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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

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CHAIRMAN
WILLIAM A. MUNDELL
COMMISSIONER
JIM IRVIN
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Arizona Corporation Commission

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

DOCKET NO. RT-00000F-02-0271

STAFF'S NOTICE OF FILING
INITIAL POST-HEARING BRIEF

The Staff of the Arizona Corporation Commission ("Staff") hereby files its Initial Post-Hearing Brief, in the above-referenced matter.

RESPECTFULLY SUBMITTED this 1st day of May, 2003.

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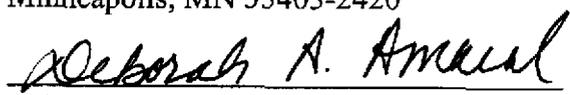
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BEFORE THE ARIZONA CORPORATION COMMISSION

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Chairman

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MIKE GLEASON

Commissioner

DOCKET NO. RT-00000F-02-0271

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

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STAFF'S INITIAL POST-HEARING BRIEF

13

PUBLIC VERSION

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I. Introduction

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This proceeding was commenced to investigate Qwest Corporation's ("Qwest") compliance with Section 252(e) of the Telecommunications Act of 1996 ("1996 Act") which requires that all voluntarily negotiated interconnection agreements entered into between an incumbent local exchange carrier ("ILEC"), such as Qwest, and a Competitive Local Exchange Carrier ("CLEC") be filed with the State Commission for approval. This requirement is critical in achieving the nondiscrimination objectives of the Act, a fundamental prerequisite to effective competition in the local market. Substantial evidence was presented which shows that Qwest violated numerous Federal and State laws in not filing 42 of the agreements at issue in this proceeding with the Commission for approval as required.

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Substantial evidence also was presented which shows that Qwest acted intentionally and in willful violation of State and Federal law in not filing its agreements with two of its largest wholesale providers, Eschelon and McLeod, with the Commission for approval. Qwest intentionally chose not to file these agreements for several reasons including that: (1) it did not want to make the favorable terms of these agreements available to other carriers under 47 U.S.C. 252(i) as it would have been

1 required to do, and, (2) through the favorable terms provided it sought to gain the CLECs' oral or
2 written agreement not to oppose its Section 271 application.

3 Because Qwest acted in contempt of State and Federal laws, Staff is proposing that Qwest be
4 subject to significant monetary fines under A.R.S. Section 40-424 and other non-monetary penalties.

5 **II. Background**

6 **A. Procedural History**

7 This proceeding was commenced to examine Qwest's compliance with Section 252(e) of the
8 Telecommunications Act of 1996. 47 U.S.C. Section 252(e) requires an Incumbent Local Exchange
9 Carrier ("ILEC") such as Qwest to file all interconnection agreements between it and CLECs with the
10 Commission for approval.

11 The issue of Qwest's compliance with this important provision of the Act first came to light
12 when the Minnesota Department of Commerce filed a complaint against Qwest alleging that it had
13 not filed certain agreements with the Minnesota Public Utilities Commission for approval under
14 Section 252(e) of the 1996 Act. At then Chairman Mundell's request, Qwest was directed to submit
15 any and all unfiled Arizona agreements to the Commission for review.

16 Shortly thereafter, AT&T Communications of the Mountain States Inc. ("AT&T") filed a
17 motion in the Section 271 proceeding, asking that the Commission examine the issue of Qwest's
18 compliance with Section 252(e) of the 1996 Act in the context of Qwest's pending Section 271
19 application. Since Qwest's compliance with Section 252(e) raised issues which would be better
20 addressed through an enforcement docket, Staff requested that these issues be addressed in a separate
21 proceeding.

22 By ruling of the Commission dated April 18, 2002, it was determined that a separate docket
23 would be used to examine Qwest's compliance with Section 252(e). Qwest filed copies of
24 approximately 90 unfiled agreements with the Commission for review by the Staff. All parties in the
25 Commission's Section 271 proceeding were automatically made parties to this docket. A procedural
26 schedule was established which allowed all parties an opportunity to comment on the agreements and
27 whether or not they were subject to the filing requirement of Section 252(e) of the 1996 Act. During
28 this initial phase of the proceeding, extensive comments were filed by Qwest and AT&T urging a

1 narrow versus a broad reading, respectively, of the relevant provisions of federal law. Limited
2 comments were filed by the Residential Utilities Consumers Office ("RUCO") and Time Warner
3 ("Time Warner"). No other parties filed comments on the issue; however WorldCom ("WCom")
4 subsequently participated in the Procedural Conference held to discuss the parties' comments.

5 Based upon the parties' comments and its own review of the agreements, Staff issued its
6 Report and Recommendation to the Commission on June 7, 2002. In its Report, Staff identified
7 approximately 25 agreements that it believed should have been filed by Qwest under Section 252(e)
8 of the 1996 Act. Because there was nothing in the record at that time indicating that Qwest's conduct
9 was intentional and willful, Staff recommended that the Commission assess penalties under A.R.S.
10 Section 40-425 in the amount of \$104,000, based on \$3,000.00 per unfilled agreement, and \$5,000.00
11 per agreement for the non-opposition clauses.

12 At the Procedural Conference held on June 19, 2002, Commissioner Spitzer directed Staff to
13 *conduct additional discovery of all CLECs operating in Arizona to determine the number of unfilled*
14 *agreements and whether the unfilled agreements had tainted the 271 record.* RUCO also raised the
15 issue of oral agreements between Qwest and McLeod. In addition, RUCO opined that the
16 Commission should examine the damage to competition and to other CLECs in the State.

17 As a result of the Procedural Conference, Staff did extensive discovery of all certificated
18 CLECs in both the Section 271 proceeding and the Section 252(e) proceeding. Commissioners
19 Spitzer and Irvin also sent letters to parties in the Dockets asking for comment on the impact of the
20 unfilled agreements which contained non-participation clauses on the record of the Section 271
21 proceeding. Staff also sent a Notice to all parties in the Section 271 proceeding asking for comment
22 on the effect of the non-participation clauses on the Section 271 record. In response to Staff's Notice
23 and the Commissioners' Requests for comment, comments were submitted by AT&T, WCom, Time
24 Warner, Eschelon, RUCO and Qwest.

25 On October 4, 2002, Staff issued a Supplemental Report and Recommendation concerning
26 Qwest Corporation's Compliance with Section 252(e). In its Report, based upon the additional
27 discovery conducted, Staff agreed that a hearing should be held to determine whether Qwest acted in
28 contempt of Commission rules in not filing certain agreements with McLeod and Eschelon with the

1 Commission for approval. Staff recommended bifurcation of non-Section 252(e) related issues such
2 that only the Section 252(e) compliance matters would be addressed in the enforcement docket as
3 originally intended. The issue of non-participation in the Section 271 proceeding and its effect, as
4 well as appropriate penalties for Qwest for interference with the Section 271 process, should be
5 addressed in a proposed Section 271 sub-docket. Staff also recommended that the proposed sub-
6 docket be concluded before the ACC made its recommendation to the FCC in Qwest's pending 271
7 application.

8 Through Procedural Order dated November 7, 2002, the 252(e) compliance issues were set for
9 a hearing. Initial testimony was filed by Qwest on December 2, 2002. RUCO filed testimony on
10 January 21, 2003; and Staff filed its testimony on February 21, 2003. Qwest filed rebuttal testimony
11 on March 7, 2003. The Hearing was held on March 17-20, 2003. Staff hereby files its Initial Post-
12 Hearing Brief.

13 **B. Telecommunications Act of 1996**

14 The 1996 Act was designed to move the final vestiges of the monopolized
15 telecommunications market, i.e., the local market, to a competitive one, and in so doing "to promote
16 competition and reduce regulation in order to secure lower prices and higher quality services for
17 American telecommunications consumers and encourage the rapid deployment of new
18 telecommunication technologies." Goldwasser v. Ameritech Corporation, 222 F.3d 390, 393 (7th Cir.
19 2000) quoting Preamble to the Act. Congress, realizing that this move and its benefits would take
20 time and oversight, "entrusted the FCC and the state public utility commissions with the task of
21 overseeing the transition from the former regulatory regime to the Promised Land where competition
22 reigns, consumers have a wide array of choice, and prices are low." *Id.* At 391. Two indispensable
23 parts of this planned move are the State commission's review of all agreements entered into between
24 ILECs and CLECs to ensure the agreements do not discriminate and are in the public interest and the
25 ability of the CLECs to have available to them the same interconnection, service, and network
26 elements made available to any other CLEC at the same price.

27 47 U.S.C. Section 251 sets out obligations applicable to all telecommunications carriers and
28 all local exchange carriers imposing interconnection obligations and other duties designed to foster

1 the development of a competitive, seamless nationwide telecommunication network. Section 251
2 imposes more stringent requirements on ILECs, such as Qwest, to open their local markets including
3 obligations relating to interconnection, the provision of unbundled access to their networks, resale
4 obligations and collocation obligations.

5 47 U.S.C. Section 252 of the Federal Act sets out a framework for negotiation and, if
6 necessary, arbitration of interconnection agreements. Section 252 encourages the parties to reach
7 agreement first through private negotiation; failing that the Act sets up a scheme for compulsory
8 arbitration by the State commission. 47 U.S.C. Section 252(a)(1) provides that upon receiving a
9 request for interconnection, services or network elements pursuant to Section 251, an ILEC may
10 negotiate and enter into a binding agreement with the requesting telecommunications carrier or
11 carriers without regard to the standards set forth in subsections (b) and (c) of Section 251. The
12 agreement is to include a detailed schedule of itemized charges for interconnection and each service
13 or network element included in the agreement.

14 47 U.S.C. Section 252(e) provides that any interconnection agreement adopted by negotiation
15 or arbitration shall be submitted to the State commission for approval. A State commission to which
16 an agreement is submitted is required to approve or reject the agreement, with written findings as to
17 any deficiencies. A State commission may only reject a negotiated agreement if:

- 18 (i) the agreement (or portion) thereof discriminates against a telecommunications
19 carrier not a party to the agreement; or
- 20 (ii) the implementation of such agreement or portion thereof is not consistent with
21 the public interest, convenience, and necessity.

22 A State commission may only reject an arbitrated agreement if it finds that the agreement
23 does not meet the requirements of Section 251, including the regulations prescribed by the
24 Commission pursuant to Section 251, or the standards set forth in subsection (d) of Section 252. If
25 the State commission does not act on the filing of a negotiated agreement within 90 days, the
26 agreement is deemed approved. 47 U.S.C. Section 252(e)(4). The State commission has 30 days to
27 approve an arbitrated agreement or it is deemed approved under this same provision of the Federal
28 Act.

1 Pursuant to 47 U.S.C. Section 252(h), the State commission is required to "make a copy of
2 each agreement approved under subsection (e) ...available for public inspection and copying within
3 10 days after the agreement or statement is approved. Other CLECs are permitted to opt-into
4 approved agreements, or portions thereof, under 47 U.S.C. Section 252(i). ("A local exchange carrier
5 shall make available any interconnection, service, or network element provided under an agreement
6 approved under this section to which it is a party to any other requesting telecommunications carrier
7 upon the same terms and conditions as those provided in the agreement.")

8 Through the various provisions of Section 252, Congress intended not only that State
9 commissions safeguard against discriminatory agreements and agreements that are not in the public
10 interest, but that the States become a sort of repository for these contracts from which other CLECs
11 can pick and choose those agreements and terms most favorable to their individual situations from
12 those agreements previously entered into by ILECs and CLECs already approved by the State
13 commission. This very important function performed by State commissions, might be called a
14 "collect and publicize" function which acts to ensure transparency of transactions between the ILEC
15 and the various CLECs so that all carriers can be assured that they are obtaining nondiscriminatory
16 treatment by the ILEC.

17 The importance of the "collect and publicize" function performed by State commissions was
18 underscored by the FCC, in considering whether agreements negotiated prior to the Act were required
19 to be filed, in the following passage:

20 "State commissions should have the opportunity to review all agreements, including
21 those that were negotiated before the new law was enacted, to ensure that such
22 agreements do not discriminate... and are not contrary to the public interest...
23 Requiring all contracts to be filed also limits an incumbent LEC's ability to
24 discriminate among carriers, for at least two reasons. First, requiring public filing of
25 agreements enables carriers to have information about rates, terms, and conditions that
26 an incumbent LEC makes available to others. Second, any interconnection, service or
27 network element provided under an agreement approved by the state commission
28 under section 252 must be made available to any other requesting telecommunications
carrier upon the same terms and conditions, in accordance with section 252(i).
Conversely, excluding certain agreements from public disclosure could have
anticompetitive consequences. For example, such contracts could include agreements
not to compete."¹

¹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499, para. 167 (rel. 1996)("Local Competition Order").

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2 In summary, the purpose of the filing requirement is threefold: 1) to prevent discrimination;
3 2) to ensure agreements are in the public interest; and 3) to allow CLECs to "pick and choose"
4 agreements and terms.

5 **C. Federal Communications Commission Rules and Orders**

6 On April 23, 2002, Qwest filed a petition for a declaratory ruling on the scope of the
7 mandatory filing requirement set forth in Sections 252(a)(1) and 252(e) of the Act. In its petition,
8 Qwest sought a ruling from the FCC on the types of negotiated contractual arrangements between
9 ILECs and CLECs that should be subject to the filing requirements of those sections.² The FCC
10 released its Memorandum Opinion and Order in response to the Qwest petition on October 4, 2002.³
11 Qwest's position in its FCC petition was that the following agreements should not be subject to
12 section 252(a)(1): (i) agreements defining business relationships and business-to-business
13 administrative procedures (e.g., escalation clauses, dispute resolution provisions, arrangements
14 regarding the mechanics of provisioning and billing, arrangements for contracts between the parties,
15 and non-binding service quality or performance standards), (ii) settlement agreements, and (iii)
16 agreements regarding matters not subject to sections 251 or 252 (e.g., interstate access services, local
17 retail services, intrastate long distance, and network elements that have been removed from the
18 national list of elements subject to mandatory unbundling).

19 The FCC granted in part and denied in part Qwest's petition and stated that any agreement
20 that creates "an ongoing obligation pertaining to resale, number portability, dialing parity, access to
21 rights-of-way, reciprocal compensation, interconnection, unbundled network elements or collocation
22 is an interconnection agreement that must be filed pursuant to section 252(a)(1)."⁴ The FCC found
23 that this standard recognizes the statutory balance between the rights of CLECs to obtain
24 interconnection terms pursuant to section 252(i) and removes unnecessary impediments to

25 _____
26 ² *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 (filed April 23,
2002)(Qwest Petition).*

27 ³ *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,
Memorandum Opinion and Order (rel. October 2002) ("FCC Declaratory Ruling)*

28 ⁴ *FCC Declaratory Ruling at para. 8.*

1 commercial relations between incumbent and CLECs.

2 The FCC discussed several of the specific classes of agreements which were the subject of
3 Qwest's petition. It found that dispute resolution and escalation provisions relating to the obligations
4 set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements, and must be
5 filed. The only exception it noted for dispute resolution and escalation provisions was when the
6 information is generally available to carriers on the ILEC's wholesale web site. See FCC MOO at p.
7 5. It also stated that inserting the term "settlement agreement" in a document does not excuse carriers
8 of their filing obligation under section 252(a) or prevent a state commission from approving or
9 rejecting the agreement as an interconnection agreement under section 252(e). *Id.* A settlement
10 agreement that contains an ongoing obligation relating to Section 251(b) or (c) must be filed under
11 section 252(a)(1). *Id.*

12 The FCC noted that the guidance it offered through its Declaratory Ruling "flows directly
13 from the statute and services to define the basic class of agreements that should be filed." FCC MOO
14 at p. 6. It stated that nothing in its declaratory ruling should preclude State enforcement actions
15 relating to these issues, including agreements that are no longer in effect. *Id.*

16 Finally, it encouraged State commissions to take action to provide further clarity to incumbent
17 LECs and requesting carriers concerning which agreements should be filed for their approval.
18 ("...states should determine in the first instance which sorts of agreements fall within the scope of the
19 statutory standard..."). *Id.* ("Based on their statutory role provided by Congress and their
20 experience to date, state commissions are well positioned to decide on a case-by-case basis whether a
21 particular agreement is required to be filed as an "interconnection agreement" and, if so, whether it
22 should be approved or rejected.") FCC Declaratory Ruling at para. 10.

23 **D. Arizona Administrative Code**

24 In not filing certain of the unfiled agreements with the Commission for approval, Qwest also
25 violated several provisions of State law. A.A.C. R14-2-1112 provides that local exchange carriers
26 must provide non-discriminatory interconnection arrangements. A.A.C. R14-2-1307 requires ILECs
27 to make essential facilities and services, such as UNEs, available to competitors pursuant to
28 negotiated agreements that must be filed with the Commission. A.A.C. R14-2-1506 states that

1 interconnection agreements are to be filed with the Commission for approval under Section 252(e)
2 within 30 calendar days of the execution date of an agreement. Finally, A.A.C. R14-2-1508 states
3 that amendments to interconnection agreements must be filed for Commission approval.

4 **III. Argument**

5 **A. Qwest Was Required to File 42 of the 96 Agreements Submitted into the Record**
6 **in this Proceeding With the Commission for Approval under Section 252(e) of the**
7 **Act.**

8 **1. Qwest Witness Brotherson Agreed that Qwest Was Required to File Many**
9 **of the Unfiled Agreements Identified by Staff under Section 252(e) of the**
10 **Act with the Commission for Approval**

11 In her testimony, Staff Witness Kalleberg identified 42 agreements out of the 96 agreements⁵
12 submitted into the record of this proceeding, as agreements that Qwest should have filed with the
13 Commission for approval under Section 252(e) of the Act. Included in this number were 14 unfiled
14 agreements pertaining to Arizona that Qwest filed with the Commission in September 2002, and
15 which were subsequently approved by the Commission, with modification, in December 2002.⁶ The
16 other 28 agreements, which Qwest has not yet filed or which are no longer in effect, were identified
17 by Ms. Kalleberg in Table 1 of her Direct Testimony.⁷ Twenty-three of the 28 agreements are no
18 longer in effect.⁸ In her testimony, Staff Witness Kalleberg goes through each of the 28 agreements
19 not filed by Qwest and identifies all of the provisions contained therein which qualify under the FCC
20 standard as an interconnection agreement.⁹

21 Qwest Witness Brotherson acknowledged in his testimony that some of these agreements
22 should have been filed with the Commission for approval.¹⁰ Of the 42 agreements identified by Staff,
23 Qwest agrees that at least 25 should have been filed with the Commission for approval.¹¹ Qwest
24 stated that its filing obligation with respect to two other agreements identified by Staff was
25 "unclear", acknowledging that there may be provisions subject to the FCC's filing standard.¹² This

26 ⁵ Joint Exhibit 1

27 ⁶ Kalleberg Direct, Ex. ST-2, pp. 19-20, See also ACC Decision No. 65475.

28 ⁷ Kalleberg Direct, Ex. ST-2, p. 15.

⁸ Kalleberg Direct, Ex. ST-2, p. 17.

⁹ Kalleberg Direct, Ex. ST-2, pp. 25-64.

¹⁰ Brotherson Direct, Ex. Q-2, LBB-1 and Supplement to LBB-1.

¹¹ See Brotherson Direct, Ex. Q-2, LBB-1 and Supplement to LBB-1; See also Kalleberg Direct, Ex. ST-2, pp. 19-30
which contains a table of the 14 unfiled agreements already filed with the Commission for approval.

¹² Brotherson Direct, Ex. Q-2, Supplement to LBB-1, Staff Exhibit Nos. 7 and 17.

1 leaves only approximately 15 agreements where there is an actual disagreement between Qwest and
2 Staff as to Qwest's filing obligation.

3
4 **2. Qwest's Objections to the Remaining Agreements Identified by Staff Should be Rejected.**

5 Qwest offered several reasons why it believes Staff's findings with respect to the remaining
6 agreements are in error. First, Qwest does not believe that certain of the core agreements with
7 Eschelon and McLeod contain ongoing obligations that pertain to Section 251(b) or (c) services.¹³
8 Second, Qwest does not believe that terminated agreements should be filed since they no longer
9 contain ongoing obligations.¹⁴ Third, Qwest argues that some of these agreements are actually
10 service order or contract forms that are used to request service, and do not need to be filed according
11 to the recent FCC Declaratory Order.¹⁵ Finally, Qwest claimed that several of the agreements
12 involved services that were not 251(b) or (c) related, and therefore, were not required to be filed with
13 the Commission for approval.¹⁶

14 **a. The Template Contracts Between Qwest and Allegiance Are Interconnection Agreements and Should be Filed Under Section 252.**

15
16 Three of these agreements are contracts between Qwest and Allegiance for Operator Services,
17 Directory Assistance and ICNAM Service. Qwest argues that since these are "form contracts",
18 Qwest is not obligated to file them with the State commission for approval. Qwest Witness
19 Brotherson relies upon language in the FCC's Declaratory Order to support Qwest's position.¹⁷ At
20 para.13 of its Memorandum Opinion and Order, the FCC stated:

21 "Qwest has also argued, in another proceeding, that order and contract forms used by
22 competitive LECs to request service do not need to be filed for state commission
23 approval because such forms only memorialize the order of a specific service, the
24 terms and conditions of which are set forth in a filed interconnection agreement.
25 [footnote omitted]. We agree with Qwest that forms completed by carriers to obtain
26 service pursuant to terms and conditions set forth in an interconnection agreement do
27 not constitute either an amendment to that interconnection agreement or a new
28 interconnection agreement that must be filed under section 252(a)(1)."

26 ¹³ Brotherson Direct, Ex. Q-2, Supplement to LLB-1.

27 ¹⁴ Brotherson Direct, Ex. Q-2, p.24.

27 ¹⁵ Brotherson Direct, Ex. Q-2, p. 34.

28 ¹⁶ Brotherson Direct, Ex. Q-2, 14-22 and p.35.

28 ¹⁷ Brotherson Direct, Ex. Q-2, LBB-1, Staff Exhibit Nos. 24, 25 and 26.

1 Staff believes that the form or template contracts at issue here should be filed for the simple
2 reason that many of the terms and conditions set forth therein are not contained in the interconnection
3 agreement. In other words, the agreements add many more specific terms and conditions with respect
4 to the services at issue. Qwest Witness Brotherson also indicated on cross-examination that Qwest
5 may vary the terms of those contracts at the request of the other contracting carrier.¹⁸ The discussion
6 in the FCC order, on the other hand, refers to form contracts for service **pursuant to terms and**
7 **conditions already set forth in** an interconnection agreement. Since these contracts contain many
8 terms and conditions that are **not** set forth in the interconnection agreement itself and since some of
9 these terms and conditions may vary for a particular carrier, Staff believes that these template
10 agreements should be filed with the Commission for approval under Section 252(e).

11 If Qwest's position is carried to its extreme, then Qwest would not be required to file
12 agreements with carriers that opted into Qwest's Statement of Generally Available Terms and
13 Conditions ("SGAT"), since Qwest's SGAT is a form of "template" agreement as well. In fact,
14 despite the fact that Qwest has put an internal committee in place to review and ensure Qwest's
15 compliance with Sections 252(a)(1) and 252(e) in the future, Qwest's primary Witness Mr.
16 Brotherson's testimony was very ambiguous as to the types of agreements that needed to be filed
17 under the FCC's Declaratory Ruling seemingly saying that a lot of agreements would not have to be
18 filed since they fell into the "form" or "available elsewhere" exceptions.¹⁹ When cross-examined on
19 this point, Staff was alarmed when Qwest Witness Brotherson stated that a member of the internal
20 committee had reviewed his testimony and signed off on it; and that, when presented with a series of
21 potential filing requirement scenarios, Witness Brotherson had considerable difficulty identifying
22 instances when the agreements should be filed with the Commission for approval.²⁰

23 The FCC Declaratory Ruling did not exempt all "form contracts" from the filing requirement.
24 Where a form contract adds additional terms and conditions to those contained in the interconnection
25 agreement, Qwest should be required to file the agreement as an amendment to its interconnection
26 agreement with the carrier.

27 ¹⁸ TR, pp. 161-164; and pp. 182-184.

28 ¹⁹ Brotherson Direct Ex. Q-2, pp. 13- 14; p. 42.

²⁰ TR, pp. 161-164; and pp. 182-184.

1
2 b. Operator Services, Directory Services and ICNAM Services are Section
3 251(b) or (c) Services and Provisions Containing Ongoing Obligations
4 Relating to These Services are Interconnection Agreements and Must be
5 Filed with the Commission for Approval.

6 Equally disturbing is Qwest's position that it is not required to file its agreements with
7 Allegiance for Operator Services and Directory Services because these are not 251(b) or (c) services.
8 Staff believes that Qwest has once again misinterpreted the Section 252 filing requirements. While
9 the FCC determined in the *UNE Remand Order*²¹ that ILECs no longer had to provide access to its
10 OS/DA as an unbundled network element, the FCC did find that "[a]ll LECs, however, must continue
11 to provide their competitors with nondiscriminatory access to their OS/DA, pursuant to section
12 251(b), as implemented by the Commission."²² The filing requirement contained in Section
13 252(a)(1) applies to both 251(b) and (c) services. Moreover, in its Declaratory Ruling, the FCC
14 recognized that Section 251(c)(1) requires incumbent LECs to negotiate in good faith, in accordance
15 with Section 252, the particular terms and conditions of agreements to implement their duties set
16 forth in Sections 251(b) and (c).²³ Further, if one closely examines the FCC's standard, it refers to
17 an agreement that creates an ongoing obligation with regard to *inter alia* "dialing parity" which is
18 defined under Section 251(b)(3) as: "[t]he duty to provide dialing parity to competing providers of
19 telephone exchange service and telephone toll service, and the duty to permit all such providers to
20 have nondiscriminatory access to telephone numbers, *operator services, directory assistance, and*
21 *directory listing, with no unreasonable dialing delays.*" (emphasis added). Therefore, clearly terms
22 and conditions pertaining to its ongoing obligations with regard to the nondiscriminatory provision of
23 operator services and directory assistance is an interconnection agreement which must be filed under
24 Sections 252(a)(1) and 252(e). Accordingly, Staff believes that Qwest's Operator Service, Directory
25 Assistance and ICNAM Service agreements with Allegiance constitute interconnection agreements
26 that Qwest is required to file under Sections 252(a)(1) and 252(e) of the Act.

26
27 ²¹ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC
28 Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking (rel. November 5,
1999) ("*UNE Remand Order*") at para. 442.

²² *Id.*

²³ FCC Declaratory Ruling at para. 8.

1
2 c. Provisions Setting Forth Ongoing Obligations Relating to Reciprocal
3 Compensation Arrangements are Interconnection Agreements and Must
4 be Filed by Qwest with the Commission for Approval.

5 Qwest also argues that it was not required to file provisions containing ongoing obligations
6 relating to reciprocal compensation arrangements with Internet Service Providers (“ISPs”) with the
7 Commission because the FCC determined that the service is “interstate” in nature.²⁴ Once again,
8 Qwest’s position that it does not have to file such agreements with the Commission is at odds with
9 the various FCC Orders on this topic and the recent standard promulgated by the FCC in its October
10 4, 2004 Declaratory Ruling. The FCC’s standard itself expressly references ongoing obligations
11 relating to **reciprocal compensation** as being among those 251(b) and (c) services that have to be
12 filed under Sections 251(b) and (c): “...we find that an agreement that creates an *ongoing*
13 **obligation** pertaining to resale, number portability, dialing parity, access to rights-of-way, **reciprocal**
14 **compensation**, interconnection, unbundled network elements, or collocation is an interconnection
15 agreement that must be filed pursuant to section 252(a)(1).” (emphasis in bold print added).

16 Qwest relies upon an earlier Order of the FCC²⁵ which found that ISP traffic was interstate in
17 nature; and therefore, according to Qwest provisions containing ongoing obligations relating to the
18 payment of reciprocal compensation on ISP traffic is not an interconnection agreement and does not
19 have to be filed with the Commission for approval.²⁶ However, the FCC specifically stated in this
20 same Order that:

21 “...state commission authority over interconnection agreements pursuant to
22 section 252 ‘extends to both interstate and intrastate matters.’ [footnote
23 omitted]. Thus the mere fact that ISP-bound traffic is largely interstate does
24 not necessarily remove it from the section 251/252 negotiation and arbitration
25 process.”²⁷ [footnote omitted]While to date the Commission has not
adopted a specific rule governing the matter, we note that our policy of treating
ISP-bound traffic as local for purposes of interstate access charges would, if
applied in the separate context of reciprocal compensation, suggest that such
compensation is due for that traffic.”

26 ²⁴ See, Brotherson Direct, Ex. Q-2, p. 15.

27 ²⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-*
Carrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98 and 99-68, Declaratory Ruling, (Rel. February 26,
1999)(“*ISP Declaratory Ruling*”).

28 ²⁶ See, Brotherson Direct, Ex. Q-2, p. 15.

²⁷ *ISP Declaratory Ruling* at para. 25.

1 Over a year later, the FCC released an Order providing for a phase-out of reciprocal
2 compensation for ISP bound traffic, with implementation of a bill-and-keep inter-carrier
3 compensation mechanism thereafter.²⁸ It is Staff's position that provisions containing ongoing
4 obligations relating to reciprocal compensation are interconnection agreements and must be filed with
5 the State commission for approval.

6 e. **Failure to Meet 30 Day Filing Requirement Within A Reasonable Time**
7 **and the Fact that Many of the Agreements are Now No Longer in Effect**
8 **Should not Act to Excuse Qwest's Conduct.**

9 Of the remaining disputed agreements, Qwest states that several were not required to be filed
10 because they were subsequently formalized or superceded by other agreements and/or
11 interconnection agreement amendments or have been terminated.²⁹ Under A.A.C. R14-2-1506,
12 Qwest is required to file all interconnection agreements and/or amendments within 30 calendar days
13 of the execution date of an agreement. Waiting longer than 30 days to incorporate the terms of an
14 agreement with a carrier into an interconnection agreement or amendment undermines the purpose
15 behind the filing requirement contained in both the 1996 Act and the Arizona Administrative Code.
16 Where the time period between expiration of the 30 day period and the actual filing of the agreement
17 by Qwest was relatively short, Staff attributed Qwest's failure to file to inadvertence.³⁰ Where the
18 time period between expiration of the 30 day period and the actual filing of the agreement was
19 longer, however, Staff's position is that the agreement should have been filed and Qwest should be
20 fined for not complying with the filing requirement.

21 In addition, the fact that many of these agreements have been terminated by mutual agreement
22 or have expired by their own terms, should not excuse Qwest from being fined for having violated
23 Federal and State law in not filing the agreements with the Commission when they were executed.

24 f. **Several of the Remaining Disputed Contracts Are Part of the Core of**
25 **Agreements Involved in the Eschelon/McLeod 10% Discount**
26 **Arrangement Which Relate to Qwest's Ongoing Obligation to Provide**
27 **251(b) and (c) Services at Rates that are Just, Reasonable and**

28 ²⁸ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier
Compensation for ISP-Bound Traffic, cc Docket No. 96-98, 99-68, Order on Remand and Report and Order (rel. May
15, 2001).*

²⁹ See, Brotherson Direct, Ex. Q-24; See also LBB-1, Staff Exhibit Nos. 5, 8, 10 and 9, and Supplement to LBB-1, Staff
Exhibit Nos. 25 and 24.

³⁰ See, Kalleberg Direct, Ex. ST-2, p. 65, Table 7.

1 252(e).³²

2 Staff has also consistently argued that the term "interconnection agreement" must be defined
3 broadly to include "any contractual agreement or amendment which relates to or affects
4 interconnection, wholesale services or network elements."³³ Staff Witness Kalleberg noted in her
5 testimony that:

6
7 "Both reports are consistent with the FCC's Order. Staff and the FCC relied directly
8 on the language in Sections 251 and 252 of the 1996 Act as it relates to
9 interconnection in order to provide additional clarification on the appropriate filing
10 standard. The FCC's Order dated October 4, 2002, did not create new law regarding
11 the filing obligations of ILECs with respect to interconnection agreements. The
12 FCC's Order simply clarified existing law."³⁴

13 While Staff has acknowledged in the past, that the FCC Order did provide needed clarity with
14 respect to certain terms and that it is not always clear in some cases whether an agreement qualifies
15 as an interconnection agreement and must be filed, there is substantial evidence in the record that
16 Qwest acted intentionally and willfully in violating numerous State and Federal laws in not filing the
17 Eschelon and McLeod agreements with the Commission for approval.

18 Both Staff Witness Kalleberg's testimony and RUCO Witness Deanhardt's testimony present
19 compelling and substantial evidence that Qwest knowingly and intentionally violated State and
20 Federal law in not filing the agreements with Eschelon and McLeod with the Commission for
21 approval.³⁵ The evidence demonstrates that Qwest's reasons for not filing the agreements were
22 largely two-fold: (1) it did not want the favorable terms and conditions of those agreements to
23 become available to other carriers under 47 U.S.C. 252(i), and, (2) in return for favorable pricing and
24 other concessions, it sought to obtain the CLECs' agreement to remain neutral or not oppose its
25 pending Section 271 application.³⁶

26 The most significant concession provided to both Eschelon and McLeod in their unfiled
27 agreements was a 10 percent discount³⁷ on all of the carriers' purchases of Qwest services, including

28 ³² FCC Declaratory Ruling at para. 12

³³ August 14, 2002 Supplemental Staff Report at p. 6.

³⁴ Kalleberg Direct, Ex. ST-2, pp. 8-9.

³⁵ Kalleberg Direct, Ex. ST-2, pp. 19-54; Deanhardt Direct, Ex. R-1B.

³⁶ *Id.*

³⁷ The McLeod agreement provided for a discount of up to 10%.

1 but not limited to, Section 251(b) and (c) services, for 5 years in Eschelon's case and [Begin
2 Confidential].[End Confidential] In Eschelon's case, the agreement for the discount was in effect
3 from November 15, 2000 (the beginning date of the discount stated in the agreement) until the
4 agreement was terminated on March 2, 2002, nearly 17 months.³⁸ [Begin Confidential] [End
5 Confidential]³⁹

6 Both Eschelon and McLeod received other significant concessions not available to other
7 carriers through their unfiled agreements with Qwest. [Begin Confidential] [End Confidential]⁴⁰
8 Eschelon also received credits for inaccurate switched access minute reporting, which other carriers'
9 may have been experiencing at the time as well.⁴¹

10 Qwest disingenuously argues that the 10% pricing discount provided to Eschelon was actually
11 for consulting services.⁴² Evidence produced by both Staff and RUCO show, however, that the
12 consulting service arrangement was a sham used to disguise the discriminatory pricing arrangement
13 the parties had negotiated.⁴³ As Staff Witness Kalleberg noted:

14 "Staff does not believe that the 10 percent discount was truly intended to cover the
15 consulting services Eschelon provided to Qwest. It is more probable that the 10
16 percent discount was first agreed upon by the parties in exchange for Eschelon's
17 commitment to purchase large volumes of services from Qwest. Then the consulting
18 concept was developed later to disguise the true purpose of the 10 percent discount.
Letters between the parties and other documents indicate that first a volume discount
was discussed during the negotiation process. In was only later in the process that the
consulting concept was developed. [cite omitted].

19 Staff also believes that under the terms of the agreement for a 10 percent discount, it
20 appears that Eschelon could have provided no consulting services to Qwest, yet still
21 received a discount if it met its purchase commitments. If Eschelon provided
consulting services, but did not meet its purchase commitments, then Eschelon would
receive no discount."⁴⁴

22 Substantial evidence was also provided by Staff Witness Kalleberg and RUCO Witness
23 Deanhardt demonstrating that Qwest chose to willfully and intentionally violate State and Federal
24 laws to *inter alia* further its 271 application at the Commission. In one of its unfiled agreements,

25 ³⁸ Kalleberg Direct, Ex. ST-2, p. 20.

26 ³⁹ Kalleberg Direct, Ex. ST-2, p. 37.

⁴⁰ Kalleberg Direct, Ex. ST-2, pp. 21 and 38.

⁴¹ See TR. pp. 59-60.

⁴² Rixe Rebuttal, Ex. Q-11.

⁴³ Kalleberg Direct, Ex. ST-2, pp. 24-25; Deanhardt Direct, Ex. RB1, pp. 56-61.

⁴⁴ Kalleberg Direct, Ex. ST-2, pp. 24-25.

1 Eschelon agreed not to oppose Qwest's pursuit of Section 271 approval in Qwest's 14-state
2 territory.⁴⁵ Evidence was presented that Qwest interpreted its agreement with Eschelon to mean that
3 Eschelon could not participate at all in the Section 271 proceeding in the Qwest 14-state region,
4 including Arizona.⁴⁶ McLeod also acknowledged an oral agreement with Qwest not to oppose
5 Qwest's pursuit of Section 271 in Qwest's 14-state territory, as well.⁴⁷ Evidence in the record also
6 demonstrates that Eschelon was an active participant in the Arizona 271 UNE-P workshops up to the
7 time it entered into a series of unfiled agreements with Qwest in November, 2001. In a subsequent
8 workshop conducted by Staff in July of 2002, Eschelon raised a myriad of issues which it claimed
9 had gone unresolved because of its nonparticipation agreement with Qwest.⁴⁸ Nonparticipation in
10 the Section 271 proceeding by McLeod and Eschelon was a significant benefit to Qwest, because as
11 Staff Witness Kalleberg pointed out in her testimony, U.S WEST was providing poor wholesale
12 service to both McLeod and Eschelon at the time, and both of these carriers were two of Qwest's
13 largest wholesale customers. ⁴⁹

14 **C. The Unfiled Agreements Were Discriminatory and Had an Adverse Impact Upon**
15 **Competition in Arizona**

16 Substantial evidence was introduced at the hearing and in the testimony of both Staff Witness
17 Kalleberg and RUCO Witness Deanhardt that the unfiled agreements entered into between Qwest and
18 Eschelon and McLeod contained *inter alia* both pricing and service quality conditions that were more
19 favorable to McLeod and Eschelon than the pricing and service quality terms generally available to
20 other CLECs at the time.⁵⁰ In addition, the record contains substantial evidence that Covad also
21 received more favorable service quality and provisioning terms than were available to other carriers
22 at the time its agreement was entered into.⁵¹

23 Moreover, evidence was submitted by both Staff Witness Kalleberg and RUCO Witness

24 ⁴⁵ Kalleberg Direct, Ex. ST-2, p. 21.

25 ⁴⁶ Ex. ST-2.

26 ⁴⁷ Kalleberg Direct, Ex. ST-2, p. 38.

27 ⁴⁸ Ex. ST-3.

28 ⁴⁹ Kalleberg Direct, Ex. ST-2, pp. 19 and 35-36.

⁵⁰ Kalleberg Direct, Ex. ST-2, pp. 19-23, and pp. 35-39; Deanhardt Direct, Ex. RB1.

⁵¹ TR. (Lucero) pp. 344-356.

1 Johnson which demonstrated that Qwest's conduct had an adverse impact on the development of
2 competition in the local market in Arizona. For instance, Staff Witness Kalleberg testified that both
3 Eschelon and McLeod gained market share during the relevant time period. Staff Witness Kalleberg
4 pointed out that at the end of 2000, [Begin Confidential].[End Confidential]⁵² With respect to
5 others, CLECs is difficult to quantify the exact impact on competition.

6
7 **D. The Commission Should Impose Monetary and Non-Monetary Penalties to Deter**
8 **Qwest and Other Public Service Corporations from Future Contemptuous**
9 **Behavior and to Encourage Competition as Envisioned by the Filing**
10 **Requirements**

11 Qwest intentionally and willfully failed to file interconnection agreements as required by
12 Federal law and Arizona rule. Further, Qwest limited participation in Commission proceedings by
13 abusing its market power. Staff's proposed fines are appropriate considering the blatant disregard for
14 Commission authority evidenced by these acts. Staff's recommended monetary fines and penalties
15 are designed to remedy Qwest's contemptuous behavior and provide specific and general deterrence.
16 Staff's recommended non-monetary penalties are designed to deter bad acts and to encourage
17 competition in Arizona as it would have been encouraged had Qwest met its filing obligations. Staff
18 believes the fines will send a clear deterring message specifically to Qwest and to Arizona
19 telecommunications providers in general.

20 **1. The Commission Should Assess Monetary Fines Under A.R.S. Section 40-424**
21 **Against Qwest for Acting in Contempt of Commission Rules and Federal Law.**

22 Staff recommends the Commission impose monetary penalties on Qwest under two available
23 statutes. Qwest should be found in contempt under A.R.S. § 40-424. When a corporation, such as
24 Qwest, fails to comply with Commission orders, rules or requirements, that corporation is in
25 contempt of the Commission. A.R.S. § 40-424.A. The statute provides penalties of not less than one
26 hundred, nor more than, five thousand dollars. Id. The penalties in the statute are cumulative with
27 other penalties provided in the article. A.R.S. § 40-424.B.

28 The Commission should also fine Qwest for violation of the Commission's orders under

⁵² Kalleberg Direct, Ex. ST-2, p. 38.

1 A.R.S. § 40-425.A. Fines may be not less than one hundred nor more than five thousand dollars. *See*
2 *id.* Unlike section 424, however, section 425 expresses that “violations continuing from day to day
3 are one offense.” A.R.S. § 40-425.B. Therefore, unlike the contempt statute, section 425 only allows
4 the Commission to consider each failure to file an interconnection agreement as one offense for
5 which it may fine from one hundred to five thousand dollars. Whereas, absent limiting language like
6 that found in section 425, section 424 allows the Commission to impose a penalty of one hundred to
7 five thousand dollars each day Qwest continued to be in contempt of a Commission order or rule by
8 failing to file interconnection agreements, and by interfering with and misleading the Commission.

9 Staff identified 42 agreements, that should have been filed for Commission approval.⁵³ The
10 computation of maximum fines under Section 425 is simple. The Commission may fine Qwest up to
11 \$5,000 for violating Commission rules each time it failed to file an agreement. Therefore, the
12 Commission may fine Qwest between \$4,200 and \$210,000. Staff’s recommendation of \$47,000 is
13 well within the range of fines allowed under Section 425. The computation of per day fines under
14 Section 424 requires more in the way of computation.

15 A.A.C. R14-2-1506 requires filing of interconnection agreements within 30 days of execution.
16 Therefore, Staff identified the thirtieth day after the agreements’ execution as the first day Qwest was
17 in violation of its filing requirements and in contempt of Commission rules. *See* Staff’s Post Hearing
18 Exhibit. Staff identified the agreements’ filing or termination date as the last day of noncompliance.
19 If the agreement terminated in stages, the last day any clause of the agreement had force is the last
20 day of noncompliance because as long as any part of the agreement has effect, the agreement must be
21 filed. *See id.* Staff also identified agreements that as of March 20, 2003, ten days before the filing of
22 Staff’s post-hearing exhibit, had not been filed. *See id.* The end date for these agreements continues
23 to advance until the agreements are either filed or terminated. *See id.* As of March 20, 2003, Qwest
24 was intentionally and willfully in contempt of Commission rules for a total of 8,848 days for not
25 filing twenty-four separate agreements. *See id.* The Commission may impose a penalty against
26 Qwest for each day, or a total penalty under Section 424 of between \$884,800 and \$44,240,000.⁵⁴

27
28 ⁵³ Kalleberg Direct, Ex. ST-2.

⁵⁴ And rising each day Qwest continues to fail to file the necessary unfiled interconnection agreements.

1 Staff's recommendation of \$15,000,000 is well within that range.

2 Qwest disputes Staff's calculation of fines. See Qwest comments to Staff's Late-Filed
3 Exhibit, April 15, 2003. Qwest's arguments can be summarized as these: 1) Staff incorrectly
4 identified either a start or end day of noncompliance; 2) Staff failed to use the day an agreement was
5 provided to (not filed with) the Commission as the last day of noncompliance; 3) Staff, because it has
6 identified separate agreements as working with other agreements to create an interconnection
7 agreement, must consider all related agreements as one in calculating days of noncompliance; and, 4)
8 some of the agreements identified by Staff are not required to be filed under Section 252(e). Qwest
9 also raises the issue of whether the Commission may use its contempt authority to impose a fine for
10 past conduct. See *id.* at 2 n. 1. Qwest does not dispute the Commission's general authority to impose
11 fines and penalties for its acts and omissions in this case.

12 Staff identified all start and stop days in its computation of days of noncompliance and
13 contempt from the face of the documents themselves. While addressing the specific calculation flaws
14 alleged by Qwest in its response is beyond the scope of this closing brief, Staff affirms that its
15 calculations are correct. Staff also reaffirms its belief that all agreements which when read together
16 create an on-going obligation regarding terms of provision of Section 251 and 252 items, those
17 agreements should be considered separately when computing fines. Each time Qwest entered into
18 such an agreement it evidenced its contempt of Commission rules. Had Qwest expressed all the
19 terms of the separate agreement in one contract, perhaps Staff would have considered that but one
20 agreement. However, Qwest chose to parse the agreements in an effort to hide the agreements' true
21 effect as an interconnection agreement. Considering the separate agreements as one would reward
22 Qwest for its efforts to hide the true effect of these agreements from the Commission and Arizona
23 CLECs. The Commission should consider each agreement separately.

24 Qwest's provision of the documents to Staff does not constitute filing. The fact that Qwest
25 filed some documents and provided some to Staff without filing, indicates Qwest recognizes a
26 distinction. Importantly, making the agreements available to the Commission does not afford CLECs
27 the opportunity to opt-in. That opportunity is presented only when the agreements are filed. Qwest's
28 obligation to file is not met with provision of the agreement to Staff; to meet its obligation Qwest

1 must file the agreement making its terms available to all CLECs. Taking these facts into
2 consideration, Staff believes it is appropriate to only stop counting days in contempt when Qwest
3 either files or terminates the agreement, but not when it provides an agreement to Staff.

4 The contempt statute reads: "If any corporation or person fails to observe or comply with any
5 order, rule, or requirement of the commission, the corporation or person shall be in contempt"
6 A.R.S. § 40-424.A. The 1996 Act and the rules of the Arizona Corporation Commission require
7 Qwest to file interconnection agreements. Qwest did not do so. By not doing so, Qwest failed to
8 comply with Commission rules. Staff believes the plain language of the statute leads to the
9 conclusion that when Qwest failed (and fails) to comply with Commission filing requirement rules, it
10 is in contempt of the Commission.

11 Qwest claims the Commission should not adopt a "per se" standard that if an agreement was
12 not filed there was harm to competition. Direct Testimony of Harry M. Shoosan III, Tr. at 428.
13 Qwest insists the Commission should first prove actual harm to CLECs resulting from the
14 discrimination caused by Qwest's failure to file, and then claims the Commission must quantify that
15 harm. Id. at 428-30, 457. Staff has not adopted such a per se standard. The record indicates harm.
16 The record shows that Qwest's interfered with the Commission's ability to evaluate the openness to
17 competition of the Arizona market. The record shows Qwest's failure to file interconnection
18 agreements harmed competition in Arizona because the agreements were not available for
19 Commission review and CLEC opt-in.

20 Unfortunately, Qwest's acts and omissions have another result: the degree of harm to
21 competition in Arizona can never truly be quantified. Qwest asks the Commission to quantify harm
22 by considering what CLECs in Arizona could have opted in to all terms of the unfiled agreements.
23 However, as stated by Qwest's letter to the Commission filed in this docket on April 24, 2003, the
24 filing requirement is "not dictated . . . by whether another 'CLEC is similarly situated and desires the
25 same Agreement;' rather, the filing obligation of Section 252 depends upon whether the agreements
26 create" an agreement required to be filed by the terms of the section. Letter from Qwest counsel,
27 Timothy Berg, dated April 24, 2003 to the Commission. Moreover, trying to quantify harm by
28 evaluating CLEC presence and ability at the time the unfiled agreements were executed ignores that

1 CLECs' abilities and presence change over time. CLECs not in Arizona may have considered
2 moving to Arizona to take advantage of a ten percent discount. CLECs already in the state may have
3 repositioned themselves so they could opt-in to the unfiled agreements.

4 **2. The Commission Should Impose Other Non-Monetary Penalties Against Qwest**

5 These penalties are designed to help ameliorate the anti-competitive outcome of the unfiled
6 agreements and remedy the adverse impact on the emergence of local competition in Arizona from
7 the existence of the unfiled agreements while deterring Qwest and other Arizona CLECs from
8 engaging in anticompetitive behavior. Staff fashioned its recommended non-monetary penalties to
9 provide benefits to CLECs unable to opt-in to unfiled agreements that the CLECs would have had
10 available if the agreements had been filed.

11 Staff recommends the Commission require Qwest to file all terminated agreements, making
12 the terms of those agreements available now to CLECs. Qwest should be required to allow CLECs to
13 opt-in to the agreement for the same period of time the agreement was in effect with the initial
14 contracting CLEC. Qwest should not be allowed to obviate its responsibility to make the
15 agreements' benefits available to CLECs able to opt-in, simply by terminating the agreements. If
16 Qwest is not required to file the agreements, the Commission should require Qwest to make the
17 benefits of the agreements available to the CLECs.

18 Qwest should be required to provide each CLEC, other than Eschelon and McLeod, with a
19 cash payment totaling 10 percent of its purchases of Section 251(b) or (c) services and 10 percent of
20 its purchases of intrastate access from Qwest in Arizona from January 1, 2001, through June 30,
21 2002, and for a future 18 month period. Such payments and discounts will allow the CLECs to
22 realize the benefit of opting-in to the Eschelon and McLeod agreements that the CLECs were denied
23 by Qwest's failure to file.

24 Staff also recommends adjustment of certain performance indicator definitions to ensure the
25 provision of a minimum level of service to CLECs and foster competition. Staff's recommendations
26 are based on Qwest's proposals in the Minnesota unfiled agreement docket and will not affect parity
27 standards. Staff further recommends Qwest retain independent auditors to monitor its future
28 compliance with Section 252(e) and develop a code of conduct to thwart future anticompetitive acts.

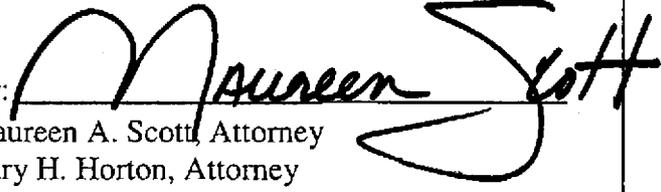
1 Qwest argues that because Staff's non-monetary penalties have some collateral financial
2 impact, the penalties should be considered as monetary penalties. Staff believes any penalty,
3 sanction, or other remedy that does not require payment of a fine will likely have some financial
4 impact. Either because the party against whom the remedy is enforced will have to spend money
5 doing something it was not doing before, or because they must discontinue doing something they
6 have been doing to make money. Staff does not believe the fact that there is financial impact makes
7 the remedy analogous to a monetary penalty or fine. Here, Qwest would be forced to provide the
8 same benefits and prices it would have been required to provide had CLECs opted for them. That
9 result does not amount to a fine or monetary penalty, but rather places both CLECs and Qwest in the
10 position they would have been in had Qwest met its filing requirements. These expenses to Qwest of
11 rectifying its prior bad acts are not fines, they were self-inflicted when Qwest made the decision to
12 not fulfill its filing obligations. Regardless of the financial impact to Qwest, Staff's recommended
13 non-monetary penalties should not be regarded as a type of monetary penalty.

14 **IV. Conclusion**

15 Qwest knowingly violated State and Federal law in not filing certain agreements with
16 Eschelon and McLeod with the Commission as it was required to do. In so doing, Qwest
17 discriminated against other CLECs and harmed the development of local competition in Arizona.
18 The Commission should impose monetary fines against Qwest under both A.R.S. Sections 40-424
19 and 40-425, and other non-monetary penalties as discussed herein.

20
21 RESPECTFULLY SUBMITTED this 1st day of May, 2003.

22 ARIZONA CORPORATION COMMISSION

23
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