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BEFORE THE ARIZONA CORPORATION COMMISSION
Arizona Corporation Commission

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COMMISSIONERS

- GARY PIERCE - Chairman
- BOB STUMP
- SANDRA D. KENNEDY
- PAUL NEWMAN
- BRENDA BURNS

IN THE MATTER OF:

DOCKET NO. T-01051B-10-0200

GEORGE BIEN-WILLNER, for
GLENDALE & 27TH INVESTMENTS, LLC

COMPLAINANT,

v.

QWEST CORPORATION,

RESPONDENT.

**PROCEDURAL ORDER PARTIALLY
GRANTING MOTION TO DISMISS
AND RESETTING PROCEDURAL
SCHEDULE**

BY THE COMMISSION:

On May 17, 2010, George Bien-Willner, for Glendale & 27th Investments, LLC (“Complainant”) filed with the Arizona Corporation Commission (“Commission”) a Formal Complaint (“Complaint”) against Qwest Corporation¹ (“Qwest” or “Respondent”). The Complaint alleges that Qwest has incorrectly billed Complainant, who owns and operates Sterling International Hotel, for a 1-800 line that should have terminated in 2004. Complainant requests relief in the amount of approximately \$10,000.

On February 10, 2012, by Procedural Order, the hearing was continued from February 13, 2012 to July 2, 2012, and a revised procedural schedule was established.

On March 12, 2012, Complainant filed a Second Amended Complaint.

On March 28, 2012, Qwest filed a Motion to Dismiss (“MTD”).

On April 12, 2012, Qwest filed its Answer to the Second Amended Complaint.

¹ Qwest is now known as Century Link; however, for this proceeding will be referred to as Qwest.

1 On April 13, 2012, by Procedural Order, Complainant was directed to file a response to
2 Qwest's Motion by May 4, 2012.

3 On May 4, 2012, Complainant docketed a response to Qwest's Motion and requested that the
4 Motion be denied.

5 On May 18, 2012, by Procedural Order, the hearing was vacated due to the to Complainant's
6 failure to file testimony in support of its Second Amended Complaint and a Procedural Conference
7 was scheduled for May 29, 2012, to discuss whether Complainant should be ordered to obtain
8 counsel to assist him in litigating this matter.

9 On May 23, 2012, Complainant docketed a request that the procedural conference be
10 continued because Complainant would be out of the state of Arizona.

11 On May 24, 2012, by Procedural Order, the procedural conference was continued to June 13,
12 2012.

13 On June 13, 2012, a procedural conference was held as scheduled. Complainant appeared on
14 his own behalf. Respondent appeared through counsel. Discussions were held regarding whether the
15 Complainant needed the assistance of counsel to further litigate the Amended Complaint.
16 Complainant was advised of the procedural steps that would be required prior to this matter going to
17 hearing and the proper procedure to be followed during the evidentiary hearing proceeding.
18 Complainant stated that he believed he did not need the assistance of counsel to further litigate the
19 Amended Complaint. During the procedural conference, Complainant was granted leave to continue
20 to litigate the Amended Complaint without the assistance of counsel. However, Complainant was
21 advised that on numerous occasions his actions or inactions had caused delay in this proceeding and
22 that, if during the evidentiary hearing, Complainant caused further delay the hearing would be
23 recessed and Complainant would be required to obtain counsel under the Arizona Supreme Court
24 Rules of Practice Rule 31.

25 A discussion was held regarding resetting the hearing date and the resolution of Respondent's
26 motion to dismiss. Respondent requested that the hearing not be set during the last half of August due
27 to a scheduling conflict. Complainant stated he would check his calendar and file some information
28 on prospective hearing dates. To date, Complainant has not made a filing regarding acceptable

1 hearing dates. Therefore, it is appropriate to reset the hearing in this matter as well as resolve the
2 pending motion to dismiss.

3 **Motion to Dismiss**

4 Respondent's MTD requests that the Commission dismiss the Amended Complaint pursuant
5 to A.A.C. R14-3-101 and Rule 12(b)(6) of the Arizona Rules of Civil Procedure ("A.R.C.P"), on the
6 grounds that Complainant has failed to state a claim upon which relief can be granted and that the
7 Commission lacks subject matter jurisdiction to grant the relief requested by Complainant.
8 Respondent's MTD asserts that the Amended Complaint fails to state sufficient facts upon which the
9 Commission may determine whether relief is warranted.

10 In reviewing the grant of a motion to dismiss for failure to state a claim all factual allegations
11 made must be taken as true for the purposes of deciding Respondent's MTD. The moving party has
12 the burden of proof of showing that plaintiff's complaint does not state a claim upon which relief may
13 be granted.² The MTD should be denied unless "it appears beyond doubt that the plaintiff can prove
14 no set of facts in support of his claim which would entitle him to relief."³

15 Respondent's MTD seeks dismissal of the Amended Complaint related to three categories of
16 claims: 1) the informal complaint process; 2) business practices i.e., paperwork and billing issues;
17 and 3) claims made regarding other similarly situated customers.⁴

18 **Informal Complaint Process**

19 The Amended Complaint states that Complainant was forced to file the formal complaint
20 because Respondent refused to participate in the informal complaint process and has failed to explain
21 why it did not comply with Commission procedures.⁵

22 Respondent's MTD states that the issue regarding the informal process was previously ruled
23 on by Procedural Order issued on February 17, 2011, and that the Commission concluded that the
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27 ² See, *Newman v. Maricopa County*, 167 Ariz. 501(Ariz.App. Div. 1 1991).

³ Id.

⁴ See, Generally Respondent's MTD.

28 ⁵ Amended Complaint at para 5.

1 informal process for this matter was completed.⁶ Respondent states that the issue is raised but that
2 Complainant does not specifically connect it to any claim in the Amended Complaint.⁷

3 Complainant responded that Respondent's stated reasons to dismiss this claim "are
4 unsupported, generalized gripes directed at Complainant."⁸

5 On November 4, 2010, by Procedural Order, the parties were ordered to participate in an
6 informal mediation that was to be conducted by the Commission's Utilities Division ("Staff"). In
7 response, Staff filed a Motion to Forego Staff Participation in Informal Mediation ("Motion"). Staff
8 stated that it had previously reviewed the issues raised in the Complaint during the informal process;
9 that Staff did not believe informal mediation would be an effective use of Staff's limited resources;
10 that mediation allows complainants unfamiliar with utility subject matter an opportunity to present
11 concerns in a relaxed setting; that Qwest is well-versed in Commission practice; that Complainant
12 has substantial experience with Commission proceedings and has filed approximately fifteen (15)
13 informal complaints; and that Staff had already expended significant resources inquiring about the
14 issues during the informal complaint process.

15 Complainant objected to Staff's Motion stating that Complainant had been deprived of its
16 mandated opportunities under A.A.C. R14-2-510 and that Staff's assertion that Complainant is a
17 "successful businessman who has substantial experience with the Commission is irrelevant and an
18 attempt to taint Mr. Bien-Willner."⁹

19 Staff's reply stated that A.A.C. R14-2-510 does not create an entitlement to a Staff-facilitated
20 mediation; that the rule does not implicate due process rights because arbitration by Staff is not
21 binding; that the rule does not protect or enforce private rights; that informal mediation is not
22 required for every informal complaint received nor is the rule a prerequisite for filing a formal
23 complaint; that Complainant had already filed its formal complaint; and that the assertion that Staff is
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26 ⁶ MTD at para 2.

27 ⁷ Id.

28 ⁸ Response to MTD at 2.

⁹ See, Generally Response of Glendale & 27th Investments LLC to Arizona Corporation Commission Staff's Motion to Forego Staff Participation in Informal Mediation.

1 somehow biased is unsupported by Complainant's belief that it will derive a benefit from a Staff led
2 informal process.¹⁰

3 By Procedural Order issued on February 17, 2011, Staff's motion to forego participation in
4 the informal process was granted over the objection of Complainant. The granting of Staff's Motion
5 ended further participation by the parties in an informal process. Therefore, Respondent's motion to
6 dismiss the claim related to Respondent's failure to participate in the informal process is hereby
7 granted.

8 **Business Practices**

9 The MTD asserts that Complainant's claims regarding Qwest's business practices related to
10 keeping paperwork¹¹ and related to billing¹² should be dismissed because the allegations are not
11 connected to any claim for relief and because no damages are stated.

12 In response, Complainant asserts that this is a "straightforward case" that involves allegations
13 of Qwest charging the Complainant thousands of dollars for a telephone line that he never requested
14 or ordered and that Complainant has pointed out gross deficiencies in Qwest's ordering and billing
15 processes.

16 **Paperwork**

17 The Amended Complaint states that Qwest did not keep contemporaneous "paperwork"
18 showing that Complainant ordered all of the services for which Qwest charged Complainant;¹³ that
19 the Commission and other Qwest small business customers should be interested to know that Qwest
20 did not require its small business group to keep any paperwork, even though other business groups
21 required forms;¹⁴ that the small business rules are different;¹⁵ that Qwest has never provided a policy
22 stating what, in fact, its small business rules were and if they were followed, or if any rules were in
23 writing;¹⁶ that other business groups require forms and keep copies of them, but Qwest admitted it
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25 ¹⁰ See, Generally Staff's Motion to Forego Staff Participation in Informal Mediation and Staff's Reply.

26 ¹¹ MTD referencing Amended Complaint at para 7, 8, 28, 29, 30, 31, 32, 33, and 34.

27 ¹² MTD referencing Amended Complaint at para 12, 13, 14, 15, 16, 17, and 27.

28 ¹³ Amended Complaint para 7.

¹⁴ Amended Complaint para 8.

¹⁵ Amended Complaint para 28.

¹⁶ Amended Complaint para 29.

1 didn't do so for the Hotel or other small business customers;¹⁷ that Qwest has not explained why its
 2 small business group operated by different rules and did not maintain any records of the Hotel's
 3 orders, or other customer orders;¹⁸ that Qwest should be required and should have kept forms
 4 regarding the services it placed on the Hotel which would have avoided Qwest charging for services
 5 never ordered;¹⁹ that Qwest did not have authority to have a different sets of rules for dealing with
 6 commercial customers;²⁰ and that Qwest's rules for small business customers is less advantageous
 7 because the rules did not require Qwest to keep critical account information in writing or require a
 8 written order from the customer.²¹

9 We find that the Amended Complaint asserts sufficient facts related to the procedure for
 10 "keeping paperwork." Therefore, Respondent's MTD is hereby denied, as related to claims alleged
 11 in the Amended Complaint at paragraphs 7, 28, 29, 30, 31, 32, 33, and 34.

12 Billing

13 The MTD requests dismissal of Complainant's assertions that it experienced "numerous
 14 difficulties" related to billing because the Amended Complaint does not identify telephone numbers,
 15 accounts, services, customer locations, and does not describe the "difficulties" experienced. The
 16 MTD states that it is unclear why Complainant recites such allegations because no damages are stated
 17 and they are not connected to any claim for relief.²²

18 The Amended Complaint asserts that Qwest's billing was unclear,²³ that there were problems
 19 with Qwest's service and billing set up;²⁴ that Qwest issued a credit of \$1,366.81 for erroneous
 20 billing;²⁵ Qwest failed to offer adequate written or oral explanations regarding its bills;²⁶ that Qwest
 21 mischarged Complainant;²⁷ that the deficiencies in Qwest's billing and account set-up procedures are

23 ¹⁷ Amended Complaint para 30.

24 ¹⁸ Amended Complaint para 31.

25 ¹⁹ Amended Complaint para 32.

26 ²⁰ Amended Complaint para 33.

27 ²¹ Amended Complaint para 34.

28 ²² MTD at 3.

²³ Amended Complaint para 12, 13, 17.

²⁴ Amended Complaint para 13.

²⁵ Amended Complaint para 12.

²⁶ Amended Complaint para 13.

²⁷ Amended Complaint para 13.

1 highlighted by Staff;²⁸ that Qwest's employees were unable to understand the services for which the
2 hotel was billed; and that Qwest has failed to produce clear copies of bills for the Hotel.²⁹

3 Complainant's response to the MTD states that Complainant is requesting damages which
4 include overcharges for services and that Qwest has already provided a partial refund toward that end
5 in the amount of \$810.89.³⁰ Complainant's response states that the Commission is better suited than
6 Qwest to determine the proper scope and amount of damages in this case and that there is no
7 requirement to allege an exact figure for damages at this time.³¹

8 Because Complainant has alleged sufficient facts related to billing issues and Complainant's
9 request to refund for overcharges, we believe those are claims upon which relief can be granted.
10 Therefore, Respondent's MTD is hereby denied, relating to the claims alleged in the Amended
11 Complaint at paragraphs 12, 13, 14, 15, 16, 17, and 27. However, as the Complainant in this matter,
12 Complainant has the burden of proof as to all allegations.

13 **Claims Regarding Other Similarly Situated Customers**

14 The MTD requests that the scope of the Amended Complaint be limited because it attempts to
15 obtain relief on behalf of other Arizona customers or other similarly situated customers, who are not
16 named and with respect to whom no salient facts are alleged.³² The MTD states that Complainant
17 lacks standing to file this Complaint on behalf of those other complainants, and that the Complaint
18 does not support a finding from the Commission to grant such relief or that other customers have
19 experienced the problems that Complainant alleges. The MTD asserts "that justiciable claims cannot
20 be made by mere recitation of conclusory expressions, standing alone, without any allegations of
21 specific facts."³³

22 The MTD references paragraph 8 of the Amended Complaint which states that it is "likely of
23 particular interest to the Commission and other Qwest small business customers, Qwest did not
24 require its small business group to keep any paperwork...." Further, the Amended Complaint at

25 _____
26 ²⁸ Amended Complaint para 15, 17.

²⁹ Amended Complaint 16.

27 ³⁰ Response to MTD at 4.

³¹ Response to MTD at 5.

28 ³² MTD referencing Amended Complaint at para 8 and 38.

³³ MTD at 3.

1 paragraph 38 states that Complainant also believes that Qwest's unclear billing likely applies to other
2 similarly situated customers.

3 To the extent that claims stated in paragraphs 8 and 38 assert claims on behalf of other small
4 business customers or other similarly situated customers, we find that Complainant has not
5 demonstrated that it has standing to assert claims on behalf of other small business customers or other
6 similarly situated customers. Therefore, Respondent's MTD is granted as to the claims stated in
7 paragraph 8 and 38 (as it relates to other similarly situated customers).

8 IT IS THEREFORE ORDERED that the **hearing** in the above-captioned matter shall
9 commence on **November 5, 2012, at 10:00 a.m.**, or as soon thereafter as is practicable, at the
10 Commission's offices, 1200 West Washington Street, Hearing Room No. 1, Phoenix, Arizona 85007,
11 **and continuing on November 6, 2012 at 10:00 a.m.**, if needed.

12 IT IS FURTHER ORDERED that the **detailed direct testimony and associated exhibits** to
13 be presented at hearing **by Complainant and any witness(es) Complainant will have testify at**
14 **hearing** shall be reduced to writing and filed on or before **August 31, 2012**.

15 IT IS FURTHER ORDERED that the **responsive testimony and associated exhibits** to be
16 presented at hearing **by Respondent and any witness(es) Respondent will have testify at hearing**
17 shall be reduced to writing and filed **on or before September 28, 2012**.

18 IT IS FURTHER ORDERED that **Complainant and Respondent** may conduct discovery
19 through **October 1, 2012**.

20 IT IS FURTHER ORDERED that discovery shall be permitted by law and the rules and
21 regulations of the Commission. Any objection to discovery requests shall be made within five (5)
22 calendar days of receipt³⁴ and responses to discovery requests shall be made within seven (7)
23 calendar days of receipt. The response time may be extended by mutual agreement of the parties
24 involved if the request requires an extensive compilation effort.

25 IT IS FURTHER ORDERED that for discovery requests, objections, and answers, if a
26 receiving party requests service to be made electronically, and the sending party has the technical

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28 ³⁴ The date of receipt of discovery requests is not counted as a calendar day, and requests received after 4:00 p.m. MST
will be considered as received the next business day.

1 capability to provide service electronically, service to that party shall be made electronically.

2 IT IS FURTHER ORDERED that, in the alternative to filing a written motion to compel
3 discovery, any party seeking resolution of a discovery dispute may telephonically contact the
4 Commission's Hearing Division to request a date for a procedural hearing to resolve the discovery
5 dispute; that upon such a request, a procedural hearing will be convened as soon as practicable; and
6 that the party making such a request shall contact all other parties to advise them of the hearing date
7 and shall at the procedural hearing provide a statement confirming that the other parties were
8 contacted.³⁵

9 IT IS FURTHER ORDERED that **Complainant and Respondent** shall file a joint Status
10 Report discussing any issues that have been resolved and how they were resolved on or before
11 **October 1, 2012.**

12 IT IS FURTHER ORDERED that any **Responses to Motions** shall be filed within five (5)
13 calendar days of the Motion.

14 IT IS FURTHER ORDERED that any **Motions** which are filed in this matter and which are
15 not ruled upon by the Commission within 20 days of the filing date of the Motion shall be deemed
16 denied.

17 IT IS FURTHER ORDERED that **all parties shall comply with A.A.C. R14-3-104 (F),**
18 **with respect to maintaining proper conduct during Commission proceedings. A.A.C R14-3-**
19 **104(F) provides that:**

- 20 **1. All persons appearing before the Commission or presiding officer in any**
21 **proceeding shall conform to the conduct expected in the Superior Court of the**
22 **state of Arizona.**
- 23 **2. Any alleged inappropriate conduct before a Commissioner or a Hearing**
24 **Officer shall be referred to the Commission for appropriate action.**
- 25 **3. Contemptuous conduct by any person appearing at a hearing shall be**
26 **grounds for his exclusion by the presiding officer from the hearing.**

27 _____
28 ³⁵ The parties are encouraged to attempt to settle discovery disputes through informal, good-faith negotiations before seeking Commission resolution of the controversy.

1 Copies of the foregoing emailed/mailed/delivered
this 27th day of July 2012, to:

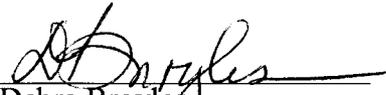
2
3 George Bien-Willner
4 GLENDALE & 27TH INVESTMENTS, LLC
3641 North 39th Avenue
Phoenix, AZ 85019-3601

5 Norman G. Curtright, Corporate Counsel
6 QWEST CORPORATION
7 dba CENTURYLINK-QC
20 East Thomas Road, First Floor
Phoenix, AZ 85012-3132

8 Janice Alward, Chief Counsel
9 Legal Division
10 ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

11 Steven M. Olea, Director
12 Utilities Division
13 ARIZONA CORPORATION COMMISSION
1200 West Washington Street
Phoenix, AZ 85007

14 ARIZONA REPORTING SERVICE, INC.
15 2200 North Central Avenue, Suite 502
Phoenix, AZ 85004-1481

16 By: 
17 Debra Broyles
18 Secretary to Yvette B. Kinsey

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