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BEFORE THE ARIZONA CORPORATION COMMISSION

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

Arizona Corporation Commission
DOCKETED
JAN 23 2004

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AZ CORP COMMISSION
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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 REPLY
IN SUPPORT OF EXCEPTIONS
REGARDING RECOMMENDED
OPINION AND ORDER FILED
DECEMBER 1, 2003**

Qwest Corporation ("Qwest") hereby files its Reply in support of its Exceptions to the Recommended Opinion and Order. The responses filed by RUCO, AT&T, and Time Warner failed to raise any new or valid reasons for this Commission to reject the Proposed Settlement Agreement or to adopt the Recommended Opinion and Order ("Recommended Order") in its stead. The Commission should, therefore, decline to enter the Recommended Order and should approve the Settlement Agreement.

1 **I. The Voluntary Contributions in the Proposed Settlement Directly Benefit**
2 **Ratepayers and Are Permissible Under Arizona Law.**

3 The primary concern raised in the response comments is that the Voluntary
4 Contributions in the Proposed Settlement improperly benefit Qwest (*see* RUCO's Reply
5 at 3; AT&T's Response at 2) and are impermissible under Arizona law. *See* Time
6 Warner's Response at 2-3. As Qwest pointed out in its Exceptions, there is nothing
7 illegal or improper about the Voluntary Contributions. *See* Qwest's Exceptions at 5.
8 RUCO and the CLECs continue to ignore the fact that the Commission, not Qwest, would
9 make the ultimate determination of the specific projects to be financed by the Voluntary
10 Contributions and, in doing so, the Commission may consider and resolve any concerns
11 about collateral benefits to Qwest, including preventing Qwest from receiving such
12 benefits. Moreover, the Voluntary Contributions cannot reasonably be considered
13 "redirected penalties" in the absence of any assessment of penalties by the Commission
14 and without the adoption of any findings of fact or conclusions of law that could be the
15 basis for penalties.

16
17 **II. The Credits Offered in the Proposed Settlement Reasonably Compromise the**
18 **Parties' Litigation Positions.**

19 The response comments also reiterate the CLECs' objections to the credits
20 offered in the Proposed Settlement, while failing to recognize that the credits described in
21 the Recommended Order may overstep the Commission's jurisdiction and substantive
22 authority. As Qwest has presented in its briefing, and as a matter of federal law, the
23 Commission cannot order Qwest to allow CLECs to opt into interconnection agreements,
24 or portions of interconnection agreements, without first requiring each CLEC to satisfy
25 all related terms and conditions. *See* 47 U.S.C. § 252(i); Qwest's Exceptions at 26-29.
26 AT&T's only attempt to refute this legal principal – an accusation that the related terms

1 were a “sham” (*see* AT&T Response at 2-3) – is not supported by record evidence, and,
2 indeed, AT&T cites no authority for its position. Moreover, no party attempts to refute in
3 its response comments the Commission’s lack of authority to order Qwest to pay credits
4 against CLECs’ purchases of intrastate services as a “penalty” for Section 252 violations.
5 Indeed, the CLECs urge the Commission to take a path that will render the resulting
6 penalty order seriously vulnerable on appeal.

7 In contrast to the credits in the Recommended Order, the credit provisions
8 in the Proposed Settlement represent a reasonable compromise of the parties’ positions
9 and do not suffer the same legal infirmities. The Discount Credits in the Proposed
10 Settlement focus, appropriately, on 251(b) and (c) services purchased from January 1,
11 2001 through June 30, 2002. Under the Settlement Agreement, the amounts paid to
12 CLECs will, in fact, reflect any harm they suffered as a result of the failure to file
13 interconnection agreements. Time Warner’s repeated complaints about the credits it
14 would receive under the Proposed Settlement (*see* Time Warner’s Response at 3) are
15 unjustified; the credits are tailored to compensate CLECs for any actual damages, not to
16 serve as a windfall, no matter how desperately Time Warner desires more. Furthermore,
17 the Discount Credits in the Proposed Settlement afford CLECs broader remedies than
18 they would be entitled to receive under the 1996 Act because they do not require CLECs
19 to satisfy related terms and conditions to qualify for the payments – a substantial
20 concession by Qwest.

21
22 **III. The Factual Findings in the Recommended Opinion and Order Lack Any**
23 **Evidentiary Basis.**

24 RUCO claims that Qwest “suggests an evidentiary standard much higher
25 than required” (RUCO’s Reply at 6-7), but fails to cite any case law refuting the well-
26 established rule that any decision by this Commission must be supported by “substantial

1 evidence.” See, e.g., *Tucson Elec. Power Co. v. ACC*, 132 Ariz. 240, 247, 645 P.2d 231
2 (Ariz. 1982); *Pine-Strawberry Improvement Ass’n v. ACC*, 152 Ariz. 339, 340, 732 P.2d
3 230 (Ariz. Ct. App. 1986); *City of Tucson v. Citizens Utils. Water Co.*, 17 Ariz. App. 477,
4 481, 498 P.2d 551 (Ariz. Ct. App. 1972) (rejecting the Commission’s determination of a
5 rate base, where the Commission’s determination was based solely on the testimony of an
6 expert who “failed to consider all the relevant factors” and whose testimony “was filled
7 with speculation and uncertainty” and noting “[m]ere speculation and arbitrary
8 conclusions are not substantial evidence and cannot be determinative.”). Both RUCO
9 and AT&T claim that there is sufficient evidence to support the Recommended Order’s
10 findings (RUCO’s Reply at 6-7; AT&T’s Response at 5), but neither cites any such
11 evidence. Instead, their arguments now serve only to emphasize that the conclusions in
12 the Recommended Order are based solely on speculation and not on any testimony from
13 witnesses with firsthand knowledge of the facts.

14 A review of the record in the Section 252 docket reveals that:

- 15 • No witness offered by the Staff or RUCO had any firsthand knowledge of Qwest’s
16 or the relevant CLECs’ motivations or their understanding of the filing standard;
- 17 • Qwest’s witnesses demonstrated that Qwest took concrete steps to ensure that
18 CLECs were treated in a non-discriminatory manner – and there was no testimony to the
19 contrary;
- 20 • There was no evidence that any CLEC would have been eligible to opt into any of
21 the unfiled agreements;
- 22 • There was no evidence that any CLEC suffered harm as a result of the agreements,
23 and AT&T’s suggestion now that harm can be inferred from the mere existence of the
24 agreements (AT&T’s Response at 3) is baseless and contrary to the FCC’s rejection of
25 the argument that the failure to file an agreement (even an agreement that falls within the
26 FCC’s standard) is *per se* discriminatory; and

1 • Testimony from a Qwest employee with firsthand knowledge of Eschelon's
2 consulting services to Qwest went un rebutted – yet is not acknowledged in the
3 Recommended Order.

4 Findings by the Commission must be supported by substantial evidence to
5 withstand appeal, and the conclusions in the Recommended Order do not satisfy that
6 standard.

7 **IV. The Recommended Order Is Procedurally Flawed.**

8 RUCO, AT&T, and Time Warner all agree that Qwest should be allowed to
9 renew its request for a hearing in the 271 Sub-docket, although RUCO suggests limiting
10 that hearing to the issue of penalties. *See* RUCO's Reply at 9; AT&T's Response at 4;
11 Time Warner's Response at 4. RUCO also suggests, however, that even if Qwest is
12 granted the hearing to which it is entitled in the 271 sub-docket, the recommended
13 penalty in the Recommended Order should remain unchanged. *See* RUCO's Reply at 9.
14 RUCO is wrong. The penalty proposed in the Recommended Order expressly was
15 calculated as a resolution of all three dockets. *See* Recommended Order at 41 ("We
16 believe that based on the records in the underlying dockets, administrative penalties in the
17 amount of \$11,000,000 for Qwest's intentional willful violation of Section 252(e),
18 Arizona law, *and* its interference with the Section 271 regulatory process is appropriate."
19 (emphasis added)). If one docket is severed out, the amount of the penalty in the
20 Recommended Order should be decreased to reflect the reduced scope of the dockets and
21 issues it resolves.

22 Finally, as Qwest pointed out in its Exceptions, this proceeding was
23 intended to decide the appropriateness of the Settlement Agreement. The Recommended
24 Order improperly enters orders resolving the dockets on their merits by using a rejected
25 Settlement as a basis for ordering Qwest to pay credits and penalties that are not
26 supported by the law or evidence, and to provide non-monetary benefits (such as

1 consultants and monitors) that are not within the Commission's authority to order.

2 For all the foregoing reasons and the reasons addressed in Qwest's
3 Exceptions, Qwest respectfully requests that the Commission accept the Proposed
4 Settlement. Qwest further requests, that, if the Commission rejects the Proposed
5 Settlement, it decline to enter the Recommended Order.

6
7 DATED this 23rd day of January 2004.

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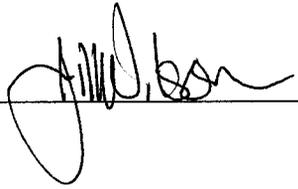
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