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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

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JEFF HATCH-MILLER
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AZ CORP COMMISSION
DOCKET CONTROL

IN THE MATTER OF THE APPLICATION OF)	DOCKET NO. T-03632A-06-0091
DIECA COMMUNICATIONS DBA COVAD)	T-03406A-06-0091
COMMUNICATIONS COMPANY, ESCHELON)	T-03267A-06-0091
TELECOM OF ARIZONA, INC., MCLEODUSA)	T-03432A-06-0091
TELECOMMUNICATIONS SERVICES, INC.,)	T-04302A-06-0091
MOUNTAIN TELECOMMUNICATIONS, INC.,)	T-01051B-06-0091
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.)	
)	
)	

NOTICE OF FILING RESPONSE TESTIMONY

OF DOUGLAS DENNEY ON BEHALF OF JOINT CLECS

DIECA Communications, Inc., doing business as Covad Communications Company, Eschelon Telecom of Arizona, Inc., McLeodUSA Telecommunications Services, Inc., Mountain Telecommunications, Inc., and XO Communications Services, Inc. hereby file the Response Testimony of Douglas Denney in response to the Settlement Agreement Testimony of Armando F. Fimbres.

Arizona Corporation Commission

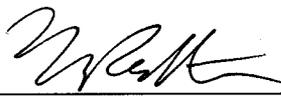
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SEP 28 2007

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1 RESPECTFULLY SUBMITTED this 28th day of September 2007.

2 ROSHKA DEWULF & PATTEN, PLC

3
4 By 

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9 Attorneys for Covad Communications Company and
10 Eschelon Telecom of Arizona, Inc.

11 Also authorized to sign on behalf of: McLeodUSA
12 Telecommunications Services, Inc. and XO Communications
13 Services, Inc.

14 Original and 23 copies of the foregoing
15 filed this 28th day of September 2007 with:

16 Docket Control
17 Arizona Corporation Commission
18 1200 West Washington Street
19 Phoenix, Arizona 85007

20 Copy of the foregoing hand-delivered/mailed
21 this 28th day of September 2007 to:

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24 By *Mary J. Spolts*
25
26
27

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MIKE GLEASON – Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
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APPROVAL OF QWEST WIRE CENTER LISTS.)	
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RESPONSE TESTIMONY

OF DOUGLAS DENNEY

**ON BEHALF OF ESCHELON TELECOM, INC.,
DIECA COMMUNICATIONS DBA COVAD COMMUNICATIONS COMPANY,
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.,
AND XO COMMUNICATIONS SERVICES, INC.
("JOINT CLECS")**

September 28, 2007

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1 **I. INTRODUCTION.**

2
3 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

4 A. My name is Douglas Denney. I work at 730 2nd Avenue South, Suite 900, in Minneapolis,
5 Minnesota.

6
7 **Q. ARE YOU THE SAME DOUGLAS DENNEY WHO FILED DIRECT TESTIMONY**
8 **IN THIS PROCEEDING ON JULY 28, 2006 AND REBUTTAL TESTIMONY ON**
9 **OCTOBER 6, 2006?**

10 A. Yes.

11
12 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

13 A. The purpose of my Testimony¹ is to respond to the Testimony of Armando Fimbres,
14 Utilities Division, Arizona Corporation Commission (“Staff Testimony”), regarding the
15 proposed Settlement Agreement in this matter between Qwest Corporation (“Qwest”) and
16 the Joint CLECs.² The Parties³ to the proposed Settlement Agreement previously
17 described the proposed settlement in Section II of their Notice of Joint Filing and Amended
18 Motion for Order Approving Settlement Agreement dated June 27, 2007.

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23 ¹ This Testimony represents the position of participating Joint CLECs (Eschelon, Covad
24 McLeod and XO) and does not attempt to represent the position of Qwest.

25 ² “Joint CLECs” is a defined term in the proposed multi-state Settlement Agreement, which
26 provides in the definitions (Section II) that “Joint CLECs” refers collectively to Covad
27 Communications Company and DIECA Communications, Inc. (Covad), Eschelon Telecom, Inc.
(Eschelon), Integra Telecom Holdings, Inc. (Integra), McLeodUSA Telecommunications Services,
Inc. (McLeod), Onvoy, POPP.Com (POPP), US Link, Inc. d/b/a TDS Metrocom, Inc. (TDSM),
and XO Communications Services, Inc. (XO).”

³ The term “Parties” is defined on page 1 of the proposed Settlement Agreement as referring
to the defined Joint CLECs and Qwest collectively.

1 **II. DISCUSSION**

2 .
3 **Q. HOW IS YOUR DISCUSSION ORGANIZED?**

4 A. I will respond to each of the Staff's comments and recommendations generally in the order
5 they appear in the Executive Summary to Staff Testimony.

6
7 **A. STAFF COMMENT/RECOMMENDATION NUMBER ONE:**
8 **NEGOTIATIONS AND THE PUBLIC INTEREST**

9 **Q. STAFF ITEM NUMBER ONE STATES: "STAFF WAS NOT A SIGNATORY TO**
10 **THE AGREEMENT."⁴ STAFF ALSO STATES THAT IT DID NOT**
11 **PARTICIPATE IN THE NEGOTIATIONS AND THAT "SETTLEMENT**
12 **PROCESS NEGOTIATIONS ARE BEST SERVED WITHOUT STAFF**
13 **PARTICIPATION."⁵ PLEASE RESPOND.**

14 A. Staff participation or not in settlement negotiations is at Staff discretion. Representatives
15 of Qwest and the Joint CLECs⁶ participated in the settlement negotiations. In addition,
16 representatives of the Minnesota Department of Commerce ("DOC") participated in the
17 multi-state negotiations.

18
19 **Q. STAFF STATES THAT THE PROPOSED SETTLEMENT AGREEMENT, AS**
20 **FILED, IS NOT IN THE PUBLIC INTEREST.⁷ PLEASE RESPOND.**

21 A. The intent of the Joint CLECs is to be party to a settlement in this matter only if the
22 resolution is in the public interest. By filing the Notice of Joint Filing and Amended
23 Motion for Order Approving Settlement Agreement and requesting Commission approval,
24

25 _____
26 ⁴ Staff Testimony, Executive Summary, ¶1, p. i.

27 ⁵ Staff Testimony, pp. 1-2.

⁶ Of the defined Joint CLECs, the CLECs who executed the proposed Settlement Agreement
and participated in Arizona are Covad, Eschelon, McLeodUSA and XO.

⁷ Staff Testimony, p. 2, lines 18-19.

1 the Parties recognized that the proposed Settlement Agreement must meet a public interest
2 test to obtain Commission approval before any implementation.

3
4 **Q. STAFF STATES THAT, IN ORDER TO CONSIDER THE PROPOSED**
5 **SETTLEMENT AGREEMENT, IN THE PUBLIC INTEREST, CERTAIN**
6 **MODIFICATIONS OR CLARIFICATIONS ARE NEEDED.”⁸ PLEASE**
7 **RESPOND.**

8 A. The Commission must decide whether to accept the proposed Settlement Agreement
9 among the Parties, reject the proposed Settlement Agreement, or modify the proposed
10 Settlement Agreement as proposed by Staff. Regarding the latter option, Paragraph VII(C)
11 of the Proposed Settlement Agreement provides: “If, prior to approval, any Commission
12 modifies any portion of this Settlement Agreement, the Parties expressly acknowledge that
13 any Party may terminate this Settlement Agreement as to that particular state.” There are a
14 number of Staff recommendations to which the Joint CLECs anticipate no objection (*i.e.*,
15 the recommendations are unlikely⁹ to cause the Joint CLECs to terminate the proposed
16 Settlement Agreement under Paragraph VII(C) if adopted) if the recommendations were
17 applied to the Parties to the proposed Settlement. In the course of discussing these Staff
18 recommendations below, I further describe how provisions of the proposed Settlement
19 Agreement would operate.

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24
25 ⁸ Staff Testimony, p. 2, lines 19-20.

26 ⁹ As the particulars of the Order (such as specific language modifications, if any) may affect
27 the analysis, Joint CLECs would need to review the Order before finally indicating whether they
would terminate based upon a modification. Regarding any other recommendation if adopted or
other modification, Joint CLECs would review and respond to the Order adopting them on a case-
by-case basis

1 **B. STAFF COMMENT/RECOMMENDATION NUMBER TWO:**
2 **VINTAGE OF ARMIS DATA.**

3 **Q. STAFF ITEM NUMBER TWO STATES: “STAFF RECOMMENDS**
4 **UTILIZATION OF 2004 ARMIS 43-08 DATA.”¹⁰ PLEASE RESPOND.**

5 A. Staff “believes the 2004 ARMIS 43-08 data should be utilized. Staff recommends such
6 modification to the agreement.”¹¹ Although not expressly stated in the proposed
7 Settlement Agreement, 2004 ARMIS 43-08 data were used in determining the Initial Wire
8 Center List for purposes of settlement. As recognized by Staff, “Qwest and the Joint
9 CLECs explained that 2004 ARMIS Data was the base information to which adjustments
10 were made for the selection of the initial set of Non-Impaired Wire Centers.”¹² Joint
11 CLECs anticipate no objection if such a modification were made to the proposed
12 Settlement Agreement of the Parties.

13 **C. STAFF COMMENT/RECOMMENDATION NUMBER THREE:**
14 **NON-RECURRING CHARGE, CONVERSIONS, AND CUSTOMER**
15 **IMPACT**

16 **Q. STAFF ITEM NUMBER THREE STATES: “STAFF BELIEVES THE \$25 NON-**
17 **RECURRING CONVERSION CHARGE, IN SECTION IV, IS JUST AND**
18 **REASONABLE.”¹³ PLEASE RESPOND.**

19 A. Staff states that “Staff initial recommendation was zero but given that negotiation is a
20 process of compromise since Qwest and the Joint CLECs have agreed to the proposed rate,
21 Staff believes the charge is just and reasonable.”¹⁴ No citation is provided for the source of
22 the just and reasonable test cited by Staff. It appears to be a reference to a just and
23 reasonable negotiated rate as among the Parties to the proposed Settlement, given that Staff

24
25
26 ¹⁰ Staff Testimony, Executive Summary, ¶2, p. i.
27 ¹¹ Staff Testimony, p. 3, lines 14-15.
 ¹² Staff Testimony, p. 3, lines 11-13.
 ¹³ Staff Testimony, Executive Summary, ¶3, p. i.
 ¹⁴ Staff Testimony, p. 4, lines 22-24.

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1 states that “negotiation is a process of compromise.”¹⁵ The non-recurring charge in Section
2 IV is a negotiated¹⁶ rate among the Parties to the proposed Settlement Agreement. The
3 negotiated rate is about halfway between Qwest’s litigation position of \$50.00 and the Joint
4 CLECs’ position that no charge, or only a minimal charge, should apply.

5
6 If, however, by “just and reasonable,” the Staff is referring to any pricing or TELRIC
7 standard, the Joint CLECs disagree with the suggestion, if any, that a \$25.00 non-recurring
8 charge (“NRC”) may be adopted as a cost-based rate. The \$25.00 rate applicable to the
9 Parties to the proposed Settlement Agreement, if it is approved, is specifically the result of
10 that “process of compromise.”¹⁷ Paragraph VII(B) specifically provides that the proposed
11 Settlement Agreement “is made only for settlement purposes and does not represent the
12 position that any Party would take if this matter is not resolved by agreement” and that it
13 may not be used as evidence. For example, the fact that the Parties to the proposed
14 Settlement Agreement are willing to compromise on \$25 cannot be used as evidence to
15 support a finding that \$25 is a generally applicable just and reasonable or cost-based rate or
16 as evidence that zero is not an appropriate rate. Paragraph IV(C) provides that the Parties
17 may disagree as to the amount of the applicable non-recurring charge after three years from
18 the Effective Date of the proposed Settlement Agreement, and each Party reserves all of its
19 rights with respect to the amount of charges after that date.¹⁸ In later seeking a cost-based
20 rate, a Party would be prejudiced by a finding in this matter – based on an agreement that
21 is *not* to be used as evidence and is to set *no* precedent – that \$25 is a cost-based rate. If a
22 cost-based rate is set in this matter, it needs to be set on the merits of the underlying case
23

24
25 ¹⁵ Staff Testimony, p. 4, lines 22-23.

26 ¹⁶ See 47 U.S. C. §252(a)(1). See also paragraph VII(B) of the proposed Settlement
27 Agreement.

¹⁷ Staff Testimony, p. 4, lines 22-23.

¹⁸ Per Paragraph VII(B), the proposed Settlement Agreement establishes no precedent as to
the appropriate non-recurring charge for the potential rate dispute after the minimum three-year
period expires.

1 (in which both the Staff and Joint CLECs proposed an NRC of zero¹⁹). If the negotiated
2 rate is accepted as part of the proposed Settlement Agreement, it needs to be accepted as
3 the compromise by the Parties that it is.

4
5 **Q. STAFF STATES THAT IT “BELIEVES THAT THE PUBLIC INTEREST**
6 **REQUIRES CLARIFICATION ON CUSTOMER IMPACT TO EXPLAIN WHY**
7 **CUSTOMER IMPACT IS NO LONGER A CONCERN.”²⁰ STAFF ADDS THAT**
8 **THE “JOINT CLECS’ CONCERNS MAY HAVE BEEN ALLEVIATED SINCE**
9 **QWEST HAS EXPLAINED THAT ‘...AFTER PROCESSING MORE THAN 1400**
10 **CONVERSIONS OF UNEs TO QWEST ALTERNATIVE SERVICES THERE**
11 **HAVE BEEN NO ISSUES RAISED BY CLECS REGARDING CUSTOMER**
12 **HARM.” HAVE CLECS’ CONCERNS BEEN ALLEVIATED BY THIS QWEST**
13 **ASSERTION?**

14 **A.** No, customer impact remains a concern for the reasons provided in my previous testimony.
15 Nothing in the proposed Settlement Agreement authorizes Qwest to use its proposed
16 method of conversion²¹ or precludes the Commission from ruling on the manner of
17 conversion in another matter. Joint CLECs raised customer impact concerns in the course
18 of discussing the conversion charge and how, if Qwest appropriately treats the conversion
19 as a billing change, adverse customer impact may be avoided.²² The Joint CLECs were

20
21 ¹⁹ Staff Testimony, p. 4, line 22.

22 ²⁰ Staff Testimony, p. 4, lines 17-19.

23 ²¹ Qwest’s conversion procedures were announced unilaterally by Qwest in non-CMP Qwest
24 “TRRO” notices of changes to its PCAT. Qwest previously said that it would update its SGATs
25 and deal with TRO/TRRO issues in CMP, but did not do so. (See, e.g., June 30, 2005 CMP
26 minutes, stating “. . . *as SGAT language changes, we will have a comment period* and that the
27 States will engage you when decisions are made. *Cindy also said that PCAT changes will be*
brought through CMP,” available at http://www.qwest.com/wholesale/cmp/cr/CR_PC102704-1ES.htm.) Qwest also would not negotiate these terms in ICA negotiations, so that the manner of
conversion became an arbitration issue between Eschelon and Qwest (discussed below). Qwest’s
conversion terms are merely a proposal by Qwest, as they were not mutually developed. For
further discussion, see, e.g., Eschelon (Starkey) Direct (11/8/06), pp. 69-84 & Eschelon (Starkey)
Rebuttal (2/9/07), pp. 69-84, Docket Nos. T-03406A-06-0572; T-01051B-06-0572.

²² See, e.g., Testimony of Douglas Denney, filed in this Docket on July 28, 2006 (“Denney
Direct”), p. 56, lines 6-8 (“The ‘conversion of a UNE into a private line is not a network facility

1 willing to discuss procedures in this proceeding or in interconnection agreement
2 negotiations.²³ Since then, the Joint CLECs reached a proposed Settlement Agreement
3 with Qwest in this proceeding that does not address the manner of conversion, leaving the
4 subject open for ICA negotiation and consideration in other proceedings.

5
6 For example, Eschelon and Qwest negotiated regarding this issue in ICA negotiations until
7 reaching impasse and then brought the issue to arbitration. The arbitrated ICA language
8 will be available to other CLECs for opt-in under Section 252(i) of the federal Act. The
9 manner of conversions is addressed in Issues 9-43 and 9-44 in the Qwest-Eschelon
10 interconnection agreement (“ICA”) arbitration pending before this Commission.²⁴ If the
11 proposed agreement is approved in this docket and Eschelon's position for Issues 9-43 and
12 9-44 is adopted in the ICA arbitration, Qwest will be able to charge a rate (negotiated in
13 this case) that is high compared to the minimal amount of work (*i.e.*, repricing) advocated
14 by Eschelon in the arbitration to perform the conversion. For example, if Qwest takes the
15 position that the compromise rate includes the cost of changing the circuit ID, then
16 Eschelon will as part of its compromise on the rate pay the cost of changing the circuit ID
17 even though the circuit ID will not change under Eschelon's proposed ICA language. The
18 rate is a negotiated²⁵ rate only. To the extent that Qwest claims that it incurs any costs
19 (such as associated with use of a new USOC for repricing), Qwest will receive ample
20

21 issue – it is an issue with Qwest's internal systems and how Qwest plans to move the billing for
22 the facility from one system to another system.”); *id.* p. 57, lines 3-5 (“There is no reason why a
23 CLEC's end user customer should be placed at risk. However the process by which Qwest plans
24 on implementing this billing change, which includes a record change to the circuit ID, does just
25 that.”).

26 ²³ See, e.g., Denney Direct, p. 54, lines 3-5 (“CLECs are willing to develop those procedures
27 bi-laterally with Qwest in interconnection agreement negotiations or as part of this proceeding.”).

28 ²⁴ Docket Nos. T-03406A-06-0572; T-01051B-06-0572 (Arbitration Issue Nos. 9-43 and 9-
29 44). The NRC for the conversion is arbitration Issue 9-40. If the proposed Settlement Agreement
30 is approved, the rate of \$25.00 and accompanying language will be used in the new Qwest-
31 Eschelon ICA (closing Issue 9-40). If it is not approved, Issue 9-40 will remain open pending
32 resolution of this docket on the merits. See Joint Motion of Eschelon and Qwest for Single
33 Compliance Filing of the Interconnection Agreement and, if Granted, a Revised Schedule, Docket
34 Nos. T-03406A-06-0572; T-01051B-06-0572 (June 20, 2007).

35 ²⁵ See 47 U.S. C. §252(a)(1).

1 compensation, pursuant to a rate to which it has agreed. That Eschelon has agreed to such
2 a high rate illustrates that Eschelon's primary concern when proposing a repricing manner
3 of conversion is not the rate but the potential impact of any conversion on customers.
4

5 **Q. WHEN STAFF SAID THAT IT “BELIEVES THAT THE PUBLIC INTEREST**
6 **REQUIRES CLARIFICATION ON CUSTOMER IMPACT TO EXPLAIN WHY**
7 **CUSTOMER IMPACT IS NO LONGER A CONCERN,”²⁶ STAFF RAISED THE**
8 **ISSUE IN THE CONTEXT OF THE “CONVERSION PROCESS.”²⁷ DID THE**
9 **JOINT CLECS ALSO RAISE CUSTOMER IMPACT IN ANOTHER CONTEXT**
10 **AND, IF SO, HOW IS THAT CONCERN ADDRESSED?**

11 **A.** Yes. The Joint CLECs addressed concerns about customer impact with respect to blocking
12 or rejection of orders as well.²⁸ As advocated by the Joint CLECs, Qwest has not and will
13 not develop a UNE blocking process. In Oregon, Qwest told the Commission: “Qwest
14 does *not* seek reconsideration of the Order forbidding Qwest to ‘block’ or ‘reject’ CLEC
15 orders for UNEs at a non-impaired wire center, and will, of course, comply with the Order.
16 . . . Qwest and the Joint CLECs continue to work on a settlement and, as stated, Qwest has
17 agreed not to ‘reject’ or ‘block’ orders by CLECs for UNEs at non-impaired wire centers
18 (indeed, Qwest is prohibited from doing so in Oregon because of the Order).”²⁹ Paragraph
19 234 of the TRRO³⁰ provides that, upon receiving a request for access to a dedicated
20

21 ²⁶ Staff Testimony, p. 4, lines 17-19.

22 ²⁷ Staff Testimony, p. 4, line 11.

23 ²⁸ See, e.g., Denney Direct, p. 51, lines 10-14 (“The FCC’s position is eminently sensible.
24 The service to the customer comes first and it should not be jeopardized. If the CLEC is mistaken
25 about the status of the wire center, Qwest can seek redress and back bill the CLEC for the
26 difference between the UNE rate and the Private Line rate. If Qwest is mistaken about the status
27 of a wire center, no harm is done to the end-user customer.”).

²⁹ See Qwest Corporation’s Motion for Reconsideration and/or Clarification Regarding Wire
Center Update Data and Regarding Procedures for CLEC Orders in Non-Impaired Wire Centers,
In the Matter of TRRO/Request for Commission Approval of Wire Center Lists submitted on behalf
of the Joint CLECs, Oregon Docket No. UM 1251 (May 21, 2007), p. 6 (emphasis in original).

³⁰ Order on Remand, *Review of the Section 251 Unbundling Obligations of Incumbent Local*
Exchange Carriers, WC Docket No. 04-313; CC Docket No. 01-338, FCC 04-290 (rel. February
4, 2005) (“TRRO”).

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transport or high-capacity loop UNE, the incumbent LEC must immediately process the request. The proposed Settlement Agreement reflects this in the ICA language in Attachments B, C, and D (which are available to other CLECs per Paragraph VII(A)(1)(4)):

Upon receiving a request for access to a high capacity loop or high capacity transport UNE pursuant to Section 2.0 of the TRRO Amendment, Qwest must immediately process the request. Qwest shall not prevent order submission and/or order processing (such as via a system edit, or by requiring affirmation of the self-certification letter information through remarks in the service request, or through other means) for any such facility, unless the Parties agree otherwise in an amendment to the Agreement. Regarding ordering with respect to the initial Commission-Approved Wire Center List, see Section 2.0.A, and regarding ordering after any additions are made to the initial Commission-Approved Wire Center List, see Section 2.0.F. For changes of law, the Parties agree that the change of law provisions contained in the interconnection agreement between the Parties will apply.³¹

**D. STAFF COMMENT/RECOMMENDATION NUMBER FOUR:
METHODOLOGY**

Q. STAFF ITEM NUMBER FOUR STATES: “STAFF SEES THE NEED FOR ADDITIONAL CLARIFICATION REGARDING THE METHODOLOGY IN SECTION V.B (COLLOCATION)” AND STAFF IDENTIFIES TWO PROPOSED CHANGES.”³² PLEASE RESPOND TO THE FIRST OF THE TWO STAFF PROPOSED CHANGES TO METHODOLOGY.

A. Staff states that the “proposed Agreement does not provide any specific date or language for determining the affiliation of fiber-based collocators. The proposed Agreement language should be revised to include language that is specific and acceptable to all

³¹ See Attachment B, ¶2.0.B; Attachment C, ¶9.1.13.4; Attachment D, ¶2.0.B.
³² Staff Testimony, Executive Summary, ¶4, p. i.

1 Parties.”³³ Staff recommended that “Regardless of the data vintage, affiliated fiber-based
2 collocators should not be counted separately if their legal affiliation exists at the date of a
3 Commission Order designating a wire center as non-impaired.”³⁴ In addition, regarding
4 Paragraph VI(E)(1), staff recommends that the “timing of the affiliated, fiber-based
5 collocator information . . . must also be properly addressed in this section.”³⁵ These
6 recommendations are consistent with the definition of fiber-based collocator. Joint CLECs
7 do not anticipate objecting to these proposed modifications, if adopted.
8

9 **Q. PLEASE RESPOND TO THE SECOND OF THE TWO STAFF PROPOSED**
10 **CHANGES TO METHODOLOGY.**

11 A. Staff states that the “amount of time allowed for the CLECs to respond to a letter from
12 Qwest concerning the fiber-based collocation status of Carriers is ‘. . . no less than 10
13 business days . . .’ Staff continues to believe that 60 days is an appropriate period.”³⁶ The
14 10-day period is set forth in the Methodology Section, in Paragraph V(B)(4), of the
15 proposed Settlement Agreement. Staff appears to indicate that “two weeks is simply
16 inadequate”³⁷ as a period of time for responding to a claim by Qwest that a collocator is a
17 fiber-based collocator. Paragraph V(B)(4) provides that the 10-day period is for the
18 purpose of providing “feedback to this information before Qwest files its request.” It may
19 start a dialogue and may assist in avoiding unnecessary filings, but it has no preclusive
20 effect. In other words, per the terms of the proposed Settlement Agreement, failing to
21 provide “feedback” during the 10-day period does not mean that the collocator cannot
22 object once Qwest makes its filing with the Commission.
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26 ³³ Staff Testimony, Executive Summary, ¶4(a), p. i.
27 ³⁴ Staff Testimony, p. 5, lines 13-16.
³⁵ Staff Testimony, p. 7, lines 1-4.
³⁶ Staff Testimony, Executive Summary, ¶4(b), p. i.
³⁷ Staff Testimony, p. 6, lines 1-3.

1 The next Section of the proposed Settlement Agreement contains provisions that should
2 make this more clear. Section VI addresses future Qwest filings to request Commission
3 approval of non-impairment designations and additions to the Commission-approved wire
4 center list. At least two of the provisions of Section VI go to Staff's concern about the
5 ability of CLECs to respond regarding potential status as a fiber-based collocator. First,
6 Paragraphs VI(E)(1)(e) and (f) require Qwest to provide supporting data to the
7 Commission and CLECs that have signed a protective agreement copies of any responses
8 to the Qwest letter sent to collocator(s) identified by Qwest as fiber-based and all written
9 correspondence between Qwest and those collocator(s). As this information will be filed
10 with the Commission, Staff and parties (including the identified collocator and CLECs
11 other than the identified collocator) will have an opportunity to review and respond to the
12 information at that time. Second, Paragraph VI(F)(1) provides that a "CLEC or any other
13 party" may raise objections to Qwest's request with the Commission. There is no
14 limitation on the nature of the objection that would preclude a collocator from objecting at
15 this time. Section V deals with feedback before Qwest's request for Commission approval;
16 Section VI deals with review and responses after Qwest files its request for approval. In
17 Utah, for example, a collocator provided feedback after Qwest made its request for
18 Commission approval, and Qwest modified its request based upon the feedback once
19 received.³⁸ The Commission may review proposed non-impairment or tier designations

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23 ³⁸ In Utah, Qwest initially sought approval for the Midvale wire center based on business line
24 counts and fiber-based collocations. After filing its request with the Commission, Qwest filed a
25 letter stating: "Prior to filing its petition, and as part of its normal validation process, Qwest
26 sought confirmation from all fiber-based collocating CLECs. Qwest received a response from one
27 of the CLECs after Qwest had filed its petition. The late response from the CLEC only indicated
that its collocation in the Midvale wire center did not meet the definition of a fiber-based
collocation, but did not provide any specific details. Because of this response, Qwest initiated a
more detailed review of all of the records associated with that CLEC's fiber-based collocation in
the Midvale wire center. At this time, Qwest is no longer asserting that there are at least three
fiber-based collocations in the Midvale wire center." Letter from Qwest to Utah Public Service
Commission (Sept. 6, 2007).

1 either as a result of objections filed with the Commission by any party (whether or not a
2 signatory to the proposed Settlement Agreement), including Staff,³⁹ or on its own motion.⁴⁰

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4 If, despite these provisions, Staff continues to believe that clarification is needed, Joint
5 CLECs do not anticipate objecting to this proposed modification, if adopted.

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7 **E. STAFF COMMENT/RECOMMENDATION NUMBER FIVE:**
8 **ANNUAL MAXIMUM FOR REQUESTS BASED ON LINE COUNTS**

9 **Q. STAFF ITEM NUMBER FIVE STATES: “STAFF DOES NOT SEE A NEED FOR**
10 **THE SECTION VI.A.2 RESTRICTION WHICH ONLY ALLOWS QWEST TO**
11 **FILE A REQUEST FOR ADDITIONAL ‘NON-IMPAIRED WIRE CENTERS**
12 **BASED IN WHOLE OR PART UPON LINE COUNTS AT ANY TIME UP TO**
13 **JULY 1 OF EACH YEAR.”⁴¹ PLEASE RESPOND.**

14 **A.** Staff cites no legal basis for objection to this provision in Paragraph VI(A)(2) but only
15 indicates that Staff “does not see a need” for it.⁴² Paragraph VI(A)(2) is mutually agreed
16 upon among the Parties to the proposed Settlement Agreement and is integral to the
17 compromise reached. The paragraph provides for a measure of contractual certainty as the
18 Joint CLECs are engaging in business planning necessary to offer terms to their own
19 customers, which requires them to factor in UNE availability when planning for the
20 associated costs, risks, etc. In addition, Qwest’s position is that it can only use ARMIS
21 data for this purpose. As ARMIS data is available on an annual basis, the annual time
22 period is consistent with Qwest’s claim that it must use ARMIS data. The line counts
23 should be current. Particularly in the event of declining line counts, Qwest should not use

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26 ³⁹ See, e.g, Paragraphs VI(F)(1) & VI(F)(5) (both: “a CLEC or any other party”).
27 ⁴⁰ See, e.g, Paragraph VI(F)(2) (“unless the Commission orders otherwise”).
⁴¹ Staff Testimony, Executive Summary, ¶4, p. i.
⁴² Staff Testimony, p. 6, lines 16-22.

1 old line counts. The annual time period helps ensure use of current data, as Qwest is
2 relying upon ARMIS data that is only available as of December 31st each year.

3
4 **F. STAFF RECOMMENDATION REGARDING OTHER PROVISIONS:**
5 **WHETHER TO APPLY NON-IMPAIRMENT ASSIGNMENTS TO ALL**
6 **CARRIERS**

7 **Q. STAFF RECOMMENDS THAT “THE NON-IMPAIRMENT ASSIGNMENTS FOR**
8 **WIRE CENTERS APPLY TO ALL CARRIERS.”⁴³ BEFORE ADDRESSING NON-**
9 **IMPAIRMENT ASSIGNMENTS SPECIFICALLY, PLEASE FIRST ADDRESS**
10 **GENERALLY THE RELIEF THE PARTIES TO THE PROPOSED SETTLEMENT**
11 **AGREEMENT ARE SEEKING.**

12 **A.** Regarding the issue of “how the Commission will apply details in the Agreement to
13 CLECs who are not a party to this Agreement,” Staff recommends “that the non-
14 impairment assignments for wire centers in this docket apply to all carriers.”⁴⁴ As
15 recognized by Staff, Joint CLECs have previously pointed out that there is “no provision
16 in the proposed Settlement Agreement stating that it binds all CLECs.”⁴⁵ Although
17 Qwest’s litigation position was that it wanted an order that binds all CLECs,⁴⁶ both Qwest
18 and the Joint CLECs are now asking the Commissions for approval of the proposed
19 Settlement Agreement with respect to the Parties that have executed the proposed
20 Settlement Agreement.⁴⁷ As Qwest has pointed out, Paragraph VII(B) “provides that the

21 ⁴³ Staff Testimony, p. 7, lines 18-19. This particular recommendation does not appear in the
22 Executive Summary to Staff Testimony.

23 ⁴⁴ Staff Testimony, p. 7, lines 15-19.

24 ⁴⁵ Staff Testimony, p. 7, lines 13-15.

25 ⁴⁶ See proposed Settlement Agreement (fifth “Whereas” clause, stating Qwest’s positions
26 from its petition for a Commission investigation).

27 ⁴⁷ See Colorado Hearing Transcript, Docket No. 06M-080T, Aug. 21, 2007, Vol. 1, p. 7, line
12 – p. 9, line 11 (Counsel for Qwest, stating: “. . .staff raised a very good point in their
comments, which is, What exactly is the relief that the moving parties are asking for? Are the
moving parties simply asking for approval of this settlement agreement only with respect to the
signatory parties or are the moving parties asking for approval of this settlement agreement so that
it would apply to all CLECs in the state of Colorado? And the answer to the question is, we are
only asking for approval of this settlement agreement with respect to the parties that have executed
the settlement agreement. . . . Now, VII-B provides that the agreement is a settlement of
controversy, no precedent is established; the agreements is for settlement purposes only. It shall

1 a settlement of controversy, no precedent is established; the agreements is for settlement
2 purposes only. It shall not be used as evidence or for impeachment in any proceeding
3 before the Commission or any other administrative or judicial body except for future
4 enforcement.”⁴⁸ Specifically, Paragraph VII(B) states: “No precedent is established by this
5 Settlement Agreement, whether or not approved by Commissions.” Regardless of whether
6 the proposed Settlement Agreement is sent to CLECs for comment,⁴⁹ no precedent is set
7 even if approved by the Commission. Using a proposed settlement agreement among
8 certain Parties to decide the merits of the underlying issues as to all carriers, however,
9 would be using the proposed agreement as evidence for a ruling that would set a precedent
10 for other carriers. Under Paragraph VII(B), an order applicable to all CLECs, if any, has to
11 be made without regard to the terms of the proposed Settlement Agreement (*i.e.*, on the
12 merits). In contrast, an order approving the proposed Settlement Agreement as to the
13 executing Parties provides other CLECs with an opportunity to opt in to its terms under
14 Paragraph VII(A)(4) without relinquishing their Section 252 rights to instead negotiate and
15 arbitrate their own terms.

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19 not be used as evidence or for impeachment in any proceeding before the Commission or any other
20 administrative or judicial body except for future enforcement. So I think that's a critical piece of
21 information to have, because I think that answers one of staff's critical threshold questions with
22 respect to the settlement, which is, Who does it apply to? It only applies to the signatory parties.
23 That then goes to one of the threshold questions, in my mind, that's in staff's comments, which is,
24 If that's the case, has what, in staff's view, is one of the central purposes of the docket -- has that
25 been addressed by the settlement agreement? And that is that the relief -- that the docket should be
26 used essentially to determine not only the wire center impairment or non-impairment designations
27 for the current docket, but how we're going to treat future wire-center-impairment decisions. And I
think -- again, I think it's critical, for purposes of this hearing, that we understand that the settling
parties are only seeking approval of the agreement as to them and they are not seeking approval of
the agreement or the imposition of those terms on any other party.”).

⁴⁸ Id. p. 8, lines 10-16.

⁴⁹ See Staff Testimony, p. 7, line 21 – p. 8, line 10. The Joint CLECs have no objection to
sending out the proposed Settlement Agreement for comment (particularly as this could make
CLECs aware of their potential opt-in rights), but even if the notice very clearly informed them
that the proposed terms may apply to them, this would not change the content of Paragraph VII(B)
or any Party's right to terminate if the proposed Settlement Agreement were used as evidence or
precedent. It is a compromise, not a decision on the merits.

1 Q. IF THE PARTIES INITIALLY BROUGHT THESE ISSUES TO THE
2 COMMISSION FOR A DECISION ON THE UNDERLYING ISSUES, WHAT HAS
3 CHANGED SO THAT THE PARTIES NOW SEEK DIFFERENT RELIEF?

4 A. The unanticipated event that occurred after parties requested a broader resolution is the
5 proposed settlement. As with any other proposed settlement, it changes the request by the
6 parties. Before settlement, each party is advocating a specific position whereas, after the
7 proposed settlement is signed, the parties to the settlement agreement are requesting
8 adoption of a compromise instead. In this case, the proposed Settlement Agreement is very
9 clear that, absent agreement, the Parties' positions would be different (*i.e.*, "The Settlement
10 Agreement . . . does not represent the position that any Party would take if this matter is not
11 resolved by agreement."). As indicated above, Paragraph VII(B) precludes the use of the
12 Settlement Agreement generally as evidence. The only evidence on the merits (as opposed
13 to a compromise) is the evidence submitted earlier by the parties to the proceeding. If the
14 proposed Settlement Agreement is rejected or terminated, that evidence is on the record
15 and will then be considered as to the merits. If the proposed Settlement Agreement is
16 approved as to the Parties, other CLECs will have an opportunity to opt in to its terms
17 under Paragraph VII(A)(4), while maintaining their Section 252 rights to instead negotiate
18 and arbitrate their own terms.

19
20 For example, a CLEC which has currently executed the TRRO amendment (so a \$50 NRC
21 is applied) may simply execute Exhibit B or Exhibit D⁵⁰ and obtain instead the lower \$25
22 rate⁵¹ -- without expending any of its own or administrative resources on litigating the rate.

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24 ⁵⁰ Exhibit B is for CLECs who already have an executed TRRO amendment. Exhibit D is for
25 CLECs who do not yet have an executed TRRO amendment. In addition, the language of Exhibit
26 C is available for use in a new ICA, for CLECs negotiating new ICAs (instead of amending their
27 old ICAs).

⁵¹ Joint CLECs anticipate that Qwest will notify CLECs of the availability of Exhibits B, C,
and D through Qwest's notice process for ICA/amendment language and that Qwest will post
Exhibit B, C, and D on the Qwest web site as being available to CLECs (*i.e.*, at the location at
which Qwest currently posts its TRRO amendment under which it charges the higher non-
recurring charge, *etc.*). See <http://www.qwest.com/wholesale/clecs/agreementsamendments.html>

1 Or, the CLEC has the right, under Sections 251 and 252, to pursue a cost-based rate.
2 Practical obstacles exist to pursue the latter course, due to the time and expense of actively
3 participating in an arbitration or cost case (which may potentially explain why some
4 CLECs executed an amendment applying a \$50 rate instead of contesting the rate in this or
5 other dockets). When these obstacles to pursuing a different rate for non-executing CLECs
6 are combined with the number of executing CLECs (which are generally the more active
7 CLECs in regulatory proceedings), there may be little likelihood on these particular facts
8 that any additional regulatory proceedings will occur regarding the issues addressed in the
9 proposed Settlement Agreement. Therefore, the proposed Settlement Agreement, although
10 only approved as to the Parties to that agreement, would serve to minimize future disputes.

11
12 **Q. STAFF SPECIFICALLY RECOMMENDS THAT “THE NON-IMPAIRMENT**
13 **ASSIGNMENTS FOR WIRE CENTERS” APPLY TO ALL CARRIERS.⁵² PLEASE**
14 **RESPOND REGARDING NON-IMPAIRMENT ASSIGNMENTS FOR WIRE**
15 **CENTERS.**

16 **A.** This recommendation specifically relates to the initial Commission-Approved Wire Center
17 List. It appears to go to the issues, with respect to non-executing CLECs, of (1) whether
18 non-executing CLECs may challenge wire centers even though they are on the initial list;
19 and (2) whether Qwest may make UNEs unavailable for wire centers that are on the initial
20 Commission-Approved Wire Center List. The first issue is addressed in my previous
21 response. The non-executing CLECs which do not take advantage of Exhibits B, C, or D,
22 would have the right to challenge the list,⁵³ although the practical obstacles of doing so
23 (when the much easier course of opting-in is available to them) may make that unlikely.

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26 ⁵² Staff Testimony, p. 7, lines 18-19. This particular recommendation does not appear in the
Executive Summary to Staff Testimony.

27 ⁵³ Even under the terms of the proposed Settlement Agreement, no limitations on the basis for
objection are identified on the right to object before the Commission. See Paragraph VI(F)(1).

1 The second issue may be based at least in part on a concern that Qwest would impose a
2 longer list of wire centers on non-executing CLECs (making more UNEs unavailable to
3 them). One way to view this is that those CLECs have the option of avoiding that result by
4 taking advantage of Exhibit B, C, or D to obtain the initial Commission-Approved Wire
5 Center List for themselves. If, however, the Staff is suggesting that Qwest ought to
6 commit to not imposing on other CLECs a list longer than the Commission-Approved
7 Wire Center List, Qwest is a party to the proposed Settlement Agreement and, per that
8 agreement, has agreed to use the Commission-Approved Wire Center List. So, Qwest may
9 be willing to do so (though Qwest would need to indicate whether that is the case). A
10 modification that would appear to capture this concern would provide that Qwest would
11 not impose non-impairment designations or wire centers that are not reflected in the
12 Commission-Approved Wire Center List upon any CLEC, regardless of whether the CLEC
13 executed the proposed Settlement Agreement (or language to that effect). To the extent
14 that this requirement would apply to Qwest's actions and Qwest indicates it would not
15 terminate based on such a requirement, Joint CLECs would not anticipate objecting to such
16 a proposed modification, if adopted.

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18 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

19 **A. Yes.**
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