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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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JAN 21 2003



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

Docket No. T-00000A-97-238

**QWEST CORPORATION'S RESPONSE TO AT&T'S AND RUCO'S
COMMENTS IN THE 271 SUB-DOCKET**

On December 20, 2002, the Administrative Law Judge ordered that parties other than Qwest Corporation ("Qwest") and Staff have until January 10, 2003 to "submit additional evidence and to comment on the impact, if any, of certain parties inability to participate in the Section 271 process." Only RUCO and AT&T filed comments. Qwest files this response to those comments.

RUCO's comments focus primarily on two things: (1) A repetition of previously filed allegations regarding Qwest's actions with respect to McLeod and Eschelon and (2) a proposed penalty consisting of the creation of a special fund designed to fund both the Staff's and CLEC's costs for ILEC-CLEC disputes and for investigations regarding implementation of the 1996 Telecom Act. RUCO's charges concerning Qwest's conduct are without merit

and its suggested remedy is both unreasonable and inappropriate. Further, to the extent the Commission imposes fines against Qwest outside of Qwest's Performance Assurance Plan ("PAP"), the money obtained from those fines must go the State's General Fund. Therefore, RUCO's recommendation is impracticable. *See, e.g.*, A.R.S. § 35-142.

Initially, RUCO repeats many of the allegations against Qwest previously made in various filings in the 252(e) docket. Qwest has responded to those allegations at length in that docket. *See, e.g.*, Qwest's Reply to Responses to Qwest's Comments Regarding Filing Obligations, filed on May 31, 2002; Qwest's Response to RUCO's Comments on Qwest's Submissions filed on June 4, 2002; Qwest's Comments on Staff's Reply to Comments on its Supplemental Report and Reply to RUCO's Motion for Procedural Conference filed on September 17, 2002. As discussed further in this response, the very record on which it relies belies many of RUCO's statements.

The only facts material for consideration in this subdocket are, however, largely undisputed. Qwest entered into agreements with Eschelon and McLeod that contained provisions whereby those CLECs agreed not to oppose Qwest's 271 Applications. For a period of time while those agreements were in effect, Eschelon and McLeod either did not participate in the Arizona 271 process or limited their involvement in that process. But other than the question of what penalties the Commission should impose for Qwest's decision to enter into agreements with these nonparticipation clauses, the only remaining issue is the impact that the nonparticipation clauses had on the regulatory process. Through the workshop held in July of 2002, Eschelon, McLeod and other CLECs have had the opportunity to present any issues that they believe were not raised in the 271 process as a result of the nonparticipation clauses, a process that remedied any such impact. *See, e.g.*,

Nov. 26, 2002 Letter from K. Clauson to M. Scott. It is Qwest's understanding that Staff intends to issue a supplemental 271 report indicating how those issues should be resolved within the framework of the 271 process.

Qwest strongly disagrees, however, with RUCO's characterization of the purpose, methods and effects of these agreements. *See also* Qwest's Sept. 17, 2002 Comments at 5-9. Moreover, the real issue in this docket is where the 271 process goes from here.

With regard to the first part of RUCO's comments, RUCO raises broad allegations about Qwest's conduct in negotiating the settlement agreements at issue. Some of those allegations relate to findings of the Minnesota PUC, but other such allegations have never been proven. In particular, RUCO alleges that Qwest coerced Eschelon into entering into the nonparticipation clauses using its market power over Eschelon.¹ This is not true, is not supported by the evidence, and forms no part of the findings made by the Minnesota commission. The settlement agreements at issue were made voluntarily with the full consent of both parties. *See, e.g.*, Deposition, Richard A. Smith, at 70:2-71:15 (Oct. 26, 2002).

RUCO refers to agreements that were never entered into between the parties as evidence of Qwest's coercion of Eschelon. For example, RUCO cites to an agreement proposed by Qwest, which contained a provision that Eschelon would file testimony in support of Qwest. However, Qwest and Eschelon never entered into an "agreement" for Eschelon to testify on Qwest's behalf in the 271 matter. Evidence from the Minnesota proceeding shows that Qwest proposed terms relating to support in the 271 docket, but Eschelon did not agree with and did not sign those proposals. Without accord manifested by

¹ It should be noted that except for Eschelon's participation in the July 2002 workshops, Eschelon has not filed any comments or otherwise participated in the on-going inquiry into the potential effects of non-participation on the 271 process.

execution of both parties, there is simply no “agreement.” Despite RUCO’s allegations of market power and coercion, Eschelon simply did not agree with Qwest to file testimony in support of the 271 applications. Similarly, while RUCO indicates that Qwest requested that Eschelon dispose of certain audit materials, no “agreement” was ever made between the parties to “destroy evidence” as alleged by RUCO.²

In its comments, RUCO states that the ability of Qwest to “exploit its monopoly power over Eschelon” demonstrates “the true impact on competition.” *See* RUCO Comments at 4. To the contrary, the fact that Eschelon did not accept the above-referenced proposals as alluded to by RUCO demonstrates that Qwest did not coerce Eschelon into signing and entering into any agreements with Qwest. Rather, Eschelon, as was the case with McLeod, voluntarily entered into only those agreements that would be mutually beneficial.

Further, the remaining claims alleged by RUCO in this filing have been and continue to be properly considered in the related 252(e) docket. These enforcement issues need not be considered here. 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 271 subdocket.

In this 271 subdocket, the stated purpose is to determine “what actions the Commission should pursue with respect to the allegations that Qwest interfered in the Section 271 regulatory process.” *See* Nov. 7, 2002 Procedural Order at 6. The proper scope of this proceeding is, therefore, what, if any penalty should be imposed.

² The fact that Qwest proposed a term in one billing settlement that required Eschelon to deliver to it “all reports work papers and other documents related to the audit process ...” is not evidence or proof of Qwest attempting “to destroy evidences” of access minute reports and audits. *See* RUCO comments at 3-4.

Qwest continues to maintain that the agreements at issue did not negatively impact the 271 process. For example, of the forty-four CMP redesign core team meetings, Eschelon participated in thirty-nine. Also, of the 192 systems change requests from CLEC's, Eschelon submitted sixty-six. *See* Staff's Oct. 4, 2002 Report and Recommendation at 10. McLeod's time out from participating in the 271 process, for example, began over a year prior to its alleged "oral agreement" with Qwest to remain neutral in Qwest's 271 application. *Id.* at 12. In any event, Eschelon fully participated in the July 2002 workshop held by Staff to ensure that all outstanding issues were identified and addressed. Staff will submit reports dealing with the issues raised in these workshops. Once those issues are resolved, any impact of the non-participation clause will have been dealt with. Further, the proper remedy for failing to file these agreements with the Commission, i.e. fines and penalties, is being dealt with in the 252(e) enforcement docket.³ To that end, Staff has recommended that Qwest pay fines: \$3,000.00 per agreement for 23 agreements and \$5,000.00 per agreement for 7 other non-participation provision agreements, totaling \$104,000.00, which Qwest has agreed to pay if that would resolve the matter. *See* Staff's June 6, 2002 Report at 18-19.⁴

RUCO's penalty fund recommendation, however, is not appropriate, and duplicates remedies that already exist as a result of the 271 process or that are more properly part of the 252(e) proceedings. RUCO suggests that the first portion of its proposed fund be used to support Commission efforts to monitor "competition conditions" and to investigate and resolve "issues related to the 1996 Telecom Act and the transition to competition including ILEC-CLEC disputes." However, Qwest has already submitted and the Commission has

³ In its Comments, RUCO implies that moving forward and finalizing the 271 process to further open the long distance market is in the public interest, as opposed to continued hearings and testimony in the 271 matter.

⁴ Staff has also stated that it believes the record to be complete with regard to the possible effects of CLEC non-participation in the 271 process. *See, e.g.*, Staff's Oct. 4, 2002 Report and Recommendation at 19.

already approved a lengthy Performance Assurance Plan ("PAP") as part of its 271 application that will provide for Tier II payments to offset the Commission's cost associated with: (1) administering the PAP, including long term PID administration, (2) monitoring post-entry compliance, (3) dispute resolution, (4) auditing costs and (5) assessing proposals in any state or federal service quality proceeding. *See* Qwest's June 12, 2002 Notice of Filing Revised PAP. Thus, the Tier II payments under the PAP already fulfill the function envisioned by RUCO for the first part of its fund. Moreover, as discussed, RUCO's plan is impractical given that it is statutory requirement for all monies belonging to the State be paid into the state treasury and credited to the general fund. *See* A.R.S. § 13-142(A).

RUCO proposes a second portion of the fund to offset the costs of CLEC participation in similar regulatory proceedings. Again, this recommendation is duplicative and unnecessary. The revised 22-page PAP contains extensive provisions for CLECs, including monetary penalties against Qwest, if Qwest does not provide parity and benchmark standards for service. The PAP accomplishes RUCO's goals of ensuring compliance by Qwest and providing means for CLECs to recover resources if Qwest is out of compliance. Moreover, nothing suggests that parties, such as AT&T, have been or will be unable to bring complaints and grievances against Qwest to the Commission for 271 violations. Qwest's PAP is an added protection measure to the complaint process already in place at the Commission.

Qwest accepts responsibility for the nonparticipation clauses in the agreements with Eschelon and McLeod. In its original report, Staff proposed that under A.R.S. § 40-424 Qwest be fined under \$5,000 for those agreements as well as for additional agreements that contained clauses whereby CLECs agreed not to oppose the U S WEST/QWEST merger.

Qwest has repeatedly indicated that it is willing to pay the fines proposed by Staff for entering into these clauses to resolve this case. The CLECs that believe that some part of those agreements prevented them from participating in the 271 process have been able to participate through the July 2002 workshop and to file whatever evidence they think necessary or appropriate in completing the application process.

Further, Qwest already has agreed to implement numerous remedial measures to address Commission concerns. *See* Qwest's Dec. 23, 2002 Supp. Comments to its Motion to Reconsider Procedural Order. For example, in the future, if Qwest enters into a settlement agreement with any party in a generic docket before this Commission, it will submit that agreement to the Commission for its approval. If any such agreement contains a clause, such as a clause that the settlement resolves the CLEC's issues and the CLEC will withdraw from the proceeding, and the Commission finds that clause objectionable, the Commission can reject the agreement. Qwest remains willing to work with Staff and the Commission to resolve these issues including the payment of a reasonable level of fines such as that previously proposed by Staff. To the extent that RUCO and other parties believe additional remedial measures are necessary, the 252(e) enforcement docket has been opened to deal with issues arising from the unfiled agreements. Further, on a going-forward basis, Qwest has filed a PAP that will protect the integrity of its services to CLECs should 271 status be granted. There is simply no reason to install a third penalty and enforcement measure for future CLEC grievances as RUCO suggests.

Finally, AT&T also filed comments in this subdocket. In essence, AT&T indicates that the issues that were not raised in the 271 process as a result of the nonparticipation clauses are those set forth in the July 2002 workshop. AT&T reserves its right to comment

on Staff's reports concerning that workshop and comments that the impact of the nonparticipation clauses was that those issues which were addressed in the July workshop would have been addressed earlier absent the clauses. Despite participating fully in the 271 and unfiled agreement proceedings in Arizona, AT&T proposes no specific fine or other remedy for the nonparticipation clauses. Qwest believes that AT&T will have an adequate opportunity to address its concerns if any with respect to Staff's reports from the July 2002 workshop after the report is issued.

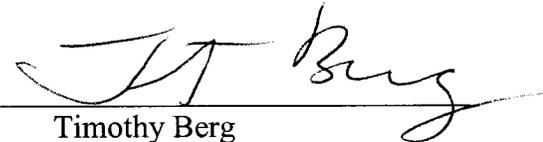
CONCLUSION

It is important to note that only RUCO and AT&T have filed comments in the subdocket. Neither Eschelon nor McLeod have filed comments, and none of the other CLECs that have participated in the 271 process has filed comments or proposed penalties. RUCO has proposed a new, unnecessary and duplicative fine mechanism. For the reasons set forth above, the Commission should reject that proposal.

Dated this ^{21st} day of January, 2003.

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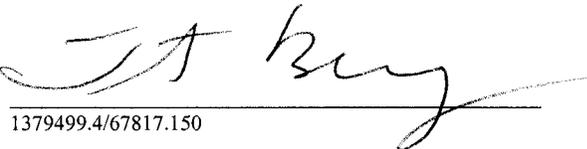
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