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7
8 IN THE MATTER OF THE APPLICATION
9 OF MCIMETRO ACCESS TRANSMISSION
10 SERVICES, LLC, FOR APPROVAL OF AN
11 AMENDMENT FOR ELIMINATION OF
12 UNE-P AND IMPLEMENTATION OF
13 BATCH HOT CUT PROCESS AND QPP
14 MASTER SERVICES

DOCKET NO. T-01051B-04-0540
DOCKET NO. T-03574A-04-0540

15 **QWEST CORPORATION'S REPLY IN SUPPORT OF ITS EXCEPTIONS TO**
16 **THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED OPINION AND**
17 **ORDER DENYING QWEST'S MOTION TO DISMISS**

18 Pursuant to the Procedural Order issued July 11, 2005, Qwest Corporation
19 ("Qwest") files this reply in support of its exceptions to the Administrative Law Judge's
20 Recommended Opinion and Order ("ROO") denying Qwest's motion to dismiss.

21 **I. INTRODUCTION AND SUMMARY**

22 The FCC has squarely addressed and unambiguously determined when local
23 exchange carriers are required under Section 252 of the Telecommunications Act of 1996
24 ("the Act") to submit agreements to state commissions for review and approval. The
25 FCC could not have been any clearer in ruling that *only* those agreements that contain an
26 *ongoing obligation* relating to section 251(b) or (c) must be filed under section

1 252(a)(1)."¹ A fundamental question that must be answered under this binding FCC
2 standard is whether the Qwest Master Services Agreement ("QPP Agreement") contains
3 any "ongoing obligations relating to section 251(b) or (c)." Instead of conducting this
4 legally mandated analysis, the ROO concludes that Qwest and MCI are required to file
5 the QPP Agreement because it does not fit within the three examples in the *Declaratory*
6 *Order* of agreements that do not have to be filed.² As Qwest discussed in its opening
7 brief, however, the FCC expressly stated that in providing those examples, it was not
8 establishing an exhaustive list of the agreements that do not have to be filed under
9 Section 252.³ The ROO does not account for this statement and, contrary to the FCC's
10 express intent, converts the FCC's merely illustrative list into an all-encompassing,
11 preclusive legal standard.

12 In their responses to Qwest's Exceptions, Commission Staff and MCI do not
13 attempt to defend this incorrect interpretation and application of the *Declaratory Order*.
14 Unlike the ROO, Staff and MCI do not contend that the three examples in the
15 *Declaratory Order* comprise an exhaustive list of the agreements that LECs are not
16 required to file under Section 252. There is thus no support from any party for this
17 flawed legal standard that is central to the ROO's conclusion that MCI and Qwest must
18 file the QPP Agreement for review and approval.

19 Staff chooses instead to attempt to defend the ROO by arguing that the FCC did
20 not really mean it when it said that "only those agreements" containing "ongoing section

21 ¹ Memorandum Opinion and Order, *In the Matter of Qwest Communications*
22 *International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and*
23 *Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*,
24 WC Docket No. 02-89, 17 FCC Rcd 19337, ¶ 8 & n.26 (Oct. 4, 2002) ("*Declaratory*
Order") (emphasis added).

25 ² ROO at ¶ 7 & n.10.

26 ³ Qwest Corporation's Exceptions to the Administrative Law Judge's Recommended
Opinion and Order Denying Qwest's Motion to Dismiss ("Qwest Br.") at 11-13.

1 251(b) or (c) obligations" must be filed for review and approval. Thus, despite the plain
2 meaning of this language, Staff states that it "believes" the FCC was merely attempting to
3 establish that carriers are not required to file all agreements with state commissions.⁴
4 Staff did not have this "belief" when it described the *Declaratory Order's* filing standard
5 in the Unfiled Agreements case. There, Staff told this Commission that under the
6 *Declaratory Order*, the determination of whether an agreement must be filed for review
7 and approval turns on whether the agreement contains ongoing Section 251(b) or (c)
8 obligations: "[O]ne must look at the substance of the agreement to determine whether it
9 contains ongoing obligations relating to Section 251(b) and (c) services."⁵ Staff fails to
10 explain this inconsistency, stating only that its "arguments in this case are not
11 inconsistent with its arguments in the Unfiled Agreements case."⁶ But this conclusory
12 assertion cannot mask the fact that Staff's positions in these two dockets are entirely
13 irreconcilable. The reality is that Staff has abandoned its previous and accurate
14 articulation of the FCC's filing standard to achieve a result – filing of the QPP agreement
15 – that the standard does not permit.

16 The unlawfulness of the filing requirement imposed by the ROO, as demonstrated
17 in Qwest's opening brief, is confirmed by the recent rulings of the Montana federal
18 district court and the Minnesota Public Utilities Commission. In Montana, the
19 Commission's position before the federal court was the same as Staff's position here –
20 that the filing requirement extends beyond agreements pertaining to Section 251(b) and
21 (c) services. The Montana federal court squarely rejected this argument: "[S]ection 252's
22 language limits the requirement that agreements be submitted to state commissions for
23

24 ⁴ Staff's Response to Qwest's Exceptions to the Administrative Law Judge's
25 Recommended Opinion and Order Denying Qwest's Motion to Dismiss ("Staff Br.") at 5.

25 ⁵ See Qwest Br. at 6-7.

26 ⁶ Staff Br. at 5 and n.8.

1 approval to those agreements that contain section 251 obligations."⁷ Staff and MCI do
2 not – and, indeed, cannot – distinguish the Minnesota and Montana rulings. While Staff
3 concedes begrudgingly that the rulings are "informative,"⁸ both parties are left to argue
4 only that the rulings are not binding on this Commission.⁹ But the rulings implement a
5 filing standard – established by the *federal* agency charged with administering the *federal*
6 Act – that is indisputably binding on this Commission. Under that standard, Qwest and
7 MCI cannot be compelled to submit the QPP Agreement for review and approval because
8 it does not contain any ongoing obligations relating to Sections 251(b) or (c).

9 For these reasons and those discussed below, Staff's and MCI's responses to
10 Qwest's exceptions are without merit. The Commission should not adopt the ROO.

11 II. ARGUMENT

12 A. Like The ROO, Staff Fails to Define The "Interconnection Agreements" That 13 Must Be Submitted For Review and Approval And Gives No Effect To The 14 FCC's Definition Of That Term.

15 Under the Act, carriers are only required to file for approval by state commissions
16 "interconnection agreements," a term of art that the FCC and the Montana federal court
17 have defined as agreements that relate to ongoing obligations to provide services required
18 under Sections 251(b) and (c). Unlike in the Unfiled Agreements case, Staff treats the
19 term "interconnection agreement" not as a defined term of art but, rather, as an undefined
20 term, the meaning of which could vary from one case to another. Thus, Staff asserts as
21 follows: "The QPP agreement establishes the terms and conditions for unbundled access
22 to network elements; and as such is an interconnection agreement."¹⁰

23 The basic flaw in this conclusory assertion is that Staff begs the essential question

24 ⁷ Montana Order at 14.

25 ⁸ Staff Br. at 2.

26 ⁹ *Id.*; MCI Br. at 1.

¹⁰ Staff Br. at 2.

1 of what type of agreement qualifies as an "interconnection agreement" that is subject to
2 the Section 252 filing requirement. Nowhere in its brief does Staff put forth a definition
3 of the term, although the term must of course be defined before the Commission can
4 meaningfully determine whether the QPP Agreement is subject to the Section 252 filing
5 requirement.

6 The question that Staff begs is the precise question the FCC and the Montana
7 federal court answered when they ruled that only agreements containing ongoing
8 obligations relating to Sections 251(b) and (c) are "interconnection agreements" subject
9 to the Section 252 filing requirement. Staff itself defined the term just as clearly as these
10 federal decision-makers when it stated in the Unfiled Agreements case that to determine
11 whether an agreement is an "interconnection agreement" subject to the filing requirement
12 "one must look at the substance of the agreement to determine whether it contains
13 *ongoing obligations relating to Section 251(b) and (c) services.*"¹¹

14 Under this standard, the fact that an agreement sets forth terms and conditions
15 relating to *any* network element is not enough, contrary to Staff's argument, to trigger the
16 filing and approval requirement. Instead, consistent with the FCC's ruling that "only"
17 agreements containing Section 251(b) or (c) obligations must be filed for approval, it is
18 essential to analyze whether an agreement involves providing access to the unbundled
19 network elements incumbent local exchange carriers ("ILECs") are required to provide
20 under Section 251(c)(3). The need for this inquiry is forcefully demonstrated by the
21 recent ruling from the Montana federal court.¹²

22
23 ¹¹ See *In the Matter of Qwest Corporation's Compliance with Section 252(e) of the*
24 *Telecommunications Act of 1996*, Docket No. RT-00000F-02-0271, Staff's Reply Brief
(Confidential Version) at p.5, filed May 15, 2003 (emphasis added).

25 ¹² *Qwest Corporation v. Montana Public Service Commission*, CV-04-053-H-CSO, Order
26 on Qwest's Motion for Judgment on Appeal (D. Mont. June 9, 2005) ("Montana Order").
A copy of this order is attached to Qwest's opening brief as "Exhibit B."

1 In the Montana case, the court addressed whether Qwest and Covad
2 Communications Company were required to file for approval with the Montana
3 Commission an agreement under which Qwest is providing Covad with access to the
4 network element that was known as line sharing.¹³ After reciting the FCC's standard that
5 only agreements involving ongoing Section 251(b) or (c) obligations are to be filed for
6 approval, the court then analyzed whether the parties' line sharing agreement involves
7 providing access to a network element pursuant to Section 251.¹⁴ Consistent with an
8 FCC ruling that eliminated line sharing as a UNE that ILECs are required to provide
9 under Section 251, the court determined that the agreement does not relate to access to a
10 network element under Section 251.¹⁵ Based on that finding, the court held that the
11 Montana Commission erred in requiring Qwest and Covad to file the agreement for
12 approval:

13 As Qwest argues, section 252(a)(1)'s requirement that an agreement be
14 submitted to a state commission is expressly premised on the agreement
15 being for interconnection, services or network elements provided 'pursuant
16 to section 251.' Here, as the parties agree and as relevant authority
17 establishes, line sharing is not a service or element provided pursuant to
18 section 251. Therefore, Qwest's CLSA with Covad is not the type of
19 agreement contemplated in section 252(a)(1) that must be submitted to the

20 PSC for approval.¹⁶

21 ¹³ Qwest's use of the term "was" in this sentence is deliberate and is included to reflect
22 the effect of the FCC's oral ruling issued August 5, 2005 in which the FCC eliminated the
23 obligation of ILECs to provide competitive access to their lines for high-speed Internet
24 access. In its press release announcing the order, the FCC stated that "wireline
25 broadband Internet access providers, like cable modem service providers, will be
26 considered information service providers and will no longer be compelled by regulation
to unbundle and separately tariff the underlying transmission component of their Internet
access service." A written order from the FCC is forthcoming.

¹⁴ *Id.* at 14.

¹⁵ *Id.*

¹⁶ *Id.*

1 Just as line sharing was a network element when Qwest and Covad entered into
2 their agreement, but not one that ILECs provide pursuant to Section 251, the switching
3 and transport elements that are the subject of the QPP Agreement are network elements
4 but are not Section 251 elements. Indeed, there is no dispute on this point, as neither
5 Staff nor MCI contests Qwest's demonstration in its opening brief that the FCC has
6 removed these network elements from Section 251.¹⁷ Because these elements are not
7 Section 251 elements, as the Montana court ruled in virtually the same context, the QPP
8 Agreement "is not the type of agreement contemplated in section 252(a)(1) that must be
9 submitted to the PSC for approval."¹⁸

10 Like the ROO, Staff also attempts to blunt the effect of the FCC's and the Montana
11 court's reference to ongoing Section 251(b) and (c) obligations by arguing that when read
12 in context, the FCC's words in the *Declaratory Order* should not be given their plain
13 meaning. Thus, Staff states that it "believes that the FCC was attempting to construe the
14 statute in a manner that would not impose unlimited liability upon Qwest or other carriers
15 for failing to file 'any' agreement with the State commissions" ¹⁹ Staff is correct that
16 the FCC made it clear in the *Declaratory Order* that carriers are not required to file "all"
17 agreements for review and approval,²⁰ but after establishing that broad principle, the FCC
18 went on to define the types of agreements that carriers are required to file – those
19 containing ongoing obligations under Sections 251(b) or (c). Staff ignores this second,
20 critical component of the FCC's ruling.

21 Staff's failure to define "interconnection agreement" and its opposition to giving
22 effect to the FCC's express words in the *Declaratory Order* undermine its contention that
23

24 ¹⁷ See Qwest Br. at 8-9.

25 ¹⁸ Montana Order at 14.

26 ¹⁹ Staff Br. at 5.

²⁰ *Declaratory Order* at ¶ 8 & n.26.

1 the QPP Agreement must be submitted under the language in Section 252(e)(1) providing
2 that "[a]ny interconnection agreement adopted by negotiation or arbitration shall be
3 submitted for approval to the State commission." According to Staff, the reference to
4 "any interconnection agreement" necessarily encompasses the QPP Agreement.²¹ This
5 argument only begs the question as to what is the definition of an "interconnection
6 agreement" and ignores that the term is a term of art defined by the FCC as including
7 "only" agreements involving "ongoing Section 251 (b) or (c) obligations." Equally
8 important, as Qwest demonstrated in its opening brief, Section 252(e) does not impose a
9 filing requirement separate from the filing requirement in Section 252(a)(1).²² The
10 negotiated agreements referred to in Section 252(e)(1) are the same negotiated
11 agreements referred to in Section 252(a)(1) and, as discussed below and in Qwest's
12 opening brief,²³ QPP is not a Section 252(a)(1) negotiated agreement.

13 Finally, Staff relies on paragraphs 165-171 of an FCC order from 1996, commonly
14 known as the *First Report and Order*, the first comprehensive order issued after the
15 passage of the Act. Staff quotes from those provisions of the 1996 order to support the
16 proposition that "the FCC interprets the filing requirement very broadly." But the
17 specific issue the FCC was considering in those paragraphs was the treatment of
18 agreements carriers entered into prior to February 1996. Thus, the section of the *First*
19 *Report and Order* in which the paragraphs are found is entitled "Applicability of Section
20 252 to Preexisting Agreements." Some commenters suggested, and the FCC ultimately
21 disagreed, that the language of the first sentence of section 252(a)(1) meant that the only
22 pre-existing agreements that needed to be filed were those amended after February 8,
23 1996. That issue, of course, is different from the one before the Commission in this case.

24
25 ²¹ Staff Br. at 2.

26 ²² Qwest Br. at 16-18.

²³ *Id.* at 15-16.

1 The issue the FCC was addressing concerned the time the agreements were executed (and
2 whether, in light of the execution dates, the agreements should be filed), as opposed to
3 the nature of the services. Thus, the language Staff quotes does not expand the filing
4 requirement established in the *Declaratory Order*. The *Declaratory Order*, not the *First*
5 *Report and Order*, sets forth the FCC's implementation of the Section 252 filing
6 requirement for agreements entered into after passage of the Act.

7 In sum, contrary to its position in the Unfiled Agreements case, Staff incorrectly
8 assumes here, as does the ROO, that an "interconnection agreement" subject to the
9 Section 252 filing and approval requirement is any agreement that provides access to any
10 network element. That definition of "interconnection agreement" violates the Act, the
11 *Declaratory Order*, and the decision of the Montana federal court.

12 **B. The QPP Agreement Is Not A Negotiated Agreement Within The Meaning Of**
13 **Section 252(a).**

14 Staff argues incorrectly that the QPP Agreement falls within the filing requirement
15 of Section 252(a)(1) because it "is a voluntary agreement for wholesale services, or
16 network elements pursuant to 251, without regard to the standards set forth in subsections
17 (b) and (c) of that section."²⁴ For two independent reasons, this argument is wrong.

18 First, the QPP Agreement is not an agreement for "network elements pursuant to
19 251." As Qwest discussed in its opening brief, following a remand from the U.S. Court
20 of Appeals for the D.C. Circuit, the FCC ruled unambiguously in the *Triennial Review*
21 *Remand Order* ("TRRO") that ILECs no longer have an obligation under Section 251 to
22 provide the switching and shared transport elements that comprise QPP.²⁵ This ruling
23 directly contradicts Staff's unexplained statement that the QPP Agreement is for "network
24 elements pursuant to 251." Staff does not – and indisputably cannot – reconcile its

25 ²⁴ Staff Br. at 4.

26 ²⁵ Qwest Br. at 9.

1 statement with the FCC's *TRRO* ruling.

2 Second, Staff's argument premised on Section 252(a)(1) assumes that any
3 agreement for wholesale services entered into, in the words of Staff, "without regard to
4 the standards set forth in subsections [251] (b) and (c)," falls within the terms of Section
5 252(a)(1)'s filing requirement. That assumption ignores and is contradicted by the
6 language of that section.

7 Section 252(a)(1) provides:

8 Upon receiving a request for interconnection, services, or
9 network elements *pursuant to section 251 of this title*, an
10 incumbent local exchange carrier may negotiate and enter
11 into a binding agreement with the requesting
12 telecommunications carrier or carriers without regard to the
13 standards set forth in subsections (b) and (c) of section 251 of
14 this title. The agreement shall include a detailed schedule of
15 itemized charges for interconnection and each service or
16 network element included in the agreement. *The agreement .*
17 *. . . shall be submitted to the State commission under*
18 *subsection (e) of this section.*²⁶

15 The introductory clause – “Upon receiving a request for interconnection, services,
16 or network elements *pursuant to section 251 of this title*” – makes clear that everything
17 that follows in that sentence must be read in the context of services required by Section
18 251. Staff's argument treats the introductory phrase of Section 252(a)(1), which limits its
19 scope to network elements provided “pursuant to section 251,” as though it does not
20 exist.²⁷ To accept the argument, the Commission would have to eliminate the quoted
21 language from the statute, thus violating the principle that courts should construe statutes
22

23 ²⁶ 47 U.S.C. § 252(a)(1) (emphasis added).

24 ²⁷ In addition, the Agreement itself contradicts the argument that the Agreement is a
25 negotiated agreement within the meaning of Section 252(a)(1). The Agreement plainly
26 states both Qwest's and MCIMetro's intent and agreement that Section 271, not Section
252(a)(1) is the source of the Agreement: "This Agreement is offered by Qwest in
accordance with Section 271 of the Act."

1 “to give every word some operative effect.”²⁸

2 In addition, the "without regard to" language in this section merely makes it clear
3 that, upon receiving a request for services or elements subject to section 251, an ILEC
4 and CLEC can negotiate and enter a binding agreement for those services or elements
5 “without regard to the standards” of sections 251(b) or (c). In other words, consistent
6 with Congress’s and the FCC’s preference for freely-negotiated agreements, the statute
7 informs the parties they may enter an agreement for elements required by section 251(b)
8 or (c) on the terms they choose and that they need not pay undue regard for the standards
9 of those sections.

10 The “without regard to” language plainly does not nullify the introductory clause
11 of Section 252(a)(1), as demonstrated by case law construing that language. For
12 example, the Fourth Circuit recently noted that “the 1996 Act permits local carriers to
13 *agree to terms* ‘without regard to standards set forth in subsection (b) and (c) of section
14 251.’”²⁹ In other words, the purpose of the language is to make it clear to parties
15 negotiating an agreement for services subject to section 251(b) and (c) that they are
16 allowed to *agree to terms* that may differ from the standards imposed by section 251(b)
17 and (c). Construing the same language, a federal district court in the Northern District of
18 Illinois stated that “parties may agree to *terms in an agreement that do not meet all of the*
19 *requirements of the Act* and, pursuant to Section 252(e)(2), the [Illinois Commerce

20 ²⁸ *Cooper Industries v. Aviall Services*, 125 S.Ct. 577, 584 (2004) (the “settled rule” is
21 “that we must, if possible, construe a statute to give every word some operative effect”);
22 *United States v. Tsosie*, 376 F.3d 1210, 1217 (10th Cir. 2004) (“we are also guided by the
23 traditional canon of statutory construction that courts should avoid statutory
24 interpretations which render provisions superfluous”); *Foutz v. City of South Jordan*, 100
25 P.3d 1171, 1174 (Utah 2004) quoting *Perrine v. Kennecott Mining Corp.* 911 P.2d 1290,
26 1292 (Utah 1996) (“We strive to construe statutes in a manner that renders ‘all parts
thereof relevant and meaningful.’”).

²⁹ *Verizon Maryland, Inc. v. Global NAPs, Inc.*, 377 F.3d 355 (4th Cir. 2004) (emphasis
added).

1 Commission] would have no power to reject such an agreement.”³⁰ Neither case suggests
2 that the “without regard to” clause alters the clear meaning of the first clause (*i.e.*, that
3 section 252(a)(1) relates only to services or elements required by section 251(b) or (c)).

4 That the last clause does not nullify the opening clause is also clear from another
5 perspective. The first sentence of section 252(a)(1) juxtaposes its opening clause—
6 “Upon a request for interconnection, services, or network elements **pursuant to Section**
7 **251**”—with the last clause of that sentence—“without regard to the **standards** set forth in
8 subsections (b) and (c) of Section 251.”³¹ Staff’s apparent interpretation suggests that the
9 last clause relates to and trumps the first clause. A reading of the whole sentence shows
10 that the first clause of that sentence addresses **services and network elements**, and the
11 services and network elements at issue in Section 252 are services and network elements
12 an ILEC is required to provided under section 251(b) or (c). Further, the “without regard
13 to” phrase should be interpreted according to the plain meaning of that language, which,
14 as discussed above, is that the ILEC and the CLEC may negotiate the provisioning of
15 section 251 services and adopt different terms than expressly required by sections 251(b)
16 and (c). That is, an ILEC and a CLEC may negotiate different terms, rates, or conditions
17 than those mandated by section 251. But it cannot mean, as Staff apparently concludes,
18 that the agreements for services that must be filed under section 252 are limitless.

19 **D. The QPP Agreement Is Not Integrated With The Qwest/MCI Interconnection**
20 **Agreement.**

21 Relying on the same two provisions of the QPP Agreement that the ALJ cited in

22 ³⁰ *AT&T Communications v. Illinois Bell Tele. Co.*, 1998 U.S. Dist. LEXIS 12925 at *14
23 (N.D. Ill. 1998) (emphasis added). *See also Coserv Limited Liability Corp. v.*
24 *Southwestern Bell Tele. Co.*, 350 F.3d 482, 485 (5th Cir. 2003) (“Under the provision for
25 voluntary negotiations [*i.e.*, the first sentence of section 252(a)(1)] the parties are free to
reach any agreement, *without* regard to the duties set forth in § 251”) (emphasis in
original).

26 ³¹ Bold print added.

1 the ROO, Staff asserts that the QPP Agreement and the amendment to the Qwest/MCI
2 ICA that Qwest submitted to the Commission for review and approval are inseverable.³²
3 The alleged inseverability of the two instruments, according to Staff, requires Qwest to
4 file both with the Commission for review and approval.³³ This argument is without either
5 factual or legal support.

6 As Qwest discussed in its opening brief, in reviewing and interpreting contracts, it
7 is essential "to effectuate the parties' intent, giving effect to the contract in its entirety."³⁴
8 Here, the QPP Agreement's integration clause establishes that Qwest and MCI intended
9 to enter into separate and independent agreements. Consistent with that intent, the QPP
10 Agreement and the ICA Amendment were drafted in strict conformity with the FCC's
11 Section 252 filing standard. Specifically, all of the terms setting rates or other conditions
12 for non-Section 251 services are contained in the QPP Agreement, and all of the rates and
13 other terms for Section 251 services are set forth in the ICA Amendment. The parties
14 used separate agreements precisely because they intended and desired to have
15 independent, severable instruments that account for the different regulatory regimes that
16 apply to section 251 UNEs and Section 271 network elements.³⁵

17 Like the ROO, Staff does not provide any analysis of the parties' intent and relies
18 instead on inaccurate inferences drawn from isolated provisions in the QPP Agreement.
19 Qwest explains in its opening brief why those provisions do not support the inference of
20 inseverability that Staff and the ROO attempt to draw.³⁶ In the end, the relevant question
21 is whether the QPP Agreement contains terms and conditions for the provisioning of
22 Section 251 services. And it is undisputed that there are no such terms and conditions in

23 ³² Staff Br. at 3.

24 ³³ Staff Br. at 2-3.

25 ³⁴ *Potter v. U.S. Specialty Insurance Co.*, 98 P.3d 557, 559 (Ariz. Ct. App. 2004).

25 ³⁵ Qwest Br. at 20-22.

26 ³⁶ *Id.*

1 the Agreement.

2 Qwest also takes strong exception to Staff's assertion that Qwest has attempted "to
3 avoid its filing obligations" by entering into an ICA amendment to address Section 251
4 services and the QPP Agreement to address Section 271 services.³⁷ Rather than avoiding
5 filing obligations, Qwest has acted exactly as required by Section 252, the *Declaratory*
6 *Order*, and the decision of the Montana federal court. Moreover, Staff's argument that
7 terms and conditions relating to Section 251 UNEs should be merged into one agreement
8 with terms and conditions relating to Section 271 elements ignores the fundamentally
9 different regulatory regimes that govern these network elements.

10 As Qwest described in its opening brief, Congress, the FCC, and the courts have
11 established very different regulatory frameworks for Section 251 UNEs, on the one hand,
12 and Section 271 network elements, on the other.³⁸ In arguing that Qwest should have
13 used one agreement for both types of elements, Staff fails to recognize that Section 251
14 UNEs are subject to a significantly higher level of regulation than Section 271 network
15 elements. This difference is rooted in the fact that, by definition, CLECs are
16 competitively impaired without access to Section 251 UNEs and, accordingly, are
17 entitled under the Act to obtain them at highly regulated rates, terms, and conditions. By
18 contrast, CLECs are not competitively impaired without access to the network elements
19 that Regional Bell Operating Companies ("RBOCs") provide only under Section 271 and
20 not under Section 251.³⁹

21 Like the ROO, Staff would have the Commission apply the regulatory regime
22 reserved for Section 251 UNEs to Section 271 elements that Congress expressly
23 exempted from that scheme. The FCC's determinations that CLECs are not impaired

24
25 ³⁷ Staff Br. at 3.

26 ³⁸ Qwest Br. at 21-22.

³⁹ *Id.* 20-22.

1 without access to switching and transport under the terms required by Sections 251 and
2 252 removed those elements from the Section 251 regulatory framework (*i.e.*, they are no
3 longer required UNEs). A requirement for Qwest to enter into one agreement subject to
4 the Commission's review and approval would improperly and unlawfully reimpose the
5 Section 251 framework on these Section 271 elements.

6 Finally, there is no merit to Staff's assertion that this case raises an issue similar to
7 Qwest's request in the Unfiled Agreements case for the Commission to permit Qwest not
8 to file for review and approval discrete sections of individual agreements. Here, unlike in
9 that case, Qwest is not asking the Commission to review individual sections of a single
10 agreement involving Section 251 obligations and to refrain from reviewing other portions
11 of the same agreement that did not involve such obligations. Instead, Qwest is asserting
12 that the Commission is without authority to review and approve an entire agreement that
13 indisputably does not include any Section 251 obligations and that the parties
14 intentionally kept separate and distinct from the ICA amendment that does include
15 Section 251 obligations. Ironically, it is Staff that is improperly attempting to transform
16 the issue in this case into one similar to that addressed in the Unfiled Agreements case by
17 requesting that Qwest's and MCI's two separate agreements should be merged into one
18 and given the same regulatory treatment. That result would be unlawful.

19 In sum, Qwest complied fully with the governing law by entering into two
20 agreements that are independent and severable.

21
22 **E. Qwest Is Not Seeking To Limit The Commission's Authority To Determine**
23 **In The First Instance Whether An Agreement Is An "Interconnection**
24 **Agreement" That Is Subject To The Section 252 Review And Approval**
25 **Process.**

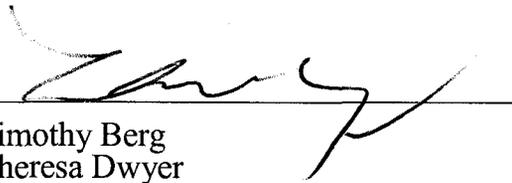
26 Staff asserts inaccurately that "Qwest would also limit the commission's ability to
determine whether a specific agreement is an interconnection agreement in the first

1 RESPECTFULLY SUBMITTED this 19th day of August, 2005.

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22 COPY of the foregoing hand-delivered
23 this 19th day of August, 2005 to:

24 Dwight Nodes
25 Hearing Division
26 ARIZONA CORPORATION COMMISSION
1200 West Washington
Phoenix, Arizona 85007

1 Maureen Scott
2 Legal Division
3 ARIZONA CORPORATION COMMISSION
4 1200 West Washington
5 Phoenix, Arizona 85007

4 Christopher K. Kempley, Chief Counsel
5 Legal Division
6 Arizona Corporation Commission
7 1200 West Washington Street
8 Phoenix, AZ 85007

7 Ernest Johnson, Director
8 Utilities Division
9 Arizona Corporation Commission
10 1200 West Washington Street
11 Phoenix, AZ 85007

10 COPY of the foregoing mailed
11 this 19th day of August, 2005 to:

12
13 Thomas F. Dixon
14 MCImetro Access Transmission Svcs, LLC
15 707 - 17th Street, Suite 4200
16 Denver, CO 80202

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15 Thomas H. Campbell
16 Michael T. Hallam
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9	Lisa Lezotte CAN Communication Services, Inc. 32991 Hamilton Court Farmington Hills, MI 48334	Ronald Rodemerk Global Crossing Local Services, Inc. 1080 Pittsford Victor Road Pittsford, NY 14534
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12	Donna Beaver The J. Richard Company 4607 E. Molly Lane Cave Creek, AZ 85331	Prince Jenkins DIECA Communications, Inc. 2330 Central Expressway Santa Clara, CA 95050
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14	Keith Nussbaum Preferred Long Distance, Inc. 16830 Ventura Boulevard, Suite 350 Encino, CA 91436	Todd Meislahn 1-800- Reconex, Inc. 2500 Industrial Avenue Hubbard, OR 97032
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17	Arthur L. Magee Budget Phone, Inc. 6901 W. 70 th Street Shreveport, LA 71149	Gregory Lawhon Ionex Communications North 2020 Baltimore Kansas City, MO 64108
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19	Linda Hunt Lightyear Network Solutions, LLC 1901 Eastpoint Parkway Louisville, KY 40223	Jeff Swickard Tel West Communications LLC P.O. Box 94447 Seattle, WA 98124
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21		
22	Steven S. Solbrack Popp Telecom, Inc. 620 Mendelssohn Avenue N Golden Valley, MN 55427	Matt O'Flaherty NorthStar Telecom, Inc. 1101 Hills Road Fremont, NE 68025
23		
24	Jeff Compton Telscape Communications, Inc. 606 E. Huntington Drive Monrovia, CA 91016	Debra Waller CAT Communications International, Inc. P.O. Box 13167 Roanoke, VA 24031-3167
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1 Paul Masters
2 Ernest Communications, Inc.
3 6475 Jimmy Carter Boulevard, Suite 300
4 Norcross, GA 30071

Paul Riss
New Rochelle Telephone Corporation
74 South Broadway, Suite 302
White Plains, NY 10601

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