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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

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Arizona Corporation Commission

DOCKETED

MARC SPITZER, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
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AZ CORP COMMISSION
DOCUMENT CONTROL

NOV 22 2004

DOCKETED BY [Signature]
DOCKET NO. T-03632A-04-0603
DOCKET NO. T-01051B-04-0603

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

PROCEDURAL ORDER

BY THE COMMISSION:

On May 14, 2004, Qwest Corporation ("Qwest") submitted two agreements to the Arizona Corporation Commission ("Commission"). The first document was entitled "Commercial Line-Sharing Amendment to the Interconnection Agreement" signed April 14, 2004. This Agreement sets forth the terms and conditions governing Qwest's provision of line-sharing to Covad for orders placed through October 1, 2004, pursuant to the transitional rules created by the FCC's *Triennial Review Order*.¹ Qwest filed this Agreement with the Commission for approval under Section 252 of the Telecommunications Act of 1996 ("1996 Act").

On the same date, Qwest submitted a second agreement with Covad entitled "Terms and Conditions for Commercial Line Sharing Arrangements" ("Arrangements Agreement") also executed April 14, 2004. Qwest states it provided this agreement with the Commission for informational purposes only. Qwest claims that the Arrangements Agreement is a "commercially negotiated" agreement and argues that it is not required to file it with the Commission for approval under Section 252 of the 1996 Act. Under the Arrangements Agreement, Qwest agreed to provide access to the high frequency portion of its local loops so that Covad may offer advanced data services simultaneously with Qwest's voice band service. The Arrangements Agreement pertains to line sharing orders placed after October 1, 2004.

¹ Report and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Service Offering Advance Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147 (rel. August 21, 2003).

1 On August 26, 2004, the Commission's Utility Staff ("Staff") filed the Arrangements
2 Agreement with Docket Control and requested that a Docket be opened to review the matter as is
3 normally done when interconnection agreements are submitted to the Commission for approval.

4 On September 13, 2004, Qwest filed a Motion to Dismiss Staff's Request for Review of
5 Negotiated Commercial Agreement (With Alternative Request for Intervention). Qwest argues that
6 as a result of the D.C. Circuit's decision in *United States Telecom Association v. FCC* ("USTA II"),²
7 Qwest does not have to provide line sharing as a network element under Section 251 or 252 of the
8 1996 Act for line sharing orders placed after October 1, 2004. Qwest argues that the Arrangements
9 Agreement does not create any terms or conditions for services that Qwest must provide under
10 Sections 251(b) and (c), and it is not an interconnection agreement or an amendment to the existing
11 interconnection agreement between Qwest and Covad.

12 On September 21, 2004, Staff filed a Notice that it was seeking comments from interested
13 parties on Qwest's and Covad's filing obligations under Section 252 of the 1996 Act with respect to
14 the Arrangements Agreement.

15 On October 7, 2004, Covad filed Comments pursuant to Staff's September 21, 2004 Request.
16 Covad stated that it believes that all filing obligations rest with Qwest. Covad acknowledges that
17 Qwest takes the position that the Arrangements Agreement does not have to be filed for approval
18 because it does not involve unbundled network elements under Section 251 as a result of the FCC's
19 *Triennial Review Order*. Covad notes that both Qwest and Covad have publicly disclosed the terms
20 of the Arrangement Agreement and that Qwest has offered these terms to other carriers. Covad states
21 it concurs with this approach. In addition, Covad urges the Commission to stay this Docket until
22 final rules are issued by the FCC. Covad further notes that the FCC issued a Notice of Proposed
23 Rulemaking on the filing standard for these types of commercial agreements in its Order and Notice
24 of Proposed Rulemaking released on August 20, 2004, *In the Matter of Unbundled Access to Network*
25 *Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange*
26 *Carriers*, WC Docket No. 04-313, CC Docket No., 01-338, para. 13.

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² *United States Telephone Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

1 On October 5, 2004, Staff filed an Opposition to Qwest's Motion to Dismiss. Staff states that
2 Section 252(e) of the 1996 Act requires that "any" Interconnection Agreement be filed with the state
3 commissions. Staff argues that there was no Congressional intent to qualify the Section 252(e) filing
4 requirement to mean only those agreements which contain ongoing obligations under Section 251 (b)
5 and (c) as suggested by Qwest. Staff also argues that the Commission has the authority to approve
6 interconnection agreements containing terms and conditions relating to network elements provided
7 under section 271. In addition, Staff claims that there is no exception to the Section 252(e) filing
8 requirement for "commercially negotiated" agreements.

9 On October 8, 2004, Staff filed the Order of the United States District Court for the Western
10 District of Texas in *Sage Telecom, LP vs. Public Utility Commission of Texas*,³ as Supplemental
11 Authority.

12 On October 15, 2004, Qwest filed its Reply in Support of its Motion to Dismiss. Qwest
13 argues that Staff's interpretation of the filing requirements of Section 252(e) is misplaced as it is
14 directly contradicted by section 252(e)(2) that specifically establishes that the interconnection
15 agreements are those that are negotiated under section 252(a). According to Qwest, Section 252(a)
16 refers specifically to negotiations conducted pursuant to "a request for interconnection services, or
17 network elements *pursuant to section 251*." (Emphasis added). Furthermore, Qwest argues, this
18 interpretation is consistent with the FCC's *Declaratory Order*,⁴ in which the FCC concluded that
19 carriers are only required to file for approval with state commissions those agreements containing
20 ongoing obligations relating to Section 251(b) or (c). Qwest also argues that Staff does not address
21 the absence of any delegation to state commissions of approval or decision-making authority over
22 non-251 network elements. Qwest distinguishes its agreement with Covad from the agreement that
23 was the subject of the decision in *Sage Telecom*, on the grounds that the latter contained terms and
24 conditions that indisputably related to ongoing obligations under sections 251 (b) and (c) in addition
25 to non-251 terms. In this case, Qwest argues, the Covad Arrangements Agreement does not contain

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27 ³ Case No. A-04-CA-364-SS (rel. October 7, 2004).

28 ⁴ *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, 17 FCC Rcd 19337, *Memorandum Opinion and Order* (October 4, 2002).

1 any terms relating to Section 251.

2 IT IS THEREFORE ORDERED that oral argument on Qwest's Motion to Dismiss and
3 consideration of Covad's suggested stay, shall commence on **December 7, 2004 at 11:00 a.m.**, at the
4 Commission's Phoenix offices, 1200 W. Washington, Phoenix, Arizona. Parties may participate
5 telephonically by calling **602 542-9014**.

6 IT IS FURTHER ORDER that the presiding Administrative Law judge may rescind, alter,
7 amend, or waive any portion of this Procedural Order by subsequent Procedural Order or by ruling at
8 hearing.

9 DATED this 18th day of November, 2004.

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11 
12 JANE L. RODDA
ADMINISTRATIVE LAW JUDGE

13 Copy of the foregoing mailed/delivered
this 18th day of November, to:

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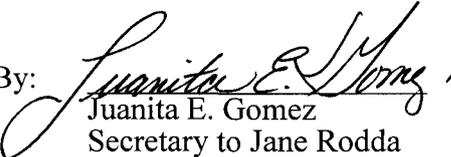
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