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BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
Chairman
WILLIAM MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner
KRIS MAYES
Commissioner

Arizona Corporation Commission
DOCKETED

OCT 15 2003

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ARIZONA CORPORATION COMMISSION
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IN THE MATTER OF THE 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

ARIZONA CORPORATION COMMISSION,
Complainant,

DOCKET NO. T-01051B-02-0871

v.

**QWEST CORPORATION'S
INITIAL POST-HEARING BRIEF**

QWEST CORPORATION,

Respondent.

I. INTRODUCTION AND OVERVIEW OF SETTLEMENT AGREEMENT.

The Settlement Agreement dated July 25, 2003 (hereinafter the "Agreement") resolves issues posed in three dockets currently pending before the Commission (collectively the "Litigation"): (1) the 252(e) docket (concerning allegations that Qwest failed to file certain agreements with the Commission for approval), (2) the 271 subdocket (concerning allegations of agreements between Qwest and certain CLECs that they would not participate in the 271 docket), and (3) the Order to Show Cause ("OSC") docket (concerning allegations that Qwest failed to implement wholesale rates in a timely fashion).

As discussed herein, Qwest and Staff negotiated a set of principles for settlement of

1 the Litigation. They shared these principles with other interested parties. Staff held two
2 meetings and distributed draft documents, soliciting comments from RUCO and the CLECs
3 on the settlement proposal. After receiving input from RUCO and certain CLECs, Staff and
4 Qwest drafted and finalized the Agreement. As a result of this process some, but not all, of
5 the concerns raised by the CLECs and RUCO were incorporated into the final Agreement.
6 Further, parties clearly had the opportunity to submit comments and testimony and the
7 Commission conducted a two-day hearing to consider adoption of the Agreement.

8 The Agreement achieves a fair and balanced resolution of the issues raised in the
9 Litigation, providing benefits to all of the relevant parties and interests. It benefits the State
10 in the form of the \$5.1 million payment to the General Fund. It provides direct, targeted
11 benefits to Arizona ratepayers in the form of the \$6 million worth of voluntary contributions
12 for economic development, educational purposes or investment in facilities needed by the
13 State. It benefits CLECs that may voluntarily choose to receive the credits provided by the
14 Agreement. These CLECs may also receive significant non-monetary benefits because they
15 can opt-in to the non-monetary portions of certain unfilled agreements. Under the
16 Agreement, the uncertainty created by the Wholesale Cost Docket appeal will disappear,
17 ending protracted, contentious litigation between the parties.

18 Qwest has made considerable concessions, both monetarily and otherwise, in
19 reaching this settlement. It will pay a minimum of \$20 million to the General Fund and to
20 the parties through Voluntary Contributions and CLEC credits. It has also waived important
21 legal defenses to the Litigation and has acquiesced in CLECs' receipt of broader remedies
22 (through the credit and opt-in provisions) than those to which they are entitled under the
23 Act. Finally, Qwest has made significant commitments to prevent the recurrence of the
24 problems that gave rise to the Litigation.

25 The Agreement contains a number of significant provisions that are summarized as
26 follows:

1 1. Recitals. The recitals summarize the allegations underlying the Litigation
2 providing context for the Agreement's evolution. Importantly, the recitals also affirm
3 Qwest's commitment: (1) to conduct its Arizona operations in compliance with state law
4 and Commission regulations and orders, (2) not to engage in any fraudulent, deceptive or
5 unlawful behavior in any matter pending before the Commission, and (3) to act in a manner
6 evidencing respect for the Commission's regulatory process. Qwest further acknowledges
7 that a breach of the Agreement may be punished by contempt after notice and a hearing as
8 provided by A.R.S. § 40-424.

9 2. Section 1. Section 1 of the Agreement provides for the payment of \$5.1
10 million by Qwest to the State's General Fund.

11 3. Section 2. Section 2 requires Qwest to make Voluntary Contributions totaling
12 \$6 million for (1) economic development, (2) educational programs, and (3) infrastructure
13 investments, including those permitting the provision of service in unserved and
14 underserved territories. Although Qwest and Staff will submit a joint list of projects for
15 consideration, the final decision allocating the Voluntary Contributions among the three
16 categories and determining the specific projects in which investment will be made rests with
17 the Commission.

18 4. Sections 3, 4 and 5. Sections 3, 4, and 5 of the Agreement provide three types
19 of credits to CLECs. In addition, each section sets both minimum and maximum amounts
20 that Qwest will pay for each category of credits. Under Section 3, a CLEC can receive a
21 credit of 10% of its purchases of Section 251(b) and (c) services purchased between January
22 1, 2001 and June 30, 2002, referred to in the Agreement as "Discount Credits." Under
23 Section 4, a CLEC can obtain credits, referred to as the "Access Line Credits," in the
24 amount of \$2.00 per the average number of UNE-P lines or unbundled loops each month
25 from July 1, 2001 through February 28, 2002, less the amount that the CLEC actually billed
26 Qwest for terminating intraLATA toll during the same period. Under Section 5, a CLEC

1 can obtain "UNE-P Credits," in the amount of \$13 per UNE-P line purchased each month
2 from November 1, 2000 to June 30, 2001, and \$16 per UNE-P line purchased each month
3 from July 1, 2001 to February 1, 2002, less the amounts that the CLEC billed interexchange
4 carriers for switched access during those respective periods. To obtain the credits, a CLEC
5 must execute a release of all claims relating to intrastate services arising from the conduct at
6 issue in the Litigation. Alternatively, a CLEC may choose not to accept the credits and
7 execute the release, and instead may pursue its claims against Qwest.

8 5. Section 6. Section 6 provides that to the extent the credits paid by Qwest
9 under Sections 3, 4 and 5 do not equal the required minimum amounts set, Qwest will pay
10 the difference (i.e., the minimum amount less the actual amount paid) as additional
11 Voluntary Contributions under Section 2.

12 6. Section 8. Section 8 provides that Qwest will pay for an independent, third
13 party monitor selected by Staff to conduct an annual review of Qwest's Wholesale
14 Agreement Review Committee, thereby ensuring that the process by which Qwest
15 determines what agreements are to be filed with the Commission complies with the Act and
16 the FCC standards.

17 7. Section 10. Under Section 10, CLECs can opt in to the non-monetary terms
18 of certain unfiled agreements designated by Staff.

19 8. Section 11. In Section 11, Qwest agrees to dismiss its pending United States
20 District Court appeal of the Commission's decision in the Wholesale Cost Docket.

21 9. Section 12. Under Section 12, Qwest will pay for a consultant selected by
22 Staff to review Qwest's wholesale rate implementation process and make recommendations
23 for improvement.

24 10. Section 15. Section 15 sets a specific deadline for the implementation of
25 wholesale rates by Qwest on a going forward basis.

26 11. Section 16. Section 16 obligates Qwest to docket with the Commission,

1 within 10 days of execution, any settlement agreement reached in a Commission docket of
2 general application.

3 Qwest will address the provisions of the Settlement Agreement and respond to the
4 criticisms of those who oppose its adoption in greater detail.¹ By and large, those criticisms
5 consist of (1) complaints by CLECs that they do not receive enough under the Agreement
6 while others, including ratepayers, receive too much, (2) claims raised by specific CLECs
7 that are not properly the subject of this proceeding because they are unrelated to the
8 Litigation, and either are the subject of pending proceedings or should be raised in other
9 dockets, and (3) arguments that fail to recognize that a settlement is by its very nature a
10 compromise of disputed factual and legal positions. Based on the evidence presented at the
11 hearing, the Administrative Law Judge ("ALJ") should recommend that the Commission
12 approve the Agreement.

13 **II. THE AGREEMENT REPRESENTS A FAIR AND BALANCED RESOLU-**
14 **TION OF THE ISSUES IN THE LITIGATION.**

15 The Agreement is a reasonable compromise of parties' positions and correctly
16 balances the varying principles and interests at stake in a way that benefits each constituent
17 in the Litigation, including the State of Arizona and Arizona ratepayers.² In prefiled
18 testimony and at the hearing, RUCO and the CLECs opposed numerous provisions of the
19 Agreement and questioned the process by which it was reached. Other provisions of the
20 Agreement were not criticized at all. Viewed in its entirety, however, the Agreement
21 represents a fair and balanced resolution of the Litigation. It provides tangible monetary
22 benefits to the ratepayers, the State, and CLECs, and will prevent a recurrence of the
23 problems giving rise to the Litigation.

24 ¹ Qwest's witness David Ziegler responded during the hearing to specific questions that had been posed
by Commissioner Mundell. Those responses are attached as Exhibit A.

25 ² See Transcript ("TR") at 132:22-133:3 (Ziegler) ("The agreement we tried to structure with Staff so that
26 it had benefits across ratepayers, State of Arizona, and CLECs. To the extent that a CLEC's desires are
not in the agreement to me reflects just that a Settlement Agreement in general never reflects all the
interests of all the parties. It's a compromise of differing positions.")

1 A. Cash Payment.

2 The Agreement requires Qwest to pay \$5,197,000 to the State Treasurer within 30
3 days of its Effective Date (*see* Agreement § 1) and to make additional voluntary
4 contributions of \$6,000,000. *Id.* § 2. As Mr. Ziegler testified, “We looked at the \$5.197
5 million as being directly to the State of Arizona, that being more indirect to the ratepayers.
6 The \$6 million voluntary contribution was intended to be more of a direct benefit in the
7 form of any telecommunications needs that the Commission may see out there.” TR at
8 87:8-14. The Agreement apportions the cash payment to each docket as follows: (1)
9 \$5,000,000 for the 252(e) Unfiled Agreements Docket and the 271 Subdocket; (2) \$47,000
10 for a portion of the 252(e) Unfiled Agreements Docket; and (3) \$150,000 for the OSC. *Id.*
11 The largest portion of the cash payment – the \$5,000,000 payment – addresses the Staff’s
12 allegations concerning the principal agreements at issue in the Section 252(e) case,
13 particularly those with Eschelon and McLeod, and Staff’s case in the 271 Subdocket. The
14 \$47,000 portion is the actual penalty recommended by the Staff to address the remaining
15 agreements at issue in the Section 252(e) docket, for which Staff concluded Qwest’s failure
16 to file was not intentional or willful. *See* Testimony of M. Rowell at 2-3. Finally, Staff and
17 Qwest stipulated to a \$150,000 payment to account for Staff’s case in the OSC.

18 This aggregate payment is attacked by certain CLECs and RUCO³ as insufficient.
19 *See, e.g.,* Testimony of T. Pelto at 6-7; Testimony of M. Hazel at 5-6; Testimony of S.
20 Ahearn at 4, 7. These claims lack merit. However, even assuming a larger penalty or a
21 finding of wrongdoing would result through continued litigation, such an “achievement”
22 would be a poor and belated substitute for the practical measures realized through the
23 immediate adoption of the Agreement, assuring future compliance.

24 Equally important, RUCO and the CLECs offer no reasonable basis by which the

25 _____
26 ³ Most of RUCO’s criticisms relate not to the amount of the penalties, but to RUCO’s belief that a finding
of wrongdoing is needed. Those criticisms are addressed in Part VII, *infra*.

1 proposed \$5 million cash payment could be judged inadequate. RUCO briefly argues that
2 the penalties are *insufficient given Qwest's size*. Testimony of S. Ahearn at 8 n.1. RUCO
3 proposes that any penalty be calculated as a percentage of the operating revenues for all
4 Qwest related entities throughout the country, and should not be limited to Qwest's
5 regulated operations in Arizona. Qwest's total revenues, national and even international, do
6 not provide an appropriate context for measuring the potential impact of a multi-million
7 dollar penalty on those responsible for Qwest's Arizona operations. RUCO introduced no
8 evidence and sought no discovery from Qwest regarding the scope and profitability of
9 Qwest's Arizona operations, or of Qwest's revenue or profits generally linked to the
10 services at issue in the Litigation. TR at 469:4-470:12 (Ahearn). Because the Litigation
11 addressed the effects of Qwest's conduct in Arizona, the proper comparison is to Qwest's
12 Arizona intrastate earnings, not Qwest's total revenue. In fact, there was evidence in the
13 record that Qwest had negative earnings on its Arizona rate base in recent years, and five
14 million dollars is a significant penalty when viewed on its own or in the context of Qwest's
15 business in Arizona. See TR at 110:1-8 (Ziegler).

16 Similarly, AT&T argued that the cash payments were inadequate by comparing them
17 to penalties initially proposed by Staff. See Testimony of T. Pelto at 6-7. In making this
18 claim, AT&T has consistently mischaracterized the posture of the case stating that Staff had
19 "found" Qwest guilty of misconduct before hearings had even been held in these
20 proceedings.⁴ See, e.g., AT&T's Response to Settlement Agreement at 6-8; Testimony of
21 T. Pelto at 7. As Mr. Ziegler testified, Staff, RUCO, CLECs, and Qwest initially "disagreed
22 on interpretations and applications of the governing law as well as many of the operative
23 facts. In each of these proceedings, Staff appeared and functioned as a *party*" that sought to

24 _____
25 ⁴ AT&T's witness admitted, however, that he had reviewed only a limited portion of the relevant record.
26 TR at 248:23-250:23 (Pelto). For example, Mr. Pelto relied heavily on the testimony of Staff witness
Kalleberg as the basis for attributing these "findings" to Staff, but failed to review Ms. Kalleberg's live
testimony or cross-examination. *Id.* at 249:13-250:3.

1 convince the ALJ, and ultimately the Commission, to make certain rulings and take certain
2 actions. Rebuttal Testimony of D. Ziegler at 5.

3 Qwest has no doubt that Staff conducted an independent review of the evidence in
4 these dockets. That said, Staff's filings are not "findings," because Staff does not function
5 in these proceedings as an adjudicator, but rather as an advocate. "It is incorrect and
6 misleading to argue that Staff's 'findings' represent an outcome in these proceedings, and to
7 attack the Settlement Agreement as inconsistent with those 'findings.'" *Id.* Staff took an
8 initial litigation position in recommending penalties, and after lengthy proceedings made a
9 reasoned determination to settle for \$20 million dollars in payments to the State, credits to
10 CLECs, and Voluntary Contributions, as well as practical non-monetary measures to assure
11 future compliance.

12 In addition, Mr. Pelto testified that his analysis of the fairness and sufficiency of the
13 Agreement was based only on his narrow review of a subset of relevant filings, which did
14 not include legal challenges to the Commission's authority to impose the maximum
15 penalties initially sought by Staff:

16
17 Q. So did you review any of the filings made by the other
18 parties, including Qwest, Eschelon, or McLeod?

19 A. With the exception of the materials that I told Mr.
20 Spivack about, my review was confined to those listed on
21 page 4 plus the additional materials that I reviewed since the
22 time of filing this testimony.

23 Q. Okay. So in focusing on Staff's filings, you may not
24 be aware of some of the legal arguments advanced by the
25 other parties, for instance, with respect to the Commission's
26 finding [sic; fining] authority under ARS 40-424 and 425?

A. Correct.

TR at 282:15-283:1 (Pelto). Indeed, Staff's witness, Ernest Johnson, testified that Qwest's

1 challenges to the Commission's authority to order the level of penalties originally proposed
2 were a factor in its decision to negotiate a settlement with Qwest. See TR at 343:24-344:5
3 (Johnson) ("In terms of the issues here, based upon my discussions with Staff and Staff
4 counsel, there was significant disagreement relative to the Commission's jurisdiction and
5 the remedies that the Commission could order. These were of the type considerations that
6 would have been taken into consideration in determining whether or not negotiation was
7 appropriate.").

8 Mr. Pelto's conclusion that the cash payment contained in the Agreement is
9 "inadequate" further ignored the value of other provisions, including the \$6,000,000
10 Voluntary Contributions:

11

12 Q. And at one point, you state that what Staff and Qwest
13 ultimately agreed upon in the Settlement Agreement is 75
14 percent less than what Staff initially recommended, correct?

15 A. Correct.

16 Q. And how do you calculate that?

17 A. Let me see what I said. As I recall, the way I
18 calculated that was there was an initial Staff recommendation
19 that was in the \$20 million range, and divided 5 million by
20 that, I suppose, yes, divided 5 million by that.

21 Q. Okay. So your statement that the Settlement
22 Agreement contained 75 percent less than what Staff initially
23 recommended gives no consideration at all to the \$6 million
24 in contributions?

25 A. Correct.

26 Q. If it were, that would be a much greater number, would
it not, 11 million?

A. Yes.

Q. And Mr. Pelto, that was a Staff recommendation,

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correct?

A. Yes.

TR at 288:3-24 (Pelto).

Michael Hazel of Mountain Telecommunications, Inc. ("MTI") similarly criticized the level of the cash payment attributed to the OSC. See Testimony of M. Hazel at 6; TR at 490:15-492:5 (Hazel). Staff initially proposed a payment of \$189,000 in the OSC. Under the Agreement, Qwest has agreed to pay \$150,000. The amount is consistent with the level of the fines recommended by the Staff and a fair and reasonable compromise of the parties' positions. Nevertheless, Mr. Hazel argued that the cash payment in the Agreement was too low in comparison to the economic harm allegedly suffered by MTI, and that the \$150,000 payment "will go to the State Treasurer, not to the entities who have been harmed by Qwest's excessive charges." Testimony of M. Hazel at 6.

First, it is important to note that the *amount* of the transport charges is not an issue in any of the three dockets resolved by the Agreement. MTI intervened in the OSC complaining about the transport rates established by ACC Decision No. 64922 and implemented by Qwest. The substance of MTI's complaint is being addressed in a special proceeding as part of the Wholesale Cost docket. TR at 489:7-17 (Hazel). Notably, there is no basis for issuing an administrative penalty against Qwest for its implementation of transport rates ordered by the Commission. Neither Staff nor MTI has requested any penalty in that docket. At the hearing, MTI recognized that if the transport rate was inappropriate, the rate would be changed by the Commission, and the Commission could order a refund back to June 12, 2002.⁵ *Id.* at 491:9-15. Indeed, that is exactly what the Commission did. Thus, MTI's alleged damages have already been addressed in the

⁵ Mr. Hazel also testified that MTI has, in fact, withheld payment on \$816,000 of the total disputed amount of \$896,284.12. TR at 491:16-492:5 (Hazel).

1 Wholesale Cost docket and have no bearing on Qwest's cash payment under the Agreement.

2 **B. The \$6 Million Voluntary Contributions Provide Additional Benefits to**
3 **Arizona Ratepayers.**

4 Qwest's Voluntary Contributions reflect "an intent that monies be utilized for
5 projects targeted to promote specific interests of Arizona ratepayers." Testimony of D.
6 Ziegler at 8. With Staff's participation and the Commission's ultimate determination, the
7 Voluntary Contributions will be paid to any of three categories: (1) Section 501(c)(3)
8 organizations or other State-funded programs involved in education and/or economic
9 development; (2) educational programs designed to promote a better understanding of
10 telecommunications issues by Arizona consumers; and (3) infrastructure investment in
11 unserved and/or underserved areas in Arizona.

12 In agreeing to the Voluntary Contributions, Qwest and Staff intended to create a
13 unique provision that would directly benefit ratepayers. TR at 93:5-7 (Ziegler). The
14 CLECs have presented no substantive legal argument against the Voluntary Contributions,
15 but have attacked them based on the potential for Qwest to receive tax deductions or rate
16 base enhancements. Their argument fails to address the fact that it is the Commission, not
17 Qwest, that will choose the specific projects to be financed by the voluntary contributions.
18 *See, e.g.*, TR at 268:16-268:18 (Pelto). The Agreement provides for the Commission to
19 exercise its judgment in choosing the most appropriate projects, and in doing so, the
20 Commission may consider any concerns about collateral benefits to Qwest. *Id.*

21 Additionally, Staff will have significant participation in the selection of projects.
22 Testimony of D. Ziegler at 14-15. Consistent with directions to think "outside the box," the
23 Voluntary Contributions evidence a positive feature rather than a deficiency in the
24 Agreement, provide a benefit that could not have been achieved through the Litigation, and
25 serve the interests of the State, its ratepayers, and the parties. *See* Rebuttal Testimony of D.
26 Ziegler at 15 (quoting letter from Commissioner Mundell to the parties, June 30, 2003).

1 AT&T criticizes the Voluntary Contribution aspect of the Agreement because it
2 "provides no benefit to CLECs. I cannot imagine any CLEC proposing such a provision."
3 Testimony of T. Pelto at 5. AT&T insists that the only purpose of the underlying
4 proceedings was to benefit CLECs, not Arizona ratepayers. *See, e.g.*, AT&T's Response to
5 Settlement Agreement ("AT&T's Response") at 9 ("The three proceedings focus on harm to
6 competition and to the CLECs . . . denying all CLECs . . . disadvantage of the CLECs . . .
7 CLECs did not receive the benefits . . . these issues affect the CLECs . . ."). Unwilling to
8 credit the Commission's ability to weigh the usefulness and appropriateness of various
9 projects to be funded through the Voluntary Contributions, AT&T disparages Staff's efforts
10 to direct part of the settlement to benefit ratepayers as a "slush fund" (Testimony of T. Pelto
11 at 11), and a scheme to allow Staff to "advance pet projects . . ." AT&T's Response at 9.
12 Such slurs ignore any notion that the benefits achieved under the Agreement should not
13 accrue to the CLECs alone, especially when they are not obligated to pass on credits
14 received thereunder to their customers. *See* TR at 253:9-254:11 (Pelto). The Agreement
15 must address the interests and concerns of the Commission, Staff, RUCO, Qwest, other
16 CLECs, and Arizona ratepayers. Staff fairly considered all of these interests in negotiating
17 its terms.

18 AT&T also claims that the Voluntary Contributions will not benefit ratepayers
19 because Qwest will spend the money on ordinary infrastructure, disguised advertising, and
20 charitable contributions that Qwest would have made anyway. *See, e.g.*, Testimony of T.
21 Pelto at 11-13. AT&T's argument assumes that Staff and the Commission will not select
22 projects keeping with the intent of the Agreement. AT&T ignores the fact that the
23 Commission must and will ensure that these contributions are not anti-competitive and are
24 made in addition to any investment planned by Qwest. Testimony of M. Rowell at 3-7; TR
25 at 325:12-327:24 (Johnson); Rebuttal Testimony of D. Ziegler at 13-16. The Agreement
26 expressly provides that the Commission decides where investment through voluntary

1 contributions will be made. *See id.*; Agreement § 2 at 4-5. Qwest fully expects the
2 Commission and Staff to choose projects where no other CLECs or ILECs have volunteered
3 to make the investment because the project does not offer an adequate economic return.
4 Testimony of D. Ziegler at 16. "For example, if the Commission approves investment in
5 unserved territory, such investment clearly would be in excess of what Qwest would have
6 otherwise spent because Qwest does not invest in facilities outside of its service territory."
7 *Id.* at 14.

8 **C. The Credits in the Agreement Address the CLEC Interests Concerning**
9 **Any Non-compliance with Section 252 Filing Requirements.**

10 As part of the Agreement, Qwest will issue three types of one-time credits to eligible
11 CLECs due to claims made in the Section 252(e) docket. First, to address allegations that
12 Eschelon and McLeod received discounts of 10% of their purchases over certain periods of
13 time, Qwest will issue credits measured by 10% of a CLEC's purchase of Section 251(b)
14 and (c) services through its interconnection agreement with Qwest or through Qwest's
15 SGAT from January 1, 2001 through June 30, 2002. *See* Agreement § 3. Second, to
16 address allegations concerning payments by Qwest for Eschelon's termination of
17 intraLATA toll, Qwest will issue credits equal to \$2 per UNE-P line or unbundled loop
18 purchased by a CLEC from Qwest between July 1, 2001 and February 28, 2002, less
19 amounts billed and collected by that CLEC from Qwest for terminating intraLATA toll
20 during that same period. *See* Agreement § 4. Third, to address allegations concerning
21 payments made to Eschelon in settling a dispute about the accuracy of daily usage
22 information provided to Eschelon under a manual process, Qwest will issue credits to
23 eligible CLECs that did not receive accurate daily usage files equal to \$13 per month for
24 each UNE-P line purchased by the CLEC from November 1, 2000 through June 30, 2001,
25 and \$16 per month for each UNE-P line purchased by the CLEC from July 1, 2001 through
26 February 28, 2002, offset by the CLEC's billings to IXCs for switched access. *See*

1 Agreement § 5. To obtain these credits, CLECs must satisfy certain eligibility criteria,
2 including the execution of a release of claims addressed in the Section 252(e) Docket and
3 the Section 271 Subdocket for intrastate services.

4 Each of the credits reflects considerable concessions by Qwest. Most significantly,
5 Qwest is offering these credits without requiring CLECs to assume all related terms and
6 conditions in the underlying contracts.⁶ For example, Qwest is offering the 10% credit
7 based on Section 251 services without also requiring CLECs to satisfy the substantial
8 volume and term commitments agreed to by Eschelon and McLeod. Similarly, Qwest is
9 offering the Section 5 credit without requiring that CLECs be similarly situated to Eschelon.
10 Qwest's agreement to pay Eschelon a per-line credit was expressly based on issues that
11 resulted from Eschelon's receiving daily usage files through a manual (rather than a
12 mechanized) process as part of the UNE-Star Platform. Further, the Eschelon agreement
13 provided that this credit would terminate upon the implementation of a mechanized process.
14 Nonetheless, the Section 5 credit is available to CLECs that received daily usage records
15 through a mechanized process as part of the UNE-P platform. During the hearing, Mr. Pelto
16 downplayed the significance of these concessions by suggesting that AT&T would be able
17 to satisfy the related terms and conditions of the underlying agreements. TR at 261:14-
18 262:7 (Pelto). Yet, he conceded that AT&T has received mechanized daily usage records
19 for switched access billing for at least a year (*id.* at 262:18-263:6), suggesting that even
20

21 ⁶ As Mr. Pelto conceded, for a CLEC to opt-in to a term of an interconnection agreement under Section
22 252(i), the CLEC must accept all related terms and conditions.

23 Q. But in order, under federal law, in order to opt into any agreement,
you would have to accept all related obligations, correct?

24 A. Yes, if there were valid and legitimate related obligations that were
25 being enforced.

26 TR at 276:20-24 (Pelto).

1 AT&T would not have been eligible for Section 5 credits without the Agreement.

2 In addition to reflecting considerable concessions by Qwest, Qwest has gone even
3 further to address the CLECs' main concerns about the credits. In pre-filed testimony and at
4 the hearing, CLECs raised two primary issues: (1) whether the scope of the credits CLECs
5 would receive is commensurate with the scope of the release CLECs would be required to
6 execute, and (2) whether the minimum and maximum aggregate values of the credits are
7 appropriate.

8 As discussed in Part V, *infra*, the testimony at the hearing met and resolved concerns
9 about the scope of the credits and the release. Further, any issues concerning a ceiling for
10 the aggregate credit amounts or the adequacy of the calculation of the minimum and
11 maximum aggregate credit values are unjustified. As an initial matter, the minimum and
12 maximum values of the credits serve the legitimate purpose of clarifying the extent of
13 Qwest's concessions and obligations under the Agreement. With regard to their calculation,
14 Qwest's records demonstrate that the minimum and maximum values of the credits are
15 overestimates and that CLECs will be able to collect the full value of any credits under the
16 Agreement.⁷ To the extent the aggregate credits are less than the minimum settlement
17 amount, the Agreement requires Qwest to pay the difference as an additional Voluntary
18 Contribution. Thus, any overestimation of the amount of the credits benefits CLECs (by
19 ensuring that enough funds are provided to credit all eligible CLECs) and the State of
20 Arizona (through additional Voluntary Contributions), not Qwest.

21 **1. The Discount Credit Gives CLECs the Maximum Payment to**
22 **Which They Would Be Entitled under Section 252**

23 The Discount Credits are appropriately focused on 251(b) and (c) services purchased
24 from January 1, 2001 through June 30, 2002. Because the Litigation addressed issues of

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26 ⁷ Qwest conservatively added 10% to its estimate of the credits to reach the maximum values. See TR at
62:2-21, 63:15-64:17, 66:4-67:12, 68:5-69:3, 70:25-71:8, 71:24-73:3 (Ziegler).

1 Qwest's compliance with Section 252 of the Act and its non-discrimination obligations
2 under Section 251, the structure of the discount was crafted to address the alleged harm to
3 CLECs from a Section 251 and 252 perspective. As a result, CLECs will receive differing
4 amounts because the remedy parallels the alleged harm suffered by each specific CLEC.⁸

5 The Discount Credits also afford CLECs broader remedies than afforded by the Act.
6 First, the Agreement provides Discount credits for an 18-month period, which is as long as,
7 or longer than, the duration of the discounts allegedly given Eschelon and McLeod. *Cf.* TR
8 at 453:25-455:24 (*Ahearn*). Second, the CLECs receive the credit without having to adopt
9 all related terms of Eschelon and McLeod contracts. That is, to receive a credit, a CLEC
10 will not be required to assume the same obligations as Eschelon and McLeod, had they
11 opted into the Eschelon or McLeod provisions under Section 252(i) of the Act.⁹ Here, the
12 CLECs will receive a credit but will not have to satisfy the significant volume and term
13 commitments contained in the Eschelon and McLeod agreements – Eschelon's volume
14 commitment of \$150 million over a term of 5 years, and McLeod's volume commitment of
15 \$480 million over a term of 3 years.

16 Finally, CLECs also have a duty to file interconnection agreements and, therefore,
17 their failure to file represents a violation as argued by both Staff and RUCO in the Section
18 252(e) Docket.¹⁰ Although McLeod and Eschelon are excluded from the Discount Credits,

19
20 ⁸ For instance, Time Warner complains that it will receive only approximately \$26,877 under Section 3 of
21 the Agreement. *See* TR at 168:17-170:15 (*Ziegler*). However, that amount – 10% of Time Warner's
22 purchase of Section 251(b) and (c) services for the relevant period – reflects the harm Time Warner
23 would have suffered as the result of any violation of Qwest's filing obligation for Eschelon and McLeod
24 agreements.

25 ⁹ The FCC has made clear that CLECs may not use the Section 252(i) opt-in process to strip the pricing
26 terms in an interconnection agreement away from the other terms and conditions on which that price is
premiered (such as volume and term commitments). A CLEC exercising its opt-in rights is required to
abide by "the same terms and conditions, in addition to rates, as those provided in the agreement." *See* 47
C.F.R. § 51.809(a); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 396 (1999). If the CLEC cannot
meet the other terms and conditions, it has no right under Section 252(i) to opt into the pricing term in
isolation.

¹⁰ *See, e.g.*, Complaint and Notice of Pre-Hearing Conference, Washington State Utils. & Transp.
Comm'n, Docket No. UT-033011 (filed Sept. 8, 2003) available at <http://www.wutc.wa.gov/>

1 the other CLECs that signed the “unfiled agreements” may take advantage of the Agreement
2 notwithstanding any “benefits” they obtained from being a party to an “unfiled agreement.”

3 Despite these benefits, CLECs raised additional concerns about the Discount Credits,
4 including their duration, scope, and their retrospective, rather than prospective, application.

5 **a. A prospective discount would conflict with federal law.**

6 AT&T and RUCO criticize the Agreement because it does not provide for a going
7 forward discount. However, the prospective discount advocated by AT&T and RUCO, as
8 AT&T admits, is problematic. See TR at 295:15-296:10 (Pelto). For instance, if McLeod
9 and Eschelon are included in a prospective discount, the discount fails to address any
10 alleged harm or to level the playing field for other CLECs (giving them the “benefits”
11 received by Eschelon and McLeod). However, if Eschelon and McLeod are excluded from
12 any prospective discount, the discount is discriminatory and violative of federal law. The
13 McLeod and Eschelon agreements have been terminated, and any prospective discount
14 would essentially require Qwest to provide a rate reduction to CLECs that would not be
15 available to McLeod and Eschelon. Thus, any prospective discount would defy logic, lack
16 any remedial purpose, and would itself violate Section 251 for excluding Eschelon and
17 McLeod.

18 AT&T’s argument that a prospective discount credit would allow CLECs to make
19 buying decisions with a 10% discount factored in (encouraging CLECs to pass discounts on

20 rms2.nsf/0/ACC3D683BFB7141588256D820077E6E0/\$file/Complaint+&+PHC+notice.pdf (asserting
21 claims against CLECs for failing to file agreements for Commission approval under Section 252); *In re*
22 *AT&T Corp. v. Qwest*, Order Making Tentative Findings, Giving Notice for Purpose of Civil Penalties,
23 and Granting Opportunity to Request Hearing at 5, Iowa Dep’t of Commerce Utils. Bd., Docket No.
24 FCU-02-2 (May 29, 2002) available at <http://www.state.ia.us/government/com/util/orders2q02.html>
25 (noting that both parties to an interconnection agreement are subject to the filing requirement); *In the*
26 *Matter of an Investigation into Unfiled Agreements between Qwest Corporation and Competitive Local*
Exchange Carriers, Final Order Regarding Compliance with Outstanding Section 271 Requirements:
SGAT Compliance, Track A, and Public Interest at ¶ 296, Util. Case No. 3750 (May 8, 2002) available at
[http://www.nmprc.state.nm.us/utility/telecommunications/pdf/271/3269foregrdcomplianceoutstandsec271.](http://www.nmprc.state.nm.us/utility/telecommunications/pdf/271/3269foregrdcomplianceoutstandsec271.pdf)
pdf (concluding that “both incumbent LECs and CLECs have the responsibility of submitting agreements
to the Commission for approval.”).

1 to end users) is, as Mr. Peltó admitted, entirely speculative. TR at 296:1-14 (Peltó). There
2 still would be no guarantee that a CLEC would pass a prospective discount on to its
3 customers. *Id.* at 297:25-298:3 (Peltó). Moreover, nothing in the Agreement prevents a
4 CLEC from passing on the benefits of a retroactive credit to a consumer. *Id.*

5 **b. The exclusion of non-§ 251(b) and (c) services from the**
6 **credit is entirely appropriate.**

7 Because the issue in the Section 252(e) Docket was Section 252 compliance, the
8 Discount Credits are appropriately restricted to Section 252. Because Section 252(e) does
9 not create a filing obligation for non-251(b) or (c) services, the credit does not extend
10 beyond Section 251(b) and (c) services to include services such as intrastate access. Under
11 Section 252(i) of the Act, CLECs do not have any opt-in rights to non-Section 251 services.
12 Whether Eschelon or McLeod may have received a discount for intrastate wholesale
13 purchases from Qwest does not expand the scope of the CLECs' opt-in rights under Section
14 252. Indeed, the FCC has made clear that not filing non-251(b) or (c) terms – such as terms
15 related to intrastate access – does not cause discrimination in violation of Sections 251, 252,
16 or 271.¹¹

17 CLECs offer no support to extend the credit to include services outside the scope of
18 Section 251, such as intrastate access. Indeed, in the underlying docket, Staff witness
19 Kalleberg conceded that requiring a discount on intrastate access services would go beyond
20 Section 252(e)'s filing requirement:

21
22 Q. But we agree that part of your recommendation is
23 something that goes beyond what Qwest was required to file
24 under Section 252(e), which is intrastate access; correct?

25 ¹¹ *In the Matter of Application of Qwest Communications International, Inc. for Authorization to Provide*
26 *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.

1 A. Staff is recommending that Qwest be required to
2 provide a 10 percent discount on 251(b) or (c) services and on
3 intrastate access. Staff is not recommending that Qwest file
4 an agreement containing these particular terms with the
5 Commission, that the Commission would then review and
6 approve and parties would review under 252(i) or opt-in
7 rights.

8 Q. But Staff's recommendation, an intrastate access
9 payment, goes beyond Section 252(e)'s filing requirements;
10 correct?

11 A. I would agree that Section 252(e) requires that Section
12 251(b) or (c) services that are contained -- an agreement that
13 contains those services should be filed for Commission
14 approval, and that yes, intrastate access is not one of those
15 251(b) or (c) services.

16 252(e) Hearing Transcript at 929:24-930:18 (Kalleberg).

17 Finally, the Commission cannot order a refund based on non-Section 251(b) and (c)
18 services without violating the filed rate doctrine, which prevents the Commission from
19 retroactively changing a tariffed service, such as switched access rates.¹² If a carrier gives
20 one customer an unlawful preferential rate or term of service (that departs from the tariffed
21 rates and terms approved by the regulator as consistent with the public interest), the
22 regulator may not compound the harm and the risks to the public interest by extending the
23 unlawful and unapproved terms to other customers.¹³ Rather, the proper remedy under the

¹² It is well-established that the doctrine applies in administrative proceedings and constrains the ability of regulatory agencies to order remedial relief (such as refunds or damage awards) that effectively would be equivalent to enforcing rates that were never filed or approved by the agencies. *See, e.g., Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 132-33 (1990); *see also id.* at 126 ("The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. . . . This stringent rule prevails, because otherwise the paramount purpose of Congress -- prevention of unjust discrimination -- might be defeated." (quoting *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922))).

¹³ *See Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 (1981) ("It would undermine the Congressional scheme . . . to allow a state court to order as damages a rate never filed with the

1 filed rate doctrine is to require the carriers receiving the different rates to refund the amounts
2 of the alleged discounts.¹⁴ A Commission order granting all CLECs automatic refunds on
3 intrastate access, for instance, would not be an available remedy under the filed rate
4 doctrine.

5 Although AT&T did not raise the issue during the Section 252(e) hearing, AT&T has
6 argued here that intrastate access should have been in the Discount Credits as a remedy for
7 alleged discrimination in violation of A.R.S. § 40-334. Testimony of T. Pelto at 15. This
8 argument is wrong for several reasons. First, A.R.S. § 40-334 does not provide for the
9 automatic refunds AT&T seeks. Arizona courts have interpreted this obligation as being
10 akin to the federal requirement that similarly situated customers receive similar treatment:
11 "The non-discrimination doctrine [embodied by A.R.S. § 40-334] has been defined as an
12 obligation of a public service corporation to provide impartial service and rates to all its
13 customers *similarly situated*." *Miller v. Salt River Val. Water Users' Ass'n*, 463 P.2d 840,
14 843 (Ariz. App. 1970) (emphasis added). Accordingly, unless CLECs were situated
15 similarly to Eschelon and McLeod (for which there was no evidence in the Section 252(e)
16 hearing), they could not have suffered discrimination under A.R.S. § 40-334 to justify the
17 inclusion of intrastate access in the Discount Credits.

18 Furthermore, AT&T presumes that the remedy for a violation of A.R.S. § 40-334 is
19 to reproduce the alleged benefit to every customer in the market. To the contrary, the more
20 appropriate and likely remedy is to require Eschelon and McLeod to disgorge any benefits
21 they received that were not available to similarly situated CLECs. Because tariffed services
22 are at issue, such a remedy is more consistent with the filed rate doctrine and federal law.

23
24 Commission and thus never found to be reasonable within the meaning of the Act."). See also *Square D*
Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409 (1986); *Keogh v. Chicago & Northwestern R. Co.*,
25 260 U.S. 156 (1922); *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998).

26 ¹⁴ See *County of Stanislaus v. Pac. Gas & Elec. Co.*, 114 F.3d 858, 863 (9th Cir. 1997) (disapproving
damages claims based on the filed rate as "too speculative" because such claims "require a showing that a
hypothetical lower rate should and would have been adopted by [the agency].").

1 As a result, AT&T's objections based on A.R.S. § 40-334 have no real bearing on the
2 Commission's consideration of the Agreement.

3 **2. The UNE-P Credits Must Be Offset by Switched Access Billings to**
4 **Interexchange Carriers.**

5 The UNE-P Credits account for the allegations regarding provisions in two Eschelon
6 agreements, dated November 15, 2000, and July 3, 2003. These provisions stem from
7 credits Qwest extended to compensate Eschelon for its claim that Qwest was not providing
8 accurate Daily Usage Files ("DUF") for a specific UNE-P Platform, known as "UNE-Star"
9 or "UNE-E." Testimony of D. Ziegler at 14-16; Rebuttal Testimony of D. Ziegler at 20-24.
10 Qwest provided carriers on the UNE-Star with manual, rather than mechanized DUFs, from
11 which Eschelon determined its billings to interexchange carriers of switched access charges
12 for originating and terminating interexchange calls. Eschelon claimed that the manual
13 DUFs were not accurate, a claim disputed by Qwest. Testimony of D. Ziegler at 15. The
14 November 15, 2000 agreement resolved this dispute by providing Eschelon a pro rata \$13
15 credit per UNE-Star line per month in any month in which Qwest did not provide accurate
16 daily usage information, until a mechanized process was put in place. *Id.* Eschelon
17 committed to purchase \$15 million of telecommunications services as part of the agreement.
18 The July 3, 2001 agreement increased the credit to \$16 per month per UNE-Star line.

19 The UNE-P Credits attempt to simulate the credits provided to Eschelon for a period
20 of fourteen months; however, Qwest's agreement to pay Eschelon a per-line credit expressly
21 provided that the credits would cease when a mechanized DUF process was in place for the
22 UNE-Star platform. CLECs on the UNE-P platform already received DUF records through
23 a mechanized process. *Id.* at 16. As part of the Agreement, Qwest is not asserting that
24 CLECs must have received DUF records through the manual process to be eligible for the
25 credit, nor is Qwest asserting the \$15 million volume commitment – prerequisites that
26 would disqualify all or nearly CLECs from opting in under Section 252(i). Therefore,

1 CLECs that obtained DUF records through a mechanized process but receive UNE-P
2 Credits under the Settlement Agreement are in fact receiving more than even Eschelon
3 received under its Agreement.

4 Contrary to the suggestion of the Agreement's opponents, these credits were
5 implemented such that Eschelon's switched access billings to IXCs for the UNE-E lines
6 offset Qwest's obligation to give credits by amounts billed by the CLEC from interexchange
7 carriers for both terminating and originating toll, including both intraLATA and interLATA
8 toll. *See* Rebuttal Testimony of D. Ziegler at 21-22. Thus, the Agreement parallels those
9 for which the objecting parties now claim opt-in rights – it requires CLECs requesting this
10 credit to offset the billings to their IXCs. By the same logic, a CLEC cannot and should not
11 receive any credit to reflect lost billings if a CLEC was not billing IXCs for switched access
12 over its UNE-P lines. Without concomitant billings to IXCs, there is no compensable
13 "loss."

14 To be eligible for the UNE-P Credits, CLECs must meet only a minimal burden.
15 CLECs must submit four pieces of information entirely within their control: (i) information
16 regarding the months that the CLEC did not receive accurate daily usage information; (ii)
17 the reasons it believes the information was inaccurate;¹⁵ (iii) the average number of UNE-P
18 lines leased by the CLEC for each relevant month; and (iv) the total amount the CLEC
19 actually billed interexchange carriers for switched access in each relevant month. As AT&T
20 conceded, only the CLECs have the documentation of their billings to IXCs:

21
22 Q. Does AT&T know the average numbers of UNE-P
lines that it leased from Qwest during those months?

23 A. I do not.

24 Q. Is that information that AT&T would be able to
25 determine?

26 ¹⁵ If Qwest disputes the reason given, the burden is on Qwest to show that the records were correct.

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A. Oh, yes.

Q. There's no doubt in your mind that AT&T could do that?

A. Could we ascertain the average number of lines that we leased during those months? Yes, I think we could ascertain that.

Q. And how about the aggregate amounts that AT&T billed interexchange carriers for switched access that was originated and terminated through UNE-P lines that it leased from Qwest during those months? Is that also information that AT&T has?

A. I believe we would be able to determine that.

Q. And is it, do you know whether it's true that only AT&T has those records as opposed to Qwest?

A. I would think that Qwest would have, would be able to ascertain the average number of UNE-P lines that AT&T had. *I don't believe Qwest would be able to ascertain what we billed IXCs, and that would only be available to AT&T.*

TR at 263:23-264:22 (Pelto) (emphasis added). As Mr. Pelto testified, Qwest has never had any access, nor would it under any circumstances, to the switched access billings of any CLEC to an IXC, and thus could not calculate the appropriate offset. But without the offset calculation, CLECs obtaining credits would receive a windfall double recovery: the billings they collected from IXCs and credits from Qwest that are intended to serve the identical function. Accordingly, a CLEC that does not provide Qwest with the relevant information is not and should not be eligible to receive the Section 5 credit.¹⁶

During the hearing, Arizona Dialtone suggested a method for bootstrapping its

¹⁶ Although the hearing did not focus on the Section 4 credit, (also referred to as the Access Line Credit), the same arguments and logic apply to offset and requirements that CLECs produce records to receive that credit.

1 eligibility for the credit. In a September 2000 settlement agreement with Global Crossing,
2 Qwest agreed that "rates and charges for UNE-P . . . as requested for resale lines by Global
3 Crossing . . . shall be applicable for the affected lines retroactive to April 15, 2000." *See* TR
4 at 149:18-160:1 (Ziegler) (introducing confidential exhibit AZD-2). Arizona Dialtone
5 suggested that it could opt into this provision (through Section 10 of the Agreement), "have
6 its UNE-P wholesale pricing effective as of April 15, 2000," and thereby be deemed to have
7 leased UNE-P lines during the relevant time period. TR at 157:8-159:12 (Ziegler). This
8 attempt to backdoor eligibility for the UNE-P Credits must fail. First, Section 10 of the
9 Agreement would allow eligible CLECs to opt into only non-monetary provisions related to
10 Section 251(b) and (c) services. If opting into a provision would result in any exchange of
11 money – as would opt-in to the provision cited by Arizona Dialtone – such provision would
12 not qualify as "non-monetary" and would not be available under Section 10 of the
13 Agreement. Second, even if the provision regarding Global Crossing's UNE-P conversion
14 date and retroactive UNE-P wholesale pricing were non-monetary, Arizona Dialtone and
15 other CLECs would be eligible to opt into that provision only if they satisfied the criteria
16 under Section 252(i) – i.e, only if they were similarly situated and willing to accept all
17 related terms and conditions. *See* Agreement at § 10. As the Global Crossing agreement
18 makes clear, prior to the settlement agreement, Global Crossing had submitted to Qwest
19 requests for conversion of its lines to UNE-P and was in dispute with Qwest regarding the
20 proper charges for the lines and whether an amendment to its interconnection agreement
21 was necessary to convert those lines. It does not appear that Arizona Dialtone was in a
22 similar situation at that time. Finally, even if Arizona Dialtone were able to opt into the
23 UNE-P conversion date in the Global Crossing agreement, it would not be eligible for the
24 UNE-P Credits if it was not actually billing interexchange carriers for switched access
25 during the relevant time period.

26

1 **3. Interest Payments on the Credits Are Not Warranted under Arizona**
2 **Law.**

3 Finally, Time Warner's contention that CLECs should receive interest on the amount
4 of the credits calculated under the Agreement is mistaken. See Comments of Time Warner
5 Telecom at 4. Requiring Qwest to pay CLECs interest on the credits would be somewhat
6 similar to an order for *prejudgment interest in civil litigation*. Under Arizona law,
7 prejudgment interest is not available to the prevailing party in litigation unless the claim for
8 payment is liquidated prior to judgment, and even then, "prejudgment interest on liquidated
9 claims cannot be awarded for any period prior to the initial demand for payment." See, e.g.,
10 *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 603 P.2d 513, 535 (App. 1979). Here,
11 not only have CLECs' claims not been liquidated¹⁷ and demands for payment not made, but,
12 more significantly, these credits are being offered in the context of the settlement of
13 disputed claims rather than any final judgment. Qwest has waived significant legal defenses
14 through the settlement and is offering credits to CLECs based on agreements that many
15 CLECs would not be willing or able to opt into if the requirements of Section 252(i)
16 applied. CLECs' requests for ever-more benefits under the Agreement, including interest
17 and an expansion of the scope of the credits, ignore Qwest's substantial concessions and fail
18 to recognize the Agreement's fair and equitable balance of all the interests that affected by
19 the settled dockets.

20
21 ¹⁷ Under Arizona law, a claim is liquidated "if the evidence furnishes data which, if believed, makes it
22 possible to compute the amount with exactness, without reliance upon opinion or discretion." *Northern*
23 *Ariz. Gas Serv. Inc. v. Petrolane Transport Inc.*, 702 P.2d 696, 708 (Ariz. Ct. App. 1985). However, a
24 claim is not liquidated when the court must exercise any discretion in determining the elements of the
25 damages formula. *Id.* at 708-09. See also *Ritter Landscaping, Inc. v. Meeks*, 905 S.W.2d 495, 497 (Mo.
26 Ct. App. 1997) (holding that a claim is not liquidated where the parties dispute "the amount of damages to
be applied and the method used to calculate those damages.") Here, the parties dispute the amount of
harm incurred by CLECs, and, even assuming the Commission had the authority to order remedies similar
to the credits offered in the agreement, the elements that could be considered in calculating the amount of
the remedy. Accordingly, if CLECs asserted claims for damages based on the unfiled agreements, their
claims would not be liquidated and they would not be entitled to prejudgment interest under Arizona law.

1 **III. THE NON-ECONOMIC PROVISIONS OF THE AGREEMENT PROVIDE A**
2 **FRAMEWORK FOR CONSTRUCTIVE RESOLUTION OF THE RATE**
3 **PROCESS ISSUES RAISED IN THE DOCKETS.**

4 The Agreement provides for monitoring of Qwest's compliance mechanisms under
5 Section 252(e), and of Qwest's wholesale cost docket implementation. Qwest will pay for
6 an independent, third-party monitor, selected by the Director of the Utilities Division, who
7 will conduct an annual review of Qwest's Wholesale Agreement Review Committee.
8 Agreement § 8 at 13-14. Additionally, Qwest must hire an independent, third-party
9 consultant, selected by the Director, to conduct assessments of and recommend
10 improvements to Qwest's wholesale rate implementation process. Agreement § 12 at 15-
11 16. Both the consultant and the monitor will be retained for a maximum period of three
12 years, during which time Qwest will also continue its web-based training program for new
13 and existing employees, Agreement § 9 at 14, and continue its internal cost docket
14 governance team. Agreement § 14 at 16-17. The Agreement further requires Qwest to
15 continue processes instituted prior to the settlement to ensure timely implementation of cost
16 docket rates. Agreement §§ 14 and 15 at 16-17. Qwest also commits to submit to the
17 Commission settlement agreements in any Commission dockets of general application.
18 Agreement § 16 at 18.

19 Ernest Johnson, the Commission's Utilities Director, testified that the Agreement as
20 a whole is in the public interest. Testimony of E. Johnson at 12. He further testified at the
21 hearing that Staff had chosen not to pursue the "alternative path" of continued litigation
22 because "a healthy, properly functioning regulatory regime requires open communication,
23 honesty, integrity, respect for laws and regulations, but most important, at least from a Staff
24 perspective, it requires trust." TR at 329:6-17 (Johnson). The non-economic terms of the
25 Agreement are crucial to meeting those goals. Qwest has agreed to some of the non-
26 economic provisions on an interim basis during the course of the Litigation, and they are

1 now extended and augmented by the terms of the Settlement Agreement. It is highly
2 unlikely that a more comprehensive and constructive approach to building a working
3 relationship between Staff and Qwest could be accomplished through continued litigation.

4 **IV. THE SETTLEMENT PROCESS WAS FAIR TO THE PARTIES AND DID**
5 **NOT VIOLATE DUE PROCESS.**

6 Some of the CLECs also criticize the Agreement on vaguely articulated "due
7 process" grounds. *See, e.g.*, Filed Testimony of T. Pelto at 3 (concerning "secret
8 negotiations" between Staff & Qwest); TR at 44:7-20 (Opening Remarks of MTI).
9 Significantly, the parties who raise these purported due process concerns can point to no
10 statute, rule, or principle of common law that has been violated. *See* TR at 280:10-14
11 (Pelto). It is also important to put the CLECs' comments in context. The CLECs simply
12 have no economic incentive to support the Agreement. Rebuttal Testimony of David
13 Ziegler at 4-5. Under the Agreement, the CLECs can oppose its adoption now and later
14 accept the credits after the Agreement is approved by the Commission. As Mr. Ziegler
15 explained: "They can adopt a 'wait and see' attitude, attempt to expand settlement benefits
16 to their advantage, and ultimately receive the benefits of the Agreement despite their
17 opposition." *Id.* at 5.

18 The vague due process criticisms leveled by the non-settling parties certainly do not
19 rise to the level of constitutional or statutory claims. Nothing in the Constitution or statutes
20 of this State requires a settlement to be agreed to by all parties to litigation or to a regulatory
21 proceeding. This Commission regularly reviews and approves settlements that are
22 supported by less than all of the parties to a docket.

23 Nonetheless, Qwest recognizes that the Commission may want to review the process
24 by which the Agreement was reached simply as a matter of policy and general fairness. In
25 doing so, the Commission should recognize the numerous ways in which Staff and Qwest
26 have attempted to give adequate notice to the non-settling parties, and to incorporate their

1 concerns into the Agreement. During the course of negotiating the Agreement, Staff and
2 Qwest notified the CLECs once it became clear that Qwest and Staff had sufficient common
3 ground to make a settlement feasible. TR at 34:1-17 (Johnson). Two separate meetings
4 were held with the CLECs after an outline of basic principles had been formulated, but
5 before the final text of the Agreement was drafted. Rebuttal Testimony of D. Ziegler at 2-3.
6 During and after this time the CLECs had the right to conduct discovery regarding issues
7 related to the settlement, a right which some CLECs used to learn the amount of credits they
8 would be entitled to pursuant to the settlement. *See, e.g.*, TR at 168:17-169:6 (Ziegler)
9 (introducing Qwest response to Time Warner's data request). Qwest also responded to
10 Arizona Dialtone's informal request for information regarding the impact of the settlement.

11 In addition to these direct opportunities for CLECs to provide input into and receive
12 information regarding the Agreement, Staff also made reasonable efforts to address the
13 CLECs' interests. Staff takes into consideration the concerns of various parties and non-
14 parties to proceedings:

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Q. Do you believe Staff should make an independent assessment of facts of the case and provide its recommendations to the Commission based on that assessment?

A. That's what Staff does.

Q. When making that assessment, does Staff take into consideration all parties and nonparty concerns?

A. When making that assessment, does Staff take into consideration all parties' concerns? I think generally Staff seeks to be mindful of the concerns of various parties.

Q. What about nonparty concerns?

A. Pardon?

Q. What about nonparty concerns?

1 A. I think the Staff's concern as indicated by its history
2 go beyond just the participants in a given litigation.
3 TR at 340:16-341:7 (Johnson). And, although Mr. Pelto suggested that AT&T's positions
4 were not "given proper weight and consideration" in the settlement, he admitted that he was
5 unable to identify "any instance in which Staff had misrepresented [AT&T's] position." TR
6 at 283:16-284:4, 284:23-25 (Pelto). Indeed, the Agreement – by offering CLECs credits
7 without requiring them to accept related terms and conditions – confers great benefits to
8 CLECs as the result of a docket that was not initiated by CLECs, in which the Staff bore the
9 burden of proof, and in which CLECs (including AT&T) did not submit any testimony
10 regarding the harm they now purport to have suffered. In light of these benefits, AT&T's
11 claim that its interests were short-changed rings hollow.

12 AT&T's claim that "the settlement tracks pretty much 100 percent what Qwest's
13 position has been" (*id.* at 284:1-4) is also baseless. First, AT&T is able to make such a
14 claim only by ignoring the more than \$20 million value of the settlement (see TR at 12:22-
15 13:7 (Ziegler)) – an amount that far exceeds the minimal penalties (if any) that Qwest
16 believes are appropriate in the dockets being resolved. Second, AT&T ignores the
17 significant (and meritorious) legal positions and rights that Qwest waives in the settlement,
18 such as paying over \$11 million in cash payments and contributions, offering credits to
19 CLECs without requiring them to satisfy related conditions under Section 252(i), and
20 dismissing its appeal of the Commission's June 12, 2002 cost docket order. Such
21 concessions are directly at odds with Qwest's litigation position and are evidence that the
22 proposed settlement is a fair and balanced compromise of the parties' positions.

23 Further, the CLECs ignore the hearing process in which they are engaged. The
24 Agreement itself is subject to review through this hearing process and ultimately, approval
25 through the open meeting process of the Commission. The Agreement was duly filed, a
26 procedural conference was held, and information was shared with the non-settling parties

1 through disclosure and discovery prior to the hearing. In addition, all parties have had the
2 opportunity to comment, to present both pre-filed and live testimony, and to cross-examine
3 witnesses and file post-hearing briefs.

4 The CLECs also ignore the optional nature of the Release and Credit provisions
5 under the Agreement. The Agreement does not deprive the CLECs of rights or claims they
6 believe they may have under the law that transcend the Agreement, because they can choose
7 to opt out of the credit provisions and bring any complaints they have in any appropriate
8 forum. As Ernest Johnson noted, although typically "that is not the way settlements are
9 done," this provision was adopted "out of an abundance of caution" specifically to protect
10 the rights of CLECs that did not wish to join in the Agreement. TR at 330:2-25 (Johnson).
11 Additionally, the Agreement provides that if a CLEC decides to accept the credits, any
12 disputes about those credits will be resolved by Staff. TR at 76:4-15 (Ziegler). If a CLEC
13 is unhappy with the Staff's resolution of the issue, Qwest recognizes that a dissatisfied
14 CLEC could elevate the dispute to the Commission. *Id.*; *see also id.* at 222:8-19.

15 It is also worth noting that counsel for several of the CLECs in their opening remarks
16 at the hearing responded to the optional credit provisions by pointing out the corollary
17 probability that the Agreement will not resolve all the related litigation. TR at 29:1-12
18 (AT&T), 32:17-22 (Arizona Dialtone), and 37:23-38:7 (Time Warner). Neither Qwest nor
19 Staff can prevent the CLECs from continuing to litigate if that is their choice, but it should
20 be clear that no settlement is possible if the CLECs are unwilling to compromise on any
21 aspect of the dispute, or even set reasonable boundaries on the scope of the dispute. Several
22 of the participants in this proceeding and the underlying dockets have attempted to raise
23 issues that were clearly not even within the scope of Staff's original intent in opening the
24 dockets.

25 Undoubtedly the CLECs feel that their negotiating position against Qwest is stronger
26 when they have the ability to continue bringing up marginally related issues in these

1 ongoing dockets, rather than resolving each dispute on its own merits. Counsel for MTI
2 was particularly clear in that regard, questioning witnesses about matters that had already
3 been heard by another ALJ but not finally decided by the Commissioners, on the theory that
4 "it ain't over till it's over." See TR at 184:8-186:21 (Ziegler); TR at 421:19-422:12
5 (Johnson). The fact that some CLECs may continue litigating against Qwest is not a
6 sufficient reason why the Commission should continue expending resources on protracted
7 litigation when the broadest and most important goals of these dockets can be accomplished
8 here and now by approval of the Agreement. Due process simply does not require the
9 Commission to extend these dockets indefinitely as a forum for CLECs to air any and all
10 individual grievances as they arise.

11 As made clear by Staff at the Commission's procedural conference of August 5,
12 2003, the hearing on the Agreement was not intended to reopen the floodgates to relitigate
13 the relevant dockets or to raise new complaints. See Rebuttal Testimony of D. Ziegler at 10.
14 The issues raised by Arizona Dialtone, for example, are not even part of these dockets.
15 Most of Arizona Dialtone's testimony relates to complaints about Qwest's handling of
16 matters under its interconnection agreement with Qwest. These matters can be properly
17 raised in a separate complaint, and are not relevant to the three dockets resolved by the
18 Agreement. Similarly, MTI's issues concerning transport rates and their effective dates are
19 irrelevant here. These issues are the subject of a separate proceeding that has already been
20 heard and resolved.

21 **V. THE RELEASE CLECS ARE REQUIRED TO SIGN IS NOT OVERBROAD.**

22 The release associated with the CLEC credits has been the subject of considerable
23 controversy, at least in part because Qwest sent an early draft of the release to the CLECs,
24 and no final draft was incorporated into the Agreement. TR at 136:12-137:7 (Ziegler). It is
25 undisputed that the form of release earlier provided to the CLECs does not match the final
26 terms of the Agreement, and Qwest has attached a revised draft release that incorporates the

1 terms of the Agreement to this Brief as Exhibit B. A review of the actual language of the
2 Agreement concerning the release and the language of Exhibit B makes it clear that many of
3 the criticisms made by the CLECs do not apply to the release as envisioned by the
4 Agreement. As Mr. Ziegler testified, "The Settlement does not require the CLECs to
5 release any claims unrelated to the issues in the 252(e) Unfiled Agreements Docket and the
6 271 Subdocket. The release also does not require the CLECs to release any claims they
7 may have relating to the purchase of interstate services." Rebuttal Testimony of D. Ziegler,
8 at 28; *see also* TR at 145:16-146:2 (Ziegler). The Commission's jurisdiction does not
9 extend to interstate service, as AT&T admits. TR at 256:23-257:3 (Pelto). Thus, CLECs
10 retain the right to assert any claim they may have related to interstate service in an
11 appropriate forum.

12 The major remaining criticism leveled by the CLECs against the release provision of
13 the Agreement relates to their claim that the scope of the release is broader than the scope of
14 the Discount Credits provided by Section 3 of the Agreement. They assert that it is unfair to
15 make them release all claims arising from the 252(e) docket and the 271 subdocket related
16 to intrastate services when the credits they receive are limited to 251(b) and (c) services.
17 Much of this argument is simply a restatement of their claims that the scope of the credits
18 should be broader. Qwest has responded to those arguments *supra*. and will not repeat those
19 points here.

20 In any event, the CLECs ignore the fact that there is a reasonable quid pro quo that
21 they receive in exchange for the release. As explained earlier in this Brief, the credits the
22 CLECs receive under Section 3 are not subject to the related terms and conditions
23 requirements established by federal law. To this extent, they are getting a better deal on
24 251(b) and (c) services than McLeod and Eschelon allegedly did. In exchange, they do not
25 receive a discount on non-251 services but release all intrastate claims. This is a fair and
26 balanced settlement. Of course, under the Agreement, no CLEC is forced to accept credits

1 and execute a release. Any CLEC that feels that its claims (including claims related to non-
2 251 intrastate services) are worth more than it can get under the Settlement Agreement is
3 free to pursue those claims.

4 **VI. THE TIME ALLOWED FOR WHOLESALE RATE IMPLEMENTATION IS**
5 **REASONABLE.**

6 The OSC docket involved claims that Qwest had failed to implement wholesale rates
7 resulting from Decision No. 64922 in a timely fashion (and failed to provide the
8 Commission and CLECs timely notice of that failure). The Settlement Agreement contains
9 several provisions addressing this issue. First, Section 14 of the Settlement Agreement
10 obligates Qwest to provide prompt written notification to its wholesale customers of
11 changes in wholesale rates upon issuance of an order changing rates and upon the
12 appearance of those rates on bills to the CLECS. Qwest understands that under that Section,
13 it is obligated to provide similar notice to Staff. Second, Section 12 of the Agreement
14 obligates Qwest to pay for an independent third party consultant selected by Staff to review
15 Qwest's wholesale rate implementation process and recommend improvements in that
16 process. Third, Section 13 of the Agreement obligates Qwest to continue in existence its
17 Cost Docket Governance Team as to provide oversight and serve as an escalation point for
18 issues or problems that arise in wholesale rate implementation process. Fourth, Section 15
19 of the Agreement obligates Qwest to implement newly-set wholesale rates within 60 days of
20 the effective date of a final Commission order approving new wholesale rates and setting
21 forth the numeric rates to be implemented. Only Section 15 was subject to any criticism at
22 the hearing.

23 AT&T criticized Section 15 arguing that Qwest should have 30 days, rather than 60
24 days, to implement new wholesale rates following the entry of an order approving and
25 setting forth the numeric rates. AT&T makes two arguments. First, it argues that Staff in
26 the OSC hearing took the position that 30 days was the appropriate time frame and has not

1 justified the 60 days contained in the Agreement. Second, AT&T argues that Qwest must
2 implement wholesale rates in 30 days in order to achieve parity with its implementation of
3 retail rates. Neither of AT&T's arguments has any merit.

4 First, AT&T's argument that Staff cannot agree to a 60-day implementation period
5 because it proposed a 30-day period in the OSC docket ignores the fundamental nature of
6 settlements. In the OSC proceeding, Staff and AT&T proposed that Qwest be ordered to
7 implement rates within 30 days of the effective date of an order imposing new wholesale
8 rates. Rebuttal Testimony of D. Ziegler at 30. Qwest proposed that the Commission adopt
9 a requirement that wholesale rates be implemented in 90 days after the effective date of an
10 order setting rates. *Id.* Here the Agreement chooses the middle ground between those
11 positions, 60 days. Both Staff and Qwest viewed the 60-day requirement contained in
12 Section 15 as a reasonable compromise of their respective litigation positions. *Id.* It is
13 inherent in the nature of a settlement that neither party's litigation position is adopted
14 entirely by the Agreement. Compromise between litigation positions is what a settlement
15 strives to achieve. AT&T presented no evidence that the 60-day period set forth in Section
16 15 is an unreasonable compromise.

17 Second, AT&T's argument that a 30-day implementation period is required by the
18 Act is simply wrong. Throughout the OSC proceeding, AT&T suggested that the process
19 for implementing wholesale rates should not take any longer than the process for changing
20 retail rates and that the parity requirements of the Act required that retail and wholesale
21 rates be implemented in the same timeframe. In making this argument that Qwest must be
22 required to implement wholesale rates within 30 days of an order, AT&T relied on the
23 Federal Communication Commission's First Report and Order, FCC 96-325 (rel. Aug. 8,
24 1996) at para. 518, which states, among other things, that "if competing carriers are unable
25 to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair,
26 and billing for network elements and resale services in substantially the same time and

1 manner that an incumbent can for itself, competing carriers will be severely disadvantaged,
2 if not precluded altogether, from fairly competing.” AT&T construes this language to
3 require absolute parity between Qwest’s implementation and billing of rate changes for
4 wholesale and implementation and billing of rate changes for retail. AT&T’s argument
5 misses the mark and is out of step with both the First Report and Order and subsequent FCC
6 decisions interpreting the requirements governing wholesale billing.

7 The language from the First Report and Order cited by AT&T relates to AT&T’s
8 ability “to perform the functions of . . . billing for network elements and resale services in
9 substantially the same time and manner that an incumbent can for itself . . .” FCC First
10 Report & Order at para. 18. While AT&T suggests that this language imposes a
11 requirement that ILECs implement wholesale rates in the same timeframe as retail rates, the
12 language in fact requires that the ILEC provide the information needed by the CLEC to bill
13 its end-user customers in the same time and manner that the ILEC provides that information
14 to itself.

15 Billing with respect to CLECs is made up of two components: Daily Usage Files (or
16 Usage Extracts) and carrier bills. *See, e.g., In the Matter of Application by SBC*
17 *Communications Inc., et al., to Provide In-Region InterLATA Services Pursuant to Section*
18 *271 of the Telecommunications Act of 1996, Memorandum Opinion and Order, FCC 00-*
19 *238, 15 F.C.C.R. 18354, at 210 (rel. June 30, 2000) (hereinafter “SBC 271 Texas*
20 *Application”).* Daily Usage Files (“DUFs”) itemize usage records for CLEC customers.
21 This is the information that CLECs use to bill their own customers. Carrier bills serve as a
22 monthly invoice incorporating charges for all products and services provided to the CLEC
23 from the ILEC. This information is not needed to permit the CLEC to bill its customers.

24 The parity requirement in the First Report and Order relates to a CLEC’s ability to
25 access the DUF information in “substantially the same time and manner” that Qwest could
26 access its own daily usage information so that the CLEC can bill its customers in a timely,

1 accurate and efficient manner. *Id.* As the FCC recently stated in approving a section 271
2 application:

3 As we have required in prior section 271 orders, [an ILEC]
4 must demonstrate that it provides competing carriers with
5 complete and accurate reports on the service usage of
6 competing carriers' customers in substantially the same time
7 and manner that [the ILEC] provides such information to
8 itself, and wholesale bills in a manner that gives competing
9 carriers a meaningful opportunity to compete.

10 *In the Matter Joint Application by SBC Communications Inc., et al., for Provision of In-*
11 *Region, Interlata Services in Kansas and Oklahoma*, 16 F.C.C.R. 6237, 6319 at 163 (rel.
12 Jan. 22, 2001).

13 Thus, under Section 271, ILEC implementation of new wholesale rates is not the
14 focus of "substantially similar time and manner" requirement; instead, the requirement is to
15 ensure CLEC access to DUFs so that a CLEC may, in turn, bill its customers in
16 substantially the same manner as the ILEC or another CLEC would be able to provide
17 billing to their customers. *See, e.g.*, SBC 271 Texas at 212. AT&T has not and could not
18 claim that Qwest failed to timely provide DUFs to it prior to full implementation of the
19 ordered rates. Therefore, regardless of when Qwest was able to implement the wholesale
20 rates, in 60 days or 120 days, Qwest continued to provide AT&T with access to the
21 information necessary to bill its customers in a timely manner and in conformance with the
22 requirements of Section 271. The parity requirement does not mean that Qwest must
23 implement newly ordered wholesale rates in exactly the same time period as it does its retail
24 rates. Section 271 simply does not require it.

25 Further, AT&T's suggestion that wholesale rates should be implemented in the same
26 amount of time as retail rates ignores the significant differences that exist between the
27 wholesale and retail billing processes. For a retail rate change, most of the retail services
28 already exist in the Qwest databases, and therefore already have been assigned a Uniform

1 Service Order Code ("USOC"). By contrast, Decision 64922 required Qwest to identify
2 and implement hundreds of changes to USOCs. In fact, AT&T's witness at the hearing on
3 the Settlement Agreement admitted that he had no real knowledge of industry benchmarks
4 for implementation of wholesale rates. TR at 303:23-304:1 (Pelto).

5 **VII. A FINDING OF WRONGDOING IN THE AGREEMENT IS NEITHER**
6 **NECESSARY NOR PROPER.**

7 AT&T and RUCO argue that the Commission should add findings of wrongdoing to
8 the terms of the Order approving the Agreement. There should be no doubt that adding
9 quasi-judicial findings to the Agreement would constitute a material change, and would be
10 in direct conflict with the fundamental purpose of entering into a compromise settlement.
11 The Agreement is consistent with Arizona's public policy encouraging private resolution of
12 disputes¹⁸ and with the common practice for settlement agreements not to contain or require
13 admissions of liability. In fact, RUCO's witness recognized that the Commission has
14 approved settlement of serious regulatory matters in the past without findings of
15 wrongdoing. TR at 466:24-467:11 (Ahearn). One such settlement was approved as
16 recently as August 14, 2003.¹⁹

17 In addition, RUCO's observation that the Agreement consists of a "purely financial
18 penalty" is simply wrong. Testimony of S. Ahearn at 8. The Agreement contains numerous
19 forward-looking, non-economic provisions that are designed to ensure compliance. One of
20 those provisions is an express notice and acknowledgement by Qwest that the
21 Commission's contempt powers would apply to any violation of the Agreement by Qwest.

22 _____
23 ¹⁸ See, e.g., *United Bank of Arizona v. Sun Valley Door & Supply, Inc.*, 149 Ariz. 64, 68, 716 P.2d 433,
24 437 (App. 1986) ("Public policy favors settlement."); *Speed Shore Corp. v. Denda*, 605 F.2d 469, 473,
25 citing *Williams v. First National Bank*, 216 U.S. 582 (1910) ("It is well recognized that settlement
26 agreements are judicially favored as a matter of sound public policy."); *Shell Oil Company v. Christie*,
125 Ariz. 38, 39, 607 P.2d 21, 22 (App. 1979) ("settlements of litigation are favored").

¹⁹ See generally Decision No. 66166, *A.C.C. v. Southwest Gas Corp.*, G-01551A-02-0257, entered Aug.
14, 2003. The Southwest Gas Order is not in the record of this matter as evidence, but the Order is part of
the records of the Commission and therefore its contents are subject to judicial notice.

1 RUCO's inference that Qwest would not be sufficiently deterred by the prospect of multi-
2 million dollar penalties has no support in the evidence. Mr. Ahearn testified that previous
3 penalties imposed by the Commission had not lead Qwest to comply with Commission rules
4 and orders. However, he admittedly failed to take into account the fact that, although Qwest
5 had previously paid substantial service tariff penalties in 1996, Qwest had not paid such
6 penalties in 2002. TR at 459:25-461:2 (Ahearn). In fact, Qwest has done its best to provide
7 service in conformance with the quality of service tariff and thereby avoid additional fines,
8 and Mr. Ahearn recognized that one can reasonably conclude the fines paid under the Tariff
9 "incented Qwest to improve its service quality." TR at 462:2-8 (Ahearn).

10 RUCO suggests that a finding of contempt could somehow broaden the
11 Commission's contempt powers with respect to potential future misconduct by Qwest.
12 Again, this suggestion is simply wrong. The Commission's contempt powers are only
13 available when the conduct at issue violates a specific "order, rule or requirement of the
14 Commission" within the meaning of 40 A.R.S. § 424(A). "Punishment [for contempt] can
15 only rest on a clear, intentional violation of a specific, narrowly drawn order; *specificity is*
16 *an essential prerequisite of a contempt citation.*" 17 Am. Jur. 2d Contempt § 157 (1990)
17 (citations omitted) (emphasis added). The essence of contempt is that a party fully
18 understands, but chooses to ignore, a mandate; contempt cannot be based upon a vague
19 requirement. *See International Longshoremen's Assn. v. Philadelphia Marine Trade*, 389
20 U.S. 64, 77 (1967).

21 The Agreement as it currently exists contains clear "requirements" for Qwest's
22 conduct in the future, and is an ample basis for any future exercise of the Commission's
23 contempt power if a violation of the Agreement occurs. A general finding that Qwest's past
24 conduct was wrongful would not change the availability of contempt because it does not
25 impose the type of specific order, rule or requirement, the violation of which is punishable
26 as contempt. The finding proposed by RUCO and AT&T would have no legal significance

1 in terms of the Commission's contempt power, but would have a fundamental impact on the
2 reasonable compromise embodied in the Agreement.

3 AT&T's and RUCO's insistence on findings of wrongdoing also fails to recognize
4 the CLECs' simultaneous obligation to file agreements falling within Section 252, an
5 obligation that all of the CLEC signatories to the unfiled agreements also violated each time
6 Qwest allegedly violated it. None of those CLECs is subject to sanction in the current
7 dockets. See TR at 387:9-388:15 (Johnson). Rather than destroying constructive progress
8 made in the Agreement by attempting to impose formal findings of wrongdoing on Qwest,
9 the Commission should consider promulgating rules that specify both ILECs' and CLECs'
10 filing obligations.

11 **VIII. CONCLUSION**

12 The Agreement is a fair and balanced resolution of the issues posed by the Litigation.
13 It provides monetary benefits to the State, ratepayers and the CLECs. It also contains
14 provisions that will prevent a recurrence of the problems giving rise to the Litigation. The
15 ALJ should recommend that the Commission adopt the Agreement as submitted.

16 DATED this 15th day of October, 2003.

17
18 FENNEMORE CRAIG, P.C.

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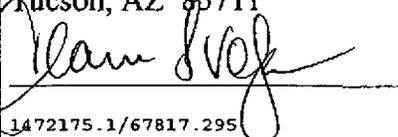
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EXHIBIT

A

1 BEFORE THE ARIZONA CORPORATION COMMISSION

2

3 IN THE MATTER OF U S WEST)
COMMUNICATIONS, INC.'S COMPLIANCE) DOCKET NO.
4 WITH SECTION 271 OF THE) T-00000A-97-0238
TELECOMMUNICATIONS ACT OF 1996.)

5)
6 IN THE MATTER OF QWEST) DOCKET NO.
CORPORATION'S COMPLIANCE WITH) RT-00000F-02-0271
7 SECTION 252(e) OF THE)
TELECOMMUNICATIONS ACT OF 1996.)

8 ARIZONA CORPORATION COMMISSION,) DOCKET NO.
9 Complainant,) T-01051B-02-0871

10 v.)

11 QWEST CORPORATION,)

12 Respondent.)

13

14 At: Phoenix, Arizona

15 Date: September 16, 2003

16 Filed: SEP 22 2003

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

18

VOLUME I
(Pages 1 through 233)

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25 QWEST

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1 purposes. To the extent the CLECs' credits are less
2 than the minimum settlement amounts for the CLEC
3 credits, the difference would be added to the voluntary
4 contribution.

5 In addition, Qwest agrees to dismiss its
6 appeal of the cost docket. This provision provides
7 benefits for the State of Arizona and the CLECs.

8 The proposed global settlement has a minimum
9 value of \$20.397 million. The settlement is in the
10 public interest and should be approved by the
11 Commission.

12 MR. BERG: Your Honor, with your permission,
13 what I intended to do next was take Mr. Ziegler through
14 the questions asked by Commissioner Mundell in his
15 letter on Friday. If you would prefer to do that some
16 other way, that's fine with me, but that's what we
17 intended to do next.

18 ALJ RODDA: Excellent idea. Better you than
19 me.

20 MR. BERG: We will proceed on that point.

21 MR. WOLTERS: One point, we will not have
22 had the opportunity to see the answers he has given
23 orally in advance. That's not possible. I wonder if we
24 would have brief time to review those responses and
25 maybe ask follow up. It's going to be pretty difficult

1 to follow what he says on the record and then prepare
2 any follow-up questions.

3 ALJ RODDA: So what are you, do you have a
4 proposal?

5 MR. WOLTERS: Well, I don't have an
6 objection to asking the questions, but I think it would
7 be helpful to see it in writing and maybe have an
8 opportunity to respond to it. I don't know how to do
9 that, but some of these questions are real important,
10 and we won't have any input to the responses. So I
11 would like to just throw that out now and maybe we can
12 think about how we could have an opportunity to deal
13 with it.

14 ALJ RODDA: Okay.

15 I'm sorry, Ms. Burke.

16 MS. BURKE: I was just commenting,
17 Commissioner Mundell may want them in writing, too, so
18 he may have an opportunity to read through them.

19 ALJ RODDA: Exactly right. I'm sure there's
20 some sort of post-hearing comment process that we can
21 think of.

22 MR. BERG: We haven't talked to the court
23 reporter about this, but one possibility would be to see
24 if we could get just this part of the transcript
25 accelerated so people could have it tomorrow morning. I

1 hadn't, the issue hadn't come up, so I hadn't asked her.

2 MR. WOLTERS: I think that would be
3 acceptable.

4 MR. BERG: That's another possibility, and
5 certainly we assume -- the look I'm getting tells me it
6 may not be a possibility.

7 MS. SCOTT: Judge Rodda, we had also
8 intended to respond to Commissioner Mundell's questions
9 in writing.

10 ALJ RODDA: Okay. Well, let's go off the
11 record for a minute.

12 (An off-the-record discussion ensued.)

13 ALJ RODDA: Let's go back on the record.

14 What we've decided to do is ask Mr. Ziegler
15 the questions and deal with it later, see how it goes.

16 MR. BERG: What I'm going to do, just so the
17 record is clear, is read each question to Mr. Ziegler
18 and let him answer it because I think if we do it some
19 other way, it won't be as clear. Maybe a little
20 quicker, but not as clear.

21 Q. (BY MR. BERG) I'm going to start with
22 question 2.1. "What tax benefits does Qwest intend to
23 take advantage of through the 'voluntary contribution'
24 of \$6 million? Please quantify the anticipated savings
25 from such for Qwest. Please explain how considering

1 Qwest's anticipated benefits, this is an appropriate
2 consequence/resolution in these matters."

3 A. Any, any potential contributions to
4 501(c)(3) organizations is totally at the discretion of
5 the Commission, so if the Commission says, "That's not
6 where we want to expend the \$6 million," there will be
7 zero dollars or zero tax benefits. What we attempted to
8 do was quite simply give the Commission maximum
9 flexibility, some range of option of things they could
10 do to meet the Commission's desires in providing
11 benefits to ratepayers as part of the settlement. So
12 certainly to the extent that the Commission decided that
13 something to a 501(c)(3) organization that is involved
14 in education or economic development, the tax laws would
15 permit that to be reflected. If the Commission decides
16 that's not where it would desire to spend the \$6 million
17 and desires it to go to a state-funded program or
18 infrastructure, there would be no tax benefits.

19 Q. Question 2.2, "On page 4, the first full
20 paragraph indicates the voluntary contribution amount
21 shall be subject to increase if the minimum settlement
22 amount is not reached. When is it anticipated that this
23 final determination with regard to satisfying the
24 minimum settlement amount will be made?"

25 A. There are two different time periods in the

1 Settlement Agreement for reporting purposes, and so a
2 determination on the minimum settlement amount could be
3 reached at either the first or second time period. The
4 first report is due 240 days after Commission approval
5 of the agreement.

6 If, for instance, all CLECs had signed
7 releases and we knew that and payments had been made,
8 then we would be able to report to the Commission that
9 there were no further outstanding issues or whatever,
10 and we could make the payments, I think, 90 days after
11 that time period.

12 If there are still some outstanding releases
13 or claims that have been filed, then we file a report,
14 that goes for one year, and then 60 days after that, at
15 the end of 14 months. So it would be 240 days, and the
16 second report would be at the end of 14 months from
17 approval of the agreement at which time we would know
18 whether the minimum settlement amounts had been met or
19 not. It could be either of those.

20 Q. Question 2.3., "In that same paragraph, the
21 language goes on to state that 'Qwest agrees that all
22 such investments shall be in addition to any
23 investments, construction or work already planned by
24 Qwest.' How is Staff planning on confirming such an
25 avowal? What time frame does 'already planned'

1 anticipate, i.e., is that at the time of Qwest signing
2 the settlement or the Commission's final action on the
3 settlement, etc.?"

4 I'm obviously not going to ask you how Staff
5 is planning on verifying this, but would you answer the
6 second part?

7 A. Yes. From Qwest's perspective, the already
8 planned would be at the time the Commission approves the
9 Settlement Agreement.

10 Q. Question 2.4., "Page 4, second full
11 paragraph, when did the parties anticipate that the
12 Commission would determine the percentage allocation,
13 simultaneous with approval of the settlement? If so,
14 what evidence did the parties intend to provide to aid
15 the Commission in making such allocations? If this
16 decision is to be made at a later date, when and through
17 what mechanism do the parties envision such a decision
18 request to be brought before the Commission? Wouldn't
19 it be more advantageous to have Qwest submit its
20 anticipated allocations for review by the Commission?
21 Wouldn't such a submission make this contribution more
22 voluntary and potentially effect a determination on
23 qualifications for tax benefits for Qwest's
24 contribution?"

25 A. It was the intention of the parties to

1 request the permission, to clarify up front, if
2 possible. The parties did not intend to provide
3 anything regarding making allocations. What we were
4 seeking was to make the process what we viewed as
5 efficient as possible in that if the Commission has no
6 interest in 501(c)(3)s or education, for instance, then
7 there's no point in the parties making proposals along
8 those lines. And so if the interest is in
9 infrastructure or economic development or whatever the
10 case may be, the parties can focus their efforts on
11 looking at those types of projects and not focus time on
12 things the Commission really has no interest in.

13 Q. Okay. Question 2.5., "Please describe what
14 the parties envision from the Commission when the
15 settlement states they will request that the Commission
16 provide guidance on the allocation of funds among the
17 categories prior to submission of the project lists by
18 the parties. What is the practical difference between
19 the sentence that indicates the Commission will
20 determine the percentage allocation and this one that
21 states that the Commission will provide guidance on the
22 allocation?"

23 A. There is no difference. It was meant to say
24 the same thing.

25 Q. 2.6., "Please describe the mechanism that

1 will provide the forum for the Commission to act as
2 described in the second paragraph on page 4 when the
3 settlement states the Commission shall have the
4 discretion to revise such allocations on a project by
5 project basis. As well, please describe how it will be
6 determined if Qwest has already spent the allocated
7 funds or has contractually committed the funds. What
8 evidence do the parties envision providing the
9 Commission to make such a determination? It appears
10 that the parties anticipate project suggestions will be
11 submitted by an entity other than Qwest. What entities
12 are included in the term 'any other signatory' used in
13 the final paragraph on page 4?"

14 A. I'll answer the last question first. Any
15 other signatory is just a term that was used whenever
16 the document was drafted and we were still in
17 discussions with other parties in the event that other
18 parties signed the agreement.

19 The intent of allocations on a project by
20 project basis is simply, again, a flexibility issue. If
21 something new comes to the Commission's attention, maybe
22 the Commission has indicated that they are interested in
23 a particular infrastructure, a route between two cities
24 or something, and then something else comes to their
25 attention that perhaps there's an area of the state that

1 citizens have said, you know, "We have an issue here."
2 They may want to reallocate those funds from the one
3 they were looking at to another or something like that.
4 So it's simply to provide flexibility to the extent the
5 construction and the projects are not already
6 contractually committed to with vendors and those sorts
7 of things, as long as Qwest is not contractually
8 obligated and hasn't started the work or paid out the
9 funds, and it gives the Commission flexibility.

10 Q. Question 2.7., "Page 5, lines 4 through 6
11 state, 'Qwest shall also be required to provide Staff
12 with such additional information on those projects as
13 well as other projects identified by Staff to allow
14 Staff to make its determination in an informed manner.
15 Please define the terms those projects and other
16 projects. Please describe the nature of the
17 determination that Staff will be making as referenced
18 here."

19 Mr. Ziegler, I don't think you can tell
20 people what determination Staff is going to make, but
21 would you please define the terms project and other
22 projects?

23 A. I would define proposed projects as those
24 projects proposed by both Staff and Qwest. Staff would
25 make proposals, Qwest would make proposals, and 30 days

1 after the approval of the agreement, Staff would make
2 proposals if they desired 60 days after the agreement.
3 So proposed projects refers to proposals proposed by
4 both Qwest and Staff, and any other projects to me
5 relates to any other projects that would come up at a
6 different time.

7 Q. Question 2.8., "Page 5, lines 6 through 7
8 state that Staff will establish the projects that are in
9 addition to any construction and work already planned by
10 Qwest. Please indicate whether the parties agree the
11 previously planned construction/work would mean
12 construction prior to Qwest's signing of the agreement
13 or prior to the Commission's decision in these matters.
14 Please define the terms construction and work in this
15 context. What information was Staff planning to require
16 Qwest to submit to make its initial determination of
17 what project were previously planned?"

18 Mr. Ziegler, don't answer the last question
19 because I don't think it's addressed to you, but would
20 you answer the other parts?

21 A. Yes, I would interpret the terms
22 construction and work as being synonymous with projects,
23 and it is intended that it would mean construction prior
24 to the Commission decision in the matter.

25 Q. Question 2.9., "Page 5, first full

1 paragraph, uses the term approved projects in the first
2 line. Please define this term."

3 A. Approved projects would be projects that are
4 agreed to by Qwest and Staff or as ordered by the
5 Commission.

6 Q. Question 2.10, "Please distinguish between
7 the statement on page 4 that conveys the Commission
8 shall have the discretion to revise such allocations on
9 a project by project basis and the statement on page 5
10 which indicates within each investment category,
11 approved projects shall be determined by mutual written
12 agreement of the Director of the Commission's Utilities
13 Division and Qwest's Arizona President."

14 A. To me, that says the Commission has the
15 final say over any and all projects. It's set up that
16 both the Utility Director and the President of Qwest
17 Arizona can work together to present projects to the
18 Commission, but to me, this says the Commission has the
19 final say in any of the projects.

20 Q. Okay.

21 Question 2.11, "On page 5, line 16, what
22 entity will determine if 'Any additional facilities
23 construction or development of new programs will be
24 required'? Please define each of the following terms:
25 Facilities, construction, development, and new

1 programs."

2 A. To me, the terms facilities, construction,
3 development, refer to infrastructure. New programs, you
4 know, if the Commission were to decide economic
5 development or education, you know, maybe there is a new
6 program being developed by the state or something that
7 it would take longer. But basically, it says if there
8 is no infrastructure or construction, it's just a
9 payment, then it would be made within that time period.

10 Q. Question 2.12, "On page 6, lines 4 through
11 5, please define the term not adequately served in
12 relation to the definition of unserved area. Also on
13 lines 7 through 8, please define Qwest wireline
14 facilities available. "

15 A. I, this is probably best answered by Staff,
16 but I'll give you my definition in that I think the
17 Commission has to determine what not adequately served
18 would be. If there is an area they are interested in,
19 they would have to make that decision.

20 Qwest wireline telephone services would be
21 within the Qwest service area, where there's currently
22 no service available.

23 Q. 2.13, "What cutoff date will be used to
24 determine what Qwest would have invested absent this
25 agreement as reflected in the second full paragraph on

1 page 6? Please describe the method and anticipated
2 tools Staff will use to determine the base amount as
3 described in lines 8 through 9, page 8. Please define
4 the term incremental investment."

5 Again, I will ask you to skip the second
6 question since it asks what Staff is going to do and
7 answer the rest of it.

8 A. Okay. As far as the cutoff date to
9 determine whether Qwest would have invested absent the
10 agreement, the agreement provides that we will provide
11 Staff with the information necessary and the Commission
12 to make that determination. So as projects are being
13 presented and reviewed, we'll be presenting information
14 to the Staff that they will be able to see what projects
15 we currently have that are planned and that sort of
16 thing. So I don't have a specific date that says
17 December 31st, 2003, or anything like that. It will be
18 at the time that this will ultimately be approved by the
19 Commission and we're reviewing projects and wherever we
20 are. Generally, we do work on our projects for the
21 coming year in the December-January time frame.

22 Q. 2.14, "Please explain why the word 'would'
23 is used instead of the word 'shall' on line 13, page 6."

24 A. Qwest thinks it would be fine if the word
25 shall was substituted for the word would. We don't have

1 a problem there.

2 Q. I thought you were going to say it was the
3 lawyers' fault.

4 We go now to Section 3, discount credits.
5 Question 3.1., "Please explain why a cap of \$8,910,000
6 is appropriate in determining with regard to the
7 discount credits. Were any eligible CLECs involved in
8 setting this cap? If not, please explain how due
9 process was met with regard to the CLECs."

10 A. The cap was established by Qwest estimating
11 the 10 percent credits based on its records. Qwest had
12 ~~a range that's in my testimony attached as an exhibit of~~
13 6 to \$8 million for the 10 percent credit. What Qwest
14 did was took the high end of that range, the 8 million,
15 to be conservative, then we added 10 percent to that to
16 make it ultra-conservative. We quite frankly do not
17 believe we will exceed even the minimum, and so the cap,
18 it provides some certainty as far as the value of the
19 settlement to Qwest and puts some parameters around it.
20 But that's how it was developed, and we don't think the
21 cap is going to be an issue.

22 Q. Question 3.2., "Was the survey conducted to
23 determine what the estimated aggregate amount discount
24 credits would be if every CLEC participated in the
25 discount credit payment? If so, please provide that

1 figure. As well, please describe the manner in which
2 eligible CLECs will be given notice of this information
3 prior to making their decision on opting into the
4 settlement discount credits program."

5 A. A survey was not conducted. I'm not sure
6 what the term meant by survey. Calculations as I
7 mentioned in the previous response were developed, and
8 they are attached to my rebuttal testimony. If any CLEC
9 asks Qwest, we will provide that information to them. I
10 believe we've told three CLECs since this proceeding has
11 started. As far as the information for different CLECs,
12 we view that to be confidential to that CLEC. So we
13 will provide it directly to the CLEC if they ask for it
14 or at the time we provide the notice.

15 Q. Question 3.3., "Page 7, lines 9 through 13
16 provide that if the aggregate discount credits
17 accumulate beyond the stated cap, the cap amount will be
18 shared by all eligible CLECs on a percentage basis.
19 Please explain why this is in the public interest. If
20 the eligible CLECs can demonstrate a right to a specific
21 amount under this discount provision, explain how due
22 process is served by binding their right to all others
23 in their field. Also explain when the cutoff date will
24 occur for determining if the cap has been exceeded by
25 the aggregate discount credits. Please describe what

1 entity will make the final determination of whether the
2 cap has been exceeded and what notice will be given to
3 the eligible CLECs of such. After such notice, will
4 eligible CLECs be given an opportunity to withdraw their
5 executed releases described in the last paragraph on
6 page 6 and lines 1 through 3 on page 7."

7 A. It's our intention and anticipation that the
8 CLECs would know exactly what their credits were before
9 they signed a release in response to the last question.

10 As I mentioned previously, we don't believe
11 that the CLEC credits will meet, will reach the caps.
12 We anticipate that we would be able to provide that
13 information to Staff at the end of the 180-day period
14 just exactly where we're at. But again, we don't think
15 we're going to exceed it, and they will know exactly
16 what they're going to receive before they sign their
17 release.

18 Q. Question 3.4., "Is there a deadline for an
19 eligible CLEC to enter participation in the discount
20 credits program? If yes, what notice will be given to
21 eligible CLECs and when is that deadline? If no, what
22 will happen if some CLECs are paid their fully requested
23 amount and then additional eligible CLECs enter causing
24 the aggregate discount credit amount to exceed the cap
25 amount?"

1 A. Based on what I have already shared, we
2 don't believe we will exceed the cap amount.
3 Technically, a CLEC would, based upon the reporting
4 periods built into the agreement, would have up to one
5 year to sign it. I mean, we anticipate they would
6 probably do it within the first 180 days, but
7 technically, before the last report would be due to the
8 Commission, they would have one year to execute the
9 release.

10 Q. Question 3.5., "Please explain why such a
11 vague and broad release as described in the last
12 paragraph on page 6 through lines 1 to 3, page 7, is an
13 appropriate requirement for each eligible CLEC to
14 participate in the discount credits program."

15 A. We've clarified the release somewhat I think
16 in my rebuttal testimony. Initially, there was a draft
17 proposal of a release. It was decided by Qwest and
18 Staff to describe it rather than actually attach the
19 release and leave it to Qwest and the CLECs to develop
20 the release. So the, I think it's probably somewhat of
21 a legal issue as far as the release and that sort of
22 thing, but that's sort of the history behind it.

23 Q. Section 4, access line of credits, 4.1.,
24 "Please describe how the parties arrived at the \$2 per
25 month rate provided in line 15 of page 7."

1 A. That was based on what Eschelon received for
2 the termination of Qwest's intraLATA toll. It was right
3 out of the letter agreement.

4 Q. Section 4.2., "Please explain why a cap of
5 \$660,000 is appropriate and determined with regard to
6 the access line credits. Were any eligible CLECs
7 involved in setting this cap? If not, please explain
8 how due process was met with regard to the CLECs."

9 A. And rather than repeating my responses, it
10 would be the same as my response to question 3.1.

11 ALJ RODDA: Wait --

12 THE WITNESS: They're similar --

13 ALJ RODDA: -- the process might have been
14 similar, but the number, I mean, I don't see how that's
15 responsive. How did you get -- I mean, the question is
16 why a cap of 660, so maybe you should just tell me the
17 response again.

18 THE WITNESS: Sure, that's fine.

19 Again, we developed our estimates of what we
20 thought the credits would be, went on the high end of
21 the estimate, and then added 10 percent to it, which was
22 the same process that we did for the 10 percent credits.

23 ALJ RODDA: Maybe I should have asked this
24 earlier. You developed that estimate based on what
25 number of --

1 THE WITNESS: Based upon Qwest's records, on
2 the number of UNE-P lines, and the 251(b) and (c)
3 services that CLECs purchased during the relevant time
4 periods.

5 ALJ RODDA: Okay. And I'm just going to ask
6 this, the next question, because I would come back to it
7 later. I understand, I think I understand what's
8 implicit in your response, but I don't think you ever
9 explicitly responded to were any eligible CLECs involved
10 in setting that cap.

11 THE WITNESS: No, we just developed our
12 calculations, took the high end, and added 10 percent.

13 ALJ RODDA: Thank you. Sorry.

14 Q. (BY MR. BERG) Question 4.3., "Was a survey
15 conducted to determine the estimated aggregate amount
16 the access line credits would be if every eligible CLEC
17 participated in the access line credit payment? If so,
18 please provide that figure. As well, please describe
19 the manner in which eligible CLECs will be given notice
20 of this information prior to making their decision on
21 opting into the settlement access lines credit program."

22 A. And again, the process was very similar to
23 the process that I described in Section 3.2. In that,
24 I'm not sure exactly what Commissioner Mundell means by
25 survey, but we did develop calculations as I described

1 in response to 4.2. The CLECs would be given notice of
2 the information as described in the Settlement Agreement
3 of the eligibility that they're eligible for these
4 credits.

5 Q. Question 4.4., "Page 8, lines 8 through 12
6 provides that if the aggregate access line credits
7 accumulate beyond the stated cap, the cap amount will be
8 shared by all eligible CLECs on a percentage basis.
9 Please explain why this is in the public interest. If
10 the eligible CLECs can demonstrate a right to a specific
11 amount under this access line credit provision, explain
12 how due process is served by binding their rights to all
13 others in their field. Also explain when the cutoff
14 date will occur for determining if the cap has been
15 exceeded by the aggregate access line credits. Please
16 describe what entity will make the final determination
17 of whether the cap has been exceeded and what notice
18 will be given to eligible CLECs of such. After such
19 notice, will eligible CLECs be given an opportunity to
20 withdraw their executed releases described in the last
21 paragraph on page 7 and lines 1 to 2, page 8?"

22 A. The process would be similar to our previous
23 one on question 3.3. in that CLECs will know what the
24 credit is before they execute the release. We would
25 anticipate knowing approximately at the end of 180 days.

1 Staff would be involved in that process and
2 notification, and again, we do not anticipate exceeding
3 the maximum on this credit.

4 Q. Question 4.5., "With regard to the deadline
5 for an eligible CLEC to enter participation of the
6 access line credits program as described on page 8,
7 subsection B, is that the cutoff date for an eligible
8 CLEC to opt in the access line credits program? If
9 yes, what notice will be give to eligible CLECs of when
10 the deadline expired? If no, what will happen if some
11 CLECs are paid their fully requested amount and then
12 additional eligible CLECs enter causing the aggregate
13 access line credit amount to exceed cap amount?"

14 A. Again, the process will be similar to the
15 process for all the credits as I described in the
16 response to 3.4. They would have up to one year to
17 execute the release. Qwest does not believe that it
18 will exceed the cap for this credit of \$660,000.

19 Q. Question 4.6., "Please explain why such a
20 vague and broad release as described in the last
21 paragraph on page 7 through lines 1 and 2, page 8, is an
22 appropriate requirement for each eligible CLEC to
23 participate in the access lines credit program."

24 A. It's the same release for the entire
25 agreement, so it would be the same as my response to

1 question 3.5.

2 Q. Question 4.7., "Turning to subsection D on
3 page 9, what entity will determine if a CLEC has
4 reasonably complied with the settlement access line
5 credits by providing Qwest any necessary information?
6 What entity will determine what information is
7 necessary?"

8 A. Staff will resolve any disputes regarding
9 the credits.

10 Q. Section 5, UNE-P credits, question 5.1.,
11 "Please describe how the parties arrived at the \$13 per
12 month rate provided in the last paragraph of page 9 and
13 the \$16 per month rate provided on line 1 of page 10."

14 A. Those amounts are the amounts that were in
15 the Eschelon agreement for the UNE-P credits, so they're
16 right out of that agreement.

17 Q. Question 5.2, "Please explain why such a
18 vague and broad release as described on lines 10 through
19 13, page 10, is an appropriate requirement for each
20 eligible CLEC to participate in the UNE-P credits
21 program."

22 A. Again, the release is the same release for
23 the entire agreement, so it would be the same as my
24 response to, I believe it's 4.6.

25 Q. Question 5.3., "Please explain why a cap of

1 \$550,000 is appropriate and determined with regard to
2 the UNE-P credits. Were any eligible CLECs involved in
3 setting this cap? If not, please explain how due
4 process was met with regard to the CLECs."

5 A. The cap was set with a similar process.
6 Qwest estimated what the credits would be and took the
7 high end of that, and then added 10 percent. No CLECs
8 were involved in setting this cap.

9 Q. Question 5.4., "Was a survey conducted to
10 determine the estimated aggregate amount the UNE-P
11 credits would be if every eligible CLEC participated in
12 the UNE-P credit payment? If so, please provide that
13 figure. As well, please describe the manner in which
14 eligible CLECs will be given notice of this information
15 prior to making their decision on opting into the
16 settlement UNE-P program."

17 A. Calculations, as I mentioned in the previous
18 response, were determined to estimate the credits. The
19 procedure in the Settlement Agreement allows, provides
20 that CLECs will be notified of what the credit is based
21 on the provisions set forth. So they would know what
22 that credit is before they would execute a release and
23 make any decision.

24 Q. Question 5.5., "Page 10, lines 19 through
25 23, provides that if the aggregate discount credits

1 accumulate beyond the stated cap, the cap amount will be
2 shared by all eligible CLECs on a percentage basis.
3 Please explain why this is in the public interest. If
4 the eligible CLECs can demonstrate a right to a specific
5 amount under this UNE-P credit provision, explain how
6 due process is served by binding their right to all
7 others in their field. Also explain when the cutoff
8 date will occur for determining if the cap has been
9 exceeded by the aggregate UNE-P credits. Please
10 describe what entity will make the final determination
11 of whether the cap has been exceeded by the aggregate
12 UNE-P credits. Please describe what entity will make
13 the final determination of whether the cap has been
14 exceeded and what notice will be given to the eligible
15 CLECs of such. After such notice, will eligible CLECs
16 be given an opportunity to withdraw their executed
17 releases described on lines 10 through 13, page 10?"

18 A. The eligible CLECs will be given the credit
19 amount prior to executing the release. Staff will be
20 making the final determination of whether the cap has
21 been exceeded. Notice will be given to the CLECs as I
22 mentioned of what their credit amount is prior to
23 executing a release.

24 As far as the aggregate amounts accumulated
25 beyond the estimated cap, again, Qwest believes we will

1 be below the minimum on this cap, and that we think we
2 will know within probably 180 days, but they would have
3 up to one year.

4 Q. Question 5.6., "With regard to the deadline
5 for an eligible CLEC to enter participation of the UNE-P
6 credits program as described on page 11, subsection B,
7 is that the cutoff date for a CLEC to opt in the UNE-P
8 credits program? If yes, what notice will be given to
9 eligible CLECs of when the deadline expires? If no,
10 what will happen if some CLECs are paid their fully
11 requested amount, then additional eligible CLECs enter
12 causing the aggregate UNE-P credit amount to exceed the
13 cap amount?"

14 A. The deadline to participate, again, would be
15 one year from the date of the Commission decision. As
16 far as notice of the CLEC that the deadline's expired,
17 we can certainly do that. As far as some of the CLECs
18 receiving the amount and additional CLECs coming in, we
19 don't anticipate that being an issue, again, because we
20 don't anticipate reaching the maximum caps.

21 Q. Question 5.7., "Turning to subsection C on
22 pages 11 through 12, what forum and potential remedy do
23 the parties anticipate a CLEC pursuing if they disagreed
24 with Qwest's finding that the DUF files it provided were
25 accurate?"

1 A. The Settlement Agreement provides throughout
2 the agreement that if there's any disputes that those
3 will be resolved by Staff.

4 Q. Question 5.8., "Turning to subsection D on
5 page 12, what entity will determine," my letter says is,
6 I think it should be if, "if CLEC has reasonably
7 complied with the settlement UNE-P credits by providing
8 Qwest any necessary information? What entity will
9 determine what information is necessary?"

10 A. If there's any disputes, Staff would resolve
11 the dispute of what's required.

12 Q. Section 6, additional voluntary
13 contributions, 6.1., "In Section 6, it states Qwest may
14 deduct amounts attributable to eligible CLECs that do
15 not execute a release of any and all claims against
16 Qwest from the amount of the discount credits, access
17 line credits, and/or UNE-P credits owed under this
18 agreement for a period of one year. Do the parties
19 agree that this applies only if the minimum settlement
20 amounts are not met as set out in Sections 3, 4, and 5?
21 If this is accurate, why is this an appropriate
22 exception to the requirement that the remainder of the
23 minimum settlement amounts be additional voluntary
24 contributions?"

25 A. The first question, the parties do agree

1 that this applies only if the minimum settlement amounts
2 are not met.

3 (An off-the-record discussion ensued.)

4 THE WITNESS: If this is accurate, why is it
5 an appropriate exception to the requirement that the
6 remainder of the minimum settlement amounts, the
7 additional voluntary contributions, it's Qwest's
8 position that we are making benefits or payments to
9 CLECs through the Settlement Agreement. If a CLEC
10 chooses to not execute the release and take advantage of
11 the Settlement Agreement, then we would in fact, if a
12 claim was filed, potentially be paying a CLEC twice. Or
13 not CLEC, but be paying the monies twice, once to the
14 State that was being held for the CLEC payments, and
15 then potentially for a CLEC if there was a claim and
16 they were successful. So that's the rationale for
17 withholding that, if the claim is upheld.

18 Q. (BY MR. BERG) Question 6.2., "Please define
19 the term claim and in what jurisdiction such would be
20 brought as it is used in line 6 on page 13."

21 A. Claim would be before any forum, the
22 Corporation Commission, court, arbitration, as set forth
23 in the Interconnection Agreement.

24 MR. BERG: That concludes our direct
25 examination of Mr. Ziegler.

EXHIBIT

B

RELEASE OF ALL CLAIMS

KNOW ALL PERSON BY THESE PRESENTS:

WHEREAS, on or about **DATE** The Arizona Corporation Commission ("Commission") approved a settlement agreement ("Agreement") between Qwest Corporation ("Qwest") and the Arizona Corporation Commission Staff ("Staff") with respect to dockets then pending before the Arizona Corporation Commission ("Commission"), specifically Docket No. RT-00000F-02-0271 (the "252(e) Unified Agreements; Docket No. T-00000A-97-0238 (the "271 Subdocket") and T-01051B-02-0871. These dockets shall be collectively referred to in this Agreement as the "Litigation."

WHEREAS, as part of the Agreement, certain competitive local exchange carriers certificated by the Commission to provide local exchange services in Arizona, who purchased interconnection services or unbundled network elements under Section 251(b) or (c) of the Act from Qwest may be entitled to receive Discount Credit, Access Line Credit or UNE-P Credit under the terms of this Agreement.

WHEREAS, **NAME OF CLEC**, on its own behalf and on behalf of its corporate parents, affiliates, subsidiaries, and agents, desires to receive the benefits contained therein, including execution of this Release of All Claims, as referenced in Paragraph(s) 3, 4 and 5 of the Agreement.

1. In consideration for the payment of Discount Credits, Access Line Credits and/or UNE-P Credits under the Agreement, the receipt and sufficiency of which are hereby acknowledged, **NAME OF CLEC**, on its own behalf and on behalf of its corporate parents, affiliates, subsidiaries, and agents, releases any and all claims, causes of action, rights, liabilities, complaints before or to a regulatory or governmental body, suits, requests for remedies or damages, and obligations of every nature, kind or description whatsoever regardless of what legal theory based, and regardless of whether grounded in common law, statute, administrative rule or regulation, tariff, contract, tort, equity or otherwise, including, but not limited to, claims or causes of action for fraud, misrepresentation, discrimination, violation of any law of the State of Arizona, violation of any tariff, breach of contract, the violation of federal statutes, rules or regulations, which **NAME OF CLEC** had, has, may hereafter have, or which any other person had, has, or may hereafter have through **NAME OF CLEC** based in whole or in part upon any agreement, act or omission of Qwest that is the subject of the Litigation including but not limited to Qwest's failure to file agreements with the Commission for review pursuant to Section 252 of the Telecommunications Act of 1996. This Release is limited to claims arising from the actions of Qwest that are the subject of the Litigation and that relate to (1) services purchased by **NAME OF CLEC** from Qwest in the State of Arizona pursuant to Sections 251(b) or (c) of the Telecommunications Act of 1996, and (b) and all other intrastate telecommunications services purchased by **NAME OF CLEC** from

Qwest, including but not limited to switched access and private line services, in the State of Arizona.

2. This Release of All Claims reflects a fully binding and complete settlement between Qwest and **NAME of CLEC**, on its own behalf and on behalf of its corporate parents, affiliates, subsidiaries, and agents, pertaining to the Litigation referenced above.

3. This Release of All Claims shall be construed, interpreted, and enforced in accordance with the laws of the State of Arizona.

4. This Release of All Claims represents Qwest's and **NAME OF CLEC's**, on its own behalf and on behalf of its corporate parents, affiliates, subsidiaries, and agents, mutual desire to compromise and settle all disputed claims at issue in the Litigation in a manner consistent with the public interest and based upon the pre-filed testimony and exhibits and the evidentiary record developed in the Litigation. This Release of All Claims represents a compromise of the positions of Qwest's and **NAME OF CLEC's**, on its own behalf and on behalf of its corporate parents, affiliates, subsidiaries, and agents. Acceptance of this Release of All Claims is without prejudice to any position taken by any party in the Litigation and none of the provisions of the Agreement or this Release of All Claims may be referred to, cited or relied upon by any other party in any fashion as precedent or otherwise in any proceeding before this Commission or any other regulatory agency or before any court of law for any purpose except in furtherance of the purposes and results of this Release of All Claims.

6. The provisions of this Release of All Claims may not be waived, altered, or amended, in whole or in part, without the written consent of Qwest and **NAME OF CLEC**.

7. The terms of this Release of All Claims are contractual and not mere recitals, and no representations have been made which are not contained herein.

8. This Release of All Claims constitutes the full and complete understanding of Qwest and **NAME OF CLEC** and supersedes any prior understandings or agreements, whether oral or in writing.

9. In the event that any term, covenant, or provision of this Release of All Claims shall be held by a court of competent jurisdiction or any regulatory or governmental body including the Commission to be invalid or against public policy, the remaining provisions of this Release of All Claims shall remain in full force and effect.

10. Qwest and **NAME OF CLEC** hereby represent to each other that they have reviewed and understand this Release of All Claims, and that neither Qwest nor **NAME OF CLEC** shall deny the validity of this Release of All Claims on the grounds that they did not understand the nature and consequences of this Release of All Claims or did not have the advice of counsel.

11. **NAME OF CLEC** represents that it has the authority to act on behalf of its corporate parents, affiliates, subsidiaries, and agents to release all claims stated herein and to execute this Release of All Claims.

12. **NAME OF CLEC** and its corporate parents, affiliates, subsidiaries, and agents represent that they have not transferred the right to enforce any claims stated herein to any other person or entity.

13. This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which shall constitute one and the same instrument.

DATED this ____ day of _____, ____.

NAME OF CLEC, on its OWN behalf and on behalf of its corporate parents, affiliates, subsidiaries and agents

BY: _____

AND

QWEST CORPORATION

BY: _____