IN THE MATTER OF INVESTIGATION INTO U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH CERTAIN WHOLESALE PRICING REQUIREMENTS FOR UNBUNDLED NETWORK ELEMENTS AND RESALE DISCOUNTS.

DOCKETED SEP 21 2001

IN THE MATTER OF INVESTIGATION INTO U S WEST COMMUNICATIONS, INC.'S COMPLIANCE WITH CERTAIN WHOLESALE PRICING REQUIREMENTS FOR UNBUNDLED NETWORK ELEMENTS AND RESALE DISCOUNTS.

DOCKETED SEP 21 2001

Docket No. T-00000A-00-0194

REPLY BRIEF OF Z-TEL COMMUNICATIONS

In its initial Post-Hearing Brief, Qwest repeatedly misrepresents Z-Tel Communications' ("Z-Tel") position, while it simultaneously cites Z-Tel testimony that directly contradicts those misrepresentations. Instead of providing substantive rebuttal, Qwest appears to have chosen to try and misconstrue and confuse this Commission regarding Z-Tel's position. In fact, Z-Tel's position is simple and straightforward and sets forth important considerations regarding the interrelationship between this docket and the Arizona 271 docket. Indeed, this Commission has acknowledged that the pricing adopted here has implications in the 271 docket.

A. Loop Pricing

1. Qwest continues to assert [Qwest Brief at 6] that Z-Tel urges the abandonment of TELRIC pricing. However, Z-Tel has repeatedly stated – in its testimony and in its opening brief – that TELRIC pricing is the first goal of this proceeding. Dr. Ford testified that this proceeding must determine what rates legitimately can be described as
TELRIC compliant. Even Qwest recognizes this fact when they state, “Dr. Ford argues . . .
the Commission must set cost-based rates using TELRIC principles.” [Qwest Brief at 66]
The key point of Z-Tel’s testimony is that it is unlikely there will be a single rate that
satisfied TELRIC principles, but rather a range of rates that do so – that is, a TELRIC
“zone of reasonableness.”

That range of TELRIC-compliant rates leads to the next step in the analysis –
selecting a rate from the “zone of reasonableness.” The FCC has embraced this concept by
operation of its “TELRIC Test” in its review of Section 271 applications. Qwest
effectively acknowledges that this analysis is relevant [see Qwest Brief at 6] in describing
what the FCC has done in Section 271 dockets. But Qwest wants this Commission to
ignore this analytical step and to approve a rate that is so far above any reasonable loop rate
that the FCC will be required to determine that the Commission erred in its application of
TELRIC principles. If that happened, a good deal of the work by the Commission and the
industry in this proceeding will go for naught. Z-Tel strongly believes that the Commis-
sion should utilize this proceeding to ensure that the rates it adopts fit well within the
TELRIC zone of reasonableness and that they would be consistent with the FCC’s
TELRIC analysis.

2. Qwest complains [at 6-7] that Z-Tel has selectively applied the FCC
TELRIC test by omitting New York and Massachusetts from the analysis. In fact, Dr. Ford
provided in testimony the results for all five states, though only the SBC states (which are
most proximate to Arizona in geographic space and teledensity) were included. While it is
ture that including New York and Massachusetts loop rates would result in a higher upper
bound, this Commission should not be interested in being the “worst-in-class” or using the
mechanism to have the highest rates possible. Instead, the goal of this Commission should
be to determine whether its rate is reasonable and consistent with law and public policy.
Further, it is important to note that if New York and Massachusetts are included, the upper
bound rate would be approximately $16.50 -- well below Qwest’s proposed loop rate. This
fact demonstrates clearly how unreasonable and unlawful Qwest’s proposed loop rate is. Indeed, the value of the FCC test is to root out clear cases where proposed rates are radically out-of-line, such as the rates Qwest has proposed here. For instance, Qwest’s proposed Arizona loop rate is more than 60% greater than what the HCPM’s estimate of loop costs are for Arizona. Among states where the FCC has approved 271 applications, loop rates are generally at or below the level of the HCPM loop cost estimate. In fact, the highest proportionate loop rate (from Massachusetts – which notably is under review at this moment) is only 2% larger than the HCPM estimate. The Texas loop rate, alternatively, is 14% less than the HCPM estimate of loop costs in Texas. Under any HCPM or FCC application or analysis, Qwest’s proposed loop rate is exceedingly too high.

Furthermore, Qwest is confusing the issue as to the appropriate Arizona loop rate by bundling in other UNEs into its analysis. As was explained in Dr. Ford’s rebuttal testimony, Dr. Fleming’s computation of $18.21 as an upper bound loop rate improperly includes costs for loop plus transport plus switching. Qwest’s attempt to justify a high loop rate by including the costs of other network element rates is improper and inconsistent with 47 CFR § 51.505(e), which requires incumbent LECs to “prove to the state commission that the rates for each element” comply with TELRIC. Ironically, even Dr. Fleming’s overreaching analysis finds an upper bound that is still 30% less than Qwest’s proposed loop rate.

3. At pages 67-68, Qwest basically acknowledges that this Commission faces a range of TELRIC-compliant rates, but argues that the Commission cannot choose UNE rates from the lower end of the range as proposed by Dr. Ford. Qwest also asserts that the Commission is under no obligation to select prices from the range that will foster competition. However, any price consistent with TELRIC, by definition, meets the Act’s requirement and the Commission can choose from anywhere within the TELRIC-compliant range and satisfy the Act.
Qwest further argues [at 67] that while “Section 252(d) of the Act does require state commissions to set cost-based rates for UNEs, there is no provision in the Act requiring state commissions to price UNEs in such a way as to foster competition.” Assuming Qwest is correct (and ignoring the fact that Section 252(d) is found under Part II of the 1996 Act, entitled Development of Competitive Markets), then it is also true that there is no provision in the Act prohibiting the Commission to price UNEs in such a way as to foster competition.

Moreover, Qwest’s argument [at 67] that choosing a price from the lower end of the TELRIC-compliant range favors one type of competitor (non-facilities based) over another (facilities based) is inconsistent on its face. In fact, a TELRIC-compliant price, by definition, does not favor one form of entry over another and instead represents the forward-looking costs of replicating that element. Encapsulated in a TELRIC price is a full accounting of the “make/buy” decision all CLECs must face. Therefore, a TELRIC price has all the salient properties Qwest demands, regardless of whether that TELRIC price is drawn from the lower end of the TELRIC estimates. Qwest’s argument also ignores the economic reality that the incentive to build alternative loop plant is substantially increased when the facilities-based entrant has a ready source of demand available – that is, customers in the hands of CLECs. The risk of building a network with zero customers (i.e., the “build it and they will come” approach of most bankrupt CLECs) is substantially greater than building a network with pre-construction, 20-year IRUs from CLECs who already have customers acquired through the UNE Platform.

Only if rates are not TELRIC-compliant would the Commission begin to encounter the risk discussed by Qwest. The portion of Dr. Ford’s testimony cited by Qwest on this point [at 68] was in relation to non-TELRIC-compliant rates. A TELRIC-compliant rate would not be too low and would not harm facilities-based competition.
B. Line Sharing

Qwest has grossly misrepresented Z-Tel’s and the other CLECs’ position on line sharing. CLECs have not asked for “free” line sharing. Rather, CLECs argue that under Qwest’s proposed pricing, the cost of the high frequency is fully recovered in the price of the low frequency. If Qwest charges its loop rate for low frequency and charges an additional amount for the high frequency, it will be over-recovering by an amount equal to the high frequency charge. TELRIC principles do not allow over-recovery. If a positive price is charged for the high frequency, then the low frequency portion must be reduced. The cost model output is the full cost of the loop. If that is $13, then Qwest cannot charge $13 for the loop and $5 for the high frequency. That would be $18 in revenue for a $13 loop – clearly, Qwest’s loop costs would be over-recovered.

The CLEC position is straightforward. If Qwest charges for the high frequency portion of the loop, then the rate for the whole loop must be reduced. Otherwise, the Commission will permit Qwest to double-recover its costs.

Qwest further complains [at 101] that there can be no fixed formula for determining the allocation of costs between high and low frequency. Therefore, Qwest apparently believes that the answer is to permit it to over-recover by charging for both the whole loop and the high frequency portion of the loop at the same time. Qwest is wrong. There is a formula. That formula, based on the economic theory of joint supply, concludes that the allocation of costs between two services sold over a single facility must be such that loop costs are not over-recovered. Although Qwest acknowledges the theory of joint supply, it proceeds to ignore the theory in its attempts to justify its right to over-recover. In fact, Qwest’s proposal to over-recover loop costs is simply untenable.

Z-TEL COMMUNICATIONS, INC.

By:  

Michael W. Patten  
ROSHKA HEYMAN & DEWULF, PLC  
One Arizona Center  
400 East Van Buren Street, Suite 800  
Phoenix, Arizona 85004  
(602) 256-6100

ORIGINAL and 10 COPIES filed  
September 21, 2001, with:

Docket Control  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

COPIES hand-delivered September 21, 2001, to:

Dwight Nodes, Esq.  
Administrative Law Judge  
Hearing Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

Maureen Scott, Esq.  
Legal Division  
ARIZONA CORPORATION COMMISSION  
1200 West Washington Street  
Phoenix, Arizona 85007

COPIES mailed September 21, 2001, to:

Timothy Berg, Esq.  
FENNEMORE CRAIG, P.C.  
3003 North Central, Suite 2600  
Phoenix, Arizona 85012-2913
Mary E. Steele, Esq.  
DAVIS WRIGHT TREMAINE, L.L.P.  
2600 Century Square  
1501 Fourth Avenue  
Seattle, Washington 98101-1688

Dennis D. Ahlers, Esq.  
ESCHELON TELECOM, INC.  
730 Second Avenue South, Suite 1200  
Minneapolis, Minnesota 55402

Mari Allbright, Esq.  
MPOWER COMMUNICATIONS CORP.  
5711 South Benton Circle  
Littleton, Colorado 80123

Mr. Richard Sampson  
Z-Tel Communications, Inc.  
602 South Harbour Island Boulevard, Suite 2200  
Tampa, Florida 33602