BEFORE THE 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
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

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I. INTRODUCTION

After reading the post-hearing briefs submitted by the Arizona Corporation Commission Staff and the Residential Utility Consumer Office ("RUCO"), Qwest Corporation ("Qwest") finds it significant that those briefs spend so little time discussing the testimony received during the hearing that took place in Phoenix on March 17-20, 2003. As Qwest's Post-Hearing Brief explained in careful detail, the hearing fleshed out the rest of the story and provided much-needed perspective on the Staff's and RUCO's testimony. Without contesting the fact that agreements were not filed, Qwest provided the legal and factual context under which the agreements were negotiated, executed, and not filed. Qwest offered first-hand, personally knowledgeable testimony demonstrating that it treated all of its CLEC customers equally and fairly, whether or not they had entered into agreements with Qwest that made this *post hoc* "unfiled agreements" list. Qwest detailed the remedial and prophylactic measures it took nearly a year ago to address the concerns raised by this and other commissions regarding the scope of the filing requirement, measures that correctly anticipated the FCC's ultimate articulation of the standard and aligned Qwest's filing practices with a conservative interpretation of that standard. Qwest offered testimony from a policy expert the Staff itself has retained in other matters who explained (consistently with the legislative history and case law Qwest has cited throughout this case) that, in an environment moving from a regulatory model to one driven by market forces, the Commission cannot just presume harm to CLECs, the market or the regulatory process from the mere fact that agreements were not filed when, based on the standard now in place, we now know they would have been. To the contrary, Qwest, through Mr. Shooshan, provided a rational and proportionate framework for the Commission's consideration of remedies appropriate to the actual facts and circumstances before the Commission in this case.

Qwest also demonstrated, both at the hearing and in its Post-Hearing Brief, that the Staff and RUCO missed the mark with their legal and factual theories of the case and, perhaps most vividly, with their sweeping penalty recommendations. After refuting many of their factual premises and, in the most memorable moment of the hearing, exposing RUCO's chief witness's unapologetic decade-long bias against Qwest and its predecessors, Qwest undercut the bases of the Staff's $15 million penalty, its even more costly "non-monetary penalties," and RUCO's wish list of litigation funds, cash payouts, and directed infrastructure expansions. For its part, RUCO took, and apparently still takes, the position that it is not required even to consider whether Qwest's filing decisions did or even could have harmed anyone – it hews to its strict liability view of the world and insists, notwithstanding the categorical lack of precedent, or logic, or any proportionality to any proven harm for any of its demands, that Qwest fund its and others' litigation against itself, among other things.

The Staff and RUCO "responded" in their post-hearing briefs to Qwest's persuasive evidence and arguments by ignoring them altogether. The Commission will find nary a mention of the hearing, let alone an effort to address the compelling testimony of the Qwest witnesses and the refutation of the RUCO and Staff witnesses. The Staff's and RUCO's refusal to address the facts and arguments Qwest presented at the hearing and in its Post-Hearing Brief leaves Qwest to begin its reply with only a brief discussion of the factual and legal issues and the others' omissions. In the course of this discussion, Qwest highlights a few of the most significant points it made in its initial Brief and responds to points raised by AT&T, Eschelon, McLeod, and others. Qwest spends the bulk of this reply addressing the Staff's and RUCO's penalty recommendations and demonstrates once again that their approaches, as well as the proposed penalties themselves, are inappropriate and disproportionate under the circumstances of this case.

II. THE OTHER PARTIES FAILED TO CONFRONT THE EVIDENCE PRESENTED AT THE HEARING

The other parties to this proceeding incorrectly assume, without any support in the law, that Qwest bears the burden in this case of refuting the unarticulated and amorphous accusations against it. 1/ As Qwest explained in its opening brief, under Arizona law, the party who asserts a fact has the burden to establish it. 2/ Here, because the Staff and RUCO claim that Qwest committed certain regulatory violations, they, not Qwest, must present the substantial evidence necessary to support a Commission decision. The unfairness of improperly shifting the burden of proof to Qwest – particularly here, where the procedural order did not even contain specific allegations for Qwest to defend against – is highlighted by RUCO's patently unfair attempt to draw conclusions from Qwest witness Dana Filip Crandall's not mentioning the November 15, 2000 *Escalation Procedures and Business Solutions Letter* with Eschelon in her direct testimony. 3/ At the time Ms. Crandall submitted her testimony, that agreement was not among the agreements identified by the Staff as being subject to Section 252 in Exhibit G to the Staff's Supplemental Report and Recommendation. 4/ There was, therefore, no reason to believe that that particular agreement would be at issue in these proceedings and no reason for Qwest witnesses to address it. 5/ The Staff and RUCO should not be permitted to twist Qwest's failure to respond to unarticulated allegations into conclusions about Qwest's beliefs and motivations.

1/ *See, e.g.*, Post-Hearing Brief of the Residential Utility Consumer Office (hereinafter "RUCO Post-Hearing Brief"), at 50 ("In this proceeding, neither Qwest, Eschelon nor McLeod has offered credible evidence to refute the accusations that they violated the law.").

2/ *See Troutan v. Valley Nat'l Bank of Ariz.*, 170 Ariz. 513, 517, 826 P.2d 810.

3/ RUCO Post-Hearing Brief, at 21-22.

4/ Ms. Crandall's testimony expressly states that it "focuses on those agreements identified by the Staff in the August 14, 2002 Supplemental Report and Recommendation which raise issues related to provisioning of service, including procedures for escalations." Pre-Filed Direct Testimony of Dana Filip Crandall, at 2:13-16.

5/ Ms. Crandall did address the November 15, 2000 *Escalation Procedures and Business Solutions* Letter in her rebuttal testimony, explaining that Eschelon was not treated more favorably than other customers as a result of the escalation provisions, after the Staff asserted in its pre-filed testimony that the agreement was required to be filed.

Such tactics illustrate the reason defendants are typically afforded the due process protection of having the accusing party bear the burden of proof. 6/

A. The Staff and RUCO ignore the extensive evidence that Qwest treated all Arizona CLECs equally.

It is telling that the Staff and RUCO persist in claiming there was "de facto" discrimination as a result of non-filing, 7/ even though neither cites any legal authority for that principle and both ignore the testimony from Qwest's witnesses that no actual discrimination occurred. In fact, the FCC observed that the non-filing of agreements creates only the *possibility* of discrimination, if a CLEC "thereby receives favorable terms and conditions not available to other competitive LECs." 8/ Moreover, in its October 4, 2002 Order, the FCC implicitly 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. Instead, the FCC permitted ILECs some flexibility in making agreements or services available to CLECs in ways other than filed interconnection agreements. 9/ As such, the FCC held that an ILEC does not run afoul of its nondiscrimination provisions by not filing an agreement if that agreement is made available to

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6/ *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).

7/ RUCO Post-Hearing Brief, at 19; Staff Post-Hearing Brief, at 23. Although the Staff claims that it has "not adopted …a per se standard," it then states that the failure to file agreements "harmed competition in Arizona because the agreements were not available for Commission review and CLEC opt-I," (*id.*), precisely the per se standard that the Staff professes to reject.

8/ 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 ¶ 487.

9/ FCC Order, at ¶ 9.

CLECs through other media, such as Qwest's website. 10/ The Staff and RUCO cannot evade their burden to produce evidence of actual harm by appealing to principles of *per se* discrimination and arguing that the lost opportunity to opt-in under Section 252(i) is itself a redressable harm. 11/

The Staff's and RUCO's retreat to this legally untenable position is not surprising in light of the extensive evidence presented by Qwest that all Arizona CLECs were treated equally, even for the services provided in the agreements not formally filed under Section 252. Indeed, despite their protestations that nondiscrimination is a "bedrock" principle of the 1996 Act, 12/ the Staff and RUCO totally disregard every piece of evidence demonstrating that:

- All Arizona CLECs received the same level of service; 13/
- All Arizona CLECs' orders were processed under the same standards; 14/
- No Arizona CLEC received favorable treatment with regard to reciprocal compensation for terminating Internet-bound traffic; 15/ and
- No Arizona CLEC other than Eschelon and McLeod purchased a variation of the UNE-Star platform and would have been eligible to opt into the

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10/ *Id. 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 no ongoing discrimination exists where the terms of an agreement are available though Qwest's SGAT).

11/ Courts also reject theories of *per se* injury in the anti-trust context, even in cases involving *per se* violations of the Clayton Act. *See Atlantic Richfield Co. v. USA Petro. Co.*, 495 U.S. 328, 344 (1990) ("'[P]roof of a per se violation and of antitrust injury are distinct matters that must be shown independently.'" (quoting Page, *The Scope of Liability for Antitrust Injury*, 37 STAN. L. REV. 1445, 1460 (1985))).

12/ RUCO Post-Hearing Brief, at 1.

13/ Qwest Post-Hearing Memorandum, at 30-33.

14/ *Id.*, at 33-34.

15/ *Id.*, at 37-39.

unfiled provisions even if they had been filed with and approved by the Commission. 16/

The only "evidence" other than the agreement terms themselves cited by the Staff in support of its claim that the unfiled agreements had an adverse impact on competition was Ms. Kalleberg's assertion (unsupported by even a showing of actual numbers) that both Eschelon and McLeod gained market share during the relevant time period. 17/ However, the Staff's inference that any gain in market share is attributable to the unfiled agreements is pure speculation. 18/ As the Staff conceded, it did not analyze the costs incurred by Eschelon (or, presumably, McLeod) in negotiating or performing under the agreements, 19/ and therefore has no basis to conclude that the agreements netted a significant benefit to the CLECs. Instead of analyzing the issue, the Staff chose to assume that there was harm to individual CLECs and to competition generally. 20/ As Mr. Shooshan testified, such an assumption is erroneous:

> It is theoretically possible that a particular CLEC could establish that it was damaged because its competitor received a preference for which it could have been eligible but did not receive. Such damage evaluations turn on an actual case-by-case review of the circumstances of particular CLECs, and the actual term involved. Even in that case, however, the *overall* effect on competition would likely be minimal. Because the Act requires CLECs opting

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16/ *Id.*, at 34-36.

17/ Staff Post-Hearing Memorandum, at 19.

18/ In the antitrust context, courts require plaintiffs to show a causal connection between the injury alleged and the anti-competitive conduct. *See Pool Water Prods. v. Olin Corp.*, 258 F.3d 1024, 1034 (9th Cir. 2001) ("'To show antitrust injury, a plaintiff must prove that his loss flows from an *anticompetitive* aspect or effect of the defendant's behavior, since it is inimical to the antitrust laws to award damages for losses stemming from acts that do not hurt competition. If the injury flows from aspects of the defendant's conduct that are beneficial or neutral to competition, there is no antitrust injury, even if the defendant's conduct is illegal *per se.*'" (quoting *Rebel Oil Co. v. ARCO*, 51 F.3d 1421, 1433 (9th Cir. 1995))).

19/ Tr., Vol. IV, Testimony of Marta Kalleberg, at 871:10-14.

20/ *Cf. Atlantic Richfield Co. v. USA Petro. Co.*, 495 U.S. 328, 340 n.8 (1990) ("The antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity.").

> into provisions contained in filed and approved agreements to agree to all related terms and conditions, CLECs that had not been aware of a discount would be worse off only if they could have opted into the commitments that served as consideration for the discount in the first place. As such, discrimination to CLECs individually and harm to the market at large cannot be presumed—a CLEC would have to satisfy the terms related to a discount to opt into that discount. If it could not satisfy those conditions, it would not be eligible for the discount in the first place and, therefore, is no worse off for never having received the unapproved discount. Accordingly, the Commission must examine the issues on an agreement-by-agreement and CLEC-by-CLEC basis before it can conclude that any CLEC was actually harmed by lacking access to any of the unfiled agreements. 21/

The failure of the Staff and RUCO to mention, let alone attempt to discredit, the evidence presented by Qwest is a compelling indication that no actual harm resulted from the non-filing of the agreements at issue.

B. AT&T wrongly dismisses the testimony of Qwest witnesses with first-hand knowledge as hearsay.

AT&T tries a different, but equally fallacious, tactic to avoid confronting the evidence presented by Qwest – labeling Qwest's testimony as hearsay. 22/ As an initial matter, AT&T is wrong in its claim that "[o]nly one Qwest witness arguably was involved in the implementation of the agreements." 23/ In fact, Judith Rixe was not only personally involved with the implementation of the Eschelon consulting agreement, she was also present during much of the negotiations of that agreement. 24/ Kathleen Lucero, Vice President in the Network Organization, testified from first-hand knowledge regarding the implementation of the Covad Service Level Agreement in particular, and about the provisioning of services to all Arizona

21/ Pre-Filed Testimony of Harry M. Shooshan, at 18:17-19:14 (emphasis added).

22/ AT&T Post-Hearing Memorandum, at 11.

23/ *Id.*

24/ Pre-Filed Testimony of Judith Rixe, at 3:19-13:10; Tr., Vol. II, Testimony of Judith Rixe, at 361:8-362:24.

CLECs generally. 25/ And, Dana Filip Crandall testified from first-hand knowledge regarding the implementation of service-related terms in agreements with Eschelon and McLeod. 26/

Furthermore, if the testimony of *Qwest's* witnesses – which is based on their first-hand knowledge of the negotiation and implementation of the agreements at issue – is inadmissible hearsay, then certainly the testimony of the witnesses presented by the Staff and RUCO is also inadmissible hearsay. As Qwest explained in detail in its Initial Post-Hearing Memorandum, Ms. Kalleberg, Mr. Deanhardt, and Ms. Cortez each conceded that they had no personal knowledge about the facts to which they testified and little to no experience with the regulations at issue. 27/ AT&T cannot have it both ways – it cannot keep the evidence it liked and avoid the extensive evidence of equal treatment by claiming (wrongly) that Qwest's testimony was hearsay.

C. The Staff ignores or misconstrues evidence regarding Qwest's filing decisions.

The Staff portrays Qwest as stubbornly resisting the filing of certain categories of agreements, including form agreements, Directory Assistance and ICNAM service agreements, and agreements containing ongoing provisions related to compensation for the termination of ISP-bound traffic. 28/ This portrayal is inaccurate. The Staff ignores entirely Qwest's repeated commitments to file such agreements. In particular, and despite its belief that the FCC Order does not require the filing of such form contracts reflecting terms already available to CLECs through other filed and approved interconnection agreements or the SGAT, Qwest "is willing to

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25/ Tr., Vol. II, Testimony of Kathleen Lucero, at 341:20-343:8.

26/ Pre-Filed Direct Testimony of Dana Filip Crandall, at 1:15-2:8; 3:6-14:8.

27/ 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.

28/ *See* Staff Post-Hearing Memorandum, at 10-14.

file these form ICNAM and Directory Assistance contracts with the Arizona Commission under Section 252(e)." 29/ As Qwest explained in its Initial Post-Hearing Memorandum, Qwest also is willing to file other types of form contracts that neither the Staff nor any other party identified as falling within Section 252(e). 30/

The Staff also misconstrues Qwest's testimony with regard to reciprocal compensation for ISP traffic. The Staff states that Qwest "relies" upon a 1999 FCC Order to argue that it is not required to file agreements containing ongoing terms related to compensation for the termination of ISP-bound traffic. 31/ In fact, Mr. Brotherson's testimony referred to the 1999 Order to explain the context of Qwest's understanding in 1999 and 2000 that Internet-bound traffic was not subject to reciprocal compensation. 32/ And, although the Staff states – without support – that the Staff's position is that provisions containing ongoing obligations relating to reciprocal compensation for Internet traffic are interconnection agreements, the FCC decided otherwise. In an Order released in April 2001, the FCC confirmed that "ISP-bound traffic is not subject to the reciprocal compensation obligations of section 251(b)(5)." 33/

29/ Pre-Filed Rebuttal Testimony of Larry B. Brotherson, at 11:9-12.

30/ *See* Qwest Post-Hearing Memorandum, at 20. 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. (*See* Qwest's Comments in Response to Supplemental Staff Report and Recommendation, at 12 & Ex. B (Aug. 29, 2002).) Because these agreements are similar in form and context to the Allegiance ICNAM agreement, which the Staff believes to be an interconnection agreement, Qwest will file such agreements for Commission approval as part of its good faith efforts to comply with the Act.

31/ Staff Post-Hearing Memorandum, at 13.

32/ Pre-Filed Direct Testimony of Larry B. Brotherson, at 15:3-26.

33/ Order on Remand and Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Docket Nos. 96-98, 99-68 (rel. Apr. 27, 2001), at ¶ 3.

Accordingly, reciprocal compensation for ISP traffic is not a 251(b) or (c) service subject to the filing obligations under Section 252 and the October 4 FCC Order.

D. The Staff ignores evidence regarding CLECs' participation in the 271 process.

In another example of the Staff's failure to confront the evidence at the hearing, the Staff asserts that Eschelon was an "active participant in the Arizona 271 UNE-P workshops *up to* the time it entered into a series of unfiled agreements with Qwest" in November 2000. 34/ The Staff does not even mention, let alone refute, the extensive evidence demonstrating:

- From April through June 2001, Eschelon opened or raised 20 issues in the CMP process and participated in discussions regarding change requests; 35/
- Eschelon attended every CMP monthly meeting from April 2001 through March 2002; 36/
- Eschelon attended and actively participated in all but three Redesign meetings between July 2001 and March 2002; 37/
- 42% of the issues submitted by CLECs, Qwest, and the facilitator in the Redesign Team were submitted by Eschelon; 38/ and

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34/ Staff Post-Hearing Memorandum, at 18 (emphasis added). The Staff mistakenly states that the date of the agreements was November 2001 rather than November 2000.

RUCO also claims, without citation to the record, that certain service-related issues were not made part of the 271 record because of the agreements with Eschelon and McLeod. (RUCO Post-Hearing Memorandum, at 53.) Like the Staff, RUCO ignores the evidence showing Eschelon's active and regular participation in the 271 process and McLeod's statement that its decision not to participate was based on a business decision regarding allocation of resources.

35/ Pre-Filed Rebuttal Testimony of Dana Filip, at 5:21-6:1; Exhibit DLF-5.

36/ Pre-Filed Rebuttal Testimony of Dana Filip, at 8:10-13.

37/ *Id.*, at 8:19-9:3; Exhibits DLF-6, DLF-7.

38/ Pre-Filed Rebuttal Testimony of Dana Filip, at 9:12-15; Exhibit DLF-9.

- Eschelon had the opportunity to propose issues that would be discussed during the CMP process and to comment on Qwest's monthly status reports regarding the Redesign process. 39/

It is clear that Eschelon did not merely participate in the CMP process *up to* November 2000 as the Staff asserts, but was an active participant throughout.

Moreover, the Staff implies that McLeod's non-participation in the 271 process was the result of an oral agreement with Qwest. 40/ Again, the Staff can reach this conclusion only by ignoring the evidence in the record. In response to discovery served by the Staff, McLeod responded 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." 41/

III. PENALTIES

A. Qwest did not present a "no harm, no foul" defense.

After first asserting without support that discrimination occurred, and then retreating to the position that discrimination should just be assumed, RUCO and the Staff ultimately decide to use their own failure to show any harm offensively. The Staff and RUCO hope to avoid offering any nexus between resulting harm and the far-reaching penalties they seek by branding Qwest's efforts to present evidence of non-discrimination as a "no harm, no foul" defense. However, the extensive evidence (unrebutted by any other party) that no actual discrimination resulted is relevant – not to the issue of whether certain agreements fall within the filing standard the FCC articulated in its October 4, 2002 Order, which Qwest does not dispute –

39/ Pre-Filed Rebuttal Testimony of Dana Filip, at 10:16-11:12, 12:17-21, 14:4-15:2.

40/ Staff Post-Hearing Memorandum, at 18.

41/ Exhibit LBB-29.

but to aid the Commission in fairly assessing a penalty that is commensurate with the conduct at issue and the harms caused by that conduct. 42/

The measure of harm arising from this proceeding should be similar to what would be required if a CLEC sought compensation in a private right of action. Thus, the harm or damages arising from the failure to file any particular agreement cannot be based on mere speculation or conjecture. The Staff and RUCO cannot simply presume that failure to file an interconnection agreement discriminated against Arizona CLECs or competition generally, or that damages resulted from such discrimination. 43/ For example, in a private action, CLECs would never be entitled simply to take the difference between what they paid and the pricing terms in the unfiled agreements as damages. It is well-established that where a customer is claiming harm because *other* customers were given preferential rates, "[t]he measure of harm is not the difference between the discriminatory rate to customers and a just and reasonable rate, but actual damage to the complainant by virtue of the unlawful preference, or profits lost because of the ability of the favored customer to control the market price of the complainant's goods or services." 44/ In other words, the CLEC's damages in a complaint proceeding would be

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

43/ *See Barnes v. Illinois Bell Tel. Co.*, 1 FCC 2d 1247, 1264-65, ¶¶ 41-42 (1965) (in complaint proceedings under the Communications Act, "the fact that a complainant establishes that a carrier discriminated against it does not, of itself, establish that it was damaged thereby. The fact of damages resulting from a wrong must be proven with certainty.").

44/ *Exchange Network Facilities for Interstate Access*, 1 FCC Rcd 618, 628, ¶ 69 (1986). *See also ICC v. United States ex rel. Campbell*, 289 U.S. 385, 390 (1933) ("The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less."); *AT&T v. New York City Human Res. Admin.*, 833 F. Supp. 962, 980 (S.D.N.Y. 1993) (proper measure of damages for a carrier's collecting less than the full tariff rate from favored customers was not the difference in rates, but instead was the actual damage or profits lost because of the preference given to favored customers).

measured by the competitive harm it suffered as a result of other CLECs' favored arrangements – assuming any such harm occurred.

The Staff and RUCO failed to show, or even to attempt to assess, any actionable harm to CLECs or competition. Any penalty assessment by the Commission must be based on substantial evidence, 45/ and not a mere presumption of harm.

B. The Commission lacks authority to order the contempt penalties proposed by the Staff.

RUCO concedes that "the Commission does not have jurisdiction to impose criminal penalties." 46/ Yet, the contempt penalties recommended by the Staff are exactly that – criminal penalties beyond the Commission's jurisdiction. As Qwest explained in its Initial Post-Hearing Memorandum, the Commission's authority to order contempt penalties pursuant to Ariz. Rev. Stat. §§ 40-424 extends only to *civil* contempt penalties and not to *criminal* contempt penalties. 47/ The Staff states that the purpose of its recommended monetary fine is to "remedy Qwest's contemptuous behavior and provide specific and general deterrence." 48/ Under Arizona law, "[a] criminal contempt is characterized by imposition of an unconditional sentence for punishment or deterrence" 49/ and "[a] contempt finding intended solely for the purpose of imposing punishment must be a criminal contempt finding." 50/ The stated purpose of the Staff's proposed monetary fine is consistent with only criminal and not civil contempt penalties.

45/ Qwest Post-Hearing Memorandum, at 22-24.

46/ RUCO Post-Hearing Memorandum, at 26.

47/ Qwest Post-Hearing Memorandum, at 59-61.

48/ Staff Post-Hearing Memorandum, at 20.

49/ *State v. Cohen*, 15 Ariz. App. 436, 440, 489 P.2d 283 (Ariz. Ct. App. 1971).

50/ *Korman v. Strick*, 133 Ariz. 471, 474, 652 P.2d 544 (1982) (emphasis added).

As a further indication that the proposed monetary penalty is a criminal sanction outside this Commission's jurisdiction, the Staff has not proposed that Qwest be permitted to purge itself of the contempt. As United States Supreme Court explained in *International Union, United Mine Workers of America v. Bagwell*, a defining characteristic of *civil* contempt is that "the contemnor is able to purge the contempt and obtain his release by committing an affirmative act." 51/ By contrast, and in the context of fines, "a 'flat, unconditional fine' totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance." 52/

Even assuming the Commission has the authority to assess any criminal contempt penalties, the Commission does not have authority to assess such penalties on a daily basis. A.R.S. § 40-424 authorizes the Commission to impose fines "in an amount of not less than one hundred nor more than five thousand dollars." The statute itself does not provide for daily penalties, and the Staff cites no authority for its position that the Commission has the authority to accumulate penalties in that manner. It is well established that the Commission "has no implied powers." 53/ The Arizona Supreme Court has stated that "such powers as the Commission may exercise do not exceed those to be derived from a strict construction of the constitution and implementing statutes." 54/ The Commission has an express power to impose penalties under § 40-424 up to only five thousand dollars per offense, with no indication that such penalties may accumulate daily. Furthermore, in *Van Dyke v. Geary*, the court held unconstitutional the

51/ 512 U.S. 821, 828 (1994).

52/ *Id.* at 829.

53/ *Rural/Metro Corp. v. ACC*, 129 Ariz. 116, 117, 629 P.2d 83 (Ariz. 1981).

54/ *Id.* (citing *Southern Pacific Co. v. ACC*, 98 Ariz. 339, 345, 404 P.2d 692 (1965) and *Williams v. Pipe Trades Indus. Program of Ariz.*, 100 Ariz. 14, 17, 409 P.2d 720 (1966)).

predecessor to A.R.S. § 4-425, which then authorized the Commission to penalize each day's continuance of a violation as a separate and distinct offense. 55/ Following the *Van Dyke* decision, § 4-425 was revised to explicitly disallow daily accumulation of penalties. 56/ Unlike § 4-425, § 4-424 never allowed the Commission to assess daily penalties for continuing violations, 57/ and the revisions of § 4-425 to specifically exclude such penalties strongly suggest that the legislature did not intend to grant such authority.

C. Any penalty must be related to the conduct at issue.

There must be a nexus between any penalty ordered by the Commission and the conduct upon which liability is premised. 58/ Here, although any liability would be premised on Qwest's failure to file certain agreements for approval by the Arizona Commission in violation of Section 252, other parties wrongfully recommend penalties that bear no relation to the individual facts and circumstances of the alleged violations themselves.

Most prominently, the Staff and RUCO both recommend that Qwest be required to provide CLECs (other than Eschelon and McLeod) with a prospective discount. Aside from

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55/ 218 F. 111, 117, 121 (D. Ariz. 1914). In *Van Dyke*, the Commission sought to impose penalties on a daily basis pending an appeal of the Commission's order. The court concluded that such penalties deprived the complainants of the equal protection of the laws by practically depriving them of the right to appeal to the court to determine the validity of the law and the orders of the Commission. *Id.* at 120-121.

56/ *See* Rev. Code 1928, Ch. 15, § 728 ("Every violation is a separate offense, but violations continuing from day to day are but one offense."), modifying Laws 1912, Ch. 90, § 76(b) ("in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense").

57/ As originally drafted in 1912, this penalty statute is virtually identical to its current form. *See* Laws 1912, Ch. 90, § 81. This provision was recodified in 1913 (Civ. Code 1913, § 9-2357) with no substantive changes.

58/ *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513, 1523 (2003) ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.").

the fact that such a discount would be discriminatory, 59/ there is no factual basis for this proposal. The Staff cites to no evidence to support its speculative theory that a prospective discount would serve a remedial purpose and does not dispute that Eschelon and McLeod no longer receive the benefit of the alleged discount agreements.

1. Qwest cannot be penalized for not filing *non*-251(b) or (c) provisions.

The FCC Order is clear 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 Section 251(b) or (c). 60/ Contracts that do not create ongoing obligations or do not pertain to Section 251(b) or (c) matters are not required to be filed for state commission approval, and there is no basis for imposing penalties on Qwest for not filing those agreements. 61/ Nonetheless, AT&T endorses the penalty recommendations of the Staff and RUCO, based in part on its expansion of the filing requirement contrary to the FCC Order.

AT&T essentially reiterates its argument in the declaratory judgment proceeding before the FCC, apparently hoping this Commission will adopt a filing standard that the FCC expressly rejected. First, AT&T suggests that the word "agreement" must encompass documents such as letters of intent and memoranda of understanding. 62/ As noted above, the FCC Order is

59/ *See infra* notes 77 & 83 and accompanying text.

60/ *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)*, Memorandum Opinion and Order, WC Docket No. 02-89 (Oct. 4, 2002), at ¶ 8 (hereinafter "FCC Order").

61/ *See 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*, Memorandum Opinion and Order, WC Docket No. 02-314 (Dec. 20, 2002), at ¶ 488 (stating that when contracts that are not interconnection agreements are not filed, "no discrimination within the meaning of section 251, 252, or 271 has occurred because sections 251 and 252 have not been triggered with respect to those agreements").

62/ AT&T Post-Hearing Memorandum, at 4.

clear that an agreement falls within the filing standard only if it creates an *ongoing obligation* under Section 251(b) or (c). Accordingly, mere agreement proposals or non-binding agreements to agree do not fall within the standard recently articulated by the FCC. Second, AT&T proposes, "Any agreement which would give one carrier an advantage over another in the area of interconnection must be subject to approval ...." 63/ Even if such an amorphous standard could be implemented (which is unlikely), it is inconsistent with the standard announced by the FCC. For example, AT&T's broad standard does not reflect the requirements that the agreement pertain to Section 251(b) or (c) services, that obligations be ongoing, or that certain types of agreements need not be filed if they are made otherwise available. This Commission is bound by the FCC's interpretation of the Section 252(a)(1) filing requirement, 64/ and must reject suggestions by AT&T or any other party that a filing standard that is inconsistent with the FCC Order be adopted. Moreover, any assessment of penalties predicated on the non-filing of agreements that are specifically excluded from the filing standard articulated by the FCC would be in conflict with federal law.

In particular, any penalty may not exceed Section 252(e)'s filing requirement by requiring discounts on intrastate access. The Staff conceded that intrastate access is not a Section 251(b) or (c) service, 65/ yet persists in asking the Commission to order Qwest to provide CLECs a 10% discount on intrastate access from January 1, 2001 through June 30, 2002

63/ *Id.*, at 6.

64/ *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.

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

and for 18 months following the Commission's order. 66/ As the FCC has made clear, not filing *non*-251(b) or (c) terms – such as terms related to intrastate access – does not cause discrimination in violation of Sections 251, 252, or 271. 67/ Accordingly, there is no basis upon which the Commission may penalize Qwest not filing intrastate access provisions, and any penalty order that would require Qwest to provide CLECs with discounts on intrastate access lacks the required nexus to the alleged violations.

Furthermore, penalties cannot be based on terms related to regulatory participation. The subject of this proceeding is Qwest's compliance with the filing requirements under the Act. Contracts that contain non-participation agreements but do not involve Section 251(b) and (c) services do not fall within the filing standard articulated in the FCC Order. The Commission has authority to review only agreements that must be filed for whether they are within the public interest. As a result, there is no legal foundation for basing penalties on agreements that contain non-participation provisions but do not contain ongoing terms related to Section 251(b) or (c) services.

2. Any penalty assessment must be based on conduct and harm only in the State of Arizona.

The Telecommunications Act is clear that the FCC retains exclusive jurisdiction over interstate communications, 68/ including interstate access. 69/ The Staff conceded that this Commission therefore lacks authority to order a discount on interstate access charges as an

66/ Staff Post-Hearing Memorandum, at 24.

67/ *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*, Memorandum Opinion and Order, WC Docket No. 02-314 (Dec. 20, 2002), at ¶ 488.

68/ 47 U.S.C. § 152.

69/ *See* 47 C.F.R. § 69.1 *et seq.*

element of any penalty order: "I did not include interstate access [in the discount penalty recommendation] due to the fact that this Commission's jurisdiction is in the State of Arizona, and interstate access is outside of the State of Arizona, is my understanding." 70/ Time Warner suggests that, because of this jurisdictional restriction, the Commission should order a going-forward discount for more than 18 months to somehow compensate for not ordering a discount on interstate access. 71/ Certainly though, if the Commission lacks jurisdiction (and it does) to directly regulate interstate access, it also lacks jurisdiction to regulate interstate access through a proxy mechanism such as that suggested by Time Warner.

Aside from the fact that a penalty including *any* going-forward discount would violate federal and state anti-discrimination laws, 72/ Time Warner's suggestion must also be rejected because there is no factual basis for a discount exceeding 18 months. The alleged discount agreements with Eschelon and McLeod were in effect for approximately 10 ½ months and 18 months, respectively. Indeed, the only rationale Time Warner offers for extending the discount for a period greater than 18 months – to disingenuously mask an overreaching of this Commission's jurisdiction into areas of interstate communications – is an illegal one.

D. Any penalty cannot conflict with state and federal laws prohibiting discrimination.

Any remedies crafted by the Commission must be consistent with federal law, and any assumption that discards federal law and policy at the remedies stage would be fundamentally inconsistent with the regulatory regime created by Congress in enacting the 1996 Act. Under the Telecommunications Act, this Commission, like all state commissions, retains a

70/ Tr., Vol. IV, Testimony of Marta Kalleberg, at 879:23-880:1.

71/ Time Warner Post-Hearing Memorandum, at 2.

72/ *See infra* notes 77 & 83 and accompanying text.

significant role in regulating the federal scheme as the primary entity to review and enforce interconnection agreements and to patrol against unlawful discrimination. But "[t]he new regime for regulating competition in this industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law." 73/

The federal nature of this regulatory regime is so pervasive that even an area that at first blush seems to raise state law questions – such as interpretation and enforcement of an interconnection contract – is suffused with federal law, and must give way to federal law when it compels a different result than would be reached under state contract law. 74/ Similarly, a state utilities commission may not rely solely on state law when crafting remedies because "[l]egal rules which impact significantly upon the effectuation of federal rights must [] be treated as raising federal questions." 75/ This holds even where the federal statute in question is silent on the issue of remedies. 76/

Although the 1996 Act is silent as to the specific form of remedies that state commissions can impose for violating it, federal questions arise nonetheless. In the cooperative federal system created by the 1996 Act, a governing state penalty statute should be followed to

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73/ *Southwestern Bell*, 225 F.3d at 947.

74/ *See id.* at 947-948 (holding that the interpretation and enforcement of an interconnection agreement raises federal law issues); *AT&T Comm. of the S. States, Inc. v. BellSouth Telecomm., Inc.*, 7 F. Supp.2d 661, 670 (E.D.N.C. 1998) (same).

75/ *Burks v. Lasker*, 441 U.S. 471, 477 (1979).

76/ *Cf. Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942) ("When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield.").

the extent it is consistent with the 1996 Act and should be applied with the purpose of furthering the policies and goals of the Act.

In particular, any penalty assessment by this Commission cannot be contrary to the non-discrimination provisions of the 1996 Act. Qwest is obligated under Section 251 of the Act to provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory." 77/ As Eschelon and McLeod have pointed out, several aspects of the Staff's and RUCO's penalty recommendations would violate this non-discrimination mandate. 78/ First, excluding Eschelon and McLeod from the backward-looking discount recommended by the Staff does not account for the costs incurred by Eschelon and McLeod when negotiating and performing under the agreements, including costs associated with the UNE Star platform. As Eschelon explained in its Initial Brief, "Eschelon incurred substantial costs in implementing, billing and converting from UNE-Star to UNE-P." 79/ Any penalty order containing a backward-looking discount that does not account for these costs (which the Staff and RUCO conceded they did not analyze 80/) would exceed the benefits actually received by Eschelon or McLeod and would be discriminatory. 81/

77/ 47 U.S.C. § 251(c)(2)(D). Arizona state law similarly prohibits discrimination. Ariz. Rev. Stat. § 40-334.

78/ *See* Initial Brief of Eschelon Telecom of Arizona, Inc., at 10-11; Comments of McLeodUSA Telecommunications Services, Inc., at 3-4.

79/ Initial Brief of Eschelon Telecom of Arizona, Inc., at 8-9.

80/ Tr., Vol. IV, Testimony of Marta Kalleberg, at 871:10-14; Tr., Vol, IV, Testimony of Marylee Diaz Cortez, at 775:8-777:2.

81/ As Eschelon points out, Eschelon allegedly received a discount for only approximately 11 months, and therefore its being excluded from an 18-month discount is also discriminatory. Initial Brief of Eschelon Telecom of Arizona, Inc., at 9.

Second, offering other CLECs credits based on the alleged discounts without also requiring them to satisfy the volume and term commitments inherently tied to the alleged Eschelon and McLeod agreements would afford other CLECs a substantial advantage not provided to Eschelon and McLeod, contrary to the opt-in provisions and non-discrimination mandate of the Act. 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*. The Staff recommends a backward-looking discount over an 18-month period, the duration of the alleged discount with McLeod. Offering such a discount, without also requiring CLECs to meet the volume commitment required of McLeod 82/ would provide a benefit to other CLECs that was not provided to McLeod. If the Court or the Commission offers a backward-looking discount at the lower volume and term commitment contained in the Eschelon agreement ($150 million over 5 years), such a discount could not be provided for greater than 10½ months – the amount of time Eschelon allegedly received the benefit of the discount – without discriminating against Eschelon.

Third, excluding Eschelon and McLeod from the forward-looking discounts recommended by the Staff and RUCO unjustly penalizes those CLECs and is discriminatory. As Qwest explained in its Initial Post-Hearing Memorandum, the McLeod and Eschelon agreements have been terminated, and any benefits accruing to the CLECs under the agreements and any discrimination against other CLECs have ceased. Because McLeod and Eschelon have not received the value of any prospective discount, ordering the going-forward rebates recommended by the Staff and RUCO would place Eschelon and McLeod in a worse position than CLECs who

82/ **REDACTED**

were not parties to the agreements. 83/ This result would be in conflict with the non-discrimination imperatives of both federal and state law.

Fourth, allowing CLECs to opt into the terms of the November 15, 2000 *Confidential Amendment to Confidential / Trade Secret Stipulation* 84/ and the July 3, 2001 *Letter Agreement of Switched Access Minute Reporting* 85/ with Eschelon regarding per line per month credits for "each month that Qwest did not provide accurate daily usage information to a CLEC" without offsetting those credits against the amounts actually billed by the CLECs to IXCs and requiring a showing by the CLECs that the daily usage information provided to them by Qwest was inaccurate would provide a windfall to those CLECs. As a matter of fact, the actual payment from Qwest to Eschelon was a matter of a couple dollars per line, not $13 or $16. Thus, the key provisions of those agreements included: 1) inaccurate manual processing of usage data; 2) adverse impact on the CLEC's ability to make its switched access billings to interexchange carriers; 3) similar traffic patterns; 4) provision of the $13 and $16 credits on a *pro rata* basis; and 5) offsets by billings from the CLECs to IXCs for switched access on a per line basis. Because any opt-in remedy cannot give current CLECs more favorable terms than the original CLEC, the Court and Commission cannot order the $13 and $16 credits without conditioning them on these five factors. Similarly, any opt-in penalty related to the $2 per line per month credit for Qwest's intraLATA toll traffic terminating to customers served by a CLEC's switch must be offset by the amounts the CLEC actually collected from Qwest for

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83/ Indeed, Eschelon estimates that exclusion from a prospective credit would cost it between $600,000 and $2,000,000. *Id.*, at 6.

84/ Joint 1-4, at ¶ 2.

85/ Joint 1-5.

terminating switched access for each UNE-P line or unbundled loop, consistent with the terms of the original agreement with Eschelon. 86/

E. The penalties proposed by the Staff and RUCO are disproportional to the conduct at issue and to the actual effects of non-filing.

Any penalty or fine ordered by this Commission must be proportional to the seriousness of the offense and the degree of actual harm caused. 87/ Again, Qwest does not seek exoneration from the Commission in these proceedings. Qwest does, however, contend that the resolution of these issues must be based on a fair consideration of all the relevant facts, and any penalty cannot be based on mere assumptions about "facts" not in the record. The penalty recommendations of the Staff and RUCO have no factual foundation or logical connection to the issues in this proceeding and are vastly disproportional to the evidence presented during the hearing.

First, the substantial monetary penalty recommended by the Staff, aside from being outside the Commission's contempt jurisdiction, 88/ is excessive. As discussed above, by reverting to arguments of per se discrimination, the Staff and RUCO implicitly concede their inability to show *any* actual harm caused by the failure to file the agreements at issue. As a matter of both law and policy, any penalty must reflect this inability to show actual harm. 89/ Any penalty must also reflect the disagreement across the industry at the time the agreements at issue were formed regarding the scope of the filing requirement – a disagreement that necessarily

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86/ *Id.*

87/ *United States v. Bajakajian*, 524 U.S. 321, 324 (1998).

88/ *See supra* notes 46-57 and accompanying text.

89/ *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1524 (2003) ("[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.").

resulted in the Staff's and RUCO's failure to prove that Qwest acted willfully or intentionally to violate Section 252 of the Telecommunications Act.

Second, the Staff's and RUCO's proposed penalties related to wholesale service quality standards bear no relation to the agreements at issue here. 90/ As the Staff and RUCO conceded, none of the agreements contain the PID measurements or payments that they now ask the Commission to order. 91/ Moreover, there was no evidence presented by either the Staff or RUCO regarding the financial impact of their proposals, 92/ and no justification offered for deviating from the QPAP that was intensely negotiated by the Staff, the CLECs, and Qwest and accepted by the Commission.

Third, RUCO's proposed penalties related to broadband deployment bear no relation to any alleged harm in this case. RUCO attempts to justify its recommended penalty by falsely claiming it "is really asking this Commission to require Qwest to carry out on a more expedited basis what it already plans to do." 93/ In fact, the undisputed evidence was that the expansion of DSL requested by RUCO would cost Qwest between $270,000,000 and $280,000,000, an investment Qwest would not be able to recover, and is *not* part of Qwest's current plans. 94/

Fourth, the litigation fund recommended by RUCO is contrary to public policy and the purpose of the Act. As Mr. Shooshan explained, the goal of the Act is to reduce reliance

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90/ *See* Qwest Post-Hearing Memorandum, at 77-79.

91/ Tr., Vol. IV, Testimony of Marta Kalleberg, at 882:19-894:2; Tr., Vol. III, Testimony of Ben Johnson, at 535:24-536:2.

92/ Tr., Vol. IV, Testimony of Marta Kalleberg, at 884:3-18.

93/ RUCO Post-Hearing Memorandum, at 58.

94/ Tr., Vol, IV, Testimony of Kathleen Lucero, at 738:2-11, 741:5-743:6, 743:17-20, 743:7-9 ("Q. Is deployment of DSL throughout Arizona part of Qwest's existing plans? A. No.").

on regulation and litigation and encourage good faith negotiation on interconnection matters. 95/ A litigation fund such as the one proposed by RUCO would instead encourage parties to pursue litigation before the Commission. Moreover, the fund is duplicative of remedies already available to CLECs through Tier II payments under the PAP. 96/

Fifth, the Code of Conduct recommended by the Staff is unnecessary to ensure Qwest's future compliance with its obligations under Section 251 and 252 in light of the extensive remedial measures voluntarily instituted by Qwest along with Qwest's Corporate Code of Conduct for all of its business dealings.

As a result of the lack of any nexus between the facts at issue in this proceeding and the "non-monetary" penalties proposed by the Staff and RUCO, the Commission lacks authority to order these sanctions. In *Southern Pacific Co. v. ACC*, the Arizona Supreme Court held that this Commission lacked authority to order Southern Pacific to resume operating under a particular schedule as a penalty for Southern Pacific's failure to comply with a statutory requirement that it notify the Commission 30 days in advance of a service change. 97/ The Court held that the legislature "has not given the Commission the right to rearrange petitioner's train service without a judicial determination that the service so provided is inadequate," and, as a result, the Commission's decision "unconstitutionally deprive[d] petitioner of its property without due process of law." 98/

95/ Pre-Filed Testimony of Harry M. Shooshan, at 23:17-24:6. This goal is consistent with Arizona public policy encouraging private settlement of disputes. *See* Qwest Post-Hearing Memorandum, at n.273.

96/ Qwest Post-Hearing Memorandum, at n.275 and accompanying text.

97/ 98 Ariz. 339, 343-44, 348, 404 P.2d 692 (Ariz. 1965).

98/ *Id.* at 348.

Similarly, any order containing the "non-monetary" penalty recommendations of the Staff and RUCO would be outside this Commission's authority in this proceeding. This case is about Qwest's compliance with Section 252, not Qwest's wholesale service quality standards and not Qwest's broadband services. Absent a hearing on these issues and substantial evidence in support, the Commission cannot institute "remedies" affecting these unrelated issues.

The Staff's and RUCO's proposed penalties must be rejected as inherently disproportionate to the conduct alleged 99/ and beyond the Commission's authority -- the monetary penalties recommended by the Staff are grossly excessive in light of the complete absence of evidence of actual harm to Arizona CLECs or competition in general, and the "non-monetary" penalties recommended by the Staff and RUCO bear no logical connection to the agreements at issue or the conduct alleged.

F. There is no need for a separate rule-making docket.

WorldCom recommends the Commission open a rulemaking docket to adopt a definition of an interconnection agreement and filing requirements, including upon whom the obligation to file rests, when a filing is due, and how to treat confidential information. WorldCom suggests that the burden to file should rest only with Qwest and that Qwest should be required to file agreements within 10 days of execution. Qwest does not believe that this docket or WorldCom's suggestions are necessary or appropriate. In its October 4, 2002 Order, the FCC clarified the scope of the filing requirement in Section 252(a)(1). This Commission should adopt the definition articulated by the FCC, and there is no need for this Commission to open a separate docket to do so. Furthermore, WorldCom has not stated any justification for relieving

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99/ *Power v. United States*, 531 F.2d 505, 507 (Cl. Ct. 1976) (an administrative penalty must be overturned where "the penalty is so harsh that there is an 'inherent disproportion between the offense and punishment.'").

other parties to interconnection agreements from the obligation of ensuring the agreements are filed for Commission approval. Although Qwest willingly bears the burden to file interconnection agreements pursuant to Section 252, Qwest should not bear this burden alone. WorldCom's recommendation that the Commission require interconnection agreements to be filed *within* 10 days of execution should also be rejected. Under A.A.C. R14-2-1506(A), an interconnection agreement must be filed for Commission approval within 30 calendar days of the execution date of the agreement. Qwest has committed to comply with this deadline. There is no basis for revising this rule to require a shorter filing period.

VII. CONCLUSION

The initial post-hearing memoranda submitted by the Staff and RUCO make clear that their positions depend on evidentiary shortcuts and "expert" speculation and are not supported by evidence in the record. This is true not only for their vague and unsubstantiated allegations of discrimination, but also for their penalty proposals, which have no foundation in either law, fact, or sound public policy. With this factual record and in this legal context, the Court and Commission should 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.

DATED this 15th 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 13 copies of the
foregoing hand-delivered for
filing this 15th day of May 2003 to:

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

COPY of the foregoing hand-delivered
this 15th 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 15th 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

____