0000109529

ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

2003 MAY -1 P 3:47

AZ CORP COMMISSION
DOCUMENT CONTROL

Arizona Corporation Commission
DOCKETED
MAY 01 2003
DOCKETED BY CAC

MARC SPITZER
CHAIRMAN
JIM IRVIN
COMMISSIONER
WILLIAM A. MUNDELL
COMMISSIONER
MIKE GLEASON
COMMISSIONER
JEFF HATCH-MILLER
COMMISSIONER

IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 252(e) OF THE TELECOMMUNICATIONS ACT OF 1996	)	DOCKET NO. RT-00000F-02-0271
IN THE MATTER OF U S WEST COMMUNICATIONS INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996	)	DOCKET NO. T-00000A-97-0238

QWEST CORPORATION'S POST-HEARING MEMORANDUM

TABLE OF CONTENTS

BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
CHAIRMAN
JIM IRVIN
COMMISSIONER
WILLIAM A. MUNDELL
COMMISSIONER
MIKE GLEASON
COMMISSIONER
JEFF HATCH-MILLER
COMMISSIONER

IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 252(e) OF THE TELECOMMUNICATIONS ACT OF 1996	)))	DOCKET NO. RT-00000F-02-0271
IN THE MATTER OF U S WEST COMMUNICATIONS INC.'S COMPLIANCE WITH § 271 OF THE TELECOMMUNICATIONS ACT OF 1996	))))	DOCKET NO. T-00000A-97-0238

QWEST CORPORATION'S POST-HEARING MEMORANDUM

I. INTRODUCTION

In its opening statement at the hearing held from March 17 to March 20, Qwest identified three themes that, in its view, should guide the Commission in its consideration of the issues before it in this docket. First, Qwest assured the Commission that it had cured any failures to file agreements and was committed to complying with its Section 252(e) filing obligations. Second, Qwest's testimony provided the Commission with facts not identified or addressed in the discussions submitted by the RUCO and Staff witnesses. And third, Qwest offered the Commission an analytical framework for its consideration of remedies.

As Qwest pointed out throughout the hearing, it does not dispute the fact that certain agreements were not filed. Moreover, Qwest agreed that, under the standard the FCC articulated in its October 4, 2002 Order ("FCC Order"), Qwest would have (and now has) filed many of the agreements identified by the Staff had that standard been in place at the time. Qwest also acknowledged the importance of the Commission's role in reviewing, analyzing and, when appropriate, approving the terms of ILEC-CLEC agreements that the Telecommunications Act of 1996 (the "Act") requires parties to file. Qwest further recognizes that CLECs, by virtue of the fact that agreements were not filed, may have been deprived of opportunities to opt into some, but not necessarily all, provisions contained in agreements that are within the newly-stated FCC standard. On those important threshold issues, the parties stand on common ground.

Qwest and the others part company, however, on the important questions that follow, *i.e.*, (a) whether Qwest's decisions not to file certain agreements, assuming in retrospect they were wrong, caused harm to CLECs, the market and/or the Commission's processes, and (b) how best to remedy any such harms. Qwest answered these questions during the hearing:

- Qwest demonstrated, through the first-hand, direct, personally knowledgeable testimony of Larry Brotherson, that it took significant structural and procedural steps – beginning in May 2002, five months before the FCC issued its Order – to ensure that all agreements possibly subject to the filing requirement are reviewed for that purpose and filed according to a broad, overly inclusive standard.

- Qwest demonstrated, through the first-hand, direct, personally knowledgeable testimony of Dana Filip Crandall and Kathy Lucero, that Qwest applied the same network and customer service processes and standards to all wholesale customers, agreement or not, and that its processes effectively prevented Qwest from treating any particular wholesale customer differently that any other.

- Qwest demonstrated, through the first-hand, direct, personally knowledgeable testimony of Judy Rixe, that Eschelon provided real, valuable consulting services to Qwest, and thus that the consulting and network-related services agreement (Joint 1-4) was not the "sham" that those with no personal knowledge of the agreement have claimed.

- Qwest demonstrated, through the expert testimony of Harry "Chip" Shooshan, that the Act contemplates that ILECs and CLECs will negotiate increasingly individualized agreements, that the "discount" agreements at issue, even assuming RUCO's allegations to be true, represent increasing CLEC market power rather than the imposition of adhesive terms by Qwest, that the testimony presented by RUCO and the Staff has failed to assess any alleged harm to CLECs and the market in any logical manner, and that the remedies imposed here should bear some discernible relationship to those harms.

Qwest's hearing presentation was not, as one RUCO witness called it, a "no harm, no foul" defense. Instead, Qwest's testimony represented an effort to bring perspective to a civil prosecution that has taken on a life of its own given the larger context and differing array of interests in the 271 proceedings. Qwest showed how the draconian penalties sought by RUCO and the Staff grew out of ill-founded assumptions about Qwest's conduct and, more importantly, out of misconceptions about the extent of the harm flowing from the unavailability of agreements for "pick and choose" under Section 252(i).

The presentations by RUCO and the Staff only help prove Qwest's point. Both RUCO and the Staff appear to have simply assumed, without adequate investigation, evidentiary support, or careful analysis, that the market at large, each Arizona CLEC, and the Commission all suffered catastrophic harms. From there, both take the FCC Order and, applying the same 20/20 hindsight utilized by the Minnesota Department of Commerce (indeed, in RUCO's case, through the same "expert" witness), argue from a dearth of admissible evidence that Qwest acted willfully and intentionally and that tens of millions of dollars worth of penalties and "non-monetary" payments, rebates, and opt-in rights are appropriate. But neither RUCO nor the Staff looked beyond the allegations in an effort even to attempt to describe, let alone quantify, harm from the unfiled agreements or to calibrate its extreme penalty recommendations to address that harm. Indeed, both RUCO and the Staff invite the Commission to commit reversible error by imposing record sanctions based on the "findings" of staffers and "experts" who, by their own reckoning, viewed the fact, nature, and extent of actual harm as beside the point.

Qwest does not come before the Commission seeking exoneration or absolution. Qwest asks only that the Commission resolve this docket in a manner that fairly considers all of the facts, fairly identifies the issues raised by its failure to file agreements that we now know should have been filed, and fairly addresses those issues. To that end, Qwest begins this memorandum by discussing the underlying regulatory framework and applying that framework to the agreements at issue. Second, Qwest explains how the evidence submitted by the Staff and RUCO is legally insufficient to support a Commission decision. Third, Qwest recounts the unrebutted evidence demonstrating that its failure to file agreements did not discriminate among CLECs and, indeed, could not have resulted in discrimination. Fourth, Qwest confronts the McLeod and Eschelon "discount" agreements, the facts that RUCO's and the Staff's witnesses have omitted, and the way in which the cluster of interrelated – as RUCO and the Staff agree – terms comprising those "discounts" bear on any opt-in rights CLECs would have had if those agreements had been filed. And finally, Qwest discusses the proper legal and policy framework for the Commission's remedies analysis, as well as the ill-conceived proposals offered by RUCO and the Staff.

II. REGULATORY FRAMEWORK

On April 23, 2002, Qwest petitioned the FCC for a declaratory ruling on the definition of "interconnection agreement" under Section 252(a)(1)'s filing requirement, because no court or commission had addressed that question previously. The FCC granted Qwest's petition in part and denied it in part and issued a Memorandum Opinion and Order on October 4, 2002. Most significantly, the FCC granted Qwest's petition to the extent it requested the FCC to issue a definition that substantially reduced the uncertainty regarding the filing standard. The past unfiled agreements that are the subject of this docket can now be evaluated against the new standard articulated by the FCC. However, judgments regarding Qwest's conduct in either filing or not filing those agreements must be made in light of the *absence* of a standard prior to the FCC's October 4, 2002 Order.

A. The Scope of Section 252 Was Unclear Prior to the October 4, 2002 FCC Order.

Although the definitions promulgated by the FCC and other state commissions have reduced greatly the ambiguity surrounding the scope of the filing requirement under Section 252, until those definitions were adopted there was anything but clarity regarding the scope of Section 252, as evidenced by the wide variety of arguments and definitions offered by various parties and state entities. Indeed, the Staff conceded that the Act was subject to multiple interpretations: "Staff recognizes that not only Qwest, but other parties did not uniformly interpret the 1996 Act. Staff, in its own review, could understand how one agreement could be seen to both fall, and not fall, under the filing standard articulated by the 1996 Act and clarified by the FCC." 1/ It is undisputed that nowhere in the Act itself or its legislative history is the scope of the term "interconnection agreement" (and thus the scope of the Section 252 filing requirement) defined. It is also undisputed that prior to the commencement of the recent unfiled agreements investigations, the scope of the term "interconnection agreement" had never been defined by any court or administrative agency. 2/ And, other than rank speculation regarding Qwest's beliefs and motives, there is no evidence that Qwest's proposed definition of interconnection was anything other than a good faith attempt to apply Section 252 in the absence of a standard and also negotiate with CLECs to resolve and settle their issues and concerns.

During the inquiries into unfiled agreements in Arizona, in other states such as Colorado, Iowa, Minnesota, and New Mexico, and before the FCC (in Qwest's declaratory judgment request), two distinct trends emerged. First, the number of definitions offered for "interconnection agreement" equaled, and may even have exceeded, the number of parties involved. Second, many parties offered exceptionally broad, open-ended definitions, only to later concede that numerous agreements between a CLEC and ILEC were not interconnection agreements. 3/

Many of the proposed definitions were almost breathtaking in their scope and breadth. For example, the New Mexico Attorney General argued that the requirement in Section 252(e) to file "any interconnection agreement" for approval created a filing requirement

---

1/ Pre-Filed Testimony of Marta Kalleberg, at 76:17-20.

2/ *In the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996*, Transcript of Proceedings (*hereinafter* "Tr."), Vol. III, Testimony of Clay Deanhardt, at 688:4-20.

3/ Mr. Deanhardt admitted these points on cross-examination. *See id.*

"unlimited" in breadth and scope – one that encompassed every agreement entered into by a CLEC and ILEC. 4/

Similarly, in this proceeding, the Staff asserted that any time an ILEC such as Qwest "enters into a negotiated agreement with a competitor that has *any affect* [sic] on its provision of interconnection, services, or network elements, it is to file said agreement with the State Commission for approval." 5/ Although the Staff claims that this definition is "consistent with the FCC's Order," 6/ it is in fact far broader. As discussed below, the FCC limited the filing requirement of Section 252(a) to those agreements that create an *ongoing* obligation pertaining to Section 251(b) or (c) services. These limitations are lost in the Staff's formulation of the filing requirement. Indeed, as demonstrated in Attachment A (and as conceded by the Staff), after the issuance of the FCC Order, the Staff significantly revised its list of which of the unfiled agreements qualified as "interconnection agreements" within the meaning of the Act. 7/

In the face of Act's ambiguity, Qwest's filing practices represented a good faith attempt to comply with an unclear standard while also negotiating resolutions to issues and concerns raised by CLEC customers. The statutory ambiguity, Qwest's reasonable attempt to

---

4/ *See In the Matter of the Investigation into Unfiled Agreements Between Qwest Corporation and Competitive Local Exchange Carriers*, Before New Mexico Public Regulation Commission, Docket No. 3750 New Mexico Attorney General Opposition to Motion for Summary Judgment at 6 (submitted May 17, 2002).

5/ Arizona Corp. Comm'n Utilities Division, *Staff Report and Recommendation in the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, at 14 (June 7, 2002) (emphasis added) (hereinafter "Staff Report").

6/ Pre-Filed Testimony of Marta Kalleberg, at 8:24.

7/ *See* Pre-Filed Testimony of Marta Kalleberg, at 12:4-13; Tr., Vol. IV, Testimony of Marta Kalleberg, at 885:24-887:20. Similarly, the Iowa Utilities Board ("IUB") initially adopted a very broad definition of interconnection agreement, but, upon reviewing specific agreements, determined that over half of the agreements that it considered did not need in fact to be filed. This included exclusively retrospective settlement agreements, purchase agreements, and agreements otherwise outside the scope of Sections 251 and 252, and nonbinding letters of intent.

interpret the statute, and Qwest's prompt action to eliminate any future disputes, counsel against the penalties recommended by the Staff and RUCO.

B. The FCC Order Brought Much-Needed Clarity to the Filing Standard.

The FCC concluded that a contract between an ILEC and a CLEC qualifies as an "interconnection agreement" when it "creates an ongoing obligation pertaining to" the ILEC's interconnection obligations under § 251(b) or (c): "[A]n agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to Section 252(a)(1)." 8/

The most important aspect of this definition is its explicit link to the specifically identified obligations of Section 251(b) and (c). Although Qwest argued to the FCC, and has argued in this docket, that the statutory touchstone of the filing requirement was Section 252(a)(1)'s "schedule of rates and charges," the FCC tied the definition of "interconnection agreement" to agreements "pertaining to" this specific list of services -- an analytical framework the FCC found "consistent with the pro-competitive, deregulatory framework set forth in the Act." 9/ This definition means that parties and the Commission must determine whether the agreement in fact "pertains to" one of the specified obligations, rather than rely on some generalized "know it when you see it" notion of interconnection.

Applying its new standard, the FCC found that dispute resolution and escalation provisions were not *per se* outside the scope of § 251(a)(1). The FCC concluded that

---

8/ Memorandum Opinion and Order, *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89 (Oct. 4, 2002), at ¶ 8 (italics in original, underlining added) (hereinafter "FCC Order").

9/ *Id.*

"agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements" and that the means of resolving disputes "regarding Section 251(b) and (c) obligations" must be "offered and provided on a nondiscriminatory basis if Congress' requirement that incumbent LECs behave in a nondiscriminatory manner is to have any meaning." 10/ At the same time, however, the FCC also found that such provisions need not be filed if they are otherwise known and available to CLECs, such as being posted on an ILEC's website. 11/ This shows that ILECs have a measure of flexibility as to how they make "ongoing obligations" available to CLECs as one considers the filing obligations of Section 252(a). It also suggests that the Commission must analyze the connection between the agreement and the enumerated obligations and determine whether a provision is available elsewhere before it can conclude that Qwest violated the Act by not filing a particular agreement. To the extent that the Commission were to find that Qwest violated the Act by not filing an agreement, then, the FCC Order suggests that any such violation (and corresponding penalty) would be countered or at least mitigated where Qwest made the provision available through some other means.

Finally, while declining to address all of the issues raised in Qwest's petition and other carriers' comments, the FCC offered additional guidance on the application of the new standard to certain categories of ILEC-CLEC contracts that, while "relating to" Section 251(b) or (c) matters, need not be filed under Section 252. First, the FCC rejected arguments advanced by some parties that all agreements between a CLEC and an ILEC must be filed, regardless of

---

10/ *Id.*, at ¶ 9 (emphasis added).

11/ *Id.*

the subject matter, because of their potential indirect relationship to Section 251 matters. 12/ Second, the FCC agreed with Qwest that a settlement agreement providing for "backward-looking consideration," such as a cash payment, need not be filed. 13/ Finally, the FCC stated that two categories of agreements "relating to" Section 251 matters need not be filed under Section 252: (i) orders and form contracts and (ii) agreements with bankrupt competitors.

As such, the FCC Order accomplishes two fundamental legal objectives. First, it defines the term "interconnection agreement" and the filing requirement expressly in terms of whether an agreement "pertains to" the specific interconnection obligations enumerated in Section 251(b) and (c). As a result, agreements that do not create ongoing obligations pertaining to resale, number portability, dialing parity, access to rights of way, reciprocal compensation, interconnection, unbundled network elements, or collocation are not interconnection agreements that must be filed under Section 252. 14/

Second, by focusing the analysis in this fashion and permitting ILECs some flexibility in making agreements or services available to CLECs in other fora and through other media, the FCC rejected the argument that Qwest discriminated against CLECs *per se* by not filing an agreement, even an agreement that falls within the FCC's standard. The FCC has consistently interpreted Section 252(i) to require a consideration of the unique facts and circumstances of each contract provision and CLEC in determining opt-in rights. Indeed, as far back as the First Report and Order, the FCC stated that "section 252(i) permits differential

---

12/ *Id.*, at n.26.

13/ *Id.*, at ¶ 12.

14/ *Id.*, at ¶ 8.

treatment based on the LEC's cost of serving a carrier." 15/ Accordingly, simply not filing an agreement that is later found to qualify as an "interconnection agreement" is not, by itself, sufficient to support a finding of discrimination.

C. There Is Significant Agreement Among the Parties with Regard to Particular Agreements.

Qwest and the Staff have each applied the standard articulated in the FCC Order to the unfiled agreements that are the subject of this docket. To a large extent, the parties agree as to which agreements, in retrospect, fall within Section 252's filing requirement. Significantly, with few exceptions, Qwest and the Staff agree that Qwest is currently in compliance with its filing obligations.

1. Qwest is currently in compliance with Section 252.

There is very little disagreement that, for the purposes of evaluating Qwest's *current* compliance with the Section 252 filing requirement, all currently effective terms pertaining to Section 251(b) and (c) services have been filed for approval with the Commission. Qwest voluntarily filed fourteen agreements that contain ongoing provisions related to Section 251(b) or (c) services and are currently in effect for Commission approval on September 9, 2002. 16/ Some other agreements contain terms that pertain to Section 251(b) or (c) services and may have at one time been "ongoing" in nature, but are no longer ongoing terms, because they have been terminated by the parties, or have been superseded by Commission orders or subsequent agreements. In particular, Qwest and the Staff agree that, applying the FCC Order, in retrospect, the following agreements fall within Section 252, but are not currently in effect:

15/ *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 1317 (1996), *subsequent history omitted.*

16/ *See* Pre-Filed Testimony of Marta Kalleberg, at Table 4, 16:8-9.

- 12/30/99 *Confidential Billing Settlement Agreement and Release* with Electric Light Wave
- 6/21/00 *Amendment #1 to Confidential Settlement Agreement* with Electric Light Wave
- 7/19/01 *Amendment No. Three to Confidential Billing Settlement Agreement* with Electric Light Wave
- 11/15/00 *Letter from Qwest Regarding Daily Usage Information* with Eschelon
- 11/15/00 *Confidential Amendment to Confidential / Trade Secret Stipulation* with Eschelon
- 7/31/01 *Implementation Plan* with Eschelon
- 7/21/00 *Trial Agreement* with Eschelon
- 11/15/00 *Escalation Procedures Letter* with Eschelon
- 7/3/01 *Status of Switched Access Minute Reporting Letter* with Eschelon
- 9/18/00 *Settlement Agreement and Release* with Global Crossing
- 1/7/00 *Confidential Billing Dispute Settlement Agreement and Release* with GST
- 12/14/00 *Confidential Billing Settlement Agreement* with MCI WorldCom
- 5/12/00 *Confidential Billing Settlement* with Nextlink (XO)

With regard to one agreement – the February 28, 2000 *Confidential / Trade Secret Stipulation* with Eschelon – Qwest and the Staff agree that some provisions contained in the agreement pertain to Section 251(b) or (c) services but disagree whether those provisions remain in effect. Although the Staff suggests that the agreement is ongoing, every term of that agreement that applied in the State of Arizona was superseded by Amendment No. 7 to the Eschelon-Qwest Interconnection Agreement, which was filed for Commission approval on

December 22, 2000 and approved on February 2, 2001. 17/ Paragraph 7's provisions related to reciprocal compensation were superseded by paragraph 1.2 of Amendment No. 7. Paragraph 10 related to the suspension of termination liability assessments only in the State of Minnesota and had no application in Arizona. 18/ Paragraphs 11 and 12 related to a dedicated provisioning team and were superseded by the *Trial Agreement* dated May 1, 2000. In addition, paragraph 2.10 of Amendment No. 7 to the parties' interconnection agreement (filed December 22, 2000) disclosed the on-site provisioning team and contained essentially the same level of detail as the *Confidential / Trade Secret Stipulation*'s provisions. 19/ Finally, paragraph 14 contained dispute resolution procedures and was superseded by the escalation process letter dated November 15, 2000. 20/

2. Settlement agreements with only backward looking consideration are not within the filing requirements of the Act.

In principle, Qwest and the Staff also agree that settlement contracts that contain backward looking consideration are *not* within Section 252's filing requirement. 21/ However, the Staff identifies several settlement agreements that do not contain any forward-looking obligations pertaining to Section 251(b) or (c) services and contends that those agreements are subject to Section 252:

- 11/15/00 *Confidential Billing Settlement Agreement* with Eschelon. 22/ This agreement states on its face that it is a settlement agreement, and there is no non-

17/ *See* Exhibit LBB-5.

18/ In addition, this term was subsequently superseded by an October 2, 2001 order by the Minnesota Commission. *See* Exhibit LBB-1.

19/ *See* Exhibits LBB-1, LBB-5.

20/ *See* Exhibit LBB-1.

21/ *See* Pre-Filed Testimony of Marta Kalleberg, at 8:4-5, 10:3-10.

22/ Joint 1-12.

speculative testimony to the contrary. The only provisions with any forward-looking aspect are contained in paragraph 1, in which the parties discuss a "new platform which is currently being created by the Parties." Once the platform was created, the terms were contained in a filed interconnection amendment approved by the Arizona Commission. 23/ Thus, this agreement contains either a settlement of a historical dispute or simply evidences an intention to develop a new product and then enter into and file an interconnection agreement, which in fact occurred. Thus, this contract does not contain any terms that should be subject to a filing requirement.

- 9/29/00 *Confidential Billing Settlement Agreement* with McLeod. 24/ Paragraphs 1 and 2 of this contract settle historical disputes and thus are not going forward terms subject to § 252. Paragraph 1 also refers to the creation of a new platform that was subsequently developed and filed for approval with the Arizona Commission. 25/ As stated above, an intention to enter into interconnection terms that are in fact filed should not itself be an interconnection agreement.

- 10/26/00 *Amendment to Confidential Billing Settlement Agreement* with McLeod. 26/ Paragraph 1 is a settlement of a historical dispute and has been fully performed. Other provisions regarding a "new platform" are contained, reflected and superseded in a filed interconnection amendment that was approved by the Commission on February 2, 2001, 27/ and evidence an intention to enter into and file an interconnection agreement. Thus, this contract does not contain any terms that should be subject to a filing requirement.

- 6/16/99 *Confidential Settlement Agreement* with Electric Lightwave. 28/ The bulk of this agreement settles an antitrust litigation brought by ELI in federal court. Paragraph A(1) addresses a purchase agreement in which Qwest buys from ELI; such agreements are not § 251 services or obligations. However, Paragraph A(2)(a) caps total liability of U S WEST to ELI for reciprocal compensation through September 30, 1999, a provision that may be a term subject to the FCC Order.

The Staff's position with regard to these agreements is inconsistent with the clear language of the FCC Order: "[W]e also agree with Qwest that those settlement agreements that

23/ *See* Exhibit LBB-5.

24/ Joint 1-16.

25/ *See* Exhibit LBB-14.

26/ Joint 1-23.

27/ *Id.*

28/ Joint 1-36.

simply provide for 'backward looking consideration' (*e.g.*, the settlement of a dispute in consideration for a cash payment or the cancellation of an unpaid bill) need not be filed. That is, settlement contracts that do not affect an incumbent LEC's ongoing obligations relating to section 251 need not be filed." 29/ Because these agreements do not create ongoing obligations for Qwest related to Section 251, they are not subject to Section 252, and cannot properly be the basis of penalties in this proceeding.

During the hearing, the Staff raised the issue of state commissions' authority to further interpret and enforce the FCC's Order. 30/ Indeed, the FCC drafted its Order in a manner that left state commissions the authority to apply "in the first instance, the statutory interpretation [the FCC] set forth . . . to the terms and conditions of specific agreements." 31/ However, the authority of state commissions to apply and further interpret the filing requirement does not permit them to ignore or change the FCC Order, even if a state commission disagrees with the standard or believes the FCC made a poor policy choice. As the agency charged with implementing and enforcing the Telecommunications Act, 32/ the FCC's interpretation of the

---

29/ FCC Order, at ¶ 12.

30/ *See, e.g.*, Tr. Vol. II, Testimony of Larry B. Brotherson, at 226:17-227:7.

31/ FCC Order, at ¶ 7.

32/ 47 U.S.C. § 151 (creating Federal Communications Commission and charging it with task of executing and enforcing the provisions of the Telecommunications Act); 47 U.S.C. § 201(b); *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 378 (1999) ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the "provisions of this Act," which include §§ 251 and 252, added by the Telecommunications Act of 1996."). In *AT&T Corp.*, the Supreme Court considered, and rejected several challenges to the FCC's jurisdiction to promulgate rules implementing the local-competition provisions of the Telecommunications Act of 1996. *Id.* at 374. The state commissions argued to the Court that the 1996 Act gave state commissions, and not the FCC, primary responsibility for implementing the local-competition provisions of the 1996 Act. As noted, the Court held that the FCC had general authority to promulgate such rules. The Court also rejected several specific challenges to the FCC's jurisdiction to make rules regarding pricing, and the requirements of §§ 251 and 252. *Id.* at 384-85.

Section 252(a)(1) filing requirement is binding on this Commission. 33/ Accordingly, any suggestion that this Commission adopt a filing standard that is inconsistent with the FCC Order – or penalize Qwest for not filing agreements that are specifically excluded from the filing standard articulated by the FCC – would be in conflict with federal law. In light of the fact that Qwest complied in retrospect with the FCC Order, penalties are inappropriate here, particularly penalties predicated on the Staff's expansion of the FCC standard to apply to additional agreements.

3. Purchase agreements are not within the filing requirements of the Act.

The Staff also appears to agree that Purchase Agreements, standing alone, are not subject to Section 252, 34/ a position consistent with the FCC Order. Yet, the Staff contends that two purchase agreements between Qwest Communications Corporation ("QCC") and McLeod and one purchase agreement between Qwest and Eschelon should have been filed for Commission approval. Contrary to the Staff's contention, the Purchase Agreement executed by QCC and McLeod on October 26, 2000 in which QCC commits to purchase a minimum amount of services from McLeod is not subject to the filing requirements of the Act. An ILEC's contracts to purchase services from CLEC vendors do not affect the terms of the CLEC's interconnection, and, therefore, are not within the filing requirements of the Act. 35/ The Iowa

33/ *See AT&T Corp.*, 525 U.S. at 378. In a decision holding that the FCC had jurisdiction to "promulgate rules regarding state review of pre-existing interconnection agreements," the Supreme Court stated that "[w]hile it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements . . . these assignments, like the rate-establishing assignment just discussed, do not logically preclude the Commission's issuance of rules to guide the state-commission judgments." *Id.* at 385.

34/ Pre-Filed Testimony of Marta Kalleberg, at 28:20-22; 52:18-19; 53:12-14.

35/ *Cf.* FCC Order, at ¶ 8.

Board agreed with this conclusion. 36/ Similarly, the other purchase agreements at issue are commitments by the CLECs to purchase products and services from Qwest or QCC and do not include any commitment by Qwest that is subject to the Section 251/252 regulatory framework. 37/

The Staff's contention that these Purchase Agreements should have been filed (and that Qwest should be penalized for not filing them) appears to be based solely on the Staff's view that the Purchase Agreements are related to alleged discount agreements with Eschelon and McLeod, and those discounts, if they existed, would fall within the FCC's definition of "interconnection agreement." 38/ However, even if this Court or the Commission decides the discount agreements existed, the discounts are the only provisions of these agreements that would fall within the filing requirement of Section 252. The Staff's attempt to add the Purchase Agreements themselves to the list of agreements subject to Section 252 – and thereby inflate any penalties Qwest could be ordered to pay – is not justified in light of the fact that no party suggests that these agreements, standing alone, were required to be filed for Commission approval.

4. Documents that do not create new obligations pertaining to Section 251(b) or (c) services are not within the filing requirements of the Act.

The Staff and Qwest disagree regarding whether one document – which on its face does not constitute a binding contract – is subject to Section 252. The April 25, 2000

36/ *See Order Granting Request for Confidentiality*, August 26, 2002, Docket No. FCU-02-2, in which the Iowa Board found that the purchase agreement is not within Section 252(a).

37/ *Id.*

38/ *See* Pre-Filed Testimony of Marta Kalleberg, at 28:28-22 (stating with regard to the Eschelon Purchase Agreement, "This Agreement was a part of the discount agreement the parties had with one another for a discount on all of Eschelon's purchases of Qwest services. The fact that this particular Agreement is a part of the larger discount arrangement between the companies demonstrates that it is an agreement that should be filed."). *See also id.*, at 52:18-19; 53:12-14.

Confidential Settlement Document with McLeod states, "This letter documents the proposed settlement terms discussed by the parties over the last several days." 39/ Only agreements that "create obligations" pertaining to Section 251(b) or (c) services are required to be filed for state commission approval. 40/ Mere proposals or "agreements to agree" do not themselves create any binding obligations, are not subject to Section 252, and cannot be the basis of penalties here.

Similarly, the Staff and Qwest disagree whether the *Confidential Consent to Assignment & Collocation Change of Responsibility Agreement* with SBC and NAS 41/ is subject to Section 252. This contract is a settlement of a historical dispute with NAS (Network Asset Solutions) and an assignment of collocation from NAS to SBC under the terms of the SBC Interconnection Agreements. Therefore, the terms of collocation are governed by the SBC Interconnection Agreements, and this contract does not create new obligations under Section 251(b) or (c). It does not appear that the mere consent to an assignment of collocation from one CLEC to another is an ongoing term of interconnection. 42/

The November 15, 2000 *Feature Letter* with Eschelon is a more difficult case. 43/ It is unclear whether this letter agreement falls within the FCC's recently articulated definition of an interconnection agreement. On one hand, the letter simply referenced rates that have already been filed and approved for features, and did not establish new obligations or rates (as stated in

39/ Joint 1-20. In fact, this proposal letter was formalized and superseded in its entirety by the *Confidential Billing Settlement Agreement* with McLeod dated 4/28/00.

40/ *See* FCC Order, at ¶ 8.

41/ Joint 1-68.

42/ *See* Pre-Filed Testimony of W. Clay Deanhardt, at 10:19-21 ("[S]ome specific agreements implementing the requirements of interconnection agreements – for example, an agreement for a specific collocation site – do not need to be filed."). In any event, all ongoing terms of interconnection were superseded and are governed by SBC's Interconnection Agreement.

43/ Joint 1-11.

the second sentence of the first paragraph). 44/ On the other hand, the second paragraph references the treatment of features where rates may by approved in the future, thereby arguably falling within the FCC's standard. 45/ To the extent this Court or the Commission determines that this letter agreement did not create new obligations, it is not subject to Section 252.

5. Qwest is willing to file other types of agreements identified by the Staff.

Qwest also disagrees with the Staff's conclusion that the *Internetwork Calling Name Delivery Service Agreement* and the *Directory Assistance Agreement*, both with Allegiance, are subject to Section 252. 46/ Although the Staff disagrees that these agreements are service order or contract forms, it agrees that they were based on template agreements, and believes that such agreements should be filed. 47/ The FCC Order can be read to mean that Section 252(a) and (e) do not require the filing of such form contracts reflecting terms that are already available to CLECs through other filed and approved interconnection agreements or the SGAT. 48/

44/ *Id.*, at ¶ 1 ("The attached features matrix includes the corresponding USOCs and pricing, where pricing has been filed and approved." (emphasis added)).

45/ *Id.*, at ¶ 2 ("Until rates are filed and approved, features available with platform orders will be included in the flat based rate. After rates are filed and approved for such features, the established rate will apply to any features not listed in Attachment 3.2 to the Interconnection Agreement as being part of the flat rate." (emphasis added)). Regardless, this letter addressed the features that are part of the UNE-E platform, which was filed and approved with the Arizona Commission, and this document was terminated by the March 1, 2002 Settlement Agreement (¶ 3(b)(1)).

46/ Joint 1-51; Joint 1-52.

47/ Pre-Filed Testimony of Marta Kalleberg, at 18:13-24.

48/ FCC Order, at ¶¶ 9, 13. *See also* Memorandum Opinion and Order, *In the Matter of Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, WC Docket No. 02-314 (Dec. 20, 2002), at ¶ 491 n. 1789 (noting that Directory Assistance agreements are not 251-related and that the provisions in the *Internetwork Calling Name Delivery Service Agreement* are available through SGATs in certain states).

Qwest presented testimony – and no party disputed – that no discrimination resulted due to these agreements, because the same contract language was available to all CLECs through other agreements or the SGAT. 49/ Thus, while the parties may debate whether a particular document should have been filed, it is undisputed that no CLEC was harmed, because similar provisions were available. In any event, Qwest also committed, in order to resolve the issue for the future, to file these form ICNAM and Directory Assistance contracts with the Arizona Commission under Section 252(e). 50/

Qwest is also willing to file other types of form contracts that neither the Staff nor any other party identified as falling within Section 252(e). In Qwest's August 29, 2002 Comments in Response to Supplemental Staff Report and Recommendation, Qwest identified and provided for the Staff's and Commission's review an additional 10 agreements that Qwest believes are form contracts in which the same terms have been available to all CLECs. 51/ Because these agreements are similar in form and context to the Allegiance ICNAM agreement, which the Staff believes to be an interconnection agreement, 52/ Qwest will file such agreements for Commission approval as part of its good faith efforts to comply with the Act.

Finally, the *Confidential Billing Settlement Agreement* with Paging Network exemplifies that not all of the questions regarding the Section 252(e) filing obligation have clear

---

49/ Pre-Filed Rebuttal Testimony of Larry B. Brotherson, at 11:5-7.

50/ *Id.*, at 11:9-12.

51/ Qwest's Comments in Response to Supplemental Staff Report and Recommendation, at 12 & Ex. B (Aug. 29, 2002).

52/ The FCC also indicated that such form contracts might be interconnection agreements. *See* Memorandum Opinion and Order, *In the Matter of Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, WC Docket No. 02-314 (Dec. 20, 2002), at ¶ 491 n. 1789.

answers. Paragraph 5 of that agreement provides that Paging Network will opt into the Arch Interconnection Agreements. 53/ The Staff testified that "this Agreement for Paging Network to opt-in to the Interconnection Agreement of Arch makes it clear that Paging Network's opt-in was not automatic, but had to be accomplished by an amendment to the Interconnection Agreement of Arch." 54/ However, in this situation, Arch actually acquired Paging Network toward the end of 2000, and this agreement indicates that the Arch Interconnection Agreement would govern. 55/ When a CLEC assigns its interconnection agreement to another CLEC, it has been the expectation that the CLEC receiving the assignment notifies the state commissions of the assignment in addition to notifying Qwest. In this scenario, Qwest is not creating new or additional obligations to provide Section 251 services, and thus it is Qwest's understanding that the filing requirement is not implicated. However, Qwest is willing to make filings in the future pursuant to the Commission's direction on these types of issues.

Here, the Paging Network agreement provides only that Paging Network will operate under the Arch Interconnection Agreement; it does not contain any particular obligations pertaining to Section 251 services. More importantly, no party disputed that, whether only the Arch agreement was on file or an identical agreement with the name Paging Network at the top was filed in addition to Arch, all of the terms and conditions of the Arch agreement were available for opt-in. As a result, no discrimination occurred. 56/

53/ Joint 1-89.

54/ Pre-Filed Testimony of Marta Kalleberg, at 61:10-13.

55/ Pre-Filed Rebuttal Testimony of Larry B. Brotherson, at 11:23-25.

56/ *Id.*, at 12:3-6.

III. THE COMMISSION CANNOT RELY ON THE TESTIMONY OF RUCO'S AND THE STAFF'S EXPERTS

A. The Commission Must Base Its Decision on Substantial Evidence.

The Arizona Corporation Commission rules of practice and procedure are clear:

> Applicants or complainants (each of whom must carry the burden of proof) shall present their evidence and then such parties as may be opposing the application or complaint shall submit their evidence. 57/

When the Commission brings a complaint, the Commission Staff is in the same position as an applicant or complainant and carries the burden of proof. 58/ Here, the Commission's November 7, 2002 Procedural Order, along with the Staff's request for substantial penalties, place Qwest in the same position as if a complaint had been brought. The Procedural Order states that the purpose of the hearing was to determine if Qwest violated its obligations to file certain agreements pursuant to federal and state law and to consider penalties and remedies for any such violations. 59/ Accordingly, it was clear that the hearing would entail Qwest's defending itself against allegations of regulatory violations – a situation that would ordinarily not require Qwest to bear the burden of proof. 60/ And indeed, the due process protection typically afforded to defendants of having the accusing party bear the burden of proof 61/ is perhaps even more deserved here, where there were not even specific allegations for Qwest to defend itself against.

57/ Ariz. Admin. Code R14-3-109(G).

58/ *Id.*

59/ Procedural Order, Docket Nos. RT-00000F-02-0271, T-00000A-97-0238, at 6 (Nov. 7, 2002).

60/ *See Troutan v. Valley Nat'l Bank of Ariz.*, 170 Ariz. 513, 517, 826 P.2d 810 (Ariz. Ct. App. 1992) ("The party who asserts a fact has the burden to establish that fact.").

61/ *See, e.g., Francis v. Franklin*, 471 U.S. 307, 313 (1985) (due process requires the burden of proof to be carried by the State and prohibits evidentiary presumptions that short-cut that burden).

Regardless of which party bears the burden here though, the evidence presented by the Staff and RUCO – presented solely through their "expert" witnesses – cannot legally support a Commission decision against Qwest. It is well established that Commission decisions must be justified by "substantial evidence." 62/ "Substantial evidence" means "evidence of substance which establishes facts and from which reasonable inferences may be drawn. It does not connote suspicion, imaginative suggestions, surmises or conjectures. Reasonable inferences are not fine-spun arguments but are inferences based upon a reason or that a reasonable man would accept." 63/

Here, the Staff and RUCO chose to shove the entire burden of proving their cases onto the shoulders of so-called "experts" who conceded that they had no personal knowledge about the facts to which they testified and little to no experience with the regulations at issue. 64/ In fact, rather than build a factual case, it was as if the Staff, as well as RUCO, presupposed enormous penalties were appropriate and worked backwards using experts as substitutes for fact witnesses. However, experts are poor proxies for fact witnesses, as specifically acknowledged in Arizona law. In *City of Tucson v. Citizens Utilities Company*, the court rejected the Commission's determination of a rate base, where the Commission's determination was based solely on the testimony of an expert who "failed to consider all the relevant factors" and whose

---

62/ *See, e.g.*, *Tucson Elec. Power Co. v. ACC*, 132 Ariz. 240, 247, 645 P.2d 231 (Ariz. 1982); *Pine-Strawberry Improvement Ass'n v. ACC*, 152 Ariz. 339, 340, 732 P.2d 230 (Ariz. Ct. App. 1986); *City of Tucson v. Citizens Utils. Water Co.*, 17 Ariz. App. 477, 498 P.2d 551 (Ariz. Ct. App. 1972).

63/ *Citizens Utils. Water Co.*, 17 Ariz. App. at 481 (emphasis added; quoting *Internat'l Ry. Co. v. Boland*, 8 N.Y.S.2d 643, 646 (1939)).

64/ Tr., Vol. IV, Testimony of Marta Kalleberg, at 885:17-23; Tr., Vol. III, Testimony of W. Clay Deanhardt, at 692:16-693:21; Tr., Vol. IV, Testimony of Marylee Diaz Cortez, at 786:9-15.

testimony "was filled with speculation and uncertainty." 65/ As the court noted, "[m]ere speculation and arbitrary conclusions are not substantial evidence and cannot be determinative." 66/ The "expert" testimony offered by RUCO and the Staff epitomizes the type of speculative and arbitrary evidence upon which this Commission cannot legally base its determination.

1. Mr. Deanhardt's testimony is inadmissible.

As Qwest pointed out in its pre-hearing motion *in limine* and raised again in its objections during the hearing, Mr. Deanhardt's opinions are inadmissible as a matter of law for the simple reason that he is not qualified to make them. Expert witnesses must possess the requisite knowledge and experience in the field in which they profess to be an expert and their opinions cannot venture beyond that area of expertise. 67/ Whether an expert witness is qualified is not a matter of weight as RUCO argued, but admissibility. 68/ This Court, in its role as the gatekeeper, must ask the question "Does Mr. Deanhardt have the experience to form the necessary foundation for his far-reaching opinions as a telecommunication expert in this case?" The answer is simply no.

65/ 17 Ariz. App. 477, 481, 498 P.2d 551 (Ariz. Ct. App. 1972).

66/ *Id. See also ACC v. Citizens Utils. Co.*, 120 Ariz. 184, 190, 584 P.2d 1175 (Ariz. Ct. App. 1978) (holding the Commission's reliance on an expert's testimony to be "not legally permissible," because that testimony "is not itself substantial evidence but is speculative").

67/ *See State v. Varela*, 178 Ariz. 319, 322-23, 873 P.2d 567, 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).

68/ *See Lofgren v. Motorola*, No. CV 93-05521, 1998 WL 299925, at *24 (Ariz. Super. Ct. 1998) ("Under Arizona Rules of Evidence 702, a witness *cannot testify* as an expert unless he or she possesses the necessary level of 'knowledge, skill, experience, training or education.'" (emphasis added); excluding testimony of purported expert due to lack of the necessary training and experience).

Mr. Deanhardt's resume reveals that his telecommunications career is limited to a single 20-month stint as an in-house attorney at Covad Communications Company. As in-house counsel, Mr. Deanhardt was a "jack of all trades," 69/ rather than a specialist in telecommunications law or in the business of telecommunication companies. His work in those twenty months did not focus exclusively on interconnection but spanned the fields of employment to securities as is often required of in-house counsel. 70/ In fact, he has participated in the negotiation of only a handful of interconnection agreements. 71/ Moreover, he has not authored any articles on interconnection agreements or compliance with Sections 251 or 252. 72/ This limited tenure at a telecommunications company simply cannot qualify Mr. Deanhardt as a telecommunications expert.

Despite this limited background, Mr. Deanhardt offers far-reaching opinions about the credibility and intentions of persons with whom he has absolutely no personal involvement and the knowing and intentional character of Qwest's behavior. Even a cursory reading of Mr. Deanhardt's testimony reveals that he is just reading documents and speculating about what the authors may have meant. These efforts to separate the credible witnesses from the non-credible ones is prohibited by Arizona law, 73/ as are his opinions on Qwest's intentions and good faith. 74/

69/ Tr., Vol. III, Testimony of W. Clay Deanhardt, at 662:4-9.

70/ Tr. Vol. III, Testimony of W. Clay Deanhardt, at 662:4-20.

71/ *Id.*, at 661:4-25.

72/ *Id.*, at 662:21-663:3.

73/ *See, e.g.*, *State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986).

74/ *See 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)).

When Mr. Deanhardt is not deeming who is credible and who is not, he is opining on the law. 75/ In this instance, instead of impermissibly substituting himself as a fact witness, he has now placed himself in the Court's role. 76/ However, expert legal testimony is also inadmissible. 77/ Again, this issue is not one of weight but admissibility. Even if this Court were to decide that legal opinions are somehow admissible, Mr. Deanhardt is not qualified to interpret federal telecommunications law or Arizona State law. Mr. Deanhardt admitted that he does not have any specialized expertise or knowledge in Arizona law or civil law, and has no experience prosecuting criminal cases. 78/ Moreover, his twenty-month tenure at Covad certainly cannot make him an expert on the 1996 Telecommunications Act. 79/ Although the evidentiary rules are somewhat relaxed in the administrative setting, they still apply, and inadmissible expert testimony cannot and should not be the basis for imposing penalties – especially the extraordinarily onerous penalties that the Staff and RUCO recommend here.

75/ Pre-Filed Testimony of W. Clay Deanhardt at 5:5, 6:4, 7:1, 7:28, 8:3, 8:12, 9:6, 9:18, 10:13, 11:6 and 11:12.

76/ *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).

77/ *See* F.R.E. 702 and 704. *See also 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 (2d 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.").

78/ Tr., Vol. III, Testimony of W. Clay Deanhardt, at 652:23-653:11; 654:15-19.

79/ *Id.*, at 657:2-658:8; 707:17-708:3.

2. Ms. Kalleberg's also does not support the remedies and penalties requested by the Staff.

Ms. Kalleberg at least owns up to her role as an advocate. From the very start, the stated purpose of her testimony is "to explain in detail Staff's opinion and recommendations concerning Qwest corporation's ("Qwest's") noncompliance with Section 252(e) of the Telecommunications Act of 1996 ("1996 Act")." 80/ She does not profess any expertise or expert perspective that her testimony brings to the proceeding and, in fact, she admitted at the hearing that she had never had any experience with Section 252 issues before submitting testimony in this case. 81/ Moreover, she, like Mr. Deanhardt, ventures far beyond her area of expertise by offering opinions about whether Qwest intentionally and willfully failed to file the agreements. 82/

Her job, purely and simply, was to explain to the Commission what the Staff has concluded about what Qwest did. She assumes the facts are adverse to Qwest, and her testimony quite clearly proceeds from the premise Qwest had to prove otherwise. Indeed, Ms. Kalleberg's conclusions in many cases simply adopt Mr. Deanhardt's reasoning, without setting forth any evidence of the independent assessment purportedly conducted by the Staff. 83/ This Court should not let the opinions of interested advocates substitute for actual evidence. To decide otherwise would render the hearing meaningless and leave any penalty order without evidentiary support.

80/ Pre-Filed Testimony of Marta Kalleberg, at 1:21-23.

81/ Tr., Vol. IV, Testimony of Marta Kalleberg, at 885:11-23.

82/ *Id.*, at 865:9-25.

83/ *Id.*, at 902:7-903:9; Pre-Filed Testimony of Marta Kalleberg, at 24:1-25; 39:10-16.

Moreover, like Mr. Deanhardt, Ms. Kalleberg answers a number of quintessentially legal questions. 84/ After answering these questions, Ms. Kalleberg goes on to apply the Staff's filing standard to each of the agreements at issue 85/ – again, a classically and undeniably legal analysis. Ms. Kalleberg's expert legal testimony is inadmissible and should not be the basis for imposing Staff's suggested penalties.

3. Ms. Cortez's testimony was the product of bias.

Ms. Cortez submitted expert testimony much like Mr. Deanhardt's and Ms. Kalleberg's and equally unsupportive of her proposed remedies. Beyond attaching her resume, Ms. Cortez makes no effort to explain how her training as an accountant and her testimony in rate cases qualifies her to analyze the terms of contracts between ILECs and CLECs, to discuss the propriety of those contracts, to identify alleged deceptive schemes or to determine the credibility of witnesses.

As became clear at the hearing, Ms. Cortez's opinions sprang not from any accounting principle but from her predisposition about the facts of this case and the character of Qwest. 86/ This is seen mostly clearly in her improper resolution of disputed issues of fact and

---

84/ Pre-Filed Testimony of Marta Kalleberg, at 7:5; 8:12; 9:5; 10:12.

85/ *See id.*, at 10:21 *et seq.*

86/ As Ms. Cortez testified:

> Q. So you don't have a favorable view of Qwest, do you, Ms. Diaz Cortez?
>
> A. Based on their record in Arizona, and the various dockets, and the, you know, things that have transpired out, no.
>
> We all were hopeful that we would see something else out of the Qwest merger. We haven't. I guess we were all hopeful that with the 271 process, that Qwest would move forward and foster the ultimate goal of healthy, robust competition in Arizona. Based on this docket we're not seeing that.
>
> And so do I have a healthy view of Qwest? No. I've worked at RUCO for the last 11 years now, and I've been auditing and dealing in dockets

the sweeping conclusions she reaches about Qwest's intent and state of mind, opinions that certainly fall outside her expertise as an accountant. 87/ After making her credibility determination, she spins the whole "UNE-Star Partnership," 88/ explicating RUCO's entire theory of the case without the support of a single live witness with personal knowledge of this alleged conspiracy. It is not until page 18 of her 24-page testimony that any of her "analysis" relates to accounting issues. Even there, however, her opinions are nothing more than mere speculation – she has admitted absolutely no personal knowledge of Qwest's accounting systems 89/ or billing systems, 90/ yet proclaims that Qwest's Director of Finance, Arturo Ibarra, who

---

> and transactions between Qwest and this Commission for that entire 11 years, and quite frankly, I haven't seen much positive that's come out of any of it.
>
> Q. Is it fair to say, Ms. Diaz Cortez, that your views of Qwest as you just articulated, were formed before this docket was even opened?
>
> A. Not on these specific transactions, no.
>
> Q. No, but generally; is that fair?
>
> ***
>
> THE WITNESS: Is there a cumulative effect from one docket to the next, from one transaction to the next? Yes, of course there is.
>
> Everybody, I mean, there are those that can go back today, 25 years in U S WEST/Qwest dockets, I can only go back 11, but I don't think any one person who has institutional knowledge and a chronological chain of events to refer to can leave that evidence, if you will, out of subsequent actions, no.

Tr., Vol. IV, Testimony of Marylee Diaz Cortez, at 795:8-796:18.

87/ *See, e.g.,* Pre-Filed Testimony of Marylee Diaz Cortez, at 10:17-20 ("Collectively, these exhibits provide evidence that Qwest and McLeod intentionally concealed and disguised the nature of the rebate agreements they had with each other in order to prevent opt-in by other CLECs."); *id.*, at 11:23-12:4 (certain exhibits viewed alongside others "show that the documents that would be filed vs. those that were to remain secret were intentionally picked and chosen to discourage opt-in by other CLECs"). Indeed, even Ms. Cortez admitted that there was no basis for "finding" that payments were made to McLeod "pursuant to an oral agreement." Tr., Vol. IV, Testimony of Marylee Diaz Cortez, at 813:11-15.

88/ *See* Pre-Filed Testimony of Marylee Diaz Cortez, at 15:8-18:12

89/ Tr., Vol. IV, Testimony of Marylee Diaz Cortez, at 798:9-20.

90/ *Id.*, at 797:8-10.

actually does have first-hand knowledge of those systems, was "unconvincing" in his explanation of their functions. 91/

Ms. Cortez's willingness to offer opinions clearly beyond her area of expertise was puzzling until the hearing – when it became clear that her opinions were a product of deep-seated partiality and preconceptions. Indeed, this bias led Ms. Cortez to testify that even if the agreements were not required by law to be filed, Qwest *still* should have filed or disclosed these agreements with its customers. 92/ Such opinions, which certainly are not based on her accounting background, are at best unhelpful to the fact-finding process, and at worst highlight the danger of allowing biased "expert" testimony to supplant that of fact witnesses and of abandoning any requirement that expert witnesses have the requisite training or specialized education in the areas in which they opine.

IV. QWEST DID NOT DISCRIMINATE AGAINST ARIZONA CLECS

In stark contrast to the Staff's and RUCO's testimony, Qwest brought to the hearing witnesses who could testify to the facts and who were subject to cross-examination by up to five sets of lawyers and the Court. As described in detail below, the testimony of these witnesses demonstrated that Qwest took concrete steps to ensure that CLECs were treated in a non-discriminatory manner. This evidence went entirely unrebutted and unanswered during the hearing.

A. All Arizona CLECs received the same level of service.

Many of the agreements at issue related to service management for Eschelon and McLeod. Yet, no party presented evidence that Eschelon and McLeod received better service

---

91/ Pre-Filed Testimony of Marylee Diaz Cortez, at 21:6-8.

92/ Tr., Vol. IV, Testimony of Marylee Diaz Cortez, at 792:14-19.

quality than any other Arizona CLEC. To the contrary, Qwest witness Dana Filip Crandall testified that all Qwest's wholesale customers receive the same level of service. All of Qwest's customers receive the same product, process, Operations Support System ("OSS"), and change management information. 93/ All of its wholesale customers receive PID measures that can be customized into specific scorecards that track and focus on the particular PID measures of importance to the wholesale customer. 94/ All of Qwest's service management teams meet regularly with their assigned CLEC customers to address service issues on a customer-by-customer basis. 95/

The only thing that differed for Eschelon was that Eschelon's service manager was located on Eschelon's premises. However, this difference was explicitly disclosed in the Eschelon Interconnection Agreement Amendment Terms, §§ 2.10, which was filed with and approved by the Commission. 96/ This Amendment allowed other CLECs to opt into the on-site team if they wished to, which they did not. In fact, despite the public availability of this Amendment, not one of Qwest's CLEC customers requested on-site service management before or after this docket was opened. 97/

More importantly, regardless of where a customer's service manager sits or to whom a service manager is assigned, 98/ every service manager performs the same functions. 99/

93/ Exhibit DLF-2; Pre-Filed Direct Testimony of Dana Filip Crandall, at 9:17-10:14.

94/ Pre-Filed Direct Testimony of Dana Filip Crandall, at 8:16-9:4.

95/ *Id.*, at 7:20-8:9; Tr. Vol. II, Testimony of Dana Filip Crandall, at 318:22-319:8.

96/ Pre-Filed Direct Testimony of Dana Filip Crandall, at 7:1-6.

97/ Tr., Vol. II, Testimony of Dana Filip Crandall, at 334:6-11.

All service managers use the identical processes to identify root causes and trends, recommend action plans, and identify initiatives already in place to improve service. These functions do not vary depending on the location of the service team. 100/ Not one witness gave testimony to the contrary.

Ms. Crandall also testified about the service escalation charts included in some of the agreements. The Eschelon escalation chart attached to the Implementation Plan is *identical* to the standard escalation chart used by *all* wholesale customers. 101/ The only changes Qwest made to Eschelon's chart was to insert Eschelon's name in place of another company's and to insert the names of the specific Qwest personnel who service the Eschelon account. 102/ In addition, Ms. Crandall's unrebutted testimony demonstrated that the Eschelon and McLeod escalation procedures that extend beyond the vice-president level merely memorialized what occurs for all CLECs if a vice president cannot solve a problem. 103/ Not one witness set forth one single example of Ms. Crandall or other senior management refusing to handle an escalation, further corroborating Ms. Crandall's testimony. 104/

98/ Dedicated service management is not unique to Eschelon. (Pre-Filed Direct Testimony of Dana Filip Crandall, at 6:16-19.) All CLEC customers have assigned service management. (*Id.*, at 6:14-16.)

99/ *Id.*, at 6:19-21.

100/ *Id.*, at 7:16-8:4.

101/ *Id.*, at 11:1-15.

102/ *Id.*, at 13:4-9.

103/ Pre-Filed Rebuttal Testimony of Dana Filip Crandall, at 16:14-17:2.

104/ Tr., Vol. II, Testimony of Dana Filip Crandall, at 334:17-23. Similar to the escalation procedure, executive quarterly meetings are not unique to Eschelon and McLeod. As a Senior Vice President for wholesale service, Ms. Crandall has never refused to meet with executives from any wholesale customer on any basis or schedule. *See id.*, at 334:12-16. Neither the Staff nor RUCO set forth any evidence to the contrary.

However, rather than speculate, simply assume that discrimination occurred, or argue that such a task is "impossible," as Staff and RUCO did, the Court can look to the data. The 271 Service Metrics, demonstrate that Qwest's service has improved continually for *all* CLECs since it merged with U S WEST in 2000 and that Qwest is currently performing at significantly improved levels for *all* CLECs. 105/

B. All Arizona CLECs' orders were processed under the same standards.

Like Ms. Crandall, Ms. Kathleen Lucero, Vice President in the Network Organization, testified from first-hand knowledge about the factual issues raised in this case. Ms. Lucero gave unrebutted testimony that the service goals articulated in the Covad Service Level Agreement were implemented for *all* CLEC customers – not just Covad. 106/ In fact, as Ms. Lucero testified, many of the targets contained in the Covad Agreement were actually less stringent than Qwest's own internal standards. 107/

Qwest's approach to process development insured that discrimination did not occur. From an ordering and processing perspective, it would be impossible to have different standards for each CLEC. 108/ As a practical matter, because there are over 1,000 employees in the Network Organization, in order to manage the service process procedure, there must be an

---

105/ Pre-Filed Direct Testimony of Dana Filip Crandall, at 9:11-15.

106/ Pre-Filed Direct Testimony of Kathleen Lucero, at 3:4-7.

107/ *Id.*, at 6:14-18.

108/ *Id.*, at 4:12-17.

operational baseline. 109/ As a consequence, Qwest's process for entering orders into the Qwest Service Order Processor and generating FOC dates operates on a "first in, first out" basis. 110/

Again, rather than speculate, Ms. Lucero attached to her testimony documents that corroborate her testimony. Ms. Lucero attached to her testimony internal process documents and data that demonstrate conclusively that Covad was not provided service superior to other CLECs. 111/ Rather than rebut this evidence, the Staff and RUCO simply chose to ignore it.

C. No other Arizona CLEC purchased a variation of the UNE-Star product.

Several of the agreements at issue contain terms that relate exclusively to the UNE-Star platform, a variation of standard UNE-P. Eschelon and McLeod were the only Arizona CLECs who purchased a variation of the UNE-Star product. 112/ It is undisputed that the rates, terms, and conditions of UNE-Star were negotiated and filed as amendments to Eschelon's and McLeod's existing interconnection agreements and were subsequently approved by the Arizona Commission. 113/

These filed and approved amendments reflect the significant development and implementation costs associated with the UNE-Star products. As a result of those costs, Qwest required CLECs wishing to purchase the UNE-Star products to make total and annual minimum purchase commitments over a multi-year minimum term. Other requirements included imposing a significant penalty if the CLEC did not meet those minimum commitments; "bill and keep" for

---

109/ *Id.*, at 4:17-19.

110/ *Id.*, at 4:16-5:2.

111/ *See* Exhibits KAL-1 – KAL-6.

112/ Pre-Filed Direct Testimony of Larry B. Brotherson, at 38:20-22.

113/ *Id.*, at 38:27-39:5; Exhibits LBB-5, LBB-15.

reciprocal compensation, including Internet-bound traffic ("ISP traffic"); a one-time, lump sum conversion charge to convert the embedded base; 114/ restricting the offering to business customers; and the requirement that the CLECs provide an ongoing, updated, geographic end-user customer volume and loop distribution forecast for purposes of adjusting price points. 115/ As approved interconnection amendments, all of the UNE-Star rates, terms and conditions were available to any requesting CLEC in Arizona under Section 252(i).

Qwest concedes that, in light of the FCC Order, certain provisions in unfiled agreements that relate to the UNE-Star platform fall within the recently articulated definition of "interconnection agreement." For example, the November 15, 2000 *Confidential Amendment to Confidential/Trade Secret Stipulation* with Eschelon contained a provision whereby Qwest agreed, "For any month (or partial month), from November 1, 2000 until the mechanized process is in place, during which Qwest fails to provide accurate daily usage information for Eschelon's use in billing switched access, Qwest will credit Eschelon $13.00 (or pro-rata portion thereof) per platform line per month as long as Eschelon has provided the WTN information to Qwest." 116/ This $13 credit, and the subsequent $16 credit, were offset by Eschelon's actual billings for switched access by Eschelon to IXCs. UNE-Star was a unique product in that it had

---

114/ Ms. Cortez claims that the costs associated with the UNE-Star were not disclosed in full because settlement amounts off-set Eschelon's and McLeod's costs. (Pre-Filed Testimony of Marylee Diaz Cortez, at 5:1-6; 5:20-6:9.) However, on their faces, the settlements were of historical billing disputes, including disputes regarding switched access. Cross-examination revealed that Ms. Cortez's theory was the product of pure speculation, as she never even investigated these billing disputes. (Tr., Vol. IV, Testimony of Marylee Diaz Cortez, at 775:21-777:2; 839:3-840:24.) Interestingly, Ms. Cortez stated that an investigation of the claims purportedly settled was within the scope of Mr. Deanhardt's testimony, (*id.*, at 776:4-9), while Mr. Deanhardt in turn simply referred to the findings in Ms. Cortez's audit. (Pre-Filed Testimony of W. Clay Deanhardt, at 62:20-63:2; 64:14-20.) Such circular reasoning cannot be the basis of any Commission decision.

115/ *See* Exhibits LBB-5, LBB-14; Pre-Filed Direct Testimony of Larry B. Brotherson, at 39:14-40:1.

116/ Joint 1-4.

UNE-P functionality, including that a CLEC purchasing UNE-Star could bill switched access, but for a period of time Qwest did not have a mechanized process to generate the Daily Usage Files ("DUFs") necessary for CLECs on UNE-Star to bill IXCs for switched access, and instead relied on a manual process. 117/ The credit was the result of Eschelon's disputing the accuracy of the switched access data captured through this manual process.

Following this interim agreement, Eschelon continued to dispute the accuracy of Qwest's switched access data. 118/ Eschelon asserted that the Qwest tapes recording switched access minutes were lower than the minutes that Eschelon was experiencing. 119/ As a further compromise, Qwest agreed to a joint audit and, in the July 3, 2001 *Status of Switched Access Minute Reporting Letter*, increased the interim dispute resolution methodology to $16 per line per month (subject to final true-up). 120/

As the express terms of these agreements make clear, this credit is offered only when Qwest fails to provide accurate daily usage information until a mechanized process for UNE-Star was in place. Because these terms pertain solely to the UNE-Star platform, and because no CLEC other than Eschelon and McLeod purchased a variation of UNE-Star, no other CLEC would have been eligible to opt into the unfiled provisions even if they had been filed with and approved by the Commission. Accordingly, no discrimination occurred. 121/

117/ Tr., Vol. II, Testimony of Judith Rixe, at 363:13-365:25.

118/ Exhibit WCD-5.

119/ *Id.*

120/ *Id.*

121/ In any event, these provisions were superseded by the implementation of a mechanized process for generating DUF files for the UNE-Star platform. Qwest began operating the mechanized process to provide DUF files to Eschelon on November 8, 2001. *See* Exhibit Q-16 (submitted with Qwest's Comments Regarding the Staff's Late-Filed Exhibit). Furthermore, the November 15, 2000 *Confidential Amendment to Confidential/Trade Secret Stipulation* and the July 3, 2001 *Status of Switched Access*

D. No Arizona CLEC received favorable treatment with regard to reciprocal compensation for terminating Internet-bound traffic.

Agreements that contained terms related to reciprocal compensation for local traffic fall within the filing standard as clarified by the FCC Order. However, at the time of certain agreements, and still today, the most reasonable conclusion is that compensation for the termination of ISP-bound traffic does not constitute "reciprocal compensation" within Section 251(b)(5) and thus is not within the filing requirements of Section 252(e), even under the recent FCC Section 252 Order. 122/ Again though, Qwest presented undisputed evidence that these terms did not discriminate against any Arizona CLEC: 123/

- ¶ 7 of the February 28, 2000 *Confidential / Trade Secret Stipulation* between ATI and U S WEST states in part, "the parties agree for settlement purposes that reciprocal compensation for terminating internet traffic shall be paid at the most favorable rates and terms contained in an agreement executed to date by USWC." 124/ However, Eschelon and Qwest terminated this term on November 15, 2000 and agreed to a bill and keep arrangement (with was approved by the Commission). 125/ Eschelon did not bill Qwest for any traffic in Arizona prior to that bill and keep agreement. Thus, the terms of ¶ 7 did not result in any reciprocal compensation payments for Internet traffic from Qwest to Eschelon, and the parties' subsequent resolution of this issue in November of 2000 produced a filed and approved interconnection amendment that any CLEC could opt into if it wished. 126/

Minute Reporting Letter were formally terminated in the March 1, 2002 *Settlement Agreement* between Qwest and Eschelon. *See* Joint 1-6; Exhibit LBB-1; Exhibit Q-6.

122/ *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, 99-68 (Rel. April 27, 2001).

123/ Qwest also presented unrebutted evidence that it based its decision not to file these agreements on a good faith interpretation of the law. *See* Pre-Filed Direct Testimony of Larry B. Brotherson, at 15:3-26.

124/ Joint 1-1.

125/ *See* ¶ 1.2 of Exhibit LBB-5.

126/ *See* Pre-Filed Direct Testimony of Larry B. Brotherson, at 16:14-26.

- The December 30, 1999 *Confidential Billing Settlement Agreement and Release* between ELI and U S WEST and the subsequent amendments to that agreement establish certain rates and relative use factors for ISP traffic. 127/ However, it is undisputed that under the terms of these agreements, Qwest paid ELI less than it paid other CLECs under the Arizona cost docket. 128/ In fact, the agreement expressly acknowledges that the parties agreed to be compensated "at below-listed rates" as part of "the comprehensive settlement of their Existing Disputes." 129/

- The May 12, 2000 *Confidential Billing Settlement Agreement* with Nextlink also established particular rates for ISP traffic. 130/ As with the ELI agreements, it is undisputed that the rates established in the Nextlink agreement are lower than the cost docket rate, so CLECs had available to them cost docket rates that were higher than under the terms of the Nextlink agreement. 131/

- The rates and factors contained in the January 7, 2000 *Confidential Billing Dispute Settlement Agreement and Release* with GST are identical to the terms of the December 30, 1999 *Confidential Billing Settlement Agreement and Release* between ELI and U S WEST. 132/ Again, these rates are lower than the Arizona Cost Docket rates, so a CLEC would receive higher compensation under the cost docket than it would under the terms of the GST agreement. 133/

- The December 14, 2000 *Confidential Billing Settlement Agreement* with WorldCom also addressed local usage charges for ISP traffic. 134/ It is undisputed that the rates Qwest paid WorldCom were publicly available and on-file with the Commission in the Brooks Fiber Communications of Tucson, Inc. Interconnection Agreement, which was approved on

---

127/ Joint 1-33; Joint 1-34; Joint 1-35; Joint 1-39.

128/ *Id.* at 18:1-4. Under the cost docket effective prior to June 12, 2002, the state end office rate was .0028 and the tandem rate was .00508. The cost docket that became effective on June 12, 2002 lowered the tandem rate to .004995. These Commission-ordered rates are higher than the rates contained in the ELI Agreement. *Id.*, at 18:4-8.

129/ Joint 1-33.

130/ Joint 1-54.

131/ Pre-Filed Direct Testimony of Larry B. Brotherson, at 19:10-15.

132/ Joint 1-74.

133/ Pre-Filed Direct Testimony of Larry B. Brotherson, at 19:18-26.

134/ Joint 1-43.

February 6, 1997 in Docket E-1051-96-478, Decision No. 60050. Accordingly, all other Arizona CLECs had access to those same rates. 135/

- Finally, the terms of the April 25, 2000 *Settlement Document Relating to Qwest Merger* with McLeod 136/ related to reciprocal compensation are contained in a filed and approved interconnection agreement amendment, in which the parties agreed to a bill and keep arrangement. 137/ Furthermore, Qwest never paid McLeod for minutes of use in Arizona, because Qwest and McLeod did not start exchanging local reciprocal compensation traffic in Arizona until May 2001, by which time they had already agreed to the bill and keep arrangement. Accordingly, McLeod did not receive preferable treatment compared to other Arizona CLECs.

The undisputed evidence presented by Qwest demonstrated not only that the reciprocal compensation terms contained in these agreements did not discriminate in any way against Arizona CLECs, but also that these terms are no longer in effect and are therefore not relevant to an assessment of Qwest's current compliance with its filing obligations.

E. Qwest's agreement to pay Eschelon $2 per line per month for Qwest's intraLATA toll traffic did not violate Qwest's non-discrimination obligation.

FCC rulings are clear that agreements concerning the payment of access charges cannot be filed as interconnection agreements. 138/ The provision contained in the July 3, 2001 *Status of Switched Access Minute Reporting Letter* relates to access service provided by Eschelon to Qwest, and not to a service or element provided by Qwest under Section 251(b) or

135/ Pre-Filed Direct Testimony of Larry B. Brotherson, at 20:16-21.

136/ Joint 1-20. As discussed above, this document is merely a proposed settlement, and is not a binding agreement subject to Section 252.

137/ Pre-Filed Direct Testimony of Larry B. Brotherson, at 21:20-23; Exhibit LBB-4.

138/ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶¶ 176, 1033-35 (1996), *aff'd in pertinent part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *subsequent history omitted.*

(c) to Eschelon. 139/ Section 252 does not require the filing of terms and conditions of services provided by CLECs. Moreover, the Commission does not materially regulate Eschelon's access rates. The FCC has made it very clear that interstate and intrastate access charges, respectively, are subject to the federal and state regulatory regimes that predate the enactment of the Act, and that access charges are not subject to the provisions of Sections 251 and 252. 140/ Because Qwest was not required to file this term, it cannot be the basis for any claim against Qwest. 141/

V. ALLEGED DISCOUNT AGREEMENTS

Perhaps because of this overwhelming evidence that the vast majority of the unfiled agreements resulted in no discrimination against Arizona CLECs, the Staff and RUCO focus their efforts almost exclusively on two agreements they characterize as hidden discounts: the alleged oral "discount" agreement with McLeod and the consulting services provision contained in the November 15, 2000 *Confidential Amendment to Confidential Trade Secret Stipulation* with Eschelon. The entire battle here lies in defining the function of these agreements: if the agreements are simply the Purchase Agreements (McLeod) and consulting agreement (Eschelon) that the documents indicate, then Qwest was not obliged to file them.

A. Eschelon Provided Valuable Consulting Services to Qwest.

RUCO claims (and the Staff agrees) that Qwest's agreement to purchase consulting services from Eschelon is a "sham" – a disguised discount on Section 251 services

---

139/ Joint 1-5.

140/ *Id.*

141/ *See* Memorandum Opinion and Order, *In the Matter of Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, WC Docket No. 02-314 (Dec. 20, 2002), at ¶ 488.

manufactured by two "co-conspirators." RUCO based its theory entirely interpretations of documents by its advocate, Mr. Deanhardt, about which he has no first-hand knowledge. Wholly apart from the fact that Mr. Deanhardt's interpretations are not "evidence," they were decidedly refuted by the testimony of Judith Rixe, who gave unrebutted testimony, based on personal knowledge, regarding the consulting relationship with Eschelon.

For instance, unlike any witness offered by RUCO or the Staff, Ms. Rixe actually participated in meetings in which the parties negotiated this relationship. 142/ Ms. Rixe testified Eschelon had prior experience in working with other CLEC companies on the East Coast in unbundled loop conversion, an area where Qwest was having significant difficulties. 143/ Qwest determined that Eschelon's expertise in unbundled loop conversion, DSL, and collocation could be of significant assistance to its business efforts. 144/

The documents support Ms. Rixe's testimony that significant resources were expended on the consulting. In particular, Ms. Rixe testified that Qwest's primary experience was with retail DSL, rather than resale wholesale DSL. 145/ Because Qwest did not have documented processes in place, the purpose of the teams was to develop documentation and testing processes so that Qwest could offer a wholesale DSL product for resale by CLECs. As part of this effort, Eschelon dedicated a project manager to the DSL product full-time. During January through June 2001, representatives from Eschelon and Qwest met *every day* by

---

142/ Pre-Filed Testimony of Judith Rixe, at 3:19-25.

143/ *Id.*, at 4:15-17.

144/ *Id.*, at 4:17-21.

145/ *Id.*, at 7:22-24.

telephone or in person and with less frequency thereafter. 146/ As a result of those efforts, Eschelon's DSL teams for order fulfillment, ordering customer provided equipment, provisioning, installation, test and turn up, and repair provided significant output regarding DSL processes. 147/

Ms. Rixe also testified that Eschelon provided valuable consulting services through the cutover team, which met weekly in person or by telephone regarding implementation and development of cutover processes that would be used for the entire CLEC community. 148/ The team discussed specific orders for loop conversion, evaluated the week's performance, and analyzed the problems that occurred. 149/ Qwest and Eschelon also jointly conducted a trial in order to develop cutover processes. That cutover trial resulted in the processes that are now used

---

146/ *Id.*, at 8:16-18.

147/ Pre-Filed Testimony of Judith Rixe, at 8:18-21. For instance, the teams

- discovered a significant system interface problem between a CLEC's system and the Qwest system which the team resolved through the development of an interim measure (*id.*, at 9:9-15);
- designed the process flow and order examples for the IMA system (*id.*, at 10:10-11);
- helped Qwest provide consistent billing labels for customer provided equipment ("CPE") bills, which in turn allowed Eschelon and other CLECs to reconcile their CPE bills (*id.*, at 10:11-15);
- assisted in developing a wholesale CPE procurement process (*id.*, at 10:15-17);
- developed the process to produce a nonbranded kit and nonbranded documentation for CPE (*id.*, at 10:17-18); and
- developed guides for wholesale customers for providing Tier 1 support to their retail customers (*id.*, at 10:18-20).

148/ *Id.*, at 5:18-24.

149/ Coordinated cuts are orders that have a specific time during which the work must be performed. (*Id.*, at 6:10-11.) The team discussed the orders that were to be cut and which central office would handle the work so Qwest could have a central office technician available for those cuts. (*Id.*, at 6:11-14.) The team discussed any problems that occurred during the cut and discussed how to solve those problems. (*Id.*, at 6:14-15.)

for all CLEC customers at Qwest's cutover center in Omaha. Because of improved processes, Qwest's service to all CLEC customers has improved. 150/

RUCO and the Staff failed to present any non-speculative evidence to support their conspiracy theory. Mr. Deanhardt attempts to support his claim that the consulting agreement was a "sham" by arguing that Covad helped Qwest solve technical problems for free and therefore it is inconceivable that Qwest would have paid Eschelon for consulting services. 151/ This is, of course, faulty logic, but more importantly it is unsupported by fact. First, Ms. Rixe testified that the consulting work performed by Eschelon went beyond what a CLEC typically would do for an RBOC in terms of helping Qwest resolve its specific issues. 152/ In particular, Eschelon helped Qwest not merely *change* processes for the development of a DSL product, but *create* those processes. 153/ Second, the fact that another CLEC would have liked to provide consulting services to Qwest does not in any way suggest that Qwest's retaining Eschelon to perform services was a "sham." Rather, the evidence established that the agreement was what it said it was – a contract for a CLEC to provide certain services to an ILEC. Such contracts do not fall within the FCC's recently articulated definition of

---

150/ Through these meetings, Qwest also determined that the logs completed by its testers were insufficiently detailed to track orders. (*Id.*, at 6:20-22.) Qwest now keeps detailed logs that assist it in its determination as to where resources are being applied and whether they are being used to maximum benefit. (*Id.*, at 6:22-24.) The team also made the testers notes more specific so that if and when a problem does occur Qwest can identify the source of the problem. (*Id.*, at 6:24-7:2.) In addition, the Qcc does random checks on the orders today to make sure that process is being followed. Finally, as a result of the meetings, the cutover team also started the 48-hour dial tone check, which reduces customer down-time. (*Id.*, at 7:2-5.)

151/ Pre-Filed Testimony of W. Clay Deanhardt, at 59:4-60:21.

152/ Pre-Filed Testimony of Judith Rixe, at 11:15-12:6.

153/ Tr., Vol. II, Testimony of Judith Rixe, at 399:16-22.

"interconnection agreement" and are not required to be filed for state commission approval or made available for opt-in by other carriers. 154/

Even assuming that the consulting agreement with Eschelon was a discount, the Staff's and RUCO's claims of discrimination are inflated by their disregard of related terms and conditions that would have rendered many, if not most, CLECs ineligible for opt-in. In fact, Ms. Kalleberg testified for the Staff that negotiations between Eschelon and Qwest culminated in this "series" of agreements, 155/ and Mr. Deanhardt testified that all five of the agreements between Eschelon and Qwest executed on November 15, 2000 are inter-related and all part of a single transaction. 156/ Accordingly, terms integrally related to the alleged discount include: volume and term commitments ($150 million over 5 years); 157/ the purchase of UNE-Star and the

---

154/ In any event, it is undisputed that the consulting and network-related services agreement was terminated by the parties on March 1, 2002. *See* Joint 1-6.

155/ Pre-Filed Testimony of Marta Kalleberg, at 19:16-20:6.

156/ Tr., Vol. III, Testimony of W. Clay Deanhardt, at 666:24-668:7.

157/ *See* Joint 1-10; LBB-5. As Mr. Deanhardt testified with regard to both the alleged discount agreements:

> Q. And at Lines 10 through 12, which is where I wanted to direct you, you said that in both cases the parties entered into a series of interrelated agreements, including take or pay agreements with the purchase volume commitments; correct?
>
> A. Yes.
>
> Q. So those agreements were agreements to purchase from Qwest a certain volume of telecommunications services; correct?
>
> A. Yes.
>
> Q. And they also had term commitments, that is, they were over a certain period of time; correct?
>
> A. Yes. Which is, by the way, the only way a take or pay agreement would work.

Tr., Vol. III, Testimony of W. Clay Deanhardt, at 679:7-20.

associated conversion costs; 158/ and a bill and keep arrangement for reciprocal compensation. 159/ Dr. Johnson, on behalf of RUCO, conceded that no effort had been made to determine which, if any, Arizona CLECs would have or could have opted into the alleged discounts:

> Q. Neither you nor anybody else at RUCO has attempted to look at the universe of CLECs and analyzed which, if any, would have been interested just from a pure business model perspective in opting in; right?
>
> A. That's correct.
>
> Q. And then nobody from RUCO and certainly not you has made any effort to determine whether any of the CLECs in Arizona at the time could have opted into volume or term commitments that went along with the discount; correct?
>
> A. That's correct. 160/

In light of the complete lack of evidence in the record that any Arizona CLEC either would have or could have accepted these related terms and opted into the alleged discount even if it had been filed with and approved by the Commission, any claim of discrimination is fundamentally unsupported.

B. Qwest Presented Evidence that the Written Purchase Agreements Represented the Complete Agreement with McLeod.

RUCO alleges (and the Staff agrees) that on October 26, 2000 Qwest entered into an oral agreement to provide McLeod with a 10% discount on all purchases made by McLeod from Qwest between October 2, 2000 and December 31, 2003. This allegation is contradicted

---

158/ *See* Joint 1-10; LBB-5. *See also* Pre-Filed Testimony of W. Clay Deanhardt, at 62:13-14 ("In both cases, one of the interrelated agreements was filed as an interconnection agreement amendment that gave the CLEC access to UNE-Star.").

159/ *See* Joint 1-10; LBB-5.

160/ Tr., Vol. III, Testimony of Ben Johnson, at 523:16-524:2.

by: (a) the parties' written agreement; (b) the parties' accounting treatment; and (c) a draft agreement written by McLeod only several days before the execution of the final contracts.

First, the companies reduced their final agreement to writing in the form of two purchase agreements executed by QCC and McLeod on October 26, 2000. Under the terms of the McLeod Purchase Agreement, 161/ McLeod agreed to purchase from QCC and its subsidiaries at least **[BEGIN TRADE SECRET]** $480 million **[END TRADE SECRET]** in telecommunications services. Under the terms of the Qwest Purchase Agreement, 162/ QCC agreed to purchase a set minimum amount of products from McLeod totaling **[BEGIN TRADE SECRET]** $54.08 million. **[END TRADE SECRET]** 163/ These written agreements make no mention of any discount, and provide: "This [Purchase Agreement] may be amended or altered only by written instrument executed by an authorized representative of both Parties." 164/

Second, the accounting treatment by McLeod and Qwest indicates that both parties understood that the agreement was a purchase agreement, rather than an agreement for a discount. Initially, Qwest mistakenly booked the first payment pursuant to the Qwest Purchase Agreement (made in June 2001) as a reduction in revenue. 165/ However, Qwest caught the mistake internally and corrected it that same month – eight months before the Complaint was

161/ Exhibit MDC-2A.

162/ Joint 1-21.

163/ Both the McLeod Purchase Agreement and the QCC Purchase Agreement are take or pays, meaning that in the event the purchaser failed to meet the minimum, it agreed to pay the vendor the difference between the amount of actual purchases and the amount of the minimum. Pre-Filed Rebuttal Testimony of Larry B. Brotherson, at 4:15-18.

164/ Exhibits MDC-2A and Joint 1-21, at § 1.2.

165/ Pre-Filed Rebuttal Testimony of Larry B. Brotherson, at 5:24-25.

filed in the Minnesota litigation. 166/ Qwest correctly booked the first payment and all other payments as expense, which is consistent with fact that the agreement was a take-or-pay, not a discount arrangement. 167/ McLeod recorded the payments it received as revenue, which is also consistent with a purchase agreement – and Qwest's accounting treatment – and inconsistent with a discount arrangement. 168/ If McLeod believed Qwest agreed to a volume term discount, it would have booked the payments received a reduction in expense (rather than as revenue). It did not, and McLeod's treatment of the payments it received from Qwest as revenues evidence McLeod's understanding that the parties had agreed to a "take or pay arrangement" that was not subject to Sections 251 and 252, and not a discount. 169/

166/ *Id.*, at 5:25-28; Exhibit LBB-27.

167/ Pre-Filed Rebuttal Testimony of Larry B. Brotherson, at 5:25-6:1.

168/ *See id.*, at 6:3-6; Exhibit LBB-28. *See also* Tr., Vol. IV, Testimony of Marylee Diaz Cortez, at 833:12-23.

169/ Mr. Deanhardt conceded this point:

> Q. For example, you're aware of the accounting treatment that McLeod gave to the payments under the agreement you believe was an oral discount agreement; correct?
>
> A. Yes.
>
> Q. And you're aware that those payments that McLeod received were to treat those payments as revenues; correct?
>
> A. I believe that's right. I don't know if it's in the record of this case, but I believe that's right.
>
> Q. If you want to look at, I believe it's attached to Larry Brotherson's testimony.
>
> A. That's fine. Like I said, it's my recollection. Yes.
>
> Q. And for McLeod, that certainly would be a fact that is consistent with McLeod having a take or pay agreement with Qwest; correct?
>
> A. Yes.

Tr., Vol. III, Testimony of W. Clay Deanhardt, at 691:6-24

Third, RUCO's allegations are also belied by a draft agreement that was created by McLeod and sent to Qwest on October 23, 2000. 170/ That draft agreement was in the form of a take or pay with guaranteed profits and did not include a discount. 171/ An attachment to that draft agreement contains a table of McLeod's projected purchases from QCC and a corresponding "Margin Production Commitment" that McLeod proposed QCC meet. The margin production component would have obligated QCC to make purchases from McLeod in the amount of 6.5%, 8%, or 10% of McLeod's purchases from QCC, depending on the amount of McLeod's purchases from Qwest. 172/ McLeod's actions in drafting such an agreement are at odds with the alleged oral discount described by Mr. Fisher. This further confirms that before the final documents were drafted, McLeod's requests for a volume term discount were rejected.

Thus, there is significant evidence indicating that the final and legally enforceable agreements between Qwest and McLeod are memorialized in the Purchase Agreements that were executed on October 26, 2000 – agreements that are not subject to the filing requirements of the Act.

Even if these agreements should have been filed, the Staff and RUCO yet again artificially inflate their claims of discrimination by ignoring terms and conditions that even they admit are related integrally to the alleged discount agreement. 173/ As with the alleged discount agreement with Eschelon, the Staff and RUCO failed to produce any evidence that any CLEC was willing or able to agree to these related terms (including volume and term commitments

170/ *See* Exhibit LBB-26.

171/ *Id.*; Pre-Filed Rebuttal Testimony of Larry B. Brotherson, at 5:15-16.

172/ Exhibit LBB-26.

173/ Tr., Vol. III, Testimony of W. Clay Deanhardt, at 675:7-677:8; Pre-Filed Testimony of Marta Kalleberg, at 36:6-38:6.

($480 million over 3 years); 174/ the purchase of UNE-Star and the associated conversion costs; 175/ and a bill and keep arrangement for reciprocal compensation 176/) in order to receive the alleged discount. Accordingly, there is simply no evidence that any discrimination occurred as the result of the non-filing of the alleged discount agreement.

VI. PENALTIES

Through its hearing testimony, Qwest has demonstrated at length that it is currently in compliance with its filing obligations and that it provided all of its CLEC customers with the same level of wholesale service. Despite four days of hearings and hundreds of Information Requests, the Staff and RUCO have failed to present any admissible, let alone substantial, evidence to the contrary. Even if the Court were to find that a penalty appropriate, however, the proposals offered by the Staff and RUCO are not consistent with the facts, the law, or sound public policy. Instead, such a penalty should be measured by and proportionate to the proven harm resulting from unfiled agreements, rather than a speculative guess about their effects.

174/ *See* Exhibit MDC-2A. *See also* Pre-Filed Testimony of W. Clay Deanhardt, at 17:22-18:2 ("In short, McLeod committed to purchasing specified volumes of Qwest products under a take-or-pay agreement and Qwest agreed to provide McLeod with discounts if McLeod exceeded its take-or-pay commitments.").

175/ Exhibit LBB-14. *See also* Pre-Filed Testimony of W. Clay Deanhardt, at 62:13-14 ("In both cases, one of the interrelated agreements was filed as an interconnection agreement amendment that gave the CLEC access to UNE-Star.").

176/ Exhibit LBB-14.

A. As a Matter of Law, Any Fine Assessed Here Must Be Proportional to the Offense.

As a general matter, penalties must be proportionate to the offense. 177/ To put the size of the proposed penalties here in context, it is worth noting that the largest penalty ever levied by the FCC is a recent $6 million fine imposed against SBC Communications, Inc. 178/ In that case, the FCC found that SBC had willfully and repeatedly violated a competition-related condition that the FCC imposed when it approved the 1999 merger of SBC and Ameritech Corporation. In approving the merger, the FCC required SBC to offer the shared transport unbundled network element in the former Ameritech states on terms at least as favorable as those offered to telecommunications carriers in Texas as of August 27, 1999. The FCC found that SBC had violated this requirement in each of the five former Ameritech states by restricting the use of shared transport by carriers providing intraLATA toll service. Because shared transport is an essential UNE-P element, this conduct had extremely serious effects on competition in all five states.

Other FCC penalties have been significantly lower, even when health and safety matters are involved. For example, the FCC recently adopted a consent decree, including a $2 million forfeiture by AT&T, to resolve an investigation into AT&T's compliance with the Enhanced 911 ("E911") Phase II rules. 179/ Based on its investigation, the FCC found that although certain wireless carriers were required to begin selling and activating one entry-level handset model with location capability no later than October 1, 2001, as of February 19, 2002,

---

177/ *See United States v. Bajakajian*, 524 U.S. 321 (1998), discussed *infra* at note 183 and accompanying text.

178/ *See* Forfeiture Order, *In re SBC Communications, Inc.*, FCC 02-282 (October 8, 2002).

179/ *In the Matter of AT&T Wireless Servs., Inc.*, No. EB-02-TS-018 (Oct. 8, 2002).

AT&T Wireless had not yet begun selling and activating any handsets with location capability for its GSM network. Moreover, AT&T Wireless did not seek a waiver of that requirement until February 1, 2002, even though it knew as early as July 2001 that it would not be compliant with the E911 Phase II rules. 180/ When determining the amount of the forfeiture penalty, the FCC noted that "AT&T Wireless's conduct here appears to be egregious." 181/

Penalties for tower lighting violations, which the FCC "has always considered as serious violations . . . because of the potential dangers to aviation created by such violations" are also significantly lower than the maximum fine in the *SBC* case, let alone the Staff's proposals here. For example, in *In the Matter of AT&T Wireless Services, Inc.*, No. EB-02-SD-012 (Oct. 29, 2002), the FCC ordered a $117,000 forfeiture for seven "willful and/or repeated violations" including violations relating to antenna structure construction, marking and lighting, and noted that "substantial public safety issues" were involved. Similarly, the FCC found that a $5,000 forfeiture was warranted for Motorola after an inspection revealed that all of the tower lights were extinguished and the paint on one of its tower was "so badly faded and peeling that there were no contrasting orange and white bands." 182/

In evaluating the lawfulness of a potential fine, courts consider proportionality from two different perspectives. First, they consider the seriousness of the offense itself. Second, they consider whether the proposed fine for that offense is proportional to fines given for the

---

180/ *Id.*

181/ Notice of Apparent Liability for Forfeiture, *In the Matter of AT&T Wireless Servs., Inc.*, No. EB-02-TS-018 (May 9, 2002).

182/ *In the Matter of Private Land Mobile Station KNDH363*, NAL Acct. No. 315NF0044 (Sept. 24, 1997). See also *In the Matter of Puerto Rico Tower Co.*, No. EB-00-SJ-089 (Jan. 3, 2001) (imposing a $10,000 forfeiture for "willful and repeated" violations of tower lighting rules); *In the Matter of Natchez Communications, Inc.*, No. 99-OR-156 (Mar. 2, 2000) (imposing $5,000 forfeiture for a willful violation involving an antenna tower with defective paint and nonfunctioning lighting).

same or similar offenses in other cases. These legal principles should guide the Commission here. The Commission must evaluate the relative harm caused by Qwest's failure to file particular agreements. And the Commission must measure any penalty against other fines it has imposed in the past, as well as the judgments of other bodies imposing fines for related conduct.

Proportionality of penalties has its roots in the United States Constitution. In *United States v. Bajakajian*, the United States Supreme Court recognized that the Constitution requires that a fine be proportional to the gravity of the offense that it is designed to punish:

> The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. 183/

The rule for determining whether a fine or other punitive sanction is constitutionally excessive is whether the sanction "is grossly disproportional to the gravity of a defendant's offense." 184/ But even if a penalty does not rise to the level of implicating constitutional concerns, a disproportionate fine can constitute an abuse of discretion. 185/ For example, in *Allied Products Co. v. Federal Mine Safety and Health Review Commission*, the Fifth Circuit held that the penalties assessed against Allied for certain violations that resulted in the death of an employee were inconsistent with the statutory factors as well as "the amounts assessed in other cases" and were therefore an abuse of discretion. 186/ Similarly, the United States Court of Claims overturned a penalty as an abuse of discretion, commenting that "courts disapprove discipline

183/ 524 U.S. 321, 324 (1998).

184/ *Id. See also State v. Leyva*, 195 Ariz. 13, 20, 985 P.2d 498 (Ariz. Ct. App. 1998).

185/ *Petras v. Arizona State Liquor Bd.*, 129 Ariz. 449, 452, 631 P.2d 1107 (Ariz. Ct. App. 1981). *Cf.*, *Tucson Elec. Power Co. v. ACC*, 132 Ariz. 240, 247, 645 P.2d 231 (Ariz. 1982) (overturning Commission decision as abuse of discretion because not supported by evidence); *City of Tucson v. Citizens Utils. Water Co.*, 17 Ariz. App. 477, 498 P.2d 551 (Ariz. Ct. App. 1972) (same).

186/ 666 F.2d 890 (5th Cir. 1982).

which is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion by the agency." 187/ The court stated that an administrative penalty must be overturned where "the penalty is so harsh that there is an 'inherent disproportion between the offense and punishment.'" 188/ Furthermore, if an abuse of discretion is demonstrated, the court will set aside the penalty even where it lies within the range of penalties permitted by statute or regulation. 189/

B. As a Matter of Policy, Any Fine Assessed Here Must Reflect the Staff's and RUCO's Inability to Show Any Actual Harm.

The answer is the same from a policy perspective. As Mr. Shooshan testified without contradiction from RUCO or Staff witnesses, the punishment should fit the defendant's proven conduct and harm. Three principles should guide any penalty assessment by the Commission:

> 1. The penalty should take into account what, if anything, the party being penalized gained from the disputed actions; and
>
> 2. The punishment should fit the infraction. That is, the penalty should be commensurate with the harms caused by the actions, and take into consideration ambiguities in the law and other mitigating factors.
>
> 3. The penalty should suffice, in conjunction with other enforcement measures, to deter future infractions. 190/

These principles counsel against the extraordinary penalties proposed by the Staff and RUCO here. In particular, any penalties should reflect "the ambiguities in the law that were

---

187/ *Power v. United States*, 531 F.2d 505, 507 (Cl. Ct. 1976) (long time employee terminated for allegedly false reimbursement claim).

188/ *Id.*

189/ *Id.* 507-08.

190/ Pre-Filed Testimony of Harry M. Shooshan, at 20:11-17.

not clarified" until the October 2002 FCC Order and the comprehensive remedial actions implemented by Qwest. 191/ The Commission should also evaluate the extent to which any particular agreement provisions that it believes it should have been filed are terms that it would have approved as well as the extent to which the terms were available to other CLECs. 192/ Finally, "it is significant that these agreements constitute terms and conditions under which Qwest was agreeing to do things for CLECs to help them do business in the local market. ... Indeed, one of the ironies of this proceeding appears to be that Qwest is being criticized for trying to accommodate the needs of particular CLECs. ... [T]his is exactly what the Telecommunications Act was meant to encourage. Consequently, sizable penalties are not required for deterrence." 193/

Mr. Shooshan emphasized that any penalty assessment cannot be based on the mere assumption that Qwest's failure to file certain agreements caused harm to CLECs or to the market. Instead, the Commission "must consider the actual impact of the failure to file in the context of the facts proven in the hearing, the market as a whole, and the state of the law at the time of the agreements." 194/ There is no reason why the harm to actual CLECs cannot be analyzed – it is, as Mr. Shooshan testified, knowable. RUCO or the Staff would only have had to do the following:

191/ *Id.*, at 21:3-14.

192/ *Id.*, at 21:14-17.

193/ *Id.*, at 21:18-22:6.

194/ *Id.*, at 22:7-18.

- Identify the universe of Arizona-certificated CLECs in October or November 2000. That should be as easy as consulting the Commission's records as of those dates.

- For each CLEC, review its basic business model, customer focus and product offerings. 195/ Ask these questions: did the CLEC lease facilities from Qwest or build its own? Did it purchase UNE-P, Centrex, or some other product set? What were its purchase volumes at that time? Both RUCO and the Staff have had the authority to issue information requests to determine that information.

- Determine, based on the foregoing, whether each CLEC could actually have opted into each of the agreements at issue. 196/ By looking at recent purchase volumes, for example, RUCO or the Staff could have analyzed and offered informed argument on whether a

---

195/ Dr. Johnson, on behalf of RUCO, admitted that it cannot simply be assumed that one CLEC would want to opt into a provision that another CLEC contracted for:

> Q. And in terms of determining whether -- putting aside for a moment opt-in rights -- whether a particular CLEC would want, as a business matter, to opt into ay particular contract provision, you can't just assume that a CLEC would want to opt in without knowing how that CLEC has decided to obtain its services, and to whom it seeks to sell them, can you?
>
> A. I agree.
>
> Q. And a CLEC's decision in a particular instance to opt in or not to opt in to a contract provision is a matter of that CLEC's business judgment; correct?
>
> A. Yes.

Tr., Vol. III, Testimony of Ben Johnson, at 504:25-505:12.

196/ Dr. Johnson also admitted that not every CLEC is permitted to opt into – without limitation – every approved contractual provision:

> Q. You understand that a CLEC's right to opt in to a particular contract term is a function of related terms and conditions; correct?
>
> A. Yes, that's appropriate.

Id., at 506:17-20. *See also* Exhibit Q-14, First Report and Order, ¶ 1315.

CLEC could have opted into the volume and term commitments corresponding to each "discount" alleged here. 197/

- For each CLEC that can reasonably be said to have been denied an opt-in opportunity, estimate the actual impact to that CLEC. With respect to the "discounts," for example, RUCO or the Staff could have analyzed these CLECs' purchases of Arizona-related services and determined the foregone "discount" relating to those services, 198/ or, perhaps through expert testimony, netted the potential marginal improvement in service quality from an on-site provisioning team against the increased cost. And again, both RUCO and the Staff had the ability to serve discovery that could answer those questions.

But neither RUCO nor the Staff undertook anything of the sort. Instead, both simply presumed systemic harm to competition generally, to all Arizona CLECs individually, and to the Commission from the fact that agreements were not filed, whether or not Qwest was required by law to file them in the first place. RUCO witnesses Ben Johnson and Marylee Diaz

---

197/ As Dr. Johnson conceded, a CLEC that wanted to opt into the alleged discounts would be bound to also accept a volume commitment:

> Q. But it's fair to say, though, that you can't presume that a CLEC could come in and cherry pick the discount without any sort of volume commitment at all?
>
> A. I think that would be fair. If there were none whatsoever, I think it would be extremely unlikely that the Commission would say that you have the right to do that.

Tr., Vol. III, Testimony of Ben Johnson, at 511:20-512:1.

198/ The Commission's remedy authority extends only to harms caused and suffered in Arizona, not those caused or suffered elsewhere. The Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the state." U.S. Const. art. I, sec. 8, cl. 3. *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982). "Any attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977). Under these principles, an attempt to assert regulatory authority over commerce in other states by penalizing Qwest for harms outside Arizona would exceed the Commission's authority and impinge upon the sovereignty and authority of other states.

Cortez both testified, in so many words, that actual harm was not relevant to RUCO's view of the case:

> Q. So the answer to my question about whether you attempted, in the course of your audit, to quantify the harm to individual CLECs would be a no?
>
> A. Correct. It's not an issue with us. 199/
>
> ***
>
> Q. You've performed no analysis that would allow you to opine as to whether competition in Arizona is more robust, say, before the summer and fall of 2000 as opposed to after the summer and fall of 2000, have you?
>
> A. I haven't specifically done any calculations in that regard.
>
> Q. Have you done any general sort of analysis in that regard?
>
> A. In general, the trend towards increased competition has continued nationwide, and I would expect Arizona's part of that overall trend. 200/

This worldview, and the absence of any analysis of specific harm resulting from the conduct at issue in this case, are inconsistent both with the law and good public policy. As Mr. Shooshan testified: "any enforcement procedures, policies, or penalties should be crafted carefully to fit the transaction and should reflect relevant mitigating factors after a finding of actual, not presumed, harm to competitors and to the market." 201/ Furthermore, "The Commission may not simply assume that the failure to file an agreement that should have been filed *per se* discriminated against or caused harm to a CLEC or the market at large. The Commission must consider the actual impact of the failure to file in the context of the facts proven in the hearing, the market as a whole, and the state of the law at the time of the

---

199/ Tr., Vol. IV, Testimony of Marylee Diaz Cortez, at 801:3-6.

200/ Tr., Vol. III, Testimony of Ben Johnson, at 503:10-21.

201/ Tr., Vol. II, Testimony of Harry M. Shooshan, at 428:8-12.

agreements." 202/ That is, even assuming the agreements at issue fall within the filing requirements of the Act, the mere fact that their terms are memorialized in contracts with some CLECs but not with others is not enough to show harm or discrimination. After all, "the Act does not require that all interconnection agreements be identical." 203/

C. The Penalties Proposed by the Staff Are Not Supported by the Law or the Record.

1. Monetary Penalty

The Staff recommends that Qwest be fined $15,047,000 under Ariz. Rev. Stat. §§ 40-424 and 40-425. The Staff reaches this figure by recommending a flat $15 million penalty with respect to the Eschelon and McLeod agreements and the non-participation clauses, additional fines of $3000 for each of the remaining 12 agreements with carriers other than Eschelon and McLeod that should have been filed (for a fine of $36,000), and a fine of $1000 for each of the 11 agreements with carriers other than Eschelon and McLeod that Qwest filed for Commission approval in September 2002 (for a fine of $11,000). As an initial matter, 6 of these 11 agreements for which the Staff recommends a $1,000 fine per agreement were not included in Exhibit G to the Staff's Supplemental Report and Recommendation as agreements that were subject to Section 252(e). 204/ Thus, the Staff is attempting to seek penalties for Qwest's filing agreements that the Staff as of that time did not consider interconnection agreements. Penalizing Qwest for over-filing under the Staff's application of its interpretation of the filing standard is unfair and unjustified.

202/ Pre-Filed Testimony of Harry M. Shooshan, at 22:13-18.

203/ *MCI Telecommunications Corp. v. Michigan Bell Tel. Co.*, 79 F. Supp.2d 768, 795 (E.D. Mich. 1999).

204/ These agreements are numbered 1, 3, 9, 12, 13, and 14 on Table 4 in Ms. Kalleberg's testimony.

The Staff's methodology for assessing a $15 million penalty with respect to the Eschelon and McLeod agreements and the non-participation clauses is legally and factually flawed. First, the Commission's contempt authority does not extend to a fine for past conduct. Second, given the lack of clarity regarding the Section 252 filing standard, any violations by Qwest cannot be "intentional, willful, and contrary to Commission rules and processes" as the Staff alleges. Third, terms regarding regulatory participation do not fall within Section 252 and cannot serve as a basis for penalties here.

The Commission has authority pursuant to Ariz. Rev. Stat. §§ 40-424 to issue *civil* contempt penalties for the failure to observe or comply with a Commission order, rule, or requirement. However, that statute does not authorize the Commission to issue *criminal* contempt penalties as recommended by the Staff. Arizona law is clear that "the purpose of finding a person in civil contempt is to coerce that person to do or refrain from doing some act." 205/ In other words, civil contempt authority exists only to require a person to do some act in the future. The classic example is where an entity with civil contempt authority imposes a per day penalty from the date of a hearing to require a person or entity to do something that it has been ordered previously to do. The penalty ceases upon compliance. In contrast, "[a] criminal contempt is characterized by imposition of an unconditional sentence for punishment or deterrence." 206/ This distinction between the purposes of criminal and civil contempt is

---

205/ *Korman v. Strick*, 133 Ariz. 471, 474, 652 P.2d 544 (1982). *See also Ong Hing v. Thurston*, 101 Ariz. 92, 98, 416 P.2d 216 (1966) ("civil contempt is the disobeyance of a court order directing an act for the benefit or advantage of the opposing party to the litigation").

206/ *State v. Cohen*, 15 Ariz. App. 436, 440, 489 P.2d 283 (Ariz. Ct. App. 1971). *See also Korman*, 133 Ariz. at 474 ("[a] contempt finding intended solely for the purpose of imposing punishment must be a criminal contempt finding." (emphasis added)); *Ong Hing*, 101 Ariz. at 98 ("criminal contempt is the commission of a disrespectful act directed at the court itself which obstructs justice ... We are satisfied that we are dealing with a criminal contempt as the primary purpose of respondent's action was to punish for petitioner's alleged disrespect to the court and attempted obstruction of justice.").

manifest in the nature of the penalties: penalties for civil contempt are prospective whereas penalties for criminal contempt are retrospective. 207/ "A person is imprisoned for civil contempt to force compliance; he holds the keys to the jail and can gain release at any time by complying with the order. A criminal contempt citation, on the other hand, is intended to vindicate the dignity of the court. It is a criminal offense for which a specific punishment is meted out, over which the defendant has no control." 208/

Here, it cannot be disputed that the contempt penalties the Staff recommends are *purely* retrospective and for the sole purpose of punishing any past failure to comply with Section 252 and deterring future non-compliance – improper purposes for civil contempt sanctions. Indeed, the Staff consistently characterizes the proposed fine as a "penalty" and suggests that the size of the penalty is "sufficient *to deter Qwest* from its non-compliant behavior." 209/ Moreover, as discussed above, Qwest currently is in compliance with its obligations under Section 252, and the Staff has nowhere suggested that contempt sanctions are necessary to coerce future compliance with that provision. The monetary penalty proposed by the Staff falls well outside the Commission's civil contempt authority pursuant to Ariz. Rev. Stat. §§ 40-424. 210/

207/ *See Vanguard Eng'g v. State*, 166 Ariz. 405, 406, 803 P.2d 126 (1990) ("Since the petitioner could not prospectively avoid the penalty by performing the acts required of it by the court, the fine cannot be classified as civil in nature.").

208/ 17 A.R.S. Rules of Crim. Proc., Rule 33.1, cmt. Arizona law prohibits fines greater than $300 for criminal contempt unless the defendant has been found guilty of contempt by a jury or has waived the right to trial by jury. 17 A.R.S. Rules of Crim. Proc., Rule 33.4.

209/ Pre-Filed Testimony of Marta Kalleberg, at 88:25 (emphasis added).

210/ Moreover, Ariz. Rev. Stat. § 40-429 requires that contempt penalties can be imposed only by a court of competent jurisdiction after the Commission files an action in the name of the state.

This is no small distinction under the law. The procedure for imposing civil contempt sanctions is far different in Arizona than that for imposing criminal contempt sanctions. The civil contempt authority granted by the state legislature to the Commission requires notice and a hearing. 211/ In contrast, criminal contempt sanctions require a far greater array of procedural due process protections, including reasonable notice of the charges, a proceeding before a state trial court in which the state bears the burden of proof beyond a reasonable doubt, and a right to a trial by jury (in many circumstances). 212/ None of these procedural due process rights was present in the proceeding that occurred here.

Second, the large fine proposed by the Staff is not justified in light of the fact that the Staff and RUCO failed to prove that Qwest acted willfully or intentionally to violate Section 252 of the Telecommunications Act. Indeed, under the fair notice doctrine, the undeniable disagreement across the industry at the time the agreements at issue were formed regarding the scope of the Section 252 filing requirement precludes a finding that Qwest acted willfully or intentionally. 213/

Qwest's decisions to file or not to file agreements represented a good faith attempt to comply with the law as Qwest understood it at the time of the agreements themselves. Even Mr. Deanhardt admitted, as he must, that neither the FCC nor this Commission or any court in the United States had ever defined the scope of agreements that ILECs must file pursuant to Section 252. 214/ And perhaps even more to the point, the Staff significantly revised its list of

---

211/ 17 Ariz. Rev. Stat. § 40-424.

212/ *See* 17 Ariz. Rev. Stat. Rules Crim. Proc., Rule 33.4; *Korman v. Strick*, 133 Ariz. 471, 464, 652 P.2d 544 (Ariz. 1982).

213/ *See infra* notes 219-226 and accompanying text.

214/ Tr., Vol. I, Testimony of W. Clay Deanhardt, at 131:13-20.

agreements that were subject to Section 252 after the FCC issued its clarifying order on October 4, 2002. 215/ There can be no willful or intentional violation of a filing requirement when, as here, the only consensus is, in essence, that Qwest should have known an agreement needing to be filed when it saw it, 216/ under pain of administrative sanctions.

Qwest's good faith attempt to comply with its filing obligations is further supported by the fact that CLECs stated under oath in response to the Staff's discovery requests that they thought all agreements (which included several agreements at issue in this proceeding) that were required to be filed in fact had been filed. 217/ Of the 48 CLEC respondents, only five believed that they had interconnection agreements with Qwest that were not filed. And, of these, four were typical interconnection agreement amendments that had recently been executed and were filed within Qwest's typical processes after the CLECs had responded to the data requests. 218/ Whether or not the Court ultimately agrees with the lines Qwest drew, relevant authorities and the record in this case provide ample evidence that Qwest acted in good faith and that, under the circumstances, retrospective penalties are not appropriate.

Even if Qwest got the law wrong, it is unfair, and possibly unconstitutional, to penalize Qwest for violating an unarticulated standard. As a matter of due process, an agency rule that does not give those subject to the rule sufficient guidance to determine what constitutes

---

215/ *See supra* Section II.C and Attachment A; *see also* Transcript, Mar. 5, 2002, at 113:24-114:23.

216/ *Cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . . .") (Stewart, J., concurring).

217/ Supplemental Staff Report and Recommendation at 4-5, Docket No. RT-00000F-02-0271 (Aug. 14, 2002).

218/ *Id.* at 4.

appropriate conduct is void for vagueness and cannot be enforced. 219/ Under this "fair notice doctrine," "the well-established rule in administrative law [holds] that the application of a rule may be successfully challenged if it does not give fair warning that the allegedly violative conduct was prohibited." 220/ The doctrine "has now been thoroughly 'incorporated into administrative law,'" and is grounded in the due process clause of the United States Constitution. 221/

As such, where punitive proceedings serve "'as the initial means for announcing a particular interpretation' – or for making its interpretation clear," 222/ an agency may not impose liability on a regulated party unless that party, "acting in good faith" and reviewing the regulations and public statements of the agency, "would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." 223/ But "[w]here, as here, the regulations and other policy statements are unclear, where the petitioner's interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not 'on notice' of the jury's ultimate interpretation of the regulations, and may not be punished." 224/ An administrative body

219/ *See, e.g.*, *Lindsay v. Industrial Comm'n of Ariz.*, 564 P.2d 943, 944 (Ariz. 1977) (a rule is void for vagueness if "[i]t forbids or requires the doing of an act in ters so vague that men of common intelligence must necessarily guess at its meaning and differ as to ist application."); *United States v. Vasarajs*, 908 F.2d 443, 448 (9th Cir. 1990) (stating that "the very words of statutes must be sufficiently precise to provide comprehensible notice to average citizens of the substance of the rules that bind them").

220/ *United States v. Chrysler Corp.*, 158 F.3d 1350, 1355 (D.C. Cir. 1998).

221/ *General Electric*, 53 F.3d at 1329 (quoting *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987)).

222/ *Id.* at 1329 (quoting *Martin v. OSHRC*, 499 U.S. 144, 158 (1991)).

223/ *Id.* (quoting *Diamond Roofing*, 528 F.2d at 649).

224/ *Id.* at 1333-34.

"cannot, in effect, punish a member of the regulated class for reasonably interpreting" the rules in question. 225/ The "extraordinary intuition or . . . the aid of a psychic . . . [is] more than the law requires." 226/

To impose penalties in these circumstances would raise serious due process concerns. A statute must at a minimum "give fair notice that certain conduct is proscribed." 227/ Section 252(a)(1) does not give fair notice of the scope of the filing requirement, and certainly not the scope as recently enunciated by the FCC, and it would be both unconstitutional and unfair for the Court or the Commission to penalize Qwest for failing to anticipate and comply with a standard that no authority had ever defined.

Finally, the Staff's recommendation that penalties be assessed for various terms related to regulatory participation is contrary to sound public policy and beyond the proper scope of this proceeding. 228/ Qwest understands that the Commission does not favor non-participation agreements. Although Qwest believed in the past that resolutions of issues pending in any docket were encouraged by the law in Arizona, Qwest committed to submit in the future all resolutions and settlements of disputes in cases of general applicability (including for

---

225/ *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 4 (D.C. Cir. 1987).

226/ *Chrysler Corp.*, 158 F.3d at 1357.

227/ *Rabe v. Washington*, 405 U.S. 313, 314 (1972); s*ee also Palmer v. City of Euclid*, 402 U.S. 544 (1971); *Rabeck v. New York*, 391 U.S. 462 (1968).

228/ Allegations that Qwest prevented Eschelon from participating in the 271 process also proved to be unfounded. Ms. Crandall's unrebutted testimony demonstrated that Eschelon was one of the most active participants in Qwest's Change Management Process and opened "nearly twice as many issues as all the other CLECs combined." Pre-Filed Rebuttal Testimony of Dana Filip Crandall, at 5:12-6:4; 8:8-16; Exhibits DLF-5, DLF-6, DLF-7.

example Alternative Forms of Regulation (AFORs), mergers and acquisitions, and others of that type) to the Commission for review. 229/

However, whether these agreements provide a separate basis for penalties is an entirely different question. This proceeding is about Qwest's compliance with Section 252. As the FCC stated in its October 4, 2002 Order, the filing obligation is limited to agreements pertaining to Section 251(b) and (c) services. 230/ The public interest evaluation is part of the consideration for the approval of an agreement that must be filed under Section 252(e), and the Commission has authority to evaluate only contracts that must be filed for whether they are in the public interest. 231/ As a result, contracts that contain non-participation agreements but do not involve Section 251(b) and (c) services – such as the April 4, 2000 Agreement between AT&T, U S WEST, 232/ and Qwest and the December 24, 2001 *Confidential Billing Settlement Agreement* with Allegiance 233/ – are not within Section 252(e)'s filing requirement and cannot be the basis for penalties.

Moreover, these agreements are not necessarily inconsistent with the public interest. As Mr. Shooshan testified, agreements to resolve disputes outside of litigation and the regulatory process are within the public interest:

229/ Pre-Filed Rebuttal Testimony of Larry B. Brotherson, at 10:11-16.

230/ *See* FCC Order, at ¶ 8.

231/ *See* 47 U.S.C. § 252(e)(2)(A).

232/ In this agreement, Qwest and U S WEST agreed not to support open access regulations within its 14-state territory in exchange for AT&T's agreement to withdraw from opposition to the merger between Qwest and U S WEST. Neither of these provisions involved Section 251(b) or (c) services.

233/ This agreement constituted an agreement between the parties to amend their interconnection agreement, an agreement that is not itself subject to Section 252. Subsequently, the proposed amendment was formalized when the parties filed an Amendment to their Interconnection Agreement relating to coordinated installation with no testing. That Amendment was filed with the Commission for approval on June 6, 2002, long before the Staff's proposed end date of March 20, 2003.

> The system is working if ILECs make concessions to minimize CLEC complaints in 271 proceedings or any other regulatory dockets. This process should be permitted—indeed, encouraged—by regulators. Put another way, if a CLEC is satisfied with the service it is receiving from an ILEC, it has nothing to litigate. The deregulatory goals of the Act are furthered, in my opinion, whenever ILECs and CLECs can achieve satisfactory resolutions of the 271 checklist issues (or other matters) between themselves and without regulatory intervention.
>
> More generally, I believe that such private dispute resolution procedures are very much in the public interest. Disputes can be resolved faster, more efficiently, and with better outcomes, if they can be addressed without resolution to courts or government agencies. That is why companies always try to avoid the costs of litigation, and often use private mediation or arbitration when they need outside assistance in resolving disagreements. These processes also save the public resources of courts and commissions for other purposes. They are to be encouraged, not discouraged. 234/

Furthermore, "[n]o one can point to any obligation on the part of a CLEC (or any other party) to spend its resources participating in regulatory proceedings." 235/ Indeed, McLeod stated that "[d]ecisions not to participate in regulatory proceedings are the result of considerations related to allocation of limited legal/regulatory resources at McLeodUSA" and "[a]s long as Qwest was in compliance there was little or no basis or reason to participate." 236/ And, Dr. Johnson, on behalf of RUCO, conceded that a CLEC's decision whether to participate is a matter of business judgment:

> Q. Dr. Johnson, you don't contend that CLECs have any sort of obligation to participate in 271 proceedings, do you?
>
> A. No. And they generally cannot afford to.
>
> ***
>
> Q. Whether a CLEC decides to participate in a 271 proceeding is a matter of the CLEC's business judgment; correct?

234/ Pre-Filed Testimony of Harry M. Shooshan, at 13:6-14:2.

235/ *Id.* at 19:21-20:2.

236/ Exhibit LBB-29. McLeod further stated, "McLeodUSA does not know what, if any, issues would have been raised in the absence of [the agreement to remain neutral if Qwest remained in compliance]." *Id.*

> A. And what it can afford to do. It would look at whether there was any likely impact on them, and there probably is, and would weigh that against what it would cost them. And in many cases in my impression across the country CLECs do not participate because it's too costly to do so. 237/

In any event, an evaluation of whether an agreement is within the public interest is part of the consideration for approval of an agreement that must be filed under Section 252(e), not a separate and independent requirement for all voluntarily negotiated agreements, as the Staff's penalty proposal appears to assume. 238/

2. Opt-in penalty

Staff proposes that Qwest be ordered to file all of the previously unfiled agreements – including those that were terminated, superseded, or have expired – and that interested CLECs be permitted to opt into those agreements for two years from the date of Commission approval. 239/ In addition, in its Supplemental Report and Recommendation, the Staff proposed that issues relating to a specific carrier's ability to opt-in to any of the previously unfiled agreements should be addressed on a case-by-case basis as disputes arise and recommended a Phase B of this Docket be set up for that purpose. 240/ Qwest agrees that a separate body of law under Section 252(i) governs issues of opt-in and that a Phase B is appropriate to deal with opt-in issues on a case-by-case basis.

However, there are several general principles that limit the Staff's proposed remedy. First, not all of the provisions in the agreements at issue pertain to ongoing Section 251

237/ Tr., Vol. III, Testimony of Harry M. Shooshan, at 539:6-23.

238/ *See* 47 U.S.C. § 252(e)(2)(A).

239/ Pre-Filed Testimony of Marta Kalleberg, at 89:8-23.

240/ Supplemental Staff Report and Recommendation, Docket No. RT-00000F-02-0271, at 8-9 (Aug. 14, 2002).

services. Many of the agreements here contain other terms, such as settlements of historic disputes with backward looking consideration. Section 252(i) of the Act permits CLECs to pick and choose only interconnection provisions approved and subject to Section 252(e). 241/ Accordingly, these other terms, including settlement provisions, should not be made available for other CLECs to attempt to opt into.

Second, in order to opt into an ongoing provision related to Section 251(b) or (c) services, a CLEC must be similarly situated to the contracting CLEC and must accept all related terms. The FCC orders and rules impose both substantive and procedural constraints on the opt-in process. CLECs may not use Section 252(i) to strip individual provisions in an interconnection agreement out of context and thereby avoid the related terms and conditions on which that provision is premised. 242/ When a CLEC invokes its "pick and choose" rights, it must "accept all terms that [the ILEC] can prove are 'legitimately related' to the desired term." 243/ This limitation is not confined to pricing provisions; the FCC rules are clear that CLECs must agree to accept "the same terms and conditions, *in addition to rates*, as those provided in the agreement" 244/ if they wish to opt in. For that reason, opt-in does not ordinarily proceed automatically in every case: if a CLEC refuses to accept the terms and conditions that are legitimately related to the desired provision, the ILEC is permitted to seek adjudication under

---

241/ 47 U.S.C. § 252(i); Memorandum Opinion and Order, *In the Matter of Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, WC Docket No. 02-314 (Dec. 20, 2002), at ¶ 488.

242/ *See, e.g.*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16139 ¶ 1315 (1996) ("*Local Competition Order*").

243/ *Southwestern Bell Tel. Co.*, 221 F.3d at 818 (citing *Iowa Utils. Bd.*, 525 U.S. at 396).

244/ 47 C.F.R. § 51.809(a) (emphasis added). This provision was upheld in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 396 (1999).

the relevant state process. 245/ In other words, even if provisions of the unfiled agreements had originally been filed, opt-in by other CLECs would have been considered on a case-by-case basis, and in no case would the CLEC have been entitled to ignore related provisions of the agreements.

3. 10% Offering

The Staff recommends that Qwest provide each CLEC (other than Eschelon and McLeod) with a cash payment totaling 10% of the CLEC's purchases of Section 251(b) or (c) services and 10% of its purchases of intrastate access from Qwest in Arizona for the period from January 1, 2001 through June 30, 2002. In addition, the Staff proposes that Qwest provide each CLEC (except Eschelon and McLeod) with a credit totaling 10% of its purchases of Section 251(b) or (c) services and 10% of its purchases of intrastate access from Qwest in Arizona for 18 months following the date of the Commission's decision. 246/ This penalty proposal is also flawed.

245/ *Local Competition Order* ¶ 1321.

246/ The Staff acknowledged that this discount recommendation is in lieu of allowing CLECs to opt into the discount provisions under the opt-in remedy discussed above:

> Q. Is making the benefits of the consulting agreement available to CLECs in addition to the 10 percent cash payment and credit that you're recommending?
>
> A. No. What Staff did is Staff specifically put the 10 percent within what I refer to as Nonmonetary Penalty No. 2.
>
> Q. Does that apply to the McLeod agreement for the discount as well?
>
> A. Are you asking if my recommendation is based on an agreement between Qwest and McLeod for 10 percent?
>
> Q. No. All I'm asking is I'm trying to understand the remedies proposed by Staff. Under Part 1, are you recommending that either the Eschelon consulting agreement or the McLeod take or pay agreement and the extension of it as Mr. Fisher testified be available under Part 1 [the opt-in remedy]?
>
> A. No.
>
> Q. So it's only under Part 2 [the 10% offering]?
>
> A. That is correct.

First, the Staff's proposal, in essence, asks the Commission to order Qwest to violate Section 251 by providing every CLEC except Eschelon and McLeod with a going-forward discount. Section 251 imposes non-discrimination obligations on ILECs, and Section 252(i) opt-in rights serve to prevent discrimination in interconnection rates and services received from an ILEC by similarly situated CLECs. 247/ The Staff's proposal discards federal law and policy and is fundamentally inconsistent with the regulatory regime created by Congress in enacting the 1996 Act. Because the McLeod and Eschelon agreements have been terminated, the Staff's recommendation would essentially require Qwest to provide a rate reduction to CLECs that is not available to McLeod and Eschelon. Once an agreement is terminated or superseded (as the alleged discount agreements have been), provision of Section 251 services under the terms of that agreement cease, and, if the terms were discriminatory, any discrimination (and any resulting harm) ceases. Therefore, the Staff's recommendation would give other CLECs the benefits of the alleged discount agreements for a longer duration than the favorable services were received by Eschelon and McLeod, a result that is in conflict with the underlying purposes of Sections 251 or 252. 248/

Tr., Vol. IV, Testimony of Marta Kalleberg, at 921:1-21. That is, the Staff proposed that Qwest provide only one form of a 10% discount and did not intend the 10% provisions to be part of its proposed opt-in remedy.

247/ *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 16139 ¶ 1314 (1996) ("First Report and Order") (finding that 252(i) requires opportunity to opt-in to individual provisions, rather than entire agreements, in part because of the non-discrimination language of Section 251). *Cf. GTE North Inc. v. McCarty*, 978 F. Supp. 827, 832 (N.D. Ind. 1997) (recognizing the purpose behind 252(i) is to prevent 251 discrimination by stating "practical effect of § 252(i) is to prohibit incumbent carriers from exercising a preference for one carrier over another.").

248/ Although the Staff professed that the exclusion of Eschelon and McLeod was not intended as a penalty, Ms. Kalleberg conceded on cross-examination by Eschelon's counsel that no inquiry had been made into the potential impact to those carriers from the Staff's recommendation:

Before the FCC, AT&T raised an argument based on the same premise as going-forward discount suggested by the Staff. AT&T argued that terminating an agreement does not eliminate its discriminatory effects and the proper way to remedy the discrimination was to make the terminated or superseded agreements available for pick-and-choose, and then to allow the CLECs to retain the favorable terms for the duration of their own interconnection agreements with Qwest, regardless of the actual duration of the favorable terms to the original CLEC. 249/

> Q. And is it fair to summarize your earlier answer that you consider this some sort of an additional penalty on Eschelon for its role in the particular contracts?
>
> A. No. Staff's intent was not to penalize Eschelon.
>
> Q. But you do understand that under your proposal, for 18 months Eschelon will be at a disadvantage vis-a-vis its competitors because it will be paying more for the exact same services than its competitors?
>
> A. No, I don't believe I could state that, because Staff hasn't done an analysis of whether or not Eschelon is going to be disadvantaged following, if these recommendations are implemented, Staff hasn't done the analysis to see whether or not Eschelon would be disadvantaged compared to its competitors.
>
> Q. You haven't, as part of your recommendation, you didn't study what impact this might have on Eschelon in the market; is that what you're saying?
>
> A. That is correct.
>
> Q. You don't know, for instance, as I asked Dr. Johnson, you don't know if this remedy will result in Eschelon having to lay off workers, do you?
>
> A. No, I do not.
>
> Q. And you don't know if this remedy will cause Eschelon to have trouble providing service to its customers, do you?
>
> A. No, I do not.

Tr., Vol. IV, Testimony of Marta Kalleberg, at 873:10-874:13.

249/ *See Application by Qwest Communications International, Inc. for Authorization to Provide In-Region InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, FCC WC Docket No. 02-314, AT&T November 7, 2002 *Ex Parte* Letter at 6, AT&T December 19, 2002, *Ex Parte* Letter at 3, (arguing that to alleviate discrimination caused by unfiled agreements CLECs should be able to opt-in to terminated agreements and get the benefit of those agreements "for the duration of their own interconnection agreements with Qwest." Reply Declaration of Kenneth L. Wilson (attached to November 7, 2002 letter) at 6 ¶ 14).

In other words, AT&T argued that the harm suffered by a CLEC from an unfiled agreement was the lost opportunity to opt into the agreement, and the only remedy for failure to file subsequently terminated or superseded agreement was the opportunity to opt-in as if the agreement had not been terminated or superseded. The FCC rejected these arguments, and this approach to discrimination, when it held that terminated and superseded agreements did not need to be filed and did not cause continuing discrimination. 250/

Second, there is simply no evidence in the record to justify providing any CLEC with a going-forward discount. The Staff bases the going-forward discount on pure speculation that CLECs were hindered from entering the Arizona market while the alleged discounts remained unavailable and that ordering a going-forward discount would be somehow remedial:

> A 10 percent credit on future purchases would enable CLECs who were not operating from January 1, 2001, through June 30, 2002, to receive a discount as well. *It can be argued* that these CLECs *may* have wanted to enter the Arizona market for local service during that time period, but were unable to do so due to high prices for wholesale services. *Perhaps* the discount would have enabled them to do business. By giving all carriers a 10 percent credit on a going forward basis for 18 months, CLECs who have not entered the Arizona market *may* now do so and increased local competition *may* result. 251/

The speculative nature of this "evidence" is apparent on its face, and the Staff failed to present the testimony of a single Arizona CLEC or prospective Arizona CLEC to support its hypothesis. 252/

250/ *See* Memorandum Opinion and Order, *In the Matter of Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, WC Docket No. 02-314 (Dec. 20, 2002), at ¶ 491.

251/ Pre-Filed Testimony of Marta Kalleberg, at 91:25-92:7 (emphasis added).

252/ Indeed, Ms. Kalleberg acknowledged the speculative nature of this proposed remedy on cross-examination:

On cross-examination, after acknowledging the lack of factual support for the proposed going-forward discount as a "remedy," Ms. Kalleberg attempted to justify the recommendation as a "penalty," despite the Staff's position that it was intended to remedy the harm to competition from the unfiled McLeod and Eschelon agreements. 253/ Indeed, Ms.

> Q. I think I'm stating this correctly, but I thought that in your summary you said that one of Staff's purposes in proposing the remedies was to remedy the adverse impact on competition in Arizona; is that correct?
>
> A. That is correct.
>
> Q. You've just told me I think that you don't know what that impact was.
>
> A. While Staff did not do a quantitative analysis in the sense that I believe you're earlier referring to, Staff did do a qualitative analysis. What I mean by that is Staff looked at the facts of this case, and the facts are that Qwest did not file a series of agreements for Commission review and approval, and that not filing was in violation of federal and state law. Those particular federal and state laws to which I am referring are designed to further competition. So to the extent that those laws are violated, Staff does feel confident that it can make a statement that competition in Arizona was adversely impacted.
>
> Q. Okay, but you don't know how much; correct?
>
> A. In the sense that you're asking me whether I did a quantitative analysis of exactly how much, no, Staff did not do that.

Tr., Vol. IV, Testimony of Marta Kalleberg, at 892:21-893:21

253/ As Ms. Kalleberg testified:

> Q. Another component of your penalty proposal is I think a forward-looking credit; is that correct?
>
> A. That is correct.
>
> Q. And that's for 18 months following the Commission's decision in this matter; is that correct?
>
> A. That is correct.
>
> Q. There would be an additional monetary cost to that forward-looking credit; correct?
>
> A. Correct.
>
> Q. And you don't know what the amount of that would be; correct?
>
> A. Correct.
>
> Q. And you haven't done any projections about what that would be; correct?
>
> A. Correct.

Kalleberg frequently retreated to claiming that a measure was a "penalty" when the Staff's remedial proposals were revealed on cross-examination to be bereft of factual support, analytical reasoning, or policy justification. 254/ However, simply re-characterizing a remedial recommendation as a "penalty" does not automatically render it legally or factually supportable or appropriate to the circumstances. In light of the absence of any evidence of what actual harms they would remedy and how they would do so, the Staff's "non-monetary" penalties only pile onto the monetary fine recommended by the Staff and enlarge the disproportionality between the punishment and the conduct at issue.

RUCO also failed to present any evidence in support of its proposal that Qwest be required to provide a going-forward discount for between 3 and 5 years – significantly longer than either of the alleged discounts with Eschelon and McLeod. 255/ In addition to failing to explain why a prospective discount is somehow more appropriate than a retrospective discount, RUCO ignores entirely that the alleged discount agreements with Eschelon and McLeod were in effect for approximately 10 ½ months and 18 months, respectively. There is no factual basis for a three-year, let alone five-year, discount.

> Q. And you're proposing to exclude Eschelon and McLeod from that forward-looking credit; correct?
>
> A. Correct.
>
> Q. So in essence, what Staff is recommending is that Qwest be required to pay discriminatory rates; is that correct?
>
> A. Staff is approaching this issue as a penalty recommendation to address the harm that was done to competition in Arizona as well as to be a deterrent to Qwest from committing the same or similar types of violations of federal and state law that were committed as revealed in this investigation.

Id., at 926:19-927:20.

254/ *See, e.g., id.*, at 925:1-16; 929:13-23 and footnotes 252, 263, and 264 and accompanying text.

255/ Pre-Filed Testimony of Ben Johnson, at 34:4-16.

Third, there is no evidence that any other Arizona CLEC would have been eligible for the "discounts" in the first place. As discussed above, both the Staff and RUCO base many of their penalty proposals on making terms of the unfiled agreements available to other CLECs. If the Commission is to premise remedies upon Section 252(i), then the Commission must also undergo an analysis to determine whether the CLECs would have been eligible for the discount in the first place. 256/ As the Staff and RUCO concede, the related terms integral to the alleged discount agreements with Eschelon and McLeod were significant. 257/ In addition, the alleged agreement with McLeod was not for a flat 10% discount – instead RUCO alleges there were three tiers from 6.5% to 10%, depending on purchase volumes. 258/ Any penalty assessment cannot "strip away" these related terms. 259/

Fourth, the Staff's proposed penalty goes beyond Section 252(e)'s filing requirement by requiring discounts on intrastate access – as Ms. Kalleberg conceded:

256/ The Staff recommends a backward-looking discount over an 18-month period, the duration of the alleged discount with McLeod. Under Section 252(i), for a CLEC to be eligible to opt into the discount, it would be required to accept related terms, including the significant volume commitments. Although the alleged discount provided to Eschelon had a lower volume commitment than the McLeod commitment, it was also in place for a significantly shorter time period, 10½ months. An 18-month backward-looking discount offered either without any volume commitment or at the lower Eschelon commitment level would provide a benefit to other CLECs that was not provided to either Eschelon or McLeod.

257/ *See supra* notes 155-159, 173-176 and accompanying text (describing related terms, including volume and term commitments and the purchase of the UNE-Star platform with its accompanying bill and keep arrangement and conversion costs).

258/ Pre-Filed Testimony of W. Clay Deanhardt, at 12:10-11; Tr., Vol. III, Testimony of W. Clay Deanhardt, at 679:21-681:9. *See also* Pre-Filed Testimony of Marta Kalleberg, Table 5, at 48:1-3; Tr. Vol. IV, Testimony of Marylee Diaz Cortez, at 900:11-19.

259/ *See* Exhibit Q-14, First Report and Order, ¶ 1315 ("For instance, when an incumbent LEC and a new entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily entitle a third party to receive the same rate for a three-year commitment. Similarly, that one carrier has negotiated a volume discount on loops does not automatically entitle a third party to obtain the same rate for a smaller amount of loops.").

> Q. But we agree that part of your recommendation is something that goes beyond what Qwest was required to file under Section 252(e), which is intrastate access; correct?
>
> A. Staff is recommending that Qwest be required to provide a 10 percent discount on 251(b) or (c) services and on intrastate access. Staff is not recommending that Qwest file an agreement containing these particular terms with the Commission, that the Commission would then review and approve and parties would review under 252(i) or opt-in rights.
>
> Q. But Staff's recommendation, an intrastate access payment, goes beyond Section 252(e)'s filing requirements; correct?
>
> A. I would agree that Section 252(e) requires that Section 251(b) or (c) services that are contained -- an agreement that contains those services should be filed for Commission approval, and that yes, intrastate access is not one of those 251(b) or (c) services. 260/

Whether Eschelon or McLeod may have received a discount for intrastate wholesale purchases from Qwest does not expand the scope of opt-in rights under Sections 251 and 252. Any favorable rates on non-Section 251 services cannot cause discrimination under Section 251, and are not redressable by opt-in remedies.

4. Modifications to wholesale service quality standards

The Staff recommends certain wholesale service quality standard modifications for particular PIDs. 261/ The Staff has already agreed to, and the Commission has accepted, a QPAP that was the subject of intense negotiation among the Staff, the CLECs, and Qwest. The QPAP provides a mechanism for reviewing whether modifications to the service quality standards should occur after it has been in effect for six months. 262/ The Staff presented no

---

260/ Tr., Vol. IV, Testimony of Marta Kalleberg, at 929:24-930:18.

261/ Pre-Filed Testimony of Marta Kalleberg, at 92:9-94:7.

262/ Tr., Vol. IV, Testimony of Marta Kalleberg, at 884:19-885:5

reason for abandoning what the parties have negotiated and the Commission has already ordered. 263/

In addition, this proposal is not only an inappropriate penalty or remedy for the alleged transgressions in this case, but also lacks any factual basis. In the first place, as the Staff conceded, there is no relationship between the PIDs that the Staff seeks to modify and any of the agreements at issue:

> Q. So you're saying that these specific PID measurements were at issue in this docket?
>
> A. Not necessarily.
>
> Q. Could you explain? You said not necessarily. I'm not sure what that means.

263/ Ms. Kalleberg's testimony on cross-examination revealed the lack of foundation for this recommended penalty:

> Q. And is there any testimony to support the standards that you recommend in this docket?
>
> A. There is my testimony on these standards.
>
> Q. Does your testimony state at any point what the basis for your recommended standard is?
>
> A. Yes, I believe it does.
>
> Q. Could you direct me to that, please?
>
> A. I believe at the beginning lines of Page 93, I mention what Staff's recommendations would – what the result of Staff's recommendations would be.
>
> Q. You mentioned the result. You don't mention the basis for the standards; correct? The results would be that Qwest would pay more if it didn't meet these benchmarks; correct? Or standards?
>
> A. That's one possibility, that Qwest would provide CLECs with additional monetary payments. I think that the reasoning behind this is that we're approaching this as a possible penalty, a monetary penalty in this docket, and the rationalization behind that penalty is that we believe that not only this penalty, but our full range of monetary and nonmonetary penalties is appropriate in order to address what occurred in this docket.
>
> Q. So you're saying that these specific PID measurements were at issue in this docket?
>
> A. Not necessarily.

Id., at 881:21-882:21.

A. In reviewing all the agreements that were provided Staff, there were certain agreements that did refer to service quality improvements, and that did provide certain CLECs with service quality improvements. So to the extent that any of those agreements might contain these same particular PID measurements and to the extent that Qwest was recommending changes for those CLECs to those particular PID measurements, I think there would be a correlation.

Q. Can you tell me which agreements in this docket related to these or contain these PID measurements?

A. I don't want to give the impression that I know for a fact that these particular agreements I just described contain these exact same PID measurements. I would have to go back and review those. But at this point, I could not say for certain that they contained these exact PID measurements.

Q. Is there, anywhere in your testimony, any discussion of Qwest's ability to meet these recommended standards? I mean I know you say that you reviewed Qwest's recent results under the PIDs in Table 10, but you don't state that, what those results are.

A. That is correct.

Q. That is correct that you don't state what the results are?

A. Exactly. 264/

There is also no evidence regarding the amount in which this "nonmonetary" penalty would impact Qwest:

Q. And you called this a nonmonetary penalty; correct?

264/ Tr., Vol. IV, Testimony of Marta Kalleberg, at 882:19-894:2. RUCO's proposal to require Qwest to provide CLECs with "rebates or bill credits for each instance in which Qwest provides unacceptably poor service quality or provisioning" suffers the same shortcomings as the Staff's proposal regarding service quality standards. Like the Staff, RUCO conceded that its proposal is not based on the terms of any agreement at issue in this docket:

> Q. Dr. Johnson, none of the agreements at issue in this case required Qwest to pay CLECs for poor service quality, did they?
>
> A. Not that I recall.

Tr., Vol. III, Testimony of Ben Johnson, at 535:24-536:2. Moreover, RUCO's proposal provides no incentive for CLECs *not* to claim entitlement to bill credits, because Qwest would be required to provide such credits automatically unless it wanted to bear the high costs of arbitration. Dr. Johnson offered an example of a CLEC charged $30 for a line cutover. (*Id.*, at 586:16-23.) Even if service went smoothly, that CLEC would have no incentive not to request a refund. As Dr. Johnson stated, that cutover is a nonrecurring activity, (*id.*, at 586:20), and the cost to Qwest from arbitrating (even if it ultimately prevailed) would vastly exceed the $30 loss if it simply yielded to the demand for the automatic credit. As with the litigation fund proposed by RUCO, this penalty recommendation would encourage conduct that is inconsistent with sound policy.

A. That is correct.

Q. But this actually contains a provision for monetary penalties if the recommended standard is not met; correct?

A. I would just like to clarify that while I do put this penalty recommendation in, and what I call nonmonetary penalties, I did begin my discussion of penalties stating that it is possible that even though some of these penalties are deemed nonmonetary, they may result in increased costs, for example.

Q. Did you do any investigation as to what the amount of those increased costs or reductions in revenue would be?

A. No, I did not. 265/

Third, the Staff's justification for the adoption of these standards – Qwest's settlement proposal in the Minnesota proceeding (an offer that was part of a settlement package that ultimately was not adopted by that Commission) – further reveals the lack of foundation for this penalty recommendation. As an initial matter, the Staff's proposed PID modifications go beyond and are not consistent with Qwest's proposal in Minnesota. 266/ More to the point, however, this docket is solely about Qwest's compliance with Section 252 – not about wholesale service quality. In contrast, the Minnesota Commission for years has been hearing a docket concerning wholesale service quality, and the Minnesota commissioners requested Qwest to provide a wholesale service quality proposal that could be considered with a proposal regarding unfiled agreements to resolve both of those cases. 267/ Therefore, Qwest's proposal in Minnesota was to resolve both the wholesale service quality and the 252(e) dockets. The Staff's attempt to inject service quality issues into this proceeding (and extract concessions from Qwest) is inappropriate.

265/ *Id.*, at 884:3-18.

266/ Pre-Filed Rebuttal Testimony of Larry B. Brotherson, at 30:26-27.

267/ *Id.*, at 30:27-31:6.

5. Independent monitor

The Staff accepted Qwest's proposal that Qwest obtain and pay for an independent consultant, approved by the Commission, who would conduct Section 252 compliance reviews of Qwest on a quarterly basis for the next two years. 268/ Qwest is confident that it is in compliance with Section 252 and is willing to have the Commission monitor its compliance on a going forward basis through an independent consultant.

6. Code of Conduct

Finally, the Staff recommends that Qwest develop a Code of Conduct "that will govern its relationship with CLECs and include prohibitions against the same (or similar) anti-competitive actions revealed in this investigation." 269/ Qwest believes that a Code of Conduct is not necessary to ensure Qwest's future compliance with its filing obligations and, in fact, would be duplicative of changes that it has already made, its compliance with which will be verified by the independent monitor discussed above. The FCC's October 4, 2002 Order clarified the filing standard, and, as described in detail below, Qwest has taken a number of remedial actions to implement that standard. These remedial measures, along with Qwest's Corporate Code of Conduct for all of its business dealings, 270/ are more than sufficient to ensure that Qwest complies with its obligations under Sections 251 and 252.

D. The Penalties Proposed by RUCO Are Unwarranted.

RUCO also proposes four penalties, two of which (a 10% offering and payments for wholesale service quality) are similar to the Staff's recommendations and are discussed

---

268/ Pre-Filed Testimony of Marta Kalleberg, at 94:9-95:2.

269/ *Id.*, at 95:4-18.

270/ *See* Exhibit LBB-32.

above. The remaining two proposals by RUCO – regarding a litigation fund and broadband deployment – lack any foundation either in fact or in sound policy considerations.

1. Litigation Fund

RUCO's penalty proposal included the formation of a "2-part fund designed to facilitate arbitrations...and to help the Commission in policing the 1996 Telecom Act and facilitating the transition to effective competition." 271/ As with many of the Staff's and RUCO's other penalty proposals, there is no logical connection between RUCO's proposed litigation fund and any of the allegations in this proceeding. Neither RUCO nor the Staff alleged that any CLEC received funds to pursue litigation against Qwest or presented evidence suggesting that anything of the sort occurred. Moreover, as Mr. Shooshan testified, such a fund encourages litigation 272/ (contrary to Arizona's public policy encouraging private resolution of disputes 273/) and is contrary to the purpose of the Act:

> Dr. Johnson's "2-part fund" is obviously geared to creating a litigation fund on which RUCO and even private parties could draw to litigate issues before the Commission. Given the availability of a sizable fund, these parties will have every incentive to litigate. On the other hand, the goal of the Act, as I have stated previously, is to reduce reliance on regulation and litigation and encourage private parties to negotiate in good faith on matters relating to interconnection and unbundling. If the Commission is successful in creating an environment that facilitates such negotiations (which apparently took place in reaching the agreements at issue in this proceeding), it will not need a large litigation fund—or even additional ALJs. 274/

271/ Pre-Filed Testimony of Ben Johnson, at 22: 10-13.

272/ Tr., Vol. II, Testimony of Harry M. Shooshan, at 429:6-12.

273/ *See, e.g., United Bank of Arizona v. Sun Valley Door & Supply, Inc.*, 149 Ariz. 64, 68, 716 P.2d 433, 437 (Ariz. Ct. App. 1986) ("Public policy favors settlement."); *Speed Shore Corp. v. Denda*, 605 F.2d 469, 473, citing Williams v. First National Bank, 216 U.S. 582 (1910) ("It is well recognized that settlement agreements are judicially favored as a matter of sound public policy."); *Shell Oil Company v. Christie*, 125 Ariz. 38, 39, 607 P.2d 21, 22 (Ariz. Ct. App. 1979) ("settlements of litigation are favored").

274/ Pre-Filed Testimony of Harry M. Shooshan, at 23:17-24:6.

RUCO's penalty fund recommendation also is duplicative of remedies that already exist as a result of Qwest's 271 process. RUCO suggests that the first portion of its proposed fund be used to support Commission efforts to monitor "competition conditions" and to investigate and resolve "issues related to the 1996 Telecom Act and the transition to competition including ILEC-CLEC disputes." However, Qwest has already submitted and the Commission has already approved a lengthy Performance Assurance Plan ("PAP") as part of its 271 application that will provide for Tier II payments that are to be used to offset the Commission's cost associated with: (1) administering the PAP, including long term PID administration, (2) monitoring post-entry compliance, (3) dispute resolution, (4) auditing costs and (5) assessing proposals in any state or federal service quality proceeding. 275/ Thus, the Tier II payments under the PAP already fulfill the function envisioned by RUCO for the first part of its fund.

In addition, the PAP contains extensive provisions for CLECs, including monetary penalties against Qwest, if Qwest does not meet the stated standards for service quality. The PAP accomplishes RUCO's goals of ensuring wholesale service quality compliance by Qwest and providing means for CLECs to recover if Qwest is out of compliance. Moreover, nothing suggests that parties have been or will be unable to bring complaints and grievances against Qwest to the Commission for 271 violations. Qwest's PAP is an already added protection measure to the complaint process already in place at the Commission.

2. Broadband Deployment

Finally, RUCO proposes that "Qwest be required to deploy fiber optic cable and broadband-capable network facilities (e.g., DSLAMs) closer to its customers than might

275/ *See* Qwest's June 12, 2002 Notice of Filing Revised PAP.

otherwise be accomplished given normal market forces." 276/ As with many of the other penalties proposed by the Staff and RUCO, this suggestion bears no relation to any alleged harm in this case – as RUCO concedes:

> Q. There's no allegation in this case that Qwest's failure to file any of the agreements that are actually at issue here harm the expansion of broadband deployment in Arizona or anywhere else; correct?
>
> A. I have not made any such allegation. ... 277/

Moreover, RUCO's estimation of the cost to Qwest of implementing its proposed broadband penalty was based on pure speculation 278/ and proved to be far off the mark. 279/ In fact, Ms. Lucero, a Vice President in Qwest's Local Network Organization, testified that

---

276/ Pre-Filed Testimony of Ben Johnson, at 34:20-22.

277/ Tr., Vol. III, Testimony of Ben Johnson, at 536:7-11.

278/ Dr. Johnson admitted to not having investigated how many of Qwest's central offices are currently equipped with fiber or the impact of RUCO's recommendation on Qwest's current budget:

> Q. Do you know how many, currently how many central offices are equipped with fiber?
>
> A. I have not researched that specifically. I would assume it's less than 100 percent, but I would assume it's a large number, and I don't know.
>
> Q. Do you know what the impact of your recommendation is on Qwest's current budget? Do you know what they're currently planning versus what they would have to speed up?
>
> A. They are spending a considerable amount on upgrading their network and employing fiber. By far the more important of the two components is the acceleration of fiber. And I would assume, perhaps wrongly, but I would assume that if this was an unreasonably aggressive target, they would have told us that in their rebuttal and they would have pointed out how costly it was. I might have changed my position.
>
> But that's a long way of saying no, I haven't specifically checked to see the pace they're at. And certainly, there would be some flexibility on RUCO's part to spread this timely out another year or two if it turned out to be unreasonable. I don't believe it is, but I have not investigated it in detail.

Tr., Vol. III, Testimony of Ben Johnson, at 570:16-571:14.

279/ This is not surprising in light of the complete absence of any indication in Dr. Johnson's resume that he is qualified to offer opinions regarding broadband deployment.

implementing RUCO's broadband proposal would be significantly more complex than RUCO supposed, 280/ and would cost Qwest approximately $270 to $280 million 281/ -- an investment that Qwest would not possibly recover. 282/

E. Qwest's Corrective Actions Demonstrate Its Commitment to Regulatory Compliance.

Qwest has implemented a number of remedial actions to formalize its internal controls and provide assurance to the Commission that it is currently in compliance with its filing obligations and will remain in compliance. For one, at a time when the applicable filing standard was subject to many different interpretations and proposals, Qwest voluntarily announced and implemented a standard that Qwest understood accommodated most of the concerns stated by various state agencies in Qwest's region. On May 10, Steve Davis, Qwest's Senior Vice President for Policy and Law, sent a letter to the Arizona Commission, in addition to Qwest's other in-region state commissions, in which Qwest committed to "file all contracts, agreements or letters of understanding between Qwest Corporation and CLECs that create obligations to meet the requirements of Section 251(b) or (c) on a going forward basis." 283/ Qwest has acted in accordance with that commitment and has been applying that standard broadly to encompass all new contractual matters except settlements of historical disputes, order forms and form contracts, and agreements related to bankruptcy matters. Qwest is confident that all new contracts entered into with a CLEC since May 2002 that meet this standard have been filed with the respective state commissions. Furthermore, because this company policy

---

280/ Tr., Vol, IV, Testimony of Kathleen Lucero, at 738:25-740:21.

281/ *Id.*, at 738:2-11, 743:17-20.

282/ *Id.*, at 741:5-743:6.

283/ Exhibit LBB-25; Pre-Filed Direct Testimony of Larry B. Brotherson, at 42:4-9.

substantively parallels the new standard and exceptions announced in the recent FCC Order, Qwest has been in compliance with what eventually became the FCC standard since May 2002. 284/

Second, in addition to adopting the filing standard for all wholesale contracts in May, Qwest instituted an internal review process to ensure compliance with that standard and Qwest's Section 252 obligations. Under the new review process, Qwest has created a committee, composed of a lawyer within the state regulatory organization, a policy person from Public Policy knowledgeable about wholesale matters, a lawyer from Wholesale/Commercial Law, an employee from Network Regulatory, an employee from Wholesale, and an employee from Wholesale Service Delivery, to review wholesale settlement contracts. The committee meets regularly once a week, as well as on an as-needed basis, and it is now a permanent part of Qwest's structure. The committee has reviewed all wholesale settlement contracts into which Qwest has entered since the committee's inception. Any provision that contains forward-looking terms pertaining to Section 251(b) or (c) services has been put into an interconnection agreement amendment and filed with the state commissions. 285/

Third, in September Qwest reviewed all previously unfiled contracts with CLECs in Arizona and filed all currently effective provisions insofar as those provisions involved ongoing obligations related to Section 251(b) or (c). Qwest filed all relevant agreements for approval pursuant to Section 252 with the Arizona Commission on September 9, 2002. Specifically, Qwest asked the Commission to approve the agreements such that, to the extent any active provisions of such agreements relate to Section 251(b) or (c), they are formally available

---

284/ Pre-Filed Direct Testimony of Larry B. Brotherson, at 42:11-20.

285/ *Id.*, at 42:26-43:11.

to other CLECs under Section 252(i). 286/ Because the standard used by Qwest encompasses the definition of "interconnection agreement" recently articulated in the FCC Order, all Qwest agreements with CLECs meeting the FCC's standard either have been submitted to the Commission for approval pursuant to Section 252 or have been terminated or superseded. Qwest is also willing to file those form agreements that are similar to the ICNAM agreement and that were provided to the Staff and Commission as part of Qwest's August 29, 2002 Comments in Response to Supplemental Staff Report and Recommendation. 287/

Fourth, in addition to filing the agreements, Qwest posted them on its wholesale website and indicated that it would permit CLECs to request the currently effective provisions under opt-in policies applicable under Section 252(i) pending formal Commission action approving the agreements. 288/

Fifth, as a remedial measure and in response to allegations of discrimination that some CLECs were receiving services that other CLECs were not, Qwest terminated several of the agreements at issue in this proceeding. In particular, Qwest and Eschelon cancelled several of their agreements in a settlement agreement executed in March 2002. In addition, Qwest and McLeod cancelled their October 26, 2000 Purchase Agreements and any amendments to those agreements on September 16, 2002. 289/

Finally, Qwest also implemented personnel and departmental changes that further ensure that Qwest will satisfy its filing obligations in the future. In particular, Qwest

---

286/ *Id.*, at 42:12-19.

287/ *See supra* notes 51 & 52 and accompanying text.

288/ Pre-Filed Direct Testimony of Larry B. Brotherson, at 43:20-23.

289/ *Id.*, at 44:21-27.

restructured its Wholesale Business Development department and shifted that department's responsibilities elsewhere, including Wholesale Service Delivery. 290/

Qwest's prompt and comprehensive response to the allegations raised in this proceeding demonstrates Qwest's commitment to compliance with its obligations under the Act and obviates the need for many of the penalties proposed by the Staff and RUCO.

VII. CONCLUSION

As demonstrated above, the evidence presented by the Staff and RUCO cannot legally support a Commission decision against Qwest, particularly a decision adopting the extreme penalties that they propose. Speculative testimony by hired experts is insufficient to refute the extensive evidence presented by Qwest that its comprehensive remedial measures have brought Qwest into current compliance with its filing obligations; that Arizona CLECs did not suffer discrimination; and that the Staff's and RUCO's penalty proposals lack any foundation in the facts, the law, or sound public policy. In light of the Staff's and RUCO's failure to present any evidence of actual harm and the fact that no filing standard had been articulated by a court or state commission at the time Qwest made the filing decisions at issue, Qwest should not be penalized for reaching its own reasonable conclusions about which negotiated agreements must be filed and approved before they take effect.

For the foregoing reasons, Qwest asks that the Court and Commission deny the Staff's and RUCO's requests for penalties, find that Qwest is currently in compliance with Section 252, and further find that Arizona CLECs did not suffer discrimination as a result of Qwest's previous failure to file certain agreements.

290/ *Id.*, at 44:6-19.

DATED this 1st day of May 2003.

FENNEMORE CRAIG, P.C.

By

Timothy Berg
Theresa Dwyer
Darcy Renfro
3003 N. Central Ave, Suite 2600
Phoenix, Arizona 85012
(602) 916-5421

HOGAN & HARTSON L.L.P.

Peter S. Spivack
Cynthia Mitchell
Douglas R. M. Nazarian
Martha Russo

555 13th Street, N.W.
Washington, DC 20004-1109
Phone: (202) 637-5600
Fax: (202) 637-5910

Attorneys for Qwest Corporation

ORIGINAL and 15 copies of the
foregoing hand-delivered for
filing this 1st day of May 2003 to:

Docket Control
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing hand-delivered
this 1st day of May, 2003 to:

Lyn Farmer, Chief Administrative Law Judge
Jane Rodda, Administrative Law Judge
ARIZONA CORPORATION COMMISSION
Legal Division
1200 West Washington
Phoenix, Arizona 85007

Chris Kempley, Chief Counsel
Maureen Scott, Counsel
Michelle Finical
ARIZONA CORPORATION COMMISSION
Legal Division
1200 West Washington
Phoenix, Arizona 85007

Ernest G. Johnson
Director, Utilities Division
ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing mailed
This 1st day of May, 2003 to:

Eric S. Heath
SPRINT COMMUNICATIONS CO.
100 Spear Street, Suite 930
San Francisco, CA 94105

Thomas Campbell
LEWIS & ROCA
40 N. Central Avenue
Phoenix, AZ 85004

Joan S. Burke
OSBORN MALEDON, P.A.
2929 N. Central Ave., 21st Floor
PO Box 36379
Phoenix, AZ 85067-6379

Thomas F. Dixon
WORLDCOM, INC.
707 N. 17th Street #3900
Denver, CO 80202

Scott S. Wakefield
RUCO
1110 W. Washington, Suite 220
Phoenix, AZ 85007

Michael M. Grant
Todd C. Wiley
GALLAGHER & KENNEDY
2575 E. Camelback Road
Phoenix, AZ 85016-9225

Raymond Heyman
Michael Patten
ROSHKA, HEYMAN & DEWULF
400 E. Van Buren, Ste. 900
Phoenix, AZ 85004-3906

Mark DiNuzio
COX COMMUNICATIONS
20402 North 29th Avenue
Phoenix, AZ 85027-3148

Daniel Waggoner
Greg Kopta
Mary Steele
DAVIS, WRIGHT & TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101

Traci Grundon
Mark P. Trinchero
DAVIS, WRIGHT & TREMAINE
1300 S.W. Fifth Avenue
Portland, OR 97201

Richard S. Wolters
AT&T LAW DEPARTMENT
1875 Lawrence Street, #1575
Denver, CO 80202

David Kaufman
E.SPIRE COMMUNICATIONS, INC.
343 W. Manhattan Street
Santa Fe, NM 87501

Diane Bacon, Legislative Director
COMMUNICATIONS WORKERS OF AMERICA
5818 N. 7th St., Ste. 206
Phoenix, AZ 85014-5811

Philip A. Doherty
545 S. Prospect Street, Ste. 22
Burlington, VT 05401

W. Hagood Bellinger
4969 Village Terrace Drive
Dunwoody, GA 30338

Joyce Hundley
U.S. DEPARTMENT OF JUSTICE
Antitrust Division
1401 H Street N.W. #8000
Washington, DC 20530

Andrew O. Isar
TELECOMMUNICATIONS RESELLERS ASSOC.
4312 92nd Avenue, NW
Gig Harbor, WA 98335

Jeffrey W. Crockett
Thomas L. Mumaw
SNELL & WILMER
One Arizona Center
Phoenix, AZ 85004-0001

Charles Kallenbach
AMERICAN COMMUNICATIONS SVCS, INC.
131 National Business Parkway
Annapolis Junction, MD 20701

Mike Allentoff
GLOBAL CROSSING SERVICES, INC.
1080 Pittsford Victor Road
Pittsford, NY 14534

Gena Doyscher
GLOBAL CROSSING SERVICES, INC.
101 N. Wacker Drive, #220
Chicago, IL 60606-7301

Andrea Harris, Senior Manager
ALLEGIANCE TELECOM INC OF ARIZONA
2101 Webster, Ste. 1580
Oakland, CA 94612

Kimberly M. Kirby
DAVIS DIXON KIRBY LLP
19200 Von Karman Avenue
Suite 600
Irvine, CA 82612

Gary L. Lane, Esq.
6902 East 1st Street, Suite 201
Scottsdale, AZ 85251

Kevin Chapman
SBC TELECOM, INC.
300 Convent Street, Room 13-Q-40
San Antonio, TX 78205

Richard Sampson
Z-TEL COMMUNICATIONS, INC.
601 S. Harbour Island, Ste. 220
Tampa, FL 33602

Megan Doberneck
COVAD COMMUNICATIONS COMPANY
7901 Lowry Boulevard
Denver, CO 80230

Richard P. Kolb
Vice President of Regulatory Affairs
ONE POINT COMMUNICATIONS
Two Conway Park
150 Field Drive, Ste. 300
Lake Forest, IL 60045

Steven J. Duffy
RIDGE & ISAACSON, P.C.
3101 North Central Ave., Ste. 1090
Phoenix, AZ 85012

Karen Clauson
Dennis D. Ahlers
Ray Smith
ESCHELON TELECOM
730 Second Avenue South, Ste. 1200
Minneapolis, MN 55402

Rodney Joyce
SHOOK, HARDY & BACON, LLP
Hamilton Square
600 14th Street, NW, Ste. 800
Washington, DC 20005-2004

Dennis Doyle
ARCH COMMUNICATIONS GROUP
1800 West Park Drive, Suite 250
Westborough, MA 01581-3912

David Conn
Law Group
MCLEODUSA INCORPORATED
6400 C. Street SW
PO Box 3177
Cedar Rapids, IA 52406-3177

Diane Peters
GLOBAL CROSSING
180 South Clinton Avenue
Rochester, NY 14646

Gerry Morrison
MAP MOBILE COMMUNICATIONS, INC.
840 Greenbrier Circle
Chesapeake, VA 23320

Frederick Joyce
ALSTON & BIRD, LLP
601 Pennsylvania Avenue NW
Washington, DC 20004-2601

METROCALL, INC.
6677 Richmond Highway
Alexandria, VA 22306

John E. Munger
MUNGER CHADWICK
National Bank Plaza
333 North Wilmot, #300
Tucson, AZ 85711

Brian Thomas
TIME WARNER TELECOM, INC.
520 SW 6th Avenue, Suite 300
Portland, OR 97204

Debroah Harwood
INTEGRA TELECOM OF ARIZONA, INC.
19545 NW Von Newmann Drive, Suite 200
Beaverton, OR 97006

Paul Masters
ERNEST COMMUNICATIONS INC.
6475 Jimmy Carter Blvd., Ste. 300
Norcross, GA 30071

Bob McCoy
WILLIAMS LOCAL NETWORK, INC.
4100 One Williams Center
Tulsa, OK 74172

Mark Dioguardi
TIFFANY AND BOSCO, P.A.
1850 North Central, Suite 500
Phoenix, AZ 85004

Nigel Bates
ELECTRIC LIGHTWAVE, INC.
4400 NE 77th Avenue
Vancouver, WA 98862

Richard M. Rindler
Morton J. Posner
SWIDER & BERLIN
3000 K. Street NW, Ste. 300
Washington, DC 20007

Douglas Hsiao
Jim Scheltema
BLUMENFELD & COHEN
1625 Massachusetts Ave. NW, Ste. 300
Washington, DC 20036

Mark N. Rogers
EXCELL AGENT SERVICES, LLC
P.O. Box 52092
Phoenix, AZ 85072-2092

Rex Knowles
XO
111 E. Broadway, Suite 100
Salt Lake City, Utah 84111

Penny Bewick
New Edge Networks, Inc.
PO Box 5159
Vancouver, WA 98668

Comparison of Agreements Identified by the Staff as Subject to Section 252 in the Staff's Supplemental Report and in the Testimony of Marta Kalleberg

Agreements Included in Staff's Table 1 (Agreements That Should Have Been Filed for Commission Approval) that Were Not Identified in Exhibit G to the Staff's Supplemental Report

1.	Eschelon	Trial Agreement with Qwest dated 7/21/00
2.	Eschelon	Confidential Purchase Agreement with Qwest dated 11/15/00
3.	Eschelon	Escalation Procedures Letter from Qwest dated 11/15/00
4.	Eschelon	Feature Letter from Qwest dated 11/15/00
5.	Eschelon	Status of Switched Access Minute Reporting Letter from Qwest dated 7/3/01
6.	McLeod	Confidential Billing Settlement Agreement with Qwest dated 9/29/00
7.	McLeod	Volume Discount Agreement with Qwest dated on or around 10/26/00
8.	McLeod	Purchase Agreement with Qwest Communications Corp. and its subsidiaries ("Qwest") (McLeod buys from Qwest) dated 10/26/00 ("G" only refers to "Purchase Agreement Dated 10/26/00, and Related Oral Agreement")
9.	McLeod	Purchase Agreement with Qwest Communications Corp. and its subsidiaries ("Qwest") (Qwest buys from McLeod) dated 10/26/00 ("G" only refers to "Purchase Agreement Dated 10/26/00, and Related Oral Agreement")
10.	Electric Lightwave	Confidential Settlement Agreement and Release with US WEST dated 6/16/99
11.	Electric Lightwave	Binding Letter Agreement with Qwest dated 7/19/01
12.	Allegiance	Directory Assistance Agreement with US WEST dated 6/29/00 (Ex. G has Directory Assistance Agreement dated 12/20/99)
13.	Paging Network	Confidential Billing Settlement Agreement with Qwest dated 4/23/01
14.	SBC & NAS	Confidential Consent to Assignment & Collocation Change of Responsibility Agreement with Qwest dated 6/1/01

Agreements Included in Staff's Table 4 (Agreements Filed for Commission Approval in September 2002) that Were Not Identified in Exhibit G to the Staff's Supplemental Report

1.	Ernest	Confidential Settlement Agreement and Release with Qwest dated 9/17/01
2.	McLeod	Confidential Billing Settlement Agreement with US WEST dated 4/28/00
3.	McLeod	Escalation Procedures Letter from Qwest Communications International ("QCI") dated 10/26/00
4.	SBC	Proposed Settlement Terms Letter from US WEST dated 6/1/00
5.	WorldCom	Business Escalation Agreement with Qwest Services Corp. ("QSC") dated 6/29/01
6.	WorldCom	Confidential Billing Settlement Agreement (Non-COBRA) with Qwest

ATTACHMENT A

		dated 6/29/01
7.	XO (Subs)	Confidential Billing Settlement Agreement with Qwest dated 12/31/01

Agreements on Exhibit G to the Staff's Supplemental Report and Not on Tables 1 or 4

1)	Eschelon	Definitive Settlement Agreement letter dated 2/22/02
2)	ELI	Amendment No. Three to Confidential Settlement Agreement and Release with Qwest dated 4/26/02
3)	Covad	Settlement Agreement (Facilities Decommissioning), 2002
4)	Allegiance	Confidential Billing Settlement Agreement with Qwest dated 12/24/01
5)	Allegiance	Directory Assistance Agreement with US WEST dated 12/20/99 (Table 1 has Directory Assistance Agreement dated 6/29/00)
6)	Allegiance	Operator Services Agreement with Qwest dated 6/10/02

PHX/1416301.1/67817.295

ATTACHMENT A