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BEFORE THE ARIZONA CORPORATION COMMISSION

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WILLIAM A. MUNDELL  
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Arizona Corporation Commission

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OCT 15 2002

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IN THE MATTER OF QWEST )  
CORPORATION'S COMPLIANCE )  
WITH SECTION 271 OF THE )  
TELECOMMUNICATIONS )  
ACT OF 1996 )

Docket No. T-00000A-97-238

**COMMENTS TO STAFF'S SUPPLEMENTAL REPORT AND  
RECOMMENDATIONS IN THE 271 DOCKET**

On October 4, 2002 Staff issued its Supplemental Report and Recommendation concerning the impact of the unfiled agreements on the pending 271 proceeding ("Staff Report"). In essence, the Staff Report focuses on three possible interrelations between the unfiled agreements and the 271 docket: (1) Checklist Item 2 issues relating to whether Qwest Corporation ("Qwest") is providing access to unbundled network elements on a nondiscriminatory basis; (2) past actions of Qwest in failing to file certain agreements with the Arizona Corporation Commission ("Commission") and in entering into agreements with certain competitive local exchange carriers ("CLECs") not to oppose Qwest's 271 application; and (3) what weight and effect, if any, those acts should be given during the public interest phase of the 271 proceeding. The Staff Report addresses a number of factual issues and summarizes at length comments submitted by individual parties to this docket. Because many of these issues have been discussed extensively in the past and, under Staff's

proposed procedure will be the subject of additional comments to be filed, Qwest will not address those issues in these comments. Qwest will limit its comments on the Staff Report to its discussion of Staff's recommended procedures for moving forward in the 271 proceeding.

With respect to the procedures to be followed in resolving any remaining issues related to the unfiled agreements, Qwest believes, as does Staff, that the proposed procedures regarding both Sections 252 and 271 will adequately address all relevant issues both prospectively and with regard to past conduct. Qwest agrees with Staff's conclusion that "it is not necessary ... for the 271 proceeding to be held in abeyance pending the outcome of the Section 252(e) enforcement proceeding." Staff Report at 4. This conclusion is even more correct than it was when Staff issued its Report because the FCC has since issued an order defining what agreements need to be filed with the Commission in the future for its approval. Qwest recommends that the Commission adopt a procedure that will permit the remaining issues in the 271 docket to be resolved fully, quickly and separately from the pending 252 proceeding.

I. Checklist Item 2

Checklist Item 2 requires incumbent local exchange carriers ("ILEC's") to provide unbundled network elements on a nondiscriminatory basis. The Staff Report addresses the concern as to what effects, if any, Qwest's conduct in not filing the agreements at issue had on its compliance with the nondiscriminatory standard of Checklist Item 2. As Staff correctly recognizes, the issue of compliance with Checklist Item 2 is a prospective one: the question is whether unbundled network elements are and will be available on a nondiscriminatory basis. The Staff Report concludes that there is no issue with Checklist Item 2 compliance by Qwest because: (1) Qwest has agreed to comply with the standards for

filing under Section 252 as set by the FCC, and (2) Qwest has agreed that it will file with this Commission for its approval all of the unfiled agreements that this Commission concludes should be filed under Section 252.

Subsequent to the Staff Report, the FCC issued an order setting forth the standard to apply in determining whether negotiated contractual agreements between ILECs and CLECs should be filed with the Commission for approval.<sup>1</sup> The FCC's ruling resolves the issue of what constitutes an "interconnection agreement" under Section 252(e) on a going-forward basis. Qwest will abide by this standard when making the determination as to what agreements should be filed publicly for approval by the Commission. In addition to the FCC's clarification of legal ambiguities relating to filing agreements, Qwest has agreed, as part of the 252(e) docket, to take extensive measures to ensure the controversy over unfiled agreements does not recur. *See* Qwest's August 29, 2002 Comments in Response to Supp. Staff Report and Recommendation at 20-22.

With respect to the past agreements at issue here, Staff has identified 28 agreements on Exhibit G of its August 14, 2002 Supplemental Report and Recommendation. Staff reports that of those agreements, Qwest has already filed eight as well as six others. Subsequent to those filings, Qwest filed one additional agreement from Staff's Exhibit G on September 17, 2002. In addition, Staff indicates that 15 other agreements have been terminated or have expired.<sup>2</sup> Staff Report at 19-20. With the FCC's guidance, Staff, Qwest and other interested parties should be able to resolve the question of which of the few remaining agreements are within the FCC's filing standard. To the extent that the parties do

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<sup>1</sup> FCC Memorandum and Order, *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, FCC 02-276, WC Docket No. 02-89, Oct. 4, 2002.

not agree, this issue can be quickly resolved through the 252 proceeding. As Qwest has previously stated before this Commission, the facts necessary in determining which agreements to file already exist in the record. Thus, any additional proceedings on the remaining agreements are not necessary. The exception is if the Commission elects to examine in greater detail the alleged oral agreement between Qwest and McLeod for a discount on prices paid by McLeod. The existence of the agreement is based upon the unsubstantiated allegations of an affiant who did not testify subject to cross-examination in Minnesota. Qwest must be afforded the opportunity to cross-examine any witnesses about this alleged agreement and present its own counter-testimony before this Commission reaches any decision about the existence of the alleged agreement. To the extent necessary, that issue can be addressed in the pending 252 docket.

Because the FCC has now set the standard for filing of agreements and Qwest has agreed to comply with that standard both in the future and as to the past unfiled agreements, there is no Checklist item 2 issue to be resolved. Qwest agrees with the Staff Report in this regard. As Staff recognized in its supplemental report of August 14, 2002, the issue of which requests are subject to opt-in by the CLECs should be determined on a case-by-case basis. When the presently unfiled agreements are filed for Commission approval, the Commission can follow the process outlined by Staff in its report for dealing with the opt-in issue. The existing opt-in procedure and standard should apply to agreements filed for Commission review in the future.

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<sup>2</sup> In its August 29, 2002 filing, Qwest identified as Exhibit B 16 agreements that had already terminated or expired. Staff in its August 14, 2002 Report and Recommendation as Exhibit I listed 13 agreements as "No Longer in Effect." Therefore, it is not entirely clear which 15 agreements Staff is referring.

## II. Qwest's Past Conduct and Possible Remedies

Staff also raises several issues with regard to Qwest's conduct in entering into agreements with CLECs not to oppose Qwest's 271 application. Staff states that issues may remain with respect to (1) the impact those agreements had on the 271 process and (2) the appropriate penalty, if any, for Qwest's behavior in entering into those agreements.

As the Staff Report correctly notes, any issue relating to the impact these agreements had on the 271 process is already being addressed. Qwest agrees with Staff that any concerns regarding an incomplete 271 record have been adequately addressed. On July 30 and 31, 2002, Staff held a workshop designed to address any issue from concerned parties that believed they had been precluded from raising in the 271 docket due to some agreement with Qwest. All concerned parties participated fully through testimony and multiple data requests. Staff Report at 3, 17 and 19. Staff believes this workshop adequately addressed concerns regarding the 271 record and intends to issue a separate report and recommendation regarding its findings. The Commission can then decide what actions, if any, need to be taken in light of the concerns raised in that workshop. Thus, no further proceedings are necessary at this time with respect to the impact, if any, the agreements had on the 271 process.

Staff's second category of issues relates to how the Commission should deal with Qwest's past conduct in not filing the agreements and in entering into the nonparticipation agreements. Staff recommends that the Commission: (1) open a sub-docket under the 271 docket to address what if any monetary or nonmonetary penalty is appropriate for Qwest's alleged interference with the 271 process, and (2) allow the ongoing 252(e) enforcement proceedings to craft the proper remedy for dealing with Qwest's failure to file the agreements with the CLECs.

Qwest agrees with Staff that the proposed 271 sub-docket, as described by Staff, and the 252 enforcement proceeding will permit the Commission to adequately address any concerns about Qwest's past conduct. Under Staff's proposed 271 sub-docket, all parties - including Qwest - will have an adequate opportunity to file comments on any factors they believe the Commission should consider in assessing monetary and nonmonetary penalties against Qwest for entering into "nonparticipation" agreements.

Similarly, the Commission can address the appropriate remedy relating to Qwest's conduct for not initially filing the agreements in the 252(e) enforcement proceedings. On April 8, 2002, this Commission opened a docket to investigate Qwest's compliance with the filing requirement of Section 252(e). For the past five months, Staff and RUCO have conducted vigorous discovery into the circumstances surrounding the "unfiled agreements". In response, Qwest has produced thousands of pages of documents, including all documents produced in response to the hundreds of information requests served in Minnesota. The culpability of Qwest's conduct in failing to file those agreements can be fully addressed in the 252(e) proceeding.

### III. The Section 271 Public Interest Criteria

Without diminishing the importance of the issues underlying the unfiled agreements case, they nevertheless are not appropriate matters for consideration as part of the Section 271 public interest inquiry. As set forth in the Staff Report and other reports submitted in the 252(e) docket, there is no reason to duplicate the 252(e) enforcement proceeding record or to hold Qwest's 271 application in abeyance until the 252(e) enforcement proceeding has concluded for the reasons set forth above. *See also* Staff's Aug. 14, 2002 Supp. Report and Recommendation in Docket No. RT-00000F-02-0271 at 10-11. The unfiled agreements and the nonparticipation agreements can be, and have been, the subject of comment in the public

interest phase of the 271 docket but should not affect its outcome. In the public interest phase of Section 271, the emphasis should be on whether the telecommunications market is open on a going-forward basis and whether future interLATA competition is in the public interest – not on past conduct which can be subject to appropriate penalties in either the 252(e) docket or a 271 sub-docket. *See* 47 U.S.C. § 271(c).

All prospective issues arising from the unfiled agreements have been addressed. Qwest has agreed to follow the FCC criteria for determining whether such agreements must be filed for approval. There simply is no prospective issue remaining with respect to Qwest's obligation to file agreements with CLECs. Similarly, any concerns about the impacts of the nonparticipation agreements on the 271 process will be addressed. As Staff explains at length, all other issues relating to these agreements were brought forth in the July workshop. This workshop was specifically designed to address concerns the alleged limitations placed on certain CLECs in participating fully over the last three and one-half years that the 271 docket has been in place.

Similarly, the Commission can impose penalties for Qwest's past conduct in the 271 sub-docket and the 252(e) enforcement proceeding. These issues need not be considered in addition in the public interest proceeding. In its report, Staff states that “it is simply not necessary to duplicate the 252(e) facts or record in the public interest portion of this case or to await the conclusion of the 252(e) case, in order for parties to make their arguments in the public interest phase of this case.” Staff Report at 20. Staff also concludes that “it was never intended that the public interest phase of the 271 proceeding await resolution of each and every enforcement proceeding that may be pending at any one time.... If it were intended...271 proceedings might conceivably never end....” *Id.* Staff also indicates that

the remedies available to the Commission in the 271 sub-docket and the 252 proceeding will permit it to craft remedies that serve the public interest “making this same exercise unnecessary in the public interest phase of the 271 case.” Staff Report at 21. Qwest agrees with Staff’s analysis in this regard. To the extent they have not already been addressed by Qwest, the concerns expressed by parties to this docket and by the Commission regarding Qwest’s past conduct will be adequately dealt with in separate enforcement proceedings and need not be included in the public interest phase of the 271 process.

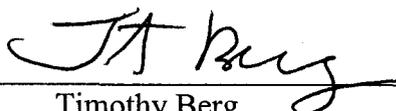
## CONCLUSION

The Commission should determine that (1) the 252(e) and 271 proceedings need not be consolidated and that they may proceed to conclusion independently; (2) a limited sub-docket as proposed by Staff should be conducted to address the penalties, if any, that are appropriate based on Qwest's agreements with CLECs not to oppose 271; and (3) the 252(e) proceeding should be limited to the question of administrative remedies, if any, appropriate for Qwest's failure to file agreements with CLECs. Although parties should be permitted to file whatever comments they wish in the public interest phase of the 271 docket, consistent with the approach taken by the FCC on these matters, the Commission should not consider the unfiled agreements issues in the public interest phase of the 271 docket. Such an approach will allow for a full, fair and expeditious Commission examination of these issues.

Dated this 15th day of October, 2002.

Mark E. Brown  
Staff Attorney – Arizona  
Qwest Communications Corporation  
3033 N. 3<sup>rd</sup> Street, Suite 1009  
Phoenix, AZ 85012

FENNEMORE CRAIG, P.C.

By   
Timothy Berg  
3003 N. Central Avenue, Suite 2600  
Phoenix, AZ 85023

Attorneys for  
QWEST Communications  
Corporation

ORIGINAL and 10 copies of the  
foregoing hand-delivered for  
filing this 15<sup>th</sup> day of October, 2002 to:

Docket Control  
ARIZONA CORPORATION COMMISSION  
1200 W. Washington St.  
Phoenix, AZ 85007

COPY of the foregoing delivered  
this day to:

Maureen A. Scott  
Legal Division  
ARIZONA CORPORATION COMMISSION  
1200 W. Washington St.  
Phoenix, AZ 85007

Ernest G. Johnson, Director  
Utilities Division  
ARIZONA CORPORATION COMMISSION  
1200 W. Washington St.  
Phoenix, AZ 85007

Lyn Farmer, Chief Administrative Law Judge  
Jane Rodda, Administrative Law Judge  
Hearing Division  
ARIZONA CORPORATION COMMISSION  
1200 W. Washington  
Phoenix, AZ 85007

Caroline Butler  
Legal Division  
ARIZONA CORPORATION COMMISSION  
1200 W. Washington St.  
Phoenix, AZ 85007

COPY of the foregoing mailed  
this 15<sup>th</sup> day of October, 2002 to:

Eric S. Heath  
SPRINT COMMUNICATIONS CO.  
100 Spear Street, Suite 930  
San Francisco, CA 94105

Thomas Campbell  
LEWIS & ROCA  
40 N. Central Avenue  
Phoenix, AZ 85004

Joan S. Burke  
OSBORN MALEDON, P.A.  
2929 N. Central Ave., 21<sup>st</sup> Floor  
PO Box 36379  
Phoenix, AZ 85067-6379

Thomas F. Dixon  
WORLD COM, INC.  
707 N. 17<sup>th</sup> Street #3900  
Denver, CO 80202

Scott S. Wakefield  
RUCO  
1110 West Washington, Suite 220  
Phoenix, AZ 85007

Michael M. Grant  
Todd C. Wiley  
GALLAGHER & KENNEDY  
2575 E. Camelback Road  
Phoenix, AZ 85016-9225

Michael Patten  
ROSHKA, HEYMAN & DEWULF  
400 E. Van Buren, Ste. 900  
Phoenix, AZ 85004-3906

Bradley S. Carroll  
COX COMMUNICATIONS  
20402 North 29<sup>th</sup> Avenue  
Phoenix, AZ 85027-3148

Daniel Waggoner  
DAVIS, WRIGHT & TREMAINE  
2600 Century Square  
1501 Fourth Avenue  
Seattle, WA 98101

Traci Grundon  
DAVIS, WRIGHT & TREMAINE  
1300 S.W. Fifth Avenue  
Portland, OR 97201

Richard S. Wolters  
Maria Arias-Chapleau  
AT&T Law Department  
1875 Lawrence Street, #1575  
Denver, CO 80202

Gregory Hoffman  
AT&T  
795 Folsom Street, Room 2159  
San Francisco, CA 94107-1243

David Kaufman  
E.SPIRE COMMUNICATIONS, INC.  
343 W. Manhattan Street  
Santa Fe, NM 87501

Diane Bacon, Legislative Director  
COMMUNICATIONS WORKERS OF AMERICA  
5818 N. 7<sup>th</sup> St., Ste. 206  
Phoenix, AZ 85014-5811

Philip A. Doherty  
545 S. Prospect Street, Ste. 22  
Burlington, VT 05401

W. Hagood Bellinger  
5312 Trowbridge Drive  
Dunwoody, GA 30338

Joyce Hundley  
U.S. DEPARTMENT OF JUSTICE  
Antitrust Division  
1401 H Street N.W. #8000  
Washington, DC 20530

Andrew O. Isar  
TELECOMMUNICATIONS RESELLERS ASSOC.  
4312 92<sup>nd</sup> Avenue, NW  
Gig Harbor, WA 98335

Raymond S. Heyman  
ROSHKA, HEYMAN & DEWULF  
400 N. Van Buren, Ste. 800  
Phoenix, AZ 85004-3906

Thomas L. Mumaw  
SNELL & WILMER  
One Arizona Center  
Phoenix, AZ 85004-0001

Charles Kallenbach  
AMERICAN COMMUNICATIONS SVCS, INC.  
131 National Business Parkway  
Annapolis Junction, MD 20701

Mike Allentoff  
GLOBAL CROSSING SERVICES, INC.  
1080 Pittsford Victor Road  
Pittsford, NY 14534

Andrea Harris, Senior Manager  
ALLEGIANCE TELECOM INC OF ARIZONA  
2101 Webster, Ste. 1580  
Oakland, CA 94612

Gary L. Lane, Esq.  
6902 East 1<sup>st</sup> Street, Suite 201  
Scottsdale, AZ 85251

Kevin Chapman  
SBC TELECOM, INC.  
300 Convent Street, Room 13-Q-40  
San Antonio, TX 78205

M. Andrew Andrade  
TESS COMMUNICATIONS, INC.  
5261 S. Quebec Street, Ste. 150  
Greenwood Village, CO 80111

Richard Sampson  
Z-TEL COMMUNICATIONS, INC.  
601 S. Harbour Island, Ste. 220  
Tampa, FL 33602

Megan Doberneck  
COVAD COMMUNICATIONS COMPANY  
7901 Lowry Boulevard  
Denver, CO 80230

Richard P. Kolb  
Vice President of Regulatory Affairs  
ONE POINT COMMUNICATIONS  
Two Conway Park  
150 Field Drive, Ste. 300  
Lake Forest, IL 60045

Janet Napolitano, Attorney General  
OFFICE OF THE ATTORNEY GENERAL  
1275 West Washington  
Phoenix, AZ 85007

Steven J. Duffy  
RIDGE & ISAACSON, P.C.  
3101 North Central Ave., Ste. 1090  
Phoenix, AZ 85012

Teresa Tan  
WorldCom, Inc.  
201 Spear Street, 9<sup>th</sup> Floor  
San Francisco, CA 94105

Karen Clauson  
ESCHELON TELECOM  
730 Second Avenue South, Ste. 1200  
Minneapolis, MN 55402

Curt Huttzell  
State Government Affairs  
Electric Lightwave, Inc.  
4 Triad Center, Suite 200  
Salt Lake City, UT 84180

Brian Thomas  
Time Warner Telecom, Inc.  
223 Taylor Avenue North  
Seattle, WA 98109



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