BEFORE THE ARIZONA CORPORATION COMMISSION

WILLIAM A. MUNDELL
CHAIRMAN
JIM IRVIN
COMMISSIONER
MARC SPITZER
COMMISSIONER

IN THE MATTER OF QWEST CORPORATIONS COMPLIANCE WITH SECTION 252(e) OF THE TELECOMMUNICATIONS ACT OF 1996.	DOCKET NO. RT-00000F-02-0271
IN THE MATTER OF U. S. WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH SECTION 271 OF THE TELECOMMUNICATIONS ACT OF 1996	DOCKET NO. T-00000A-97-0238 **PROCEDURAL ORDER**

BY THE COMMISSION:

On April 8, 2002, the Staff of the Arizona Corporation Commission ("Commission") opened the above-captioned docket for the purpose of conducting an inquiry into whether Qwest Corporation ("Qwest") has complied with Section 252(e) of the Telecommunications Act of 1996. In this docket the Commission is reviewing whether Qwest should have filed certain agreements for Commission approval, and if so, whether, and what, remedial action is appropriate.

Our Procedural Orders dated April 18, 2002, May 7, 2002, and May 20, 2002, directed the parties to make various filings. Qwest submitted copies of the subject agreements on May 10, 2002. The Residential Utility Consumers Office ("RUCO"), AT&T Communications of the Mountain States, Inc. and TCG Phoenix (collectively "AT&T") and Time Warner Telecom of Arizona, LLC ("TWTA") filed Comments on Qwest's submission on May 24, 2002. Qwest filed Responsive Comments on May 31, 2002. Staff filed its Staff Report on June 7, 2002.

On June 19, 2002, the Commission held a Procedural Conference for the purpose of determining whether an evidentiary hearing is necessary and if so, the appropriate scope of the proceeding.

In the Staff Report, Staff concludes that Section 252 should be read more broadly than Qwest had been reading it. In Staff's view, any agreement that concerns interconnection, services or

network elements should be filed pursuant to Section 252(a)(1). Thus, of the approximately 100 agreements which Qwest did not file for Commission approval, Staff identified 25 which it believes should have been filed pursuant to Section 252. Staff further recommended that Qwest be assessed fines totaling $104,000. For 23 of the unfiled agreements, Staff recommended fines of $3,000 for each agreement that Staff believes should have been filed under its interpretation of Section 252. Staff's recommendation for a nominal fine for these agreements is based on Staff's inability to rule out the possibility that Qwest's failure to file the agreement was due to a good faith difference of interpretation of the requirements of Section 252. Seven of the agreements contained prohibitions against the carrier or CLEC from participating in a Commission proceeding – either the Qwest/ US West merger docket or the Section 271 docket. Because Staff found this type of provision particularly egregious and contrary to the public interest, Staff recommended fines of $5,000 per agreement for the seven agreements that fell into this category.

At the June 19, 2002 Procedural Conference, Qwest stated that it does not believe a hearing is necessary as the essential material facts are not in dispute. Although Qwest believes it is debatable whether Staff's proposed standard for whether the agreements should have been filed is correct, Qwest accepts Staff's proposed standard and recommended fines.

In a letter dated June 18, 2002, Qwest sets forth its arguments why the agreements containing the prohibitions against participating in the Section 271 docket did not affect the integrity of that proceeding. Qwest notes that only two of the agreements affected the 271 docket, and in these cases, Qwest argues the CLECs' concerns that resulted in the secret settlement agreements were resolved so that it was natural that the complaining party withdraw from the 271 proceeding.

In its May 24, 2002 Comments, and at the Procedural Conference, RUCO requested that the Commission conduct a hearing. RUCO believes there are disputed issues of material fact, including the willfulness of Qwest's alleged violations; to determine if there are additional oral agreements that have not been considered yet; whether there has been harm to competition; whether Qwest enjoyed economic benefit; and what the Commission should do. RUCO estimated that it would require two months to conduct discovery and prepare for hearing.

AT&T agreed with Staff's proposed standard, but expressed the desire to comment on the list of agreements that Staff has recommended should have been filed. In Comments filed June 26, 2002, AT&T recommended that the Commission aggressively seek further evidence regarding whether Qwest's Section 271 application is in the public interest and any additional information that may not have been admitted into the Section 271 record as a result of the unfiled agreements. AT&T believes that the Section 271 docket was the proper forum to conduct the investigation, and that the process might benefit from the consolidation of the Section 271 and Section 252 dockets.

WorldCom believes that there are questions that remain to be answered such as whether the agreements are still in effect; whether they are available for opting in; whether Staff has identified all of the agreements that should have been filed; whether any party received preferential treatment; whether Cap Gemini Ernst & Young relied on data from a party involved in the secret agreements in its OSS test; the timing of the activity; and whether Qwest truly acted in good faith.

On June 24, 2002, Eschelon Telecom, Inc. ("Eschelon") filed a letter in response to Qwest's June 18, 2002 letter. In Eschelon's response, it disputed some of Qwest's representations and conclusions and indicated that all of its service quality issues were not necessarily resolved prior to Qwest's insistence that it drop out of the 271 proceedings.

On June 27, 2002, Qwest filed a letter in reply to Eschelon, and states that Eschelon's letter does not identify any specific terms or issues that were not raised or addressed in the 271 workshop process. Qwest states that the Commission should permit Staff to complete its analysis and then make a determination of how to proceed.

At the June 19, 2002 Procedural Conference, Staff re-stated its position that the question of which agreements should have been filed is a legal issue that does not require an evidentiary hearing. Staff stated it was revising the list of agreements that it believes should have been filed pursuant to Section 252, and agreed that parties should have an opportunity to comment on Staff's revised list.

Regarding the Section 271 proceeding, Staff believes that the Commission must determine the impact of the unfiled agreements on the 271 process. Consequently, Staff intends to send out data requests to the 271 participants in an attempt to determine if the Section 271 proceeding should be re-

opened. Staff anticipates filing reports in the Section 271 proceeding and in the 252 docket containing the results of its investigation and its recommendations whether to re-open the Section 271 proceeding. As of this date, Staff's investigation into the effect of the agreements on the section 271 process is continuing. Staff expects to file an updated list of agreements and reports on its investigation of the effect on the Section 271 docket shortly.

Based on the comments and arguments of the parties, a hearing in the Section 252 docket is required to address, at a minimum, the issue of the appropriateness of, and reasons for, Qwest's failure to file the agreements and the appropriate amount of any fines. Due to the inter-relationship between the Section 252 proceeding and the Section 271 issues, it may be beneficial to consolidate the two two dockets for the purpose of hearing. Staff's on-going investigation into the effect of the unfiled agreements, especially those containing prohibitions on participating in the 271 proceeding, will assist in the determination on whether the matters should be consolidated.

The scope of the hearing will depend on the results of discovery into the questions raised by RUCO and Worldcom as well as Staff's investigation. Although we are aware that discovery is being conducted in the Section 271 docket, we expect the parties to initiate discovery in the Section 252 docket if they have not yet done so.

IT IS THEREFORE ORDERED that interested parties shall file comments to Staff's amended list of agreements within ten calendar days of the date Staff files its amended list.

IT IS FURTHER ORDERED that interested parties shall file written comments containing their recommendations for the scope of a hearing, the time needed to prepare, whether the Section 271 and Section 252 dockets should be consolidated for the purposes of a hearing and proposed hearing procedures, within ten days of Staff filing its report on the results of its investigation.

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IT IS FURTHER ORDERED that the Presiding Officer may rescind, alter, amend, or waive any portion of this Procedural Order either by subsequent Procedural Order or by ruling at hearing.

DATED this 9th day of July, 2002.

Jane L. Rodda / by D Rodes

JANE L. RODDA
ADMINISTRATIVE LAW JUDGE

Copies of the foregoing mailed/delivered this 9th day of July, 2002, to

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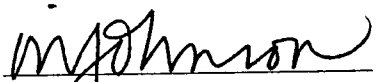
By: 
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Secretary to Jane Rodda