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7 IN THE MATTER OF U S WEST  
8 COMMUNICATIONS, INC.'S COMPLIANCE  
9 WITH SECTION 271 OF THE  
TELECOMMUNICATIONS ACT OF 1996.

Docket No. T-00000A-97-0238

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

Docket No. RT-00000F-02-0271

13 ARIZONA CORPORATION COMMISSION,

Docket No. T-01051B-02-0871

14 Complainant.

Arizona Corporation Commission

**DOCKETED**

JAN 12 2004

DOCKETED BY

15 v.  
16 QWEST CORPORATION,

17 Respondent.

18 **RUCO's REPLY**

19 The Residential Utility Consumer Office ("RUCO") hereby files its Reply to Qwest  
20 Corporation's ("Qwest") Exceptions ("Exceptions") to the Recommended Opinion and  
21 Order ("ROO") pursuant to the Procedural Order dated January 5, 2004.

1 **INTRODUCTION**

2 On December 1, 2003, the Administrative Law Judge issued her ROO as a  
3 recommended final resolution to three<sup>1</sup> separate and highly contested dockets now  
4 pending before this Commission. Among other things, the ROO rejected the proposed  
5 Settlement Agreement ("Agreement") entered into between the Commission's Utility  
6 Division's Staff ("Staff") and Qwest on July 25, 2003. More importantly, as a trier of fact in  
7 Arizona, who has listened to and considered all of the evidence, the Administrative Law  
8 Judge has determined that Qwest intentionally, willfully and deliberately violated state and  
9 federal laws. The ROO, through its recommended findings and penalties, holds Qwest  
10 accountable for its violations of state and federal law.

11 In its Exceptions, Qwest, by its misguided and misplaced arguments, continues to  
12 deny accountability for its wrongdoing. Qwest continues to downplay the significance and  
13 substance of the evidence, despite the overwhelming, unrebutted evidence in the record  
14 and the clear import of that evidence. Qwest continues to claim that it misinterpreted an  
15 imprecise federal standard when there is absolutely no question that the subject of its  
16 misconduct fell within that standard under any reasonable interpretation, including Qwest's  
17 own interpretation. Even if the Commission is persuaded by Qwest's argument, Qwest's  
18 conduct still violated the more generic state laws which prohibit discriminatory and  
19 preferential agreements<sup>2</sup>. Qwest's Exceptions are a clear indication that it still refuses to  
20 be held accountable for its misconduct.

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22 <sup>1</sup> The ROO proposes to resolve the 252 docket, 271 Sub-docket and the wholesale rate enforcement  
23 proceeding. RUCO was not a participant in the wholesale rate enforcement proceeding and takes no  
position with regard to its resolution.

24 <sup>2</sup> A.R.S. §§ 40-203, 40-334, and 40-374. Interestingly, Qwest does not address the state law and  
Commission Rules that the ROO found Qwest violated in the context of its misconduct.

1           Instead, Qwest encourages the Commission to approve the Agreement. Exceptions  
2 at 3. Qwest argues that the process used in reaching the Agreement was fair, that the  
3 monetary and non-monetary provisions of the Agreement are fair and reasonable, and that  
4 the Agreement as a whole is in the public interest. In actuality, the Agreement, as noted in  
5 the ROO, is unfair and unreasonable when measured against all the evidence in the  
6 record. ROO at 37. The Agreement is self-serving to Qwest and provides intentional and  
7 significant benefits to Qwest—a result that would be “perverse” given the “nature of  
8 Qwest’s conduct” with respect to the Eschelon and McLeod Agreements. ROO at 40.

9           Moreover, the Agreement fails miserably in what should be its primary  
10 objective—the deterrence of future misconduct by Qwest. The final resolution of these  
11 dockets should not allow Qwest to benefit by making self-serving investments and  
12 contributions. The final resolution should not provide Qwest with the incentive to engage  
13 in the same or similar conduct in the future, and consider being caught just the cost of  
14 doing business. As noted in the ROO, it is not good public policy to allow Qwest to buy its  
15 way out of a finding that it violated state and federal laws. ROO at 40. The ROO, not the  
16 Agreement, holds Qwest accountable for its misconduct. The Commission should adopt  
17 the ROO.

18           Qwest further raises two due process claims in its Exceptions. First, Qwest claims  
19 that the ROO is procedurally defective because it purports to resolve three dockets on their  
20 merits in the context of a hearing on the approval of a Settlement Agreement. Exceptions  
21 at 38. As will be more fully explained below, Qwest’s claim lacks merit because the  
22 records in the underlying dockets were complete prior to the time Qwest and Staff filed  
23 their proposed Agreement.

1 Finally, Qwest claims that it never waived its right to renew its request for a hearing  
2 in the 271 Sub-docket<sup>3</sup>. Exceptions at 11. RUCO agrees with Qwest that it should be  
3 allowed to renew its request for a hearing on the penalties only in the 271 Sub-docket.  
4 RUCO notes, however, that the recommended penalties in the ROO are specific to  
5 Qwest's failure to file the subject interconnection agreements. The penalties to be  
6 considered in the 271 Sub-docket, however, are to address the harm caused by Qwest's  
7 interference with the regulatory process. The two penalties are for two distinct acts of  
8 misconduct, and the monetary penalties recommended in the ROO only address the 252  
9 violations. Accordingly, at least with regard to the monetary penalties, the hearing that  
10 Qwest appears to be requesting<sup>4</sup> should consider monetary penalties in addition to those  
11 recommended in the ROO. Qwest should not be permitted to detract the Commission  
12 from immediate consideration of the remainder of the ROO, nor should it delay Qwest's  
13 payment of any penalties adopted by the Commission.

#### 14 **BACKGROUND**

15 Qwest and Staff filed a Notice of their Settlement Agreement and request for an  
16 Expedited Procedural Conference on July 25, 2003. Prior to that time a hearing had been  
17 held in the 252 proceeding, the record closed, and the parties were awaiting a decision. In  
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19 <sup>3</sup> Qwest also complains that in the two other dockets under consideration it was entitled to be heard on  
20 whether the specific provisions of the Agreement were appropriate resolutions to the substantive issues in  
21 those dockets. Exceptions at 11. However, with regard to the 252 docket, one of the key litigated issue  
involved remedies and what would be an appropriate resolution of the substantive issues. Therefore, Qwest  
should not be allowed to complain that the Commission deprived it of an opportunity to be heard regarding  
the resolution of the 252 issues.

22 <sup>4</sup> RUCO is unclear whether Qwest is requesting a hearing. In the title to its Exceptions, Qwest specifically  
23 requests a hearing. However, in its Motion for Leave to File a Response and Motion for Clarification filed on  
January 6, 2004, Qwest states that it is not requesting a further hearing at this time. See Qwest's Motion for  
Leave to File a Response and Motion for Clarification at page 2.

1 the 271 Sub-docket, Staff had filed its Final Report and Recommendation on May 6, 2003.  
2 In its report, Staff concluded that Qwest intentionally and deliberately interfered with the  
3 Commission's Section 271 process by entering into non-participation agreements with  
4 certain CLECs and recommended penalties including a \$7.4 million fine. See Staff's  
5 Report and Recommendation of May 6, 2003 at pp. 19-20. Staff further noted that even  
6 Qwest acknowledged that it had committed "transgressions" by implicitly or explicitly  
7 causing non-participation of certain CLECs in the 271 process. Staff Report at 19. On  
8 May 19, 2003, Qwest filed Exceptions to the Staff Report and requested a hearing on the  
9 penalties proposed by Staff in its report. See Qwest's Exception Regarding Section 271  
10 Sub-docket and Request for Hearing filed on May 16, 2003.

11 On July 29, 2003, Qwest withdrew its request for a hearing in the 271 Sub-docket  
12 without prejudice to renew its request. The Commission, in its Procedural Order of August  
13 7, 2003, consolidated the three dockets and reopened them for the limited purpose of  
14 considering the proposed Agreement. A hearing to consider the Agreement took place on  
15 September 16 and 17, 2003. The parties filed post-hearing and reply briefs.

#### 16 **THE EVIDENCE IN THE RECORD SUPPORTS THE ROO'S FINDINGS**

17 The ROO finds that Qwest's failure to file, among others, certain interconnection  
18 agreements it had with Eschelon and McLeod which provided Eschelon and McLeod  
19 discounts on all their purchases, and favorable escalation and provisioning procedures  
20 violated § 252 of the Telecommunications Act of 1996, A.R.S. §§ 40-203, 40-374, 40-334,  
21 A.A.C. R14-2-1112, R14-2-1307, R14-2-1506 and R-2-1508. ROO at 51. Qwest  
22 challenges this portion of the ROO's findings, claiming, first, that it could not have willfully  
23 and intentionally violated an unclear standard. Exceptions at 15.

1 RUCO has set forth its response to Qwest's argument on this point in its Initial Post-  
2 Hearing and Post-Hearing Reply Brief filed in the 252 docket (Docket No. T-00000A97-  
3 0238). Initial Post Hearing Brief at pp. 12-23 and Post-Hearing Reply Brief at pp. 9-12.  
4 For the sake of brevity, RUCO would incorporate those arguments into this Reply to  
5 Qwest's Exceptions.

6 RUCO, however, would note the following. First, not even Qwest disputes that  
7 agreements affecting the pricing for interconnection services and the terms and conditions  
8 of service are subject to the Act. Initial Post Hearing Brief at 17. The discount provisions  
9 in the Eschelon and McLeod Agreements affected rates for interconnection services and  
10 were therefore required to be filed under the Act. There was nothing "unclear" about  
11 Qwest's obligation to file those agreements.

12 Nor was there anything unclear about Qwest's obligation to file the interconnection  
13 agreements it had with Eschelon and McLeod regarding their preferential escalation and  
14 provisioning procedures. Those agreements clearly had provisions that affected the terms  
15 and conditions under which Qwest would provide interconnection services to McLeod and  
16 Eschelon. Qwest knew of its filing obligations regarding these agreements, and the ROO  
17 correctly found that Qwest deliberately and intentionally failed to file them.

18 Second, Qwest's arguments that the record is devoid of evidence of willful and  
19 intentional misconduct and that the record does not support the ROO's findings that Qwest  
20 violated the Act and interfered with the regulatory process are also misplaced.<sup>5</sup> Qwest  
21 argues that the underlying evidence relied on to make the findings was insufficient and  
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23 <sup>5</sup> Again, RUCO has set forth its response to Qwest's arguments on these points in its Initial Post Hearing and  
24 Post-Hearing Reply Brief in Docket No. T-00000A-97-0238. Initial Post Hearing Brief at pp. 27-50, and Post-  
Hearing Reply Brief at pp. 11-13. For the sake of brevity, RUCO would incorporate those arguments into  
this Reply to Qwest's Exceptions.

1 suggests an evidentiary standard much higher than required. Exceptions at 18-20. Qwest  
2 is critical of the underlying witnesses upon whose testimony the ALJ made her findings,  
3 discrediting their testimony as having no "first-hand knowledge" of Qwest's intent.  
4 Exceptions at 18-19. Qwest's arguments occupy the realm of the absurd - the witnesses  
5 in question relied on the documentary evidence and depositions (all of which were  
6 admitted in the 252 record) of, among others, Qwest's own employees<sup>6</sup> who were  
7 intricately involved in Qwest's misconduct. Equally compelling is the fact that Qwest did  
8 not produce as witnesses at trial these same employees with first-hand knowledge to rebut  
9 RUCO or Staff's case. In truth, despite the overwhelming evidence against Qwest, the  
10 best description of Qwest's defense to the underlying allegations of misconduct was that it  
11 was very limited.<sup>7</sup>

12 RUCO and Staff's evidence regarding the underlying misconduct was substantial,  
13 compelling and mostly undisputed. In fact, the Minnesota Public Utilities Commission also  
14 found that Qwest intentionally and deliberately violated the Act relying mostly on the same  
15 evidence that is in the record in this case. The ROO sets forth in complete detail the  
16 evidence submitted by Staff and RUCO. ROO at pp. 4-8. Substantial evidence exists to  
17 support the ROO's findings. See *U.S. West v. Ariz. Corp. Comm'n*, 185 Ariz. 277, 282-  
18 283, 915 P. 2d 1232, 1237-1238 (App. 1996).

21 \_\_\_\_\_  
22 <sup>6</sup> Audrey McKenney, Greg Casey and Arturo Ibarra.

23 <sup>7</sup> Rather, Qwest's approach as set forth by its attorney in his opening statement at hearing was to address  
24 three issues: 1) how future compliance with the Act would be assured; 2) provide summaries of why past  
noncompliance occurred, and 3) talk about appropriate remedies. Transcript Vol. I, pp 11-12, March 17,  
2003, Docket No. RT-00000F-02-0271.

1 **THE ADOPTION OF THE ROO WILL NOT DENY QWEST DUE PROCESS**

2 Qwest claims that the ROO raises several due process concerns. Procedurally,  
3 Qwest argues the ROO is defective because it purports to resolve three dockets on their  
4 merits in the context of a hearing on the approval of a Settlement Agreement. Exceptions  
5 at 38. According to Qwest, the Commission needs to either approve or reject the  
6 Agreement before proceeding any further on the merits in the underlying dockets. See  
7 Qwest's Motion for Leave to File a Response and Motion for Clarification at 2.<sup>8</sup> Should the  
8 Commission reject the ROO, Qwest believes a procedural conference would be  
9 appropriate to consider what other additional proceedings are necessary. See Qwest's  
10 Motion for Leave to File a Response and Motion for Clarification at 2 and 3. Qwest's  
11 argument should be dismissed since the record in the underlying dockets was complete  
12 (with the exception of Qwest's right to a hearing on the penalties in the 271 Sub-docket)  
13 and there is no legal basis to reopen the underlying dockets again.

14 At the time Qwest and Staff filed their proposed Agreement, Qwest had rested its'  
15 case in the 252 Docket. In the 271 Sub-docket, the only procedural matter pending was  
16 Qwest's request for a hearing on Staff's proposed penalties. No party had requested that  
17 any of the dockets be reopened to consider further evidence in the record. A.A.C. R14-3-  
18 108 (G). The ALJ reopened the records in the underlying dockets for the sole purpose of  
19 considering the Agreement. At the time Qwest and Staff filed their proposed Agreement  
20 no party, not even Qwest, was raising due process concerns and/or questioning the ALJ's  
21 ability to decide the 252 and wholesale enforcement dockets on their merits.

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24 <sup>8</sup> This argument was not clear to RUCO until it read Qwest's Motion for Leave to File a Response and Motion  
for Clarification filed on January 6, 2004.

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The only thing that has changed since the proposed Agreement was filed is that the ALJ has recommended that the Agreement be rejected. The previous records are still complete. Qwest has not made an offer of further evidence or set forth any legal reason why the record needs to be reopened for further consideration. The ROO's finding on the merits of the underlying dockets does not deny Qwest due process.

Qwest next complains that the ROO is procedurally defective in that it denies Qwest the right to renew its request to a hearing in the 271 Sub-docket. RUCO agrees with Qwest that it should be allowed to renew its request for a hearing on the penalties<sup>9</sup> only in the 271 Sub-docket. However, the Commission can adopt the ROO's penalties prior to hearing the 271 Sub-docket matter. The recommended monetary penalty in ROO was determined by a mechanical formula based on Qwest's filing violations on a per-day basis. Qwest's interference in the Commission's 271 regulatory process was not a consideration in the penalty computation. RUCO recommends that the ROO be amended to note this fact and that a hearing be scheduled to consider additional penalties in the 271 Sub-docket.

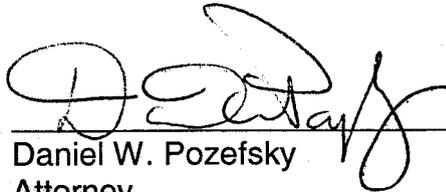
**CONCLUSION**

The ROO is in the public interest and should be adopted by the Commission with an amendment to allow for a hearing on the consideration of additional penalties in the 271 Sub-docket.

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<sup>9</sup> There is, of course, the question of exactly what it is Qwest is requesting. Qwest's original request was for a hearing on Staff's proposed penalties. The ROO did not adopt Staff's recommendations, at least with regard to the monetary penalties, and the monetary penalties recommended in the ROO relate specifically to Qwest's 252 violations.

1 RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of January, 2004.

2  
3   
4 Daniel W. Pozefsky  
5 Attorney

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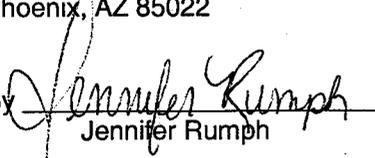
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