
6 time to evaluate whether it believes Qwest's assurances are sufficient to address the  
7 concerns identified in the three enforcement dockets now pending before the  
8 Commission.

9 **III. Conclusion**

10 Staff believes that the parties in their Responses to Qwest's Petition for  
11 Reconsideration have failed to recognize subsequent procedural rulings of the  
12 Administrative Law Judge and give them sufficient consideration. Staff believes that the  
13 two Dockets are now structured in a manner which would allow the Commission to  
14 proceed to address both Dockets independently of one another, while still allowing parties  
15 to make arguments regarding the weight the Commission should give to these issues in the  
16 Public Interest Phase of the 271 proceeding.

17 Nonetheless, it is also Staff's opinion, that Qwest has failed up to this point to give  
18 sufficient recognition to the Commission's concerns as evidenced by the various  
19 enforcement dockets now pending before the Commission. Qwest has also failed to give  
20 the Commission adequate and concrete assurances that this same pattern of conduct  
21 against the Commission and CLECs will not be repeated and that the Company has put  
22 adequate and concrete measures in place to address concerns regarding its past behavior .

23 The ALJ and Commission should consider amending the current Procedural Order  
24 to defer a decision on whether to proceed with the 271 application prior to conclusion of  
25 the 252(e) Phase A enforcement Docket. If Qwest comes forward with adequate  
26 assurances before the time arrives for the Commission to make its final Public Interest  
27 determination in the 271 proceeding, the Commission can at that time decide whether its  
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1 concerns have been sufficiently addressed by Qwest to allow the Commission to proceed  
2 with Qwest's 271 application before conclusion of the 252(e) enforcement proceeding.

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4 RESPECTFULLY SUBMITTED this 12th day of December, 2002.

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