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BEFORE THE ARIZONA CORPORATION COMMISSION

MARC SPITZER
Chairman
WILLIAM MUNDELL
Commissioner
JEFF HATCH-MILLER
Commissioner
MIKE GLEASON
Commissioner
KRISTIN K. MAYES
Commissioner

Arizona Corporation Commission

DOCKETED

OCT 29 2003

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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,

DOCKET NO. T-01051B-02-0871

Complainant,

QWEST CORPORATION'S REPLY BRIEF

v.

QWEST CORPORATION,

Respondent.

I. INTRODUCTION

If any single theme emerges from the post-hearing briefs addressing this Settlement Agreement, it is that no resolution of these three proceedings could make everyone completely happy. But AT&T's, RUCO's, and others' complaints about the Agreement presently before the Commission hardly undermine it. If anything, they prove that the Settlement Agreement represents a good and fair deal. A settlement that fully satisfies the interests of a single party – particularly in an industry with parties, business models, and interests as diverse and competitive as those in the telecommunications

1 market – disproportionately ignores another’s. Settlements flow from reasoned
2 compromises, which are motivated in the first instance by the decision that a compromise
3 is better (e.g., less risky, less divisive, better for the industry as a whole) than continuing
4 a fight in the hope of winning outright. To get to settlement, however, everyone involved
5 has to give a little – or, put another way, the “cost” of avoiding the expense and
6 uncertainty of litigation lies in recognizing that each person achieves less than total
7 victory.

8 These concepts seem entirely absent from the objections lodged by AT&T,
9 RUCO, and the other CLECs to this Agreement. Each, in a different way that reflects its
10 individual interests, complains that it wants something more. AT&T wants Qwest to pay
11 more in the way of fines and to make additional payments to the CLECs rather than
12 investing in the voluntary contribution projects designed to benefit Arizona ratepayers.
13 Arizona Dialtone wants specific recognition of its UNE-P conversion issues, as well as
14 specific recognition of its right to recover at all. RUCO wants a specific finding of
15 wrongdoing on the part of Qwest. Time Warner wants to expand the settlement beyond
16 its statutory underpinnings.

17 But each party that is complaining about the Settlement Agreement overlooks two
18 things. First, the critics overlook the fact that Qwest and the Commission’s Staff both
19 have moved toward the center from their respective litigation positions. Qwest has
20 agreed to compromise its litigation positions and to pay in excess of \$21 million in
21 credits and voluntary payments, as well as to make serious non-monetary concessions –
22 none of which it would be required to pay or do if it litigated these cases to conclusion
23 and won. During the Litigation itself, Staff took litigation positions similar to the some
24 of the arguments AT&T and RUCO currently assert (positions AT&T misleadingly
25 characterizes as “findings” that, it suggests, somehow bind the Staff now); but Staff now
26 has secured the benefits of the Settlement Agreement for the industry as a whole and for

1 Arizona ratepayers, while eliminating the litigation risk and delays caused by additional
2 proceedings and appeals. The Agreement thus represents a significant victory for all
3 parties.

4 Second, the critics overlook the fact that nobody, save the Staff and Qwest, is
5 bound by the terms of the Settlement Agreement after the Commission approves it. If
6 AT&T or another CLEC wants to fight for more, it is free not to avail itself of the
7 settlement benefits and to pursue its claims directly – and, therefore, to bear the increased
8 litigation risk in exchange for the greater potential reward. They cannot, however,
9 demand the now-risk-free benefits of the settlement and retain the right to press for more
10 or, more to the point, insist that Qwest give up everything while they give up nothing.

11 At the end of the day, the Settlement Agreement is a good and fair compromise
12 that brings real benefits to the industry, the Arizona ratepayers, and the process. Qwest
13 respectfully submits that the Commission should approve it as proposed.

14 **II. THE SETTLEMENT AGREEMENT BETWEEN STAFF AND QWEST**
15 **WAS REACHED IN A FAIR AND REASONABLE MANNER.**

16 In their briefs, MTI, AT&T, and Time Warner continue to argue that the
17 Settlement Agreement should be rejected because the CLECs were not given an adequate
18 opportunity to participate in early settlement discussions. MTI even goes so far as to
19 accuse Staff of entering into a “secret agreement” with Qwest. MTI at 6. Both Qwest
20 and Staff have explained in their opening briefs the process by which the Settlement
21 Agreement was reached and the opportunities the CLECs had to give their input.
22 Certainly, the CLECs would have preferred an agreement that gave them everything they
23 wanted (and nothing to anyone else). As is explained in Qwest’s Post-hearing Brief, the
24 Settlement Agreement (like this proceeding) is a no-lose opportunity for the CLECs.
25 They can oppose the Agreement, refuse to sign it, and nonetheless obtain the benefits of
26 the Agreement once approved. Further, their participation in the Settlement Agreement is

1 wholly optional. Ultimately, these CLECs' refusal to join in the Settlement Agreement
2 has little bearing on whether the Agreement is in the public interest. This is an
3 enforcement matter, and Staff has crafted an Agreement that contains sufficient penalties
4 and safeguards to prevent recurrence of the events giving rise to this Litigation.

5 Nevertheless, AT&T suggests that because AT&T and others did not unanimously
6 approve the Settlement Agreement, the Commission's discretion is severely limited.
7 AT&T at 9-11. AT&T argues that the Commission cannot apply the "public interest"
8 standard usually used to evaluate settlements, but instead "must, for each component of
9 the Settlement Agreement, make an independent finding, supported by substantial
10 evidence in the record as a whole, that the component is just and reasonable, and the
11 Commission must have the legal authority to impose terms based on the evidence." *Id.* at
12 11. This argument seeks to impose a limit on the authority of the Commission to resolve
13 matters before it that has no basis in the Arizona Constitution or applicable statutes.

14 In support of this proposition, AT&T relies primarily on an Illinois case in which
15 the state commissioners sought to avoid specific statutory requirements for rate cases by
16 impermissibly blurring the distinction between a rate finding and a settlement. *Id.*, citing
17 *Bus. & Prof'l People for the Public Interest v. Ill. Commerce Comm'n*, 555 N.E.2d 693
18 (Ill. 1989). By contrast, in the present proceedings it is the CLECs, not the Commission,
19 who are attempting to blur the distinction between a rate case and an enforcement case by
20 suggesting that the CLECs' consent is necessary in order for Commission Staff to
21 negotiate a settlement regarding alleged regulatory violations. There is nothing in
22 Arizona law that requires the Commission to reject a Settlement Agreement that is in the
23 public interest.

24 Contrary to the CLECs' suggestion, the Commission's enforcement authority does
25 not depend on the consent of intervenors. See A.R.S. § 40-241 to 248. By adopting the
26 Settlement Agreement the Commission would not be imposing any burden on any party

1 other than Qwest. No right of the CLECs is abrogated or affected by the Settlement
2 Agreement. Indeed, Staff took the extra step of negotiating a compromise credit
3 provision that would allow CLECs to receive substantial compensation for their alleged
4 injuries without further litigation, but this provision is not being imposed on the CLECs.
5 The CLECs are free to pursue other remedies if they so desire, and they have a
6 considerable head start in evaluating their claims because of the extensive evidence
7 developed through discovery in these dockets.

8 Even if the present case involved setting rates, Arizona law does not require
9 unanimous consent of the parties in order for the Commission to approve a settlement
10 that is reasonable and in the public interest. Indeed, RUCO made a similar argument,
11 citing the same cases AT&T cites now, in its brief opposing Qwest's 1999 Price Cap
12 settlement. *In the Matter of the Application of U.S., West Comm., Inc, a Colorado Corp.,*
13 *for a Hearing to Determine the Earnings of the Co., the Fair Value of the Co. for*
14 *Ratemaking Purposes, to Fix a Just and Reasonable Rate of Return Thereon and to*
15 *Approve Rate Schedules Designed to Develop Such a Return, Docket No. T-01051B-99-*
16 *0105, Ruco's Closing Brief at 3, Dec. 18, 2000. The Price Cap settlement was*
17 *nevertheless approved. A.C.C. Order 63487 at 21-22.*

18 AT&T presents no Arizona authority to support the notion that due process would
19 be violated if the Commission approves a settlement in which less than all the parties
20 have joined, when the settlement as a whole is in the public interest. AT&T simply
21 ignores the fact that the Commission regularly approves settlements in a variety of
22 contexts, including rate cases. *See, e.g., Docket No. U-1551-96-596, Decision No.*
23 *60352, August 29, 1997 (Southwest Gas); Docket No. E-1051-91-004, Decision No.*
24 *57462 (July 15, 1991) (U.S. West). The dockets comprising the present Litigation arise*
25 *from complaints and orders to show cause initiated by the Commission Staff against*
26 *Qwest. There is nothing remarkable or unlawful about resolution of these cases by an*

1 agreement between Staff and Qwest.

2 The CLECs also assert that they relied on these dockets to address their alleged
3 damages. *See, e.g.*, AT&T at 2. This argument is somewhat remarkable given that, as
4 Staff pointed out in its opening brief, none of the CLECs introduced evidence that could
5 have proven its damages “with a degree of exactitude” in the docket that dealt with the
6 allegedly discriminatory agreements. Staff at 17. Indeed, none of the CLECs who are
7 dissenting in this proceeding presented any testimony at all in the 252(e) hearing on the
8 unfiled agreements. If some of the CLECs have legitimate claims they want to litigate
9 further, they are entitled to do so. However, the Commission Staff is not required to
10 prosecute the individual claims of the CLECs for them, or to give primary consideration
11 to the CLECs’ issues in evaluating a possible settlement. In reaching the Settlement
12 Agreement with Qwest, Staff used its best judgment to obtain terms that ensure the
13 integrity of the regulatory process, foster competition, and protect Arizona ratepayers. In
14 addition, Staff obtained a credit provision that will benefit those CLECs who are not
15 interested in continuing these proceedings indefinitely. There is simply no reason why
16 the Commission should use Staff time and public resources to litigate the complex
17 jurisdictional and substantive legal questions associated with AT&T, MTI, and Time
18 Warner’s individual (and highly debatable) claims for additional damages.

19 Finally, Time Warner and AT&T suggest that the settlement process violated an
20 internal Commission policy regarding multi-party settlements. Time Warner at 5; AT&T
21 at 6. It is unclear that this policy would be applicable in cases such as these, which are
22 the result of complaints and orders to show cause initiated by Staff against a carrier.
23 Further, the promulgation of any such policy clearly does not meet the promulgation and
24 publication requirements for a Rule of general applicability as defined by A.R.S.
25 § 41001(17), and the policy would be an invalid Rule if generally applied to affect the
26 substantive rights of parties before the Commission. *Carondelet Health Services, Inc., v.*

1 *Arizona Health Care Cost Containment System Administration*, 182 Ariz. 221, 228, 895
2 P.2d 133, 140 (Ariz. Ct. App. 1994) (“a rule must be promulgated in accordance with the
3 provisions of the APA or it is invalid”). Indeed, AT&T apparently recognizes that the
4 policy discussed at the February 8, 2001 meeting is not a Rule of general application. *See*
5 AT&T at 6, 8.

6 Given that AT&T and Time Warner rely only on an internal policy of the
7 Commission and not a published Rule, the burden must be upon them to show that this
8 policy is applicable to the present case, and has not been changed or abandoned by the
9 Commission. Qwest defers to Staff as to the question of whether the policy is applicable
10 and whether the actions in this case comply with that policy. In any event, regardless of
11 whether Staff’s actions were consistent with the Commission’s internal policy, an internal
12 policy cannot be the basis for a decision on the merits of the Settlement Agreement in this
13 case. A.R.S. § 41-1005(A)(4) only permits agencies to adopt rules for internal
14 management on an informal basis if the rules do not “affect the procedural or substantive
15 rights or duties of any segment of the public.”

16 As Qwest pointed out in its Post-hearing Brief, the fact that AT&T, MTI, and
17 Time Warner did not get everything they wanted from the Settlement Agreement is not
18 sufficient to support an objection based on due process. Staff took CLEC concerns into
19 account when negotiating over the original statement of principles, Staff at 15, and the
20 CLECs have had numerous opportunities to be heard on the merits of the Agreement
21 itself. CLECs were notified of the Settlement Agreement before it was finalized, and
22 were given two formal opportunities to meet with Staff and Qwest to discuss the principal
23 points of the Agreement. They have now had a hearing in front of an ALJ, and they will
24 have an additional opportunity to argue in front of the Commissioners at an open
25 meeting. Qwest fully expects that AT&T, MTI, and Time Warner will continue to make
26 use of these opportunities by attempting to increase the private benefits available to them

1 under the Settlement Agreement. As discussed further in Part V, Qwest has no objection
2 to changes that would make the credit provisions simpler or fairer as between the CLECs,
3 but an expansion of the credit provision, providing additional credits to cover times or
4 services that are beyond the scope of this proceeding and beyond the Commission's
5 jurisdiction, would materially change the terms of the Agreement. Consideration of the
6 Settlement Agreement should not focus on providing the largest possible private benefits
7 to the CLECs, but rather should remain on the issues identified as most important by
8 Staff: ensuring the integrity of the regulatory process, protecting Arizona ratepayers, and
9 improving the functioning of competitive markets going forward.

10 **III. THE SETTLEMENT AGREEMENT MORE THAN ADEQUATELY**
11 **REPRIMANDS QWEST UNDER THE CIRCUMSTANCES.**

12 The Settlement Agreement's detractors, principally AT&T and RUCO, complain
13 in various ways that the \$11 million in payments to the state treasury and commitments to
14 infrastructure, economic and charitable development are not adequate. Once again, these
15 arguments miss the point, particularly when AT&T grounds this view, *see* AT&T at 12-
16 14, on the penalty demands advocated by the Staff in earlier phases of these cases. It is
17 true that when the Staff filed its testimony in the Section 252(e) case it sought penalties
18 of \$15,000,000 and \$47,000 under the governing Arizona statutes.

19 But as the Staff knew from the many briefs filed before and after the evidentiary
20 hearing, the pre-filed testimony and four days of live witness testimony, total victory for
21 the Staff, RUCO, Qwest or anyone else in the Section 252(e) case was far from clear – a
22 fact to which AT&T willfully blinded itself by conveniently selecting the materials
23 reviewed in preparing testimony. TR at 248:23 to 250:23 (Pelto). All of the parties that
24 participated in that case saw, heard and read evidence and legal arguments supporting the
25 others' positions. The uncertainty of prevailing naturally alters everyone's calculus
26 regarding the likelihood of winning, and the terms of the Settlement Agreement,

1 accordingly, reflect a reasoned compromise from everyone's litigation positions. It
2 therefore makes no sense to argue, as AT&T does, that a settlement should reflect the
3 maximum possible fine.

4 AT&T's views also fail to account for the very real legal impediments to the fine
5 the Staff and others advocated during the hearing phase. As the Staff's witness, Mr.
6 Johnson, acknowledged at the settlement hearing, Qwest's challenges to the
7 Commission's authority to order the level of penalties originally proposed factored into
8 the Staff's decision to negotiate a settlement with Qwest. See TR at 343:24-344:5
9 (Johnson) ("In terms of the issues here, based upon my discussions with Staff and Staff
10 counsel, there was significant disagreement relative to the Commission's jurisdiction and
11 the remedies that the Commission could order. These were of the type considerations
12 that would have been taken into consideration in determining whether or not negotiation
13 was appropriate."). Qwest respectfully disputes, with considerable legal and factual
14 force, that the Commission has the authority under A.R.S. § 40-424 to fine or impose
15 penalties for criminal contempt at all.¹ Moreover, the facts do not support the complaints
16 AT&T and others have lodged regarding the supposed financial and competitive harms to
17 CLECs from the inability to opt into the terms and conditions of the "unfiled
18 agreements." In addition to the fact that a great majority of the terms at issue had nothing
19 to do with "discounts" or credits – such as, for example, the terms relating to on-site
20 service teams, escalation provisions and dispute resolution clauses – the fact remains that
21 not one CLEC has requested any term from any "unfiled agreement" in the time since
22 those agreements were included in Qwest's remedial filing under Section 252 in
23 September of 2002, nor has any CLEC attempted to opt into any of those terms in any of
24 the other states in which Qwest has filed those agreements.

25 _____
26 ¹ Qwest recognizes, of course, that the Commission has the *civil* contempt power to enforce compliance
with its orders, as the Agreement itself acknowledges. Agreement at 2.

1 AT&T simply is wrong, therefore, when it argues that Qwest has been and
2 remains in contempt of this Commission. As Qwest explained in its *Initial Post-Hearing*
3 *Memorandum*, the Commission's authority to order contempt penalties pursuant to
4 A.R.S. § 40-424 extends only to civil contempt penalties (the coercion of compliance
5 with an existing rule or order) and not to criminal contempt penalties (the punishment of
6 past behavior). Qwest Post-Hearing Brief at 59-61. Even if there were relevant contempt
7 authority, there is no Commission rule or order that directed Qwest to file the 24
8 agreements at the time they were filed, and Qwest's obligation to file them was precisely
9 the issue being litigated in the Section 252(e) case. As a result, the fines initially
10 recommended by the Staff and now referenced by AT&T have no legal basis.

11 Moreover, AT&T is in error when it says that Qwest remains in contempt by
12 failing to file 24 agreements. AT&T neglects to mention that Qwest has filed every
13 agreement still in force, and the 24 agreements about which AT&T complains were
14 terminated long ago. Qwest also made the agreements available to the Commission and
15 the Staff – and to all parties to the case – at the Staff's request in the summer of 2002. As
16 such, it is wrong to say that Qwest is in contempt, and that potential fines continue to
17 accrue. And it hardly seems fair, logical or rational to penalize Qwest's "failure" to file
18 these terminated agreements during the pendency of the Section 252(e) docket when the
19 parties and the Commission are in the process of resolving the many complex issues
20 related to the filing obligations under Section 252, and when Qwest completed a remedial
21 filing in September 2002 of every agreement still in existence. Thus, AT&T's
22 "calculation" is inconsistent, unfair, and illogical.

23 Moreover, Qwest has provided argument in this docket showing that the
24 Commission does not have the authority to impose fines on a daily basis in any event.
25 A.R.S. § 40-424 authorizes the Commission only to impose fines "in an amount of not
26 less than one hundred nor more than five thousand dollars," not on a daily basis. And

1 despite AT&T's unavailing efforts to distinguish it, *Van Dyke v. Geary* in fact invalidated
2 the predecessor to A.R.S. § 40-425, which the legislature then revised explicitly to
3 disallow daily accumulation of penalties.² Unlike § 40-425, § 40-424 never allowed the
4 Commission to assess daily penalties for continuing violations,³ and the revisions of § 40-
5 425 to specifically exclude such penalties strongly suggest that the legislature did not
6 intend to grant such authority. AT&T's "distinction" – that *Van Dyke* found "only" that
7 the daily penalties provision failed because it deprived the regulated party of the right to
8 appeal – is a distinction without a difference. The Commission's authority to impose
9 daily penalties was held unconstitutional by an Arizona federal court nearly ninety years
10 ago, and neither AT&T nor any other party has cited any more recent authority to the
11 contrary.

12 AT&T picks two other nits, AT&T at 13-14, that merit a brief rebuttal. First, the
13 portion of the cash payment attributable to the Show Cause proceeding (\$150,000)
14 mirrors closely the amount recommended by the Staff in that case (\$189,000). It is
15 difficult to understand AT&T's complaint in that regard. Second, the \$7.4 million in
16 penalties the Staff sought in the Section 271 sub-docket flowing from the alleged harm to
17 the process from nonparticipation clauses entirely duplicate penalties the Staff sought in
18 the Section 252(e) case. It makes perfect sense to account for those alleged harms once
19 in the context of the overall Settlement Agreement, and it makes no sense to criticize the
20 Agreement for failing to exact duplicative payments from Qwest.

21 For its part, RUCO's complaints about the monetary value of the settlement
22 contradict themselves. On the one hand, RUCO concedes that Qwest's obligations under

23 ² See Rev. Code 1928, Ch. 15, § 728 ("Every violation is a separate offense, but violations continuing
24 from day to day are but one offense."), modifying Laws 1912, Ch. 90, § 76(b) ("in case of a continuing
25 violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense").

26 ³ As originally drafted in 1912, this penalty statute is virtually identical to its current form. See Laws
1912, Ch. 90, § 81. This provision was recodified in 1913 (Civ. Code 1913, § 9-2357) with no
substantive changes.

1 the Settlement reflect “a substantial amount of money,” RUCO at 5, even “historic”:

2 MR. POZEFSKY: Thank you, Your Honor. Thank you,
3 Commissioner Gleason.

4 The Settlement Agreement represents a good start toward resolving
5 these dockets. Not even RUCO can suggest that 20 million plus
6 settlement has no redeeming value. In fact, RUCO recognizes that
7 this will be an historic settlement in Arizona. No settlement before
8 this Commission has involved this large a sum of money.

9 TR at 29:19-30:1 (emphasis added). On the other hand, RUCO characterizes the same
10 “historic” payments as “insufficient” because they represent a small percentage of
11 Qwest’s overall gross revenues. Looking at gross revenue figures makes no sense
12 because they include revenues from both regulated and unregulated services and revenues
13 both within and without Arizona, and RUCO offers no basis or authority for using this
14 particular measuring stick. But then again, RUCO did not offer, in the course of
15 litigating this case, any measurement of harm grounded in fact. Instead, as the
16 Commission will recall, RUCO’s witnesses simply presumed catastrophic harm to the
17 telecommunications industry from the “unfiled agreements” without any consideration of
18 whether any CLECs could have opted into or satisfied the terms of the agreements at
19 issue. Instead, the Commission should consider the different streams of payment covered
20 by the Settlement Agreement in the context of the fairly and hotly contested proceeding
21 in which they arose, recognizing them as fair and reasonable compromises of the parties’
22 litigation positions.

23 **IV. THE VOLUNTARY CONTRIBUTIONS PROVISION WILL BENEFIT**
24 **ARIZONA RATEPAYERS.**

25 Some of the CLECs oppose the voluntary contribution provision of the Settlement
26 Agreement, contending that any additional payments should be made to them instead of
being used to benefit ratepayers directly. Additionally, they attempt to suggest that the

1 voluntary contributions will not be used in the public's interest, or will primarily benefit
2 Qwest. AT&T in particular once again assumes that the Commission is incapable of
3 selecting appropriate projects by weighing the benefits to ratepayers with any potential
4 public relations or tax benefits to Qwest, and that Staff is incapable of monitoring
5 Qwest's compliance. AT&T at 21-22. Qwest believes that the Commission is in the best
6 position to assess its own capabilities in this regard. AT&T also assumes that Qwest will
7 earn a return on any investments in infrastructure under the Agreement. *Id.* at 21. In
8 fact, the Settlement Agreement is silent on the subject of whether Qwest will earn a
9 return on any infrastructure projects, and to the extent Qwest's revenue is likely to be
10 determined by its rate base in the future, the allowable return is largely within the
11 Commission's discretion.

12 Qwest believes it has adequately addressed these arguments regarding the
13 voluntary contributions in its initial Post-hearing Brief, with the exception of one new
14 point raised in the post-hearing briefing. Seemingly as an afterthought, Time Warner
15 somewhat tentatively suggests that "if" the voluntary contributions are "in reality a
16 redirected penalty," then the Settlement Agreement is "likely unlawful." Time Warner at
17 9-10. Similarly, Time Warner notes that "a problem *may* exist" if the voluntary
18 contributions are actually "an appropriation of unrestricted general funds." *Id.* at 10-11
19 (emphasis added). For the latter proposition Time Warner relies on a 1948 case in which
20 an accountant tested Arizona's appropriation laws by working one day under a contract
21 with the Commission and then demanding payment for his work from the State Auditor.
22 *Millett v. Frohmiller*, 66 Ariz. 339, 341, 188 P.2d 457, 459 (1948). The Supreme Court
23 held that the Commission does not have constitutional authority to appropriate money
24 directly from the treasury. *Id.* at 348, 188 P.2d at 463-4. Neither Time Warner nor
25 *Millett v. Frohmiller* suggests any basis whatsoever for concluding that the voluntary
26 contributions in this case could be considered an "appropriation" from the treasury.

1 Although slightly more plausible on its face, a brief examination shows that Time
2 Warner's "redirected penalty" theory similarly lacks merit. From a legal perspective, the
3 voluntary contributions cannot reasonably be considered penalty payments when no
4 penalty has been assessed and no findings of fact or conclusions of law have been made
5 upon which a penalty assessment could be based.⁴ Moreover, both Qwest and Staff
6 recognized from the beginning that any cash payments in lieu of penalties would go to
7 the general fund. As Mr. Johnson testified, however, the Agreement included the
8 maximum cash payment on which the parties could reach agreement. Testimony of E.
9 Johnson at 9. It simply does not make sense from a practical perspective to suggest that
10 Staff somehow "redirected" a penalty payment from the general fund, when it was clear
11 that no larger payment in lieu of penalties would have been forthcoming.

12 The voluntary contribution projects are an integral part of the cooperative,
13 forward-looking approach that Qwest and Staff adopted in reaching the Settlement
14 Agreement. Instead of making any additional cash payment to the state, under Section 2
15 of the Agreement the parties will decide jointly on appropriate projects to be funded by
16 Qwest. The Commission will retain ultimate approval authority to ensure the parties'
17 expectations in establishing the voluntary contributions are met. Qwest's willingness to
18 fund these projects is no more a "redirected penalty" than Qwest's willingness to fund the
19 independent monitor provided for in Section 8, or the consultant provided for in Section
20 12 of the Agreement.

21 **V. CLEC CREDITS.**

22 The criticisms raised by CLECs – all directed at increasing the amount of credits
23 they would receive – do not present any reasoned basis for rejecting the Settlement
24

25 ⁴ In fact, Qwest continues to believe that, if these dockets were litigated to a final conclusion, the legal
26 defenses available to Qwest under the facts of these cases and the statutory limitations on the
Commission's fining authority would probably result in significantly lower penalties.

1 Agreement. Instead, the supposed faults CLECs identify are simply the product of their
2 failure to recognize the nature of the proceedings being settled and the importance of
3 interests other than their own.

4 **A. The Overall Structure of the Credits Is Reasonable and Fair.**

5 CLECs expressed several concerns regarding the general structure of the credits,
6 including the minimum and maximum values, the possibility of additional funds being
7 directed to Voluntary Contributions, and the absence of interest payments on the credit
8 amounts. First, MTI suggested – based only on Qwest’s responses to data requests from
9 three CLECs – that the amounts of the credits would not be “anywhere close” to the
10 minimum aggregate payments and are therefore insufficient. MTI at 7. MTI’s reasoning
11 is patently fallacious. Certainly, the aggregate value of the credits will be substantially
12 different from the sum of the credits for only three CLECs, and MTI’s attempt to
13 extrapolate the total value of the credits from the small sample it reviewed is absurd.
14 Qwest’s calculations of the minimum and maximum values of the credits, and the
15 numbers and the data underlying them, were not secret, as Arizona Dialtone suggested.
16 Arizona Dialtone at 2. Mr. Ziegler explained the calculations during the hearing (*See,*
17 *e.g.*, TR at 62:4 to 63:14; 65:23 to 68:4; 70:10 to 71:8), and if MTI, Arizona Dialtone, or
18 any other party desired additional information regarding the calculations or the data, it
19 could have propounded discovery requests to Qwest.⁵ Their failure to do so and the
20 speculations they resort to as a result are not a basis for rejecting the Agreement.

21 Second, AT&T again expressed its aversion to aspects of the Settlement
22 Agreement that would benefit ratepayers by complaining about the Agreement’s
23 requirement that any difference between minimum aggregate payments and the actual
24

25 ⁵ Time Warner’s 4th set of data requests to Qwest, served on October 21, 2003, requested Qwest’s
26 calculation of the credits payable under Section 3 of the Agreement to CLECs who had ceased doing
business in Arizona and those who were still engaged in business in Arizona. Qwest responded to the
data requests on October 27, 2003.

1 amounts be directed to additional voluntary contributions. AT&T at 26. As explained
2 above, the voluntary contributions provide a direct benefit to Arizona consumers and are
3 not a benefit to Qwest, as AT&T contends. Moreover, as Qwest explained during the
4 hearing and in its Opening Brief, Qwest's records demonstrate that the minimum and
5 maximum values of the credits are overestimates and that CLECs will be able to collect
6 the full value of any credits under the Agreement. See TR at 62:2-21, 63:15-64:17, 66:4-
7 67:12, 68:5-69:3, 70:25-71:8, 71:24-73:3 (Ziegler). Accordingly, the minimum values
8 provide certainty to the Commission regarding the extent of Qwest's concessions and
9 obligations under the settlement, while in no way disadvantaging CLECs.

10 Third, Arizona Dialtone objects to the upper limits placed on the credits. Arizona
11 Dialtone at 5. As explained in Qwest's opening brief, the caps are appropriate to provide
12 certainty to Qwest as well as to the State regarding the total value of the Settlement
13 Agreement. If Arizona Dialtone truly desired the opportunity to review the "data
14 confirming the total amount of claims," as it professed, (*id.*), it could have requested such
15 information through the discovery process.

16 Fourth, Arizona Dialtone now wants "post-judgment interest" as well as "pre-
17 judgment interest" to be assessed on the credit amount. Arizona Dialtone at 14. As an
18 initial matter, Arizona Dialtone raises its desire for post-judgment interest for the first
19 time in its post-hearing brief, after not mentioning this issue in its testimony or at any
20 point during the hearing. This illustrates the impossibility of fully satisfying every
21 participant in these proceedings – there will always be provisions, including some that no
22 one has yet thought of, that would make the Settlement Agreement a better deal for one
23 party or another. However, that does not mean that the Agreement is not a fair and
24 reasonable compromise in its present form. With regard to interest on the credits,
25 Arizona Dialtone's desire for pre- and post-"judgment" interest is misplaced. Most
26 fundamentally, Arizona Dialtone overlooks the basic fact that there is no "judgment"

1 here. Qwest is offering these credits to CLECs in the context of the settlement of
2 disputed claims – a settlement in which Qwest waives significant legal defenses and
3 through which CLECs may obtain credits that they would not be willing or able to opt
4 into if the requirements of Section 252(i) applied.⁶ Arizona Dialtone justifies its request
5 for post-judgment interest as being necessary to motivate Qwest to provide credits to
6 CLECs quickly, a concern also raised by Time Warner. However, some delay between
7 approval of the Agreement and issuance of the credits is necessary for CLECs to present
8 the documentation necessary for Qwest to calculate the amounts owed, and is the natural
9 and inevitable result of a well-ordered payment process. CLECs' concerns about any
10 delays being excessive are addressed by the explicit timelines for the issuance of the
11 credit in the Settlement Agreement.

12 Finally, Arizona Dialtone requested the addition of several terms to the Settlement
13 Agreement, including provisions stating that it is eligible for the credits, the amount of
14 the credits it is entitled to receive, and that the Commission has jurisdiction over disputes
15 regarding the Agreement. None of these provisions is necessary. The Settlement
16 Agreement explains the criteria for eligibility for the credits; application of those criteria
17 to any particular CLEC is an issue for the Commission (if the parties are in dispute) and
18 is not appropriate for inclusion in the Agreement itself. Furthermore, Arizona Dialtone
19 asked for and received documentation from Qwest regarding the amount of credits it
20 would receive under the terms of the proposed Agreement. There is no basis (and
21 Arizona Dialtone did not articulate one) for incorporating that documentation or
22 information into the settlement. Moreover, Arizona Dialtone's attempt to lock in the
23 amount it would receive under the 10% credit by including that figure in the Agreement

24
25 ⁶ Moreover, Arizona law makes pre-judgment interest available only under limited conditions, which
26 would not be satisfied by the facts of these cases, even if the cases were to proceed to final judgment. See
Qwest Post-Hearing Brief at 25.

1 *while at the same time* advocating revisions to the switched access credit, which would
2 change the amount of its 10% credit (because it would have purchased a lower amount of
3 Section 251(b) and (c) services), is game playing and should be rejected. A provision
4 regarding Commission jurisdiction over disputes regarding the Agreement is also
5 unnecessary. Qwest agrees that if the Settlement Agreement is approved through an
6 order by this Commission, the Commission will have jurisdiction over any disputes
7 arising from the Agreement.

8 **B. The Discount Credits Are Consistent with the Scope of the Section**
9 **252(e) Docket.**

10 CLECs raised several additional criticisms regarding the 10% discount credits.
11 AT&T claimed that the discount credit contained in the Settlement Agreement is itself
12 discriminatory because it is limited to only Section 251(b) and (c) services, reasoning that
13 “[s]ince not all CLECs purchase the same services or have the same product mix, by
14 eliminating certain services, the remedy will treat all CLECs differently.” AT&T at 23.
15 Time Warner similarly complained that the Discount Credit is anti-competitive due to its
16 exclusion of interstate and intrastate switched and special access. Time Warner at 7-8.
17 These criticisms are misguided. First, all CLECs are treated the same under the credits:
18 they are each entitled to receive a credit measured by 10% of their purchase of Section
19 251(b) and (c) services through their interconnection agreement with Qwest or through
20 Qwest’s SGAT from January 1, 2001 through June 30, 2002. The fact that the amount of
21 the credit will vary from CLEC to CLEC is a function of the CLECs’ different business
22 models and not an indication that the credit discriminates among carriers.

23 Second, focusing the scope of the discount credits on Section 251(b) and (c)
24 services appropriately mirrors the scope of the litigation, which addressed issues of
25 Qwest’s compliance with Section 252 of the Act and its non-discrimination obligations
26 under Section 251. The discount credits were crafted to address the alleged harm to

1 CLECs from a Section 251 and 252 perspective. As a result, CLECs will receive
2 differing amounts because the remedy parallels the alleged harm suffered by each
3 specific CLEC. If a CLEC did not typically purchase Section 251(b) or (c) services from
4 Qwest, then it was not injured by the conduct at issue in the litigation and is not entitled
5 to credits under the settlement.

6 Third, regardless how "critical" Time Warner believes the inclusion of interstate
7 services in the credit is, the Commission does not have jurisdiction to order Qwest to
8 provide discounts on interstate services – as AT&T conceded.⁷ AT&T at 24. Finally, as
9 Qwest explained in its opening post-hearing brief, the Commission cannot order a refund
10 based on non-Section 251(b) and (c) services without violating the filed rate doctrine,
11 which prevents the Commission from retroactively changing a tariffed service, such as
12 switched access rates.⁸ If a carrier gives one customer an unlawful preferential rate or
13 term of service (that departs from the tariffed rates and terms approved by the regulator
14 as consistent with the public interest), the regulator may not compound the harm and the
15 risks to the public interest by extending the unlawful and unapproved terms to other
16 customers.⁹ Rather, the proper remedy under the filed rate doctrine is to require the

17
18 ⁷ AT&T, after conceding the Commission's lack of jurisdiction to include interstate claims in the
19 discount credits, then suggested that, because of this jurisdictional restriction, the Commission should
20 order a "retrospective and prospective discount" to somehow compensate for not ordering a discount on
21 interstate access. AT&T at 24. Certainly though, if the Commission lacks jurisdiction (and it does) to
22 directly regulate interstate access, it also lacks jurisdiction to regulate interstate access through a proxy
23 mechanism such as that suggested by AT&T. Moreover, entering such a legal thicket is unnecessary
24 because CLECs are not being asked to give up their claims to interstate access credits; such claims will be
25 excepted from the release.

26 ⁸ See *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) ("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))).

⁹ See *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 (1981) ("It would undermine the

1 carriers receiving the different rates to refund the amounts of the alleged discounts.¹⁰
2 Thus, a Commission order granting all CLECs automatic refunds on intrastate access, for
3 instance, would not be an available remedy under the filed rate doctrine.

4 AT&T also argued that limiting the discount credits to Section 251(b) and (c)
5 services fails to remedy alleged discrimination in violation of A.R.S. § 40-334. AT&T at
6 24. This argument overlooks the fact that A.R.S. § 40-334 does not provide for the
7 automatic refunds AT&T seeks. Arizona courts have interpreted the non-discrimination
8 obligation of § 40-334 as being akin to the federal requirement that similarly situated
9 customers receive similar treatment: "The non-discrimination doctrine [embodied by
10 A.R.S. § 40-334] has been defined as an obligation of a public service corporation to
11 provide impartial service and rates to all its customers similarly situated." *Miller v. Salt*
12 *River Val. Water Users' Ass'n*, 463 P.2d 840, 843 (Ariz. App. 1970) (emphasis added).
13 Accordingly, unless CLECs could prove that they were situated similarly to Eschelon and
14 McLeod (for which there was no evidence in the Section 252(e) hearing), they could not
15 have suffered discrimination under A.R.S. § 40-334 to justify the inclusion of intrastate
16 access in the Discount Credits.

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

23 Congressional scheme . . . to allow a state court to order as damages a rate never filed with the
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.*,
260 U.S. 156 (1922); *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998).

25 ¹⁰ See *County of Stanislaus v. Pac. Gas & Elec. Co.*, 114 F.3d 858, 863 (9th Cir. 1997) (disapproving
26 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 doctrine and federal law. As a result, AT&T's objections based on A.R.S. § 40-334 have
2 no real bearing on the Commission's consideration of the Agreement.

3 AT&T and Arizona Dialtone contend that the Discount Credit should be
4 prospective and apply for either 23 months (AT&T) or 5 years (Arizona Dialtone).
5 AT&T at 25; Arizona Dialtone at 12-13. However, any prospective discount would
6 either fail to remedy the alleged harm caused by the failure to file the agreements at issue
7 in the Section 252(e) docket or would itself violate Section 251. If McLeod and Eschelon
8 are included in a prospective discount, the discount would not address any alleged harm
9 or serve to level the playing field for other CLECs (by giving them the "benefits"
10 received by Eschelon and McLeod). Yet, if Eschelon and McLeod are excluded from any
11 prospective discount, the discount is discriminatory and violative of federal law. The
12 McLeod and Eschelon agreements have been terminated, and any prospective discount
13 would essentially require Qwest to provide a rate reduction to CLECs that would not be
14 available to McLeod and Eschelon. Moreover, the durations for the prospective
15 discounts proposed by AT&T and Arizona Dialtone have no factual support in the
16 Section 252(e) docket (and AT&T and Arizona Dialtone cite none). The documentation
17 addressing the alleged discount agreements with Eschelon and McLeod was in effect for
18 approximately 15 ½ months and 18 months, respectively, and there is no basis on which
19 to extend the Discount Credits for a longer duration.

20 AT&T next complains that Eschelon and McLeod "had the opportunity to make
21 prospective business decisions with the knowledge that they had a discount of 10% on all
22 future purposes for the length of the contracts" and that the Discount Credits do not
23 confer upon CLECs a similar opportunity. AT&T at 24. To the contrary, CLECs will be
24 receiving credits prospectively under the settlement, even though the credits are
25 calculated retrospectively. This provides CLECs the same opportunity to make
26 prospective business decisions based on the amount of the discount credit as Eschelon

1 and McLeod had under the agreements at issue in the Section 252(e) litigation, while
2 avoiding the potential legal problems of a prospective discount, as discussed above.

3 **C. The Access Line and UNE-P Credits Remedy Any Actual Harm**
4 **Suffered by Arizona CLECs.**

5 Arizona Dialtone suggested that the average monthly payments made to Eschelon
6 be used as a proxy for the amount owing to each CLEC under the Section 4 and 5 credits
7 in the proposed settlement. As Mr. Ziegler explained during the hearing, Qwest used
8 these "proxy" numbers when estimating the aggregate credit amounts that would be owed
9 to CLECs under the Settlement Agreement for the purpose of establishing the minimum
10 and maximum payment amounts. TR at 120:16-122:12. Qwest is amenable to amending
11 the Agreement consistent with Arizona Dialtone's suggestion and crediting CLECs based
12 on the proxy amounts. Qwest clarifies, however, that this change would apply to all
13 CLECs requesting credits under Sections 4 and 5, and Qwest would not agree to offering
14 CLECs a choice between the proxy amounts or the current calculation. Furthermore, to
15 be eligible for the Section 5 Credit, even using the proxy numbers, CLECs must have
16 leased UNE-P lines from Qwest for each relevant month and have actually billed
17 interexchange carriers for switched access during the relevant time period.

18 As with the Discount Credits, AT&T argued that the access line and UNE-P
19 credits should be prospective and for 23 months instead of 16 months, because these
20 changes "would provide greater remedial benefits." AT&T at 25. AT&T failed to
21 explain what supposed harm these changes would remedy, or on what basis AT&T
22 selected the 23-month period. The credits in the proposed settlement are offered for the
23 same periods the agreements with Eschelon were in effect. Providing credits to CLECs
24 under the settlement for any longer period of time would discriminate against Eschelon in
25 violation of Section 251 and would serve no remedial purpose.

26 Finally, in its initial post-hearing brief, Arizona Dialtone again advocated a

1 method for bootstrapping its eligibility for the Section 5 credit. In a September 2000
2 settlement agreement with Global Crossing, Qwest agreed that “rates and charges for
3 UNE-P . . . as requested for resale lines by Global Crossing . . . shall be applicable for the
4 affected lines retroactive to April 15, 2000.” See TR at 149:18 to 160:1 (Ziegler)
5 (introducing confidential exhibit AZD-2). Arizona Dialtone suggested that it could opt-in
6 to this provision (through Section 10 of the Agreement), “roll[] back the conversion of
7 UNE-P,” and thereby be deemed to have leased UNE-P lines during the relevant time
8 period. Arizona Dialtone at 12. This attempt to backdoor eligibility for the UNE-P
9 Credits must fail.

10 First, Arizona Dialtone was reselling PAL lines and, as such, was not entitled to
11 convert to UNE-P PAL until the FCC ordered that UNE be used for payphone lines.
12 Second, Section 10 of the Agreement would allow eligible CLECs to opt into only non-
13 monetary provisions related to Section 251(b) and (c) services. If opting into a provision
14 would result in any exchange of money – as would opt-in to the provision cited by
15 Arizona Dialtone – such provision would not qualify as “non-monetary” and would not
16 be available under Section 10 of the Agreement.

17 Third, even if the provision regarding Global Crossing’s UNE-P conversion date
18 and retroactive UNE-P wholesale pricing were non-monetary, Arizona Dialtone and other
19 CLECs would be eligible to opt-in to that provision only if they satisfied the criteria
20 under Section 252(i) – i.e., only if they were similarly situated and willing to accept all
21 related terms and conditions. See Agreement at § 10. As the Global Crossing agreement
22 makes clear, prior to the settlement agreement, Global Crossing had submitted to Qwest
23 requests for conversion of its lines to UNE-P and was in dispute with Qwest regarding
24 the proper charges for the lines. It does not appear that Arizona Dialtone was in a similar
25 situation at that time.

26 Finally, even if Arizona Dialtone were able to opt into the UNE-P conversion date

1 in the Global Crossing agreement, it would not be eligible for the UNE-P Credits if it
2 were not actually billing interexchange carriers for switched access during the relevant
3 time period.

4 **D. The Release Is Not Overbroad.**

5 In light of the confusion expressed during the hearing regarding the scope of the
6 release CLECs would be required to execute in exchange for the credits, Qwest submitted
7 a new version of the release with its initial post-hearing brief. The revised release
8 clarifies that CLECs are releasing only claims arising from the actions of Qwest that are
9 the subject of the Litigation and that relate to the purchase of Section 251(b) or (c)
10 services and all other intrastate telecommunications services, including but not limited to
11 switched access and private line services, in Arizona. Accordingly, as Mr. Ziegler
12 testified, "The Settlement does not require the CLECs to release any claims unrelated to
13 the issues in the 252(e) Unfiled Agreements Docket and the 271 Subdocket. The release
14 also does not require the CLECs to release any claims they may have relating to the
15 purchase of interstate services." Rebuttal Testimony of D. Ziegler at 28:13-16; *see also*
16 TR at 145:16-146:2 (Ziegler).

17 Arizona Dialtone suggested that CLECs should be able to select only part of the
18 credits and execute a more limited release based only on the credits it opts to receive.
19 This is not a reasonable request. CLECs may choose to participate fully in the settlement
20 or to not participate in the settlement at all and pursue any claims against Qwest
21 independently. They may not, however, pick and choose among the terms of the
22 Settlement Agreement. The release is a reasonable quid pro quo in exchange for the
23 credits CLECs are entitled to under the Agreement.

24 As Qwest explained in its initial brief, the credits the CLECs receive are not
25 subject to the related terms and conditions requirements established by Section 252(i) of
26 the 1996 Act. To this extent, the CLECs receiving the credits are getting a better deal on

1 Section 251 (b) and (c) services than McLeod and Eschelon allegedly did. In exchange,
2 they release all intrastate claims. This is a fair and balanced settlement. Of course, under
3 the Agreement, no CLEC is forced to accept credits and execute a release. Any CLEC
4 that feels that its claims (including claims related to non-251 intrastate services) are
5 worth more than it can get under the Settlement Agreement is free to pursue those claims.

6 **VI. SIXTY DAYS IS A REASONABLE IMPLEMENTATION PERIOD FOR**
7 **NEW WHOLESALE RATES.**

8 As Qwest explained in its Post-hearing Brief, the 60-day period for implementing
9 new rates was a reasonable compromise between the 30 days initially proposed by Staff
10 and the 90 days initially proposed by Qwest. AT&T continues to complain about this
11 provision, but presents no reason why 60 days was an unreasonable compromise, and no
12 reason why a 60-day implementation period would cause harm to AT&T or other CLECs.
13 See AT&T at 27-28. Accordingly, there is no reason why this provision of the Settlement
14 Agreement should not be approved.

15 **VII. FACTUAL FINDINGS ATTRIBUTING FAULT TO QWEST ARE**
16 **UNNECESSARY AND INAPPROPRIATE IN THE CONTEXT OF A**
17 **COMPROMISE SETTLEMENT.**

18 In the post-hearing briefing, only RUCO has continued to argue that the
19 Settlement Agreement should be rejected because it does not include a finding of
20 wrongdoing.¹¹ RUCO at 9-12. RUCO once again expresses a “strong concern” about the
21 Commission’s contempt power in the absence of such findings. *Id.* at 11. However,
22 RUCO still fails to explain how a finding of wrongdoing would enhance the
23 Commission’s civil contempt power, and still fails to cite any legal authority that would
24 provide clarification. RUCO does suggest that a finding of illegal conduct would allow

25 ¹¹ AT&T had previously argued that a finding of wrongdoing was appropriate, Testimony of T. Pelto at
26 29-29, but in its Post-Hearing Brief AT&T focuses primarily on demanding higher penalties, larger
CLEC credits, and elimination of the voluntary contributions provision.

1 the Commission to order Qwest to “cease such conduct,” apparently concluding that this
2 would proscribe a broader “category of misconduct” than the Settlement Agreement. *Id.*
3 As it has throughout these proceedings, RUCO fundamentally misconceives the nature of
4 the contempt power.

5 By definition, the Commission cannot use its civil contempt powers to proscribe a
6 “broad category of misconduct.” In order to be enforceable by contempt an order must
7 be directed at specific and definite conduct, like the language in the Settlement
8 Agreement. *See* Qwest’s Post-Hearing Brief at 50-51, and cases cited therein; *see also*
9 *LeMay v. Leander*, 994 P.2d 546, 557 (Haw. 2000) (“to hold a party in civil contempt
10 there must be a court decree that sets forth in specific detail an unequivocal command
11 that the contemnor violated”); *Go-Video, Inc., v. Motion Picture Ass’n of America*, 10
12 F.3d 693, 695 (9th Cir. 1993) (holding civil contempt is “disobedience to a specific and
13 definite court order”). This does not mean the Commission lacks the authority to enforce
14 the broad categories of conduct covered by the laws and regulations within its purview.
15 It merely means that the civil contempt power is significantly narrower than the
16 Commission’s general enforcement power, and the findings RUCO seeks would do
17 nothing to change that.

18 Qwest is reluctant to belabor the matter any further, since the Commission’s
19 practice in issuing orders shows that the Commission understands the scope of its civil
20 contempt power very well. For example, RUCO states in a footnote that it seeks a
21 finding “similar to what the Commission does all the time in securities matters.” RUCO
22 at 11, n.10. RUCO fails to note that the securities matter it cites does not proscribe a
23 “broad category of misconduct,” but instead orders Lehman Brothers to “desist” from
24 violating A.R.S. § 44-1961(A)(13) in connection with the specific “research practices
25 referenced in this Order” *In the Matter of Lehman Bros. Inc.*, Docket No. S-
26 03535A-03-0000, Decision No. 66320, Aug. 20, 2003. As the Commission is no doubt

1 well aware, this is a narrow prohibition that appears to be specifically designed to provide
2 a proper basis for a future finding of contempt if necessary.

3 The scope of the order to desist in the *Lehman Bros.* matter is certainly no broader
4 than the scope of the Commission's power to address violations of the Settlement
5 Agreement through civil contempt, as is reflected in the recitals to the Agreement. The
6 Settlement Agreement states that the Agreement constitutes a Commission Decision, and
7 specifically acknowledges that the Commission's contempt power may be implicated if
8 Qwest breaches the Agreement. Agreement at 2. Qwest has agreed to take steps to
9 ensure compliance with the filing requirements of Section 252(e) of the Act (Agreement
10 at 2 & §§ 8 & 9), to timely implement cost dockets (Agreement § 15), and to file with the
11 Commission any settlement agreements reached in Commission dockets of general
12 application (Agreement § 16). These are the same "categories" of conduct that would be
13 covered by Commission findings if these dockets were litigated to a conclusion. More
14 importantly, however, the Agreement contains forward-looking and specific steps that
15 Qwest and Staff will take to ensure compliance. A finding of wrongdoing could not
16 produce the constructive engagement outlined in the Agreement's provisions for
17 additional notification, an independent monitor, an implementation consultant,
18 compliance training, and escalation through Qwest's cost docket governance team.

19 Finally, RUCO argues that the lack of specific findings would preclude a
20 Commission proceeding to investigate Eschelon's and McLeod's failure to notify the
21 Commission of the discount agreements at issue in the 252(e) docket. RUCO at 12-13.
22 This is simply wrong. Once again, RUCO cites no authority for the proposition that a
23 settlement in a civil enforcement proceeding would ordinarily exonerate others who are
24 not party to the settlement. Qwest believes no such authority exists, and certainly the
25 Settlement Agreement itself does not suggest such a result. Whether or not the
26 Commission intends to pursue any further action against Eschelon and McLeod is

1 irrelevant to the question of whether the Settlement Agreement is in the public interest.

2 **VIII. CONCLUSION.**

3 For the foregoing reasons, the Commission should find that the Settlement
4 Agreement between Staff and Qwest is reasonable and in the public interest, and should
5 approve the Settlement Agreement in its entirety.

6 DATED this 29th day of October, 2003.

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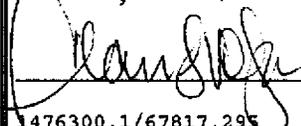
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