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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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

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

ARIZONA CORPORATION
COMMISSION
Complainant.

v.

QWEST CORPORATION
Respondent.

DOCKET NO. T-00000A-97-0238

DOCKET NO. RT-00000F-02-0271

DOCKET NO. T-01051B-02-0871

AT&T'S RESPONSE TO
EXCEPTIONS
OF QWEST CORPORATION

AT&T Communications of the Mountain States, Inc. and TCG Phoenix

(collectively, "AT&T") hereby file their response to Qwest Corporation's Exceptions

Regarding Recommended Opinion and Order filed December 1, 2003, and Request for

Hearing.

I. INTRODUCTION

Qwest's Exceptions reargue at length the facts of the three cases; however, Qwest views the evidence in a light most favorable to it, and it ignores evidence that is detrimental to it and supports the Administrative Law Judge's ("ALJ") Recommended Opinion and Order. AT&T intends to address only limited issues raised by Qwest's Exceptions and will rely on its initial and reply briefs as to the remaining issues.

II. ARGUMENTS

A. Voluntary Contributions

Qwest suggests that voluntary contributions are appropriate. It argues that the Commission may easily resolve the argument that they are inappropriate because they potentially benefit Qwest: "Because the voluntary contributions are wholly within the control of the Commission, it can ensure Qwest receives no direct or indirect benefit therefrom". Qwest Exceptions at 5. It would be impossible to structure the voluntary contributions in a manner that prevents Qwest from receiving any direct or indirect benefit, and Qwest does not suggest how this could be done. The only way to ensure that Qwest does not receive any direct or indirect benefit is to convert the voluntary contributions to penalties. This is what the ALJ did.

B. Related Terms and Conditions

Qwest continues to argue that the credit provisions are reasonable because the competitive local exchange carriers ("CLECs") do not have to opt in to related provisions. Qwest Exceptions at 7. Qwest refuses to acknowledge that the agreements were structured so the other CLECs would not, and could not, opt in. *See* AT&T's Reply

Brief at 8-9. The agreements were a sham. To suggest the CLECs have to accept and abide by all the terms of a sham to get the essential benefits received by Eschelon and McLeod is ridiculous.

Qwest suggests that there is an issue regarding the amount of damages suffered by the CLECs because no CLECs put on evidence regarding their damages. Qwest Exceptions at 8. This is a red herring. The evidence shows that Eschelon and McLeod received discounts. The evidence identifies the period they received the discounts. Qwest has in its possession the purchases made by all other CLECs during the period of the discounts. It is a simple matter of multiplying the qualifying services by 10% for each CLEC to determine the amount of damages. This is simple arithmetic.

C. The Recommended Order is Procedurally Proper.

Qwest argues the Recommended Order is procedurally improper. AT&T disagrees.

Hearings were held in the Show Cause proceeding and Section 252 proceeding, and the proceedings were thoroughly briefed. The Staff proposed monetary and non-monetary penalties during the proceedings that are consistent with the Recommended Order. Qwest identified the processes and procedures it put in place, or was going to put in place, as a part of its direct case. *See* AT&T's Reply Brief at 10-11 (regarding non-monetary penalties).¹ The ALJ reviewed the complete records of all 3 proceedings. Recommended Order at 37. The fact that the Settlement Agreement incorporates some of the terms of the Settlement Agreement does not make it defective. The issue is whether

¹ Qwest argues that the Commission cannot implement some of the non-monetary provisions. Qwest Exceptions at 13-14. To the extent Qwest agreed to non-monetary provisions as part of its case, the Commission can incorporate these provisions in its order. If Qwest's wishes to continue to object, AT&T suggests that the Commission verify that the non-monetary penalties in its final order are consistent with Qwest original proposals, omit any inconsistent provisions, and increase the penalties.

the evidence supports the findings and conclusions contained in the Recommended Order; it does.

There is one procedural issue that is raised by Qwest that does have merit. The hearings in the Section 271 sub-docket were never held. Qwest withdrew its request for a hearing without prejudice and expressly reserved its right to renew its request if the Settlement Agreement was not approved. Qwest Exceptions at 11. Therefore, the Commission cannot order penalties or remedies in the Section 271 sub-docket until Qwest has had its hearing. However, nothing precludes the Commission from severing this issue from the Recommended Order and issuing an order on the Show Cause proceeding and the Section 252 proceeding. Qwest had its hearing in these proceeding, they were fully briefed, and the ALJ's Recommended Order is based on the evidence in the record of these two proceedings.

D. The Statutory Standard was Clear

Qwest argues it could not have willfully and intentionally violated an unclear standard. Qwest Exceptions 15-18. AT&T believes the evidence demonstrates Qwest was well aware of the standard. Qwest purposely structured the agreements so that CLECs other than Eschelon and McLeod could not opt in under the Act, the very Act that requires the agreements to be filed. Furthermore, Qwest attempted to keep the agreements secret. These actions demonstrate that Qwest was fully aware of its filing obligations under the Act.

Furthermore, what is noteworthy is that Qwest never waived its attorney-client privilege and provide evidence of legal advice to support its position that the legal standard was unclear. Nothing prevented it from doing so.²

E. The Record is Not Devoid of Evidence of Willful and Intentional Misconduct

Qwest claims that the testimony of Staff and RUCO is legally insufficient to support the Recommended Order. Qwest Exceptions at 18-19. Qwest misses the point. The very evidence the Staff and RUCO witnesses relied on to draw their conclusions is in the record. The ALJ and Commission can rely on the very same evidence to make its own findings and conclusions, and the evidence provides ample support for the ALJ and Commission to reach the same conclusions the Staff and RUCO's witnesses did.

F. A.R.S. §§ 40-334 and 40-374 Provide the Commission the Authority to Order Credits

Qwest suggests that A.R.S. § 40-334 does not support credits as a remedy. Relying on case law, Qwest argues that the other CLECs must be similarly situated. Qwest Exceptions at 32. AT&T maintains the other CLECs are similarly situated – they bought the same services from Qwest that Eschelon and McLeod did. This is more than

² Chairman Spitzer and Commissioner Mundell discussed the attorney-client privilege with Qwest at length. See TR 44-53 (Dec. 13, 2003). Chairman Mundell: "...I recall when the new officers of Enron came on board they waived the privilege and let all the evidence come out, the e-mails, and that occurred and the attorney-client memos. And so to go to your counsel's statement about the good intentions, it seems to me there has got to be a memorandum there that talked about the issue of the difference of, in the legal community, on what needed to be filed at the FCC. If it's truly, if it was truly the motivation and that was your, that was the reason for it, it seems to me that there has got to be documents that show that attorney-client memorandum. And it seems to me if, again I want to get to the facts, I want to know the reasons, you are telling us, you know, in your pleadings the reasons were there was a difference of opinion legally on what needed to be filed, and we don't really have bad motives, we just – there was a difference of opinion. Now, the FCC says what needs to be filed. I am more than positive there has got to be e-mails and memorandums that support your position that could easily be disclosed, to see if that was the real reason why you entered into these interconnection agreements that had the nonparticipation clauses and all those other things that we are concerned about. Again, let me make it clear. The new officers of Enron waived the attorney-client privilege. Let the e-mails be discovered, let the attorney-client memorandum come out, and the fact came out on what was really the motivation for the filing or the nonfiling of the interconnection agreements." TR 44-46 (Dec. 13, 2002).

sufficient to demonstrate that the other CLECs were similarly situated, considering the other terms of the agreements were a sham. Qwest should not be permitted to hide behind sham agreements to claim other CLECs were not similarly situated.

Qwest continues to claim that the filed-rate doctrine applies and that the proper remedy should be for Eschelon and McLeod to “disgorge any benefits they received that were not available to similarly situated CLECs. *Id.* AT&T addresses this issue in its reply brief. AT&T Reply Brief at 6-7. *See* also Recommended Order at 31. Two questions must be asked: who will make Qwest “disgorge” any benefits *it* received from the illegal transactions, and who will see that the discrimination suffered by the other CLECs is remedied? The Commission, and the Recommended Order answers these questions for it.

Qwest simply ignores A.R.S. § 40-374. This statute expressly prohibits rebates and discounts. The discounts Qwest provided fall within the scope of Section 374. Furthermore, the Commission has the authority to order Qwest to provide the other CLECs the same discounts during the applicable period as a remedy for Qwest’s violation of Section 374.

III. CONCLUSION

AT&T recommends that the Commission sever the Section 271 sub-docket issues and grant Qwest a hearing on those issues. AT&T also recommends that the Commission issue an order on the Show Cause and Section 252 issues, consistent with the ALJ’s Recommended Order.

Respectfully submitted this 12th day of January, 2004.

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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 AT&T Communications of the Mountain States, Inc. and TCG Phoenix's Response to Exceptions of Qwest Corporation were sent by overnight delivery on January 12, 2004 to:

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