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IN THE MATTER OF QWEST CORPORATION'S)
 COMPLIANCE WITH SECTION 252(e) OF THE) DOCKET NO. RT-00000F-02-0271
 TELECOMMUNICATIONS ACT OF 1996)

**QWEST CORPORATION'S MOTION *IN LIMINE* TO EXCLUDE TESTIMONY OF
 W. CLAY DEANHARDT**

Qwest Corporation ("Qwest") respectfully moves for an Order excluding the pre-filed testimony submitted by Residential Utility Consumer Office ("RUCO") expert witness W. Clay Deanhardt. Mr. Deanhardt's filing is inappropriate expert testimony and should be stricken for three reasons. First, expert testimony on legal issues is inadmissible as a matter of Arizona law, and the same legal opinions and analysis were disregarded in the Minnesota Public Utilities Commission proceeding for which he first drafted it.

Second, Mr. Deanhardt compounds the error of his legal testimony by offering his resolutions of disputed questions of fact (despite having no personal knowledge as to any of them), his (unsurprisingly) negative views of Qwest's credibility (based solely on his review of documents and presence at prior proceedings in his capacity as a paid expert and legal consultant

for an adverse party), and his conclusion that Qwest “knowingly and intentionally” violated the Telecommunications Act of 1996 and Arizona state law (based again on documents and his own “experience”). His analysis of the alleged facts and documents, and his application of his legal analysis to those facts, wrongly usurps the role of the Commission as trier of fact. This becomes all the more inappropriate when Mr. Deanhardt attempts to elevate affidavit and deposition testimony from absent witnesses, *i.e.*, hearsay, into admissible testimony simply by reading and agreeing with it – again, in direct contravention of Arizona law.

Third, Mr. Deanhardt’s twenty months as in-house counsel for a CLEC, year-long retention by the Minnesota Department of Commerce (and current retention for RUCO and AT&T), past president of a software dot-com, and unrelated prior experience as a litigator do not qualify him to offer “expert” testimony on the telecommunications industry, the Telecommunications Act’s filing requirement, Qwest’s conduct or intent, or anything else at issue in this case. The Commission should, therefore, enter an Order striking the pre-filed written testimony of Mr. Deanhardt and precluding him from testifying at the hearing in this matter.

DISCUSSION

Under both Federal and Arizona Rule of Evidence 702, expert testimony is admissible “[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702; Ariz. R. Evid. 702. “It is not the expert’s function, however, to substitute himself or herself for the jury and advise them with regard to the ultimate disposition of the case.” *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986). This principle applies all the more strongly where, as here, the trier of

fact is not a jury, but the Commission, elected officials with particular expertise on the subject matter at hand.

Expert legal testimony – that is, testimony regarding the relevant law, its meaning and its application to the facts of the case – is inadmissible under Rules of Evidence 702 and 704. *United States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999) (citing *Aguilar v. International Longshoreman’s Union*, 966 F.2d 443, 447 (9th Cir. 1992) and *Marx & Co. v. Diners’ Club, Inc.*, 550 F.2d 505, 509-10 (2^d Cir. 1977)); *Knoell v. Metropolitan Life Ins. Co.*, 163 F. Supp. 2d 1072, 1078 n.8 (D. Ariz. 2001); *see also Police Retirement Sys. of St. Louis v. Midwest Inv. Advisory Serv., Inc.*, 940 F.2d 351, 357 (8th Cir. 1991); *Specht v. Jensen*, 853 F.2d 805, 807-808 (10th Cir. 1988); *United States v. Cross*, 113 F. Supp. 2d 1282, 1283 (S.D. Ind. 2001) (“[A] lawyer may not testify as an expert to purely legal matters.”). When a proffered expert testifies as to the applicable law and renders conclusions regarding issues of law, he substitutes himself for the tribunal and the factfinder’s role rather than assisting the trier of fact to understand the evidence or decide a fact in issue. *See Specht*, 853 F.2d at 807-08; *see also, e.g., Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) (same, citing cases); *Burkhart v. Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1212 (D.C. Cir. 1997) (same). Even when the trier of fact must decide a mixed question of law and fact, “testimony which articulates and applies the relevant law . . . circumvents the [trier of fact’s] decisionmaking function by telling it how to decide the case.” *Specht*, 853 F.2d at 808 (quoting Fed. R. Evid. 704 advisory committee note). Expert legal testimony here usurps the role of the Commission as the arbiter of what the law means in this matter, *see Police Retirement Sys. of St. Louis*, 940 F.2d at 357; *see also Specht*, 853 F.2d 809-10 (“In no instance can a witness be permitted to define the law of the case.”).

Aside from the obvious prohibition against legal testimony, experts may not offer opinion evidence as to credibility, *Lindsey*, 149 Ariz. at 475, 720 P.2d at 76, or testify as to the unexpressed subjective intent of parties to an agreement. *Energy Oils, Inc. v. Montana Power Co.*, 626 F.2d 731, 737 n.11 (9th Cir. 1980) (citing 3 *Corbin on Contracts* § 543 at 139 (1960) and *Restatement (Second) of Contracts* § 238, comment c (Tentative Draft No. 7, 1973)). And although experts can review hearsay materials for purposes of forming their opinions, they cannot transform it into admissible testimony by doing so – at most, hearsay can be introduced in this fashion only for the purpose of identifying the bases of the expert’s opinion, leaving the underlying hearsay with “no substantive value.” *State v. Jessen*, 130 Ariz. 1, 7 n.1, 633 P.2d 410, 416 n.1 (1981); *see also Steed v. Cuevas*, 24 Ariz. App. 547, 553, 540 P.2d 166, 172 (1975) (reversible error to allow “unqualified witness to give an expert opinion” and to “allow rank hearsay to come into evidence clothed with the respectability of a public record.”). Mr. Deanhardt’s testimony violates all of these proscriptions.

A. Mr. Deanhardt’s Legal Analysis Is Improper Expert Testimony

After introducing himself and summarizing his testimony, Mr. Deanhardt begins his testimony with a section entitled “Legal Background.” Testimony of W. Clay Deanhardt (“Deanhardt Test.”), 5:4-12:4. Consistently with the title, Mr. Deanhardt then asks and answers a series of quintessentially and indisputably legal questions that establish the legal standards and framework that he and RUCO want to govern the case:

- “What is the legal framework for determining Qwest’s federal obligations under the Act?” *Id.* at 5:5.
- “What is the role of the Commission in reviewing interconnection agreements?” *Id.* at 6:4.
- “What has the FCC said about the obligation to file interconnection agreements with state commissions?” *Id.* at 7:1.

- “Has the FCC ever defined the term interconnection agreement?” *Id.* at 7:28.
- “What was the context for the FCC issuing this definition?” *Id.* at 8:3.
- “Had the FCC defined interconnection agreement prior to its October 4, 2002 order?” *Id.* at 8:12.
- “How can you be sure [that Qwest knew the FCC standards before the FCC’s order] given the fact that Qwest filed the petition for declaratory injunction?” *Id.* at 9:6.
- “Qwest has argued that several of the agreements it entered into with CLECs are either ‘business agreements’ or settlements of pending claims or litigation. Does that change the analysis?” *Id.* at 9:18.
- “Does that mean that every agreement between a CLEC and an ILEC needs to be filed under § 252?” *Id.* at 10:13.
- “What are the state law requirements for interconnection?” *Id.* at 11:6.
- “Are there any other state statutes that are applicable in this proceeding?” *Id.* at 11:12.

Mr. Deanhardt submitted a practically identical legal discussion as part of his pre-filed testimony in the Minnesota unfiled agreements proceeding and the Administrative Law Judge presiding over that case agreed with Qwest that it was inadmissible and should not be considered. This Commission should do the same.

To be sure, RUCO, like Qwest and any other party, has the right to argue to the Commission about what legal standards that should govern this docket, to articulate its views about what the governing law is and how that law applies to this case. But legal arguments typically and properly appear in legal memoranda, which are submitted by counsel and considered by the Commission as argument rather than evidence, and RUCO is not entitled to cloak its legal arguments in the garb of its “expert” witness to elevate the evidentiary status of his legal views. Nor are Mr. Deanhardt’s legal arguments entitled to any more weight than those

of any other counsel who have appeared in the case, even if he were entitled to offer them – which he is not, since he is not counsel of record for RUCO, not a member of the Arizona Bar, and not admitted *pro hac vice* in this proceeding. As a matter of Arizona law, then, Mr. Deanhardt’s “Legal Background” section is inappropriate expert testimony and should be stricken.

B. Mr. Deanhardt’s Testimony Is Also Inappropriate Because He Resolves Questions of Fact, Expresses Opinions On The Outcome Of The Case And Usurps The Fact-Finding Function Of The Commission

In the next two sections of his – Section III, entitled “The McLeod Agreement,” Deanhardt Test. at 12:5-54:15, and Section IV, entitled “The Eschelon Agreements, *id.* at 54:16-68:15 – Mr. Deanhardt tells the Commission what the facts are, applies his version of the law to them, and supplies the Commission with a ready-made decision on liability. He painstakingly describes his (paid, although he never mentions that) investigation of Qwest on behalf of the Minnesota Department of Commerce, characterizes the agreements at issue, identifies the documents, interviews, affidavits and depositions he thinks are important, explains what he thinks the documents prove, separates the credible witnesses from the non-credible ones, in direct violation of Arizona law, *see, e.g., State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986), opines on Qwest’s credibility and good faith, divines Qwest’s intentions, which he cannot, *see Energy Oils, Inc. v. Montana Power Co.*, 626 F.2d 731, 737 n.11 (9th Cir. 1980), and unsurprisingly concludes that Qwest willfully violated both federal and Arizona law.

It is difficult to imagine expert testimony more inappropriate. Mr. Deanhardt’s testimony does not help the Commission understand any aspect of the case otherwise beyond the ken of the individual Commissioners. He does not shed light on an arcane area of science or economics or offer any experience or perspective that the Department could not obtain from

actual first-party evidence – for example, from the supposedly aggrieved CLECs. And, by his own reckoning, Mr. Deanhardt offers no first-hand knowledge of any of the contracts at issue – save for peripheral facts surrounding the Covad Agreement, which he avowedly did not negotiate. *See Deanhardt Test.* at 68:16-70:15. What he offers is the unvarnished advocacy of a lawyer – and one who, by his own description, now consults for AT&T as well as RUCO and the Minnesota Department of Commerce, *see Deanhardt Test.* at 3:12 and n.1 – who as a witness, an “expert” witness, makes his arguments under oath and in the form of “evidence.” RUCO should not be permitted to assert evidentiary standing for its litigation positions by having Mr. Deanhardt present them as expert testimony.

On top of the threshold impropriety of his testimony, Mr. Deanhardt embraces and attempts to import inadmissible hearsay into the record of this case – an evidentiary corner RUCO should not be permitted to cut. Rather than calling live witnesses with actual personal knowledge, RUCO seeks to offer hearsay testimony of at least three witnesses – the depositions and affidavits of Blake Fisher and Lori Deutmeyer of McLeod and the Minnesota hearing testimony of Sarah Padula of Popp Communications – into this case by having Mr. Deanhardt refer to and rely on it. Ms. Padula’s testimony, *see Deanhardt Test.* at 61:1-13, is not even attached – Mr. Deanhardt simply offers his rendition of what happened at the Minnesota hearing. The others are attached as exhibits to his testimony or to that of another RUCO witness, Mary Lee Diaz Cortez. These depositions, affidavits, and descriptions of testimony from other proceedings cannot properly be considered evidence in this case – under Arizona law, they have no substantive value beyond identifying them as a basis for Mr. Deanhardt’s opinion. *State v. Jessen*, 130 Ariz. 1, 7 n.1, 633 P.2d 410, 416 n.1 (1981); *Steed v. Cuevas*, 24 Ariz. App. 547, 553, 540 P.2d 166, 172 (1975) (reversible error to allow “unqualified witness to give an expert

opinion” and to “allow rank hearsay to come into evidence clothed with the respectability of a public record.”). RUCO has offered them for much more: it has offered Mr. Deanhardt’s testimony and the materials on which he relies as the substantive evidence on which it bases its case. The Commission should hold RUCO to the same evidentiary standards it holds Qwest and any other party appearing before it.

At the end of the day, Mr. Deanhardt’s application of the facts to his legal theories is nothing different than that RUCO’s counsel can, and no doubt will, file as a posthearing memorandum, with one big exception – the evidence hasn’t yet been taken, the witnesses haven’t yet been cross-examined, and the parties have not made their arguments to the Commission. For RUCO, none of those procedural requisites have been applied – it asks the Commission simply to receive and credit Mr. Deanhardt’s legal and factual opinions as evidence. But Mr. Deanhardt’s testimony is not testimony – it is argument. The Commission should strike it and refuse to permit him to testify at the hearing.

C. In Any Event, Mr. Deanhardt Lacks The Credentials To Qualify As An Expert On Telecommunications Law, CLECs, Or Any Other Matter That Is The Subject Of This Case

It is not good enough just to know something. An expert witness must have both sufficient knowledge and practical experience with the subject matter of the proposed testimony, expertise typically obtained either through formal education or significant experience. *See State v. Varela*, 178 Ariz. 319, 322-23, 873 P.2d 657, 660-61 (1993) (finding that trial court erred in admitting medical expert testimony from psychologist without “recognized training, study and certification”); *State v. Livanos*, 151 Ariz. 13, 15-16, 725 P.2d 505, 507-08 (1986) (affirming ruling refusing to qualify graphologist as handwriting expert). “The fact that a person may deal with a subject in such a manner that it makes him more knowledgeable than the average citizen

does not necessarily make him such an expert that it is an abuse of discretion to refuse to allow him to testify.” *Livanos*, 151 Ariz. at 15, 725 P.2d at 507. The Commission has considerable discretion in deciding whether to exclude expert testimony based on a lack of competency or foundation, including discretion to exclude it. Even if the Commission were to consider testimony of the sort submitted by Mr. Deanhardt to be appropriate (which it should not), his testimony should be stricken because he lacks the expertise and credentials to offer any such testimony.

Mr. Deanhardt’s resume (attached as Exhibit 1 to his testimony) reveals that he began his career as a telecommunications lawyer in January 1999 when he left his position as a litigation associate at a Palo Alto law firm (his practice apparently did not include enough telecommunications litigation to warrant inclusion on his resume for the nearly six preceding years) to take an in-house position at Covad. Mr. Deanhardt learned what he knows about telecommunications law in the twenty months he spent at Covad before he left to take a job with a start-up internet company (again, the word telecommunications does not appear in his own description of the company, nor does any variant). When he left that position after ten months, he opened his own consulting firm, through which he has performed “[i]ndependent consulting on telecommunications and general business issues, including business plan review,” for a total of seventeen months – almost all of it, in terms of time and revenue, serving as an investigator, consultant, shadow counsel and expert witness in “unfiled agreements” cases against Qwest in Minnesota and now in Arizona.

Mr. Deanhardt’s limited tenure with a telecommunications company hardly constitutes the “years of occupational experience” needed to qualify Mr. Deanhardt as a telecommunications expert. Indeed, even during his tenure at Covad, Mr. Deanhardt apparently

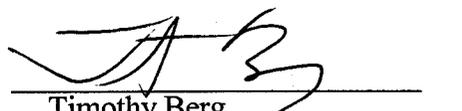
only worked on a handful of interconnection agreements. *See Deanhardt Test.* at 4:11-5:3. More importantly, perhaps, is the fact that Mr. Deanhardt did not negotiate interconnection agreements that contain a number of provisions like the ones at issue in this case, such as clauses related to dedicated provision services and consulting services. *See Minnesota Department of Commerce's Responses to Qwest Corporation's Third Set of Discovery Requests, Interrogatories Nos. 14, 22.* Mr. Deanhardt also has no special qualifications that would aid the Commission in its understanding of the legal requirements of the Act. Mr. Deanhardt certainly did not draft any portion of the legislation and is not privy to Congress' intent regarding the policy, structure and implementation of that Act. To the contrary, Mr. Deanhardt's testimony simply offers a view – hardly an expert one – of how the Commission should apply the relevant portions of the Act to the facts Mr. Deanhardt thinks the Commission should find. And, again, if RUCO wishes to present Mr. Deanhardt's views as argument, it can retain him as counsel and do so. It cannot, however, make him into an expert that he is not, then take evidentiary advantage of its inappropriate alchemy.

CONCLUSION

For the foregoing reasons, the Commission should strike the pre-filed written testimony of Mr. Deanhardt.

DATED this 11th day of March, 2003.

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