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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION
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ARIZONA CORPORATION COMMISSION,

Complainant,

vs.

QWEST CORPORATION,

DOCKET NO. T-01051B-02-0871

QWEST CORPORATION'S POST-HEARING BRIEF

I. INTRODUCTION

On June 12, 2002 the Arizona Corporation Commission ("Commission") adopted Decision No. 64922 (the "Decision") authorizing revised wholesale rates. The Decision stated that the rates would be effective immediately but did not specify an implementation¹ date. The Decision required Qwest to make a compliance filing containing the price list agreed to by the parties within 30 days of the effective date of the order. Qwest filed a Notice of Compliance on June 26, 2002, exactly two weeks after adoption of the Decision and began implementing the new rates the very next day. On October 7, 2002, AT&T sent a letter to the Commission expressing concerns about the length of time for implementation of the Arizona wholesale rates. Qwest responded to AT&T

¹ Throughout this brief Qwest's reference to "implementation" includes identification, provisioning and billing of a particular new rate element. In this case, the rate elements implemented were the 547 rate elements involved in Decision No. 64922.

1 on October 16, 2002 that implementation of the Arizona rates was being dealt with as quickly as
2 possible and that, based on the current implementation schedule, it was projected that the rate
3 implementation would be completed sometime in mid-December 2002.

4 Qwest completed the rate implementation for all companies except five wireless
5 companies on December 15, 2002. The rate changes for the wireless companies were completed
6 on December 23, 2002. These new rates were applied back to the effective date of the Decision.
7 As a part of this back-billing process, CLECs were issued credits and paid interest (at six
8 percent) on the difference between what they had previously been billed and the billable amounts
9 using the new rates.

10 On November 26, 2002, Commission Staff filed a request for an Order to Show Cause
11 with regard to the above. A special open meeting was held on December 2, 2002 to discuss
12 Staff's request and provide Qwest an opportunity to respond. On December 12, in Decision No.
13 65450, the Commission issued a Complaint and Order to Show Cause as to "(1) why its failure to
14 implement rates required by the Decision No. 64922 is not unreasonable, (2) why its
15 implementation of rates in the other states with pending 271 applications at the FCC ahead of
16 Arizona is not unreasonable, and (3) why its failure to notify the Commission of the delay and
17 seek relief from the Order is not reasonable." Qwest answered the Complaint on December 23,
18 2002. On June 13, 2003, a hearing was held on the above issues.

19 **II. QWEST'S IMPROVED RATE IMPLEMENTATION PROCESS**

20 As a threshold matter, Qwest has acknowledged that its communications with regard to the
21 implementation process and related timelines for the wholesale rate changes ordered by the
22 Commission in the Decision have been inadequate. Qwest should have proactively set forth its
23 timeline for implementation of the Commission's Order in this matter, and promptly notified
24 Commission Staff and other affected parties when circumstances indicated that Qwest's internal
25 implementation timelines would not be met. Qwest's conduct in this regard was not intentional.
26 However, consistent with the dialogue initiated by Staff's December 12, 2002 Comments filed in

1 Qwest's 271 proceeding (Docket No. T-00000A-97-0238), Qwest pledges to work cooperatively
2 with the Commission, its Staff, and interested parties to ensure that such incidents are not repeated
3 in the future.

4 Consistent with Qwest's commitment at the Commission's December 2, 2002 Open
5 Meeting, Qwest completed the rate change portion of the implementation process on December 15,
6 2002 for the wholesale rate changes ordered by the Commission in the Phase II Decision. As of
7 that date, Commission-mandated rates were entered into Qwest billing systems. The new rates,
8 including credits due back to the effective date of the Order, were applied to each CLEC customer's
9 bill based on the individual CLEC's billing date. In addition, in mid-January Qwest paid applicable
10 interest to all affected CLECs. These remedial actions have certainly alleviated any harm arising
11 from Qwest's implementation of the Decision.

12 In addition, Qwest completed full implementation of Commission-mandated rates in
13 Decision No. 65451 ("the Phase IIA Decision") 60 days after the compliance filing, due January 11,
14 2002. Qwest has also committed to ensure that the Commission is kept apprised of any issues
15 adversely affecting implementation in the future.

16 Most importantly, Qwest has already begun a full re-examination of its rate implementation
17 processes and procedures. Toward that end, Qwest already has:

- 18
- 19 • Engaged an outside consultant to provide recommendations for automation of as many
20 of the processes associated with cost docket implementation as possible;
 - 21 • Implemented a mechanized solution to shorten the time it takes to map individual
22 CLEC contracts in the 1st Quarter 2003.
 - 23 • Designated a Program Management Office to oversee the implementation process –
24 ensuring that implementation schedules are adhered to and opportunities for process
25 improvement can be explored and acted upon.
 - 26 • Established a Cost Docket Governance Team comprised of executive level personnel
from the organizations within the company with primary involvement and responsibility
for cost docket implementation. Those organizations include: Wholesale Product
Management, Wholesale Service Delivery, and Policy & Law. The purpose of the
Governance Team is to provide both an oversight role and to serve as an escalation
point for issues or obstacles that may arise during the implementation process. The

1 Team has scheduled meetings every two weeks, but may meet more frequently if issues
2 arise that require immediate resolution.

- 3 • Modified its Communications process to require increased correspondence with the
4 Commission Staff and all wholesale customers at critical process points, including:
 - 5 1. Immediately after the issuance of a final Commission Order;
 - 6 2. Immediately after rate sheets are updated;
 - 7 3. Immediately prior to the introduction of new Commission-approved rates to
8 wholesale customer bills; and

9 Qwest does not view these process changes as exhaustive of future actions in this area.
10 Qwest does believe, however, that they represent an appropriate step toward addressing the
11 concerns identified in the Commission's Order to Show Cause action.

12 **III. ANY DELAY OF IMPLEMENTATION IN ARIZONA WAS NOT WILLFUL,
13 AND QWEST SHOULD NOT BE HELD IN CONTEMPT.**

14 **A. Introduction.**

15 In implementing the rates under Decision 64922, Qwest had no evil motive. There was no
16 one "behind the curtain," as AT&T has suggested, engineering an effort to ensure states with 271
17 approval received preferential treatment. TR 62:10-11; 63:22. Rather, Qwest had a manually
18 intensive system for implementation of wholesale rate elements. As a result, in states, such as
19 Arizona, where 547 elements had to be implemented and over 100 CLEC interconnection
20 agreements reviewed before the process could be completed, the wholesale rate implementation
21 process was both labor intensive and time consuming. Qwest has already taken, and is
22 committed to continue taking, steps to upgrade and improve this system as well as its
23 communications with CLECs and with the Commission in future wholesale rate proceedings.

24 **B. The Order to Show Cause.**

25 In Decision 65450, the Commission alleges three Counts of contempt on the part of Qwest:
26 (1) failure to implement rates approved in Decision No. 64922 within a reasonable amount of time;

1 (2) deliberately delaying implementation of wholesale rate changes in Arizona until it had
2 implemented the wholesale rate changes in other states in which Qwest had pending before the
3 FCC its 271 applications; and (3) attempting to discourage parties from notifying the Commission
4 of its delay in complying with Decision No. 64922. Staff has recommended fines of \$750.00 per
5 day for Counts 1 and 2, totaling \$189,000.00 based on a total of 126 days (the difference between
6 the date that Qwest completed implementation of the wholesale rates and the date that Staff
7 believed Qwest should have implemented the rates). *See* Rowell Direct at 16. Staff was unable,
8 however, to conclude that statements made by Qwest in its October 16, 2002 letter to AT&T (and
9 copied to Staff) were intended to deter AT&T from "bringing their issues forward to the
10 Commission." *Id.* at 18; TR33:4-10.² Staff's finding of contempt and assessment of fines in
11 Counts 1 and 2 are not supported by law or fact and should be rejected.

12 Again, Qwest does not contend that the implementation of the wholesale rates, and
13 particularly Qwest's failure to notify the Commission and CLECs about the implementation
14 timeline, was not, in hindsight, inappropriate. Qwest does contend, however, that the resolution of
15 these issues must be based on a fair consideration of all relevant facts, and any penalty cannot be
16 based on mere assumptions about "facts" not in the record. The penalty recommendations of Staff
17 and AT&T do not have factual foundation and are disproportionate to evidence presented during
18 the hearing.

19 The important questions here are ones of intent and harm, both of which are lacking in this
20 instance. Qwest did not intentionally delay the implementation of the Arizona rates and, in fact,
21 would have no incentive to delay the implementation, as a delay would only increase the amount of
22 back billing and other work required by Qwest. *See, e.g.,* TR at 91:13-19. Qwest has already
23

24 ² Given that no party at the hearing presented any evidence that Qwest attempted to deter AT&T from
25 bringing its issues to the Commission and no party argued for the imposition of sanctions on this basis,
26 Qwest will not address that point further in this brief.

1 unilaterally paid interest (six percent) on the difference between the prior Arizona wholesale rates
2 and the wholesale rates set by the Decision for CLECs during the time that the rates were not yet
3 implemented, thus providing additional refunds over and above the set rates and true-up amounts.
4 Wholesale customers, as noted by Staff, have been compensated for any delay through Qwest's
5 calculation of interest amounts and "will be made whole."³ Rowell Direct at 16.

6 Additionally, as explained more fully below, the Arizona implementation of wholesale rates
7 did not harm or otherwise affect AT&T's or any other CLEC's ability to access customer billing
8 information upon which they depend to bill their end-user customers. Qwest continued to provide
9 them access to that information in "substantially the same time and manner" it provides such
10 information to itself.⁴ This is the standard by which Qwest is judged under Section 271 of the 1996
11 Telecommunications Act (the "Act"). Qwest did not and has not violated its duties to provide
12 CLECs this access. Qwest has also improved its wholesale billing processes so that it can
13 implement within 90 days of the compliance filing for future wholesale cost dockets. Finally,
14 Qwest is committed to proactively communicating future implementation timelines and plans with
15 the Commission, its Staff and interested parties. Based on this, as well as the actions Qwest has
16 taken to improve the process, a finding of contempt and assessment of fines are inappropriate and
17 unnecessary.

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23 ³ As to the question of harm, Mr. Rowell acknowledges on page 16 of his direct testimony that the
CLECs have been made whole.

24 ⁴ AT&T's witness admitted at hearing that AT&T's ability to bill its customers in the same manner
25 Qwest bills its customers does not depend on the receipt of wholesale bills from Qwest. Rather, "the
information that AT&T requires from Qwest to bill retail customers is the services features that Qwest is
26 providing AT&T so that we can provide service ultimately to our end user customer." TR 74:25-75:17.

1 **C. The Record Provides No Basis for Finding Qwest in Contempt.**

2 1. The Arizona Cost Docket was Particularly Complex and Required More
3 Time to Implement.

4 The record establishes that Qwest implemented the Arizona wholesale rate changes in the
5 same manner as it implemented orders from generic wholesale cost dockets in other states. Easton
6 Direct at 11-12. During 2001 and 2002, Qwest implemented wholesale rates from generic cost
7 dockets in the order of the effective date of each order. *Id.*; Easton Direct at 16. The rates set by the
8 Decision were implemented in the same manner as wholesale rates in other states and the period of
9 time required to implement Arizona wholesale rate changes was at the mean of the time required to
10 implement rates resulting from generic cost dockets. TR 29:22-30:03. There is no evidence that
11 Qwest willfully disobeyed the Decision or intentionally delayed implementation of the rates
12 resulting from the Decision. To understand what Qwest did to implement the rates and why the
13 rate change process was not completed until December of 2002, it is necessary to focus on the
14 wholesale rate implementation process.

15 a. Implementation of Phases

16 Implementation of a cost docket order, such as Decision 64922, is an extremely complex
17 undertaking. Qwest's wholesale cost docket implementation process consists of three (3) primary
18 phases: the Initiation Phase, the Contract Implementation Phase, and the I.T. Rate Implementation
19 Phase. Once these Phases are completed there is an additional work effort required to determine
20 what, if any, true-up is required pursuant the Commission's Decision or language in CLEC
21 interconnection agreements.⁵

22 The Initiation Phase occurs once the rates set in the Decision of the Commission in the cost
23 docket become final. In this instance, rates were set at the time Qwest made its compliance filing

24 ⁵ Unless otherwise indicated, information regarding Qwest's implementation process was presented as
25 part of Mr. Easton's Rebuttal Testimony and Qwest's Response to STF 22-288, Staff Hearing Exhibit S-
26 1C.

1 on June 26, and the Initiation Phase began on June 27. *See* Qwest's Response to STF 24-001, Staff
2 Hearing Exhibit S-1B. This Phase involves at least 13 individuals representing each of the business
3 entities within Qwest that are charged with implementing the Commission's decision. The entities
4 include representatives from Wholesale, Product Management, Business Development and
5 Contract Development & Services. During this Phase, the Commission's order is evaluated and
6 analyzed to determine the scope of work necessary to implement each of the rates. Issues raised by
7 the order are assigned for resolution within the appropriate business units, legal interpretation is
8 provided, and operational impacts are also addressed in this Phase. The rates are then mapped into
9 existing CLEC interconnection agreements and the new rate information is sent on to the
10 departments charged with posting the new rate information on internal websites, determining the
11 application of the rates to each CLEC and preparing the necessary documentation to incorporate the
12 new rates into the various billing systems. Twenty-five business days are normally scheduled for
13 the work required in this Phase. However, that time period may vary depending on the size, scope
14 and complexity of the docket to be implemented, the number of CLEC contracts to which the rates
15 need to be applied and the workload of implementation activities associated with cost dockets from
16 other jurisdictions.

17 The Contract Implementation Phase involves over 23 individuals – again representing the
18 business units responsible for the tasks necessary to complete this Phase including the Cost Docket
19 Coordinator, the Contract Implementation Team for IABS, the Contract Implementation Team for
20 CRIS, representatives from CPMC (collocation), Product Process representatives and the Program
21 Management Organization. Activities include preparing the documents necessary to build new rate
22 tables, performing quality and accuracy checks of the rate information, data entry associated with
23 inputting the rates into the system, CLEC notification of updated rate sheets associated with their
24 contract, creating documentation necessary for any new rate elements or structure changes, and
25 determining cost of and establishing priority for the systems modifications. Twenty business days
26 are normally scheduled for the work required in this Phase. Again, that time period may vary,

1 depending on the size and scope of the docket to be implemented, the number of CLEC contracts to
2 which the rates need to be applied and the workload of implementation activities associated with
3 cost dockets from other jurisdictions.

4 The I.T. Rate Implementation Phase involves at least 13 individuals representing the
5 various billing systems (CRIS, IABS, LEXCIS). These individuals receive all of the
6 documentation from work done in previous phases and are responsible for updating the system
7 tables, making system modifications where necessary to accommodate the rate changes and
8 completing the tasks necessary to have the new rates reflected on the CLEC bills. This Phase is
9 normally scheduled for completion within 15 business days, with variance possible due to
10 complexity or workload demands. This wholesale rate implementation process is followed in all
11 fourteen Qwest service states. It places rates into the billing systems on a going forward basis and
12 also provides for "back billing", which is the process of making billing adjustments back to the
13 effective date of the order or to a date designated by the Commission.

14 In addition to these steps, there may also be another step called "true-up", which would
15 apply the new rates to a period prior to the effective date of the order. A true up is necessary if
16 individual interconnection agreements call for interim rates to be adjusted to reflect a Commission
17 decision in a cost docket. The primary application of true ups is when a rate element is being
18 addressed for the first time by the Commission. To determine if a true up is necessary, a review of
19 all interconnection agreements in the state must be conducted to see if there is contract language
20 related to the retroactive application of cost docket rates. If there is such language, true up
21 adjustment amounts are calculated for that carrier.

22 b. Multiple Interconnection Agreements and Mapping

23 The implementation process is complicated due to the existence of a large number of rate
24 elements, multiple billing systems and the fact that changes must be made on a carrier-by-carrier
25 basis. Existing contracts with CLECs have been negotiated and arbitrated at various points in time
26 since the passage of the 1996 Telecommunications Act. As a result, contractual provisions and

1 structure concerning rates varies. TR 73:17-20. In Arizona, Qwest had a large number (137) of
2 CLEC and wireless service provider contracts in effect at the time the Decision was issued. Easton
3 Direct at 11:6-9. When the Commission ordered new rate elements or changed a rate element
4 structure, each of the interconnection agreements had to be analyzed to determine how the change
5 impacts that particular contract.⁶ TR 42:22-43:3; 102:7-13; 105:13-23; Easton Direct at 11. For
6 example, an early interconnection agreement for CLEC "XYZ" may have different product names
7 or rate elements than those identified in the Commission's cost docket Decision, making a manual
8 review of the contract necessary to determine how the Commission's order applies to "XYZ."
9 Such review and analysis is critical to ensure that CLECs are billed accurately. This makes
10 implementing cost docket rates significantly more complicated than merely changing rates in a
11 table, as is the case with retail rate changes.

12 Despite their best efforts, Staff and AT&T were unable to show that Qwest's
13 implementation process in Arizona was somehow discriminatory, irrational or out of step with
14 implementation of full rate case orders in other states. *See, e.g.*, TR 106. AT&T's witness
15 admitted that he had never actually reviewed any of Qwest's interconnection agreements in Arizona
16 or had no first-hand involvement with implementation of wholesale rate changes with other RBOCs
17 in any non-Qwest states. TR at 63:14-17; 64:15-19; TR 73:4-20. Similarly, Staff was able only to
18 suggest, although without showing any first-hand experience in doing so or that any other RBOC
19 had done so, what might possibly be a way to expedite the mapping process for quicker
20 implementation.⁷ TR 41:6-20; 43:21-44:12.

21 At the time of hearing, however, Qwest had already begun putting into place a mechanized
22

23 ⁶ Even the 38 resale agreements in effect at the time had to be reviewed simply to ensure that no
24 implementation was required. TR 102:7-13; 105:13-23

25 ⁷ AT&T's witness also admitted that he has never reviewed any of Qwest's interconnection agreements
26 in Arizona and admits that an agreement with any particular CLEC could provide for a different list of
elements. TR at 73:4-20.

1 system for mapping that Staff's witness had recommended in order to shorten the time for
2 implementation. TR 92:13-19. Additionally, prior to this hearing, Qwest unilaterally began
3 organizing meetings with individuals who had participated in the various cost docket proceedings
4 in an effort to get a jump start on some of the changes it felt would be subsequently ordered in that
5 particular state.⁸ TR 94:16-24. Qwest did so on its own accord because the delay in implementing
6 rate elements, particular in cost dockets involving over 500 elements as in Arizona, was not and is
7 not in the best interest of either Qwest or the CLECs. TR 91:13-92:3.

8 c. Wholesale Implementation is more Complex than Retail.

9 Throughout this proceeding, Staff and AT&T have suggested that the process for
10 implementing wholesale rates should not take any longer than the process for changing retail rates.
11 While this suggestion may appear reasonable on its face, it ignores the significant differences that
12 exist between the wholesale and retail billing processes. For a retail rate change, most of the retail
13 services already exist in the Qwest databases, and therefore already have been assigned a Uniform
14 Service Order Code ("USOC"). By contrast, Decision 64922 required Qwest to identify and
15 implement hundreds of changes to USOCs. While Staff has suggested that Qwest could begin the
16 process of implementation before the Commission issues a final order, given the nature of a cost
17 docket, particularly Arizona's cost docket, it is difficult to anticipate and plan for each potential
18 outcome prior to the final determination by the Commission, greatly limiting the amount of
19 preparation that can be done before a decision is issued. TR 39:22-40:2; 42:22-43:3; Easton Direct
20 at 9-11.

21 Further, as even AT&T's witness recognizes, unlike retail rates for which there are no
22 contract specific elements or rate structures, wholesale rate implementation must occur at a CLEC
23

24 ⁸ In so doing, Qwest recognized that these attempts to begin implementation on what its witnesses and
25 participants thought may happen with respect to a cost order, it is not necessarily helpful in every case.
26 TR 94:16-24.

1 by CLEC level due to differences in the interconnection agreements. Finnegan Direct at 6:6-8
2 (“Unlike with retail rate changes, to change the rate for one item requires potentially dozens of
3 changes to CLEC-specific rates.”); *see also*, Rowell Direct at 19 (“Retail changes are not
4 implemented on a customer by customer basis. On the wholesale side, Qwest’s system is such that
5 rates need to be implemented on a customer by customer basis. Thus, each system table/database
6 needs to be updated for each rate changed *and for each CLEC.*” (emphasis in original).

7 2. Qwest Did Not Implement Wholesale Rates Out of Order to Support
8 States where Qwest has been given 271 Status.

9 Qwest implemented all comprehensive cost dockets, such as Arizona, sequentially in the
10 order of the effective date of the decision establishing rates. Only certain voluntary rate reductions
11 were implemented prior to the implementation of the Arizona wholesale rates. Since these rate
12 changes were made based on reference to benchmark rates adopted in Colorado, it was more
13 efficient to implement the voluntary changes on an integrated basis. In addition, the complexity of
14 the benchmark rate changes was significantly less than that required for a cost docket order such as
15 Arizona’s. The number of benchmark rate changes was substantially smaller than the number of
16 changes for Arizona: an average of 35 versus the 547 changes in Arizona. Most significantly, the
17 benchmark changes did not require CLEC by CLEC true ups, a determination of how the rate
18 changes applied to a given CLEC’s contract or any restructuring of the rate elements and the
19 necessary system changes that restructuring entails.

20 Staff and AT&T allege that Qwest implemented rates in Arizona out of order or put ahead
21 of Arizona other states that had 271 approval. There is no evidence to support this assertion. When
22 looking at the average rate of implementation in Qwest’s states, Arizona was at the mean, taking
23 the average of five months in this case. TR 29:22-30:3. Implementation in Wyoming and
24 Washington, for example, took more business days than in Arizona. TR 29:15-21; 30:13-17.
25 Colorado took the same number of business days (although two less calendar days), and Montana
26 took two less business days to implement than Arizona. TR 30:18-31:2. For the most part, only

1 the four states where Qwest implemented benchmark rates, as opposed to full rate orders, was the
2 implementation time measurably shorter.⁹ TR 21:8-10. As Staff testified, even though Qwest
3 implemented rates in those benchmark states in a shorter time, there was no way to quantify or
4 otherwise show that those implementations somehow adversely affected Qwest's ability or attempts
5 to implement the wholesale rates in Arizona. TR 22:14-24. Moreover, Qwest has provided a
6 reasonable explanation of the lengthy implementation in Arizona, including the extraordinary
7 number of rate elements involved (547), and neither Staff nor AT&T has shown that Qwest
8 purposely avoided implementation in Arizona in defiance of the Decision.

9 "Benchmarking" is a term that the FCC utilizes in its evaluation of UNE prices for states
10 that applied for 271 approval. This benchmarking process compared rates from one state to another
11 state's rates. For example, when Oklahoma's rates were being evaluated for TELRIC compliance,
12 the FCC was not satisfied that Oklahoma's rates were completely compliant with TELRIC
13 principles. The FCC then compared Oklahoma's rates for basic UNE elements to those same
14 element rates from Texas, where UNE rates had already been evaluated and deemed to be TELRIC
15 compliant. When the FCC made the comparison they found that Oklahoma's rates were within a
16 zone of reasonableness when adjusted by the FCC Universal Service Fund (USF) cost model for
17 state cost differences.

18 Qwest utilized the FCC benchmarking approach proactively in its 271 (nine state)
19 applications. Qwest made the same comparison of rates as the FCC by comparing eight states'
20 rates to the Colorado rates (which Qwest felt were TELRIC compliant). Where certain rates were
21 higher than the Colorado benchmark, Qwest voluntarily lowered the rate to be the equivalent of the
22

23 ⁹ The one exception to this is **Nebraska** where the Nebraska Commission specifically ordered that rates
24 be implemented within 60 days of the order being issued. In addition, at the time the Nebraska
25 Commission ordered the specific due date, Qwest was only working on one other cost docket
26 concurrently, as opposed to four other cost dockets when Arizona implementation began. See Qwest's
Response to AT&T Data Request 01-009, AT&T Hearing Exhibit B.

1 Colorado rate adjusted by the FCC USF cost model state differences. The FCC accepted this
2 approach and has found both the Colorado rates to be TELRIC compliant, and each state's
3 evaluation and adjusted rates to be within the zone of reasonableness of TELRIC. Easton Direct at
4 16.

5 Qwest implemented these limited rate changes as part of an integrated project and nothing
6 in the record suggests this project slowed implementation in Arizona. TR 22:14-24. Indeed, Mr.
7 Rowell was asked to quantify any delay that occurred in the Arizona rate implementation process
8 because the benchmarked rates were implemented. He was unable to quantify any such delay. He
9 was asked to identify what resources were diverted from implementing Arizona rates so that the
10 benchmarked rates could be implemented. He was unable to do so. TR 33:21-35:2. He testified
11 that he believed as a general matter that the implementation of the benchmarked rates slowed down
12 the implementation of the Arizona rates. This conclusion was based in part on his supposition that
13 Qwest personnel could not be performing the same stage of the implementation process described
14 earlier in this brief for two states at the same time. His supposition was incorrect. Rather, as
15 Qwest's witness testified, the same team is assigned to the various phases of implementation
16 process. TR 113. For example, if there were four cost docket implementations in four states, these
17 individuals would work on all four in addition to doing other work required by Qwest. TR 114:8-
18 13. The more cost docket rate implementations being implemented simultaneously, the more work
19 was required by Qwest's implementation team. Thus, the only facts presented on the matter were
20 presented by Qwest and showed nothing more than a lot of employees doing a lot of work to
21 complete implementation in a number of states simultaneously.

22 There is simply no evidence in the record to support the conclusion that Qwest
23 discriminated against CLECs doing business in Arizona or unlawfully preferred other states in the
24 implementation of wholesale rates.

25
26

1 3. Decision 64922 was ambiguous, was not narrowly drawn and did not
2 proscribe any of the conduct charged against Qwest.

3 A contempt penalty must be based on a narrowly drawn order or rule that specifies the
4 prohibited conduct. See A.R.S. § 40-424(A) (“If any corporation . . . fails to observe or comply
5 with any order, rule or requirement of the commission . . .”).¹⁰ The essence of contempt is that
6 a party fully understands, but chooses to ignore, a specific mandate; contempt cannot be based
7 upon a vague requirement. See, e.g., *Int’l Longshoreman’s Assn. v. Philadelphia Marine Trade*,
8 399 U.S. 64, 77 (1967). Moreover, the specific, narrowly drawn mandate must give Qwest fair
9 notice of the conduct prohibited or required. A regulatory requirement must, at minimum, “give
10 fair notice that certain conduct is proscribed.” *Rabe v. Washington*, 405 U.S. 313, 314 (1972);
11 see also *Palmer v. City of Euclid*, 402 U.S. 544 (1971). A rule may be enforced only when
12 “those subject to the rule are reasonably able to determine what conduct is appropriate.” *In re*
13 *N.P.*, 361 N.W.2d 386, 394 (Minn. 1985). Under this “fair notice doctrine,” “the well-
14 established rule in administrative law [holds] that the application of a rule may be successfully
15 challenged if it does not give fair warning that the allegedly violative conduct was prohibited.”
16 *U.S. v. Chrysler Corp.*, 158 F.3d 1350, 1355 (D.C. Cir. 1998). The doctrine “has now been
17 thoroughly ‘incorporated into administrative law,’” and is grounded in due process clause of the
18 United States Constitution. See, e.g., *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C.
19 Cir. 1995) (quoting *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987)). Thus, in
20 order for Qwest to be penalized for implementing final wholesale rates on December 15, 2002,
21 that implementation schedule must have violated a specific, narrowly drawn mandate that fairly

22 _____
23 ¹⁰ Arizona’s statute is consistent with hornbook law regarding contempt. See 17 Am.Jur.2d Contempt
24 § 157 (1990) (“Punishment [for contempt] can only rest on a clear, intentional violation of a specific,
25 narrowly drawn order; specificity is an essential prerequisite of a contempt citation.”) (citations omitted,
26 emphasis added).

1 warns Qwest that its implementation schedule was prohibited.¹¹

2 The Decision itself does not support a contention that implementation was to be done
3 “immediately” nor do any inferences that can be gleaned from it. The Decision states that the
4 decision shall become “effective immediately” not “implemented immediately.” In fact, the
5 Decision did not actually set rates at all but adopted models, inputs and assumptions to be used for
6 calculating various rate elements. The Decision then ordered an additional 30 days to file a
7 compliance filing. In other words, Qwest had to run the models, inputs and assumptions and
8 calculate some 547 rate elements. Then, Qwest had to come to agreement with Staff and CLEC
9 interveners¹² on 547 rate elements and file those agreed rates with the Commission within 30 days
10 of the effective date of the Decision. *See* Rowell TR 27:22-28:7. Qwest did this and filed the rates
11 two weeks before the compliance filing was due. *Id.* at 29:8-14. Qwest began implementation of
12 these rates the very next day. *Id.* at 28:18-22. Thus, Qwest began developing the compliance
13 filing, which determined the agreed upon rates, immediately and finished that process 14 days after
14 the Decision was issued. It then immediately began the implementation process. These actions
15 cannot constitute contempt.

16 Further, the Decision was ambiguous and subject to conflicting interpretations as even Staff
17 conceded at hearing. First, when asked to clarify its basis for determining Qwest violated the
18 Decision directives, Staff’s witness stated: “Staff believes that effective immediately means
19 implemented immediately, or implemented within a reasonable period of time.” *Id.* at 48:3-5.
20 Second, although Staff recommended penalties based on what it believed was a “reasonable” time
21 after the Decision was issued, Staff’s witness admitted that it would, in fact, not be reasonable to

22 _____
23 ¹¹ Qwest recognizes that Staff has “mitigated” the damages it believes the Commission may assess
24 against Qwest because the company’s efforts to “retroactively remedy this situation thru credits.”
25 Rowell Direct at 16-17. Qwest, however, does not agree with the basis for its initial assessment of
26 penalties on a daily basis and the starting date of August 11, 2002.

¹² In this case, it was only AT&T that participated in the compliance filing with Qwest.

1 start the clock upon issuance of the Decision since the compliance filing was not even due until 30
2 days from that date.¹³ *Id.* at 39:11-40:2. Staff further agreed that until an order adopts a rate
3 structure (i.e., the compliance filing), Qwest could not compare rate structures and make
4 adjustments pursuant to its interconnection agreements with various CLECs. *Id.* at 42:23-43:3.
5 Thus, the Decision contained no narrowly drawn order or rule. It contained standard “effective
6 immediately” language that was ambiguous at best. No party has identified any other Commission
7 order, rule or requirement that requires Qwest (or any other ILEC) to fully implement new ordered
8 rates within a particular time period. Moreover, to the extent any conduct was prescribed, such as
9 the compliance filing within 30 days of the Decision, Qwest complied fully.

10 **D. The Recommended Penalties are Excessive in light of the Record.**

11 Even if the Commission were to find that Qwest purposely failed to abide by
12 some provision of Decision 64299, the penalties recommended by Staff are excessive and are not
13 supported by law or fact.

14 1. The Proposed penalties are not proportional to the harm or lack thereof.

15 Any penalty or fine ordered by this Commission must be proportional to the seriousness of
16 the offense and the degree of actual harm caused. *See, e.g., United States v. Bajakajian*, 524 U.S.
17 321, 324 (1998).¹⁴ The evidence shows that Qwest did not intentionally delay implementation in
18 Arizona and that Qwest implemented its Arizona wholesale rates in order and in accordance with
19 the Decision. Moreover, the monetary penalties recommended by Staff are excessive in light of the
20 complete absence of evidence of any actual harm to Arizona CLECs or competition in general.

21 _____
22 ¹³ Staff admits that making June 12 the beginning of the implementation penalty period was unreasonable
23 since the Commission ultimately did not adopt a rate structure identical to any of the parties’
24 recommended rate structures in this docket. TR at 40:18-21. Thus, mapping any individual CLEC rates
in Arizona prior to Qwest’s compliance filing would have been virtually impossible.

25 ¹⁴ *See also Power v. United States*, 531 F.2d 505, 507 (Cl.Ct. 1976) (an administrative penalty must be
26 overturned where “the penalty is so harsh that there is an “inherent disproportion between the offense
and punishment.”)

1 Staff did not even undertake an effort to determine what each affected CLEC ordered to ascertain
2 whether Qwest would ultimately owe them money due to rate reduction or if the CLEC would owe
3 Qwest due to a rate increase. TR 19:1-13. Staff admitted at hearing that Qwest's offer to pay six
4 percent interest for the delay in billing will make the affected CLEC's whole. Rowell Direct at 16.
5 Additionally, at hearing, Staff's witness stated that Qwest had "fulfilled its legal obligation" to the
6 CLECs by giving them a six-percent interest rebate on time lost during implementation, while at
7 the same time emphasizing that the effect on CLECs being denied the benefit of the lower rate
8 during this time was their "principal concern." TR 16-22. Thus, the Commission, through Staff's
9 own admission, must conclude that no penalty is warranted since the CLECs were made whole and
10 Qwest had already fulfilled any legal obligation it had to compensate them through interest
11 reduction.

12 2. Staff Erred in Calculating its Recommended Penalty on a Per Calendar
13 Day, Per Occurrence Basis.

14 Even assuming that the imposition of some penalty is authorized – which it is not – a
15 major premise of Staff's recommended penalty of \$189,000.00 is that A.R.S. § 40-424 allows the
16 Commission to levy fines of up to \$5,000 per calendar day. Rowell Direct at 14-16. This
17 interpretation of § 40-424 is inconsistent with the plain meaning of the statute under Arizona
18 law, the statute's legislative history, and the purposes associated with "per day" penalties for
19 "contempt."

20 a. Section 40-424 Provides No Authority to Assess Per Day Penalty.

21 The plain language of § 40-424 contains no provision allowing for the assessment of
22 penalties on a per day basis. The statute reads as follows:

23 § 40-424. Contempt of corporation commission; penalty.

24 A. If any corporation or person fails to observe or comply with any order,
25 rule or requirement of the commission or any commissioner, the
26 corporation or person shall be in contempt of the commission and shall,
after notice and hearing before the commission, be fined by the

1 commission in an amount not less than one hundred nor more than five
2 thousand dollars, which shall be recovered as penalties.

3 b. The remedy prescribed by this article shall be cumulative.

4 Thus, the statute does not authorize the Commission to impose a penalty for each day on
5 which an alleged violation occurred.

6 Moreover, Arizona law prohibits any reading of the statute that would add any terms by
7 implication. The Commission has no implied powers. *See, e.g., Rural/Metro Corp. v. ACC*, 129
8 Ariz. 116, 117, 629 P.2d 83, 84 (Ariz. 1981). Instead, its powers are derived only from a strict
9 construction of the Arizona Constitution and implementing statutes. *See, e.g., Southern Pacific*
10 *Co. v. ACC*, 98 Ariz. 339, 345, 404 P.2d 692, 696 (Ariz. 1965).

11 A simple review of the statute reveals that it makes no provision for assessing a penalty
12 on a per day basis. Because the Commission possesses only those powers that can be derived
13 from a strict reading of the statute, no additional provision allowing the Commission to assess
14 the penalty on such a basis can be implied in that statute. Moreover, the Arizona Constitution
15 expressly limits the Commission's power to impose fines to assessing a penalty on a per
16 violation, not a per day, basis.¹⁵ These provisions must be strictly construed and cannot be read
17 to confer any implied powers. Thus, the Commission simply has no power to assess a contempt
18 penalty on a per day basis.

19 Further, as set forth below, the legislative history of § 40-424 confirms that the
20

21 ¹⁵ Arizona Const., art. 15, sections 16 and 19, read as follows (emphasis added):

22 Section 16. If any public service corporation shall violate any of the rules, regulations,
23 orders, or decisions of the corporation commission, such corporation shall forfeit and
24 pay to the state not less than one hundred dollars nor more than five thousand dollars *for*
each such violation, to be recovered before any court of competent jurisdiction.

25 Section 19. The corporation commission shall have the power and authority to enforce
26 its rules, regulations, and orders by the imposition of such fines as it may deem just,
within the limitations prescribed in section 16 of this article.

1 Commission was never intended to have the power to assess penalties for contempt on a per day
2 basis.

3 c. The Legislative History of the Statute Demonstrates that the
4 Legislature Intended to Preclude the Commission from Assessing
Contempt Penalties on a Daily Basis.

5 In addition to confirming that the statute does not – and has never – provided for the per
6 day assessment of contempt penalties, the legislative history of § 40-424 demonstrates that the
7 legislature expressly intended not to grant that power to the Commission. In order to fully
8 understand § 40-424, it is necessary to review its history in conjunction with that of its
9 companion statute, § 40-425.

10 Sections 40-424 and 40-425 were originally drafted in 1912 as part of Act 90, relating to
11 public service corporations. Section 40-424 has survived in substantially the same form since
12 that time, with relatively minor changes. This statute has never contained language authorizing
13 the Commission to impose contempt penalties for each day on which a violation occurs. The
14 predecessor to § 40-424, which was originally designated § 81, appears in the table below in the
15 left column and the current version of § 40-424 appears in the right:

<p>16</p> <p>17 Act 90, § 81 In case any public service corporation, corporation or person shall fail to observe, obey or comply with any order, decision, rule, regulation, direction, demand or requirement, or any part or portion thereof, of the commission or any commissioner, such public service corporation, corporation or person shall be in contempt of the commission and shall be fined by the commission a sum not less than one hundred dollars nor more than five thousand dollars, to be recovered before any court of competent jurisdiction, in this state.</p> <p>22 Procedure had in such contempt proceedings shall be the same as in courts of record in this state. The remedy prescribed in this section shall not be a bar to or affect any other remedy prescribed in this act, but shall be cumulative and in addition to any such other remedy or remedies.</p>	<p>17 § 40-424.</p> <p>A. If any corporation or person fails to observe or comply with any order, rule or requirement of the commission or any commissioner, the corporation or person shall be in contempt of the commission and shall, after notice and hearing before the commission, be fined by the commission in an amount not less than one hundred nor more than five thousand dollars, which shall be recovered as penalties.</p> <p>B. The remedy prescribed by this article shall be cumulative.</p>
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1 As shown above, the changes to § 40-424 consist of paring down “any order, decision,
2 rule, regulation, direction, demand or requirement, or any part or portion thereof” to include only
3 “any order, rule, or requirement,” streamlining the statement that the remedy is cumulative, and
4 other insignificant wording changes. Thus, § 40-424 does not now, nor has it ever, provided for
5 the daily assessment contempt penalties.

6 Section 40-425, on the other hand, underwent a significant change. Subsection B of the
7 predecessor to § 40-425, which was originally designated § 76, appears in the table below in the
8 left column and the current version of § 40-425(B) appears in the right (emphasis added):

9 Act 90, § 76(b) Every violation of the provisions of 10 this act, or of any order, decision, decree, rule, 11 direction, demand or requirement of the commission, 12 or any part or portion thereof, by any corporation or 13 person is a separate and distinct offense, and <i>in case of a continuing violation each day's continuance thereof shall be and be deemed to be a separate and distinct offense.</i>	§ 40-425(B) Each violation is a separate offense, <i>but violations continuing from day to day are one offense.</i>
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14 Thus, the predecessor statute, § 76, specifically provided that each day on which a
15 continuing violation occurred constituted a separate offense. Thus, because the penalty applied
16 to each offense, the original version of § 40-425 provided for the per day assessment of penalties.
17 This very aspect of Act 90 was among those challenged in *Van Dyke v. Geary*. *Van Dyke v.*
18 *Geary*, 218 F. 111 (D. Ariz. 1914). In that case, the court found Act 90’s imposition of penalties,
19 including the per day assessment of monetary penalties, to be unconstitutional. *Id.* at 121. After
20 the *Van Dyke* case was decided, the Arizona legislature changed the language in subsection (b) of
21 the statute, which provided that each day of a continuing violation constituted a separate offense,
22 to its current form. *See* Rev. Code 1928, § 15-728. Section 40-425(B) now provides that “[e]ach
23 violation is a separate offense, *but violations continuing from day to day are one offense.*”

24 This legislative history is instructive because it explains the differing approaches to the
25 same end result – *i.e.*, no per day assessment of penalties – in the language of § 40-424 and § 40-
26 425. First, it shows that the Arizona legislature deliberately omitted the authority to assess per

1 day penalties from § 40-424 because it included the ability in one statute and did not include it in
2 the substantively identical companion statute. In other words, if the legislature intended to
3 authorize the Commission to impose per day penalties under § 40-424, it would have done so
4 expressly, as it did in § 40-425.

5 The absence from section § 40-424 of the language now included in § 40-425 explicitly
6 providing that a continuing violation constitutes a single offense does not suggest that the
7 Commission is authorized to impose a per day fine under the former. As discussed above, this
8 interpretation not only impermissibly expands the authority § 40-424 confers, but it is also
9 directly contrary to the legislative history of both statutes. The legislative history establishes that
10 the inclusion of language in § 40-425 explicitly providing that a continuing violation constitutes
11 a single offense was intended to expressly eliminate the daily assessment of fines after the
12 original statute's provision permitting the per day assessment was struck down. No such
13 language exists in § 40-424 because that statute never allowed the daily assessment of penalties.
14 No change was necessary.

15 The legislative intent is clear: the current forms of these statutes are not intended to and
16 do not confer any authority upon the Commission to assess penalties on a per day basis.

17 **IV. STAFF'S AND AT&T'S RECOMMENDED 30-DAY TIMELINE FOR FUTURE**
18 **IMPLEMENTATION IS NOT REASONABLE AND SHOULD BE REJECTED.**

19 **A. Qwest's implementation of wholesale rates involves significant dedication of**
20 **resources not necessary in implementation of standard retail rates or**
21 **benchmark rates.**

22 As already discussed, the process for full implementation of Qwest's rates is particularly
23 complex and is not the same as it is for retail customers. Qwest has also acknowledged the need for
24 a revised process and, as noted previously, has taken steps to put such a process into place.
25 However, Staff's and AT&T's suggested requirement that wholesale rate changes be made within
26 30 days of the effective date of an order in a wholesale docket is not supported by the evidence or
the legal authorities cited in support of their position.

1 Staff's 30-day proposal simply has no evidentiary support in the record. In determining the
2 appropriate penalty to recommend, Staff witness Rowell testified that 60 calendar days is a
3 reasonable time within which Qwest should have implemented the Decision. Nonetheless, Mr.
4 Rowell presented Staff's proposal that in future rate cases, Qwest be required to file wholesale rates
5 in future cost dockets within 30 days of the effective date of the order. However, Mr. Rowell was
6 able to give no compelling reason for his adoption of a 30-day implementation period. Indeed, he
7 testified that it just seemed like a reasonable number to Staff.

8 On cross-examination, Staff's selection of a 30-day implementation period was revealed to
9 be without basis and unreasonable. First, Staff indicated that its recommendation of a 30-day
10 implementation period was not based on any legal interpretation of the Act¹⁶. Second, while Staff
11 indicated that its recommendation was based in part upon what it believed other RBOCS could and
12 did do in implementing rates, Mr. Rowell agreed that the SBC/California order on which he relied
13 provided that SBC had 60 days from the date of the order to "make the necessary changes in
14 computer systems" to implement the rates ordered by the California PUC. Mr. Rowell admitted
15 that he did not in fact know whether SBC was required to fully implement rates in that 60 day
16 period or whether SBC in fact implemented the rates within that period. To the extent that the
17 authorities cited by Staff support any conclusion, they support the conclusion that periods of 60
18 days (or more) from the date of the order are appropriate for the implementation of wholesale rates.

19 Further, Mr. Rowell conceded that a 30-day implementation period would be unreasonable
20 in a case such as this. Mr. Rowell conceded that the Decision adopted a cost model and not specific
21 rates. He conceded that the Decision required that Qwest make a compliance filing setting forth the
22 rates within 30 days of the effective date of the order. He also conceded that, if the compliance
23 filing were made on the 30th day, implementation could not also be completed on that day. In
24

25 ¹⁶ Specifically, Staff did not adopt AT&T's conclusion that the Act requires a 30-day implementation. See
26 Section IV.B, *infra*.

1 effect, Mr. Rowell conceded that, in a case where a compliance filing is required within 30 days of
2 the effective date of the order, it is not reasonable to require implementation within 30 days of the
3 effective date of the order and that a reasonable compliance period would be 60 days from the
4 effective date of the order. TR 39-40,

5 Qwest believes 60 business days, or 90 calendar days, with a true up to follow, is a more
6 reasonable time frame for the implementation of new wholesale rates, balancing the needs for
7 timely implementation with the recognition that this is a complex, time consuming process. In
8 reviewing the process and making improvements to the implementation process, Qwest's goal
9 was to shorten the implementation time as much as possible because, among other things, longer
10 implementation time ties up resources unnecessarily. At this time, 90 days is the best result
11 given the improvements made so far; this includes execution mechanization of solutions as
12 recommended by Staff. TR 91:14-20; 92:13-19. Qwest is committed to continuing efforts to
13 improve the implementation system and is reviewing CLEC contracts as they expire to determine
14 whether additional standardization of pricing and other provisions can be made in order to further
15 shorten the necessary individualized review and implementation time. This process is ongoing.
16 TR 93-94.

17 **B. The Telecommunications Act of 1996 does not require absolute parity**
18 **between retail and wholesale implementation and billing.**

19 AT&T argues that Qwest should be required to implement wholesale rates "in substantially
20 the same time and manner" as it does retail rates. As a result, AT&T argues that because Qwest is
21 able to implement retail rate changes within 30 days of the effective date of a Commission order,
22 the Commission should require Qwest to implement newly ordered rates to CLECs within 30 days
23 of any ordered wholesale rate change.¹⁷

24 ¹⁷ AT&T's witness admitted that he had never had any first hand experience implementing wholesale
25 rates with other RBOCs in other states but had heard from others at AT&T that the implementation
26 process was less cumbersome and the time was shorter. TR 64:3-22; 60:7-12 ("Our experience, AT&T's
experience with other BOCs...and other ILECs...is when there is a rate change implemented, *our*

1 AT&T's witness, however, admitted during the hearing that he had no real basis from
2 which to opine that 30-days was the "average" rate of implementation for any RBOC. TR 63:14-
3 17.¹⁸ Rather, Mr. Finnegan testified that AT&T did not rely on implementation standards achieved
4 by other RBOCs to support its recommendation. Rather, it relied solely upon its reading of the
5 Telecommunications Act of 1996 as requiring that Qwest implement wholesale rates changes in the
6 same timeframe as it implements retail rate changes. In making this argument that Qwest must be
7 required to implement wholesale rates within 30 days of an order, AT&T relies on the Federal
8 Communication Commission's First Report and Order, FCC 96-325 (rel. Aug. 8, 1996) at para.
9 518, which states, among other things, that "if competing carriers are unable to perform the
10 functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network
11 elements and resale services in substantially the same time and manner that an incumbent can for
12 itself, competing carriers will be severely disadvantaged, if not precluded altogether, from fairly
13 competing."¹⁹ AT&T construes this language to require absolute parity between Qwest's
14 implementation and billing of rate changes for wholesale and implementation and billing of rate
15 changes for retail. AT&T's argument misses the mark and is out of step with both the First Report
16 and Order and subsequent FCC decisions interpreting the requirements governing wholesale
17 billing.

18 The language from the First Report and Order cited by AT&T relates to AT&T's ability "to
19

20 *expectation* is we should see the rate change on the next bill or the bill after.") (emphasis added).

21 ¹⁸ In fact, the only standard by which AT&T could measure Qwest's implementation time in Arizona
22 were internal conversations with AT&T's billing staff in Georgia and its perceived standard of Qwest's
23 retail billing practices. TR 64:8-14. Otherwise, AT&T provided the following as its basis for such a
24 conclusion: "From a legal obligation, although I'm not an attorney, we believe Qwest has a legal
25 obligation to make rate changes in substantially the same time and manner it does for retail. For us to
26 make an assertion that Qwest should make rate changes for wholesale as quickly as is done in Verizon,
Bell South or SBC, I don't know that there would be any legal justification for that." TR 64:3-65-4.

¹⁹ This is in contrast to Staff's lack of reliance on any FCC order to provide a basis for opining that 30
days was reasonable after previously stating that it believed 60 days was a reasonable amount of time for
implementation. TR 14:7-10.

1 perform the functions of . . . billing for network elements and resale services in substantially the
2 same time and manner that an incumbent can for itself . . .” While AT&T suggests that this
3 language imposes a requirement that wholesale rates be implemented by ILECs in the same
4 timeframe as it changes retail rates, the language in fact requires that the ILEC provide the
5 information needed by the CLEC to bill its end-user customers in the same time and manner that
6 the ILEC provides that information to itself.

7 Billing with respect to CLECs is made up of two components: Daily Usage Files (or Usage
8 Extracts) and carrier bills. *See, e.g., In the Matter of Application by SBC Communications Inc., et*
9 *al., to Provide In-Region InterLATA Services Pursuant to Section 271 of the Telecommunications*
10 *Act of 1996, Memorandum Opinion and Order, FCC 00-238, 15 F.C.C.R. 18354, at 210 (rel. June*
11 *30, 2000) (hereinafter “SBC 271 Texas Application”).* Daily Usage Files (“DUFs”) itemize usage
12 records for CLEC customers. This is the information that CLECs use to bill their own customers.
13 Carrier bills serve as a monthly invoice incorporating charges for all products and services provided
14 to the CLEC from the ILEC. This information is not needed to permit the CLEC to bill its
15 customers.

16 The parity requirement referenced by AT&T in the First Report and Order relates to a
17 CLECs ability to access the DUF information in “substantially the same time and manner” that
18 Qwest could access its own daily usage information so that the CLEC can bill its customers in a
19 timely, accurate and efficient manner. *Id.*; TR 75:6-12. As the FCC recently stated in approving a
20 section 271 application:

21
22 As we have required in prior section 271 orders, [an ILEC] must
23 demonstrate that it provides competing carriers with complete and
24 accurate reports on the service usage of competing carriers’
25 customers in substantially the same time and manner that [the
26 ILEC] provides such information to itself, and wholesale bills in a
manner that gives competing carriers a meaningful opportunity to
compete.

1 *In the Matter Joint Application by SBC Communications Inc., et al., for Provision of In-Region,*
2 *Interlata Services in Kansas and Oklahoma*, 16 F.C.C.R. 6237, 6319 at 163 (rel. Jan. 22, 2001).
3 This is the purpose of Section 271, Checklist Item 2 regarding non-discriminatory access to
4 network elements. *See, e.g.,* Qwest Exhibit 2, FCC 03-81 Opinion and Order, at 50 (“The
5 Commission has established in past section 271 orders that, as part of the OSS showing, a BOC
6 must demonstrate that competing carriers have non-discriminatory access to its billing systems.”);
7 Appendix F at 39.

8 Thus, under Section 271, ILEC implementation of new wholesale rates is not the focus of
9 “substantially similar time and manner” requirement, but CLEC access to DUFs so that CLECs
10 may, in turn, bill its customers in substantially the same manner as the ILEC or another CLEC
11 would be able to provide billing to their customers. *See, e.g.,* SBC 271 Texas at 212; TR 76:17-
12 77:14. AT&T has not and could not claim that Qwest failed to timely provide DUFs to it prior to
13 full implementation of the ordered rates. TR 75:13-17. Therefore, regardless of when Qwest was
14 able to implement the wholesale rates, in 60 days or 120 days, Qwest continued to provide AT&T
15 with access to the information necessary to bill its customers in a timely manner and in
16 conformance with the requirements of Section 271.²⁰ AT&T witness Finnegan admitted that
17 AT&T’s ability to bill its customers does not depend on its receipt of wholesale bills from Qwest.
18 TR at 74:24-75:17. More importantly, the parity requirement does not mean that Qwest must
19 implement newly ordered wholesale rates in the exact same time period (or in 30 days as suggested
20 by AT&T) as it does its retail rates. TR at 76: Section 271 simply does not require it.

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²⁰ It seems difficult to imagine that a subsequent decrease in rates for an AT&T customer with a six percent interest being given to AT&T would result in customer or company dissatisfaction. AT&T customers were able to realize the rate change at the same time as any other CLEC’s customers in Arizona.

1 **V. THE MULTIPLEXING RATE ESTABLISHED IN ACCORDANCE WITH**
2 **DECISION 64922 SHOULD NOT BE ADDRESSED IN THIS PROCEEDING.**

3 Mountain Telecommunications, Inc., (“MTI”) intervened in this proceeding seeking relief
4 from increased transport rates after implementation of Decision 64922. On April 8, 2003, the
5 parties agreed to request a separate, expedited hearing (the “Mini-Docket”) for the purpose of
6 addressing MTI’s transport rate issue and another issue raised by Qwest concerning analog port
7 rates.²¹ In its testimony for the Mini-Docket, MTI attempted to expand the issues by making
8 reference to multiplexing rates set as a result of Decision 64922. MTI argued that multiplexing
9 and other unspecified rates set forth in Qwest’s compliance filing after Decision 64922 were not
10 approved by the Commission and should be rolled back. Direct Testimony of Michael Lee Hazel
11 (“Hazel Direct”), April 25, 2003, pp. 6-7; Rebuttal Testimony of Michael Lee Hazel (“Hazel
12 Rebuttal”), May 12, 2003, pg. 4. Qwest’s witness responded that the multiplexing rate is not
13 within the scope of the proceeding, and that MTI had misinterpreted Decision 64922. Rebuttal
14 Testimony of Theresa K. Million, May 12, 2003, pp. 4-5. MTI and Qwest stipulated to the
15 admission of this limited testimony concerning multiplexing here after the same testimony was
16 stricken from the Mini-Docket because it was beyond the scope of that proceeding as established
17 by the stipulation of the parties.

18 **A. Multiplexing Rates are not properly at issue in this docket.**

19 By stipulating to the admission of testimony on multiplexing, Qwest did not acknowledge
20 that the OSC docket is an appropriate forum for revisiting the rates established by the
21 Commission in accordance with Decision 64922. First, the Complaint and the subsequent
22 pleadings and orders filed in this docket simply do not place the validity of the rate structure at
23 issue; rather, this proceeding focuses on whether Qwest implemented the Commission’s ordered
24 rates in a timely fashion. MTI raised the issue of multiplexing for the first time in an oblique

25 ²¹ Stipulation Concerning Expedited Hearing on Transport and Analog Port Rates, April 8, 2003.
26

1 comment on Staff's Transport Pricing Option 1 by MTI's witness Michael Hazel.²² Hazel Direct,
2 p. 6-7. Mr. Hazel's brief comments on multiplexing are not a sufficient basis for the
3 Commission to make any substantive determination on the reasonableness of the multiplexing
4 rate.

5 The lack of formal pleadings by MTI concerning multiplexing also raises due process
6 issues because it places Qwest at a considerable disadvantage in responding to MTI's vague
7 allegations. Qwest simply does not know at this point whether MTI has any valid substantive
8 concerns about the multiplexing rate in particular, or whether MTI is simply seeking a rollback
9 of any and all rates as the opportunity arises. MTI has never filed a motion or any other pleading
10 to establish the scope of its concerns. Neither Commission Staff nor any other party has
11 addressed these issues. Accordingly, Qwest asks the Commission to find that the multiplexing
12 rate at issue was lawfully established in accordance with Decision 64922. Alternatively, Qwest
13 asks that the Commission decline to address the multiplexing rates at this time, and consider
14 those rates along with other disputed wholesale rates in the Phase III Wholesale docket.

15 Attempting to reopen the multiplexing issue now is procedurally inappropriate because
16 this docket is focused on Qwest's implementation of rates, not the evaluation and establishment
17 of rates. The multiplexing rate at issue here is part of Qwest's rate structure filed on June 26,
18 2002 in compliance with the Commission's Phase II Decision of June 12, 2002. MTI admitted in
19 the Mini-Docket that it chose not to participate in the Phase II proceedings, and apparently did
20 not even examine the rates filed as a result of those proceedings until months later. *See, e.g.,*

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23 ²² It is apparent from Mr. Hazel's April comments that he assumed the rate proposal in Staff's Option 1
24 could be applied to roll back any rate that MTI found less than desirable, including multiplexing. To the
25 contrary, Staff's Option 1 was expressly limited to establishing two interim transport rates, "the prior
26 Interconnection Entrance Facility and Direct Trunked Transport recurring rates." *See* Staff Response to
the Motions of MTI, Qwest & Time Warner, March 5, 2003, pg. 3. In March MTI appeared to have a
more accurate understanding of Staff's Option 1. *See* Comments on Staff Response to Motions of MTI,
Qwest, & Time Warner, March 18, 2003.

1 Hazel Direct at 2-3, 5 (stating MTI did not know about rate changes until January, 2003). MTI
2 did not seek any form of appeal or review of the Commission's Decision, nor did it object in any
3 way to the rates filed in accordance with that Decision. Allowing MTI to use this proceeding to
4 launch a belated collateral attack on existing rates would undermine the Commission's efforts to
5 address wholesale rates in a timely and efficient manner, and would give MTI and other CLEC's
6 no incentive at all to participate in an orderly fashion in future rate proceedings.

7 Even if the issue of multiplexing had been properly raised, MTI has made no substantive
8 allegation on which the Commission could base a finding that the rate is unreasonable,
9 discriminatory, or otherwise contrary to law. In its testimony in the Mini-Docket, MTI expressed
10 a lack of comprehension as to how the multiplexing rate and other stipulated rates came to be
11 incorporated in Qwest's June 26, 2002 compliance filing. Hazel Direct at 6 ("I do not understand
12 how or why Qwest chose to increase the multiplexing rates . . ."). MTI has not put forward any
13 evidence that the rate calculation was not TELRIC compliant, nor has MTI made even an
14 allegation that the rate is discriminatory. Qwest believes that there is no basis to re-examine the
15 rates listed in Qwest's compliance filing as a result of Decision 64922. However, if MTI has any
16 substantive issue regarding the multiplexing rate, MTI should request that the rate be re-
17 examined in Phase III. Meanwhile, MTI has failed to state any basis whatsoever for immediately
18 rolling back multiplexing rates to 1998 levels.

19 **B. The rates set forth in Qwest's June 26, 2002 compliance filing were lawfully**
20 **established in accordance with Decision 64922.**

21 In attempting to raise the issue of multiplexing, MTI has suggested that Decision 64922
22 effectively froze all rates that had not been explicitly set by the Commission's order. Hazel
23 Direct at 6-7; Hazel Rebuttal at 4. This interpretation is simply wrong, and has not been adopted
24 by Staff or any other party. While it is true that the Commission declined to set several
25 categories of rates based on the available record, the Commission did order Qwest and the parties
26 to calculate UNE rates in accordance with the Commission's directions, and to "file within 30

1 days of the date of this Decision, a joint schedule setting forth all rates and charges approved
2 herein.” Decision 64922 at 84; *see also* TR 27:3-29:4 (Cross Examination Testimony of
3 Matthew Rowell describing rate implementation). Qwest filed the necessary rate schedule on
4 June 26, 2002. *See* Qwest Notice of Compliance to Decision 64922, June 26, 2002.

5 With regard to some elements, including multiplexing, the Commission did not attempt
6 to establish a model for calculation of rates. Instead, the Commission stated that “it is in the best
7 interests of all parties to promptly meet to attempt to resolve the pricing issues associated with
8 these services” Decision 64922 at 80. The parties followed the Commission’s directive and
9 were able to agree on appropriate rates for many elements, including Dark Fiber, Common
10 Channel Signaling, OC3, OC12, Directory Assistance, and Multiplexing. Like the calculated
11 rates, the stipulated UNE rates are clearly shown as established by “Agreement of Parties” on
12 Qwest’s compliance filing. *See* Qwest Notice of Compliance to Decision 64922, June 26, 2002,
13 pp. 7, 12, 13, 16-19. No one but MTI has contended that the stipulated rates do not comply with
14 the Commission’s order, and if any party wished to object, the time to do so was when the rates
15 were filed.

16 There is nothing surprising or unusual about parties to a rate docket narrowing the issues
17 by stipulation, nor was it unlawful for the parties to comply with the Commission’s instructions
18 to resolve remaining rate issues by agreement. The Commission was acting in its capacity as
19 arbitrator under 47 U.S.C. § 252(b) when it expressly authorized the parties to resolve issues by
20 negotiation and stipulation. Nothing in the 1996 Telecommunications Act prohibits this method
21 of reaching a reasonable rate. To the extent the rates contained in Qwest’s June 26, 2002 filing
22 went beyond the Commission’s intent in Decision 64922, the Commission and all affected
23 parties had the opportunity to object within the time allowed by 47 U.S.C. § 252(e)(4). MTI
24 failed to do so, and should not be allowed to unilaterally reopen rate proceedings nearly a year
25 after the rates were established.

26

1 **C. Rolling back individual rates to 1998 levels is not presumptively lawful.**

2 The multiplexing rate listed in Qwest's compliance filing of June 26, 2002 was lawful
3 and in accordance with the Commission's order. No affected carrier filed any timely objection.
4 However, even if MTI could offer a substantive and procedurally appropriate challenge to the
5 multiplexing rates in this proceeding, there would be no lawful basis for resurrecting the rates set
6 in the Commission's Decision 60635, Opinion and Order re: Consolidated Wholesale Pricing
7 Dockets (February 4, 1998). In the Wholesale Phase II Procedural Order, the Administrative
8 Law Judge (the "ALJ") ruled that the Commission had never determined whether the UNE rates
9 established by Decision 60635 complied with the FCC's pricing rules:

10 When the Commission approved Qwest's current UNE rates in
11 Decision No. 60635, the FCC's pricing rules were not in effect.
12 This Commission has not to date found that Qwest's UNE rates
13 comply with the FCC pricing rules The record indicates that
 the Commission has always contemplated that it would review the
 statewide UNE rates.

14 Procedural Order, *Investigation into Qwest Corporation's Compliance with Certain Wholesale*
15 *Pricing Requirements for Unbundled Network Elements and Resale Discounts*, Docket No. T-
16 00000A-00-0194 (February 15, 2001) at 2. In support of her ruling that these rates had to be
17 revisited, the ALJ pointed out that "since the Commission originally approved the UNE rates
18 there have been factual and legal changes that support a review at this time." *Id.* at 3. If the rates
19 established in Decision 60635 were already outdated in 2001, there can be no reasonable basis
20 for finding that the 1998 rates are presumptively lawful in 2003.

21 Qwest has always maintained that the Decision 60635 rates were lawful when
22 established, but the Ninth Circuit has held that the initial finding of lawfulness by a state
23 commission, even if correct at the time it was made, could not save a rate that failed to comply
24 with the Act and the FCC's pricing rules. *U.S. West Communications, Inc. v. Jennings*, 304 F.3d
25 950, 957 (9th Cir. 2002). The Commission must evaluate rates in light of intervening changes in
26

1 interpretation by the FCC and the courts. *Id.* It would be improper for the Commission to now
2 replace the stipulated rates established in Decision 64922 with outdated rates that have never
3 been evaluated for compliance with either the HAI model's TELRIC-compliant cost allocations,
4 or more generally with the FCC's pricing rules.

5 **D. Multiplexing rates may not be adjusted retroactively.**

6 For all the preceding reasons, Qwest believes the Commission should and will decline to
7 alter the multiplexing rates at this time based on the vague and untimely allegations in MTI's
8 Mini-Docket testimony. However, in the unlikely event that the Commission decides to change
9 the multiplexing rate in this proceeding, it has long been an established rule that rates can only be
10 changed prospectively. The U.S. Supreme Court in *Arizona Grocery Co. v. Atichson, Topeka &*
11 *Santa Fe Railway, Co.*, 284 U.S. 370 (1932), held that retroactive rates may not be established
12 based on "what the Commission now holds it should have decided in the earlier proceeding"
13 *Id.* at 284 U.S. at 390 (referring to the Interstate Commerce Commission).

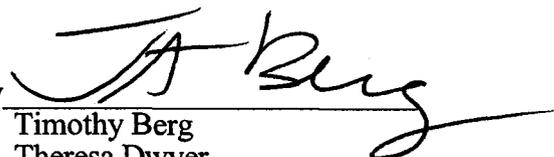
14 Neither the Act nor the FCC's orders and regulations authorize retroactive rate setting,
15 especially for changes to UNE rates previously approved as permanent and lawful by the state
16 commission. The FCC's *Local Competition Order* confirms that rates may be changed during
17 the term of an agreement, if at all, solely on a prospective basis. First Report and Order,
18 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC
19 Docket No. 96-98, FCC 96-325, 11 FCC Rcd 15499 at ¶ 693 (rel. Aug. 8, 1996). In particular,
20 the FCC stated that where it is appropriate to replace rates with new ones, the replacement would
21 "take effect at or about the time of the *conclusion*" of the state commission's subsequent
22 proceeding, and that the new rates would "*apply from that time forward.*" *Id.* at ¶ 693 (emphasis
23 added); *see also id.* at ¶¶ 769, 782. Under the circumstances of the present case, there is simply
24 no basis for changing the multiplexing rate retroactively.

1 **CONCLUSION**

2 The record in this matter establishes that Qwest failed to communicate adequately with the
3 Commission, Staff and the CLECs the time schedule for implementation of the rates resulting from
4 the Decision. Qwest has taken steps to correct this problem and prevent its recurrence as well as to
5 improve the time in which wholesale rates are implemented by Qwest. There is no evidence to
6 support any finding that Qwest deliberately delayed implementing these rates or discriminated
7 against CLECs in Arizona. As Staff has recognized, Qwest has taken steps to ameliorate any injury
8 suffered by the CLECS. There is no basis to conclude that the actions of Qwest constitute
9 contempt of the Commission. In any event, the penalties proposed by Staff are excessive and not
10 supported by the evidence. There is no basis in the law or evidence for AT&T's and Staff's
11 suggestion that Qwest be required to implement wholesale rate changes in 30 days from the
12 effective date of the order. The evidence establishes that such a requirement is patently
13 unreasonable and no provision of the Telecommunications Act or order of the FCC requires
14 implementation in such a period. Finally, re-examination of the multiplexing rate was not properly
15 raised in this proceeding. If there is any substantive reason to re-open the multiplexing rate, that
16 proceeding should be deferred until the Phase III docket.

17 DATED this 15th day of July, 2003.

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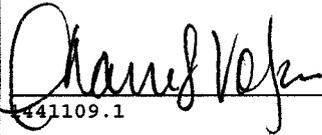
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