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IN THE MATTER OF THE APPLICATION OF DIECA COMMUNICATIONS DBA COVAD COMMUNICATIONS COMPANY, ESCHELON TELECOM OF ARIZONA, INC., MCLEODUSA TELECOMMUNICATIONS SERVICES, INC., MOUNTAIN TELECOMMUNICATIONS, INC., XO COMMUNICATIONS SERVICES, INC. AND QWEST CORPORATION REQUEST FOR COMMISSION PROCESS TO ADDRESS KEY UNE ISSUES ARISING FROM TRIENNIAL REVIEW REMAND ORDER, INCLUDING APPROVAL OF QWEST WIRE CENTER LISTS.

DOCKET NOS. T-03632A-06-0091
T-03406A-06-0091
T-03267A-06-0091
T-03432A-06-0091
T-04302A-06-0091
T-01051B-06-0091

QWEST CORPORATION'S POST HEARING BRIEF

Pursuant to the procedural schedule established in this case, Qwest Corporation ("Qwest") files its Post-Hearing Brief with the Arizona Corporation Commission ("Commission").

I. INTRODUCTION AND BACKGROUND

In this case, Qwest and the Joint CLECs (Dieca Communications DBA Covad Communications Company, Eschelon Telecom of Arizona, Inc., McLeodUSA Telecommunications Services, Inc., Mountain Telecommunications, Inc., and XO Communications Services, Inc.) are asking the Commission to assist them in implementing one of the most important national telecommunications policy market opening decisions made by the Federal Communications Commission. Specifically, the parties are asking the Commission to

1 approve the Settlement Agreement they have negotiated, establishing the initial list of non-
2 impaired wire centers determined under the criteria laid down by the FCC in its *Triennial Review*
3 *Remand Order* (“*TRRO*”),¹ and the methodology to be used for future determinations of
4 additions to the list of non-impaired wire centers. These determinations are essential to meeting
5 the objectives of the market-opening requirements of the 1996 Act, and to realizing the FCC’s
6 aim to bring competition to markets, while also taking into account the extent to which
7 unbundling requirements might undermine the incentives of both incumbent LECs and new
8 entrants to invest in new facilities and deploy new technology. *TRRO*, ¶ 11. Specifically, under
9 the *TRRO*, the unbundling requirements for dedicated inter-office transport and high-capacity
10 loops depend on the wire center determinations. The Settlement Agreement resolves those
11 determinations, is consented to by the parties, and is consistent with the terms of the *TRRO*.

12 On February 15, 2006, the Joint CLECs filed a Request for Commission Process to
13 Address Key UNE Issues Arising from the FCC Triennial Review Remand Order, Including
14 Approval of Qwest Wire Center Lists. In their request, the Joint CLECs asked the Commission
15 to address issues arising from the *TRRO*, to approve the initial list of non-impaired wire centers,
16 and to implement a process for updating and approving the lists.

17 On February 28, 2006, Qwest filed its Response to the Joint CLECs’ Application, in
18 which Qwest concurred that the Commission should conduct an adjudicatory proceeding to
19 determine the number of business lines and fiber collocators in the Arizona wire centers so that
20 the initial list of non-impaired wire centers may be approved. Qwest also asked the Commission
21 to confirm Qwest’s right to assess a nonrecurring charge for conversions of former UNEs to
22 other alternative Qwest services or facilities, and to establish a process for future updates to
23 Qwest’s list of non-impaired wire centers. Qwest asked that the proceeding bind Qwest and all
24

25 ¹ *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling*
26 *Obligations of Incumbent Local Exchange Carriers, Order on Remand, 20 FCC Rcd 2533 (2005)*
 (“*Triennial Review Remand Order*” or “*TRRO*”).

1 CLECs in Arizona.

2 The Commission asked Qwest, the Joint CLECs, and the Commission Staff to file
3 testimony stating their positions on matters raised by the *TRRO*, and set a hearing schedule.
4 (Procedural Order, June 2, 2006). Accordingly, the parties filed their testimony, identifying a
5 number of contested issues.² Every CLEC holding a certificate of convenience and necessity in
6 Arizona was served notice of the proceeding.³ On October 20, 2006, the Joint CLECs and Qwest
7 filed a Motion to Suspend the Hearing Schedule to accommodate settlement discussions. Such
8 settlement discussions continued for some time. Ultimately, on June 14, 2007, the Joint CLECs
9 and Qwest separately filed a copy of the unexecuted Settlement Agreement. (Qwest Report on
10 Status of Settlement Agreement, Hearing Ex. Q-1). On June 22, 2007, the Joint CLECs and
11 Qwest notified the Commission that the Settlement Agreement had been signed, and filed a Joint
12 Motion for Approval of Settlement Agreement and narrative Supporting Agreement. (Joint
13 Filing for Order Approving Settlement Agreement, Hearing Ex. Q-2).

14 The Joint Motion for Approval of Settlement Agreement sought approval of the
15 Settlement Agreement without necessity of a hearing. However, Staff objected and the
16 Commission ordered that a hearing be convened. The hearing was conducted on October 30,
17 2007. The Joint CLECs, Qwest, and the Commission Staff appeared at the hearing.

18 **II. DESCRIPTION OF SETTLEMENT**

19 The text of the Settlement Agreement appears on the record in Qwest's Report on Status
20 of Settlement Agreement (Hearing Ex. Q-1) and as Exhibit RA-RS1 to the Responsive
21 Testimony on Settlement Agreement of Renee Albersheim filed on September 28, 2001 (Hearing
22

23 ² The testimony filed prior to the Settlement Agreement has been made part of the evidentiary
record herein.

24 ³ This docket was opened to address the portions of the *TRRO* concerning non-impaired wire
25 centers in Arizona. This docket does not address implementation of other facets of the *TRRO*,
such as non-impairment of mass market switching and the transition of CLECs from UNE-P to
26 alternative services.

1 Ex. Q-11). A summary of the Settlement Agreement appears in Section II of the Joint Filing for
2 Order Approving Settlement Agreement filed on June 27, 2007 (Hearing Exhibit Q-2).

3 **III. DISCUSSION OF REMAINING ISSUES**

4 A relatively small number of matters surrounding the Settlement Agreement are at issue.⁴

5 **A. The Commission's Review Of The Settlement Agreement Should Focus On**
6 **Whether The Agreement Is Consistent With The *TRRO*.**

7 The parties' discussions that led to the Settlement Agreement were properly focused on
8 the meaning and intent of the FCC's rulings in the *TRRO* and, in turn, the appropriate language
9 for implementing those rulings. That focus reflects the fact that the Settlement Agreement does
10 not resolve every preexisting dispute among the parties but, instead, is entered into for the
11 specific purpose of implementing the FCC's order. Consistent with that purpose, this
12 Commission should approve the Settlement Agreement unless it finds that the Agreement is not
13 consistent with the *TRRO*. As discussed in the sections that follow, the Agreement properly
14 implements the FCC's express rulings in the *TRRO*, and in the few instances in which the FCC
15 did not expressly rule on matters, the relevant provisions of the Agreement are consistent with
16 the intent and purpose of the order.

17 The Commission should reject the suggestion that its review of the Settlement Agreement
18 should be based upon application of a broad "public interest" standard. Application of a public
19 interest standard is not appropriate where, as here, the parties are simply agreeing upon language
20 that implements legal rights and obligations defined and set forth in an order from the FCC. In
21 this circumstance, the only relevant question should be whether the parties' agreement is or is not
22 faithful to the FCC's order.

23 A proper reading of the *TRRO* confirms that the Commission should give significant

24 _____
25 ⁴ Because an issues matrix was not presented, Qwest respectfully reserves the right to request
26 permission to respond to other issues that may be raised by parties in their post-hearing briefs. A
number of aspects of the Settlement Agreement were touched upon in the testimony, but did not
appear to be in controversy.

1 deference to the parties' settlement. The FCC clearly envisioned that ILECs and CLECs would
2 negotiate the terms and conditions necessary to implement the rulings in the *TRRO*, stating that
3 "[w]e expect that incumbent LECs and competing carriers will implement the Commission's
4 findings as directed by Section 252 of the Act." *TRRO*, ¶ 233. The FCC emphasized further that
5 "the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates,
6 terms, and conditions necessary to implement our rule changes," and it directed states to monitor
7 the negotiation process "to ensure that parties do not engage in unnecessary delay." *Id.* As this
8 language demonstrates, the FCC expected that its rulings in the *TRRO* would be largely self-
9 effectuating. Consistent with that expectation, the parties to the Settlement Agreement have
10 done precisely what the FCC required by negotiating in good faith and reaching agreement on
11 the terms for implementing the *TRRO* rulings.

12 Application of a "public interest" standard would be inconsistent with the FCC's directive
13 that ILECs and CLECs should reach negotiated agreements and, moreover, would conflict with
14 the FCC's expectation that the *TRRO* should be largely self-effectuating. Further, application of
15 such a standard would give rise to the risk of state commissions making "public interest"
16 determinations that conflict with the FCC's rulings and policy determinations in the *TRRO*.

17 The Settlement Agreement comports with the terms of the *TRRO* and therefore must be
18 approved. Qwest witness Renee Albersheim states:

19 Qwest believes that the settlement agreement does comport with the *TRRO* and its
20 implementation regulations. The parties came into the settlement with, obviously,
21 opposing views on what the *TRRO* required, and we came from our extremes to
22 an agreement in the middle on how to implement the *TRRO*.
And it is our view that neither Qwest nor the Joint CLECs would have entered
into a settlement agreement that either party considered in opposition to the
requirements of the *TRRO*. (Tr. 21).

23 The Joint CLECs agree. (Tr. 125, 8-11). The Commission Staff likewise examined the
24 Settlement Agreement to see if it violated any provisions of the *TRRO* (Tr. 166), and reported not
25 a single conclusion that any part of the Settlement Agreement was at odds with the *TRRO*.

26 In contrast to the standard of proof suggested by Qwest, the Staff purports to apply a test

1 of whether the Settlement Agreement meets the public interest. However, the Staff did not
2 identify at the hearing how the public interest is determined, or how it is affected by any
3 particular provision of the Settlement Agreement. No member of the general public appeared at
4 the hearing, and the Staff witness disclaims that he represents the public. (Tr. 167, line 17).

5 To be clear, although it should not be a legal requirement, the Settlement Agreement is in
6 the public interest, especially because it fulfills the national telecommunications policy
7 articulated by the *TRRO*. It provides further public interest benefits:

8 First, it resolves contested issues without litigation, and reduces the
9 potential for future disputes by setting forth an agreed upon process for future
10 wire center designations. The settlement represents an industry supported
11 solution for the determination and implementation of non-impaired wire centers
12 for both the initial Commission Approved List, as well as for any future requests
13 by Qwest for non-impaired status. As a matter of policy, it is generally accepted
14 that an agreement which is supported by opposing parties is a better outcome than
15 litigation over the terms.

16 Second, the Settlement creates judicial and administrative efficiency. It
17 ends the present litigation, including the possibility of future appeals over a
18 contested decision. The settlement also contains terms for future updates to the
19 non-impaired wire center list, which will limit the likelihood of litigation over
20 those future filings. Further, since the Settlement is a multi-state agreement,
21 Qwest and the CLECs will avoid having to manage and administer different, and
22 possibly conflicting, terms in each state. For instance, having a uniform process
23 for counting business lines and the number of fiber based collocators throughout
24 the six states governed by the Settlement, will be more efficient and reduce the
25 possibility of confusion or misunderstandings about the process.

26 Third, the Settlement provides certainty to CLECs, and as a result, to their
end-user customers. This is especially so because the Settlement creates a
definitive initial list of non-impaired wire centers by establishing clear
implementation guidelines and procedures to follow in the future. (Albersheim
Responsive Testimony, pages 5-6, Hearing Exhibit Q-11).

No one denies that these public interest benefits accrue by reason of the Settlement Agreement.

B. The Evidence Establishes That The Settlement Agreement As It Was Filed Meets All Legal Requirements And Therefore The Commission Should Approved It Exeditiously.

The Settlement Agreement is the product of an extensive negotiation between the Joint
CLECs and Qwest. According to Joint CLEC witness Douglas Denney, the parties spent
“countless hours,” negotiating “at least once a week.” (Tr. 128). He further testified: “But there

1 was a lot of give and take and a lot of discussion. You know, the language was really gone over
2 multiple times, the details, to make sure that everybody was satisfied and that every scenario and
3 issue was covered within that.” (*Id.*)

4 In the course of treating “every scenario and issue,” the parties reached accord on those
5 matters which were central to this docket—a determination of the initial list of non-impaired
6 wire centers, the methodology to be used for future determinations, and the process for making
7 those future determinations and presenting them to the Commission for approval. Of the many
8 matters resolved by the Settlement Agreement, the Commission Staff has not identified any
9 concerns regarding the core questions of the initial determination of wire centers (Fimbres, Tr.
10 186, lines 12-16), or the future counting methodology. (*Id.*)

11 The Settlement Agreement as filed meets the standard for approval advocated by Qwest,
12 because it comports with the requirements of the *TRRO*; and it meets the standard for approval
13 advocated by the Staff. Even in the light most favorable to Staff’s criticisms, the alleged
14 shortcomings are few and nonfatal. As Staff witness Armando Fimbres agreed, the vast
15 preponderance of the Settlement Agreement is in the public interest. (Tr. 196, line 25 through
16 197, line 21).

17 Consequently, a rejection of the Settlement Agreement, or even a delay taken to address
18 the minor Ten Business Day Request issue and the “clarifications” discussed by Staff, would be
19 unreasonable. Rejection or delay would do great disservice to the national telecommunications
20 policy goals articulated by the *TRRO*. When the *TRRO* was adopted, it was clear that the FCC
21 intended for it to provide an expeditious implementation of the new unbundling framework,
22 neither requiring nor inviting state agency involvement unless disputes arose regarding
23 incorporation of the *TRRO* into existing interconnection agreements or regarding the ILECs’
24 calculations under the specified criteria. Pursuant to the D.C. Circuit’s decision in *United States*
25 *Telecom Ass’n v. FCC*, 359 F.3d 554 (2004) (“*USTA II*”), the FCC abandoned its earlier “sub-
26 delegation” to state authorities to engage in further granular impairment analysis.

1 In the *TRRO*, the FCC stated that the new impairment framework is “self-effectuating.”
2 *TRRO*, ¶3. (Emphasis added.) The FCC expected that carriers would transition away from
3 discontinued UNEs during a one-year transition period ending on March 11, 2006. *TRRO*, ¶¶
4 142, 195. The criteria for determining which wire centers are non-impaired were based on
5 simple methodologies. In the case of the counting of business access lines, for example, the
6 prescribed tests “are an objective set of data that incumbent LECs have already created for other
7 regulatory purposes.” *TRRO*, ¶ 105. The FCC said: “[B]y basing our definition in an ARMIS
8 filing required of incumbent LECs and adding UNE figures, which must also be reported, we can
9 be confident in the accuracy of the thresholds and a simplified ability to obtain the necessary
10 information.” (*Id.*)

11 Based on the transition plan outlined in the *TRRO*, ILECs such as Qwest were required to
12 file with the FCC a list of non-impaired wire centers coincident with the effective date of the
13 *TRRO*. Qwest received a request from the FCC for the list of non-impaired wire centers, and
14 filed its initial list in February 2005. (Albersheim Direct, p. 6, ln. 11-18, Hearing Exhibit Q3).

15 The parties have not asked the Commission to issue an order regarding the *TRRO* rules
16 themselves. It is clear that the FCC intended the unbundling rules established in the *TRRO* to be
17 largely self-effectuating and implemented through negotiations between the carriers. *TRRO*, ¶
18 233. The *TRRO* anticipates that “parties to the negotiation process will not unreasonably delay
19 implantation of the conclusions adopted on the Order,” and that the role of the state commissions
20 will be “to monitor this area closely to ensure that parties do not engage in unnecessary delay.”
21 *TRRO*, ¶ 233. Further, state commissions are asked by the FCC to adjudicate disputes arising
22 between ILECs and CLECs about the self-certification impairment determinations envisioned by
23 the *TRRO*. *TRRO*, ¶ 234.

24 Thus, the Commission’s urgent and important role in this proceeding is to expeditiously
25 rule on the parties’ request regarding the list of wire centers, as well as the methodology for
26 subsequent additions to the list, as set forth in the Settlement Agreement.

1 **C. The Settlement Agreement Comports With Staff's Position That Business**
2 **Line Counts For The Initial Determination Of Non-Impaired Wire Centers**
3 **Must Be Based On 2004 ARMIS Data; No Substantial Public Interest Will**
4 **Be Advanced By Amending The Agreement To Declare That Fact.**

4 Throughout its testimony, the Staff recommended the use of 2004 vintage ARMIS 43-08
5 data. Qwest and the Joint CLECs have separately confirmed that the Initial List of Wire Centers
6 listed in Attachment A of the Settlement Agreement was in fact based on the vintage of data that
7 Staff advocates. (Albersheim Responsive Testimony on Settlement, Hearing Exhibit Q-11, p. 7,
8 line 4; Denney Response Testimony, Hearing Exhibit Joint CLEC-1, p. 4, lines 6-8). Indeed, the
9 Staff recognized that fact prior to the hearing. (Fimbres Settlement Agreement Testimony , p. 3,
10 lines 1-14, Hearing Exhibit S-4). Regardless, the Staff asked that the Settlement Agreement be
11 amended to state the vintage of data that was employed, for the sole reason that without such
12 statement, “[the public] would not know the foundation that was used.” (Fimbres, Tr. 167, line
13 24 through 168, line 2). However, in response to questions from the bench, the Staff stated that
14 its concerns would be met if the Commission’s order approving the Settlement Agreement notes
15 that 2004 ARMIS data was used by the parties for identifying the business line counts for the
16 initial list of non-impaired wire centers included in the Settlement Agreement. (Fimbres, Tr.
17 183, lines 2-4). Qwest agrees that a notation in the Commission’s order will be the most
18 efficient way to satisfy Staff’s concern.

19 **D. No Sufficient Reason Exists To Address The Process For Conversion of**
20 **UNEs to Qwest Alternative Services In the Settlement Agreement.**

21 When wire centers are designated as non-impaired, the consequence is that certain types
22 of UNE services will no longer be available as UNEs. CLECs must therefore transition to
23 facilities of their own, or to alternative services from another provider, or from Qwest. If they
24 select Qwest for such alternative services or facilities, under the Settlement Agreement, the
25 parties have agreed that Qwest may charge a \$25 conversion fee to convert the former UNE to
26 such alternative services or facilities. When Qwest converts the UNE to a Qwest alternative

1 service, it usually will involve the change of a “circuit ID” within Qwest’s systems.
2 (Albersheim, Tr. 26-28). No party contests the conversion fee provisions in the Settlement
3 Agreement.

4 The Settlement Agreement does not address the conversion process. (Albersheim, Tr. 33,
5 line 10). The Staff has asked whether it should be addressed. (Fimbres Settlement Agreement
6 Testimony, Hearing Exhibit S-4, p. 4). However, having raised that question, the Staff has not
7 articulated a position, or found a deficiency in Qwest’s conversion process, which the evidence
8 shows has operated successfully without any service disruptions. Rather, the Staff states that it is
9 “not saying that there are problems with the conversions[s],” (Tr. 169: 1-6). The Staff is “not
10 taking sides on whether [the conversion process] really is a bad process or a good process,” and
11 the Staff has not concluded that it is a “harmful process.” (Tr.172: 4-6).

12 Although the Staff has decided to not take sides or draw conclusions about the conversion
13 process, the substantial evidence in the record demonstrates that the conversion process works
14 well and is not an issue in this proceeding. Qwest testified that “those processes are in place and
15 have been working for all of the CLECs who had signed amendments or new interconnection
16 agreements with us to implement the *TRRO* for them.” (Albersheim, Tr. p. 28, lines 20-23). The
17 evidence shows that the carriers who do not agree with some aspect of Qwest’s conversion
18 process will be able to resolve those concerns through contract negotiations or arbitrations.
19 (Denney, Tr. 119, lines 20-24). Because the conversion process is already in place and working
20 successfully, and because CLECs can bring their concerns before this Commission in arbitrations
21 of their interconnection agreements, it is not necessary to anticipate those issues in this
22 proceeding.

23 The Staff does recognize that favorable experience in processing large numbers of
24 conversions without any incidents could alleviate concerns over potential customer harm, citing
25 that Qwest had processed (at that time) more than 1400 conversions without incident. (Fimbres
26 Settlement Agreement Testimony, Hearing Exhibit S-4, p. 4). In fact, at the hearing, Qwest

1 witness Renee Albersheim updated the Commission on that number, which at that time stood at
2 1,583 successful UNE conversions without a single incident of customer harm. (Tr. 18, lines 2-
3 4). The Staff recognizes that this is an important fact. (Fimbres, Tr. 170, lines 12-16).
4 Moreover, no CLECs filed complaints with the Commission regarding conversions, and the Staff
5 is not aware of any problems. (Fimbres, Tr. 168, lines 22-25). Even if the Staff has not decided
6 whether the conversion process is “a good process or a bad process,” the evidence is more than
7 adequate for the Commission to determine that the potential for risk of customer harm is merely
8 speculative and conjectural, and is not supported by substantial experience. The Staff has not
9 presented any basis for the Commission to withhold its approval of the Settlement Agreement as
10 written.

11 The lack of inclusion of the conversion process in the Settlement Agreement does not
12 render the Settlement Agreement deficient. While the *TRRO* clearly requires that UNE services
13 must be transitioned to alternatives, it does not require any particular conversion process, and the
14 lack of provisions about Qwest’s conversion process in the Settlement Agreement does not
15 contravene the *TRRO* in any way. (Albersheim, Tr. 70). Nor does the lack of provisions about
16 the conversion process have any adverse effect on the subject areas which are treated in the
17 Settlement Agreement. (Id., 127).

18 The conversion process, which was discussed in the original docket testimony in
19 connection with the application of the conversion charge (Denney, Tr. 119, lines 6-12), was
20 never contemplated to be part of the docket. (Denney, Tr. 127, line 12 through 128, line 4). The
21 Joint CLECs testify that from the very outset, the conversion process issues were, “separate
22 issues in Eschelon’s arbitration and they didn’t cross over.” (Denney, Tr. 119, lines 13-19). Mr.
23 Denney characterized the nonrecurring charge as “a wire center case issue,” while the conversion
24 process was “a separate issue . . . in the Eschelon arbitrations.” The Eschelon / Qwest arbitration
25 is currently before the Commission, in Docket Nos. T-03046A-06-0572, T-0105B-06-0572. The
26 conversion process issue is presented as Issue Nos. 9-43, 44 in that arbitration.

1 Commission approval of the Settlement Agreement without the conversion process does
2 not deprive either the CLECs or the Commission of the ability to treat conversion issues in other
3 dockets, now or in the future. The parties “expected that [the conversion process] issues would
4 be dealt with – each carrier would deal with that process . . . as part of their arbitrations and
5 negotiations with Qwest.” (Denney, Tr. 119 lines 20-24).

6 In view of the Eschelon arbitration, and the ability of other CLECs to arbitrate issues
7 about the conversion process, the Staff’s testimony at the hearing amounts to an
8 acknowledgement that the lack of provisions about the conversion process in the Settlement
9 Agreement is not fatal. The Staff ultimately stated that it only seeks clarification that conversion
10 issues will be addressed in arbitrations or other future proceedings. (Fimbres, Tr. 172, line 25
11 through 173, line 4.) The parties’ testimony, as well as the Eschelon / Qwest arbitration docket
12 now open before the Commission, provide that clarification.⁵

13 Finally, it should be noted that the Staff has not found that Qwest’s conversion process is
14 unnecessary. Indeed, Staff has agreed with the \$25 conversion charge, which evidences
15 recognition of the necessity of the conversions occurring.

16 **E. New Legal Affiliations That May Occur After Qwest Files For Approval Of**
17 **Future Determinations Of Non-Impaired Wire Centers Cannot Change The**
18 **Determination**

19 The number of fiber-based collocators in each wire center is a critical element of the non-
20 impairment tests set forth in the *TRRO*. (Rachel Torrence Direct Testimony, p. 6, Hearing
21 Exhibit Q-4). Simply put, the number of fiber-based collocators and the number of business
22 lines are the two determining factors in the FCC’s tests for wire center impairment. (*Id.*, p. 7).

23 ⁵ In re-direct testimony, the Staff Attorney proposed in a question to Staff Witness Mr.
24 Fimbres the proposition that “[b]ecause Qwest may address [the conversion process]
25 with one CLEC in their ICA, doesn’t mean that Qwest is going to address it with other
26 CLECs in their ICAs, right?” Qwest notes that one of its objectives is to have a single
set of processes. (Albersheim Responsive Testimony, pages 5-6, Hearing Exhibit Q-11).
That goal that would be thwarted if Qwest were to maintain separate processes for
different CLECs.

1 One of the qualifiers the FCC placed on counting fiber-based collocators is that two or more
2 affiliated fiber-based collocators in a single wire center are collectively counted as a single fiber-
3 based collocator. (*Id.*, p. 8, citing *TRRO*, ¶ 102, and 47 C.F.R. § 51.5). Qwest recognizes this
4 rule in how it counts fiber-based collocators for purposes of future determinations in the
5 Settlement Agreement. (See Settlement Agreement Section V.B.1.c., p. 7, Hearing Exhibit Q-1).
6 Under the Settlement Agreement, Qwest applies the affiliation test to make its determinations,
7 and is obligated to “use the most recent data available at the time.” (Settlement Agreement,
8 Section VI.B., p. 9, Hearing Exhibit Q-1).

9 The issue raised in this proceeding is whether Qwest’s determinations under the rule may
10 be changed based on subsequent mergers among fiber-based collocators. Qwest witness Rachel
11 Torrence stated: “Qwest will count affiliate CLECs as only one fiber-based collocator if, at the
12 time of Qwest’s count, the CLECs enjoy legal affiliate status or have completed the merger or
13 acquisition process.” (Torrence Responsive Testimony on Settlement Agreement, p. 2, lines 8-
14 10, Hearing Exhibit Q-12). Pursuant to the *TRRO* and its implementing regulations, and under
15 court and regulatory commission rulings that interpret the *TRRO*, that determination may not be
16 changed by reason of any subsequent carrier affiliations. Staff incorrectly contends that
17 affiliated fiber-based collocators should not be counted separately if their legal affiliation exists
18 at any time up to the date of a Commission order designating a wire center as non-impaired,
19 which will necessarily occur later in time than when Qwest’s determination is made. Staff’s
20 position, if adopted, would violate the terms of the *TRRO* and the regulations that implement the
21 *TRRO*.

22 The Commission does not have to decide this question now. If, in future filings by Qwest
23 for additions to the non-impaired wire center list, the Staff or any CLEC wish to contend that
24 Qwest’s fiber-based collocators count should be amended because of new affiliations between
25 carriers, nothing in the Settlement Agreement precludes them from bringing that issue forward at
26

1 that time.⁶ No compelling need exists to decide this hypothetical issue in the context of the
2 approval of the Settlement Agreement. If the Commission believes that the matter should be
3 addressed now, however, the Commission must base its ruling on the FCC's regulations, and
4 find against the Staff's recommendation.

5 Under the *TRRO* and the regulations promulgated by the FCC, once a wire center
6 satisfies the standard for non-impairment, it cannot later be determined to be impaired. The FCC
7 stated:

8 Therefore, once a wire center satisfies the standard for no DS1 loop
9 unbundling, the incumbent LEC shall not be required in the future to unbundle
10 DS1 loops in that wire center. Likewise, once a wire center satisfies the
11 standard for no DS3 loop unbundling, the incumbent ILEC shall not be
12 required in the future to unbundle DS3 loops in that wire center. *TRRO*, fn.
13 466. (See also Hearing Exhibit Q-14).

12 The FCC codified the concept into its regulations, using similar language. With respect to DS1
13 loop unbundling the regulation provides:

14 Once a wire center exceeds both of these thresholds, no future DS1 loop
15 unbundling will be required in that wire center. 47 C.F.R. 51.319. (Hearing
16 Exhibit Q-15).

16 With respect to DS3 loop unbundling, the regulation provides:

17 Once a wire center exceeds both of these thresholds, no future DS3 loop
18 unbundling will be required in that wire center. (*Id.*)

19 And, with respect to the wire center tier designations, the regulation provides:

20 Once a wire center is determined to be a Tier 1 wire center, that wire center is
21 not subject to later reclassification as a Tier 2 or Tier 3 wire center. (*Id.*)

22 Once a wire center is determined to be a Tier 2 wire center, that wire center is
23 not subject to later reclassification as a Tier 3 wire center. (*Id.*)

24 _____
25 ⁶ By pointing out that this question is a hypothetical point that does not have to be addressed by
26 the Commission at this time, Qwest is not waiving its position, either here or in any such future
proceeding, that once a wire center satisfies the standard for non-impairment, it cannot later be
determined to be impaired.

1 From these regulations, it is clear that once a wire center has met the non-impairment threshold, its
2 non-impairment status is permanent. Qwest's interpretation is consistent with the rule:

3 The *TRRO* does not establish a minimum time period for any wire
4 center to meet the prescribed definitions before it can be defined as non-
5 impaired. Furthermore, once evidence is gathered and presented
6 substantiating that a given wire center is non-impaired, the wire center is
7 considered to be "non-impaired" going forward and in perpetuity. In short,
8 once a wire center is non-impaired, a wire center stays non-impaired.
9 (Torrence Responsive Testimony on Settlement Agreement, Hearing Exhibit
10 Q-12, p. 2, line 15 through p. 3, line 2, footnote omitted).

11 The Joint CLECs are in agreement with Qwest's interpretation. (Denney, Tr. 156, lines 18-
12 22).

13 Indeed, the Staff also agrees that once the standard for non-impairment has been met,
14 despite whatever may transpire subsequently, the designation of the wire center as non-impaired
15 does not change. (Fimbres, Tr. 174 lines 10-16). However, the Staff apparently believes that the
16 determination of non-impairment is not made until the Commission approves Qwest's petition,
17 and therefore the timing of the determination is the date of the Commission's order. There is no
18 support for the Staff's view to be found in the *TRRO*, the regulations, the practice in the
19 telecommunications industry, or in the Settlement Agreement.

20 To be clear, the process set up by the FCC does not provide for the state commissions to
21 make the determinations of non-impairment. With regard to unbundled high-capacity loops, the
22 regulation states, "once a wire center exceeds both of these thresholds," no further unbundling will
23 be required. This is a fact-based determination, using information that is readily available that the
24 FCC expected carriers to use in making their certifications. The role of state commissions in this
25 scheme is to decide disputes that arise out of these carrier-made determinations. The Washington
26 Utilities and Transportation Commission accurately describes the state commissions' regulatory role
as follows:

 After reviewing the petitions and the *TRRO*, we find it necessary to
clarify our understanding of the role of state commissions in implementing the
FCC's rules on non-impaired wire centers. First, we find the FCC established a

1 self-implementing process for determining which wire centers meet the non-
2 impairment criteria. The *TRRO* does not identify who, or which entity, will
3 designate a wire center as non-impaired. In practice the ILECs have
4 “designated” certain wire centers as non-impaired by submitting lists to the FCC
5 identifying which wire centers the ILECs believe meet the non-impairment
6 criteria in the *TRRO*. Both Qwest and the Joint CLECs agree that ILECs
7 designate whether a wire center is non-impaired, not CLECs or state
8 commissions. We concur.

9 Second, the *TRRO* requires carriers to work out between themselves which
10 wire centers are non-impaired, but if they cannot agree, the state commissions
11 may resolve disputes among parties about whether a wire center is properly
12 classified or designated as non-impaired. The role of state commissions in
13 implementing the FCC’s wire center non-impairment criteria, thus, is to resolve
14 disputes between the ILECs and their competitors, providing a check on the
15 ILECs’ designation. (Order 06, Washington State Utilities and Transportation
16 Commission, Docket UT-053025, ¶¶ 31-32; Hearing Exhibit Q-16, footnotes
17 omitted, emphasis added).

18 The Settlement Agreement simply builds on this structure, by providing a procedure for all
19 of Qwest’s future determinations to be submitted to the state commissions. It provides finality with
20 respect to non-contested determinations (Settlement Agreement VI.F.2) and provides a mechanism
21 to resolve disputes over Qwest’s determinations when disputes do arise (Settlement Agreement
22 VI.F.3). In the course of resolving those disputes, however, the Commission is bound by law to use
23 the data as it existed at the time that Qwest made the determinations.

24 The Washington Commission correctly found that when it adjudicates disputes over Qwest’s
25 wire center determinations, it must evaluate the most current data available when Qwest designated
26 the wire center as non-impaired:

27 If a wire center meets the FCC’s criteria at the time an ILEC designates
28 the wire center, but does not meet the criteria when applying data from a later
29 period of time, the wire center designation would change, contrary to the FCC’s
30 rules. Thus, we find that state commissions must evaluate the most current data
31 available when the ILECs designated the wire center as non-impaired..
32 Specifically, state commissions must consider the number of fiber-based
33 collocators in the particular wire center on the date the ILEC designates the wire
34 center as non-impaired and the annual ARMIS 43-08 business line data available
35 on the designation date. (Id., ¶ 34, emphasis added).

36 The Washington Commission’s view is joined by the U.S. District Court for the Eastern District
of Michigan, in *Mich. Bell Tel. Co. v. Lark*, 2007 U.S. Dist. LEXIS 33682, a case similar to this

1 one which arose from a dispute over Michigan Bell's initial wire center designations. In *Lark*,
2 the court, having recognized that once a wire center is deemed unimpaired it cannot be
3 reclassified as impaired, found:

4 [T]he FCC determined that disputes regarding nonimpairment designations must
5 be resolved based upon the facts at the time of a designation. These
6 specifications certainly preclude the MPSC from requiring data relative to counts
7 after the date of designation. The count at the time of designation is what
8 matters. *Mich. Bell Tel. Co. v. Lark, Id.*, at *12. (Emphasis added.)⁷

9 Qwest's view of the law is clearly the correct one, and is also the most practical one from a
10 public policy perspective independent of the Act:

11 [G]iven that a Commission proceeding may take months (and perhaps years) to
12 conclude, Staff's recommendation could well provide an incentive for a CLEC to
13 do whatever is needed to delay Commission approval if a merger or acquisition is
14 even remotely possible. This potential gamesmanship would disadvantage Qwest
15 competitively, as well as financially, by denying it the relief that the FCC
16 intended. Therefore, Qwest believes that the Commission should reject Staff's
17 recommendation and that it should uphold a wire center's non-impairment even if
18 two or more CLECs later enter into an affiliate arrangement. (Torrence
19 Responsive Testimony on Settlement Agreement., Hearing Exhibit Q-12, p. 3,
20 line 18 through p. 4, line 3).

21 Besides the risk of intentional delay, there is a significant likelihood of undesirable uncertainty.
22 Qwest's witness points out that the telecom industry is very volatile, and the passage of time in
23 a volatile industry holds the potential for many different alliances and affiliations to occur. The
24 failure to lock in on a determination will put the industry in an intolerable moving target
25 dilemma. (Torrence, Tr. 80--81).

26 Qwest's witness Ms. Torrence also testified that a change in the date the designation is
effective would be a material change to the settlement. (Torrence, Tr. 92, lines 19-23).

However, Qwest and the Joint CLECs should not be exposed to the risk that the Commission's
order will jeopardize their Settlement Agreement, for the reasons stated above.

24 _____
25 ⁷ In *Lark*, the court held that 2004 ARMIS data was available at the time of the ILEC's
26 determination. In contrast, in this case, the Arizona Staff is contending that changes to affiliation
data that occur after the ILEC's determination should be used. That clearly would not satisfy the
test in *Lark*.

1 **F. No Sufficient Reason Exists To Lengthen The “Ten Business Day Validation**
2 **Request” Period Provided In Section V.B.4 For CLECs To Respond To A**
3 **Certified Letter From Qwest Asking For Validation Of The CLEC’s Fiber-**
4 **Collocator Status.**

4 Section V.B.4 of the Settlement Agreement provides that the Joint CLECs will have a
5 reasonable period of time specified by Qwest, but no less than ten (10) business days to respond
6 to a letter from Qwest asking for validation of their fiber-collocator status (referred to herein as
7 the “Ten Business Day Validation Request”). Staff asks the Commission to find that the period
8 is unreasonable and should be amended to provide for sixty (60) days. Staff’s concern is
9 misplaced. The Commission should not disturb the arrangement that that has been negotiated
10 by the parties.

11 Qwest believes that Staff may not have understood that the Ten Business Day Validation
12 Request period of time provided in Section V.B.4 for validation of collocator status is not the
13 period of time that CLECs have to object to a filing by Qwest for additional, new non-
14 impairment. Joint CLEC witness Mr. Denney points out that the Ten Business Day Validation
15 Request is set forth in the methodology section of the Settlement Agreement, in Paragraph V,
16 and is for the limited purpose of providing “feedback to this information before Qwest files its
17 request.” (Denney Response Testimony, p. 10, lines 17-22, Hearing Exhibit Joint CLEC-1).
18 Mr. Denney states, correctly, that the Ten Business Day Validation Request “may start a
19 dialogue and may assist in avoiding unnecessary filings, but it has no preclusive effect. In other
20 words, per the terms of the proposed Settlement Agreement, failing to provide ‘feedback’
21 during the 10-day period does not mean that the collocator cannot object once Qwest makes its
22 filing with the Commission.” (*Id.*, lines 18-22).

23 The evidence establishes that the ten-day period for the validation request is ample time,
24 particularly in view of the fact that the validation request is only part of Qwest’s “due diligence”
25 and is not essential either to the determination of wire center status by Qwest or the CLECs’
26 right to dispute Qwest’s determinations. (Torrence, Tr. 90). Qwest’s witness Ms. Torrence

1 points out that in any event, the Ten Business Day Validation Request time period is part of the
2 Settlement Agreement, and the Joint CLECs, better than anyone else involved in this proceeding,
3 know what is and what is not practical and acceptable to their respective businesses. (Torrence,
4 Hearing Exhibit Q-12, p. 4, lines. 18-21). Further, Qwest's witness points out that in connection
5 with future wire center determinations, the scope and number of wire centers presented for
6 validation will be much smaller than when the initial determinations were made, and thus a two-
7 week time frame is more than reasonable. (*Id.*, p. 5, lines 1-3). The Commission should not
8 disturb the 10-business day period agreed upon by the parties.

9 **G. No Sufficient Reason Exists To Modify The Thirty (30) Day Period Provided**
10 **In Settlement Agreement Section VI.F For CLECs To Object To Future**
11 **Filings Of Additions To The List Of Non-Impaired Wire Centers.**

12 At no time in this proceeding has the Staff testified about the provision in Section VI.F of
13 the Settlement Agreement, which states: "If no objections are filed with the Commission, the
14 Effective Date of the Non-Impairment Designations will be thirty (30) days after the Filing Date,
15 unless the Commission orders otherwise." However, from the bench at the hearing, ALJ Rodda
16 wondered whether 30 days "is sufficient for the Commission to be aware an application has been
17 filed, much less have Staff respond to it." (Tr. 95, lines 4-10). Staff may argue that the 30-day
18 period is insufficient. In fact, the record shows the period is "ample":

19 Q. Right. But, Ms. Torrence, with the 10-day – the short 10-day period
20 for feedback on your determinations with respect to fiber-based collocators,
21 combined with the 30-day time period for objections, don't you agree that, you
22 know, that's kind of shorting the process on both the front and back ends so to
23 speak?

24 A. No, I really don't. 30 days is ample time. 10 days I consider ample
25 time. And when you're talking about issues that are pretty much at the forefront --
26 I mean, this is something that concerns Qwest and it concerns the Joint CLECs as
well, and it's not something that's going to be coming out of the blue. It's
something that is going to fit into their business practice. And I don't see it as
shortchanging anyone.

And, obviously, the fact that we have the signatories to the agreement, it's
something that all parties are willing to live with. (Torrence, Tr. 101, line 12
through 102, line 3).

1 As noted by Joint CLEC witness Mr. Denney, the effective time period for CLECs to become
2 aware of a future request by Qwest for additions to the non-impaired wire center list will be at least
3 forty-four (44) days, because of the Ten Business Day Validation Request which must necessarily
4 precede any subsequent filing. (Denney, Tr. 147, lines 16-21). Mr. Denney also testified that the
5 time period has been already implemented without adverse consequences, in Oregon and Utah,
6 where the process “has worked.” (Tr. 148, lines 19-20).

7 Thus, the record shows that the time allowed for objections is sufficient. The time period
8 is also consistent with the objectives of the *TRRO*, which was to establish an expeditious method
9 for implementation of the non-impairment criteria. As noted above, the *TRRO* does not require
10 state commission determinations regarding which wire centers meet the non-impairment criteria.
11 The role of state commissions is to resolve disputes between ILECs and CLECs., providing a
12 check on the ILECs’ designations. (See e.g., Order 06, Washington State Utilities and
13 Transportation Commission, Docket UT-053025, ¶¶ 31-32; Hearing Exhibit Q-16). While the
14 parties establishing the Settlement Agreement do not preclude the Commission Staff from
15 examining Qwest’s filings or from filing objections if they find errors, clearly the intent of the
16 Settlement Agreement is to leave primary responsibility for the matter between the carriers, just
17 as did the FCC in the *TRRO*. Therefore, Qwest submits that it is entirely reasonable for the
18 Commission to simply allow the carriers whose interests are directly at stake in future filings,
19 and not the Commission Staff, to examine Qwest’s filings.

20 A 30-day period is quite reasonable, as evidenced by the Commission’s rules regarding
21 approval of interconnection agreements. Under A.A.C. R14-2-1507, a hearing will not be held
22 for a request for approval of an interconnection agreement, unless the Commission otherwise
23 orders. And, under R-1507, the Commission must enter an order approving or rejecting the
24 interconnection agreement containing both arbitrated and negotiate provisions within 30 days of
25 the request. Similarly, amendments to interconnection agreements that are not rejected by the
26 Commission within 30 days become effective by operation of law. (A.A.C. R14-1508). As the

1 Commission is aware, interconnection agreements and amendments to interconnection
2 agreements are frequently very large documents, containing many provisions. In contrast, future
3 requests for additions to the non-impaired wire center list will be straightforward “counting”
4 exercises, using data defined by the *TRRO*, and employing methodologies that are clearly
5 defined by the Settlement Agreement. Thus, just as the Commission provided that no hearings
6 are required for approval of interconnection agreements, and 30 days is an adequate timeframe
7 for the approval of agreements, in this case no hearing should be mandated for new wire center
8 determinations. Thirty days is ample time for mere objections to be lodged.

9 **H. All CLECs In Arizona Have Been Noticed of This Proceeding And No**
10 **Further Notice Is Necessary Or Desirable.**

11 The Staff states that the Commission should take the additional step of sending a notice
12 to all CLECs with operating authority in Arizona, providing them with an opportunity to
13 comment on the Settlement Agreement. Staff’s position is extremely ill-advised. This is
14 especially because all of the CLECs in the state have been on notice about this proceeding since
15 June 2006, under a process established by the Commission that deliberately provides a means for
16 the CLECs and the public to be informed and for them to participate as they deem appropriate.
17 Providing additional notice is not necessary, and indeed, would be contrary to the public policy
18 objective of expeditious implementation of the *TRRO*.

19 The Settlement Agreement and the hearing regarding the Settlement Agreement represent
20 merely the final evolution of issues that were contested from the very beginning of this case in
21 2006. The Commission ordered the Joint CLECs, Qwest and the Staff to jointly propose a
22 procedural schedule, a proposed form of protective order, and a proposed service list. On May
23 30, 2006, the parties submitted a Joint Filing Regarding Procedural Matters (“Joint Filing”),
24 which included, among other things, a service list recommended by the Staff. The Joint Filing
25 was approved by a Procedural Order dated June 2, 2006, which scheduled a hearing and
26 testimony filing dates, established a Protective Order, and adopted the Staff’s proposed service

1 list. On August 2, 2006, subsequent to the filing of the initial testimony of Qwest and the Joint
2 CLECs, Qwest asked for a modification, requiring that parties on the service list affirmatively
3 state whether they desire to receive copies of pleadings and testimony. The Commission granted
4 that request, and ordered that parties interested in remaining on the service list and in continuing
5 to receive filings in this docket must file an affirmative indication of such an interest. It was also
6 noted that interested parties may continue to review all filings in the docket by accessing the
7 Commission's website at www.azcc.gov and using the e-docket function. (Procedural Order,
8 August 11, 2006).

9 The efficacy of the notice process established in this docket was further endorsed by ALJ
10 Nodes, who renewed it with respect to the next phase of the proceeding for the 2007 wire center
11 additions at the Procedural Conference held July 19. Indeed, the Staff agreed that the service list
12 was sufficient. The transcript of the July 19, 2007 Procedural Conference is attached hereto,
13 marked as Appendix A. (See, Procedural Conference Transcript, July 19, 2007, pages 14-16,
14 Appendix A).

15 Certainly, if the Commission wishes to re-address the service list for the 2007 additions,
16 or any other future phases of this docket, the Commission may do so.⁸ However, since this
17 Settlement Agreement is a direct, integral part of the original non-impaired wire center docket,
18 about which the Commission took deliberate care to provide a means for all CLECs to be
19 informed, no further notice is necessary for the Commission to approve the Settlement
20 Agreement.

21

22

23 ⁸ At the hearing, there appeared to be confusion over whether the issue regarding notice to
24 CLECs was in the context of approval of this Settlement Agreement, which was the Staff
25 witness's position (Settlement Agreement Testimony of Armando Fimbres, p. 7, lines 22 through
26 p. 8, line 10), or whether it was in the context of future additions to the wire center list (*see* Tr.
65, lines 19-23 through Tr. 67, lines 1-4). Qwest's position on the latter is that it is not necessary
to amend the Settlement Agreement to address this particular matter of practice and procedure.
The Commission can, and does, address the matter of service lists on an *ad hoc* basis in most
telecom dockets.

1 **III. CONCLUSION**

2 For the reasons stated above, the Commission should approve the Settlement Agreement.
3 The Settlement Agreement comports with the purposes for which this docket was opened, and is
4 fully consistent with the *TRRO*. The Settlement Agreement also represents a reasonable
5 compromise of the issues presented in the Docket. There is no basis to disturb the Settlement
6 Agreement or to delay its approval. Accordingly, the Commission should expeditiously approve
7 the Settlement Agreement as filed.

8

9 RESPECTFULLY SUBMITTED this 19th day of December, 2007.

10

QWEST CORPORATION

11

12

By: 
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13

14

15

16 ORIGINAL and 13 copies hand-delivered
17 for filing this 19th day of December, 2007, to:

18

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

19

20

21 COPY of the foregoing hand delivered
22 this 19th day of December, 2007, to:

23

Dwight D. Nodes
Assistant Chief Administrative Law Judge
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25

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26 

APPENDIX A

BEFORE THE ARIZONA CORPORATION COMMISSION

1
2
3 IN THE MATTER OF THE APPLICATION) DOCKET NOS.
4 OF DIECA COMMUNICATIONS DBA COVAD) T-03632A-06-0091
5 COMMUNICATIONS COMPANY, ESCHELON) T-03267A-06-0091
6 TELECOM OF ARIZONA, INC.,) T-04302A-06-0091
7 MCLEODUSA TELECOMMUNICATIONS) T-03406A-06-0091
8 SERVICES, INC., MOUNTAIN) T-03432A-06-0091
9 TELECOMMUNICATIONS, INC., XO) T-01051B-05-0091
10 COMMUNICATIONS SERVICES, INC. AND)
11 QWEST CORPORATION'S REQUEST FOR)
12 COMMISSION PROCESS TO ADDRESS KEY)
13 UNE ISSUES ARISING FROM TRIENNIAL)
14 REVIEW REMAND ORDER, INCLUDING)
15 APPROVAL OF QWEST WIRE CENTER)
16 LISTS.) PROCEDURAL
17) CONFERENCE

13 At: Phoenix, Arizona
14 Date: July 19, 2007
15 Filed:

REPORTER'S TRANSCRIPT OF PROCEEDINGS

19 ARIZONA REPORTING SERVICE, INC.
20 Court Reporting
21 Suite 502
22 2200 North Central Avenue
23 Phoenix, Arizona 85004-1481

23 By: MICHELE E. BALMER
24 Certified Reporter
25 Certificate No. 50489

1 BE IT REMEMBERED that the above-entitled and
2 numbered matter came on regularly to be heard before the
3 Arizona Corporation Commission, 1200 West Washington
4 Street, Phoenix, Arizona, commencing at 10:00 a.m. on the
5 19th day of July, 2007.

6
7 BEFORE: DWIGHT D. NODES,
Assistant Chief Administrative Law Judge

8
9 APPEARANCES:

10 For the Arizona Corporation Commission Staff:

11 Ms. Maureen Scott
Staff Attorney, Legal Division
12 ~~1200 West Washington Street~~
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13
14 For Qwest Corporation:

15 QWEST CORPORATION
By: Mr. Norman G. Curtright
16 20 East Thomas Road, 16th Floor
Phoenix, Arizona 85012

17
18 For Covad Communications and the Joint CLECs:

19 ROSHKA, DeWULF & PATTEN, PLC
By: Mr. Michael W. Patten
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21 (Appeared telephonically)
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25

1 APPEARANCES: (Cont'd)
2 For Eschelon Telecom of Arizona:
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1 ACALJ NODES: Let's go on the record.

2 Good morning. Welcome to the Arizona Corporation
3 Commission. We're here for a procedural conference in the
4 DIECA Communications, dba Covad, et al., Case 06-0091.

5 And my name is Dwight Nodes. I'm the
6 Administrative Law Judge assigned to the case.

7 Let me take appearances first on behalf of
8 Eschelon, et al., appearing telephonically.

9 MS. CLAUSON: Yes, thank you. This is Karen
10 Clauson, C-L-A-U-S-O-N, attorney for Eschelon. And with
11 me is Doug Denney, D-E-N-N-E-Y.

12 ACALJ NODES: Okay. Anyone else?

13 MR. PATTEN: Michael Patten on the phone, Your
14 Honor, appearing on behalf of Covad and the other Joint
15 CLECs. For the Eschelon folks, I certainly defer to
16 Ms. Clauson. Mr. Diamond is unable to attend today.

17 And I apologize for not being there in person,
18 but I had something run a little long, and I wasn't going
19 to get down to the Commission in time.

20 ACALJ NODES: Okay. On behalf of Qwest?

21 MR. CURTRIGHT: Good morning. Norman Curtright
22 on behalf of Qwest Corporation.

23 ACALJ NODES: And on behalf of Staff?

24 MS. SCOTT: Maureen Scott on behalf of Commission
25 Staff.

1 ACALJ NODES: All right. I think I'll turn to
2 you, Mr. Curtright. You had made some filings and had
3 requested a procedural conference, I think, primarily
4 regarding the issue of a protective order, but why don't
5 you just start things off and explain what you're looking
6 for.

7 MR. CURTRIGHT: Thank you, Judge Nodes. In
8 Qwest's view, there's three things that we need to address
9 procedurally. The first is the joint motion that was
10 filed by Qwest and the Joint CLECs for approval of the
11 settlement agreement. The request for approval of the
12 settlement agreement was filed by those parties about four
13 weeks ago. The motion sought approval of the Commission
14 without hearing.

15 The second thing in Qwest's view that we need to
16 discuss is the docketing of the 2007 additions to the
17 non-impaired wire center list. Qwest filed that with an
18 open caption as to the docket number. I guess it was our
19 expectation that it would be considered a new proceeding.
20 We noted, however, that it was docketed under the docket
21 numbers that had to do with the initial wire center
22 application. So we need, I think, to discuss the
23 appropriate handling of the docketing of the 2007
24 additions.

25 Then, the third thing in Qwest's view that needs

1 to be discussed today is the request for a protective
2 order for the 2007 additions. And I'm prepared to speak
3 to any of those at this time.

4 ACALJ NODES: Okay. Well, why don't we start off
5 with the settlement agreement filing. As I understand it,
6 there's -- obviously, given there's a settlement
7 agreement, there's consensus between the parties, perhaps
8 but for Staff, that this should be approved without a
9 hearing.

10 Is that right, Ms. Clauson?

11 MS. CLAUSON: Yes. Qwest and the Joint CLECs
12 have agreed that as between those parties, the ones who
13 signed the agreement, they have resolved their issues. So
14 for those parties, we would not need a hearing, although
15 we're certainly willing to have Mr. Denney come out there
16 if you request it.

17 ACALJ NODES: Okay. I guess the question I have,
18 then, is what is Staff's position with respect to the
19 settlement agreement and the need for a hearing?

20 MS. SCOTT: Your Honor, it is Staff's position --
21 and I think this has been clear all along -- that we would
22 like a short hearing on the settlement agreement. I mean,
23 it's a lengthy document, and I don't -- given the press of
24 other matters, I don't think my client has had an
25 opportunity to review the whole document in detail. But

1 my quick review of it, it's lengthy.

2 There are a lot of things in here, and I think
3 the Staff believes that a hearing is necessary to flesh
4 out all of the details of the settlement so that Staff can
5 determine whether they support all aspects of it, and for
6 the Commission to determine whether it's in the public
7 interest.

8 ACALJ NODES: Okay. Can you give me an idea of a
9 time frame in which Staff may be prepared to, I don't
10 know, submit a Staff Report or testimony regarding the
11 settlement agreement? And I'm not looking for an exact
12 date, but a ballpark time frame.

13 MS. SCOTT: I think that probably -- I'm just
14 trying to think. If a month and a half is not too long
15 for the Staff Report or -- I don't know the needs of the
16 other parties, but I'm thinking about the other matters
17 that Staff has before it.

18 ACALJ NODES: So early September, Staff would be
19 prepared to file a Staff Report and/or testimony regarding
20 the settlement with a hearing to follow shortly
21 thereafter?

22 MS. SCOTT: Yes. I would say early September or
23 late August, Your Honor.

24 ACALJ NODES: Okay. So let's --

25 MR. CURTRIGHT: May I speak to the question, Your

1 Honor?

2 ACALJ NODES: Sure.

3 MR. CURTRIGHT: It's Qwest's view that the
4 settlement agreement should be viewed as presumptively in
5 the public interest for the reason that it was entered
6 into between Qwest and the only parties and the only
7 competitors in the docket who actually participated.

8 I think it can be reasonably presumed that as
9 between those companies who have an interest in how it
10 turns out with the competitive environment that we're in,
11 that the agreements reached therein are reasonable and in
12 the public interest.

13 I also note that the joint motion has been on
14 file for four weeks. The settlement agreement itself was
15 filed about a week before that. So Staff has had five
16 weeks to look at it, and four weeks have elapsed since the
17 motion was filed. Under typical motion practice, an
18 answer should have been filed already and has not been.

19 I think that taking this out another month and a
20 half is extremely unnecessary and too long given the
21 amount of time that's elapsed already. I would think that
22 Staff's report should be filed within two weeks.

23 ACALJ NODES: Okay.

24 MS. SCOTT: Your Honor?

25 ACALJ NODES: Just a minute.

1 Mr. Curtright, Staff has fairly consistently
2 throughout the process indicated that they thought a
3 hearing would be necessary regardless, I guess, of where
4 Qwest and the CLECs ended up with respect to these issues.
5 I mean, you would agree with that. You're just quibbling,
6 I guess, more with the timing than anything.

7 MR. CURTRIGHT: I am prepared to agree that we
8 should have a hearing to hear Staff's concerns. I am
9 quibbling about the time.

10 ACALJ NODES: Okay. Ms. Scott.

11 MS. SCOTT: Well, you know, I would just --

12 ACALJ NODES: Can you pull the microphone over
13 just so the people on the phone can hear?

14 MS. SCOTT: I would just remind Your Honor that
15 the settlement negotiations went on for some time here.
16 And Staff was very patient, as was the Commission, in
17 agreeing to multiple extensions of time so that the
18 parties could reach a settlement.

19 And certainly I'm sure Mr. Curtright recognizes
20 that the Commission doesn't have the resources of these
21 other companies, including Qwest, and that, you know, we
22 do our best to get things done quickly. But, you know, in
23 this instance, because of the workload of Staff, I'm
24 trying to give you my best indication of when Staff would
25 be able to have an opportunity to review it and a report

1 filed. And I don't believe that two weeks will give them
2 adequate time given the length of the document.

3 ACALJ NODES: Okay. Well, here is what I'm going
4 to suggest. Why don't we make a Staff Report or testimony
5 due August 24. That gives you about five weeks.

6 MS. SCOTT: Sure.

7 ACALJ NODES: We will make any responsive
8 testimony by Qwest and the CLECs due -- let's say 10
9 days -- well, that's going to be a holiday. Let's say
10 September 5.

11 Mr. Curtright, is that sufficient time, do you
12 believe?

13 MR. CURTRIGHT: I think that's enough time for
14 Qwest to reply.

15 ACALJ NODES: And Ms. Clauson?

16 MS. CLAUSON: Yes, though I am hoping that the
17 5th isn't the day after Labor Day.

18 ACALJ NODES: Well, it's actually two days after
19 Labor Day.

20 MS. CLAUSON: Maybe one more day just to give
21 some of us some extra time.

22 ACALJ NODES: Okay. Let's say September 7. How
23 is that? That's a Friday. That's two full weeks.

24 And then we would -- you know, and I don't have
25 the book in front of me, but let's kind of tentatively

1 plan on a hearing perhaps, you know, 10 days after that,
2 which would make it September 17. And I still need to
3 check, and I imagine everyone else is going to have to
4 check their schedules as well, but for talking purposes
5 let's use that as a time frame.

6 MR. CURTRIGHT: Your Honor, I can tell you now
7 I'm out of the country the last two weeks of September.

8 ACALJ NODES: Okay.

9 MR. PATTEN: Your Honor, this is Mike Patten. I
10 think Ms. Scott and I have a rate case hearing starting
11 the week of the 10th that may run through the week of the
12 17th, and there's Open Meeting on the 18th and 19th.

13 ACALJ NODES: Okay. I should have come better
14 prepared. I didn't know that we were going to be getting
15 down to these details here this morning.

16 Well, you know, given -- I don't know what else
17 to do with the hearing date if we build in those time
18 frames for testimony.

19 Mr. Curtright, any suggestions? Beginning of
20 October?

21 MR. CURTRIGHT: The beginning of October should
22 be satisfactory subject to looking at the calendar for
23 conflicts, but I'm not aware of any.

24 ACALJ NODES: Why don't I suggest that all of the
25 parties just have a conversation and see if you can come

1 up with an agreeable hearing date. And I don't know if
2 this will take more than a day or two, but you're probably
3 in a better position than I to judge that. So if you'll
4 have a discussion, but let's work with these other dates
5 for testimony and then come up with a hearing date that
6 everyone agrees to from there.

7 MR. CURTRIGHT: We will do that.

8 ACALJ NODES: Is that agreeable, Ms. Clauson?

9 MS. CLAUSON: Yes, thank you.

10 ACALJ NODES: Okay. Ms. Scott?

11 MS. SCOTT: Yes, Your Honor.

12 ACALJ NODES: Okay. The next issue Mr. Curtright
13 identified was the docketing of the 2007 additions to the
14 wire center list.

15 MR. CURTRIGHT: Your Honor, Qwest's view on that
16 is it really is indifferent as to whether it's in a
17 separate docket or in this docket that it's been convened
18 under today. But we believe that if it's in the same
19 docket that we've all been participating in so far, it
20 should be designated as Phase II or the 2007 additions
21 phase. I think that phase of the case will build upon the
22 determinations we have about the settlement agreement
23 certainly, but the facts, then, are based upon different
24 vintage of data, and it is a different set of
25 circumstances in that regard.

1 So our interest is simply in drawing a line
2 between the two filings to indicate that the 2007
3 additions is a different factual determination.

4 ACALJ NODES: Ms. Scott, do you have any concerns
5 one way or the other with where this information is
6 docketed?

7 MS. SCOTT: I guess Staff believes it should be
8 in this 06-0091 docket, because all of these proceedings
9 are dealing with the same FCC order. And it's just a
10 subsequent determination, as Mr. Curtright says, but on
11 the same order and order's requirements. So we view it as
12 definitely being part of this docket, but we would have no
13 objection at all to calling this Phase II.

14 ACALJ NODES: Okay. Ms. Clauson, any issue with
15 identifying this as being in the Phase II of this same
16 docket?

17 MS. CLAUSON: No.

18 ACALJ NODES: Okay.

19 MR. CURTRIGHT: Your Honor, just a very minor
20 point, we might consider designating it as the 2007 phase
21 or something, because there will probably be -- there
22 could be a 2008 and a 2009.

23 ACALJ NODES: Okay.

24 MS. SCOTT: That could just be Phase III or Phase
25 IV, if there is. But I have no objection. I'm just

1 trying to respond to Mr. Curtright's concern.

2 MR. CURTRIGHT: A point which I now regret
3 raising.

4 ACALJ NODES: Okay. I think we can deal with it
5 as long as everyone identifies the information in the
6 proper manner. So why don't we for talking purposes in
7 future filings do the best you can identifying it as the
8 2007 additions, and we'll tentatively label it as
9 Phase II.

10 MR. CURTRIGHT: Point of clarification, then,
11 Judge Nodes. In Phase I, we had a service list that was,
12 if I may say, skinnied down. We asked the very large mass
13 of service-listed people, if you recall, whether or not
14 they wished to actively receive documents, and a small
15 number of participants replied affirmatively. And we've
16 been carrying them forward on our mailing list for service
17 and that sort of thing since then.

18 Would it be safe to assume that we will continue
19 to use that same service list that we currently have for
20 Phase II? My thought is that those people have been on
21 notice about the issues, and particularly since this is
22 now in the same docket, they know the same number to check
23 if they do want to become re-involved.

24 ACALJ NODES: That would be my inclination, but
25 let me ask the other parties if they have any different

1 thoughts.

2 Ms. Scott, do you believe that maintaining the
3 current service list of those people who previously
4 affirmatively identified an interest is sufficient?

5 MS. SCOTT: Yes, I believe it is.

6 ACALJ NODES: And Ms. Clauson, you as well?

7 MS. CLAUSON: I just raise there is one point of
8 difference between the Joint CLECs and Qwest, and I don't
9 know if this goes to that or not, and Norm will correct me
10 if I'm wrong.

11 I believe Qwest's position is the settlement
12 agreement should be binding on all CLECs, and the Joint
13 CLECs' position is that it should be binding on just those
14 who signed it. And one of the arguments that they may
15 make relates to who had notice, and I don't know if the
16 next issues will settle how that will work. So I guess
17 depending on where that issue is, it may or may not impact
18 who gets served.

19 ACALJ NODES: Okay. Well, do you have in mind,
20 Ms. Clauson, another -- I mean, a broader group of CLECs
21 who you believe should be given notice of Phase II of this
22 proceeding?

23 MS. CLAUSON: No. Since it's our position that
24 the agreement, you know, applies to those who sign it, the
25 notice issue doesn't affect us so much. I guess that's

1 more of a Qwest issue. And if they're satisfied with the
2 current list, that's fine with us.

3 MR. CURTRIGHT: We're satisfied.

4 ACALJ NODES: Okay. And I think as Mr. Curtright
5 indicated, I mean, given that this is -- and this probably
6 reinforces the idea that we should maintain this same
7 docket open for this additional phase. That if people are
8 checking who have been following the proceeding and have
9 an interest in it, that they'll be able to see what the
10 subsequent information is and basically what is going on
11 in the proceeding.

12 So, you know, we previously gave everyone an
13 opportunity to be included in the service list, and so it
14 seems to me that anyone who didn't so indicate proceeds at
15 their own peril, basically, but that's my thought.

16 MS. CLAUSON: And they just may be proceeding in
17 another venue --

18 ACALJ NODES: Could you repeat that, Ms. Clauson?

19 MS. CLAUSON: Yes. They simply may be proceeding
20 in another venue such as their own IC arbitration, for
21 example.

22 ACALJ NODES: Their own what arbitration?

23 MS. CLAUSON: I'm sorry. Interconnection
24 agreement. I'm sorry. I have a cold.

25 ACALJ NODES: And we're just trying for the court

1 reporter's sake. She's trying to follow, and it's hard
2 over the phone sometimes to pick up every word clearly, so
3 thanks for repeating it.

4 Okay. Well, I think we've taken care of that
5 issue. Let's move next to the protective order issue.
6 Mr. Curtright, do you want to briefly address that?

7 MR. CURTRIGHT: Yes, Judge Nodes. In the
8 settlement agreement between Qwest and the Joint CLECs,
9 the parties agreed upon a form of protective order which
10 the parties seek to have used in front of the various
11 state commissions for future submissions such as the 2007
12 additions.

13 Qwest, when we filed our application for approval
14 of the 2007 additions, asked the Commission to please
15 issue a protective order based upon that form of order,
16 and it was attached to our filing that we made on June 22.

17 In defense of the protective order that we're
18 proposing, it's one which Qwest and the Joint CLECs have
19 considered. And it, I think, is a matter of significant
20 efficiency for those parties to have the same protective
21 order be used in multiple jurisdictions, and it's economic
22 in that it relieves us of the need to deal with separate
23 protective orders with the nuances that each might have,
24 varying from state to state.

25 So Qwest seeks to have that protective order

1 adopted. I recognize that the form which we attached is
2 an order from another state commission, and because it has
3 some peculiarities from that state like statutory
4 references, there would have to be some minor changes made
5 to it. But we would like to propose that that be the form
6 that is used for this docket for the 2007 additions.

7 ACALJ NODES: And is there any substantive
8 difference between what you're proposing here such as the
9 Minnesota order and what was previously entered as a
10 protective order?

11 MR. CURTRIGHT: If I may respectfully ask if
12 Karen could respond to that question, because I know
13 that -- if she's willing to. I know that she was involved
14 in the settlement discussions much more intensely than I
15 was, and she may have a response to that, Judge.

16 ACALJ NODES: Okay. Ms. Clauson.

17 MS. CLAUSON: Yes. I don't have them right in
18 front of me, but one of the differences from state to
19 state, for example, was that the one that was chosen for
20 the Qwest and Joint CLECs had, for example, a small CLEC
21 provision. I'll have to look and see if that's in
22 Arizona, but if I recall correctly that was -- Arizona was
23 one of the states where that was a difference.

24 There are some provisions about in-house people
25 being able to review data as opposed to some states where

1 a more typical catchword for them had expert witnesses
2 required for certain information. So it's those kind of
3 things that vary state to state than the Joint CLECs and
4 Qwest agreed on, on using the one that had the provisions
5 that we appreciate Qwest having attached to its motion.

6 ACALJ NODES: Okay. Well, you know, the
7 difficultly for me is if I don't have a clean proposed
8 protective order, you know, I don't want to be put in a
9 position of trying to pull out different parts of a
10 Minnesota order and possibly make a mistake of what should
11 be in and what should be out. So I don't have any problem
12 granting a protective order, it's just that I would like a
13 clean Arizona-relevant copy proposed so that everyone is
14 in agreement with it. And if I have that, I don't have
15 any issue with issuing it.

16 Ms. Scott.

17 MS. SCOTT: Your Honor, would you have any
18 objection to Staff working with the parties and then
19 submitting an order jointly --

20 ACALJ NODES: No.

21 MS. SCOTT: -- for your consideration?

22 ACALJ NODES: That's what I would prefer. If you
23 can do that and submit it in fairly short order, I can get
24 a procedural order out granting it pretty quickly
25 thereafter, I would think. So if you do that and just

1 submit it, that's all I need really.

2 MR. CURTRIGHT: Thank you.

3 ACALJ NODES: Okay. Ms. Clauson, is that
4 satisfactory?

5 MS. CLAUSON: Yes, thank you.

6 ACALJ NODES: Okay. Mr. Curtright, any other
7 issues that you want to raise at this time before I turn
8 to the CLECs?

9 MR. CURTRIGHT: None that occur to me, Judge
10 Nodes.

11 ACALJ NODES: Okay. Ms. Clauson, is there
12 anything that you want to raise at this time?

13 MS. CLAUSON: No other issues, no.

14 ACALJ NODES: Ms. Scott, anything else?

15 MS. SCOTT: No, Your Honor.

16 ACALJ NODES: Okay. Well, let me just briefly
17 recap, then. At this time we're going to have Staff
18 testimony or a Staff Report due on August 24 regarding the
19 settlement agreement; responsive testimony September 7.

20 The parties are going to work together to come up
21 with an agreeable hearing date. Perhaps have a couple of
22 alternative proposals just in case I might have a conflict
23 or there might be a conflict with the hearing room or what
24 have you.

25 And then also the parties are going to work

1 together and submit an agreed upon protective order. And
2 I won't put a date on it, but, you know, the sooner the
3 better, I guess, from the parties' perspective.

4 Anything else that we need to do?

5 MR. CURTRIGHT: Nothing.

6 MS. SCOTT: No, Your Honor.

7 ACALJ NODES: All right. Well, thank you
8 everyone very much, and we'll proceed forward based on
9 those considerations. Thank you.

10 (The Procedural Conference concluded at
11 10:25 a.m.)

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1 STATE OF ARIZONA)
) ss.

2 COUNTY OF MARICOPA)
3

4 I, MICHELE E. BALMER, Certified Reporter
5 No. 50489 for the State of Arizona, do hereby certify that
6 the foregoing printed pages constitute a full, true and
7 accurate transcript of the proceedings had in the
8 foregoing matter, all done to the best of my skill and
9 ability.

10

11 WITNESS my hand this 25th day of July, 2007.

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MICHELE E. BALMER
Certified Reporter
Certificate No. 50489

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