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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE STAFF'S  
REQUEST FOR APPROVAL OF  
COMMERCIAL LINE SHARING  
AGREEMENT BETWEEN QWEST  
CORPORATION AND COVAD  
COMMUNICATIONS COMPANY

Docket Nos. T-03632A-04-0603  
T-01051B-04-0603

**QWEST'S REPLY IN SUPPORT OF  
ITS MOTION TO DISMISS**

**I. INTRODUCTION**

Qwest Corporation ("Qwest") hereby submits this reply to the opposition to Qwest's motion to dismiss filed by the Arizona Corporation Commission Staff ("Staff"). As discussed below, Staff's opposition misinterprets the filing requirements of the Telecommunications Act of 1996 (the "Act") and the FCC's *Declaratory Order*, and incorrectly assumes that state commissions have authority to approve or reject terms and conditions of agreements relating to access to network elements that Bell Operating Companies ("BOCs") are not required to provide under section 251.

Staff's contention that the Qwest/Covad line sharing agreement must be submitted to the Commission for approval rests on the following arguments: (1) Section 252(e) requires "any" interconnection agreement to be filed with a state commission for approval; (2) Section 252(a)(1) requires carriers to file interconnection agreements entered into "without regard to the standards set forth in subsections (b) and (c) of section 251;" (3) State commissions have the authority to approve interconnection agreements containing terms and conditions relating to network elements provided under section 271; and (4) The FCC has not excluded "commercially negotiated" agreements from the

1 agreements that carriers must file with state commissions.

2 As discussed below, each of these arguments is flawed and unsupported by the Act  
3 and the FCC's *Declaratory Order*.

## 4 **II. ARGUMENT**

### 5 **A. Staff Misinterprets The Filing Requirements of Section 252(e).**

6 Staff's argument that Qwest must submit the line sharing agreement for approval is  
7 premised in substantial part on section 252(e)(1) and the language in that section  
8 providing that "[a]ny interconnection agreement adopted by negotiation or arbitration  
9 shall be submitted for approval to the State commission." According to Staff, the  
10 reference to "any interconnection agreement" broadly encompasses agreements that do  
11 not involve ongoing obligations relating to sections 251(b) and (c).<sup>1</sup> However, that  
12 interpretation is directly contradicted by another sub-section of 251(e) that Staff did not  
13 consider and by the FCC's *Declaratory Order*.

14 While Section 252(e)(1) requires an "interconnection agreement adopted by  
15 negotiation" to be filed with a state commission, section 252(e)(2) establishes the  
16 negotiated interconnection agreements that must be filed for approval are those that were  
17 negotiated under section 252(a). Specifically, in delineating the grounds upon which a  
18 state commission may reject an interconnection agreement filed for approval, section  
19 252(e)(2)(A) only authorizes review of "an agreement (or any portion thereof) *adopted by*  
20 *negotiation under subsection [252](a).*" (Emphasis added). In turn, section 252(a)(1)  
21 refers to negotiations conducted pursuant to "a request for interconnection services, or  
22 network elements *pursuant to section 251 . . . .*" (Emphasis added). Thus, under this  
23 plain language of the Act, the only negotiated agreements that must be submitted to a state  
24 commission for approval are those that resulted from negotiations relating to a request for  
25 interconnection or network elements *pursuant to section 251*.

26 This literal reading of section 252(e) is entirely consistent with the FCC's  
27 *Declaratory Order* in which the FCC concluded that carriers are only required to file for

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28 <sup>1</sup> Staff Br. at 2-3.

1 approval with state commissions agreements containing ongoing obligations relating to  
2 section 251(b) or (c). The FCC's statement was clear and unequivocal: "[W]e find that  
3 **only** those agreements that contain an ongoing obligation relating to section 251(b) or (c)  
4 must be filed under 252(a)(1)."<sup>2</sup>

5 Here, Staff does not contest that the line sharing agreement does not pertain to any  
6 obligations under sections 251(b) and (c). Because that is indisputably the case, there is  
7 no requirement to file the agreement.

8 **B. The Commission Interprets Section 252(a)(1) Incorrectly And In A**  
9 **Manner That Conflicts With The *Declaratory Order*.**

10 Staff also bases its argument on the reference in section 252(a)(1) to the ability of  
11 an ILEC, upon receiving a request for "network elements pursuant to section 251," to  
12 "negotiate and enter into a binding agreement . . . without regard to the standards set forth  
13 in [section 251(b) and (c)]." According to Staff, the ability of an ILEC to enter into  
14 agreements that exceed the requirements of section 251(b) and (c), coupled with the  
15 obligation in section 252(a)(1) to file such agreements for approval, establishes that  
16 agreements containing obligations unrelated to section 251 must be filed for approval.<sup>3</sup>

17 With this argument, Staff is effectively contending that although the FCC has  
18 declared that only those negotiated agreements that concern section 251(b) or (c)  
19 obligations must be filed with and approved by state commissions, section 252 requires all  
20 negotiated wholesale agreements between an ILEC and a CLEC to be filed and approved  
21 by state commissions. However, the FCC specifically rejected that contention in the  
22 *Declaratory Order*.<sup>4</sup> Moreover, Staff's reading of section 252(a)(1) improperly disregards  
23 the limiting effect of the opening clause of that section: "Upon receiving a request for  
24 interconnection, services, or network elements *pursuant to section 251 . . .*" (Emphasis  
25 added). It is essential to read all of section 252(a)(1) by giving effect to this opening

26 <sup>2</sup> *Declaratory Order* at ¶ 8 & n.26 (emphasis added).

27 <sup>3</sup> Staff Br. at 3.

28 <sup>4</sup> *Declaratory Order* at ¶ 8 & n.26 ("We therefore disagree with the parties that advocate the filing of all agreements between an incumbent LEC and a requesting carrier.").

1 clause.

2 Thus, in a negotiation *pursuant to section 251*, ILECs are free to enter into  
3 interconnection agreements without regard to the standards of sections 251(b) and (c) and  
4 must file such agreements with state commissions. However, the starting point for this  
5 filing obligation, as the opening clause makes clear, must be a negotiation pursuant to  
6 section 251. In this case, the line sharing agreement was not entered into pursuant to  
7 section 251, as Staff does not contest and as evidenced by the FCC's elimination of line  
8 sharing as a section 251 unbundled network element.

9 Staff also interprets section 252(a)(1) as if Congress added the following  
10 bold-faced and italicized phrase: "Upon receiving a request for interconnection, services,  
11 or network elements pursuant to section 251, an incumbent local exchange carrier may  
12 negotiate and enter into a binding agreement with the requesting telecommunications  
13 carrier or carriers *without regard to the FCC approved list of network elements incumbent*  
14 *local exchange carriers are required to provide under section 251(b) and (c)* or the  
15 standards set forth in subsections (b) and (c) of section 251." (Emphasis added).  
16 However, the standards pursuant to which ILECs must provide unbundled network  
17 elements pursuant to section 251(b) and (c) are clearly different from the unbundled  
18 network elements themselves. Had Congress meant to state that parties could negotiate  
19 terms and conditions without reference to the unbundled network elements an ILEC is  
20 required to provide pursuant to section 251(b) and (c), it would have included that  
21 language in the statute. Congress did not, and the statute cannot reasonably be interpreted  
22 to include that language.

23 Importantly, the first sentence of Section 252(a)(1) juxtaposes its opening clause –  
24 "Upon a request for interconnection, services, or network elements *pursuant to Section*  
25 *251*" – with the last clause of that sentence – "without regard to the *standards* set forth in  
26 subsections (b) and (c) of Section 251." Staff's interpretation suggests that the last clause  
27 addresses and trumps the first clause. A reading of the whole sentence shows that the first  
28 clause of that sentence addresses *services*, and the services at issue in section 252 are

1 section 251 services. Further, the phrase “without regard to the standards of section  
2 251(b) or (c)” should be interpreted according to the plain meaning of that language,  
3 which is that the ILEC and the CLEC may negotiate the provisioning of section 251  
4 services in a manner that departs from the specific requirements of those sections. That is,  
5 an ILEC and a CLEC may negotiate different terms, rates or conditions than those  
6 mandated by section 251, but by no means does this language suggest that the agreements  
7 for services that must be filed under Section 252 are limitless.

8 Finally, Staff’s interpretation – that the filing standard can be determined “without  
9 regard to whether the services at issue are section 251 services” – cannot be reconciled  
10 with the *Declaratory Order*, in which the FCC ruled that not all ILEC/CLEC agreements  
11 must be filed and that the section 252 filing requirement is defined by section 251  
12 services.

13 **C. Staff Does Not Address The Absence Of Any Delegation To State**  
14 **Commissions Of Approval Or Decision-Making Authority Over**  
**Non-251 Network Elements.**

15 In contending that state commissions have authority to require carriers to submit  
16 for approval agreements relating to non-251 network elements, Staff argues that nothing  
17 in the Act gives the FCC exclusive jurisdiction over such agreements or precludes state  
18 commissions from reviewing them.<sup>5</sup> However, this argument fails to recognize that in  
19 passing the Act, Congress established federal authority over the regulation of local  
20 telephone competition, leaving states only with the authority that Congress expressly  
21 granted. An absence in the Act of any express prohibition against state regulatory action  
22 is not enough, therefore, to establish the authority of states to act. Instead, there must be  
23 an express grant of authority, and there is no such grant that empowers states to review  
24 agreements addressing non-251 network elements.

25 The Seventh Circuit recently described this federal regulatory regime for local  
26 telephone competition that the Act establishes:

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<sup>5</sup> Staff Br. at 3-4.

1 In the Act, Congress entered what was primarily a state system of regulation  
2 of local telephone service and created a comprehensive federal scheme of  
3 telecommunications regulation administered by the Federal  
4 Communications Commission (FCC). While the state utility commissions  
5 were given a role in carrying out the Act, Congress “unquestionably” took  
6 “regulation of local telecommunications competition away from the State”  
7 on all “matters addressed by the 1996 Act;” it required that the participation  
8 of the state commissions in the new federal regime be guided by  
9 federal-agency regulations.<sup>6</sup>

10 Under this regime, states are not permitted to regulate local telecommunications  
11 competition “except by the express leave of Congress.”<sup>7</sup> As described by the Third  
12 Circuit, “[b]ecause Congress validly terminated the states’ role in regulating local  
13 telephone competition and, having done so, then permitted the states to resume a role in  
14 that process, the resumption of that role by a state is a congressionally bestowed  
15 gratuity.”<sup>8</sup> Thus, the court explained, a “state commission’s authority to regulate comes  
16 from Section 252(b) and (e), not from its own sovereign authority.”<sup>9</sup>

17 Under this regime therefore, a state commission has authority to regulate only  
18 when Congress has expressly granted that authority. A plain reading of the Act shows  
19 that Congress did not authorize any decision-making regulatory role for state commissions  
20 in connection with non-251 network elements.

21 Without citing to any language in the Act that confers decision-making authority  
22 on state commissions, Staff presents a flawed analysis that, it claims, inferentially shows  
23 the states’ authority to approve non-251 agreements. An inferential argument that states  
24 have authority cannot substitute for the express grant of authority that is required for states  
25 to be able to administer provisions of federal law. Moreover, the statute is not reasonably  
26 susceptible to the inference that Staff seeks to draw.

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27 <sup>6</sup> *Indiana Bell Telephone Co., Inc., v. Indiana Utility Regulatory Commission*, 359 F.3d 493, 494 (7th Cir.  
28 2004) (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 & n. 6 (1999)).

<sup>7</sup> *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 510 (3rd Cir. 2001)  
(internal citations omitted).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

1 Staff's argument relies on section 271(c)(2)(A) and the contention that access to  
2 non-251 network elements be provided, pursuant to "binding agreements that have been  
3 approved under section 252." Thus, their argument goes, state commissions have  
4 authority to approve terms and conditions relating to non-251 elements, including  
5 elements provided under section 271.

6 The first flaw in this argument is Staff's contention that the "binding agreements"  
7 required under section 271(c)(1)(A) include agreements addressing access to non-251  
8 elements. Section 271(c)(1)(A) refers expressly to "agreements that have been approved  
9 *under section 252*," making it clear that the agreements referred to in that section are those  
10 that relate to section 252 – not section 271 – obligations. As discussed above, the FCC  
11 established in the *Declaratory Order* that the scope of section 252 agreements is limited to  
12 terms and conditions relating to the obligations imposed by sections 251(b) and (c).  
13 Accordingly, the reference in section 271(c)(1)(A) to agreements "approved under section  
14 252" is limited to agreements that address section 251(b) and (c) obligations and does not  
15 include commercial agreements that address issues unrelated to those sections. That  
16 section therefore does not give states authority to review agreements containing terms and  
17 conditions for access to non-251 elements.

18 As discussed above, Staff's argument also is contradicted by the provisions of the  
19 Act that define the authority of state commissions to approve interconnection agreements.  
20 Section 252(e)(1) authorizes state commissions to approve interconnection agreements  
21 "adopted by negotiation," and the negotiations to which the section refers are those  
22 addressed in section 251(c)(1), which expressly relate only to the obligations imposed by  
23 sections 251(b) and (c). There is no mention anywhere in either section 251 or 252 of  
24 negotiations relating to non-251 obligations or of state authority to approve negotiated  
25 agreements addressing non-251 obligations. The section 252(e)(1) authority of state  
26 commissions to approve negotiated interconnection agreements is limited, therefore, to  
27 agreements relating to section 251(b) and (c) obligations.

28 This conclusion is further supported by section 252(e)(6) of the Act, which grants

1 parties the right to seek judicial review of state commission determinations relating to  
2 interconnection agreements. That section limits judicial review to “whether the agreement  
3 . . . meets the requirements of section 251 and this section.” Significantly, Congress did  
4 not authorize courts to review agreements for compliance with sections other than 251,  
5 demonstrating that Congress did not intend that state commissions would make any  
6 determinations relating to agreements that address non-251 obligations. If Congress had  
7 intended otherwise, it easily could have stated as much.<sup>10</sup>

8 For these reasons, there is no merit to Staff’s contention that section 271 requires  
9 BOCs to file non-251 agreements with state commissions and gives state commissions  
10 authority to approve agreements containing terms and conditions for access to non-251  
11 network elements.

12 **D. The FCC’s Determination That State Commissions Should Evaluate**  
13 **Agreements To Determine Whether They Must Be Submitted For**  
14 **Approval Does Not Expand The Authority Of State Commissions To**  
15 **Approve Or Reject Agreements.**

16 Staff accurately recites the FCC’s determination in the *Declaratory Order* that  
17 where there is uncertainty concerning whether carriers should submit an agreement to a  
18 state commission for approval, the state commission should evaluate the agreement in the  
19 first instance to assess whether the filing requirement applies.<sup>11</sup> However, that  
20 determination does not, as Staff implies, expand the categories of agreements that state  
21 commissions can require carriers to file for approval and does not permit states to apply  
22 their own standard for when agreements must be submitted for approval.

23 While states are permitted to conduct the initial evaluation of whether an  
24 agreement must be filed, they must apply the filing requirements of the Act, as

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25 <sup>10</sup> Citing a provision in the FCC’s *Local Competition First Report and Order* in which the FCC stated that  
26 the states’ authority under section 252 extends to certain interstate matters, Staff argues that states  
27 therefore have jurisdiction over interstate line sharing service. Staff Br. at 4-5. However, Staff does not  
28 acknowledge what is plain from this statement by the FCC – that any authority states have over interstate  
29 matters must be expressly conferred by section 252. As discussed above, section 252 does not confer any  
30 authority upon states to approve interconnection agreements negotiated outside section 251, such as the  
31 Qwest/Covad line sharing agreement. That absence of authority exists regardless whether the non-251  
32 agreement at issue involves an interstate service.

<sup>11</sup> *Declaratory Order* at ¶ 10.

1 implemented by the FCC, in making that evaluation. Specifically, a state commission  
2 must determine, in the words of the FCC, whether the agreement contains “an ongoing  
3 obligation relating to section 251(b) or (c).” If an agreement does not contain such  
4 obligations, a state commission is without authority to require carriers to submit it for  
5 approval.

6 The FCC’s discussion of the states’ reviewing role in the *Declaratory Order*  
7 confirms the limited nature of these initial evaluations by state commissions. The FCC  
8 explained that it had defined “the basic class of agreements that should be filed” – those  
9 involving an ongoing obligation relating to section 251(b) or (c) – and that states should  
10 apply that standard based on their statutory role and experience relating to interconnection  
11 agreements.<sup>12</sup> The FCC cited, for example, provisions relating to dispute resolution and  
12 escalation procedures involving “obligations set forth in sections 251(b) and (c),” which it  
13 concluded “are appropriately deemed interconnection agreements.” Significantly, the  
14 FCC premised its conclusion that these provisions are interconnection agreements subject  
15 to filing requirements on the fact that they involve section 251(b) and (c) obligations.  
16 These examples provide clear instruction for states to follow in their initial evaluations of  
17 whether agreements should be filed – states must evaluate whether the agreements involve  
18 section 251(b) and (c) obligations. If an agreement does not involve such an obligation –  
19 as is the case with the Qwest/Covad line sharing agreement – there is no basis for a state  
20 commission to impose a filing requirement.

21 Finally, Staff asserts that in the *Declaratory Order*, the FCC found that only three  
22 specific types of agreements need not be filed with state commissions for approval:  
23 “settlement agreements, order and contract forms . . . , and agreements with bankrupt  
24 competitors . . . .”<sup>13</sup> The Staff misinterprets the meaning of these exceptions. The  
25 threshold question to determine whether an agreement must be filed under section 252 is  
26 whether it pertains to a service that must be offered under section 251. If not, then the

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28 <sup>12</sup> *Declaratory Order* at ¶ 10.

<sup>13</sup> Staff Br. at 7.

1 filing requirement is not triggered. Then, even if the agreement pertains to section 251  
2 services, it may not have to be filed if one of the four enumerated exceptions applies.  
3 Because the Covad Commercial Line Sharing Arrangements does not implicate section  
4 251 services, the issue of exceptions to the filing obligation never arises.

5 Staff's argument also suggests that because the FCC identified only these  
6 exceptions, all other types of agreements must be filed. In the *Declaratory Order*,  
7 however, the FCC expressly stated that it was not addressing "all the possible hypothetical  
8 situations" in which agreements would or would not have to be filed.<sup>14</sup> Instead, it  
9 emphasized that those determinations would have to be made on a case-by-case basis.<sup>15</sup>  
10 The FCC addressed the three specific types of agreements listed by Staff only because the  
11 filing requirements relating to them had been raised in a separate proceeding, *not* because  
12 they are the only types of agreements for which there is no filing requirement. The  
13 determinative factor in evaluating whether an agreement must be submitted for approval is  
14 whether it relates to an ongoing obligation under section 251(b) or (c), not, as Staff  
15 suggests, whether it is one of the types of agreements that the FCC specifically addressed  
16 in the *Declaratory Order*.

17 **E. Staff's Cite to Supplemental Authority ("*Sage Telecom*")**

18 The supplemental authority that Staff submitted, a recent decision from a federal  
19 district court in Texas, does not require a different result.<sup>16</sup> Significantly, the agreement at  
20 issue in *Sage Telecom*, unlike the Qwest/Covad line sharing agreement, contained terms  
21 and conditions that indisputably related to ongoing obligations under sections 251(b) and  
22 (c) in addition to non-251 terms. In particular, the agreement addressed section 251 terms  
23 relating to reciprocal compensation arrangements and access to unbundled loops. In  
24 concluding that the Act required submission of the agreement to the Texas Commission  
25 for approval, the court emphasized that its decision was based in substantial part on the

26 <sup>14</sup> *Declaratory Order* at ¶¶ 10, 11.

27 <sup>15</sup> *Id.* at ¶ 10.

28 <sup>16</sup> *See Sage Telecom, LP v. Public Utility Commission of Texas*, Case No. A-04-CA-364-SS, Order  
Relating to Motions for Summary Judgment and for Dismissal (Oct. 7, 2004 W.D. Tex.).

1 fact that the agreement addressed these section 251 obligations.<sup>17</sup> The court specifically  
2 stated that it was not addressing whether a filing requirement would exist if the agreement  
3 contained no section 251 terms and conditions, since that was not the case with the  
4 agreement between Sage and SBC.<sup>18</sup>

5 In this case, by contrast, the Qwest/Covad line sharing agreement does not contain  
6 terms and conditions relating to section 251. Thus, the ruling in *Sage Telecom* is plainly  
7 inapplicable, as established by the court's express statement that it was not addressing  
8 whether a filing requirement could apply to agreements that do not include section 251  
9 terms and conditions. The relevant ruling is that provided by the FCC in the *Declaratory*  
10 *Order*, which establishes that the filing requirement applies only to agreements that  
11 address ongoing obligations under sections 251(b) and (c).

12 Unlike the agreement in *Sage Telecom*, the Qwest/Covad line sharing agreement is  
13 separate and distinct from any section 251(b) or (c) services. Unlike the agreement in  
14 *Sage Telecom*, the Qwest/Covad line sharing agreement is separate in its expression,  
15 statement and form from any section 251(b) or (c) services. Most importantly, unlike the  
16 agreement in *Sage Telecom*, the mutual promises and duties (the "consideration" in the  
17 law of contracts) of Qwest and Covad in the line sharing agreement stand on their own,  
18 and are completely independent of the contractual consideration for any section 251(b) or  
19 (c) services.

20 If the Commission erroneously applies *Sage Telecom* to this situation, it will make  
21 the provisions of the line sharing agreement an integral part of the interconnection  
22 agreement, effectively combining provisions that the parties intended to make separate  
23 and took great care to keep separate. It would also combine contracts, which are separate  
24 obligations under the law of contracts. Of greater concern for regulatory purposes, such  
25 action would conjoin section 251 (b) and (c) obligations with provisions other than those  
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27 <sup>17</sup> Slip op. at 10.

28 <sup>18</sup> *Id.* at 8 ("The Court need not address this dispute, however, because the parties agree the LWC does, in fact, address at least two sets of § 251 duties . . .").

1 that are necessary to implement what ILECs are legally obligated to provide CLECs under  
2 the Act.

3 The unintended and forced conjoining of section 251 obligations and non-251  
4 obligations is a serious problem in view of the FCC's new "all or nothing rule," in which a  
5 "a requesting carrier may only adopt an effective interconnection agreement in its entirety,  
6 taking all rates, terms, and conditions of the adopted agreement."<sup>19</sup> Under the new rule, if  
7 the Commission erroneously applies the section 252 filing requirement to include non-251  
8 services, then a CLEC wishing to obtain the 251 services must take the burdens of the  
9 non-251 obligations as well. It also means that, in order to opt into the Qwest/Covad line  
10 sharing agreement, the CLEC must opt into the entire Covad interconnection agreement,  
11 which may contain terms and conditions undesirable to the requesting CLEC. CLECs will  
12 not universally want or need the non-251 provisions, but those that do not will be unable  
13 to reject the unwanted provisions. The negative ramifications of such a decision on  
14 CLECs not wanting the non-251 obligations far outweigh any attempt to portray the  
15 action as beneficial to the goals of the Act.

16 Thus, a Commission decision to include non-251 services in a section 252  
17 interconnection agreement may have the opposite policy effect desired by the  
18 Commission. That is, instead of achieving the policy goal of making services more  
19 available to CLECs, placing non-251 services into a section 252 agreement may make the  
20 non-251 services less available due to the CLECs' burdens of having to opt into the entire  
21 Covad interconnection agreement. The converse is also true, which is that by including  
22 non-251 services in an interconnection agreement, section 251 services become less  
23 available due to the increased burdens of a CLEC to assume the burdens of the non-251  
24 services. Qwest, as shown by its willingness to negotiate the Covad agreement, as well as  
25 the MCI QPP commercial agreement, will continue to negotiate with carriers to offer  
26 non-251 services to fit their wholesale needs. But, the Commission should consider the

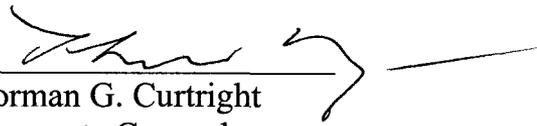
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28 <sup>19</sup> See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC  
Docket No 01-338, *Second Report and Order* (released July 13, 2004) ("FCC Report and Order") at ¶ 10.

1 prospect that requiring the filing of non-251 services in a section 252 interconnection  
2 agreement most likely will decrease the availability for services to CLECs under the  
3 all-or-nothing rule.

4 **III. CONCLUSION**

5 For the reasons stated here and in its opening brief, Qwest respectfully requests that  
6 the Commission grant Qwest's motion to dismiss.

7 By 

8 Norman G. Curtright  
9 Corporate Counsel  
10 QWEST CORPORATION  
11 4041 N. Central Ave., Suite 1100  
12 Phoenix, Arizona 85012  
13 (602) 630-2187

14 -and-

15 Timothy Berg  
16 Theresa Dwyer  
17 FENNEMORE CRAIG, P.C.  
18 3003 N. Central Ave, Suite 2600  
19 Phoenix, Arizona 85012  
20 (602) 916-5421

21 *Attorneys for Qwest Corporation*

22 ORIGINAL +13 copies filed this  
23 15<sup>th</sup> day of October, 2004:

24 Docket Control  
25 ARIZONA CORPORATION COMMISSION  
26 1200 West Washington  
27 Phoenix, AZ

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Maureen Scott  
Legal Division  
ARIZONA CORPORATION COMMISSION  
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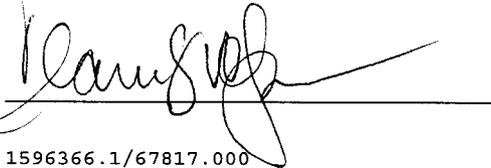
1 Ernest Johnson, Director  
2 Utilities Division  
3 ARIZONA CORPORATION COMMISSION  
4 1200 West Washington  
5 Phoenix, AZ

6 Lyn Farmer, Chief ALJ  
7 Hearing Division  
8 ARIZONA CORPORATION COMMISSION  
9 1200 West Washington  
10 Phoenix, AZ

11 COPY mailed this 15<sup>th</sup> day of October, 2004:

12 Karen Frame  
13 Senior Counsel  
14 COVAD COMMUNICATIONS COMPANY  
15 7901 Lowry Boulevard  
16 Denver, CO 80230

17 Michael W. Patten  
18 ROSHKA, HEYMAN & DeWULF  
19 One Arizona Center  
20 400 E. Van Buren Street, Suite 800  
21 Phoenix, AZ 85007

22   
23 \_\_\_\_\_  
24 1596366.1/67817.000

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