



RESIDENTIAL UTILITY CO



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2828 NORTH CENTRAL AVENUE • SUITE 1200 • PHOENIX, ARIZONA 85004 • (602) 279-5659 • FAX: (602) 285-0350

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Jane Dee Hull
Governor

Lindy Funkhouser
Director

June 27, 2002

Maureen A. Scott
Attorney, Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Arizona Corporation Commission
DOCKETED

JUN 27 2002

Re: Docket No. T-00000A-97-0238
RUCO's Comments

DOCKETED BY *AR*

Dear Ms. Scott:

The Arizona Residential Utility Consumer Office ("RUCO") hereby responds to Staff's June 20, 2002 request for comment ("request for comment") by any party in the Qwest Section 271 proceeding ("271 proceeding") before the Arizona Corporation Commission ("Commission"). The request for comment asks whether any party believes that the integrity of the 271 proceeding was "adversely affected" by side agreements between Qwest and Competitive Local Exchange Carriers ("CLECs") that were not filed with the Commission pursuant to Section 252(e) of the Telecommunications Act of 1996 ("1996 Act"), enacted by the United States Congress.

Through the diligent work of RUCO's counsel, RUCO learned that Qwest allegedly made secret deals to buy the silence of CLECs before federal and state regulators who were considering whether to grant Qwest the right to sell long distance services. A combination of oral and written agreements may have been involved. Evidence of one of the alleged oral agreements is described in affidavits from the public record in parallel proceedings before the Minnesota PUC.

If the allegations are true, Qwest was required by the 1996 Act, 47 U.S.C. 252(d)(1), to disclose and file the agreements with local public utility commissions in the Qwest 14-state region. The terms of the agreements, including the preferential pricing arrangements,

should have been available to any CLEC who wanted the same treatment, whether or not the CLEC was participating in a Qwest 271 proceeding.

A 271 proceeding is necessarily concerned with any Section 252 violation. Under the Section 271 "competitive checklist," Qwest must have provided CLECs with "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) [of the 1996 Act]." See 47 U.S.C. 271(c)(2)(B)(ii).

The Commission, to date, has not received full disclosure of the facts. Full disclosure gives the Commission and every interested party opportunity to make a judgment about whether the agreements have infected the Commission's record. Without full disclosure the process remains compromised. For that reason RUCO believes the side agreements have tainted and will continue to taint the integrity of the 271 proceeding.

RUCO's opinion remains the same whether Qwest offered the secret deals or merely responded to a "shakedown" by CLECs. RUCO deems irrelevant any representation that a CLEC would have stayed away from the 271 proceeding notwithstanding a payment for nonappearance. This does not appear to be a question of "no harm, no foul."

If the allegations are correct, the Commission, RUCO, and the public would have been entitled to know that Qwest paid competitors for not attending 271 proceedings, particularly since competitors are in the best position to say whether Qwest gives open access to local telephone markets. Absent disclosure of the secret agreements, the Commission, RUCO, and the public would be left with the impression that at least some competitors tacitly approved how Qwest was providing them with local telecommunications access. That the secret agreements might prove discriminatory collusion is no excuse for concealing their true nature.

In a June 24, 2002 letter to Commissioner Spitzer, Eschelon Telecom, Inc. ("Eschelon") alleges that it entered into a confidential agreement with Qwest, presumably to improve the quality of service that Eschelon had been receiving. The agreement was not disclosed to the Commission. Eschelon alleges that Qwest failed to fully perform the agreement and actively interfered with and prevented Eschelon from fully participating in the 271 proceedings, including proceedings to measure the quality of Qwest's commercial performance. Eschelon contradicts Qwest's representation that Eschelon was free to inform the Commission of any service problems.

The Arizona Supreme Court in the strongest terms has disapproved of settlement agreements that are not disclosed in the course of adversarial proceedings. *In the Matter of Alcorn and Feola*, 202 Ariz. 62, 70, 41 P. 3d 600, 608 (2002) (hereafter "*Alcorn*"). See also, *Hmielewski v. Maricopa County*, 192 Ariz. 1, 960 P.2d 47 (1998) (related case).¹ The court was particularly concerned about how such confidential agreements might lead

¹ RUCO cites *Alcorn* as expressing the Supreme Court's most recent statement of the law concerning side agreements that might have an impact on the conduct of adversarial proceedings. The citation of *Alcorn* and the related case of *Hmielewski* is not to suggest improper behavior by any interested party's legal counsel, many of whom this writer knows and deeply respects.

the parties to misrepresent facts or work a fraud on the court. *See Alcorn*, 202 Ariz. at 72-73, 41 P. 3d at 610-611. And silence is no refuge. The court said that precedent “does not justify silence that misleads the court.” *Id.*, 202 Ariz. at 73, 41 P. 3d at 611.

What could be more misleading than a practice or scheme to coerce silence from an entire category of market participants as this Commission deliberates, in an adversarial context, policies that will decide their economic futures? And this is not to condone the behavior of the CLECs. RUCO maintains that their duty to this Commission goes beyond the 1996 Act for the same reasons the court gave in *Alcorn*: “any agreement that has the *potential* of affecting the manner in which a case is tried is one that may encourage wrongdoing and must therefore be disclosed to the trial judge and all litigants in the case.” *Id.*, 202 Ariz. at 70, 41 P. 3d at 608 (emphasis in original). All should work to avoid a habitual lack of transparency. The rules of procedure “do not contemplate hoodwinking judges any more than jurors.” *Id.*

This Commission, RUCO, Staff, and the parties’ witnesses have possibly wasted a substantial amount of time and public money participating in good faith in a proceeding that Qwest and a number of CLECs allegedly orchestrated behind the scenes. If true, this reprehensible conduct should not be swept under the rug, nor should it go without recompense for those who acted in good faith. The circumstances demand a full and accurate accounting and, if the allegations are proven, dispensation of justice, which the participants appear to have been only too eager to frustrate.

Sincerely,



Lindy P. Funkhouser
Director

cc: Docket Control
All parties of Record