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BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission 2003 APR 30 P 4: 14

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ARIZONA CORPORATION COMMISSION  
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APR 30 2003

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

Docket No. RT-00000F-02-0271

COMMENTS OF McLEODUSA  
TELECOMMUNICATIONS SERVICES, INC.

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") submits the following comments in this docket. From the beginning, this docket was addressed to Qwest's conduct. McLeodUSA is not a formal party in this docket. Yet certain proposed penalties in this docket adversely affect McLeodUSA. McLeodUSA submits that due process and fundamental fairness precludes the imposition of penalties in this matter that adversely affect McLeodUSA.

McLeodUSA regrets its participation in the unfiled interconnection agreements at issue in this docket. McLeodUSA does not contend that it should avoid any consequences related to those agreements. However, this proceeding is not the proper one to explore such issues as to McLeodUSA. Rather, this proceeding is an investigation of Qwest and a determination of what remedies should be imposed on Qwest. McLeodUSA's comments below are intended to place this particular docket in context with respect to McLeodUSA, including why it would be improper to impose penalties adverse to McLeodUSA through this docket.

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1                   **A.     This Docket is Expressly Directed at Qwest, Not McLeodUSA.**

2                   The Arizona Corporation Commission's November 7, 2002 Procedural Order (the  
3 "Order") established the scope of this hearing as follows:

4                   The Section 252 issues concern whether *Qwest* violated  
5 its obligation to file certain agreements with this commission  
6 and if it did, what remedies are appropriate. The scope of the  
7 hearing in the Section 252(e) proceeding will determine when  
8 *Qwest* should file agreements with CLECs for Commission  
9 approval, why *Qwest* failed to file certain agreements whether  
10 *Qwest* knew or should have known the appropriate criteria at the  
11 time it failed to file the agreements, which agreement should be  
12 filed under the standard and whether *Qwest* should be subject to  
13 monetary and/or non-monetary penalties if it violated the  
14 standard. In addition, the Commission should determine if  
15 *Qwest's* conduct violated any other law, Commission Order or  
16 rule.

17 [Order at 5:10-17 (emphasis added)] Consistent with this scope, Qwest was directed to file  
18 direct testimony and was allowed to file rebuttal testimony in response to Staff and  
19 intervenor testimony. Qwest is the focus of this proceeding. There has been no order for  
20 an investigation of McLeodUSA, nor any notice that McLeodUSA's rights, privileges and  
21 property would be at risk in this proceeding.

22                   In fact, *McLeodUSA is not a formal party to this proceeding.* It did not intervene in  
23 this docket. It also is not a party to the Qwest Arizona 271 docket, which could have  
24 provided McLeodUSA with intervenor status in this docket even if it did not specifically  
25 apply for intervention here.

26                   **B.     Certain Proposed Remedies in this Docket Would Penalize McLeodUSA.**

27                   Even though McLeodUSA was not a party to this docket, it cooperated fully with the  
Commission Staff in its investigation and complaint against Qwest. McLeodUSA provided Staff  
with documentation developed in the Minnesota investigation, including discovery responses,  
deposition transcripts and affidavits. McLeodUSA also responded to numerous data requests from  
RUCO, providing voluminous materials in full response to those requests. However, that

1 cooperation does not nullify the need for due process in the assessment of any penalties against  
2 McLeodUSA. Yet, Commission Staff and RUCO seek to do just that.

3 McLeodUSA submits that the pre-filed testimony of both Staff and RUCO  
4 recommend penalties against McLeodUSA. In particular, McLeodUSA would be: (i)  
5 excluded from receiving any discounts that its competitor CLECs will receive from Qwest  
6 in the future and (ii) required to pay a \$100,000 contribution to a fund proposed by RUCO.  
7 For the Commission to adopt remedies in this proceeding against McLeodUSA would  
8 violate due process under both state and federal law. Moreover, the particular penalties  
9 proposed would violate the anti-discrimination provisions of the federal Telecommuni-  
10 cations Act of 1996 and A.R.S. § 40-334.

11 McLeodUSA urges the Commission to reject those portions of RUCO's and Staff's  
12 proposed penalties that adversely affect McLeodUSA. First, the \$100,000 "contribution"  
13 to be paid only by McLeodUSA and Eschelon – and no other CLEC – clearly constitutes a  
14 penalty. There is simply inadequate notice and process in this docket that would allow the  
15 assessment of such a penalty against either CLEC.

16 Second, in addition to remedies relating to past periods, the Commission is being asked to  
17 impose serious and substantial future consequences on McLeodUSA (and Eschelon) that would  
18 not imposed upon other CLECs. The most serious of the consequences is the recommendation that  
19 McLeodUSA not be eligible to obtain Qwest's services at the same price as its CLEC competitors  
20 in the future. This would constitute a penalty on McLeodUSA that would do great harm to  
21 McLeodUSA's ability to compete and would clearly result in discriminatory rates. McLeodUSA  
22 strongly opposes such remedies.

23 The Commission should only impose remedies in a manner that treats McLeodUSA  
24 consistently (*i.e.*, in a non-discriminatory manner) with other carriers with respect to the remedies  
25 in question and that comports with the basic tenants of due process. To the extent that  
26 McLeodUSA has already received a particular benefit from an unfiled agreement, McLeodUSA  
27 has no objections to its own exclusion from the remedy ordered by the Commission for that

1 benefit.<sup>1</sup> But for benefits that McLeodUSA has not received, the Commission should not place  
2 McLeodUSA in a worse position than any other carrier that did not receive the benefit.  
3 McLeodUSA believes that such consistent treatment is the intent of the Commission's order, based  
4 on the nondiscrimination imperative the Commission is attempting to enforce in this proceeding.

5 McLeodUSA submits that there is no reason to place McLeodUSA in a worse position than  
6 other carriers with respect to remedies for benefits that McLeodUSA did not actually receive,  
7 particular given the fact that McLeodUSA is not even a party to this docket. As with the other  
8 CLECs that would be entitled to receive the prospective 10% discount under the Commission  
9 Staff's Proposal, McLeodUSA has *not* received the value of the prospective discount. In fact, as  
10 McLeodUSA has not received any payments related to the value of any prospective discount.  
11 Given that McLeodUSA's circumstance is the same as other CLECs with respect to the prospective  
12 discount, McLeodUSA should be eligible to receive such a discount if the Commission decides to  
13 impose such a penalty on Qwest. This is appropriate both as a matter of law and as a matter of  
14 policy. To do otherwise would foster the same discrimination that the Commission Staff seeks to  
15 remedy through in this docket.

### 16 CONCLUSION

17 This case has placed before the Commission the task of trying to remedy harm from  
18 Qwest's past discriminatory conduct. The only appropriate remedy is one based on the rational and  
19 equitable principle that all carriers should receive the same payments, discounts or other benefits.

20 On that principle, it may be reasonable to exclude McLeodUSA from the retrospective 10%  
21 discount, notwithstanding the concessions McLeodUSA gave to receive its prior discount from  
22 Qwest. But McLeodUSA should be treated equally with other carriers with respect to those  
23 benefits that McLeodUSA and those other carriers have never received. If the Commission adopts  
24 a 10% prospective discount for CLECs, then McLeodUSA should not be excluded from that

25  
26  
27 <sup>1</sup> McLeodUSA does not take issue here with the *retroactive* 10% discount that may be provided to  
other, even though it provided substantial concessions to Qwest in conjunction with the 6.5% to 10%  
discount that McLeodUSA received from Qwest.

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1 discount. And, certainly, due process precludes the imposition of any monetary penalty against  
2 McLeodUSA in a docket where McLeodUSA is not a party.

3  
4 RESPECTFULLY SUBMITTED April 30, 2003.

5 **MCLEODUSA TELECOMMUNICATIONS**  
6 **SERVICES, INC**

7  
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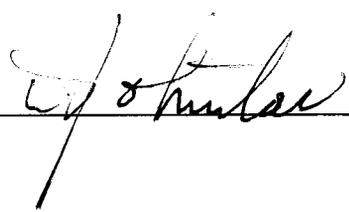
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