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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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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.

AT&T'S REPLY BRIEF

AT&T Communications of the Mountain States, Inc. and TCG Phoenix
 (collectively, "AT&T") hereby file their reply brief in the above referenced proceedings.

I. INTRODUCTION

It is readily apparent from a reading of the briefs that Qwest Corporation
 ("Qwest") and the Staff of the Arizona Corporation Commission ("Staff") have a very

different view of the adequacy of the Settlement Agreement than the competitive local exchange carriers ("CLECs") and the Residential Utility Consumer Office ("RUCO") have. On the one hand, you have Staff and Qwest, the parties that negotiated and agreed to the Outline of Principles; and, on the other hand, you have the CLECs and RUCO, the parties omitted from the negotiations on the Outline of Principles.

Qwest's position is understandable. It knew its priorities and goals, and what was acceptable and what was not when it began the negotiations. It was able to negotiate and come to an agreement with Staff on an Outline of Principles without CLEC interference. It was in its best interests to do so.

Staff, however, was in a far different position. It took it upon itself to represent the interests of the CLECs and RUCO. It is now forced to justify the Settlement Agreement against opposition from the very parties it sought to represent, without their input. This is no surprise to AT&T because Staff retreated from a number of recommendations it made during the proceedings that were beneficial to the CLECs without knowing the economic effect it would have on the individual CLECs. The result is unfortunate but easily remedied by rejecting the Settlement Agreement and requiring Qwest to amend the Agreement to reflect the positions advocated by the CLECs in their initial briefs;¹ or, if Qwest will not agree to amend the Agreement, resolving each of the proceedings on the evidence and the merits.

¹ AT&T also supports a number of RUCO's positions, including its position that findings of Qwest's unlawful and unacceptable conduct are necessary. RUCO Initial Closing Brief at 9-12.

II. ARGUMENTS

A. **Scope of Proceeding**

Staff maintains that “the focus [of all 3 proceedings] has never been upon the identification and remedy of individual CLEC harm or economic damages.” Staff’s Post Hearing Brief at 14. Staff then cites language from a November 7, 2003, Procedural Order. It is worth noting what the Procedural Order states.

“The Section 252 issues concern whether Qwest violated its obligation to file certain agreements with this Commission and *if it did, what remedies are appropriate*. The scope of the hearing in the Section 252(e) proceeding will determine ... *whether Qwest should be subject to monetary and/or non-monetary penalties if it violated the standard*. In addition, the Commission should determine if Qwest’s conduct violated any other law, Commission Order or rule.” *Emphasis added*.

It appears to AT&T that the order did not limit the scope of the monetary and non-monetary penalties. Staff’s initial recommendations are consistent with this interpretation because Staff specifically included non-monetary remedies that benefited the CLECs as a class.² Furthermore, the Procedural Order specifically addresses the violation of other state laws, Orders or rules. AT&T can only assume that if other state laws were reviewed and found to have been violated, that monetary and non-monetary remedies would be appropriate. It would have made no sense to determine if other laws, Orders or rules were violated without remedying the violations. However, Staff now insists that the scope of the proceeding is limited to Section 252 and the proceedings are not about the CLECs.

² Note that Staff says that the dockets were not about “*individual*” CLEC harm and damages. Arguably, Staff may be right. These cases were not filed as complaint cases. But Staff attempts to narrow the focus of the case to support its limited remedies. Staff’s initial proposed remedies address the harm to CLECs as a class; and, had these remedies been adopted, Staff has to acknowledge that “*individual*” CLECs would have received the benefits of Staff’s recommendations.

Staff argues, “that exact identification of individual CLEC harm, individual CLEC damages or competitive harm in general is simply not possible with any precision.” Staff’s Post Hearing Brief at 17. AT&T will acknowledge that competitive harm may not be ascertainable with “precision;” however, Qwest has been able to provide CLECs that requested it, the amount of claims they have for Section 251(b) and (c) services, all other intrastate services, and interstate services.

Staff suggested that “if these cases had indeed been focused upon the identification of individual CLEC harm and damages, then Staff would have expected to see the CLECs present their own witnesses at the Section 252(e) hearing so that those damages could be proven with a degree of exactitude.” *Id.* This was unnecessary. AT&T relied on the remedial recommendations of Staff. Furthermore, Qwest is more than able to ascertain CLEC damages based on the 10% discount, and has already provided figures to some of the CLECs.

It was Staff that recommended retroactive and prospective 10% discounts on all intrastate services as a remedy during its case-in-chief. Staff now claims that Staff’s recommendation was a “**penalty** recommendation only.” Staff Post Hearing Brief at 17 (emphasis in original).³ AT&T has no idea what kind of distinction Staff is trying to make. What AT&T does know is Staff proposed that CLECs receive retroactive and prospective 10% discounts on all intrastate services, as a part of its initial case. It agreed to a Settlement Agreement that provides CLECs a 10% retroactive discount on Section

³ Staff “penalties” section of the brief is broken down into parts. After identifying the violations Staff identifies “options” available to the Commission, Kalleberg Direct at 82-87, and then provides its specific recommendations, *id.*, at 87-96. The retroactive and prospective discounts on all intrastate services were contained in its recommendations. *Id.*, at 90-92.

251(b) and (c) services only. This is a retreat from Staff's earlier recommendations – pure and simple.

Nowhere in its case-in-chief in the Section 252(e) proceeding did Staff discuss direct harm to consumers, nor did it recommend any penalties that directly benefited consumers. Staff's testimony talks exclusively about harm to CLECs and competition. Now Staff suggests that CLECs will be indirectly benefited by direct benefits to consumers. Staff's Post Hearing Brief at 16. This stands the process on its head.

AT&T acknowledges consumers were harmed by Qwest's violations. But the direct harm was to the CLECs that did not receive the 10% discounts. They were the ones that could not make business decisions with the knowledge that prices would be 10% less than approved by the Commission. They could not use the money to reduce rates to consumers, pay down debt, buy a new switch, or expand into new markets. Staff stated in its testimony that "Staff is not recommending a high monetary penalty since Staff would rather have Qwest spend resources on non-monetary penalties which will *directly benefit CLECs* and local competition." Kalleberg Direct at 88 (emphasis added).⁴ Now, after the case is almost over, the Settlement Agreement not only reduces the monetary penalties Staff did propose but gives the CLECs only a portion of what Staff initially recommended as non-monetary penalties and effectively diverts a portion of the non-monetary damages to voluntary contributions. In addition, the CLEC must release of all intrastate claims. If the claims not covered by the Settlement Agreement are substantial, a CLEC simply cannot sign it or recover under its terms but must file separate claims to obtain all the damages it is entitled to.

⁴ The retroactive and prospective discounts were considered non-monetary penalties by Staff.

B. Discount Credits

As AT&T noted in its Response, each CLEC purchased different services depending on its business plans and, in some cases, Qwest's refusal to provision certain network elements. AT&T's Response to Settlement Agreement at 12-13.⁵ The only fair way to remedy the unlawful preference and discrimination provided in favor of McLeod and Eschelon is to retain all intrastate services within the scope of the remedies. By including only Section 251(b) and (c) services, the Settlement Agreement incorporates another type of discrimination – between CLECs entitled to recover under the terms of the Settlement Agreement. Although McLeod and Eschelon received a 10% discount on all services, the Settlement Agreement gives a preference to CLECs that bought Section 251(b) and (c) services over the CLECs that purchased other intrastate services. The Settlement Agreement should not be structured in a manner to inherently perpetuate discrimination caused as a result of Qwest's illegal preference and discrimination in favor of Eschelon and McLeod in the first place.

Qwest's argues that "the Commission cannot order a refund based on non-Section 251(b) and (c) services without violating the filed rate doctrine, which prevents the Commission from retroactively changing a tariffed service, such as switched access rates." Qwest Initial Post-Hearing Brief at 19. Qwest suggests that unless CLECs were similarly situated, they could not have suffered discrimination under A.R.S. § 40-334; and, furthermore, the appropriate remedy is to make Eschelon and McLeod "disgorge any benefits." *Id.* at 20. Qwest has a lot of chutzpah.

⁵ AT&T discusses Qwest's refusal to provision DS1 loops. Arizona Dialtone, Inc discusses Qwest's refusal to convert payphone lines to UNE-P. Arizona Dialtone Post Hearing Brief at 10-11. The effect is to place the purchased services in the uncompensated "other intrastate services" basket.

First of all, as noted in the above discussion on opt-in and related terms, CLECs were not all similarly situated because Qwest purposely structured the Eschelon and McLeod agreements so other CLECs were *not* similarly situated. However, the structure was a sham and should be disregarded.

What bothers AT&T is that inherent in Qwest's argument, is the notion that it can willfully violate federal and state law, prevent CLECs from participating in Commission proceedings and when it gets caught, the Commission cannot structure a remedy to address the harm to other CLECs but must force McLeod and Eschelon to give back the discounts. Talk about a win-win situation for Qwest. It would get the benefit of the discriminatory bargain with Eschelon and McLeod without having to pay the consideration on which it was based. It allows discrimination against the other CLECs for free.⁶ This is not a case of a company mistakenly receiving the wrong rate for a service. This is a case of intentional, willful, illegal, discriminatory conduct and deception. *See Pelto Direct (AT&T Ex. 1) at 7-10.* The "oops, sorry" defense doesn't cut it.

Case law is fact-specific. That is, the courts write law based on the facts before them. Courts have the latitude to make, and do make exceptions or distinctions to the general rule based on unique facts. Assuming for the sake of argument that the filed rate doctrine applies, the facts of this case cry out for a unique remedy.

Finally Qwest does not address A.R.S. § 40-374, which prohibits rebates and discounts. The Commission is free to fashion the appropriate remedies under this section.

⁶ This is the wrong kind of signal to send to LECs, that they can enter into discriminatory bargains, obtain the benefits of the bargain and if caught, argue the other party has to pay the consideration back.

The facts of these cases are unique. They require unique remedies. The filed rate doctrine argument is Qwest's lawyers throwing mud and seeing what sticks. The Commission should fashion appropriate remedies that fit the crime.

C. Opt-In and Related Terms

Both Qwest and Staff suggest the discounts provided to the CLECs are considerable because the CLECs do not have to take all related terms and conditions in the underlying contracts. Qwest Initial Post Hearing Brief at 14 & 17; Staff's Post Hearing Brief at 17-18. In fact, Qwest cites the testimony of AT&T witness Pelto. TR 276. But Mr. Pelto stated that a CLEC would have to accept all related obligations if they "were valid and legitimate related obligations." It is AT&T's position that the so-called related obligations were a sham and unenforceable.

Both Eschelon and McLeod representatives testified to the intent behind the agreements between Qwest and Eschelon and McLeod. Eschelon's representative, in a letter to Qwest, stated that Eschelon "may also have a mechanism that makes it more difficult for any party to opt into our agreement." AT&T's [Section 252(e)] Reply Brief at 2. AT&T also refers to testimony of McLeod's chief negotiator regarding why the McLeod deals were structured in the way they were. *Id.*

The Minnesota Administrative Law Judge ("ALJ") found that the Eschelon " 'consulting' arrangement was a sham designed to conceal the discount that Qwest agreed to provide Eschelon. The purported payment outlined in Paragraph 3 for the alleged consulting services had no rational relationship to the services to be provided by

Eschelon.”⁷ The Minnesota ALJ also found that McLeod had concerns that its discount agreement was not in writing. Qwest representatives were concerned “that other CLECs might feel entitled to the same discount if the agreements were written and made public.” *Id.*, ¶ 323. The take-or-pay agreement “by Qwest to purchase ‘products’ from McLeodUSA was merely a mechanism for securing some portion of the discount Qwest agreed to pay.” *Id.*, ¶ 325. Therefore, it is apparent that the Minnesota Commission felt the terms of the agreement were a sham to conceal the true discounts.

The Staff, in its initial recommendations, did not suggest parties had to take related provisions. AT&T does not understand why Staff would argue in its testimony supporting the Settlement Agreement, that the CLECs are better off because they do not have to take related terms that the Minnesota Commission found to be a sham based on testimony of McLeod and Eschelon representatives. Staff simply ignores the history of the agreements.

In fashioning remedies, the Commission can determine that the related terms should not be enforced or imposed on the CLECs because they were a sham or designed to prevent CLECs from opting-in in the first place. Logically, this is the only solution. To enforce related terms, or to suggest the related terms should be taken into account when implementing remedies or reviewing the Settlement Agreement, ignores the evidence and rewards Qwest for its original intentions to discriminate against the CLECs other than McLeod and Eschelon.

⁷ *Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197, Findings of Fact, Conclusions, Recommendation and Memorandum (Minn. Comm. Sept. 20, 2002), ¶ 126. The Commission adopted the ALJ’s recommended order on November 1, 2002, in its Order Adopting ALJ’s Report and Establishing Comment Period Regarding Remedies at 7.

D. Other Non-Monetary Penalties

Staff points out the benefits to the CLECs of the non-monetary portions of the Settlement Agreement. Except for the decision to withdraw the cost appeal, most of the non-monetary penalties were implemented by Qwest before it filed its direct testimony, or were agreed to as part of its direct testimony. In the testimony filed in the Section 252(e) case, Qwest's witness outline the remedial measures taken by Qwest.

1. Qwest agreed to file all contracts with the Commission.⁸
2. Qwest posted some of the agreements on the Qwest website and began permitting CLECs to opt-in.⁹
3. Qwest created a committee to review contracts and determine if the contracts contain terms which require that they be filed for Commission approval.¹⁰
4. Qwest made personnel changes.¹¹
5. Qwest "agreed to engage an independent consultant to audit and monitor its compliance with its Section 252 filing obligations."¹²

In the testimony filed in the Show Cause proceeding, Qwest also outlined a number of remedial measures it had taken or was taking.

1. According to Qwest, even before the Show Cause proceeding was initiated, it was making process improvements with the goal of shortening the time it takes to implement wholesale rate changes.¹³
2. Qwest designated a Program Management Office to oversee the implementation process.¹⁴
3. Qwest established a Cost Docket Governance Team with the responsibility of cost docket implementation.¹⁵

⁸ Docket No. RT-00000F-02-0271, Direct Testimony of Larry B. Brotherson dated December 2, 2002, at 42.

⁹ *Id.*

¹⁰ *Id.*, at 42-43

¹¹ *Id.*, at 44.

¹² *Id.*, at 5.

¹³ Docket No. T-01051B-02-0871, Rebuttal Testimony of William R. Easton dated May 15, 2003, at 13.

¹⁴ *Id.*

¹⁵ *Id.*

4. Qwest “[e]ngaged outside consultants to provide recommendations for automation of as many of the processes associated with the cost docket implementation as possible.”¹⁶
5. “Set a schedule for delivery of mechanized solutions.”¹⁷
6. Modified its communications process with the CLECs.¹⁸

These commitments are consistent with paragraphs 8, 10, 12, 13, 14 and 16 of the Settlement Agreement. Arguably, paragraphs 9 and 15 fall within the scope of the commitments made by Qwest in its testimony. Therefore, the Commission should give little weight to these terms as a basis of approving the Agreement.

As for the withdrawal of the cost appeal, AT&T has already spent thousands of dollars briefing the case in U.S. District Court. Qwest may very well have read the briefs and realized there was a good chance it would lose. Furthermore, it will take years to litigate the appeal, and the passage of time may limit the relevancy of any decision. Accordingly, there is really no way of placing any value on the withdrawal of the cost case appeal. Once again, Staff obtained some certainty, but the CLECs may have seen very little risk of letting the appeal go forward in exchange for the inclusion of other more beneficial terms in the Settlement Agreement.

E. Standard of Review

Staff maintains that the Settlement Agreement is in the public interest. As AT&T is noted in its brief, the standard for approving a settlement agreement that is not signed by all the parties is much more demanding. The U.S. Supreme Court held in *Mobil Oil* that “if there is a lack of unanimity, it may be adopted as a resolution *on the merits*, if FPC [Federal Power Commission] make an independent finding supported by ‘substantial

¹⁶ *Id.*

¹⁷ *Id.* at 14.

¹⁸ *Id.*

evidence on the record as a whole' that the proposal will establish just and reasonable rates for an area." *Mobil Oil Corp v Federal Power Comm'n*, 417 U.S. 283, 312-14 (1974) quoting *Placed Oil v Federal Power Commission* 483 F.2d 880, 883 (5th Cir. 1973) (emphasis in original). There is good reason for this holding. It prevents the positions of other parties from being ignored or not weighed in the resolution of the case, and it requires the ultimate decision to be based on the evidence and the record so the ultimate outcome is consistent with the record. In other words, it prevents one party from getting something in return for something that is unrelated to the proceeding at the expense of the other parties. It precludes the very thing that happened in this case – Staff and Qwest agreeing to lesser penalties and discounts on less than all intrastate services in exchange for Qwest agreeing to serve unserved areas, an issue completely unrelated to the case and on which no evidence was placed in the record by either Staff or Qwest. This is the very thing *Mobil Oil* was designed to prevent.

F. Release of All Claims

Qwest acknowledges the initial release did not match the final terms of the Agreement. Qwest Initial Post Hearing Brief at 31. Qwest attached a revised Release of All Claims to its initial brief.

AT&T is still concerned that the Release requires the CLEC to release all claims of the violation of federal statutes. The Release should specifically state the CLECs are not releasing any interstate claims for discrimination they may have because of Qwest's agreements with McLeod and Eschelon.

The Release specifically states the CLEC releases all claims for Section 251(b) and (c) services purchased in Arizona and all other intrastate services purchased by the

CLEC. The CLECs should not have to release all intrastate claims to receive payment on their Section 251(b) and (c) claims.

Time Warner stated that its Section 251(b) and (c) claim was worth \$26,877, according to Qwest's data response. Its discount on all intrastate services "would be nearly twelve times this amount." Time Warner Post Hearing Brief at 8. Time Warner would have to forgo its claim for other intrastate services of approximately \$300,000 to obtain \$26,877. Bad deal for Time Warner; good deal for Qwest.

III. CONCLUSION

The Time Warner example immediately above provides an excellent example of what is wrong with the Settlement Agreement; it is structured in a manner to benefit Qwest. This is just one example. The penalties are inadequate, the voluntary contributions or investments benefit Qwest but provide no benefits to the CLECs and only a select group of unserved Arizona consumers benefit, the discounts are paid on only a part of the CLECs intrastate claims, the discount are not payable in cash, and the UNE-P and access line credits place the burden of proof on the CLECs.

By omitting the CLECs' discrimination claims on all intrastate services, the CLECs are forced to file individual claims to litigate these amounts, as well as their Section 251(b) and (c) claims (since they will have to forgo any benefits under the Settlement Agreement to litigate the uncompensated claims).

Staff has argued that the CLECs are not "disadvantaged" because "a CLEC may choose not to opt-in and pursue its remedies elsewhere." Staff's Post Hearing Brief at 18. Qwest makes essentially the same claim. Qwest Initial Post Hearing Brief at 30. Because of the way the Settlement Agreement is structured, the CLECs must choose not

to opt-in to preserve possibly more valuable claims; thus, they have little choice but to pursue their own remedies.

It appears to AT&T that Qwest got what it wanted. Qwest did not want to pay Staff's recommended monetary penalty. Staff agreed to reduce it. It did not want to pay CLECs on their intrastate claims. Staff agreed to limit the discounts to Section 251(b) and (c) services. In exchange, the Staff agreed to voluntary contributions that benefit Qwest.

Qwest states: "Neither Qwest nor staff can prevent the CLECs from continuing to litigate if that is their choice, but it should be clear that no settlement is possible if the CLECs are unwilling to compromise on any aspect of the dispute, or even set reasonable boundaries on the scope of the dispute." *Id.* What Qwest fails to mention is that the CLECs were left out of negotiations and are now being asked to accept Qwest and Staff's compromises. And those compromises force the CLECs to opt-out so they can litigate valuable claims. Staff and Qwest structured the Agreement in a manner that all but force the CLECs not to join in. As noted earlier, why should a CLEC waive \$300,000 to collect \$26,000? No CLEC should have to make this decision, nor should the Commission approve a settlement agreement that forces that choice on the CLECs.

These cases are based on unique facts. It requires the Commission to review the facts and structure remedies that are appropriate, without requiring the CLECs to waive valuable and substantial claims. The Commission should require Qwest to amend the Settlement Agreement to include all intrastate claims and to address the other CLEC concerns in order to obtain Commission approval; or, alternatively, it should reject the Settlement Agreement and decide the cases on the evidence and the merits.

Dated this 29th day of October, 2003.

**AT&T COMMUNICATIONS OF THE
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CERTIFICATE OF SERVICE

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

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