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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

STAFF'S NOTICE OF FILING  
REPLY BRIEF

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

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of May, 2003.

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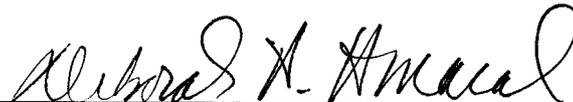
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1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

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3 **Chairman**

3 **JIM IRVIN**  
4 **Commissioner**

4 **WILLIAM A. MUNDELL**  
5 **Commissioner**

5 **JEFF HATCH-MILLER**  
6 **Commissioner**

6 **MIKE GLEASON**  
7 **Commissioner**

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

**Docket No. RT-00000F-02-0271**

**STAFF'S REPLY BRIEF**  
**PUBLIC VERSION**

12 **I. INTRODUCTION**

13  
14 The issue before the Commission is not Qwest's current compliance with Section 252(e) of  
15 the 1996 Act. The issue before the Commission is whether Qwest's past conduct violated Federal  
16 law and State Regulations. The conduct in question is Qwest's failure to file certain interconnection  
17 agreements with this Commission for approval as required by law. Although the Commission may  
18 take Qwest's current compliance, and the probability of future compliance into consideration to  
19 mitigate the penalties decided upon, Qwest's current claimed compliance does not excuse its previous  
20 violations.

21 **II. DISCUSSION**

22 **A. Qwest's Allegations of Current Compliance Should not Excuse its Past Conduct.**

23 Qwest argues that the "statutory ambiguity, Qwest's reasonable attempt to interpret the  
24 statute, and Qwest's prompt action to eliminate any future disputes, counsel against the penalties  
25 recommended by the Staff and RUCO."<sup>1</sup> The statute is not ambiguous. Qwest did not act  
26 reasonably in interpreting the statute as it did, and its own filings and actions demonstrate this fact.  
27

28 <sup>1</sup> Qwest Br. at 8

1 Further, as discussed below Qwest has not acted promptly to eliminate future disputes and in fact the  
2 testimony of its witnesses and the arguments set forth in its Brief all indicate that Qwest commitment  
3 to “overfile agreements” in the future is turning out to be “empty” promise afterall.

4 Qwest’s own testimony and initial brief strongly suggest that Qwest is still trying to excuse its  
5 conduct in not filing agreements with the Commission and is interpreting the FCC’s Declaratory  
6 Ruling<sup>2</sup> in such a way so as to create giant loopholes in the filing requirements. For example, Qwest  
7 argues in its Brief that “the ILECs have a measure of flexibility as to how they make ‘ongoing  
8 obligations’ available to CLECs as one considers the filing obligations of Sections 252(a).”<sup>3</sup>  
9 Notably absent from the Act’s provisions, however, is anything that would support Qwest’s position  
10 that the ILEC has flexibility in meeting Section 252’s filing obligations. Nor can the FCC’s  
11 Declaratory Ruling be reasonably read to give the ILEC “flexibility” in meeting the Act’s obligations.  
12 Qwest apparently relies on a narrow discussion in the FCC’s Declaratory Ruling which focused upon  
13 “escalation and dispute resolution provisions” and stated that the ILEC did not have to include  
14 escalation and dispute resolution provisions in its agreements if the same provisions were generally  
15 available to the CLECs elsewhere. Qwest broadly extends this narrow discussion into a license to not  
16 file “any provisions” when they are available elsewhere and as allowing it “flexibility” as to how to  
17 make “ongoing obligations” available to CLECs as one considers the filing obligations of Section  
18 252(a).<sup>4</sup> Moreover, Qwest would shift the burden to the Staff to determine whether a provision is  
19 “available elsewhere” so as to exempt Qwest from the Act’s filing requirements.<sup>5</sup>

20 As to Qwest’s conduct in this case, Qwest suggests that “any violation (and corresponding  
21 penalty) would be countered or at least mitigated where Qwest made the provision available through  
22 some other means.”<sup>6</sup> Qwest’s “available through other means” exception to the Section 252(e) filing  
23 requirement is fiction; it does not exist and gives Staff considerable pause in accepting Qwest’s

24 <sup>2</sup> See *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty*  
25 *to File and Obtain Prior Approval of Negotiated Contractual Arrangement under Section 252(a)(1)*, WC Docket No. 2-  
89 Memorandum Opinion and Order (rel. October 4, 2002) (“*FCC Declaratory Ruling*”).

26 <sup>3</sup> Qwest Br. at 9.

26 <sup>4</sup> Qwest Br. at 9.

27 <sup>5</sup> Qwest Br. at 9. (“It also suggests that the Commission must analyze the connection between the agreement and the  
enumerated obligations and determine whether a provisions is available elsewhere before it can conclude that Qwest  
violated the Act by not filing a particular agreement.”)

28 <sup>6</sup> Qwest Br. at 9.

1 repeated assertions that its interpretations have been made in “good faith” and that it will “overfile”  
2 agreements with the Commission to ensure that it meets the filing requirement.

3 Still another example, is Qwest’s argument concerning “certain categories of ILEC-CLEC  
4 contracts that, while ‘relating to’ Section 251(b) or (c) matters, need not be filed under Section 252.”<sup>7</sup>  
5 Qwest argues that two categories of agreements “relating to “ Section 251 matters need not be filed  
6 under Section 252: (i) orders and form contracts and (ii) agreements with bankrupt competitors.”<sup>8</sup>  
7 Once again, Qwest has taken two very narrow exceptions discussed in the FCC’s Declaratory Ruling  
8 and spun them into broad exemptions for “all orders and form contracts” and “all agreements with  
9 bankrupt competitors” from the 252(e) filing requirement. In actuality, the FCC exempted “order and  
10 contract forms” that are completed by carriers to obtain service pursuant to terms and conditions  
11 already **set forth in** an interconnection agreement.<sup>9</sup> As can be seen, the exemption for bankrupt  
12 competitors involved agreements **that do not otherwise change** the terms and conditions of the  
13 underlying interconnection agreement.<sup>10</sup> These exemptions are much narrower than Qwest’s  
14 interpretation offered in this case.

15 In summary, Staff believes that the non-monetary penalties ultimately imposed on Qwest by  
16 the Commission must be structured in such a way that the Commission is assured that Qwest is  
17 meeting its 252(a)(1) and 252(e) obligations in the future.

18 **B. Settlement Agreements, Purchase Agreements and/or Form Agreements Which**  
19 **Affect Qwest’s Ongoing Obligations Under Section 251 Must Be Filed For**  
20 **Approval Under Section 252.**

21 Significantly, in its Brief, Qwest concedes that it should have filed almost all of the  
22 agreements identified by Staff with the Commission for approval under Section 252:

23 “To a large extent, the parties agree as to which agreements, in retrospect, fall  
24 within Section 252’s filing requirement.”

25 Qwest characterizes the agreements on which Staff and Qwest disagree as “mere” settlement  
26 agreements, purchase agreements and/or form contracts which are not covered by the Section  
27 252(a)(1) and 252(e) filing requirements. However, as pointed out by Staff Witness Kalleberg and in

27 <sup>7</sup> Qwest Br. at 9.

28 <sup>8</sup> Qwest Br. at 10.

<sup>9</sup> FCC Declaratory Ruling at p. 7.

<sup>10</sup> *Id.*

1 Staff's Initial Brief, these agreements contained additional ongoing terms and conditions involving  
2 Section 251 services and/or were part of pricing discount arrangements that covered Section 251  
3 services, and therefore, Qwest was required to file the agreements under Section 252(e) of the Act.

4 For instance, on pps. 13-14 of its Brief, Qwest lists 3 different settlement agreements with  
5 McLeod and Eschelon arguing that they do not contain any forward-looking obligations to Section  
6 251(b) or (c), and therefore, do not have to be filed under Section 252. Nonetheless, Qwest  
7 acknowledges in this same discussion that the agreements all contain terms and conditions relating to  
8 the new platform "being created by the parties", and that interconnection agreements and/or  
9 amendments incorporating these terms were later filed with the Commission.<sup>11</sup> As explained in  
10 Staff's Initial Brief, the Commission's rules require filing of all interconnection agreements within 30  
11 days of their execution.<sup>12</sup> Where the time between execution of the agreement and its actual filing  
12 did not exceed the 30 day period by a long period of time, Staff attributed the failure to file to  
13 "inadvertence". Indeed, Staff Witness Kalleberg developed a separate list of agreements which she  
14 believed were actually violations of A.A.C. R14-2-1506(A). If the time period between execution  
15 and filing of the agreements referenced by Qwest was minimal, Staff would be willing to reclassify  
16 the agreements as R14-2-1506(A) violations.

17 On pps. 16-17 of its Brief, Qwest argues that purchase agreements are not within the filing  
18 requirements of the Act. Qwest then asserts that "[t]he Staff's contention that these Purchase  
19 Agreements should have been filed (and that Qwest should be penalized for not filing them) appears  
20 to be based solely on the Staff's view that the Purchase Agreements are related to alleged discount  
21 agreements with Eschelon and McLeod, and those discounts.....would fall within the FCC's  
22 definition of 'interconnection agreement.'" Amazingly, Qwest goes on to concede that if such  
23 discounts were provided to Eschelon and McLeod by Qwest, they would in fact fall within the filing  
24 standard.<sup>13</sup> Both Staff and RUCO's Witnesses have submitted substantial evidence in this  
25

26 <sup>11</sup> Staff agrees that a settlement agreement that does not contain an ongoing obligation relating to section 251(b) and (c)  
27 and that is merely an agreement providing for backward-looking consideration, need not be filed. See FCC Declaratory  
28 Ruling at p. 6. However, in this case, Qwest's agreements contained ongoing obligations relating to section 251(b) and  
(c) services.

<sup>12</sup> A.A.C. R14-2-1506(A).

<sup>13</sup> Qwest Br. at 17.

1 proceeding which demonstrates that Qwest did provide the 10% discount to both Eschelon and  
2 McLeod and that they were related in both cases to these same purchase agreements between the  
3 parties.

4 However, Qwest then disingenuously argues that Staff inappropriately included these  
5 purchase agreements on its list, thereby inflating the penalties that should be imposed upon Qwest.  
6 Had the agreements not been drafted to conceal their true purpose and the fact that 251 pricing  
7 discounts were being given, Qwest itself acknowledges that the agreements would fall within the  
8 filing obligation. The question, therefore, is not as Qwest puts it – whether the agreements, standing  
9 alone, were required to be filed with the Commission for approval – but rather, when the true intent  
10 and secret arrangement underlying the agreements is known, whether they fall within the filing  
11 obligation of Sections 252(a)(1) and 252(e). The answer to the later question is an unqualified “yes”.  
12 As the FCC stated in its Declaratory Ruling, the label or name of an agreement is not controlling as to  
13 whether it needs to be filed or not; rather one must look at the substance of the agreement to  
14 determine whether it contains ongoing obligations relating to Section 251(b) and (c) services.

15 Qwest also discusses several agreements that it claims do not create “new” obligations  
16 pertaining to Sections 251(b) or (c).<sup>14</sup> First Qwest argues that form agreements, such as the  
17 Internetwork Calling Name Delivery Service Agreement and the Directory Assistance Agreement are  
18 not subject to the filing requirement because they fall under the “form agreement” exception. Staff  
19 believes that if form agreements contain terms and conditions in addition to those found in the an  
20 interconnection agreement, they should be filed under Section 252(e) as an amendment to the  
21 Interconnection Agreement.<sup>15</sup> Moreover, in response to Qwest’s arguments that these contracts did  
22 not involve Section 251(b) or (c) services, Staff explained in its Initial Brief, that the FCC Orders  
23 make clear that these are Section 251(b) services despite the fact that they have been removed from  
24

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25 <sup>14</sup> Staff finds it interesting to note that for purposes of this discussion, Qwest has once again changed the FCC standard. In  
26 this discussion, Qwest states that the FCC standard requires filing for “new” obligations under Section 251(b) or (c) rather  
27 than “ongoing” obligations under Section 251(b) or (c).

28 <sup>15</sup> Qwest states that in its August 29, 2002, Comments to Staff’s Supplemental Report, it identified an additional 10  
agreements that Qwest believes are form contracts in which the same terms have been available to all CLECs. Once  
again, Staff believes that if an agreement adds terms and conditions not contained in the parties’ current interconnection  
agreement, they must be filed as an amendment to the agreement.

1 the FCC's UNE list.<sup>16</sup>

2 Second, on pps. 37-39 of its Initial Brief, Qwest identifies 6 agreements which contained  
3 "reciprocal compensation" provisions relating to ISP bound traffic and argues that such traffic does  
4 not constitute "reciprocal compensation" within Section 251(b)(5) of the Act and thus is not within  
5 the filing requirements of Section 251(e). Two points weigh against Qwest's position. First, many of  
6 the agreements at issue were executed prior to the FCC's most recent Order on this subject. Staff  
7 believes that these agreements would have been subject to the filing requirement.<sup>17</sup> Second, even if  
8 Qwest were correct in its position, 4 of the 6 agreements had other terms and conditions relating to  
9 Qwest's ongoing obligations under Section 251 and thus should have been filed in any event,  
10 Finally, Staff does agree with Qwest, that under the FCC's most recent Order on this subject, not all  
11 agreements involving reciprocal compensation on ISP bound traffic would have to be filed under  
12 Section 252(e) of the Act.<sup>18</sup>

13 Qwest also discusses two instances where the agreement was assigned to another CLEC.  
14 Both the SBC/NAS agreement and the Paging Network agreement involve assignments to other  
15 CLECs. Qwest states with respect to the Paging Network agreement that it has been the expectation  
16 that the CLEC receiving the assignment would notify the State commission in addition to notifying  
17 Qwest. Qwest argues that while it is not creating new or additional obligations to provide Section  
18 251 services, it is willing to make filings in the future pursuant to the Commission's direction on  
19 these types of issues. While certainly the policy argument in favor of filing is not as compelling in  
20 this instance, technically they do involve Qwest's ongoing obligations under the Act and should be  
21 filed.

22  
23  
24 <sup>16</sup> Nor does Staff agree with Qwest's statement that no discrimination occurred because the same contract language was  
25 available to all CLECs through other agreements or the SGAT. First, it is Staff's understanding that the agreements  
26 contain additional terms and conditions to those contained in the SGAT, thus, the language would not have been available  
27 in the SGAT. Moreover, Qwest has not demonstrated that the same contract language was available to all CLECs through  
28 other published agreements.

26 <sup>17</sup> *In the matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and*  
27 *Intercarrier Compensation for ISP-bound Traffic*, CC Docket Nos. 906-98 and 99-68, Declaratory Ruling, (rel. February  
28 26, 1999).

27 <sup>18</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-carrier*  
28 *Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, 99-68, Order on Remand and Report and Order (rel. May 15,  
2001).

1           **C. The FCC Declaratory Ruling Did Not Establish a New Filing Standard But**  
2           **Merely Clarified Section 252's Already Existing Standard**

3           Qwest argues that "...judgments regarding Qwest's conduct in either filing or not filing those  
4 agreements must be made in light of the absence of a standard prior to the FCC's October 4, 2002,  
5 Order."<sup>19</sup> Qwest states that neither the Act nor its legislative history defines the term  
6 "interconnection agreement".<sup>20</sup>

7           Section 252(a)(1) of the Act clearly sets out the types of agreements that are to be filed with  
8 the Commission:

9           (a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATION. –

10           (1) VOLUNTARY NEGOTIATIONS. – *Upon receiving a request for*  
11           *interconnection, services, or network elements pursuant to section 251, an*  
12           *incumbent local exchange carrier may negotiate and enter into a binding*  
13           *agreement with the requesting telecommunications carrier or carriers*  
14           *without regard to the standards set forth in subsections (b) and (c) of*  
15           *section 251. The agreement shall include a detailed schedule of itemized*  
16           *charges for interconnection and each service or network element included*  
17           *in the agreement. (Emphasis added).*

18           Qwest's arguments to the contrary notwithstanding, the Act defines what should be filed with  
19 the State Commission as an agreement arising from a "request for interconnection, services, or  
20 network elements pursuant to section 251."

21           Qwest's argument that its actions in not filing many agreements with the Commission was  
22 done pursuant to a good faith interpretation of Section 251(a)(1) "as including only those agreements  
23 which included a detailed schedule of itemized charges for interconnection and each service or  
24 network element" is contrary to its own filings and actions in the past.

25           As Staff Witness Kalleberg pointed out in her testimony in this case, Section 4.92 of Qwest's  
26 own 13<sup>th</sup> Revised SGAT dated June 28, 2002, contains a much more general description of an  
27 interconnection agreement than that urged by Qwest before the FCC or in this case:

28           'Interconnection Agreement' or 'Agreement' is an agreement entered into between  
            Qwest and CLEC for Interconnection, Unbundled Network Elements or other services  
            as a result of negotiations, adoption and/or arbitration or a combination thereof  
            pursuant to Section 252 of the Act.

<sup>19</sup> Qwest Br. at 5.

<sup>20</sup> Qwest Br. at 5.

1           Moreover, Qwest's own actions in filing many agreements or amendments thereto with the  
2 Commission for approval in the past which did not contain a "detailed schedule of itemized charges",  
3 further undermines its argument that its non-filing of certain agreements was done in good faith.

4           Qwest further argues that Staff's definition of an interconnection agreement as a contract  
5 between Qwest and a "...competitor *that has any effect* on its provision of interconnection, services,  
6 or network elements" was much broader than that ultimately adopted by the FCC, and therefore, if  
7 there was a standard it was unclear even to Staff. Qwest also relies on the fact that Staff's own list of  
8 agreements that should have been filed varied at times, indicating that Staff also had difficulty  
9 determining whether a particular agreement was subject to the filing requirement.<sup>21</sup> The standard  
10 used by Staff was actually consistent with the standard set out by the FCC in its Declaratory Ruling.  
11 As Staff Witness Kalleberg noted in her testimony: "Staff and the FCC relied directly on the  
12 language in Sections 251 and 252 of the 1996 Act as it relates to interconnection in order to provide  
13 additional clarification on the appropriate filing standard."<sup>22</sup>

14           The fact that Staff revised its initial list of agreements from its Initial Report is due more to  
15 other factors than to Qwest's alleged argument that the filing standard was not clear. Qwest as well  
16 as the CLECs filed additional agreements with the Commission after Staff's Initial Report in this  
17 matter. Staff added several of those new agreements to its list. In addition, significant discovery  
18 occurred after Staff's initial list was published which resulted in additional agreements being  
19 submitted.

20           While as Qwest pointed out in its Initial Brief that Staff noted in its reports and testimony in  
21 this case that certain of the CLECs also appeared to be confused at times as to what needed to be  
22 filed, this was the exception rather than the rule. Staff's discussion was based upon data responses it  
23 had received from Covad, McLeod and Eschelon. Their uncertainty, however, did not concern the  
24 definition of an interconnection agreement, but rather whether a specific type of agreement had to be  
25 filed.

26  
27  
28 <sup>21</sup> Qwest Br. at 7.

<sup>22</sup> Kalleberg Direct, Ex. ST-2, p. 8.

1  
2 **D. Substantial Evidence Exists in the Record Supporting Qwest's Violations of**  
3 **Sections 252(a)(1) and 252(e) and the Fact that It Intentionally Chose Not To File**  
4 **Certain Agreements With Eschelon and McLeod.**

5  
6 **1. The Commission Can Rely Upon RUCO and Staff's Witnesses.**

7 Qwest argues that the Staff bears the burden of proof in this case because when the  
8 "Commission brings a complaint, the Commission Staff is in the same position as an applicant or  
9 complainant and carrier the burden of proof."<sup>23</sup> Qwest states that the Commission's November 7,  
10 2002 Procedural Order, along with the Staff's request for substantial penalties, place Qwest in the  
11 same position as if a complaint had been brought.<sup>24</sup>

12 The issue as to the burden of proof is not as simple as Qwest would have the Commission  
13 believe. As Qwest notes, its argument that Staff bears the burden of proof has legitimacy when the  
14 Staff or Commission have filed a complaint against a carrier. However, this is not a complaint  
15 proceeding, but an investigation into Qwest's compliance with the requirements of State and Federal  
16 law dealing with the filing of interconnection agreements. Therefore, Qwest bears the burden of  
17 demonstrating that it was in compliance during the relevant time periods. Nonetheless, once Qwest  
18 establishes a prima facie case of compliance, the burden of going forward shifts to the Staff and other  
19 parties alleging that it has not. Once the Staff and other parties have established a prima facie case of  
20 noncompliance, the burden of going forward shifts back to Qwest to prove that the Staff and other  
21 parties are wrong. The fact that Staff is recommending fines and other non-monetary penalties does  
22 not matter.

23 Qwest also argues that testimony of Staff's and RUCO's witnesses in this case cannot legally  
24 support a Commission decision against Qwest.<sup>25</sup> In so doing, Qwest infers that such testimony is  
25 based upon suspicion, imaginative suggestions, surmises or conjectures.<sup>26</sup> Qwest also alleges that  
26 Staff and RUCO chose to "shove the entire burden of proving their cases onto the shoulders of so-  
27 called experts who conceded that they had no personal knowledge about the facts to which they  
28

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27 <sup>23</sup> Qwest Br. at 22.

28 <sup>24</sup> Qwest Br. at 22

<sup>25</sup> Qwest Br. at 23.

<sup>26</sup> Qwest Br. at 23.

1 testified and little to no experience with the regulations at issue.”<sup>27</sup> Qwest then accuses Staff and  
2 RUCO of “presupposing” that enormous penalties were appropriate and working backwards using  
3 experts as substitutes for fact witnesses.

4 The Commission should flatly reject Qwest’s arguments in this regard as they have absolutely  
5 no merit. Staff also finds it ironic that Qwest would choose to make this argument when its primary  
6 witness in this case, Larry Brotherson, himself admitted to having no personal knowledge of the facts  
7 surrounding the decision to file or not file the interconnection agreements at issue with the  
8 Commission for approval. Qwest’s argument would place the Commission in the untenable position  
9 of being unable to enforce compliance with Federal and State law unless the Commission’s own Staff  
10 somehow had prior personal knowledge or involvement with the alleged rule violation. This is an  
11 absurd argument on Qwest’s part.

12 Moreover, the facts in *Pine-Strawberry Improvement Association v. ACC*, 732 P.2d 230  
13 (October 21, 1986) upon which Qwest relies is easily distinguishable. *Pine-Strawberry Improvement*  
14 *Association* involved a hearing officer who did not personally attend the company’s rate hearings.  
15 The Court held that since the hearing officer had the benefit of recorded testimony, the company’s  
16 due process rights were not violated.

17 Qwest’s assertions that the Commission should reject Staff Witness Kalleberg’s testimony  
18 because “[s]he does not profess any expertise or expert perspective that her testimony brings to the  
19 proceeding” completely misses the mark. One does not have to be an expert in telecommunications  
20 policy or law in order to sift through the considerable evidence in this case and determine that  
21 Qwest’s conduct in violating Sections 251 and 252 of the Federal Act was intentional and willful.  
22 Any reasonable person could in looking at the evidence in the record in this case, come to the exact  
23 same conclusions as the Staff’s and RUCO’s witnesses.<sup>28</sup>

24 Moreover, Qwest’s argument that Ms. Kalleberg’s conclusions in many cases simply adopt  
25 Mr. Deanhardt’s reasoning, without setting forth any evidence of the independent assessment

26  
27 <sup>27</sup> Qwest Br. at 23.

28 <sup>28</sup> The cases relied upon by Qwest, i.e. *State v. Varela*, 873 P.2d 657 (Oct. 5, 1993), *State v. Livanos*, 725 P.2d 505 (July 15, 1986) and *State v. Lindsey*, 720 P.2d 73 (April 14, 1986) all involved criminal prosecutions and testimony dealing with either forgery or sex crimes, where expert testimony on the issues would be critical. That is not the case here.

1 purportedly conducted by the Staff, is belied by Ms. Kalleberg's own testimony in this case. When  
2 asked this question on cross-examination by Qwest attorneys, Ms. Kalleberg very clearly stated that  
3 she did not just adopt Mr. Deanhardt's view of the facts, but that she in fact did her own independent  
4 analysis of the evidence in this case, and drew her own conclusions which were the same or similar to  
5 those drawn by Mr. Deanhardt<sup>29</sup>.

6  
7 **2. The Agreements Between Qwest and Eschelon and Qwest and McLeod**  
8 **Were All Part of a Pattern of Conduct Between the Parties Designed to**  
9 **Provide Unlawful, Discriminatory Pricing Discounts in Return for Secrecy**  
10 **and 271 Endorsement.**

11 Despite overwhelming evidence to the contrary, Qwest continues to argue that its actions in  
12 not filing its agreements with Eschelon and McLeod were done in good faith.<sup>30</sup>

13 With regard to Eschelon, Qwest argues that the 10% discount on 251 services it gave to  
14 Eschelon was actually for consulting services.<sup>31</sup> Notwithstanding Qwest's claims in this regard,  
15 there is compelling evidence in the record that this was a "sham" arrangement designed to hide the  
16 true purpose of the discount. The most telling and conclusive evidence is that the agreements  
17 themselves did not tie the 10% discount Eschelon was to receive to the amount of consulting services  
18 Eschelon was to provide. The 10% discount in Eschelon's case was tied to the amount of products  
19 purchased from Qwest.<sup>32</sup> In other words, for any given period, Eschelon could provide absolutely no  
20 consulting services whatsoever, and still receive a 10% discount on the Section 251 services that it  
21 purchased.<sup>33</sup>

22 Moreover, there is evidence in the record from Eschelon itself, that Qwest treated the  
23 consulting arrangement as a sham.<sup>34</sup> In a letter to the Honorable Michael W. Lewis of the Minnesota  
24 Public Utilities Commission, Eschelon had the following to say about the 10% discount and  
25 consulting arrangement:

26 <sup>29</sup> Kalleberg, Tr. at 902-903.

27 <sup>30</sup> Qwest Br. at 40.

28 <sup>31</sup> Qwest Br. at 40-45.

<sup>32</sup> Kalleberg Direct, Ex. ST-2, p. 25.

<sup>33</sup> *Id.*

<sup>34</sup> Kalleberg Direct, Ex. ST-2, S-19

1 [CONFIDENTIAL]

2  
3 The above passage also indicates that the consulting arrangement was actually a calculated  
4 afterthought in that it was raised only after Eschelon initially questioned why the 10% discount did  
5 not appear in writing in any agreement.

6 Moreover, Qwest Witness Rixe testified that she only participated for a short time as part of  
7 the Eschelon service management team, and therefore, was unaware to the extent that other CLECs  
8 operating in Arizona may have had ongoing service problems with Qwest and therefore the degree to  
9 which they, like Eschelon, were providing valuable information to Qwest to help resolve their service  
10 issues. Unlike Eschelon, these other CLECs were not being paid for the "consulting" services that  
11 they gave Qwest, and because the agreement with Qwest was secret, they were unaware of it and  
12 could not opt-into it.<sup>35</sup> Certainly, other carriers besides Eschelon, had expertise in unbundled loop  
13 conversion, DSL, and collocation and could likewise offer Qwest assistance in this regard.  
14 Throughout the two year 271 workshop process in the Qwest region, participating CLECs provided  
15 considerable "consulting" services all designed to improve Qwest's processes and to resolve the  
16 CLECs' ongoing service problems with Qwest. In addition, Qwest's Change Management Process  
17 ("CMP") is designed to elicit such input from the CLECs, with the only benefit being potentially  
18 improved service for the CLEC.

19 There is also substantial evidence in the record that McLeod had a similar arrangement with  
20 Qwest but that it was content, unlike Eschelon, to accept Qwest's oral assurances that a 10% discount  
21 would be provided. There is the testimony of Mr. Blake Fisher provided through his deposition that  
22 the discount existed.<sup>36</sup> There is also the testimony of Arturo Ibarro, Jr., one of Qwest's own  
23 employees, who stated in testimony before the Minnesota Public Utilities Commission, that the 10%  
24 discount arrangement with McLeod existed:

25 [CONFIDENTIAL]

26  
27 <sup>35</sup> Rixe, Tr. at pp. 72-90.

28 <sup>36</sup> Diaz Cortez Direct, Ex. RUCO-1, Ex. MDC-2C, pp. 6-7)

<sup>37</sup> Kalleberg Direct, Ex. ST-2, S-12.

1 Qwest's reliance on its accounting procedures to support its position that no revenue discount  
2 was provided should be rejected. Qwest itself acknowledged that it initially accounted for the 10%  
3 revenue reduction as a discount.<sup>38</sup> While Qwest claims it subsequently corrected the accounting  
4 entry and recorded all other payments as expenses rather than discounts, the change in approach  
5 should not act to exculpate Qwest since that is exactly what someone would do if they wanted to  
6 disguise the true nature of the discount being provided because it was in violation of Federal and  
7 State law.

8 Moreover, the evidence also demonstrates that several of the CLECs, including Eschelon and  
9 Covad, told Qwest that they thought some of these agreements were interconnection agreements  
10 which needed to be filed under Federal and State law, but that Qwest unilaterally chose not to file the  
11 agreements with the Commission. The evidence also demonstrates that Qwest itself knew this but  
12 because of its concern with the opt-in provisions of the Act, intentionally chose not to file the  
13 agreements with the Commission.

14 In summary, substantial record evidence exists that Qwest chose to intentionally and willfully  
15 violate its obligations under Federal and State law, with regard to the Eschelon and McLeod  
16 agreements, so that it would not have to make the discount arrangements available to other carriers  
17 under the opt-in provisions of Section 252(i) of the 1996 Act.

18 **E. Qwest's Claims of "No Harm – No Foul" Should Be Rejected.**

19 Throughout much of its Brief, Qwest alleges that Staff is being unfair in arguing that it should  
20 be penalized in this case (notwithstanding the fact that it violated both Federal and State laws)  
21 because the Staff cannot prove that any actual discrimination against other CLECs occurred or that  
22 there was any demonstrated harm to competition.<sup>39</sup>

23 First, as discussed below, nothing in A.R.S. Sections 40-424 or 40-425 would require the  
24 Commission to either quantify the degree of actual discrimination against other CLECs that occurred  
25 or the degree of harm to competition in the local telephone market. These provisions of Arizona law  
26 are designed to penalize carriers for violating the law, period. Notwithstanding, Qwest would impose

27 <sup>38</sup> Qwest Br. at p. 46. ("Initially, Qwest mistakenly booked the first payment pursuant to the Qwest Purchase Agreement  
28 (made in June 2001) as a reduction in revenue."); See also Brotherson Rebuttal, p. 5-6

<sup>39</sup> Qwest Br. at pp. 30-39.

1 upon the Staff the impossible burden of having to quantify the discrimination that occurred in all  
2 cases and the degree of harm to local competition in Arizona and other competitive LECs, before  
3 fines could be imposed under that statute. This is simply not possible nor is it required.

4 Nonetheless, there is clear and compelling evidence in the record that there was  
5 discrimination and that as a result harm to competition in the local market occurred. Qwest cavalierly  
6 dismisses some of the more favorable terms and conditions found in several of Eschelon's  
7 agreements as "not unique" and "available to others – but not in writing". The following statements  
8 are indicative of Qwest's "no-harm, no-foul" approach to its violations of State and Federal law:

9 "The only thing that differed for Eschelon was that Eschelon's service manager was  
10 located on Eschelon's premises."<sup>40</sup>

11 \* \* \*

12 "In addition, Ms. Crandall's un rebutted testimony demonstrated that the Eschelon and  
13 McLeod escalation procedures that extend beyond the vice-president level merely  
14 memorialized what occurs for all CLECs if a vice president cannot solve a problem."<sup>41</sup>

15 \* \* \*

16 "In fact, Ms. Lucero testified, many of the targets contained in the Covad Agreement  
17 were actually less stringent than Qwest's own internal standards."<sup>42</sup>

18 These statements indicate that Qwest is viewing its violations of Federal and State law as  
19 insignificant ("no-foul") since Staff cannot quantify the exact degree of "harm" to other CLECs. The  
20 fact of the matter is that other CLECs were discriminated against simply by not having the same more  
21 favorable provisions contained within their written agreements with Qwest. Incorporation of a term  
22 or condition into a written agreement makes it enforceable. Qwest's internal standards are not  
23 enforceable.<sup>43</sup> For instance, Qwest acknowledged that the unpublished Covad agreement contained  
24 many service and provisioning standards that were not contained in any other interconnection  
25 agreement at the time. Yet, Qwest relies upon the fact that the same or similar intervals were  
26 contained in its internal standards at the time.<sup>44</sup> This may be true, but until these standards were later  
27 incorporated into Qwest's SGAT through the 271 process, they were not enforceable. In addition,

28 <sup>40</sup> Qwest Br. at p. 31.

<sup>41</sup> Qwest Br. at p. 32.

<sup>42</sup> Qwest Br. at p. 33.

<sup>43</sup> Lucero, Tr. at 42-43

<sup>44</sup> Lucero, Ex. Q -10.

1 what could be more discriminatory than a 10% discount on 251(b) and (c) services?<sup>45</sup>

2 Qwest takes a similar approach with respect to the opt-in rights of other carriers, arguing that  
3 since Staff cannot prove that other carriers would have opted-in to the agreements under Section  
4 252(i) of the Act, no discrimination occurred, and thus Qwest's violations of Federal and State law  
5 are seemingly insignificant.<sup>46</sup> Again, Qwest demands that the Commission disregard its violations  
6 unless the Staff can prove the "impossible." Because Qwest chose not to file these agreements with  
7 the Commission, it is impossible to go back in time and determine which carriers would have or  
8 would not have chosen to opt-in to the unfiled agreements. Moreover, Qwest structured the  
9 agreements so that their true, more favorable, terms and conditions were unknown. The written  
10 agreements on their face did not reveal the true nature and extent of the benefits received. Further, in  
11 suggesting that the Commission rely on the agreements as filed to determine opt-in rights, Qwest is in  
12 essence asking the Commission to reward it for its success in evading the filing and opt-in obligations  
13 under the Act.

14 Moreover, Qwest's arguments that the agreements actually benefited McLeod and Eschelon,  
15 and, therefore benefited competition, once again completely miss the point. [CONFIDENTIAL]  
16 Perhaps some CLECs could have remained in business. Perhaps other CLECs could have also  
17 entered the market in Arizona which otherwise chose not to. Still other CLECs may have changed  
18 their business plans in order to become the beneficiaries of the same discounts that Eschelon and  
19 McLeod received. What would have been can never be calculated with any certainty....yet Qwest  
20 would unfairly require this of the Staff, before penalties can be imposed in this case.

21  
22 **F. The monetary and non-monetary penalties recommended by Staff are proportionate to the offense committed by Qwest.**

23 **1. Staff's Recommended Fines are not Unconstitutionally Excessive Under**  
24 **the Eighth Amendment Test Announced in *Bajakajian*.**

25 Qwest, relying on *U.S. v. Bajakajian*, argues Staff's recommended penalties are not  
26 proportionate to Qwest's offenses and therefore are unlawful.<sup>47</sup> In *Bajakajian*, the Supreme Court

27 <sup>45</sup> Qwest attempts narrow the application of the 10% discount to carriers which would have purchased UNE-E and UNE-M services. However the agreements themselves contained no such linkage or limitation.

28 <sup>46</sup> Qwest Br. at p. 34.

<sup>47</sup> Qwest Br. at 50-53 citing *Bauakajian*, 524 U.S. 321 (1998).

1 considers the issue of when a forfeiture amount violates the Excessive Fines Clause of the Eighth  
2 Amendment.<sup>48</sup> The question is how disproportionate to the offense a forfeiture must be in order to  
3 be excessive. The Court identified two relevant considerations in deriving a constitutional  
4 excessiveness standard.<sup>49</sup> First, “judgments about the appropriate punishment belong in the first  
5 instance to the legislature”.<sup>50</sup> The legislature’s broad authority to determine punishments for  
6 offenses is to be given great deference.<sup>51</sup> Second, because any determination about the gravity of an  
7 offense is inherently imprecise, strict proportionality would be impossible to achieve.<sup>52</sup> Due to  
8 legislative deference and inherent impreciseness the Court held “that a punitive forfeiture violates the  
9 Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.”<sup>53</sup> The  
10 question, then, is whether Staff’s recommended fines are grossly disproportionate to Qwest’s  
11 offenses.<sup>54</sup> They are not.

12 The Framers of the Arizona Constitution and the Arizona Legislature determined that fines  
13 ranging from \$100 to \$5,000 are proportionate to the offense of violating a Commission rule.<sup>55</sup>  
14 Staff’s recommended fines are well within the parameters set out by the Constitution and the  
15 Legislature. The fines are, in fact, much less than the maximum fine amount available under A.R.S.

16 \_\_\_\_\_  
17 <sup>48</sup> See *id.* at 324. The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed,  
nor cruel and unusual punishments inflicted.” U.S.C.A. Const. Amend. 8.

18 <sup>49</sup> See *id.* at 336.

19 <sup>50</sup> *Id.*

20 <sup>51</sup> See, e.g., *Solem v. Helm*, 463 U.S. 277, 290 (1983) (“Reviewing courts ... should grant substantial deference to the  
broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes”); *Gore*  
*v. United States*, 357 U.S. 386, 393 (1958) (“Whatever views may be entertained regarding severity of punishment, ...  
these are peculiarly questions of legislative policy”).

21 <sup>52</sup> *Bajakajian*, 524 U.S. at 336.

22 <sup>53</sup> *Id.* at 335.

23 <sup>54</sup> See e.g. *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir.1987) (“The [E]ighth [A]mendment prohibits only those  
forfeitures that, in light of all relevant circumstances, are *grossly* disproportionate to the offense committed.”) (emphasis  
added).

24 <sup>55</sup> The Arizona Constitution, art. 15, section 16 “Forfeitures for violations” provides: “If any public service corporation  
shall violate any of the rules, regulations, orders, or decision of the Corporation Commission, such corporation shall  
forfeit and pay to the State not less than one hundred dollars nor more than five thousand dollars for each such violation,  
to be recovered before any court of competent jurisdiction.” (emphasis added).

25 A.R.S. § 40-424.A. provides: “If any corporation or person fails to observe or comply with any order, rule, or requirement  
of the commission or any commissioner, the corporation or person shall be in contempt of the commission and shall, after  
notice and hearing before the commission, be fined by the commission in an amount not less than one hundred nor more  
than five thousand dollars, which shall be recovered as penalties.” (emphasis added).

26 A.R.S. § 40-425.A. provides: “Any public service corporation which violates or fails to comply with any provision of the  
constitution or of this chapter, or which fails of neglects to obey or comply with any order, fine, rule or requirement of the  
commission, the penalty for which is not otherwise provided, is subject to a penalty of not less than one hundred nor  
more than five thousand dollars for each offense.” (emphasis added).

1 § 40-424. These facts demonstrate that Staff's recommended fines are not at all disproportionate to  
2 Qwest's offenses, let alone grossly disproportionate.

3 In determining the forfeitures in *Bajakajian* were excessive, the Court considered several  
4 mitigating factors. The crime was failing to report taking over \$10,000 outside the United States.<sup>56</sup>  
5 The defendant was attempting to leave the country with over \$357,000.<sup>57</sup> The government sought  
6 forfeiture of the entire amount under a statute that allowed for forfeiture of the entire amount not  
7 reported. The Court, considering mitigating factors, noted that the failure to report was unrelated to  
8 any other illegal activities, and the respondent did not fit into the class of persons for whom the  
9 statute was designed – money launderers, drug traffickers, and tax evaders.<sup>58</sup> All of which led the  
10 Court to conclude that the defendant's culpability was "small indeed" when compared to other  
11 violators of the reporting statute.<sup>59</sup> In other words, because the defendant's culpability was minimal,  
12 the forfeiture became grossly disproportionate to the offense. Qwest's only mitigating argument is  
13 that after seeking the advice of its counsel it did not understand that the interconnection agreements  
14 in question were to be filed by reading Section 252. As discussed *Infra.* at paragraph II, section B,  
15 little or no credence should be afforded Qwest's vagueness argument. The facts in *Bajakajian*  
16 mitigated culpability. The facts here do not. Qwest willfully and intentionally violated the 1996 Act  
17 and State law. Moreover, unlike the defendants in *Bajakajian*, Qwest does fit within the class of  
18 persons that Section 252 covers. The fine amount recommended by Staff, which falls well within the  
19 range authorized by the Legislature, is proportional to culpability demonstrated in Qwest's offense.  
20 Staff's recommended fine amount is not unconstitutionally excessive under the Eighth Amendment.

21  
22 **2. Staff's Recommended Fines are Proportionate to Qwest's Offenses Under Arizona Law**

23 Qwest attempts to find support in Arizona law for its proportionality argument in *State v.*  
24 *Leyva*.<sup>60</sup> However, application of the court's test in *Leyva*, reveals Staff's recommended penalties  
25 are proportionate to Qwest's offenses. The defendants in *Leyva* were husband and wife involved in a

26 <sup>56</sup> See *Bajakajian*, 524 U.S. at 324.

27 <sup>57</sup> See *id.* at 324-25.

28 <sup>58</sup> See *Bajakajian*, 524 U.S. at 537.

<sup>59</sup> See *id.* at 338-39 and n.14.

<sup>60</sup> Qwest Brief at 52 citing *State v. Leyva*, 195 Ariz. 13, 985 P.2d 498 (1998).

1 drug smuggling operation.<sup>61</sup> The trial court entered a judgment of \$20,000,000 plus ten percent  
2 interest per year.<sup>62</sup> The husband and wife raised the Eighth Amendment Excessive Fines issue on  
3 appeal.<sup>63</sup> The court administered the test set forth in *United States v. Real Property Located in El*  
4 *Dorado County*.<sup>64</sup> The proportionality test stated that “the claimant has the burden to show that  
5 forfeiture of his property would be grossly disproportionate given the nature and extent of his  
6 criminal culpability.” As outlined above, Qwest has failed to show any evidence mitigating its  
7 culpability. Further, under the test as announced in *Leyva*, the *claimant* has the burden of proving the  
8 forfeiture is excessive under the Eighth Amendment. Qwest has failed to carry the burden of proving  
9 Staff’s recommended fines are excessive.

10 Although it has no burden to do so, Staff can demonstrate its recommended penalties are not  
11 grossly disproportionate and therefore not excessive. In applying the proportionality test, the *Leyva*  
12 court considered the harshness of the penalty and the culpability of the defendant.<sup>65</sup> In considering  
13 the harshness of the penalty, the court considered the “fair market value of the property,” the  
14 intangible value of the property (i.e. was the property the family home), and the hardship on the  
15 defendant of forfeiture.<sup>66</sup> The forfeiture would have resulted in a lifetime of indenture to the state  
16 for the husband and wife.<sup>67</sup> Here the value of the penalties proposed by Staff are clear and have no  
17 intangible values. The hardship on Qwest, while not insignificant, is not so great as to render the  
18 penalties not proportional to its offenses. Staff’s recommended penalties are not overly harsh.

19 In determining culpability, the *Leyva* court considered the husband and wife’s negligence or  
20 recklessness in allowing illegal use of their property, the husband and wife’s level of involvement in  
21 the illegal activity, and the harm caused by the activity.<sup>68</sup> The court found that although the home

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22 <sup>61</sup> See *Leyva*, 195 Ariz. at ¶3.

23 <sup>62</sup> See *id.*

24 <sup>63</sup> See *id.*

25 <sup>64</sup> See *id.* citing *El Dorado*, 59 F.3d 974. *Leyva* was decided on May 19, 1998. *Bajakajian* was decided June 22, 1998.  
26 The excessive fines test announced by the United States Supreme Court is now controlling and Qwest’s discussion of  
27 *Leyva*’s test is moot. However, because Staff believes its fines are supported under the *Leyva* test, and Qwest has raised  
28 it, Staff will discuss that test’s application to this case. *El Dorado* required the *Leyva* court to apply a two prong test  
consisting of an Instrumentality Test and a Proportionality Test. See *Leyva*, 195 Ariz. at ¶¶27-36. Because the  
Instrumentality Test is inapplicable to this case, it is not discussed here.

<sup>65</sup> See *Leyva*, 195 Ariz. at ¶30.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 21.

<sup>68</sup> See *Id.*

1 was used for illegal activity and there was harm, the couple were minor players in the overall illegal  
2 scheme, and concluded the husband and wife lacked the level of culpability necessary to support the  
3 \$20,000,000 forfeiture.<sup>69</sup> Here, Qwest willfully and intentionally and unilaterally engaged in illegal  
4 activity by failing to file interconnection agreements. Unlike the couple caught up in a much bigger  
5 scheme, Qwest is solely responsible for its actions and the damage caused by those actions. Again,  
6 Staff's recommended fines are proportional to Qwest's culpability in not filing the secret  
7 interconnection agreements.

8 Under Arizona law, Staff's recommended penalties are not too harsh, and are proportional to  
9 Qwest's culpability in not filing the interconnection agreements. Staff's proposed penalties are not  
10 excessive under Arizona law.

11  
12 **G. Adoption of Staff's Recommended Fine Amounts will not Result in an Abuse of Discretion.**

13 Staff's recommended fines are within the Commission's discretion. Qwest's abuse of  
14 discretion argument is not supported by the cases it cites. In fact, the cases lend support to Staff's  
15 recommended fine amounts. *Allied Products co. v. Federal Mine Safety and Health Review*  
16 *Commission*<sup>70</sup> concerns fines levied by the Federal Mine Safety and Health Review Commission (the  
17 Mining Commission) in its investigation of a mine worker's death. The court found the Mining  
18 Commission failed to consider required statutory factors in determining fine amounts.<sup>71</sup> The court  
19 found the Mining Commission also failed to take the negligence of the worker into account when  
20 leveling fines.<sup>72</sup> Based on these factors, the court found the Mining Commission had abused its  
21 discretion by arbitrarily setting the fine amount at the highest level allowed by law.<sup>73</sup> Staff's  
22 recommended penalties reflect the willfulness of Qwest's actions. For those filing offenses reflecting  
23 willful intent to violate the filing requirement, Staff recommends higher fines. For filing offenses  
24 reflecting negligent violation of the filing requirement, Staff recommends lower or even no fines.  
25 There are no statutory factors provided to Staff other than minimum and maximum penalties allowed.

26 <sup>69</sup> See *Id.* at 20-21.

27 <sup>70</sup> 666 F.2d 890 (5<sup>th</sup> Cir. 1982).

28 <sup>71</sup> See *id.* at 894.

<sup>72</sup> See *id.* at 896.

<sup>73</sup> See *id.*

1 Staff's recommended fines are in the middle of the legally allowable range. The *Allied* case  
2 demonstrates Staff's recommended fines are well within the Commission's discretion.

3 Nor are the Arizona State Court abuse of discretion cases cited by Qwest persuasive.<sup>74</sup>  
4 Though both *Tucson Elec. Power Co. v. ACC*,<sup>75</sup> and *City of Tucson v. Citizens Utils. Water Co.*,<sup>76</sup> are  
5 cases in which Commission determinations were overturned, neither involved the Commission  
6 setting fines, and in neither case was the evidence as substantial as here. In *Tucson Elec. Power*, the  
7 court overturned the Commission's tax treatment determination because it was not supported by any  
8 evidence, but upheld all other Commission determinations in the case.<sup>77</sup> The Commission's  
9 determination of fair value of a water utility's rate base was overturned in *City of Tucson*. The court  
10 overturned the resulting rate because the Commission relied on an expert witness' determination of  
11 fair value, and that witness' determination was wrought with speculation and conjecture.<sup>78</sup> In both  
12 cases, the issue was rate setting and a lack of evidence supporting the Commission's determinations.  
13 Staff finds it difficult to follow the parallel drawn by Qwest between the rate setting issues in the  
14 Arizona cases cited and the Commission's discretion in setting penalties. However, if Qwest is  
15 arguing that Staff conclusions are not based on substantial evidence, Qwest is in error. Staff has  
16 reached its conclusions concerning Qwest's actions and the culpability associated with those actions  
17 based on the substantial evidence gathered in this docket.

18 The penalties recommended by Staff are neither overly harsh nor disproportionate to Qwest's  
19 offenses and culpability. The penalties represent a well thought out remedy based on the evidence  
20 gathered in this record. The penalties suggested are fully within the Commission's discretionary  
21 powers. As a matter of law, the penalties proposed by Staff are appropriate.

#### 22 **H. Staff Recommended Penalties are Supported as a Matter of Policy**

23 Qwest states that any punishment imposed by the Commission should fit Qwest's "proven  
24 conduct and harm."<sup>79</sup> Staff agrees that no punishment should be administered unless it is proven

25  
26 <sup>74</sup> Qwest Br. at 52 n. 185.

<sup>75</sup> 132 Ariz. 240 (1982).

<sup>76</sup> 17 Ariz. App. 477 (1972).

<sup>77</sup> 132 Ariz. 245-48.

<sup>78</sup> *City of Tucson*, 17 Ariz.App at 481.

<sup>79</sup> Qwest Br. at 53.

1 Qwest's conduct violated the law and Commission regulations. The evidence in the record clearly  
2 proves Qwest violated the 1996 Act and Commission rules and regulations by intentionally not filing  
3 interconnection agreements.

4 Qwest broke the law by failing to file interconnection agreements. Qwest argues Staff must  
5 prove the actual harm caused by that infraction and argues that Staff has not done so. Qwest's  
6 reasoning is flawed for two reasons. First, Staff has made a showing of harm as discussed *Infra.* at  
7 paragraph II, section D. Second, when the Commission fines under its statutory contempt power, no  
8 showing of damages is necessary. The Commission need only find that Qwest violated its rules to  
9 impose the fines. The evidence presented by Staff and RUCO is sufficient for the Commission to  
10 find Qwest violated the filing requirement. Of course, if Qwest wishes to mitigate its guilt, thereby  
11 perhaps lowering the fine amount the Commission determines to be appropriate, it may do so.  
12 However, Qwest has offered no convincing evidence that its willful and intentional failure to file  
13 interconnection agreements did not harm CLECs and competition in Arizona.

14 Qwest continues to claim "the ambiguities in the law" excuse its failure to file.<sup>80</sup> The  
15 language of section 252(e) is not so ambiguous as to provide Qwest an excuse for not filing. Any  
16 reasonable interpretation of the filing statute would have required Qwest to file the agreements in  
17 question. Qwest's interpretation of the requirements of Section 252 was not reasonable.

18 If Section 252 was not sufficiently clear for Qwest to determine when it was breaking the law,  
19 then the section is unconstitutional. Qwest argues that Section 252 did not provide them with the  
20 information necessary to determine when they were in violation of the statute by not filing certain  
21 agreements and that therefore fining Qwest may be unconstitutional.<sup>81</sup> When a statute "does not give  
22 persons of ordinary intelligence a reasonable opportunity to learn what it prohibits..." it is  
23 unconstitutionally vague.<sup>82</sup> If the statute is so ambiguous as to fail to give Qwest notice that its  
24 failure to file was unlawful, then the proper argument for Qwest to make would be that the statute is  
25 unconstitutionally vague not that it is now unconstitutional for Qwest to be fined under that statute.  
26 Qwest has never made the argument that Section 252 is unconstitutionally vague. It can be implied

27 <sup>80</sup> Qwest Br. at 53.

28 <sup>81</sup> Qwest Br. at 61-62.

<sup>82</sup> *See State v. Kaiser*, 396 Ariz. Adv. Rep. 19, 65 P.3d 462, ¶19 (2003).

1 that Qwest has not made the argument because it knows the statute is not unconstitutionally vague,  
2 and it knows it had a reasonable opportunity to learn what the section prohibits. The Commission  
3 should not be fooled by Qwest's argument that it did not understand the language of Section 252. It  
4 knew what the language required, but chose to adopt an unreasonable interpretation that would allow  
5 it to escape filing the inflammatory interconnection agreements.

6 To Staff's knowledge no other ILEC has had so much difficulty in interpreting Section 252(e)  
7 that it has failed to file interconnection agreements which a State that should have been filed. This  
8 problem appears to be limited to Qwest. Here, the terms of the agreements demonstrate Qwest did  
9 not want the agreements to be public. In some instances because Qwest did not want other CLECs to  
10 have an opportunity to opt-in, and in other instances because Qwest did not want the Commission to  
11 know Qwest was limiting Section 271 participation, Qwest's claim of ambiguity should be afforded  
12 little, if any, credence.

13 Mr. Shoosan states "it is significant that these agreements constitute terms and conditions  
14 under which Qwest was agreeing to do things for CLECs to help them do business in the local  
15 market."<sup>83</sup> Incredibly, Qwest apparently claims its failure to follow the law and file documents  
16 encouraged competition as envisioned by the 1996 Act.<sup>84</sup> What Qwest fails to acknowledge is that if  
17 it agrees to terms and conditions which "do things for a CLEC to help it do business in the local  
18 market," Qwest must make the same terms and conditions available to all CLECs that wish to do  
19 business in the local market. Staff's recommended penalties are not designed to deter Qwest from  
20 affording such help to CLECs, Staff's recommended penalties are designed to deter Qwest, and other  
21 ILECS, from *selectively* affording help to CLECs.

22 Qwest argues that Staff should perform an exercise outlined by Mr. Shoosan to quantify the  
23 harm to CLECs of its failure to file interconnection agreements.<sup>85</sup> Mr. Shoosan's proposed analysis  
24 requires Staff or RUCO to determine which CLECs, in existence at the time the unfiled agreements  
25 were in effect, could have and would have opted for the terms and conditions contained in the  
26 agreements. Such an exercise would demonstrate only the minimum amount of harm that possibly

27 <sup>83</sup> Qwest Br. at 54.

28 <sup>84</sup> Qwest Br. at 54.

<sup>85</sup> Qwest Br. at 54-56.

1 was caused by the secret agreements and not the actual harm or the maximum possible harm. To  
2 analyze the maximum possible harm caused by the Qwest's willful violations, Staff or RUCO would  
3 have to consider several additional factors. Staff would have to determine how many CLECs would  
4 have revised their business plans to position themselves to opt-in under Section 252(i). Staff would  
5 have to determine the number of CLECs doing business in other states that would have come to  
6 Arizona to take advantage of the terms and conditions. Staff would have to determine which CLECs  
7 would opt to change their customer focus and product offerings to take advantage of the terms and  
8 conditions. Staff would have to determine which CLECs would have found that purchasing elements  
9 in a different product set would have benefited them. Staff would have to determine which CLECs  
10 would be willing to engage in marketing activities to generate enough business to take advantage of  
11 the volume discounts available under the terms and conditions of the secret agreements. There is no  
12 need, or realistic plausibility, for Staff, or RUCO, to make such determinations. Qwest violated the  
13 law in such a way that the extent of the damage is not accurately quantifiable. Staff's monetary and  
14 non-monetary penalties are well thought out, and as a matter of policy, reasonable and proportionate  
15 to the harm caused.

16 Qwest is correct when it states that "the Act does not require that all interconnection  
17 agreements be identical."<sup>86</sup> The Act does require that all interconnection agreements be filed so that  
18 any competitor similarly positioned can opt in to any of the same terms and conditions of the  
19 interconnection agreement. That is the point of the Act that Qwest has ignored by keeping some of  
20 its interconnection agreements secret.

21 **I. Staff's Recommended Monetary and Non-Monetary Penalties are Well**  
22 **Grounded in Law and Fact**

23 Qwest argues the Commission's contempt authority is purely civil in nature.<sup>87</sup> Qwest cites to  
24 case law demonstrating that civil contempt is to be administered prospectively. Qwest then  
25 concludes that because civil contempt may only be administered prospectively, the Commission  
26 cannot "fine for past conduct."<sup>88</sup> This argument fails in light of the Arizona Constitution and

27 <sup>86</sup> Qwest Br. at 58.

28 <sup>87</sup> Qwest Br. at 59-60.

<sup>88</sup> Qwest Br. at 59.

1 Legislature's clear intent that the Commission punish rules violators pursuant to the contempt statute.

2       The Corporation Commission has the power and authority to enforce its rules by the  
3 imposition of fines.<sup>89</sup> This power may be enlarged by the Legislature.<sup>90</sup> By the plain language of  
4 A.R.S. § 40-424, the legislature has expanded the Commission's powers to fine to include the power  
5 to hold a corporation in contempt for failure to comply with Commission rules.<sup>91</sup> The Arizona  
6 Attorney General opines that fining for rules violations "should be done pursuant to A.R.S. § 40-424  
7 by citing any violation before the Commission for contempt."<sup>92</sup> The Legislature has created a  
8 contempt power that is *sui generis* to the Commission and is available to the Commission to fine for  
9 past violations of its rules.

10       The criminal contempt cases cited by Qwest rely on A.R.S. § 12-864 and are not applicable to  
11 the Commission's contempt powers under A.R.S. § 40-424. A.R.S. § 12-864 informs that direct or  
12 constructive contempts are to be "punished in conformity to the practice and usage of the common  
13 law." The civil contempt cases cited by Qwest consider the common law contempt power.<sup>93</sup> None of  
14 the cases consider the contempt power afforded the Commission under Section 40-424. The  
15 Commission has judicial, executive, and legislative powers.<sup>94</sup> The Commission's inherent judicial  
16 powers stemming from its "responsibility to make those decisions necessary to regulate public  
17 service corporations, pursuant to Article 15, Section 3 of the Arizona Constitution," are expanded by  
18 Section 40-424 to empower the Commission to punish rules violators.<sup>95</sup>

19       **J. Section 252(e) and A.A.C. R14-2-1506 Provide Fair Warning of Required**  
20       **Conduct in Filing Interconnection Agreements**

21       Qwest argues that penalizing its filing violations will violate its right to Due Process because  
22 Section 252(e) and Commission rules failed to provide Qwest with fair notice of what conduct would  
23 violate the Act and Rules and result in penalties.<sup>96</sup> Qwest places primary reliance on *General Elec.*  
24

25 <sup>89</sup> Ariz. Const. art. XV, §§ 16, 19.

26 <sup>90</sup> Ariz. Const. art. XV, § 6.

27 <sup>91</sup> A.R.S. § 40-424.A.

28 <sup>92</sup> 59 Op. Ariz. Atty Gen. 61 (1959).

<sup>93</sup> Qwest Br at 58-67

<sup>94</sup> See *Ariz. Corp. Comm'n v. State ex rel. Woods*, 171 Ariz. 286, 291.

<sup>95</sup> *Southwest Gas Corp. v. Ariz. Corp. Comm'n*, 169 Ariz. 279, 284.

<sup>96</sup> Qwest Br. at 62-64.

1 *Co. v. United States Environmental Protection Agency and United States v. Chrysler Corp.*<sup>97</sup> In  
2 *General Electric*, the court concluded “that the [agency’s] interpretation is so far from a reasonable  
3 person’s understanding of the regulations that they could not have fairly informed [the defendant] of  
4 the agency’s perspective.”<sup>98</sup> The *Chrysler* court concluded that an agency must give reasonable  
5 notice of what is required before seeking redress under the statute.<sup>99</sup> *General Electric* and *Chrysler*  
6 have both been distinguished by cases addressing reasonableness.

7 The issue is whether or not Section 252(e), as written, provides reasonable notice, to a  
8 reasonable person of what is required to be filed. It does. In *United States v. Southern Gas and*  
9 *Electric Co.*, the court, contrasting the facts present in its case to those present in *General Electric*,  
10 stated that an EPA interpretation of a statute “was not ‘so far’ from a reasonable person’s  
11 understanding of the regulations and public statements on the issue” as to find the regulated party  
12 lacked fair notice.<sup>100</sup> The court found Southern Gas had adequate notice of agency interpretation of a  
13 statute from “the language and context of the [statute]” and the purpose of the Act containing the  
14 statute.<sup>101</sup> *Federal Election Comm’n v. Arlen Specter ’96*, distinguished both *General Electric* and  
15 *Southern Gas*.<sup>102</sup> The *Specter ’96* court found that Specter should not have exclusively focused on  
16 the language of the Statute in determining what was required.<sup>103</sup> Qwest had adequate notice of both  
17 the FCC’s and the Commission’s interpretation of Section 252(e) by looking not only at the language  
18 of the section, but to its context and purpose in fulfillment of the 1996 Act.

19 To facilitate competition in the traditionally monopolized local telephone market, the 1996  
20 Act imposed “a host of duties intended to facilitate market entry” by CLECs upon the ILECs.<sup>104</sup> The  
21 Act requires ILECs to enter into interconnection agreements with CLECs;<sup>105</sup> permits parties to enter  
22 into interconnection agreements without regard to Section 251(b) and (c) standards;<sup>106</sup> requires filing  
23

24 <sup>97</sup> See *id.* citing *General Electric*, 53 F.3d 1324 (D.C. Cir. 1995); *Chrysler*, 158 F.3d 1350 (D.C. Cir. 1998).

25 <sup>98</sup> *General Electric*, 53 F.3d at 1330.

26 <sup>99</sup> *Chrysler*, 158 F.3d at 1354-55.

27 <sup>100</sup> *Southern Indiana Gas*, 245 F.Supp.2d 994, 1023 (S.D. Ind. 2003).

28 <sup>101</sup> *Id.*

<sup>102</sup> *Specter ’96*, 150 F.Supp.2d 797, 813-14 (2001).

<sup>103</sup> See *id.*

<sup>104</sup> *AT&T Corp. v. Iowa Utilities Bd.* 525 U.S. 366, 371-72 (1999) (citing 47 U.S.C. §§ 251, 252).

<sup>105</sup> See 47 U.S.C. § 251(c)(1).

<sup>106</sup> See *id.* at § 252(a)(1).

1 of interconnection agreements with State commissions for approval;<sup>107</sup> and provides that ILECs must  
2 make the terms of these agreements available to other telecommunications carriers.<sup>108</sup> Any  
3 reasonable ILEC should deduce from the stated purposes and the language and context of Section 252  
4 that ILECs may enter into agreements without regard to the standards of Sections 251(b) and (c), but  
5 that if they do, they must file that agreement with the applicable state commission for approval and  
6 all other telecommunication carriers are entitled to enter into a like agreement with the ILEC. The  
7 terms present in an agreement that would require its filing are those that concern the standards of  
8 Section 251 (b) and (c) which set out the ILEC duties and obligations. This interpretation is  
9 consistent with both that of the FCC and the Commission. The interpretation is not “so far from a  
10 reasonable person’s understanding of the regulations and public statements on the issue” as to find  
11 Qwest lacked fair notice.

12 Qwest “merely attempts to turn [its] noncompliance with the regulations into faults in the  
13 regulations of a constitutional magnitude.”<sup>109</sup> Qwest fully realized what types of agreements would  
14 trigger the filing requirement and now hides behind a fair notice issue in an attempt to excuse itself  
15 from its failures. Even more telling, is that the McLeod and Eschelon agreements contain terms  
16 Qwest sought to keep secret to avoid having to provide discounts to other CLECs and to hide its  
17 interference with CLEC participation in the Section 271 process. Qwest had fair notice that its  
18 conduct violated Section 252(e), and knew that if its conduct were found out the penalties  
19 recommended by Staff were a possible consequence.

20  
21 **K. Staff’s Recommended Non-Monetary Remedies Will Work to Cure Qwest’s Past  
Discrimination**

22 Staff recommends Qwest be required to take remedial actions to rectify the damage to CLECs  
23 caused by its discriminatory actions. Staff recommends all previously unfiled interconnection  
24 agreements, whether currently in force or not, be filed. CLECs would be allowed to opt-in to these  
25 interconnection agreements for two years after the date of Commission approval.<sup>110</sup> Staff also

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27 <sup>107</sup> See *id.* at § 252(e).

28 <sup>108</sup> See *id.* at § 252(i).

<sup>109</sup> *Fishing Company of Alaska v. United States, et al.*, 195 F.Supp.2d 1239,1251 (W.D.Wash. 2002).

<sup>110</sup> *Kalleberg Direct, Ex. ST-2*, at p 89.

1 recommends Qwest provide the 10% discount made available to McLeod and Eschelon to all other  
2 CLECs.

3       Once filed, terms of the interconnection agreements would be available to CLECs under the  
4 FCC's pick and choose rules. Qwest would have the opportunity to argue that some terms are  
5 legitimately related to other terms in the interconnection agreement. CLECs would then be required  
6 to accept all legitimately related terms to receive the benefit of the selected terms.

7       Qwest should also be required to refund 10% of CLEC purchases of Section 251(b) or (c)  
8 services and intrastate access from Qwest for the period of January 1, 2001 through June 30, 2002  
9 and for an 18 month period into the future. These refunds would not be paid to Eschelon and  
10 McLeod. This remedy would put all CLECs that purchased Section 251 services and intrastate  
11 access from Qwest during that time period on equal footing with Eschelon and McLeod. In other  
12 words, because Eschelon and McLeod initially received the 10% discount and other CLECs did not,  
13 the other CLECs will receive the discount "retroactively."

14       Qwest argues provision of the discounts on a prospective basis to all CLECs other than  
15 Eschelon and McLeod would in essence be ordering Qwest to provide discriminatory treatment.<sup>111</sup>  
16 Qwest now seeks to hide behind the very provisions of the 1996 Act it has violated in the past. More  
17 importantly, while Section 252 does bar an ILECs discriminatory treatment, it does not bar an ILEC  
18 from remedying past discriminatory treatment when ordered to do so by a state commission. The  
19 purpose of the 1996 Act is to put all CLECs on equal footing with regards to accessing the ILEC's  
20 facilities. The Act should not be interpreted to prevent remedy of past discrimination.

21       These recommendations are designed not to further penalize Qwest, but to benefit Arizona  
22 CLECs as they would have benefited had Qwest not provided McLeod and Eschelon with  
23 discriminatory treatment by not filing the interconnection agreements. While Staff realizes the  
24 remedies may have some financial impact on Qwest, the financial impact is not Staff's goal. Staff's  
25 goal is to force Qwest to provide nondiscriminatory treatment to Arizona CLECs. In some cases, the  
26 only way to achieve that goal is by retroactively providing CLECs with the same benefits McLeod  
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28 <sup>111</sup> Qwest Br. at 70.

1 and Eschelon received. Regardless, these recommendations are remedial in nature and not monetary  
2 penalties, despite the recommendation's possible collateral financial impact.

3 Implementation of a CLEC-specific Code of Conduct will help to ensure Qwest does not  
4 repeat the anti-competitive actions revealed in this investigation. The CLEC-specific Code of  
5 Conduct should be a comprehensive document governing Qwest's conduct with respect to the  
6 CLECs. It should include a statement by Qwest that it will comply with all laws and regulations,  
7 both federal and state relating to interconnection agreements. The Code of Conduct should prohibit  
8 Qwest from precluding parties to interconnection agreements from bringing matters to the  
9 Commission in the first instance. The Code of Conduct should prohibit Qwest from terminating  
10 agreements with the sole objective of eliminating Qwest's obligation to file the agreements for  
11 Commission approval.<sup>112</sup> Qwest has demonstrated its willingness to violate the law for its own gain.  
12 Staff believes a Code of Conduct will give Qwest one more reason not to do so. Although Qwest has  
13 made some changes to ensure future compliance, Staff believes the Code of Conduct will motivate  
14 Qwest not to "back-slide" from the improvements made.

15 Staff Witness Kalleberg also recommended several changes to Qwest's PIDs to ensure a  
16 minimum level of wholesale service quality in the future and an independent monitor to assure  
17 Qwest's compliance with Section 252(e) in the future.

18 **L. The Commission Should Reject Eschelon's and McLeod's Claims of**  
19 **Discrimination.**

20 Staff recommends all CLECs except Eschelon and McLeod receive 10% discounts both  
21 prospectively and retroactively. Eschelon objects to its exclusion from the prospective discounts.<sup>113</sup>  
22 Eschelon specifically argues that it should not be excluded for three primary reasons. First, Eschelon  
23 argues that it is beyond the scope of this proceeding to administer penalties on Eschelon. Second,  
24 Eschelon argues that it would be unjustly penalized by Staff's recommendation. Third, Eschelon  
25 argues that denying Eschelon the discount would be a constitutional violation of Eschelon's due

26 <sup>112</sup> Kalleberg Direct, Ex. ST-2, at p. 95.

27 <sup>113</sup> Eschelon does not oppose exclusion from Staff's recommended retroactive discount. To the extent applicable, Staff's  
28 reply here is also responsive to any objections raised by McLeod. However, because McLeod lacks standing as a formal party to this docket and has chosen not to participate to date, McLeod should not be allowed to raise any eleventh-hour objections.

1 process rights and would not be consistent with State and Federal Law. In addition, Eschelon urges  
2 that the Commission should consider mitigating factors in imposing remedies that will have  
3 consequence to Eschelon.

4 The scope of this proceeding includes the structure and administration of remedies to  
5 ameliorate the harms caused by Qwest's violation of the filing requirements. The structure and  
6 administration of remedies is clearly within the scope of this proceeding which, among other things,  
7 includes a determination of if Qwest should be subject to monetary and non-monetary penalties to  
8 both punish and remedy the harm caused. The harm to Arizona CLECs and Arizona's competitive  
9 market as a whole, was the unavailability of the secret agreements, which included discounts, for opt  
10 in by the CLECs. Because CLECs not party to the secret agreements had no knowledge of the  
11 discounts afforded to Eschelon and McLeod, the CLECs had no opportunity to opt-in to the  
12 discounts. The obvious remedy to this harm is to require Qwest to make the discounts available to  
13 the CLECs who lacked opportunity and not make the discounts available to Eschelon and McLeod,  
14 which have already realized the benefits of the discounts.

15 Eschelon's phrasing of Staff's recommended remedy as an intentional penalty against  
16 Eschelon is not accurate. The remedy of providing discounts to parties previously denied them was  
17 not fashioned with an eye toward punishment of Eschelon, but rather with an eye towards correcting  
18 past harm. As a party to secret agreements providing Eschelon with discounts, Eschelon can not now  
19 be entitled to the discounts for the remedy to have ameliorative impact Staff does not disagree that  
20 Eschelon's inability to share in the discounts provided by Staff's recommendation may have some  
21 impact not directly intended by the recommendation. However, Staff does not believe the  
22 Commission should forego an effective remedy because it may have some collateral impact on  
23 Eschelon, which was, after all, a party to the offensive agreements. Staff's recommended remedy of  
24 providing discounts to CLECs other than Eschelon and McLeod are not intended to penalize  
25 Eschelon but to remedy the harm done to the competitive market. Any collateral effect on Eschelon  
26 is not unjust when the fact that Eschelon was a party to the unfiled agreements providing the  
27 discounts is taken into account.

1 Eschelon's due process claim is unfounded. Eschelon, as an intervener in this proceeding, has  
2 had a full opportunity to present testimony and witnesses and to confront the testimony and witnesses  
3 of all other parties to the proceedings. Eschelon has had notice of the nature of Staff's recommended  
4 penalties against Qwest since Staff first outlined its penalties in testimony. Eschelon has had ample  
5 opportunity to present evidence that Staff's remedies against Qwest would have an unjust impact on  
6 Eschelon. Eschelon has not done so, but instead has waited until the last hour to raise its groundless  
7 due process argument.

8 Staff's recommended remedy concerning discounts is not that the Commission order Qwest to  
9 discriminate against Eschelon by not affording it the discount. What Staff recommends is a  
10 Commission order to remedy past discriminatory actions by Qwest and Eschelon. When a  
11 government action is designed to affirmatively correct past discrimination, the government's action is  
12 to be viewed as remedial in nature and not as discriminatory in nature. Staff's recommended  
13 discounting remedy will not cause Qwest to be in violation of the 1996 Act.

14 Eschelon asks the Commission to consider mitigating factors when implementing penalties  
15 that will have consequence to Eschelon. In other words, Eschelon asks that the Commission resist  
16 ordering prospective discounts to encourage competition in the market for all CLECs except  
17 Eschelon because Eschelon lacked culpability. Staff believes the evidence shows that despite  
18 Eschelon's claims that Qwest wielded its market power to force Eschelon into the offensive  
19 agreements, Eschelon was actually a willing participant. The president of Eschelon wrote to Qwest  
20 that "we may also have a mechanism that makes it more difficult for any party to opt into out  
21 agreement." RUCO 1B, Exhibit CD-63. Such statements make it obvious that Eschelon knew  
22 exactly what it was doing and shared culpability with Qwest.

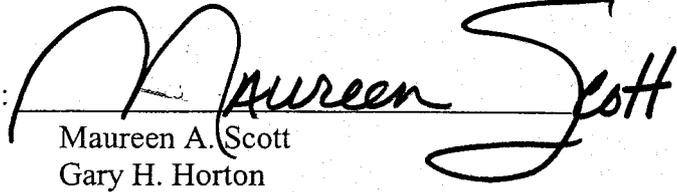
23 Staff's recommended remedy is within this proceedings scope which is to, among other  
24 things, fashion and impose remedies to undo the harm caused by the unfiled agreements. The  
25 remedies imposed upon Qwest, while they may have some collateral effect on Eschelon, do not  
26 amount to unjust "penalties" being imposed on Eschelon. Implementation of Staff's recommended  
27 penalties will not abridge Eschelon's due process rights, as Eschelon has been a full participant in  
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1 these proceedings. The remedies are lawful both under the 1996 Act, and Arizona law.

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RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of May, 2003.

ARIZONA CORPORATION COMMISSION

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