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Arizona Corporation Commission
DOCKETED

JAN 12 2004

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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

DOCKET NO. T-01051B-02-0871

Complainant.

v.

QWEST CORPORATION
Respondent.

**TIME WARNER TELECOM OF ARIZONA LLC
RESPONSE TO QWEST EXCEPTIONS**

I. THE RECOMMENDED ORDER PROPERLY REJECTS THE SETTLEMENT AGREEMENT

The Arizona Constitution expressly requires that penalties assessed against public service corporations be paid to the state and to no other source. *See* ARIZ. CONST. Art. XV, §16 (“If any public service corporation shall violate any of the rules, regulations, orders, or decisions of the corporation commission, such corporation shall forfeit and pay *to the state* not less than one hundred dollars . . . for each violation . . .”). This constitutional mandate is echoed in the statutory scheme governing the Commission’s authority to levy penalties against public service corporations. *See, e.g.*, A.R.S. § 40-421 (“The commission shall require that the laws affecting public service corporations . . . are enforced and obeyed, and that violations thereof are promptly prosecuted and *penalties due the state* therefore recovered and collected, and for such purposes may bring actions in the name of the state.”) (emphasis added); A.R.S. § 40-429 (actions to recover penalties must be brought in the name of the state). In sum, under Arizona law penalties assessed against Qwest by the Commission must be paid to the state.

The Settlement Agreement requires Qwest to pay in excess of \$11 million in fines for its unlawful behavior. As Qwest describes, \$5 million is to be paid to the state, and \$6 million is to be paid into one of three categories as determined by the Commission. (See Qwest Exceptions at 5.) The Administrative Law Judge quite appropriately found that this Voluntary Contribution was impermissible under Arizona law. Seeking to salvage the settlement, Qwest argues in response that: (a) “the Voluntary Contributions are not illegal, redirected penalties” and (b) the Commission regularly requires “commitments to invest and other non-penalty payments from public service corporations in approving settlement agreements.” Neither argument withstands analysis.

First, as the Administrative Law Judge correctly concluded it would be “disingenuous to claim that the Voluntary Contributions are not redirected penalties.” ROO at 40. “[T]he Settlement Agreement *requires* Qwest to pay \$6 million for targeted benefits to Arizona ratepayers . . .” Qwest Exceptions at 5. When a company is required to pay 6 million dollars to remedy past misconduct, that is a penalty. When the Arizona Corporation Commission assesses a penalty for misconduct, that penalty must be paid to the state general fund.

With respect to its second argument, Qwest can muster no authority for the remarkable assertion that the Commission, nonetheless, is authorized to oversee and direct the expenditure of 6 million dollars without legislative oversight. The two decisions cited by Qwest do not support its assertion. Decision No. 63268 involved contributions required in connection with Commission approval of an asset transfer and Decision No. 62672 involved conditions imposed on a regulated utility in a proposed merger. The contributions in each of these cases were not made in lieu of penalties assessed by the Commission.

Because the Voluntary Contribution portion of the Settlement Agreement is contrary to Arizona law, the Recommended Order appropriately rejects the proposed settlement.

II. THE RECOMMENDED ORDER FAIRLY RESOLVES THE DOCKETS

Because Time Warner Telecom purchases primarily from the Qwest interstate tariff, it would have been entitled to receive only a very modest credit (\$26,877) under the proposed Settlement Agreement. Time Warner Telecom’s credit will not increase significantly if the Recommended Order is approved. The loss suffered by Time Warner Telecom – due to the 10% discount given its competitors – was both real and measurable. Qwest has since been able to calculate the value of the discount and has reported to Time Warner Telecom that had it been given the 10% discount, it would have saved \$314,953 on services purchased from Qwest. During the course of the hearing on the Settlement Agreement, Staff and Qwest each

recommended that Competitive Local Exchange Carriers, like Time Warner Telecom, seek compensation for Qwest's discriminatory conduct in a new case or docket. Staff and Qwest both asserted that the dockets subject to the Settlement Agreement concerned Qwest's conduct, and not CLEC compensation.

Although Time Warner Telecom would not be made whole by the Recommended Order, it nonetheless supports the conclusions reached by the Administrative Law Judge. The order is a carefully reasoned and accurate summary of what transpired in the Global Settlement hearing and in each of the three dockets. The Recommended Order appropriately condemns Qwest conduct and endeavors to compensate CLECs. Two of the three dockets (the Section 252(e) secret agreements case and the Show Cause case) were fully briefed and the parties were awaiting a Recommended Order and Opinion when Qwest and Staff began discussing settlement. This order could well have been the awaited order. *Only*, with respect to the Section 271 sub-docket might the Recommended Order be premature. This situation could be remedied through the bifurcation of the Section 271 sub-docket. The Recommended Order would then be modified by the Administrative Law Judge to resolve only the Show Cause and Section 252(e) dockets.

Time Warner Telecom remains willing to participate in negotiations with Staff, and all other parties, to explore other alternatives for settling these cases.

Dated this 12th day of January, 2004

OSBORN MALEDON, P.A.

By 

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CERTIFICATE OF SERVICE

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

I certify that the original and seventeen copies of **TIME WARNER TELECOM OF ARIZONA LLC's** Response to Qwest Exceptions were hand delivered on January 12, 2004 to:

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