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BEFORE THE ARIZONA CORPORATION COMMISSION

2003 DEC 19 P 3:50

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

Arizona Corporation Commission

DOCKETED

DEC 19 2003

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AZ CORP COMMISSION
DOCUMENT CONTROL

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

DOCKET NO. RT-00000F-02-0271

IN THE MATTER OF U S WEST
COMMUNICATIONS, INC.'S
COMPLIANCE WITH § 271 OF THE
TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-00000A-97-0238

ARIZONA CORPORATION COMMISSION,

Complainant,

v.

QWEST CORPORATION,

Respondent.

DOCKET NO. T-01051B-02-0871

**QWEST CORPORATION'S
EXCEPTIONS REGARDING
RECOMMENDED OPINION AND
ORDER FILED DECEMBER 1, 2003
AND REQUEST FOR HEARING**

Qwest Corporation ("Qwest"), through its undersigned counsel, respectfully submits these exceptions in response to the Recommended Opinion and Order ("Recommended Order") filed on December 1, 2003 in the above-referenced dockets.

I. INTRODUCTION.

Qwest and Arizona Corporation Commission Staff ("Staff") worked diligently to craft the proposed Settlement Agreement dated July 25, 2003 (hereinafter the "Agreement") in order to resolve three separate contested dockets now pending before the Commission (collectively the "Litigation"): (1) the 252(e) docket (concerning allegations that Qwest failed to file certain agreements with the Commission for

1 approval), (2) the 271 subdocket (concerning allegations of agreements between Qwest
2 and certain CLECs that they would not participate in the 271 docket), and (3) the Order
3 to Show Cause (“OSC”) docket (concerning allegations that Qwest failed to implement
4 wholesale rates in a timely fashion). Staff and Qwest, with input from other interested
5 parties, each negotiated away from their respective strongly held legal and factual
6 positions and made concessions on key terms and points in order to resolve these matters.
7 The Settlement Agreement resulting from that process fairly resolves these three dockets
8 and benefits the industry as a whole, as well as Arizona ratepayers.

9 The Recommended Order followed a two-day hearing commencing on September
10 16, 2003, which was set for the sole purpose of determining whether the Settlement
11 Agreement should be accepted or rejected. The Recommended Order rejects the
12 Agreement, but goes on purportedly resolving the three pending dockets on their merits.
13 In rejecting the Settlement Agreement, the Recommended Order states that its “primary
14 concern” with the Agreement rests with the Voluntary Contributions provision
15 (Agreement § 2). RO at 40. The Recommended Order concludes that these contributions
16 are illegal and otherwise improper, and therefore treats the allotted \$6 million as
17 additional penalties to be paid to the General Fund. The Recommended Order reasons
18 that Qwest may obtain potential benefits from the expenditure of these funds either
19 through tax deductions or return on revenues. The Settlement Agreement, however,
20 placed control and use of the \$6 million in contributions with the Commission, and it may
21 direct the funds and prescribe the terms under which Qwest may expend the funds,
22 therefore resolving and eliminating any concerns that Qwest may benefit from the
23 contributions. Because the Recommended Order states that the potential benefits arising
24 from the Voluntary Contributions provision was the “primary concern” justifying
25 rejection of the Settlement Agreement, the barriers to approving the Settlement can be
26 virtually eliminated through the Commission’s governance of the contributions.

1 The terms and conditions, concessions and compromises embodied in the
2 Settlement Agreement provide not only Qwest and Staff, but CLECs as well, with the
3 opportunity to end what portends to be years of litigation on a variety of issues in three
4 separate dockets. The Agreement contains significant non-monetary terms to ensure the
5 avoidance in the future of the type of events that gave rise to the Litigation. As a
6 consequence of the concessions and movements of both parties, the Settlement
7 Agreement presents significant immediate benefits for all in the industry and the public.
8 Qwest requests approval of the Settlement Agreement as proposed.

9 **II. THE SETTLEMENT AGREEMENT WAS REACHED FOLLOWING AN**
10 **APPROPRIATE PROCESS AND EMBODIES A FAIR, REASONABLE,**
11 **AND BALANCED RESOLUTION OF VIGOROUSLY CONTESTED**
12 **ISSUES IN THREE SEPARATE DOCKETS.**

13 As discussed herein, the Recommended Order rejects the Settlement Agreement
14 and raises concerns about the negotiation process, the Voluntary Contributions provision,
15 and the amount of credits earmarked for qualified CLECs. None of these concerns justify
16 rejection of the Settlement Agreement. Indeed, the Recommended Order's primary
17 concern – the Voluntary Contributions – can be easily remedied.

18 Ernest Johnson, the Commission's Utilities Director, testified that the Settlement
19 Agreement as a whole is in the public interest. Testimony of E. Johnson at 12; TR at
20 329:6-17 (Johnson). (Staff chose not to pursue continued litigation because "a healthy,
21 properly functioning regulatory regime requires open communication, honesty, integrity,
22 respect for laws and regulations, but most important, at least from a Staff perspective, it
23 requires trust."). The Settlement Agreement contains an appropriate mixture of payments
24 by Qwest to the State and public, credits to the CLECs, and non-monetary provisions to
25 ensure future compliance.
26

1 **A. The Process Used In Reaching the Settlement Agreement Was**
2 **Appropriate and Included Input From All Interested Parties.**

3 The Recommended Order expresses reservations about the process by which the
4 Agreement between Qwest and Staff was reached and particularly whether other
5 interested parties were given an adequate opportunity to participate. These concerns are
6 unfounded. The negotiation process to reach the Settlement Agreement included input
7 from all interested parties.

8 Initially, Qwest and Staff negotiated a set of principles for settlement of the
9 Litigation. Qwest and Staff shared those principles with other interested parties in the
10 Litigation and requested input. Staff specifically noted that it took CLEC concerns into
11 account when negotiating over the original statement of principles (TR 340-41) and the
12 CLECs have had numerous opportunities to be heard on the merits of the settlement. TR
13 330-31. CLECs were notified of the Settlement Agreement before it was finalized, drafts
14 were distributed and comments solicited from RUCO and certain interested CLECs. In
15 addition, the interested parties were given two formal opportunities to meet with Staff
16 and Qwest to discuss the principal points of the Settlement Agreement. Input from the
17 CLECs resulted in changes to the process by which they could obtain credits under the
18 Agreement, as well as other changes.

19 Consequently, the Settlement Agreement represents a blending not only of the
20 concessions and compromises of Qwest and Staff, but also of considerations and
21 accommodations made to account for the positions of the other interested parties. It
22 certainly did not contain all of the changes desired by the CLECs and RUCO, but it also
23 did not contain all of Qwest's or Staff's initial litigation positions either. The Agreement
24 should not be rejected due to concerns about the process by which it was negotiated.

1 **B. Monetary Provisions In the Form of Outright Payments and Voluntary**
2 **Contributions Are Reasonable and Fair.**

3 Under the terms of the Settlement Agreement, Qwest agreed to pay a substantial
4 sum in excess of \$11 million in penalties and voluntary contributions -- in addition to the
5 multi-millions of additional dollars it will pay as credits (discussed below). In particular,
6 the Settlement Agreement requires Qwest to pay \$6 million for targeted benefits to
7 Arizona ratepayers in the form of voluntary contributions for economic development,
8 educational purposes or investment in needed facilities. With Staff's participation and
9 the Commission's ultimate determination, the Voluntary Contributions would be paid to
10 any of three categories: (1) Section 501(c)(3) organizations or other State-funded
11 programs involved in education and/or economic development; (2) educational programs
12 designed to promote a better understanding of telecommunications issues by Arizona
13 consumers; and (3) infrastructure investment in unserved and/or underserved areas in
14 Arizona.

15 The Recommended Order rejects the Voluntary Contributions and proposes that
16 the entire \$11 million be paid to the General Fund as penalties. It further concludes that
17 the Voluntary Contributions are illegal or otherwise inappropriate because they would
18 potentially benefit Qwest, and because they amount to "redirected penalties." RO at 40.
19 Neither of these concerns renders the Voluntary Contributions improper. Because the
20 Voluntary Contributions are wholly within the control of the Commission, it can ensure
21 that Qwest receives no direct or indirect benefit therefrom. This will obviate the
22 Recommended Order's primary concerns with the Agreement and permit the approval of
23 the Agreement. Similarly, the Voluntary Contributions are not illegal, redirected
24 penalties. The Commission regularly requires commitments to invest and other
25 non-penalty monetary payments from public service corporations in approving settlement
26 agreements. *See* Decision No. 62672, Docket No. T-01051B-99-0497; Decision No.

1 63268, Docket Nos. T-01051B-99-0737 and T-01954B-99-0737.

2 **C. The Credits Provisions Are Fair and Reasonable, While Providing**
3 **Direct, Tangible Benefits to the CLECs and Industry.**

4 The Settlement Agreement requires that Qwest issue three types of one-time
5 credits to eligible CLECs in response to claims made in the Section 252(e) docket.¹ The
6 credits result in payments to the CLECs that they would not likely achieve if they
7 continued to litigate the issues in these dockets.

8 The first credit is designed to address allegations that Qwest gave Eschelon and
9 McLeod discounts of 10% on their purchases over certain periods of time. The
10 Settlement Agreement requires Qwest to issue credits measured by 10% of a CLEC's
11 purchase of Section 251(b) and (c) services through its interconnection agreement with
12 Qwest or through Qwest's SGAT from January 1, 2001 through June 30, 2002. *See*
13 *Settlement Agreement* § 3.

14 The second portion of the credits is intended to address allegations concerning
15 payments by Qwest for Eschelon's termination of intraLATA toll. The Settlement
16 Agreement on this point requires Qwest to issue credits equal to \$2 per UNE-P line or
17 unbundled loop purchased by a CLEC from Qwest between July 1, 2001 and February
18 28, 2002, less amounts billed and collected by that CLEC from Qwest for terminating
19 intraLATA toll during that same period. *See Agreement* § 4.

20 The final credit element is designed to address allegations concerning payments
21 Qwest purportedly made to Eschelon in settling a dispute about the accuracy of daily
22 usage information provided to Eschelon under a manual process. Under this provision, to
23 those eligible CLECs that did not receive accurate daily usage files, Qwest will issue

24 ¹ The Recommended Order limits the credits given to the CLECs to the credits described in Paragraph 3
25 of the Settlement Agreement, but expands the scope of those credits to all intrastate services. While the
26 intent and context of the Recommended Order obviously are to limit that expansion to wholesale services,
the language of the Order is not clear in that regard. For the reasons set forth later in these exceptions,
any expansion of the Paragraph 3 credits is inappropriate.

1 credits equal to \$13 per month for each UNE-P line purchased by the CLEC from
2 November 1, 2000 through June 30, 2001, and \$16 per month for each UNE-P line
3 purchased by the CLEC from July 1, 2001 through February 28, 2002, offset by the
4 CLEC's billings to IXC's for switched access. *See* Settlement Agreement § 5.

5 To obtain these credits, the CLECs need only to accept the Settlement Agreement
6 and execute a release of their claims, with respect to intrastate services, related to the acts
7 giving rise to the dockets. Qwest is offering these credits without requiring CLECs to
8 assume all related terms and conditions in the underlying contracts. For example, Qwest
9 is offering the 10% credit based on Section 251 services without also requiring CLECs to
10 satisfy the substantial volume and term commitments agreed to by Eschelon and
11 McLeod. Similarly, Qwest is offering the Section 5 credit without requiring that CLECs
12 be similarly situated to Eschelon.²

13 The Recommended Order concludes that the credit provisions of the Agreement
14 are inadequate because CLECs are required to give up claims for all intrastate services,
15 but receive credits for only 251(b) and (c) services. This criticism ignores significant
16 compromises conceded by Qwest in the Settlement Agreement. Under the Agreement,
17 credits are not subject to the related terms and conditions requirements established by
18 federal law. To this extent, the CLECs are getting a better deal on 251(b) and (c) services
19 than McLeod and Eschelon allegedly did. In exchange, they do not receive a discount on
20 non-251 services but release all intrastate claims. This is a fair and balanced settlement.

21 The Settlement Agreement was also drafted so that the credits actually afford
22 CLECs broader remedies than afforded by the Act without the Settlement Agreement,
23 i.e., the longest duration of any discount allegedly given Eschelon and McLeod. *Cf.* TR

24 ² Qwest's agreement to pay Eschelon a per-line credit was expressly based on issues that resulted from
25 Eschelon's receiving daily usage files through a manual (rather than a mechanized) process as part of the
26 UNE-Star Platform. Further, the Eschelon agreement provided that this credit would terminate upon the
implementation of a mechanized process. Nonetheless, the Section 5 credit is available to CLECs that
received daily usage records through a mechanized process as part of the UNE-P platform.

1 at 453:25-455:24 (Ahearn). *See infra*. Although the credits under the Agreement are not
2 identical to those allegedly provided to Eschelon and McLeod, the CLECs who accept the
3 services Settlement Agreement receive benefits, which represent a fair and balanced
4 package in that they need not take on all of the burdens of Eschelon and McLeod.

5 Perhaps one of the most critical points to recognize about the credits is that which
6 Staff noted – although none of the CLECs introduced evidence that could have proven its
7 damages “with a degree of exactitude” in the docket that dealt with the allegedly
8 discriminatory agreements, Qwest concedes in the Settlement Agreement to give the
9 credits in any event. Opening Brief Staff at 17. Indeed, none of the CLECs dissenting in
10 this proceeding presented any testimony at all in the 252(e) hearing on the unfiled
11 agreements. They, therefore, should not be heard to complain that the Settlement
12 Agreement does not fully compensate them.

13 Further, nobody, except Staff and Qwest, is bound by the terms of the Settlement
14 Agreement after the Commission approves it. If a CLEC wants to litigate to achieve a
15 higher level of credits, it is free to pursue its claims directly and not accept the credits –
16 thus, bearing the increased litigation risk in exchange for the greater potential reward.
17 Any CLEC that feels that its claims (including claims related to non-251 intrastate
18 services) are worth more than it can get under the Settlement Agreement is free to pursue
19 those claims.

20 The CLECs derive direct and substantial benefit from the credits provisions in the
21 Settlement. The final results of the credits provisions is that the parties negotiated terms
22 and provisions that are favorable to the CLECs and they are immediately available. The
23 credit provisions of the Settlement Agreement are a fair and reasonable compromise of
24 positions with significant concessions by Qwest.

25 **D. Non-Monetary Provisions are Significant and Overarching**

26 Qwest made substantial non-monetary concessions in the Settlement Agreement,

1 each one resulting in a benefit to the ratepayers, CLECs and the regulatory process.
2 Some of the non-economic provisions in the Settlement are terms Qwest agreed to on an
3 interim basis during the course of the Litigation. Qwest agrees in the Settlement to
4 extend those terms and augment them by still more provisions. It is highly unlikely that a
5 more comprehensive and constructive approach to building a working relationship
6 between Staff and Qwest could be accomplished through continued litigation.

7 The Settlement Agreement provides for monitoring of Qwest's compliance
8 mechanisms under Section 252(e), and of Qwest's wholesale cost docket implementation.
9 Qwest will pay for an independent, third-party monitor, selected by the Director of the
10 Utilities Division, who will conduct an annual review of Qwest's Wholesale Agreement
11 Review Committee. Agreement § 8 at 13-14. Qwest also agreed to hire an independent,
12 third-party consultant, selected by the Director, to conduct assessments of and
13 recommend improvements to Qwest's wholesale rate implementation process.
14 Agreement § 12 at 15-16. Both the consultant and the monitor will be retained for a
15 maximum period of three years.

16 Qwest also agreed to continue for three years its web-based training program for
17 new and existing employees. Agreement § 9 at 14. In addition, Qwest will continue its
18 internal cost docket governance team. Agreement § 14 at 16-17.

19 Additional non-economic terms require Qwest to continue processes instituted
20 prior to the settlement to ensure timely implementation of cost docket rates and sets a
21 specific deadline for the implementation of such rates. Agreement §§ 14 and 15 at 16-17.
22 Qwest also commits in the Settlement Agreement to submit to the Commission settlement
23 agreements in any Commission dockets of general application, a term much broader than
24 current interpretations the applicable laws require. Agreement § 16 at 18.

25 Through the Settlement Agreement Staff secures an end to protracted litigation
26 and immediate, substantial benefits to the industry as a whole, Arizona ratepayers, and

1 the regulatory process, while eliminating the litigation risk and delays caused by
2 additional proceedings and appeals. The Settlement Agreement thus represents a
3 significant victory for all interested parties. Qwest respectfully submits that the
4 Commission should approve the Agreement.

5 **III. THE RECOMMENDED ORDER ERRS BY SELECTIVELY EXCISING**
6 **PORTIONS OF THE SETTLEMENT AGREEMENT AND**
7 **INCORPORATING THEM INTO A DECISION ON THE MERITS.**

8 The Settlement Agreement specifically provides that

9 Each provision of this Agreement is in consideration and
10 support of all other provisions, and expressly conditioned
11 upon acceptance and approval by the Commission without
12 change. Unless the Parties to this Agreement otherwise
13 agree, in the event that the Commission does not accept and
14 approve this Agreement according to its terms, then it shall be
15 deemed withdrawn by the Parties and the Parties shall be free
16 to pursue their respective positions in the Litigation without
17 prejudice.

18 Agreement § 19. Qwest and Staff jointly gave notice of the Settlement Agreement and
19 requested a hearing on whether the Agreement should be approved. The parties to the
20 Settlement did not request that a final order resolving the three dockets be issued in lieu
21 of approving the Agreement. Both Qwest and Staff made significant compromises in the
22 course of negotiating the Agreement, and both were entitled to resume their prior
23 litigation positions if the Settlement Agreement was rejected.

24 **A. The Recommended Order Is Procedurally Improper.**

25 The Recommended Order exceeds permissible boundaries by neither fully
26 rejecting nor accepting the terms of the filed Settlement Agreement. The Recommended
Order, instead, is a selective amalgamation of terms from the settlement agreement and
parties' recommendations in the Litigation, as well as unsupported findings, and legally
incorrect conclusions.

1 In rejecting the Settlement Agreement and then purporting to resolve all three
2 dockets, the Recommended Order deprives Qwest of significant procedural rights. The
3 clearest example is the 271 Sub-Docket (DOCKET NO. T-00000A-97-0238). On July
4 29, 2003, Qwest withdrew its request for a hearing in the 271 sub-docket based on the
5 Settlement Agreement, noting:

6 In light of the Settlement Agreement between Qwest
7 Corporation ("Qwest") and the Arizona Corporation
8 Commission Staff ("Staff") in this Docket and Docket Nos.
9 RT-00000F-02-0271 and T-01051B-02-0871, Qwest
10 withdraws its request for hearing filed in this matter on May
11 16, 2003 *without prejudice to its right to renew that request*
12 *in the event that the Settlement Agreement is not approved by*
13 *the Commission.* (Emphasis added.)

14 Despite the conditional nature of Qwest's waiver of a hearing, the Recommended
15 Order rejects the Settlement Agreement and then purports to resolve the 271 sub-docket
16 without holding an evidentiary hearing, which must be provided to any party before the
17 Commission imposes penalties. Similarly, in the two remaining dockets, Qwest was also
18 entitled to be heard on whether the specific provisions of the Settlement Agreement were
19 or were not appropriate in an order resolving the substantive issues in that Litigation.
20 The Recommended Order improperly enters orders resolving these dockets on the merits.

21 **B. The Recommended Order Improperly Incorporates Terms From The**
22 **Settlement Agreement**

23 Public policy favors settlement. *See, e.g., United Bank of Arizona v. Sun Valley*
24 *Door & Supply, Inc.*, 149 Ariz. 64, 68, 716 P.2d 433, 437 (App. 1986); *Speed Shore*
25 *Corp. v. Denda*, 605 F.2d 469, 473, citing *Williams v. First National Bank*, 216 U.S. 582
26 (1910); *Shell Oil Company v. Christie*, 125 Ariz. 38, 39, 607 P.2d 21, 22 (App. 1979).
Generally speaking, courts recognize that a settlement agreement must be reviewed as a
whole:

1 Neither the trial court nor this court is to reach any ultimate
2 conclusions on the contested issues of fact and law which
3 underlie the merits of the dispute, for it is the very uncertainty
4 of outcome in litigation and avoidance of wasteful and
5 expensive litigation that induce consensual settlements. The
6 proposed settlement is not to be judged against a hypothetical
7 or speculative measure of what might have been achieved by
8 the negotiators.

9 *Officers for Justice v. City and County of San Francisco*, 688 F.2d 615, (9th Cir. 1981).

10 In this case, the Recommended Order fails to differentiate between evaluating the
11 Settlement Agreement and reaching a decision on the merits.

12 In deciding the merits of the Litigation, the Recommended Order relies heavily on
13 the terms of the Settlement Agreement. In order to be lawful, Commission decisions
14 must be supported by competent evidence. If not, they are considered to be arbitrary,
15 capricious or an abuse of the Commission's discretion. *See generally, Tonto Creek*
16 *Estates Homeowners Ass'n v. Arizona Corp. Comm'n*, 177 Ariz. 49, 864 P.2d 1081 (App.
17 1993). Rule 408 clearly establishes that offers made in settlement discussions are not
18 competent evidence of the existence or the amount of potential liability. Rule 408, Ariz.
19 R. Civ. P. Here, the Recommended Order goes far beyond merely considering the terms
20 of the proposed settlement, and actually incorporated large portions of the Agreement
21 into the Recommended Order.

22 Courts also recognize that encouraging parties to cooperate with regulators and
23 enter settlement agreements in the future is an "intangible benefit" derived from the
24 approval of a reasonable settlement. *State ex rel. Woods v. Nucor Corp.*, 825 F.Supp
25 1452 (D. Ariz. 1992). The Recommended Order in this case will clearly have the
26 opposite effect, undermining any incentive that parties might have to undertake
settlement negotiations with Staff in the future. No regulated entity would be likely to
agree to any unfavorable terms in a future compromise settlement agreement with Staff,

1 knowing that the favorable terms can be deleted, and unfavorable terms imposed as part
2 of a purported resolution of the merits of the case. The Recommended Order's decision
3 on the merits amounts to an attempt to rewrite the Settlement Agreement. This is
4 improper. The Agreement must be either accepted or rejected. If it is rejected, the issues
5 in the Litigation must be resolved without reference to the proposed Settlement.

6 **C. Many provisions of the recommended order would exceed the**
7 **Commission's authority if adopted outside the context of settlement**

8 If the non-monetary provisions of the Recommended Order are to be considered as
9 valid and enforceable, authority must be found either in the Constitution or in statutes.
10 *Commercial Life Insurance Co. v. Wright*, 64 Ariz. 129, 166 P.2d 943 (1946). It is
11 well-settled that while the Commission has plenary authority over a utility's rates and
12 charges, and limited statutory authority over the provision of utility service, the
13 Commission "is not the owner of the property of public utility companies, and is not
14 clothed with the general power of management incident to ownership." *Southern Pacific*
15 *Company v. Arizona Corporation Commission*, 98 Ariz. 339, 347, 404 P.2d 692, 697
16 (1965), citing *State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service*
17 *Commission of Missouri*, 262 U.S. 276, 289, 43 S.Ct. 544, 547 (1923) (Brandeis, J.,
18 concurring). The Recommended Order includes numerous provisions taken directly from
19 the Settlement Agreement that clearly interfere with Qwest's right to manage its business
20 and that are beyond the power of the Commission to impose.

21 Qwest voluntarily initiated several of the non-monetary provisions during the
22 course of the underlying dockets. In the Settlement Agreement, Qwest voluntarily agreed
23 to maintain these initiatives at its own expense for a set period of time. While it is well
24 within the Commission's authority to order Qwest to comply with the law, the
25 Commission cannot simply order Qwest to employ certain individuals in certain
26 capacities. Once the Commission has established the regulatory goals and standards,

1 Qwest must be allowed the management discretion to determine the best and most cost-
2 effective ways of meeting those goals and standards.

3 For example, the Settlement Agreement provides that Qwest will leave in place its
4 executive-level committee for the review of agreements with CLECs. Agreement § 13.
5 It provides for the continuation of a Qwest in-house training program. Agreement §9. It
6 provides for the appointment of a monitor with regard to the process of determining what
7 agreements need to be filed and a consultant to evaluate Qwest's wholesale rate
8 implementation process. Agreement §§ 8, 12. Both the monitor and the consultant will
9 be selected by Staff and paid for by Qwest. *Id.* All of these provisions are appropriate in
10 the context of a voluntary Settlement Agreement. However, they amount to an
11 impermissible infringement on the Company's power of self-management if imposed by
12 Commission order.

13 **IV. THE RECOMMENDED ORDER MISAPPLIES THE LAW AND IS NOT** 14 **SUPPORTED BY THE RECORD BEFORE THE COMMISSION**

15 The Recommended Order misapplies the filing standard established by the FCC
16 and it also lacks any foundation in the facts. Commission decisions must be justified by
17 "substantial evidence."³ Here, the testimony presented in the Litigation cannot constitute
18 as a matter of law the "substantial evidence" required to support a Commission decision
19 to impose the penalties set forth in the Recommended Order.⁴

20 ³ See, e.g., *Tucson Elec. Power Co. v. ACC*, 132 Ariz. 240, 247, 645 P.2d 231 (1982); *Pine-Strawberry*
21 *Improvement Ass'n v. ACC*, 152 Ariz. 339, 340, 732 P.2d 230 (App. 1986); *City of Tucson v. Citizens*
22 *Utils. Water Co.*, 17 Ariz. App. 477, 498 P.2d 551 (App. 1972). "Substantial evidence" means "evidence
23 of substance which establishes facts and from which reasonable inferences may be drawn. It does not
24 connote suspicion, imaginative suggestions, surmises or conjectures. Reasonable inferences are not fine-
25 spun arguments but are inferences based upon a reason or that a reasonable man would accept." *Citizens*
26 *Utils. Water Co.*, 17 Ariz. App. at 481 (emphasis added; quoting *Internat'l Ry. Co. v. Boland*, 8 N.Y.S.2d
643, 646 (1939)).

⁴ See *City of Tucson v. Citizens Utilities Company*, 17 Ariz. App. 477, 481, 498 P.2d 551 (App. 1972)
(rejecting the Commission's determination of a rate base, where the Commission's determination was
based solely on the testimony of an expert who "failed to consider all the relevant factors" and whose
testimony "was filled with speculation and uncertainty" and noting "[m]ere speculation and arbitrary
conclusions are not substantial evidence and cannot be determinative."). See also *ACC v. Citizens Utils.*

1
2 **A. The Recommended Order's Findings of Willful and Intentional**
3 **Misconduct Are Unsupported.**

4 The Recommended Order erroneously concludes that Qwest "willfully and
5 intentionally" violated Section 252 when, in fact, no court or state commission had
6 articulated a standard for determining which voluntarily negotiated agreements between
7 an ILEC and a CLEC had to be filed for approval before the FCC issued its October 4,
8 2002 Order. Furthermore, the Recommended Order apparently finds Qwest in willful
9 and intentional violation of Section 252 for not filing a number of agreements that fall
10 outside the filing requirement established by the FCC's Order. These findings are
11 contrary to controlling federal law and devoid of any support in the record.

12 **1. Qwest cannot have willfully and intentionally violated an**
13 **unclear standard.**

14 The affected parties, including CLECs, *and* state entities charged with reviewing
15 the agreements as part of investigations, were unable to arrive at consistent conclusions
16 as to whether such agreements fell within the as-yet unarticulated filing standard. Indeed,
17 even after the issuance of the FCC standard, CLECs (not just Qwest) and state agencies
18 continue to disagree over the application of the filing standard. With such ambiguities,
19 there is no basis upon which to find that Qwest intentionally violated an unknown, or at
20 best unclear, filing standard.⁵

21 For example, MCI, a prominent Arizona CLEC, recently filed a motion to dismiss

22 Co., 120 Ariz. 184, 190, 584 P.2d 1175 (App. 1978) (holding the Commission's reliance on an expert's
23 testimony to be "not legally permissible," because that testimony "is not itself substantial evidence but is
24 speculative").

25 ⁵ By way of example, a number of the agreements that the Recommended Order finds that Qwest was
26 required to file are agreements that the Minnesota Public Utilities Commission reviewed and did not
identify as interconnection agreements. Similarly, a number of the contracts the Recommended Order
identifies as subject to Section 252 are at issue in an ongoing proceeding before the Washington Utilities
and Transportation Commission and both Qwest and the contracting CLEC have move to dismiss claims
arising from the failure to file the contracts, on the ground that the contracts do not fall within the FCC's
definition of "interconnection agreement."

1 before the Washington Utilities and Transportation Commission on the ground that the
2 lack of any clear filing standard prior to the FCC's October 4, 2002 Order bars penalties
3 for the failure to file particular agreements.⁶ In addition, Staff candidly admitted that the
4 Act was subject to multiple interpretations: "Staff recognizes that not only Qwest, but
5 other parties did not uniformly interpret the 1996 Act. Staff, in its own review, could
6 understand how one agreement could be seen to both fall, and not fall, under the filing
7 standard articulated by the 1996 Act and clarified by the FCC."⁷ Neither the Act itself
8 nor its legislative history defines the scope of the term "interconnection agreement" (and
9 thus the scope of the Section 252 filing requirement). And prior to the commencement of
10 the recent unfiled agreements investigations, the scope of the term "interconnection
11 agreement" had never been defined by any court or administrative agency.⁸ There was
12 and is no evidence (other than rank speculation) that Qwest's proposed definition of
13 interconnection was anything other than a good faith attempt to apply Section 252 in the
14 absence of a standard and to negotiate fairly with CLECs.

15 Moreover, the Recommended Order appears to find Qwest in willful and
16 intentional violation of Section 252 for not filing agreements that fall outside the FCC's
17 filing standard.⁹ It simply defies logic to conclude that Qwest *willfully and intentionally*
18 violated the law by not filing agreements that even the FCC does not recognize to be
19 "interconnection agreements" subject to the Act's filing requirement. The FCC
20 concluded that a contract between an ILEC and a CLEC qualifies as an "interconnection
21 agreement" when it "creates an *ongoing* obligation pertaining to resale, number
22

23 ⁶ *Washington Utils. & Transp. Comm'n v. Advanced Telecom, Inc., et al.*, Docket No. UT-033011, MCI's
24 Motion to Dismiss or for Summary Determination, at ¶¶ 15, 19 (Nov. 7, 2003).

25 ⁷ Pre-Filed Testimony of Marta Kalleberg, at 76:17-20.

26 ⁸ *In the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996*, Transcript of Proceedings (*hereinafter* "Tr."), Vol. III, Testimony of Clay Deanhardt, at 688:4-20.

⁹ The Recommended Order concludes that Qwest "intentionally" failed to file agreements with Eschelon and McLeod and suggests that this finding applies to all agreements between Qwest and those CLECs that appear on Exhibit B. See Recommended Order, Findings of Fact, ¶¶ 38-39.

1 portability, dialing parity, access to rights-of-way, reciprocal compensation,
2 interconnection, unbundled network elements, or collocation.”¹⁰ This definition means
3 that parties and the Commission must determine first whether an agreement creates an
4 *ongoing* obligation and second, whether that obligation in fact “pertains to” one of the
5 specified services.¹¹ But the Recommended Order finds that Qwest violated Section 252
6 willfully and intentionally by not filing settlement agreements with solely backward-
7 looking consideration, purchase agreements, and form agreements – agreements that the
8 FCC places squarely outside the Act’s filing requirement.¹²

9 The Recommended Order’s recommendation that the Commission impose
10 penalties – in the face of the undisputed ambiguity of the filing requirement prior to
11

12 ¹⁰ Memorandum Opinion and Order, *In the Matter of Qwest Communications International Inc. Petition*
13 *for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated*
14 *Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89 (Oct. 4, 2002), at ¶ 8
(hereinafter “FCC Order”) (italics in original, underlining added).

15 ¹¹ State commissions are bound to follow the FCC’s October 4, 2002 Order regarding definition of
16 “interconnection agreement” under Section 252(a)(1)’s filing requirement. Although the FCC drafted its
17 Order in a manner that left state commissions the authority to apply “in the first instance, the statutory
18 interpretation [the FCC] set forth . . . to the terms and conditions of specific agreements,” (FCC Order at
19 ¶ 7), the authority of state commissions to apply and further interpret the filing requirement does not
20 permit them to ignore or change the FCC Order, even if a state commission disagrees with the standard or
21 believes the FCC made a poor policy choice. As the agency charged with implementing and enforcing
22 the Telecommunications Act, (47 U.S.C. § 151 (creating Federal Communications Commission and
23 charging it with task of executing and enforcing the provisions of the Telecommunications Act); 47
24 U.S.C. § 201(b); *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 378 (1999) (“We think that the grant in
25 § 201(b) means what it says: The FCC has rulemaking authority to carry out the “provisions of this Act,”
26 which include §§ 251 and 252, added by the Telecommunications Act of 1996.”)), the FCC’s
interpretation of the Section 252(a)(1) filing requirement is binding on this Commission. See *AT&T Corp.*, 525 U.S. at 378. Federal law can preempt a state regulatory rule even if it is not technically impossible to comply with both state and federal law. See, e.g., *Wisconsin Bell, Inc. v. Bie*, No. 02-3854, 2003 WL 21911195 (7th Cir. Aug. 12, 2003) (rejecting the Wisconsin Public Service Commission’s tariff rule as impermissibly interfering with the Telecommunications Act despite the fact that compliance with both was possible). Accordingly, any suggestion that this Commission adopt a filing standard that is inconsistent with the FCC Order – or penalize Qwest for not filing agreements that are specifically excluded from the filing standard articulated by the FCC – would be in conflict with federal law. Moreover, penalties are inappropriate here, particularly penalties predicated on Staff’s expansion of the FCC standard to apply to additional agreements.

¹² Qwest’s position with regard to particular agreements is set forth in its Post-Hearing Brief. See Qwest Corporation’s Post-Hearing Memorandum at 11-21.

1 October 4, 2002 – amounts to a fundamental violation of the fair notice doctrine. Qwest,
2 like any other party that attempts to comply with its obligations in a complex regulatory
3 scheme, is entitled to know what the rules are before it is sanctioned for breaking them.
4 It is unfair – and unconstitutional – to penalize Qwest for violating an unarticulated
5 standard. A rule may be enforced only when those subject to the rule are reasonably able
6 to determine what conduct is appropriate and need not “guess at its meaning and differ as
7 to its application.”¹³ Under this “fair notice doctrine,” “the well-established rule in
8 administrative law [holds] that the application of a rule may be successfully challenged if
9 it does not give fair warning that the allegedly violative conduct was prohibited.”¹⁴ The
10 doctrine “has now been thoroughly ‘incorporated into administrative law,’” and is
11 grounded in the due process clause of the United States Constitution.¹⁵ Neither Section
12 252 nor any rule or statement from the Commission gave fair notice that the filing
13 requirement covered all agreements identified in the Recommended Order. At a
14 minimum, the imposition of substantial penalties based on the failure to file such
15 agreements, without prior guidance, would be inequitable and unlawful.

16 **2. The record is devoid of evidence of willful and intentional**
17 **misconduct.**

18 No party produced any evidence that Qwest knowingly and intentionally violated
19 the law. Indeed, each conclusion in the Recommended Order regarding Qwest’s intent is
20 based solely on speculation and ignores relevant evidence in the record establishing
21 Qwest’s good faith intent to comply with its obligations under the Act.

22 The testimony of RUCO’s “experts,” Mr. Deanhardt and Ms. Cortez, cannot serve
23 as the basis for a conclusion of knowing and intentional misconduct. These witnesses

24 ¹³ *Tabora v. State*, 150 Ariz. 262, 268-69, 722 P.2d 989, 995-96 (App. 1986). See also *Cohen v. State*,
25 121 Ariz. 20, 26, 588 P.2d 313, 319 (App. 1978).

26 ¹⁴ *United States v. Chrysler Corp.*, 158 F.3d 1350, 1355 (D.C. Cir. 1998).

¹⁵ *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (quoting *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987)).

1 lacked any firsthand knowledge of the intent of Qwest or any of the CLECs involved in
2 the filing decisions. Mr. Deanhardt and Ms. Cortez have never worked at Qwest or for
3 any CLEC other than Covad (Mr. Deanhardt) and cannot speak to the parties'
4 motivations or their understanding of the filing standard. Accordingly, Mr. Deanhardt's
5 and Ms. Cortez's testimony cannot support the Recommended Order's conclusions
6 regarding the knowing and intentional character of Qwest's conduct. Similarly, the
7 testimony offered by Staff's witness, Ms. Kalleberg, also is irrelevant to a determination
8 of Qwest's knowledge or intent. Ms. Kalleberg could not provide admissible firsthand
9 testimony regarding the factors that contributed to the parties' filing decisions and cannot
10 serve as the evidentiary basis for a conclusion that Qwest knowingly or intentionally
11 violated Section 252.

12 Without *any* testimony from Staff's or RUCO's witnesses on the issue of Qwest's
13 understanding of Section 252 or the motivations behind Qwest's and the CLECs' filing
14 decisions, the Recommended Order draws heavily on supposition and speculation and
15 ignores the testimony presented by Qwest. For example, the Recommended Order
16 concludes – without citing any evidentiary support – that “Qwest purposely structured the
17 agreements with Eschelon and McLeod to avoid its filing obligations under Section
18 252(e).”¹⁶ Qwest made good-faith decisions whether to file its agreements with its
19 customers. The Recommended Order may not agree with Qwest's line drawing, but there
20 is no support in the record for its conclusions that Qwest knew certain agreements were
21 subject to Section 252 but that it intentionally chose not to comply. Accordingly, the
22 Commission should reject the Recommended Order's findings and conclusions that
23 Qwest intentionally violated a known legal standard and thereby intentionally
24 discriminated against other CLECs.

25
26 ¹⁶ Recommended Order, Findings of Fact, ¶ 37.

1
2 **B. The Evidence Does Not Support the Recommended Order’s Findings**
3 **of Harm or Discrimination.**

4 The Recommended Order does not mention, much less attempt to discredit, the
5 extensive undisputed testimony from Qwest’s witnesses regarding the nature of the
6 agreements at issue and the lack of harm to CLECs resulting from the failure to file those
7 agreements. And yet, the Recommended Order concludes without any support that
8 Qwest discriminated against CLECs and harmed competition in Arizona. These findings
9 are inconsistent with the record evidence and should be rejected.

10 1. **The Recommended Order’s finding of “harm” to competition**
11 **erroneously ignored the substantive requirements of Section**
12 **252(i).**

13 First, the Recommended Order erroneously concludes that Qwest “impermissibly
14 discriminated against other CLECs and harmed competition in Arizona” by “providing
15 discounts and escalation procedures to Eschelon and McLeod.”¹⁷ This conclusion is
16 completely contrary to the evidence in the record. Indeed, in stark contrast to Staff’s and
17 RUCO’s testimony, Qwest brought to the hearing witnesses who could testify to the facts
18 and who were subject to cross-examination by up to five sets of lawyers and the ALJ.
19 Qwest’s witnesses demonstrated that Qwest took concrete steps to ensure that CLECs
20 were treated in a non-discriminatory manner. This evidence went entirely un rebutted and
21 un answered during the hearing – and has been disregarded in the Recommended Order.

22 More fundamentally, however, with regard to the allegedly discriminatory
23 discounts offered to Eschelon and McLeod, there was no evidence that a single other
24 CLEC would have been eligible to opt into the agreements under Section 252(i). The
25 failure to file an agreement cannot have harmed other CLECs if those CLECs would not
26 have been qualified to opt into its terms in any event – and without this crucial step, there

¹⁷ Recommended Order, Findings of Fact, ¶ 45. See also *id.* at ¶ 38.

1 can be no basis for ordering the penalties in the Recommended Order. The FCC orders
2 and rules impose both substantive and procedural constraints on the opt-in process.
3 CLECs may not use Section 252(i) to strip individual provisions in an interconnection
4 agreement out of context and avoid the related terms and conditions.¹⁸ When a CLEC
5 invokes its “pick and choose” rights, it must “accept all terms that [the ILEC] can prove
6 are ‘legitimately related’ to the desired term.”¹⁹ This limitation is not confined to pricing
7 provisions; CLECs must agree to accept “the same terms and conditions, *in addition to*
8 *rates*, as those provided in the agreement”²⁰ if they wish to opt in. For that reason, opt-in
9 does not proceed automatically in every case: if a CLEC refuses to accept related terms
10 and conditions, the ILEC is permitted to seek adjudication under the relevant state
11 process.²¹ In other words, even if provisions of the unfiled agreements had originally
12 been filed, opt-in rights would have been considered on a case-by-case basis, and in no
13 case would the CLEC have been entitled to ignore related provisions of the agreements.

14 The evidence at the Section 252 hearing established that terms integrally related to
15 the alleged discounts provided to Eschelon and McLeod included: volume and term
16 commitments (\$150 million over 5 years for Eschelon; \$480 million over 3 years for
17 McLeod);²² the purchase of UNE-Star and the associated conversion costs;²³ and a bill-
18 and-keep arrangement for reciprocal compensation.²⁴ Staff and RUCO failed to produce

19
20 ¹⁸ See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*,
First Report and Order, 11 FCC Rcd 15499, 16139 ¶ 1315 (1996) (“*Local Competition Order*”).

21 ¹⁹ *Southwestern Bell Tel. Co.*, 221 F.3d at 818 (citing *Iowa Utils. Bd.*, 525 U.S. at 396).

22 ²⁰ 47 C.F.R. § 51.809(a) (emphasis added). This provision was upheld in *AT&T Corp. v. Iowa Utils. Bd.*,
525 U.S. 366, 396 (1999).

23 ²¹ *Local Competition Order* ¶ 1321.

24 ²² See Joint 1-10; LBB-5. See also Tr., Vol. III, Testimony of W. Clay Deanhardt, at 679:7-20; Exhibit
MDC-2A; Pre-Filed Testimony of W. Clay Deanhardt, at 17:22-18:2 (“In short, McLeod committed to
purchasing specified volumes of Qwest products under a take-or-pay agreement and Qwest agreed to
provide McLeod with discounts if McLeod exceeded its take-or-pay commitments.”).

25 ²³ See Joint 1-10; LBB-5; Exhibit LBB-14.. See also Pre-Filed Testimony of W. Clay Deanhardt, at
62:13-14 (“In both cases, one of the interrelated agreements was filed as an interconnection agreement
amendment that gave the CLEC access to UNE-Star.”).

26 ²⁴ See Joint 1-10; LBB-5; Exhibit LBB-14.

1 any evidence that any CLEC was willing or able to agree to these related terms, and Dr.
2 Johnson, on behalf of RUCO, conceded that no effort had been made to determine which,
3 if any, Arizona CLECs would have or could have opted into the alleged discounts.²⁵ No
4 CLEC stepped forward to fill the evidentiary void left by Staff and RUCO. Indeed, not a
5 single CLEC presented *any* evidence,²⁶ let alone evidence of eligibility and willingness to
6 opt into an unfiled provision or other evidence of any actual harm.²⁷

7 In light of the complete lack of evidence in the record that any Arizona CLEC
8 would have or could have accepted these related terms even if the “discounts” had been
9 filed and approved, the Recommended Order’s finding of discrimination remains
10 unsupported. The Commission cannot base fines and non-monetary relief of the
11 magnitude of the Recommended Order without at least some admissible supporting
12 evidence, and there was none here.

13 **2. The Recommended Order’s findings of violations of Section 252**
14 **are not supported by the record.**

15 The Recommended Order generically concludes that the agreements listed in
16 Exhibit B “contain provisions related to on-going obligations concerning resale, UNEs,
17 reciprocal compensation, interconnection and wholesale services in general under Section
18 251(b) and (c) of the 1996 Act” and therefore were required to be filed for Commission
19 approval.²⁸ As explained above, a number of the agreements listed in Exhibit B – such as
20 settlement agreements with only backward-looking consideration, purchase agreements,

21 _____
²⁵ Tr., Vol. III, Testimony of Ben Johnson, at 523:16-524:2.

22 ²⁶ Although the record from the Minnesota unfiled agreements proceeding was incorporated into the
23 record in the Section 252 docket, that does not cure the problem of the absence of first-hand, admissible
24 evidence of discrimination against Arizona CLECs. Not surprisingly, the Minnesota record contains no
25 evidence of any harm to CLECs in the state of Arizona.

26 ²⁷ The Recommended Order notes that Time Warner was “particularly troubled by the fact that Staff did
not analyze how the proposed discounts [in the Proposed Settlement] would affect individual CLECs.”
Recommended Order at 29. This concern is ironic in light of Time Warner’s own failure (like every other
CLEC) to offer any evidence of actual harm during the Section 252 hearing.

²⁸ Recommended Order, Findings of Fact, ¶ 34.

1 proposal letters, and other contracts or documents that do not create new and ongoing
2 obligations related to Section 251(b) or (c) services – do not contain *any* “on-going
3 obligations” related to 251(b) or (c) services and therefore do not properly fall within the
4 filing requirement. To the extent the Recommended Order finds Qwest in violation for
5 not filing such agreements (as explained above), it errs.

6 In addition, the record evidence also does not support the Recommended Order’s
7 characterizations of Qwest’s agreements with Eschelon and McLeod.²⁹ No party other
8 than Qwest presented non-speculative, first-hand evidence regarding the nature of these
9 agreements. Yet, instead of basing conclusions based on documentary evidence or first-
10 hand testimony offered by Qwest employees, the Recommended Order justifies its
11 findings by referring to an affidavit and deposition testimony submitted in the Minnesota
12 proceeding by Blake Fisher, a witness who refused to appear and be subject to cross-
13 examination at the hearing.³⁰ Perhaps more surprising is the Recommended Order’s
14 statement that “there is no evidence of documents supporting the assertion that Eschelon
15 provided consulting services under the agreement.”³¹ In fact, Qwest submitted testimony
16 and a large number of documents evidencing the consulting services provided to Qwest
17 by Eschelon, including documents identifying the consulting teams,³² documents
18 describing the work of the teams as it was ongoing,³³ and documents reflecting the
19 improvements to Qwest’s processes as a result of the consulting services.³⁴ Qwest also
20 submitted a substantial amount of material that Eschelon gave Qwest related to the
21 consulting services it provided to Qwest in December 2001.³⁵ These documents were

22
23 ²⁹ Recommended Order, Findings of Fact, ¶ 36.

24 ³⁰ *E.g.*, Recommended Order at 6.

25 ³¹ Recommended Order at 39.

26 ³² Exhibits JR-1 and JR-5.

³³ *See, e.g.*, Exhibit JR-2, JR-11, and JR-12.

³⁴ *See, e.g.*, Exhibits JR-3, JR-4, JR-6, JR-7, JR-8, JR-9, and JR-10.

³⁵ Exhibit JR-13.

1 admitted into evidence during the Section 252 hearing.³⁶ The Recommended Order's
2 conclusions regarding the consulting agreement with Eschelon are reached only by
3 completely disregarding these documents – despite that fact that there was no evidence
4 disputing their authenticity – and must be rejected.

5 **3. The Recommended Order's rulings that Qwest illegally**
6 **interfered with the Section 271 process should not be sustained.**

7 The Recommended Order's finding that Qwest "undermined the Commission's
8 authority to hear complaints, prevented the Commission from learning about service-
9 related issues . . . and interfered with the Commission establishing a complete record in
10 the Section 271 investigation" by entering into certain non-participation agreements³⁷ is
11 contrary to the established public policy of the State at the time of the agreements.³⁸
12 Qwest understands that the Commission does not favor non-participation agreements.
13 However, whether these agreements provide a separate basis for penalties is an entirely
14 different question. The evidence that is available simply does not support a conclusion
15 that Qwest acted contemptuously. Moreover, it cannot be disputed that an agreement by
16 a CLEC not to participate in a particular proceeding or to not file a complaint with a state
17 commission is not an interconnection agreement subject to Section 252's filing
18 requirements. The Commission's authority to evaluate contracts for public interest
19 extends only to contracts that must be filed in the first place.³⁹ As a result, contracts that
20 contain non-participation agreements but do not involve Section 251(b) and (c) services
21 are not within Section 252(e)'s filing requirement and cannot be the basis for penalties.

22 _____
23 ³⁶ Tr., Vol. II, at 360:14-20.

24 ³⁷ Recommended Order, Findings of Fact, ¶ 44.

25 ³⁸ Certainly, any suggestion that Qwest prevented Eschelon from participating in the 271 process is
26 unfounded. Ms. Crandall's un rebutted testimony demonstrated that Eschelon was one of the most active
participants in Qwest's Change Management Process and opened "nearly twice as many issues as all the
other CLECs combined." Pre-Filed Rebuttal Testimony of Dana Filip Crandall, at 5:12-6:4; 8:8-16;
Exhibits DLF-5, DLF-6, DLF-7.

³⁹ See 47 U.S.C. § 252(e)(2)(A).

1 In addition, Qwest presented extensive testimony that these agreements – which
2 resolve disputes outside of litigation and the regulatory process – are in the public
3 interest.⁴⁰ Furthermore, “[n]o one can point to any obligation on the part of a CLEC (or
4 any other party) to spend its resources participating in regulatory proceedings.”⁴¹ Indeed,
5 McLeod stated that “[d]ecisions not to participate in regulatory proceedings are the result
6 of considerations related to allocation of limited legal/regulatory resources at
7 McLeodUSA” and “[a]s long as Qwest was in compliance there was little or no basis or
8 reason to participate.”⁴² And Dr. Johnson, RUCO’s policy and damages expert, conceded
9 that a CLEC’s decision whether to participate is a matter of business judgment.⁴³

10 Any finding that Qwest interfered with the Section 271 process or the
11 Commission’s processes by entering into non-participation agreements pre-supposes a
12 legal prohibition of such agreements that does not exist. Therefore, in light of the public
13 policy favoring settlements, the absence of any rule or order prohibiting settlements such
14 as these, and the subsequent workshop at which all parties were afforded an opportunity
15 to raise any issues they desired, the Proposed Order’s imposition of penalties based on
16 the non-participation agreements should be set aside.⁴⁴

17
18 ⁴⁰ Pre-Filed Testimony of Harry M. Shooshan, at 13:6-14:2.

19 ⁴¹ *Id.* at 19:21-20:2.

20 ⁴² Exhibit LBB-29. McLeod further stated, “McLeodUSA does not know what, if any, issues would have
21 been raised in the absence of [the agreement to remain neutral if Qwest remained in compliance].” *Id.*

22 ⁴³ Tr., Vol. III, Testimony of Ben Johnson, at 539:6-23.

23 ⁴⁴ A waiver, often in the form of a release, is an important part of every compromise and settlement,
24 without which the settlement of disputes would be rendered all but impossible. 66 Am.Jur.2d Release § 2
25 (2001). In settlements, parties may choose to waive whatever rights they see fit. *See, e.g., Romska v.*
26 *Oppper*, 594 N.W.2d 853, 857 (Mich.App. 1999)(“[The Michigan Court of Appeals] is aware of no legal
rule in Michigan that precludes settling parties from waiving whatever rights they choose.”). This
includes the right to initiate or participate in regulatory proceedings. In fact, Arizona law allows a party
to completely release and abandon an entire claim; once abandoned, the claim is extinguished and cannot
be raised in any forum – including regulatory proceedings. Once a party enters into such an agreement,
sometimes called a covenant not to sue, that agreement is enforceable under Arizona law. *Cunningham v.*
Goettl Air Conditioning, 194 Ariz. 236, 241, 980 P.2d 489, 494 (1999). Parties routinely enter into such
agreements and waive such rights to resolve disputes. The record demonstrates that this is exactly what
occurred with the settlement agreements at issue in the 271 sub-docket.

1 **C. The Remedies And Credits The Recommended Order Seeks To Impose**
2 **Are Inappropriate.**

3 The Recommended Order substitutes a hodgepodge of remedies and credits for the
4 Settlement Agreement Qwest and Staff proposed. Some of the Order's penalty
5 provisions track portions of the Settlement Agreement or are, once one gets past Qwest's
6 objections to the findings of liability and wrongdoing in the first place, otherwise
7 unobjectionable.⁴⁵ For reasons articulated many times before, however, Qwest does
8 object, and must object, to the portions of the Recommended Order requiring Qwest (i) to
9 permit CLECs to opt into the terms of the agreements listed on Exhibit B without regard
10 to related terms and conditions and (ii) to credit CLECs 10% for their purchases of
11 intrastate services or purchases from Qwest Communications Corporation.

12 **1. The Recommended Order oversteps the Commission's**
13 **jurisdictional and substantive authority in ordering opt-in rights**
14 **and credits.**

- 15 a. The Commission cannot, as a matter of law, order Qwest to
16 allow CLECs to opt into agreement terms without satisfying
17 related terms and conditions or terms in terminated
18 agreements.

19 As explained in detail above, a CLEC must accept related terms, including the
20 significant volume commitments, to opt into a term of an approved interconnection
21 agreement. Allowing CLECs to opt into contractual terms without also requiring them to

22 ⁴⁵ Subject to and without waiving its fundamental objections to the findings supporting any findings of
23 wrongdoing or penalties in these three dockets, as set forth above, Qwest has no separate objection to (a)
24 the administrative penalty of \$47,000 relating to the failure to file agreements for approval, (b) the
25 calculation of the \$189,000 administrative penalty relating to Decision No. 64922, and (c) the direction to
26 file the Exhibit B agreements for approval. Qwest does, however, object to (d) the direction that Qwest
retain and pay for an independent monitor for a three-year period, (e) the direction that Qwest continue its
internal web-based Compliance Training Program, (f) the direction that Qwest retain a consultant to
provide independent assessments of improvements to Qwest's wholesale rate implementation process, (g)
the direction that Qwest continue its Docket Governance Team for three years, and (h) the provisions of
the Order relating to timeframes and deadlines. Although Qwest is willing to agree to these conditions as
part of a voluntary settlement agreement, they amount to an impermissible infringement on the
Company's power of self-management if imposed by Commission order. *See supra*. Section III.C.

1 meet related terms, such as the volume commitment required of McLeod, affords the
2 opting-in CLEC a benefit not provided to the original CLEC.⁴⁶ Similarly, offering other
3 CLECs credits based on the alleged discounts without also requiring them to satisfy the
4 corresponding volume and term commitments affords other CLECs a substantial
5 advantage not provided to Eschelon and McLeod, contrary to the opt-in provisions and
6 non-discrimination mandate of the Act.

7 Several general principles forbid the generic opt-in penalty contained in the
8 Recommended Order. First, not all of the provisions in the agreements at issue pertain to
9 ongoing Section 251 services. Many of the agreements here contain other terms, such as
10 settlements of historic disputes with backward-looking consideration. Section 252(i) of
11 the Act permits CLECs to pick and choose only interconnection provisions approved and
12 subject to Section 252(e).⁴⁷ These other terms, including settlement provisions, cannot
13 be made available for other CLECs to opt into.

14 Second, in order to opt into an ongoing provision related to Section 251(b) or (c)
15 services, a CLEC must be similarly situated to the contracting CLEC and must agree to
16 accept “the same terms and conditions, in addition to rates, as those provided in the
17 agreement”⁴⁸ if they wish to opt in. Remedies premised upon Section 252(i) must,
18 therefore, account for the CLECs’ half of the bargain. But, as explained above, none of
19 the CLECs who participated in these dockets, nor Staff nor RUCO, have offered a scrap

20 ⁴⁶ Comparing the actual terms of the alleged McLeod and Eschelon “discounts” with the terms of the
21 Recommended Order provides a good example of the advantage to other CLECs. For a CLEC to be
22 eligible under Section 252(i) to opt into the McLeod discount, it would be required to accept related
23 terms, including the significant volume commitments, and the “discount” would remain in place for 18
24 months. Although the alleged discount provided to Eschelon had a lower volume commitment than the
25 McLeod commitment, it was only in place for 10½ months.

24 ⁴⁷ 47 U.S.C. § 252(i); Memorandum Opinion and Order, *In the Matter of Application of Qwest*
25 *Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the*
26 *States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*,
WC Docket No. 02-314 (Dec. 20, 2002), at ¶ 488.

⁴⁸ 47 C.F.R. § 51.809(a) (emphasis added). This provision was upheld in *AT&T Corp. v. Iowa Utils. Bd.*,
525 U.S. 366, 396 (1999).

1 of evidence that any Arizona CLEC would have been eligible for the “discounts” or any
2 other terms contained in these agreements, and the Recommended Order does not require
3 them to do so (as § 251(i) would). The related terms integral to the alleged discount
4 agreements with Eschelon and McLeod were significant,⁴⁹ and in any event not as simple
5 as the Recommended Order seems to assume.⁵⁰ Any penalty assessment cannot “strip
6 away” these related terms.⁵¹

7 Interestingly, at least two of Qwest’s most prominent opponents understood and
8 agreed with this position. In its Supplemental Report and Recommendation, Staff
9 recognized, and then proposed, to address issues relating to a specific carrier’s ability to
10 opt into any of the previously unfiled agreements on a case-by-case basis as disputes
11 arise, and Staff recommended a Phase B of this Docket be set up for that purpose.⁵² At
12 the time, Qwest agreed that a separate body of law under Section 252(i) governs issues of
13 opt-in and that a Phase B was appropriate, and Staff’s testimony demonstrated why such
14 a Phase B is both appropriate and necessary. Staff’s witness, Marta Kalleberg, testified
15 that the McLeod discount agreement, for example, was an extension of the take or pay
16 agreement and had different tiers of discounts depending on the volume of purchases that
17 McLeod made.⁵³ Moreover, RUCO’s own expert witness, Clay Deanhardt, upon

18 _____
19 ⁴⁹ See *supra* Section IV.B.1 (describing related terms, including volume and term commitments and the
purchase of the UNE-Star platform with its accompanying bill and keep arrangement and conversion
costs).

20 ⁵⁰ RUCO characterized the alleged agreement with McLeod not as providing for a flat 10% discount, but
rather as creating a three-tiers structure ranging from 6.5% to 10%, depending on purchase volumes. Pre-
21 Filed Testimony of W. Clay Deanhardt, at 12:10-11; Tr., Vol. III, Testimony of W. Clay Deanhardt, at
679:21-681:9. See also Pre-Filed Testimony of Marta Kalleberg, Table 5, at 48:1-3; Tr. Vol. IV,
22 Testimony of Marylee Diaz Cortez, at 900:11-19.

23 ⁵¹ See Exhibit Q-14, First Report and Order, ¶ 1315 (“For instance, when an incumbent LEC and a new
entrant have agreed upon a rate contained in a five-year agreement, section 252(i) does not necessarily
24 entitle a third party to receive the same rate for a three-year commitment. Similarly, that one carrier has
negotiated a volume discount on loops does not automatically entitle a third party to obtain the same rate
25 for a smaller amount of loops.”).

26 ⁵² Supplemental Staff Report and Recommendation, Docket No. RT-00000F-02-0271, at 8-9 (Aug. 14,
2002).

⁵³ Tr. Vol. IV, Testimony of Marta Kalleberg, at 899:23-900:23.

1 whom the Staff's witness relied for her own testimony, testified that volume and terms
2 conditions were integrally related to the Eschelon and McLeod discount agreements. At
3 the hearing, he stated that the McLeod discount actually had several different tiers,
4 depending on whether McLeod could satisfy the term and volume commitments.⁵⁴

5 The Recommended Order disregards Staff's recommendation that Section 252(i)
6 be complied with, and completely ignores this evidence from witnesses *against* Qwest
7 that there were related volume terms and conditions. As a result, the Recommended
8 Order's blanket opt-in order violates both the terms and the structure of § 252(i), and it is
9 legally indefensible.

10 b. The length of the credits is contrary to the evidence, contrary
11 to Staff's recommendation, and objectively unwarranted.

12 Whatever the original terms of the Eschelon and McLeod "discount" agreements,
13 those agreements were in effect no longer than eighteen months.⁵⁵ Once an agreement is
14 terminated or superseded (as the alleged discount agreements have been), provision of
15 Section 251 services under the terms of that agreement cease, and, if the terms were
16 discriminatory, any discrimination (and any resulting harm) ceased. But the Proposed
17 Order attempts to "rectify" the alleged harms from those agreements by requiring Qwest
18 to pay credits to each Arizona CLEC based on its purchases over a twenty-four month
19 period. The Proposed Order's credit provision is too long – it gives other CLECs the
20 benefits of the alleged discount agreements for longer than Eschelon and McLeod
21 allegedly received them, a result that conflicts with the underlying purposes of Sections

22 _____
23 ⁵⁴ Tr. Vol. III, Testimony of W. Clay Deanhardt, at 679:7-680:12, 681:2-9.

24 ⁵⁵ The Recommend Order cites Ms. Kalleberg's testimony for the conclusion that the alleged discount
25 agreement with McLeod was in effect for 23 months. See Proposed Order at 44. However, as Larry
26 Brotherson testified, that agreement was in effect only 18 months. See Rebuttal Testimony of Larry B.
Brotherson, at 6:19-25 (McLeod agreement in effect from January 1, 2001 to June 30, 2002, a period of
18 months); Exhibit S-12 (Eschelon received no payments under the alleged discount agreement since
November 9, 2001, so was in effect only 10 ½ months). Even the Staff concurs that the Eschelon
agreement was in effect at most 17 months. Testimony of Marta Kalleberg, at 20:23-21:1.

1 251 or 252 and, in a perverse result, discriminates against Eschelon and McLeod.

2 The Proposed Order evidently relies upon the October 2000 *date* of the purchase
3 agreement document as the start date, when, in fact, that document says that the purchase
4 arrangement shall begin January 1, 2001. Likewise, the Proposed Order seems to rely
5 upon the September 19, 2002 *date* of the agreement terminating the purchase
6 arrangement; however, that document says that the “cut-off” date for the arrangement
7 was June 30, 2002. Thus, the length of the Qwest/McLeod arrangement was at best 18
8 months, and there is no reasonable, evidentiary basis for a longer, 24-month period.

9 c. The Commission lacks authority to order Qwest to pay credits
10 against CLECs’ purchases of intrastate services.

11 The FCC Order is clear that a contract between an ILEC and a CLEC qualifies as
12 an “interconnection agreement” when it “creates an ongoing obligation pertaining to” the
13 ILEC’s interconnection obligations under Section 251(b) or (c).⁵⁶ Contracts that do not
14 create ongoing obligations or do not pertain to Section 251(b) or (c) matters need not be
15 filed, and there is no basis for imposing penalties on Qwest for not filing those
16 agreements.⁵⁷ And, as a matter of law, Qwest cannot be required by this Commission to
17 credit CLECs based on purchases of intrastate services as a “penalty” for violating a
18 filing requirement that does not exist.

19 This legal proposition is not in serious dispute. Staff conceded in its hearing
20 testimony in the Section 252(e) docket that intrastate access is not a Section 251(b) or (c)

21 _____
22 ⁵⁶ *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope*
23 *of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section*
24 *252(a)(1), Memorandum Opinion and Order, WC Docket No. 02-89 (Oct. 4, 2002), at ¶ 8 (hereinafter*
25 *“FCC Order”).*

26 ⁵⁷ *See In the Matter of Application of Qwest Communications International, Inc. for Authorization to*
Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska,
North Dakota, Utah, Washington, and Wyoming, Memorandum Opinion and Order, WC Docket No. 02-
314 (Dec. 20, 2002), at ¶ 488 (stating that when contracts that are not interconnection agreements are not
filed, “no discrimination within the meaning of section 251, 252, or 271 has occurred because sections
251 and 252 have not been triggered with respect to those agreements”).

1 service⁵⁸ (although prior to the Settlement Agreement it inexplicably persisted in
2 demanding that Qwest provide CLECs a 10% discount on intrastate access).⁵⁹ The FCC
3 has ruled that an ILEC does not discriminate, and therefore does not violate Sections 251,
4 252, or 271, by declining to file *non-251(b)* or (c) terms – such as terms related to
5 intrastate access.⁶⁰ Because Section 252(e) does not create a filing obligation for non-
6 251(b) or (c) services, penalty credits cannot, as a matter of law, extend beyond Section
7 251(b) and (c) to include intrastate access. Thus, any penalty order that requires Qwest to
8 provide CLECs with discounts on intrastate access lacks the required nexus to the alleged
9 violations.

10 Finally, the Commission cannot order a refund based on non-Section 251(b) and
11 (c) services without violating the filed rate doctrine, which prevents the Commission
12 from retroactively changing a tariffed service, such as switched access rates.⁶¹ If a carrier
13 gives one customer an unlawful preferential rate or term of service (that departs from the
14 tariffed rates and terms approved by the regulator as consistent with the public interest),
15 the regulator may not compound the harm and the risks to the public interest by
16 extending the unlawful and unapproved terms to other customers.⁶² Rather, the proper

17 ⁵⁸ Tr., Vol. IV, Testimony of Marta Kalleberg, at 929:24-930:18.

18 ⁵⁹ Staff Post-Hearing Memorandum, at 24.

19 ⁶⁰ *In the Matter of Application of Qwest Communications International, Inc. for Authorization to Provide*
20 *In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North*
Dakota, Utah, Washington, and Wyoming, Memorandum Opinion and Order, WC Docket No. 02-314
(Dec. 20, 2002), at ¶ 488.

21 ⁶¹ *See Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) ("The legal rights of
22 shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until
23 suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper.
24 The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. . . .
25 This stringent rule prevails, because otherwise the paramount purpose of Congress – prevention of unjust
26 discrimination – might be defeated." (quoting *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156,
163 (1922))).

⁶² *See Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 (1981) ("It would undermine the
Congressional scheme . . . to allow a state court to order as damages a rate never filed with the
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).

1 remedy under the filed rate doctrine is to require the carriers receiving the different rates
2 to refund the amounts of the alleged discounts.⁶³ A Commission order granting all
3 CLECs automatic refunds on intrastate access is not an available remedy.

4 The Recommended Order finds that Qwest violated A.R.S. § 40-334.⁶⁴ Although
5 the Recommended Order does not explain the basis for each proposed penalty, AT&T
6 argued in post-hearing briefs that intrastate access should have been part of the credits
7 afforded in the Settlement Agreement as a remedy for alleged discrimination in violation
8 of A.R.S. § 40-334.⁶⁵ In fact, A.R.S. § 40-334 cannot serve as a basis for ordering a
9 credit based on intrastate access. First, A.R.S. § 40-334 does not provide for the
10 automatic refunds AT&T seeks. Arizona courts have interpreted this obligation as being
11 akin to the federal requirement that similarly situated customers receive similar
12 treatment: “The non-discrimination doctrine [embodied by A.R.S. § 40-334] has been
13 defined as an obligation of a public service corporation to provide impartial service and
14 rates to all its customers *similarly situated*.” *Miller v. Salt River Val. Water Users’ Ass’n*,
15 11 Ariz.App. 256, 463 P.2d 840, 844 (1970) (emphasis added). Accordingly, unless
16 CLECs were situated similarly to Eschelon and McLeod (for which there was no
17 evidence in the Section 252(e) hearing), they could not have suffered discrimination
18 under A.R.S. § 40-334 to justify the inclusion of intrastate access in the Discount Credits.

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

24 ⁶³ See *County of Stanislaus v. Pac. Gas & Elec. Co.*, 114 F.3d 858, 863 (9th Cir. 1997) (disapproving
25 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].”).

26 ⁶⁴ Recommended Order, Findings of Fact, at ¶ 38 and Conclusions of Law, at ¶ 5.

⁶⁵ Testimony of T. Pelto at 15.

1 Finally, the Recommended Order suggests that Staff “bring a separate action in
2 Phase Two of this proceeding for the purpose of addressing Qwest’s discriminatory
3 rates.”⁶⁶ Such a separate action is unnecessary and duplicative, because these
4 proceedings have addressed all issues of discrimination arising from the unfiled
5 agreements and the appropriate remedies.

6 **2. The Commission lacks jurisdiction to impose criminal penalties,**
7 **and criminal contempt sanctions are inappropriate here in any**
8 **event.**

9 As even RUCO conceded, “the Commission does not have jurisdiction to impose
10 criminal penalties.”⁶⁷ The Commission has authority pursuant to A.R.S. §§ 40-424 to
11 issue civil contempt penalties for the failure to observe or comply with a Commission
12 order, rule, or requirement. However, that statute does not authorize the Commission to
13 issue criminal contempt penalties, and certainly not on the scale contemplated by the
14 Recommended Order. Under Arizona law, “[a] criminal contempt is characterized by
15 imposition of an unconditional sentence for punishment or deterrence”⁶⁸ and “[a]
16 contempt finding intended solely for the purpose of imposing punishment must be a
17 criminal contempt finding.”

18 As the United States Supreme Court explained in *International Union, United*
19 *Mine Workers of America v. Bagwell*, a defining characteristic of civil contempt is that
20 “the contemnor is able to purge the contempt and obtain his release by committing an
21 affirmative act.”⁶⁹ By contrast, and in the context of fines, “a ‘flat, unconditional fine’
22 totaling even as little as \$50 announced after a finding of contempt is criminal if the
23 contemnor has no subsequent opportunity to reduce or avoid the fine through

24 _____
25 ⁶⁶ Recommended Order at 57.

26 ⁶⁷ RUCO Post-Hearing Memorandum, at 26.

⁶⁸ *State v. Cohen*, 15 Ariz. App. 436, 440, 489 P.2d 283 (App. 1971).

⁶⁹ 512 U.S. 821, 828 (1994).

1 compliance.”⁷⁰ Under Arizona law, “the purpose of finding a person in civil contempt is
2 to coerce that person to do or refrain from doing some act.”⁷¹ In other words, civil
3 contempt authority exists only to require a person to do some act in the future, and the
4 penalty ceases upon compliance. In contrast, “[a] criminal contempt is characterized by
5 imposition of an unconditional sentence for punishment or deterrence.”⁷² This distinction
6 is manifest in the nature of the penalties: penalties for civil contempt are prospective and
7 penalties for criminal contempt are retrospective.⁷³

8 Here, the contempt sanctions in the Recommended Order are purely retrospective
9 and imposed solely to punish any past failure to comply with Sections 252 and 271 and
10 deterring future non-compliance – improper purposes for civil contempt sanctions.
11 Indeed, the Recommended Order specifically characterizes the \$11 million as
12 “administrative penalties” that respond to two forms of “contempt.”⁷⁴ Moreover, as
13 discussed above, Qwest currently is in compliance with its obligations under Section 252,
14 and thus contempt sanctions are not necessary to coerce future compliance with that
15 provision. Accordingly, the monetary penalty falls well outside the Commission’s civil
16 contempt authority pursuant to A.R.S. §§ 40-424.⁷⁵

17 ⁷⁰ *Id.* at 829.

18 ⁷¹ *Korman v. Strick*, 133 Ariz. 471, 474, 652 P.2d 544 (1982). *See also Ong Hing v. Thurston*, 101 Ariz.
19 92, 98, 416 P.2d 216 (1966) (“civil contempt is the disobedience of a court order directing an act for the
benefit or advantage of the opposing party to the litigation”).

20 ⁷² *State v. Cohen*, 15 Ariz. App. 436, 440, 489 P.2d 283 (App. 1971). *See also Korman*, 133 Ariz. at 474
21 (“[a] contempt finding intended solely for the purpose of imposing punishment must be a criminal
contempt finding.” (emphasis added)); *Ong Hing*, 101 Ariz. at 98 (“criminal contempt is the commission
22 of a disrespectful act directed at the court itself which obstructs justice ... We are satisfied that we are
dealing with a criminal contempt as the primary purpose of respondent’s action was to punish for
petitioner’s alleged disrespect to the court and attempted obstruction of justice.”).

23 ⁷³ *See Vanguard Eng’g v. State*, 166 Ariz. 405, 406, 803 P.2d 126 (1990) (“Since the petitioner could not
prospectively avoid the penalty by performing the acts required of it by the court, the fine cannot be
classified as civil in nature.”).

24 ⁷⁴ Recommended Order at 41.

25 ⁷⁵ Moreover, A.R.S. § 40-429 requires that contempt penalties can be imposed only by a court of
competent jurisdiction after the Commission files an action in the name of the state. And, criminal
26 contempt sanctions require a far greater array of procedural due process protections, including reasonable
notice of the charges, a proceeding before a state trial court in which the state bears the burden of proof

1 Even assuming the Commission has the authority to assess criminal contempt
2 penalties, the Commission lacks authority to assess such penalties on a daily basis.⁷⁶
3 A.R.S. § 40-424 authorizes the Commission to impose fines “in an amount of not less
4 than one hundred nor more than five thousand dollars.” The statute itself does not
5 provide for daily penalties. And although the Commission “has no implied powers,”⁷⁷
6 neither Staff (in the earlier briefing) nor the Commission (in the Recommended Order)
7 cites anything other than the Arizona Constitution for the proposition that the
8 Commission has the authority to accumulate penalties in that manner. The Arizona
9 Supreme Court has stated that “such powers as the Commission may exercise do not
10 exceed those to be derived from a strict construction of the constitution and implementing
11 statutes.”⁷⁸ The Commission has an express power to impose penalties under § 40-424 up
12 to only five thousand dollars per offense, with no indication that such penalties may
13 accumulate daily.

14 The Commission cannot avoid the prohibition on per-day fines through the “per-
15 CLEC” theory it articulates at page 43 of the Recommended Order for one simple reason:
16 as set forth above in Section IV.B.1, there is no evidence in the record that any one of the
17 804 certificated Arizona CLECs actually was denied an opportunity to opt into any
18 provision of the “unfiled agreements.” Again, a CLEC’s right to opt into a particular
19 term depends in the first instance on that CLEC’s ability to agree to and satisfy any
20 related terms and conditions.⁷⁹ And with respect to the “discount” agreements at the
21 center of the Section 252 proceeding, there is no evidence that a single Arizona CLEC

22 beyond a reasonable doubt, and a right to a trial by jury (in many circumstances). A.R.S. § 40-424. None
23 of these procedural due process rights was present in the proceeding that occurred here.

24 ⁷⁶ Contrary to the representation in the Recommended Order, at 42 n.18, Qwest did in fact raise its
25 objection to the Commission’s per-day fining authority in its Post-Hearing Brief, at 15-16.

26 ⁷⁷ *Rural/Metro Corp. v. ACC*, 129 Ariz. 116, 117, 629 P.2d 83 (1981).

⁷⁸ *Id.* (citing *Southern Pacific Co. v. ACC*, 98 Ariz. 339, 345, 404 P.2d 692 (1965) and *Williams v. Pipe
Trades Indus. Program of Ariz.*, 100 Ariz. 14, 17, 409 P.2d 720 (1966)).

⁷⁹ See *supra* Section II.B.3.

1 could have met the volume and term commitments to which McLeod and Eschelon
2 agreed. There is, therefore, no evidentiary basis for a “finding” that “Qwest incurred a
3 separate violation for each of the 804 telecommunications carriers certificated in Arizona
4 at the end of 2000 who were denied an opportunity to opt in.”⁸⁰

5 The also is no evidentiary or legal basis for the Recommended Order’s rationale
6 that additional penalties can be imposed for the supposed denials to CLECs of an
7 opportunity to opt into the unfiled agreements.⁸¹ Any violation here is simply a violation
8 of Section 252(e)’s filing requirement, and penalties based both on a filing violation and
9 a supposed violation of Section 252(i)’s opt-in provisions is impermissibly duplicative.⁸²
10 The same principles undercut the Recommended Order’s rationalization that Qwest
11 committed 500 separate violations for failing to implement UNE rates.⁸³

12 Furthermore, the Recommended Order’s finding that “Qwest’s conduct
13 prohibiting CLECs from participating in the Section 271 proceedings” and “Qwest’s
14 failure to provide the Commission with complete information when requesting approval
15 of Interconnection Agreements” both demonstrate contempt⁸⁴ is legally infirm for three
16 reasons, already discussed at length in this brief: First, the Commission’s contempt
17 authority does not extend to what amounts to criminal sanctions. Second, given the lack
18 of clarity regarding the Section 252 filing standard, any violations by Qwest cannot be
19 “intentional, willful, and contrary to Commission rules and processes” as Staff alleges.
20 Third, terms regarding regulatory participation do not fall within Section 252 and cannot

21 _____
⁸⁰ Recommended Order at 43.

22 ⁸¹ See, e.g., *id.*

23 ⁸² “The applicable rule is that, where the same act or transaction constitutes a violation of two distinct
24 statutory provisions, the test to be applied to determine whether there are two offenses or only one is
25 whether each provision requires proof of an additional fact which the other does not.” *Blockburger v.*
26 *United States*, 284 U.S. 299, 304 (1932). Here, there are no allegations of conduct other than possible
filing violations that could support a claim for Section 252(i) violations, so there is no justification for
additional penalties.

⁸³ Recommended Order at 43.

⁸⁴ *Id.* at 41.

1 serve as a basis for penalties here. As a result, this finding is legally and factually in
2 error.

3 **D. No substantial evidence supports any finding of liability or the**
4 **imposition of penalties in the OSC docket**

5 The Recommended Order finds that Qwest willfully and intentionally violated
6 Decision No. 64299 by not implementing new wholesale rates until Dec. 15, 2002, and
7 by failing to notify the Commission of the delay in implementation. RO at 39-40, 52. No
8 substantial evidence supports this conclusion. Qwest's conduct in not implementing the
9 rates and in failing to communicate with the Commission may have been an error in
10 judgment, but it was not contempt. In order to convert the Arizona rates, 547 elements
11 had to be implemented and over 100 CLEC interconnection agreements reviewed, a
12 process that was both labor intensive and time consuming. As noted in Qwest's post-
13 hearing brief, the evidence showed that Qwest implemented the Arizona wholesale rates
14 in the same manner as wholesale rates in other states, and the period of time required to
15 implement the Arizona rate changes was in line with the time required elsewhere.
16 Qwest's Post-Hearing Brief at 5-15, Docket No. T-01051B-02-0871. In addition, Qwest
17 has credited all affected carriers, with interest, for the rates charged during the interim
18 period. Further, Qwest has acknowledged that it should have communicated with Staff
19 earlier about the implementation timeline. Qwest has also taken proactive steps to
20 improve its wholesale rate implementation process to ensure that such rates are
21 implemented more quickly. Qwest actions in these dockets simply do not amount to
22 intentional, willful contempt of a Commission order.

23 **V. CONCLUSION**

24 The Settlement Agreement is in the public interest and should be approved by the
25 Commission. The Commission may impose terms and conditions upon the \$6 million in
26 Voluntary Contributions to alleviate the Recommended Order's "primary concerns" with

1 the Settlement, and the remainder of the Settlement can be approved as negotiated by Qwest
2 and Staff. However, if the Commission rejects the Settlement Agreement, it should decline
3 to enter the Recommended Order. The Recommended Order is procedurally defective
4 because it purports to resolve the three dockets on their merits in the context of a hearing on
5 the approval of a Settlement Agreement. Further, the findings and conclusions in the
6 Recommended Order concerning Qwest's conduct and its award of credits to the CLECs are
7 not supported by substantial evidence and are contrary to law.

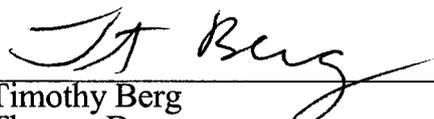
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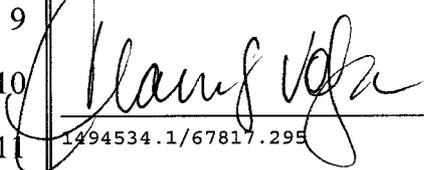
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