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BEFORE THE ARIZONA CORPORATION CO

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

DOCKET NO. T-03632A-04-0603
T-01051B-04-0603

STAFF'S REPLY BRIEF

I. INTRODUCTION

On June 23, 2006, ALJ Rodda ordered Qwest Corporation ("Qwest") and the Arizona Corporation ("Commission") Staff to submit any supplemental authorities, additional legal analysis and procedural recommendations regarding this matter. Staff and Qwest filed initial briefs on July 28, 2006. Following is Staff's Reply to Qwest's Initial Brief.

Qwest relied upon two new authorities to support its position that it should not have to file the Line Sharing Agreement with the Commission for approval under Section 252 of the Telecommunications Act of 1996 ("Federal Act"). First, Qwest relies upon a Montana District Court decision,¹ however as will be discussed, two other Federal District Courts have found that any network elements are subject to the Section 252(e) filing obligation, even those which Qwest is not compelled to provide under Section 251(c). Second, Qwest relies upon an FCC decision² addressing the classification of broadband when bundled with internet access. However, Qwest conveniently ignores the FCC's finding that the Section 251 and 252 negotiation and arbitration process was not impacted by its Order. For these reasons, as well as others that will be discussed below, the Commission should reject Qwest's Motion to Dismiss and require Qwest to file the Line Agreement with the Commission for approval.

¹ *Qwest Corporation v. Montana Public Service Commission*, CV-04-053-H-CSO, Order on Qwest's Motion for Judgment on Appeal (D.Mont. June 9, 2005)("Montana Decision").

² *In the Matter of Appropriate Framework for Broadband Internet Access Services, et al.*, CC Docket No. 02-33, et al., FCC 05-150, Report and Order and Notice of Proposed Rulemaking (Sept. 25, 2005)("DSL Internet Access Order").

1 **II. BACKGROUND**

2 Qwest is required to file all “interconnection agreements” entered into with other carriers
3 doing business in Arizona with the Commission for approval under Section 252 of the Federal Act.
4 For several years, Qwest has been attempting to narrow its filing obligations at the Commission by
5 arguing that certain agreements are not “interconnection” agreements, but instead are what Qwest
6 terms “commercial agreements.” Despite the fact that there is absolutely no exemption for
7 “commercial agreements” in the Federal Act, according to Qwest, “commercial agreements” fall
8 outside its Section 252 filing obligation.

9 This case began when Qwest sent an agreement entitled “Terms and Conditions for
10 Commercial Line Sharing Arrangements” to Staff along with a letter indicating that the agreement
11 was being provided for “informational purposes” only, and not pursuant to any obligation under
12 Section 252. Staff subsequently docketed the agreement and requested that the Commission review
13 and approval period begin to run. Qwest filed a Motion to Dismiss. The matter is before the Hearing
14 Division.

15 **III. DISCUSSION**

16 **A. The Commission Should Adopt the Reasoning of the Utah and Colorado Federal**
17 **District Courts.**

18 While the Montana District Court Decision upon which Qwest relies did find in its favor, the
19 Court appeared to put great weight upon the parties agreement that line sharing did not fall within the
20 obligations of an ILEC as set forth in sections 251(b) and (c), or in other words was not encompassed
21 within Section 251 or 252.³ But this finding conflicts with at least two other Federal District Court
22 Decisions in Colorado and Utah. The following passage from the Utah Federal District Court’s
23 Decision is particularly noteworthy:

24 Qwest argues for a restrictive construction of Section 252 that covers
25 only the filing of agreements that address compelled terms required
26 under Section 251(b) and (c). (Cite omitted) But Qwest’s
27 interpretation of the Act is contrary to the Act’s plain language and
28 purpose. None of the Act’s provisions suggest that the filing and
approval requirements apply only to select agreements.⁴

28 ³ *Montana Decision* at p. 9.

⁴ *Utah Decision* at p. 6.

1 As Staff has argued all along in this case, it is Section 252(e), not Section 252(a)(1), that
2 defines what agreements are to be filed with the State commission for approval.

3 The language of section 252(e) is unambiguous. ‘Any interconnection
4 agreement adopted by negotiation or arbitration shall be submitted for
5 approval to the State commission.’⁵

6 Further, the Utah Federal District Court ⁶expressly rejected Qwest’s reasoning that the
7 language of Section 252(e) incorporates “an unspoken limitation necessarily required by Section 251
8 and Section 252(a)(1).”⁷

9 Upon receiving a request for interconnection, services, or network
10 elements pursuant to section 251 of this title, an incumbent local
11 exchange carrier may negotiate and enter into a binding agreement with
12 the requesting telecommunications carrier or carriers without regard to
13 the standards set forth in subsections (b) and (c) of section 251 of this
14 title. The agreement shall include a detailed schedule of itemized
15 charges for interconnection and each service or network element
16 included in the agreement. The agreement, including any
17 interconnection agreement negotiated before February 8, 1996, shall be
18 submitted under subsection (e) of this section.⁸

19 The Utah Federal District Court⁹ also noted that the FCC itself had interpreted that language
20 very broadly and had expressly stated that the last sentence of Section 252(a)(1) should be read
21 independently of the rest of 252(a)(1)’s language.¹⁰

22 ⁵ *Id.*

23 ⁶ See also *Qwest v. Public Utilities Commission of Colorado*, 2006 WL 771223 (D. Colo. 2006) (“Colorado Decision”) at p. 4 (“I disagree with Qwest’s assertion that the phrase ‘pursuant to section 251’ means a request for those services or network elements specifically listed in section 251(b) &(c). Nothing in the plain language of the statute suggests that I should ascribe such a narrow meaning to this phrase. As set forth above, Section 251 contains both the general requirement that telecommunication carriers ‘interconnect’ with the ‘facilities and equipment of other telecommunication carries,’ as well as certain specific duties and obligations. Moreover, Section 252 contemplates that even those agreements an ILEC enters with a ‘requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 ... shall be submitted to the State commission under subsection (3) of this section. Based upon the plain language of the statute, I find that the Section 252 is not limited solely to agreements involving the specific duties and obligations set forth in Section 251(b) and (c)’”).

24 ⁷ *Id.*

25 ⁸ *Utah Decision* at p. 7.

26 ⁹ See also *Colorado Decision* at p. 4 (“I am not persuaded that any of the authorities cited by Qwest, including the Declaratory Order, require a different result. As an initial matter, I find that the Declaratory Order does not address the precise issue presented in this appeal.the FCC did not directly address whether agreements involving access to network elements that were no longer subject to the mandatory unbundling requirements contained in sections 251 (b) and (c) should be excluded from the section 252(a)(1) filing requirements.Finally, in the body of the Declaratory Order the FCC specifically ‘decline[d] to establish an exhaustive, all-encompassing ‘interconnection agreement’ standard, ‘ and encouraged state commissions ‘to take action to provide further clarity to [ILECs] and requesting carriers concerning which agreements should be filed for their approval.’ Declaratory Order at para. 10.”)

27 ¹⁰ The *Utah Decision* also references para. 8 from the FCC’s *Declaratory Order* (“on its face, section 252(a)(1) does not
28 further limit the types of agreements that carriers must submit to state commission.”).

1 And, the Utah Federal District Court also expressly rejected Qwest's argument that
2 agreements for network elements not compelled by Section 252(c)(3) of the Federal Act were
3 "commercial agreements," not "interconnection agreements."

4 Qwest unpersuasively argues that the Commercial Agreement is not an
5 interconnection agreement. Although the Act does not define
6 'interconnection agreement,' the language of the Act suggests that any
7 agreement entered into by competing carriers that implicates issues
8 addressed by the Act is an interconnection agreement. The court does
9 not believe that Congress intended to completely eliminate the statutory
10 filing requirement (which is the first line of defense to avoid
11 discrimination against CLECs) for certain agreements relating to
12 interconnection. Qwest's restrictive interpretation is contrary to the
13 purpose of the Act because Qwest's construction of the Act's language
14 would permit it to circumvent the protective mechanisms set up by
15 Congress.¹¹

16 Finally, the Utah Court also rejected Qwest's arguments finding that if Qwest's arguments
17 were accepted, vital non-discrimination protections and safeguards contained in the 1996 Act would
18 be circumvented.

19 As noted above, the Act provides two mechanisms to prevent
20 discrimination. First, state-commission approval provides
21 administrative review to ensure that agreements do not discriminate
22 against other carriers, and second, the public-filing requirement gives
23 other carriers an independent opportunity to resist discrimination by
24 having access to the terms and conditions obtained by the favored
25 carrier. Under Qwest's interpretation of the filing requirements,
26 carriers could circumvent these mechanisms. Carriers could simply
27 place some of their agreed-upon terms and conditions in one agreement
28 (to be withheld) and place terms and conditions for Section 251
compelled services or network elements in another agreement (to be
filed.)¹²

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¹¹ *Utah Decision* at p. 7.

¹² *Utah Decision* at p. 8. *Accord Sage Telecom v. Public Service Commission of Texas*, Case No. A-04-CA-364-SS (W.D.Tex. Oct. 7, 2004) ("*Texas Decision*") ("...Section 252(e)(1) plainly requires the filing of any interconnection agreement." *Id.* at 10. Second, if only certain parts of the parties' agreement are known, the filing of only the Section 251 relevant documents 'might fundamentally misrepresent the negotiated understanding of what the parties agreed.'" *Id.* at 11. Without access to and review of all the terms and conditions of the parties' interconnection agreement, the state commission could not make an adequate determination under the discrimination or public interest tests. That is, what might appear to be appropriate terms and conditions in the document dealing with Section 251 duties could be inappropriate when viewed in conjunction with terms and conditions in another document dealing with non-Section 251 duties. Also, other carriers would not be able to judge and evaluate (not only in their monitoring role but for their own business decisions as participants in the market) the carriers' total arrangement." *Id.* 15-16)

1 Original and thirteen (13) copies
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