



0000109798

ORIGINAL

RECEIVED

BEFORE THE ARIZONA CORPORATION COMMISSION

2003 OCT 29 P 2:08

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

Arizona Corporation Commission

DOCKETED

OCT 29 2003

AZ CORP. COM. COMMISSION
 RECORDS CONTROL

DOCKETED BY	<i>CM</i>
-------------	-----------

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

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

DOCKET NO. RT-00000F-02-0271

ARIZONA CORPORATION
 COMMISSION
 Complainant.

DOCKET NO. T-01051B-02-0871

v.

QWEST CORPORATION
 Respondent.

**RESPONSE BRIEF OF
 TIME WARNER TELECOM OF ARIZONA LLC**

October 29, 2003

I. INTRODUCTION.

A healthy, competitive, local telephone service market will not thrive in Arizona until Qwest appreciates the necessity of working cooperatively and negotiating compliance issues with Competitive Local Exchange Carriers ("CLECs"). Qwest cannot be permitted to continue manipulating Commission dockets to its own ends by excluding CLEC input. Unfortunately, the Settlement Agreement proposed by Staff is the product of just this sort of anti-competitive thinking. At no point did Qwest or Staff allow the structure of the Settlement Agreement to be shaped by CLEC input. The collaborative Section 271 workshop process stands in stark contrast to what has transpired here. That process exemplified what Qwest, Staff and CLEC parties are capable of doing if communications are open, all parties are invited to participate, and substantive issues are discussed by knowledgeable party representatives. In recent years, Time Warner Telecom has prided itself on building effective, cooperative relationships with both Staff and Qwest. Staff's failure to involve CLECs in this case is an anomaly and, for that reason, of special concern to Time Warner Telecom.

Because the CLEC-credit portion of the proposed Settlement Agreement was engineered without CLEC input and discriminates against CLECs, Time Warner Telecom opposes the Settlement Agreement.

II. STAFF'S CLAIM THAT ALL CLECS BENEFIT UNDER THE PROPOSED SETTLEMENT IS UNFOUNDED.

Staff contends in its Post Hearing Brief that CLECs will benefit from the proposed Settlement Agreement. This is quite implausible, given that *every* CLEC offering comment has lodged very strong objections to the Agreement. Staff's assertion is also remarkable because testimony at the hearing demonstrated that Staff did not obtain from Qwest any information that would reveal whether the Settlement Agreement was fair to CLECs on an individual basis:

Q. Did Staff do any analysis to determine what individual CLECs would be entitled to regarding discount credits?

A. Not to my knowledge.

Q. Did Staff do any analysis to determine whether the CLECs that would be entitled to receive discounts under the agreement were still in business in Arizona.

A. I don't know.

Tr. 358 (testimony of Mr. Johnson).

Q. Okay. Did Staff do any study or analysis to determine what individual CLECs would be entitled to as far as discount credits.

A. No, we did not.

Tr. 438 (testimony of Mr. Rowell).

Given this lack of analysis by Staff, it is possible that the bulk of the discount payments could go to a single CLEC, although the original harm – the 10% discount given the favored CLECs – impacted all CLECs equally. The disparity here is caused directly by the inconsistent remedy structured by Qwest. The harm affected all CLECs who purchased services from Qwest, but the remedy benefits only those CLECs who purchased 251(b) and (c) services from Qwest. Such a discriminatory remedy will create more market distortion and deliver an economic blow to those CLECs who receive no significant compensation. Indeed, the Settlement Agreement is

likely to produce more, not less, litigation -- litigation regarding both the Settlement Agreement and claims Staff and Qwest are recommending CLECs file as an alternative to opting into the Settlement Agreement. Tr. 143-44; Staff Post Hearing Brief, p. 18.

III. FAIRLY RECOMPENSING CLECS FOR HARM CAUSED BY QWEST HAS BEEN – AND SHOULD BE – CENTRAL TO THE COMMISSION.

Staff's contention that the dockets subject to settlement are primarily about the appropriate penalties to be assessed against Qwest, and not about recompensing CLECs, misinterprets the Commission's role. The language quoted by Staff from the November 7, 2002, procedural order was written by the Hearing Officer before the Section 252(e) hearing occurred and before the extent of the discriminatory conduct was known. The fact that the Section 252(e) docket began as an inquiry into which agreements were not filed by Qwest does not preclude the Commission from recognizing, during the course of the investigation prompted by the docket, that Qwest had engaged in discriminatory conduct. Indeed, the paragraph quoted by Staff in the November 7, 2002, procedural order gives the Commission Staff broad latitude to impose any appropriate remedy and concludes: "In addition, the Commission should determine if Qwest's conduct violated any other law, Commission Order or rule." Nov. 7, 2002 Order at 5.

During the investigation, and as a result of the Section 252(e) hearing process, Staff learned that Qwest had violated laws prohibiting discriminatory conduct. Under both state and federal law, an incumbent local exchange carrier may not discriminate between CLECs with respect to any charges, terms, or conditions of service. Specifically, the Arizona Constitution provides that "[a]ll charges made for service rendered, or to be rendered, by public service corporations within this State shall be just and reasonable, and no discrimination in charges, service, or facilities shall be made between persons or places for rendering a like and contemporaneous service" ARIZ. CONST. ART. XV, § 12. Likewise, "no public service

corporation shall . . . extend to any person any form of contract, agreement, or any rule or regulation, or any facility or privilege, except as are regularly and uniformly extended to all persons and except on order of the commission.” A.R.S. § 40-374. Finally, “[c]harges demanded or received by a public service corporation for any commodity or service shall be just and reasonable. Every unjust or unreasonable charge demanded . . . is prohibited and unlawful.” A.R.S. § 40-361(A).

Federal law also prohibits the conduct uncovered by Commission Staff in the Section 252(e) docket. *See, e.g.*, 47 U.S.C. §252(c) (prohibiting discrimination with respect to quality of and charge for interconnection services, access to network elements, and provision of services at wholesale charges); 47 U.S.C. § 253(i) (“A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement . . . to which it is a party to any other requesting telecommunications carrier *upon the same terms and conditions as those provided in the agreement.*”) (emphasis added). By providing a 10% discount on all services to two favored CLECs, Qwest violated these state and federal laws.

It is equally plain that the Commission has both the broad power and the *undoubted* responsibility to address and remedy unlawful rates charged by a public service corporation. *See, e.g.*, ARIZ. CONST. ART. XV § 3 (power over rates and charges); A.R.S. § 40-421 (mandating that the Commission require that laws affecting public service corporations be enforced and obeyed, and that it promptly prosecute violations thereof); A.R.S. § 40-424 (granting the Commission the power to fine, upon notice, any public corporation that fails to observe or comply with a rule or order). This authority clearly includes the obligation to address, at any stage, an ILEC’s anti-competitive, discriminatory behavior relating to rates. *See, e.g.*, A.R.S. § 40-203 (requiring the Commission to prescribe any public service corporation charge or

contract that is “unjust, discriminatory or preferential”); 47 U.S.C. § 252 (e)(2)(A) (requiring state corporation commissions to reject any proffered negotiated telecommunications services agreement that discriminates against a third party carrier). The Commission’s constitutional duty to prescribe “just and reasonable rates and charges” to be used by telecommunications providers includes a duty to ensure that those charges are not imposed discriminatorily. *Cf. Michigan Bell Telephone Co. v. Strand*, 305 F.3d 580, 591 n.15 (6th Cir. 2002) (ILEC’s provisioning of interconnection in a less efficient manner for CLEC violated the requirement of 47 U.S.C. § 251(e)(2)(D) that the ILEC provide interconnection on terms and conditions that are “just” and “reasonable”).

The Corporation Commission’s authority with regard to remedying Qwest’s discriminatory conduct is therefore not limited to the initial facts presented in the three enforcement dockets. Indeed, once the Commission learned of the extent of the rate discrimination, it was authorized and obliged to address each specific harm caused by Qwest’s anticompetitive behavior. *See State v. Tucson Gas, Elec. Light & Power Co.*, 15 Ariz. 294, 307 (1914) (noting that “[t]he facility afforded the Commission to probe disputes involving the classifications, rates, charges, rules, and regulations of public utilities ought to result in fair and reasonable adjustments of such controversies”).

This is not to say that remedying the economic harm caused by discriminatory conduct was the sole issue facing the Commission in these dockets. Time Warner Telecom recognizes and appreciates the Commission’s parallel need to address Qwest’s unlawful conduct and to protect the integrity of Commission proceedings. These goals are not, however, mutually exclusive. For Staff and Qwest to suggest now – after substantial CLEC investment in these dockets – that CLECs must file separate complaints (Staff’s Post Hearing Brief at 18, Rebuttal

Testimony of David Ziegler at 4) is both inefficient and effectively denies numerous CLECs any relief at all. Building new records through new complaints and following the process through to a Commission order will take months, if not a year. If this had been the Commission's intention, CLECs should have been told early in the Section 252(e) proceeding that CLEC compensation from Qwest would not be addressed in the Section 252(e) docket. Testimony during the hearing suggested that CLECs were not given this information. Tr. 396-398. As a practical matter, the inclusion of partial relief to some CLEC parties under the Settlement Agreement is ample proof that the Commission Staff considered CLEC compensation to be a legitimate component of the cases being settled. By relying on a CLEC compensation formula that produces discriminatory relief, however, the Agreement is arguably worse than had CLEC relief been eliminated from the Agreement entirely.

IV. QWEST'S POSITION ON CLEC COMPENSATION FAILS TO CONSIDER CLEC INTERESTS.

During the hearing, Time Warner Telecom established that it would receive \$26,877 under the Settlement Agreement. A subsequent data response from Qwest reveals that the compensation due Time Warner Telecom, if the 10% discount were applied to all purchases from Qwest during the discount period (including interstate services), would be nearly 12 times that amount. Qwest responds that the \$26,877 payment "reflects the harm Time Warner would have suffered as the result of any violation of Qwest's filing obligation for Eschelon and McLeod agreements." Qwest Brief p. 16. While this assertion may be factually correct, it misses the mark. Time Warner Telecom seeks compensation for the harm it suffered as a result of the 10% discount Qwest gave Time Warner Telecom's competitors during the relevant discount period. Even this remedy will not make Time Warner Telecom entirely whole because it will not have

had the added advantage of designing a sales plan around a discounted product (as did McLeod and Eschelon).

The “related terms and conditions” cited by Qwest as justification for limiting the discount remedy do not preclude fair compensation to CLECs. This argument has been rejected as “a diversion” by the Minnesota PUC and should similarly be rejected here. *See In re Matter of Complaint of the Minn. Dept. of Comm. Against Qwest Corp. Regarding Unfiled Agreements* Order dated Nov. 1, 2002, p. 5. (MPUC Docket No. P-421/C-02-197). If Qwest violated state and federal law by secretly charging different rates to different CLECs, unique terms and conditions included in the secret discount agreements are no defense. *Id.* 47 U.S.C. § 251; ARIZ. CONST. ART. XV, § 12.

V. THE SETTLING PARTIES HAVE NOT AGREED UPON A RELEASE FOR THE HEARING OFFICER, OR THE COMMISSION, TO REVIEW.

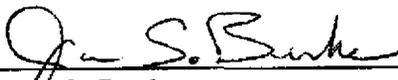
Time Warner Telecom does not intend to accept the \$26,877 offered by Qwest under the Agreement as compensation for Qwest’s discriminatory conduct. Nevertheless, even if Time Warner Telecom were considering opting into the Agreement, it would not do so without a full understanding of the release required by Qwest. Staff and Qwest, however, have reached no agreement as to what that release should include. There is no agreed-upon release for the Commission to review or the CLEC parties to evaluate. Qwest has attached as Exhibit B to its Initial Brief a “revised draft release.” This draft requires CLEC parties to release all claims arising from the 252(e) docket and 271 subdocket related to intrastate services, even though the credits they receive are limited to 251(b) and (c) services. Staff, on the other hand, has agreed to further negotiations on the details of the release, and, it appears, is not advocating adoption of the most recent release offered by Qwest. Staff Post Hearing Brief at 18. The Commission cannot possibly examine whether payments to CLECs under the proposed Settlement Agreement

comprise an appropriate remedy without knowing what claims the CLECs would be releasing in exchange for the payments. Similarly, it is difficult for CLECs to comment on the reasonableness of the release when it is not apparent that the settling parties have agreed upon the terms of the release.

CONCLUSION

The Settlement Agreement should be engineered with CLEC input and it should not create new discrimination vis-à-vis CLEC parties. Time Warner Telecom recommends that the Hearing Officer reject the Settlement Agreement and direct the parties to negotiate a framework for settlement that increases the likelihood that (a) CLECs will be fairly recompensed, and (b) this litigation will end.

OSBORN MALEDON, P.A.

By 
Joan S. Burke
2929 North Central Avenue, Suite 2100
Phoenix, Arizona 85012-2794
(602) 640-9356
jsburke@omlaw.com

Attorneys for Time Warner Telecom

CERTIFICATE OF SERVICE

(Docket No. T-00000A-97-0238, RT-00000F-02-0271, T-01051B-02-0871)

I certify that the original and seventeen copies of **TIME WARNER TELECOM OF ARIZONA LLC's** Response Brief were hand delivered on October 29, 2003 to:

Arizona Corporation Commission
Docket Control – Utilities Division
1200 West Washington Street
Phoenix, AZ 85007

and a true and correct copy was hand delivered on October 29, 2003 to:

Christopher Kempley, Chief Counsel
Arizona Corporation Commission
Legal Division
1200 West Washington
Phoenix, AZ 85007

Maureen Scott
Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007

Ernest G. Johnson, Director
Utilities Division
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007

Judge Jane Rodda
Arizona Corporation Commission
400 W. Congress
Tucson, Arizona 85701

and a true and correct copy was sent by U.S. Mail, postage prepaid, on October 29, 2003 to:

Eric S. Heath
Sprint Communications Company L.P.
100 Spear Street, Ste. 930
San Francisco, CA 94105

QWEST Corporation
4041 North Central Avenue, 11th Floor
Phoenix, AZ 85012

Joan Burke
Osborn Maledon
2929 North Central Avenue, 21st Floor
P.O. Box 36379
Phoenix, AZ 85012-2794

Maureen Arnold
QWEST Corporation
4041 North Central Avenue, 11th Floor
Phoenix, AZ 85012

Jon Poston
ACTS
6733 E. Dale Lane
Cave Creek, Arizona 85331-6561

Timothy Berg
FENNEMORE CRAIG
3003 N. Central Ave., Suite 2600
Phoenix, Arizona 85016

Thomas F. Dixon
MCI TELECOMMUNICATIONS CORP
707 17th Street, #3900
Denver, Colorado 80202

Michael M. Grant
GALLAGHER AND KENNEDY
2575 East Camelback Road
Phoenix, Arizona 85016-9225

Mark DiNunzio
Cox Arizona Telcom, L.L.C.
20401 N. 29th Avenue, Suite 100
Phoenix, Arizona 85027

Mark Dioguardi
TIFFANY AND BOSCO PA
500 Dial Tower
1850 N. Central Avenue
Phoenix, Arizona 85004

Curt Huttzell
Electric Lightwave, Inc.
4 Triad Center, Suite 200
Salt Lake City, UT 84111

Darren S. Weingard
Stephen H. Kukta
SPRINT COMMUNICATIONS CO L.P.
1850 Gateway Drive, 7th Floor
San Mateo, California 94404-2467

Thomas H. Campbell
LEWIS & ROCA
40 N. Central Avenue
Phoenix, Arizona 85007

Scott S. Wakefield, Chief Counsel
Dan Pozefsky
RUCO
1110 W. Washington, Suite 220
Phoenix, Arizona 85007

Andrew O. Isar
TRI
4312 92nd Avenue, N.W.
Gig Harbor, Washington 98335

Richard M. Rindler
Morton J. Posner
SWIDER & BERLIN
3000 K Street, N.W. Suite 300
Washington, DC 20007

Michael W. Patten
ROSHKA HEYMAN & DEWULF
400 E. Van Buren, Suite 800
Phoenix, Arizona 85004

Jeffrey W. Crockett
SNELL & WILMER
One Arizona Center
Phoenix, Arizona 85004-0001

Joyce Hundley
UNITED STATES DEPARTMENT OF
JUSTICE
Antitrust Division
1401 H Street NW, Suite 8000
Washington, DC 20530

Mark P. Trinchero
DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue, Suite 2300
Portland, Oregon 97201

Kevin Chapman
Director-Regulatory Relations
SBC Telecom, Inc.
1010 N. St. Mary's, Rm. 13K
San Antonio, Texas 78215-2109

Michael Morris
Allegiance Telecom of Arizona, Inc.
505 Sansome Street, 20th Floor
San Francisco, CA 94111

Brian Thomas
Vice President – West
Time Warner Telecom, Inc.
223 Taylor Avenue North
Seattle, WA 98109

Diane Bacon, Legislative Director
COMMUNICATIONS WORKERS OF
AMERICA
5818 North 7th Street, Suite 206
Phoenix, Arizona 85014-5811

Al Sterman
ARIZONA CONSUMERS COUNCIL
2849 E 8th Street
Tucson Arizona 85716

Karen Clauson
Eschelon Telecom Inc.
730 N. 2nd Ave. S., Suite 1200
Minneapolis, MN 55402

Jacqueline Manogian
Mountain Telecommunications, Inc.
1430 W. Broadway Rd., Suite A200
Tempe, AZ 85282

Cynthia A. Mitchell
1470 Walnut St., Suite 200
Boulder, CO 80302

Mary Steele
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688

Jim Scheltema
Blumenfeld & Cohen
1625 Massachusetts Ave. N.W., Suite 300
Washington, DC 20036

Todd C. Wiley
GALLAGHER & KENNEDY
2575 E. Camelback Road
Phoenix, Arizona 85016-9225

Harry L. Pliskin
COVAD COMMUNICATIONS CO
7901 Lowry Blvd.
Denver, CO 80230

Mark N. Rogers
Excell Agent Services, L.L.C.
P.O. Box 52092
Phoenix, AZ 85072-2092

Michael Morris
Allegiance Telecom of Arizona, Inc.
505 Sansome Street, 20th Floor
San Francisco, CA 94111

Peter Spivack
Douglas Nizarian
Martha Russo
Hogan & Hartson, LLP
555 13th Street, N.W.
Washington, DC 20004-1109

Mitchell Brecher
Greenberg, Traurig, LLP
800 Connecticut Ave., NW
Washington, DC 20006

Marti Allbright
Mpower Communications
5711 S. Benton Circle
Littleton, CO 80123

Martin Aronson
William D. Cleaveland
Morrill & Aronson, PLC
One E. Camelback Rd., Suite 40
Phoenix, AZ 85012-1648

Brenda Wendt