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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

- MIKE GLEASON – Chairman
- KRISTIN K. MAYES, Commissioner
- WILLIAM MUNDELL, Commissioner
- JEFF HATCH-MILLER, Commissioner
- GARY PIERCE, Commissioner

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.)	
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)	

NOTICE OF FILING

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 Joint CLEC Brief Regarding Proposed Settlement Agreement, a copy of which is attached.

Arizona Corporation Commission

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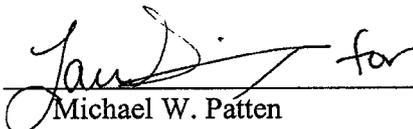
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1 RESPECTFULLY SUBMITTED this 13th day of December 2007.

2 ROSHKA DEWULF & PATTEN, PLC

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9 Attorneys for Covad Communications Company and
10 Mountain Telecommunications, Inc.

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

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

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

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21 this 13th day of December 2007 to:

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By *Tobe L. Goldberg*
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BEFORE THE ARIZONA CORPORATION COMMISSION

MIKE GLEASON

Chairman

KRISTIN MAYES

Commissioner

WILLIAM MUNDELL

Commissioner

JEFF HATCH-MILLER

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JOINT CLEC BRIEF REGARDING PROPOSED SETTLEMENT AGREEMENT

I. INTRODUCTION

DIECA Communications, Inc. d/b/a Covad Communications Company, Eschelon Telecom of Arizona, Inc., McLeodUSA Telecommunications Services, Inc., and XO Communications Services, Inc. (collectively, "the Joint CLECs"¹) submit this Brief regarding the proposed Settlement Agreement.² The Parties³ to the proposed Settlement Agreement previously described the proposed settlement in Section II of their Notice of Joint Filing and Amended Motion for Order Approving Settlement Agreement dated June 27, 2007.⁴

The Commission must now decide whether to accept the proposed Settlement Agreement among the Parties, reject the proposed Settlement Agreement, or modify the proposed Settlement Agreement as proposed by Staff. Regarding the third option, Paragraph VII(C) provides: "If, prior to approval, any Commission modifies any portion of this Settlement Agreement, the Parties expressly acknowledge that any Party may terminate this Settlement Agreement as to that particular state." Although Joint CLECs anticipate that several Staff recommendations are unlikely⁵ to cause the Joint CLECs to terminate the proposed Settlement Agreement under Paragraph VII(C) if applied to the

¹ "Joint CLECs" is a defined term in the proposed multi-state Settlement Agreement, which provides in the definitions (Section II) that "'Joint CLECs' refers collectively to Covad 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)."

² This Brief represents the position of Joint CLECs and does not attempt to represent the position of Qwest.

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

⁴ Hrg. Ex. Q-2.

⁵ As the particulars of the Order (such as specific language modifications, if any) may affect the analysis, Joint CLECs would need to review the Order before finally indicating whether they would terminate based upon a modification.

proposed Settlement, other recommendations would be objectionable and potentially result in termination.

This brief will focus on three topics.

First, Joint CLECs clarify that neither the TRRO nor the Settlement Agreement are self effectuating with respect to additions or changes to Qwest's wire center non-impairment or tier designations.

Second, Joint CLECs discuss the Staff Recommendations contained in the Executive Summary of Staff Testimony,⁶ including a discussion of how those recommendations would interact with the intended operation of the Settlement Agreement.

Third, the Joint CLECs discuss the anticipated availability of the proposed Settlement Agreement, if approved, to other CLECs.

II. DISCUSSION

1. NEITHER THE TRRO NOR THE SETTLEMENT AGREEMENT ARE SELF EFFECTUATING.

This docket was opened as the result of a CLEC request that the Commission address issues arising from the FCC Triennial Review Remand Order ("TRRO"), including approval of Qwest's wire center lists.⁷ The TRRO is not self-effectuating,⁸

⁶ Hrg. Ex. S-4.

⁷ See Joint CLEC February 5, 2006 request.

⁸ Tr. p. 120, lines 3-17 (Denney).

contrary to Qwest's assertions during the hearing.⁹ Instead, the first two sentences of paragraph 233 of the TRRO reads:

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.¹⁰

In addition, the Settlement Agreement proposed by the Parties is not self effectuating because it contemplates Commission review and approval of Qwest's proposed wire center non-impairment or tier designations in all cases, whether or not there are objections to Qwest's proposed list.¹¹ Section VI(F)(2) (and its subparts) of the Settlement Agreement addresses the situation when no objections are filed with respect to Qwest's proposed wire center non-impairment or tier designations. In particular, Section VI(F)(2)(a) makes clear that a Commission order is required before a wire center is added to the list:

In the event no objections to Qwest filing are filed with the Commission, the Parties agree that they will, within thirty (30) days of the Effective Date of the Non-Impairment Designations, **jointly request an expedited order** designating as non-impaired the facilities identified in the Qwest filing, **if no order has been received.** [emphasis added]

Section VI(F)(3) (and its subparts) of the Settlement Agreement addresses the situation when there is an objection to Qwest's proposal. This section states:

If a CLEC or any other party disputes Qwest's proposed non-impairment designations, the Parties agree to ask the Commission to use its best efforts to resolve such dispute within 60 days of the date of the objection.

⁹ Tr. p. 52, lines 4-6 (Albersheim).

¹⁰ *In re Unbundled Access to Network Elements*, FCC 04-290, WC Docket No. 04-313 and CC Docket No. 01-383, Order on Remand (rel. Feb. 4, 2005) (footnotes deleted).

¹¹ See Tr. p. 121, line 23 through 122, line 1 (Denney) and Tr. p. 149, lines 1-10 (Denney).

In no situation would a wire center receive a non-impairment or tier designation without approval from this Commission.

2. STAFF RECOMMENDATIONS

A. Staff Comment / Recommendation Number One: Negotiations and the Public Interest (Hrg. Ex. S-4, Staff, Executive Summary and pp. 1-2.)

Staff states that the proposed settlement agreement, as filed, is not in the Public Interest.¹² The intent of the Joint CLECs is to be party to a settlement in this matter only if the resolution is in the public interest. By filing the Notice of Joint Filing and Amended Motion for Order Approving Settlement Agreement and requesting Commission approval, the Parties recognized that the proposed Settlement Agreement must meet a public interest test to obtain Commission approval before any implementation.¹³

Staff recommends that, in order to consider the proposed settlement agreement, in the public interest, certain modifications or clarifications are needed.¹⁴ Staff's proposed modifications and clarifications are discussed below.

B. Staff Comment / Recommendation Number Two: Vintage of Data (Hrg. Ex. S-4, Staff, Executive Summary and p. 3.)

“Staff recommends utilization of 2004 ARMIS 43-08 Data.”¹⁵ Staff “believes the 2004 ARMIS 43-08 data should be utilized. Staff recommends such modification to the

¹² Hrg. Ex. S-4, Staff, p. 2, lines 18-19.

¹³ Hrg. Ex. Joint CLEC-1, pp. 3-4.

¹⁴ Hrg. Ex. S-4, Staff, p. 2, lines 19-20.

¹⁵ Hrg. Ex. S-4, Staff, Executive Summary, ¶2, p. i.

agreement.”¹⁶ Although not expressly stated in the proposed Settlement Agreement, 2004 ARMIS 43-08 data were used in determining the Initial Wire Center List for purposes of settlement.¹⁷ As recognized by Staff, “Qwest and the Joint CLECs explained that 2004 ARMIS Data was the base information to which adjustments were made for the selection of the initial set of Non-Impaired Wire Centers.”¹⁸ Joint CLECs anticipate no objection if such a modification were made to the proposed Settlement Agreement of the Parties.¹⁹

C. Staff Comment / Recommendation Number Three: Non-recurring Charge, Conversions, and Customer Impact (Staff Testimony, Executive Summary, p.4.)

“Staff believes the \$25 non-recurring conversion charge, in Section IV, is just and reasonable.”²⁰ Staff states that “Staff initial recommendation was zero but given that negotiation is a process of compromise since Qwest and the Joint CLECs have agreed to the proposed rate, Staff believes the charge is just and reasonable.”²¹ The non-recurring charge in Section IV is a negotiated²² rate among the Parties to the proposed Settlement Agreement. The negotiated rate is about halfway between Qwest’s litigation position of \$50.00 and the Joint CLECs’ position that no charge, or only a minimal charge, should apply.²³

¹⁶ Hrg. Ex. S-4, Staff, p. 3, lines 14-15.

¹⁷ Hrg. Ex. Joint CLEC-1, p. 4, lines 10-12. See also Tr. p. 167, lines 4-10 (Fimbres).

¹⁸ Hrg. Ex. S-4, Staff, p. 3, lines 11-13.

¹⁹ Hrg. Ex. Joint CLEC-1, p. 4, lines 15-17. See also, Tr. p. 183, lines 2-4 (Fimbres).

²⁰ Hrg. Ex. S-4, Staff, Executive Summary, ¶3, p. i.

²¹ Hrg. Ex. S-4, Staff, p. 4, lines 22-24.

²² See 47 U.S. C. §252(a)(1). See also paragraph VII(B) of the proposed Settlement Agreement.

²³ Hrg. Ex. Joint CLEC-1, p. 5, lines 11-13.

If by “just and reasonable,” the Staff is referring to any pricing or TELRIC standard, the Joint CLECs disagree with the suggestion, if any, that a \$25.00 non-recurring charge (“NRC”) may be adopted as a cost-based rate. The \$25.00 rate applicable to the Parties to the proposed Settlement Agreement, if it is approved, is specifically the result of that “process of compromise.”²⁴ Paragraph VII(B) specifically provides that the proposed Settlement Agreement “is made only for settlement purposes and does not represent the position that any Party would take if this matter is not resolved by agreement” and that it may not be used as evidence. For example, the fact that the Parties to the proposed Settlement Agreement are willing to compromise on \$25 cannot be used as evidence to support a finding that \$25 is a generally applicable just and reasonable or cost-based rate or as evidence that zero is not an appropriate rate.²⁵ Paragraph IV(C) provides that the Parties may disagree as to the amount of the applicable non-recurring charge after three years from the Effective Date of the proposed Settlement Agreement, and each Party reserves all of its rights with respect to the amount of charges after that date.²⁶ In later seeking a cost-based rate, a Party would be prejudiced by a finding in this matter – based on an agreement that is *not* to be used as evidence and is to set *no* precedent – that \$25 is a cost-based rate.²⁷ If a cost-based rate is set in this matter, it needs to be set on the merits of the underlying case (in which both the Staff and Joint CLECs proposed an NRC of zero²⁸). If the negotiated rate is accepted as part of the

²⁴ Hrg. Ex. S-4, Staff, p. 4, lines 22-23.

²⁵ Tr. p. 158, lines 4-12 (Denney).

²⁶ 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.

²⁷ Hrg. Ex. Joint CLEC-1, p. 6, lines 9-12.

²⁸ Hrg. Ex. S-4, Staff, p. 4, line 22.

proposed Settlement Agreement, it needs to be accepted as the compromise by the Parties that it is.

Staff also “believes that the public interest requires clarification on customer impact to explain why customer impact is no longer a concern.”²⁹ Staff adds that the “Joint CLECs’ concerns may have been alleviated since Qwest has explained that ‘...after processing more than 1400 conversions to UNEs to Qwest alternative services there have been no issues raised by CLECs regarding customer harm.’”³⁰

However, customer impact remains a concern for the reasons provided in the Joint CLEC Direct Testimony.³¹ Nothing in the proposed Settlement Agreement authorizes Qwest to use its proposed method of conversion³² or precludes the Commission from ruling on the manner of conversion in another matter. Joint CLECs raised customer impact concerns in the course of discussing the conversion charge and how, if Qwest appropriately treats the conversion as a billing change, adverse customer impact may be avoided.³³ The Joint CLECs were willing to discuss procedures in this proceeding or in interconnection agreement negotiations.³⁴ Since then, the Joint CLECs reached a proposed Settlement Agreement with Qwest in this proceeding that does not address the

²⁹ Hrg. Ex. S-4, Staff, p. 4, lines 17-19. See also, Tr. p. 172, line 22 through p. 173, line 4 (Fimbres).

³⁰ Hrg. Ex. S-4, p. 4, lines 15-17.

³¹ Hrg. Ex. Joint CLEC-2, pp. 54-65.

³² See Tr. p. 119, lines 20-24 (Denney); and Hrg. Ex. Joint CLEC-1, p. 7, fn 21.

³³ See, e.g., Hrg. Ex. Joint CLEC-1, p. 56, lines 6-8 (“The ‘conversion of a UNE into a private line is not a network facility issue – it is an issue with Qwest’s internal systems and how Qwest plans to move the billing for the facility from one system to another system.”); *id.* p. 57, lines 3-5 (“There is no reason why a CLEC’s end user customer should be placed at risk. However the process by which Qwest plans on implementing this billing change, which includes a record change to the circuit ID, does just that.”). See also Tr. p. 137, lines 19-24 (Denney).

³⁴ See, e.g., Hrg. Ex. Joint CLEC-1, p. 54, lines 3-5 (“CLECs are willing to develop those procedures bi-laterally with Qwest in interconnection agreement negotiations or as part of this proceeding.”). See also Tr. p. 119, lines 15-19 (Denney).

manner of conversion, leaving the subject open for ICA negotiation and consideration in other proceedings.³⁵

For example, Eschelon and Qwest negotiated regarding this issue in ICA negotiations until reaching impasse and then brought the issue to arbitration. The arbitrated ICA language will be available to other CLECs for opt-in under Section 252(i) of the federal Act. The manner of conversions is addressed in Issues 9-43 and 9-44 in the Qwest-Eschelon interconnection agreement (“ICA”) arbitration pending before this Commission.³⁶ If the proposed agreement is approved in this docket and Eschelon's position for Issues 9-43 and 9-44 is adopted in the ICA arbitration, Qwest will be able to charge a rate (negotiated in this case) that is high compared to the minimal amount of work (*i.e.*, repricing) advocated by Eschelon in the arbitration to perform the conversion. For example, if Qwest takes the position that the compromise rate includes the cost of changing the circuit ID, then Eschelon will as part of its compromise on the rate pay the cost of changing the circuit ID even though the circuit ID will not change under Eschelon's proposed ICA language.³⁷ The rate is a negotiated³⁸ rate only. To the extent that Qwest claims that it incurs any costs (such as associated with use of a new USOC for repricing), Qwest will receive ample compensation, pursuant to a rate to which it has agreed. That Eschelon has agreed to such a high rate illustrates that Eschelon's primary

³⁵ See Tr. p. 118, line 20 through p. 119, line 24 (Denney); and Hrg. Ex. Joint CLEC-1, p. 7, lines 11-14.

³⁶ Docket Nos. T-03406A-06-0572; T-01051B-06-0572 (Arbitration Issue Nos. 9-43 and 9-44). The NRC for the conversion is arbitration Issue 9-40. If the proposed Settlement Agreement is approved, the rate of \$25.00 and accompanying language will be used in the new Qwest-Eschelon ICA (closing Issue 9-40). If it is not approved, Issue 9-40 will remain open pending resolution of this docket on the merits. See Joint Motion of Eschelon and Qwest for Single Compliance Filing of the Interconnection Agreement and, if Granted, a Revised Schedule, Docket Nos. T-03406A-06-0572; T-01051B-06-0572 (June 20, 2007).

³⁷ Hrg. Ex. Joint CLEC-1, p. 8, lines 6-14.

³⁸ See 47 U.S.C. §252(a)(1).

concern when proposing a repricing manner of conversion is not the rate but the potential impact of any conversion on customers.³⁹

Moreover, although Staff's concern about customer impact arose the context of the "conversion process,"⁴⁰ the Joint CLECs also addressed concerns about customer impact with respect to blocking or rejection of orders.⁴¹ Paragraph 234 of the TRRO⁴² provides that, upon receiving a request for access to a dedicated 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.⁴³

³⁹ Hrg. Ex. Joint CLEC-1, p. 8, lines 17-19.

⁴⁰ Hrg. Ex. S-4, Staff, p. 4, line 11.

⁴¹ See, e.g., Hrg. Ex. Joint CLEC-2, p. 51, lines 10-14 ("The FCC's position is eminently sensible. The service to the customer comes first and it should not be jeopardized. If the CLEC is mistaken about the status of the wire center, Qwest can seek redress and back bill the CLEC for the difference between the UNE rate and the Private Line rate. If Qwest is mistaken about the status of a wire center, no harm is done to the end-user customer.").

⁴² 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").

⁴³ See Settlement Agreement Attachment B, ¶2.0.B; Attachment C, ¶9.1.13.4; Attachment D, ¶2.0.B.

D. Staff Comment / Recommendation Number Four: Methodology (Staff Testimony, Executive Summary, pp. 5 and 7.)

“Staff sees the need for additional clarification regarding the methodology in section V.B (Collocation)” and staff identifies two proposed changes.⁴⁴ 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 Parties.”⁴⁵ Staff recommended that “Regardless of the data vintage, affiliated fiber-based collocators should not be counted separately if their legal affiliation exists at the date of a Commission Order designating a wire center as non-impaired.”⁴⁶ In addition, with respect to Paragraph VI(E)(1), Staff recommends that the “timing of the affiliated, fiber-based collocator information . . . must also be properly addressed in this section.”⁴⁷ These recommendations are consistent with the definition of fiber-based collocator.⁴⁸ Joint CLECs do not anticipate objecting to these proposed modifications, if adopted.⁴⁹

Staff’s second proposed change to methodology states that the “amount of time allowed for the CLECs to respond to a letter from Qwest concerning the fiber-based collocation status of Carriers is ‘. . . no less than 10 business days . . .’ Staff continues to believe that 60 days is an appropriate period.”⁵⁰ The 10-day period is set forth in the Methodology Section, in Paragraph V(B)(4), of the proposed Settlement Agreement.

⁴⁴ Hrg. Ex. S-4, Staff, Executive Summary, ¶4, p. i.

⁴⁵ Hrg. Ex. S-4, Staff, Executive Summary, ¶4(a), p. i.

⁴⁶ Hrg. Ex. S-4, Staff, p. 5, lines 13-16.

⁴⁷ Hrg. Ex. S-4, Staff, p. 7, lines 1-4.

⁴⁸ Tr. p. 14, line 4 through p. 15, line 24 (Denney).

⁴⁹ Hrg. Ex. Joint CLEC-1, p. 11, lines 10-11.

⁵⁰ Hrg. Ex. S-4, Staff, Executive Summary, ¶4(b), p. i.

Staff appears to indicate that “two weeks is simply inadequate”⁵¹ as a period of time for responding to a claim by Qwest that a collocator is a fiber-based collocator. Paragraph V(B)(4) provides that the 10-day period is for the purpose of providing “feedback to this information before Qwest files its request.” It may start a dialogue and may assist in avoiding unnecessary filings, but it has no preclusive effect. In other words, per the terms of the proposed Settlement Agreement, failing to provide “feedback” during the 10-day period does not mean that the collocator cannot object once Qwest makes its filing with the Commission.⁵²

Further, Section VI of the proposed Settlement Agreement contains provisions that should clarify this concern over methodology. Section VI addresses future Qwest filings to request Commission approval of non-impairment designations and additions to the Commission-approved wire center list. At least two of the provisions of Section VI go to Staff’s concern about the ability of CLECs to respond regarding potential status as a fiber-based collocator. First, Paragraphs VI(E)(1)(e) and (f) require Qwest to provide supporting data to the Commission and CLECs that have signed a protective agreement copies of any responses to the Qwest letter sent to collocator(s) identified by Qwest as fiber-based and all written correspondence between Qwest and those collocator(s). As this information will be filed with the Commission, Staff and parties (including the identified collocator and CLECs other than the identified collocator) will have an opportunity to review and respond to the information at that time. Second, Paragraph VI(F)(1) provides that a “CLEC or any other party” may raise objections to Qwest’s request with the Commission. There is no limitation on the nature of the objection that

⁵¹ Hrg. Ex. S-4, Staff, p. 6, lines 1-3.

⁵² Hrg. Ex. Joint CLEC-1, p. 12, lines 2-6.

would preclude a collocator from objecting at this time. Section V deals with feedback before Qwest's request for Commission approval; Section VI deals with review and responses after Qwest files its request for approval.⁵³ In Utah, for example, a collocator provided feedback after Qwest made its request for Commission approval, and Qwest modified its request based upon the feedback once received.⁵⁴ The Commission may review proposed non-impairment or tier designations either as a result of objections filed with the Commission by any party (whether or not a signatory to the proposed Settlement Agreement), including Staff,⁵⁵ or on its own motion.⁵⁶

If, despite these provisions, Staff continues to believe that clarification is needed, Joint CLECs do not anticipate objecting to this proposed modification, if adopted.⁵⁷

E. Staff Comment / Recommendation Number Five: Annual Maximum for Requests Based on Line Counts (Staff Testimony, Executive Summary and p. 6.)

Staff states, "Staff does not see a need for the section VI.A.2 restriction which only allows Qwest to file a request for additional 'non-impaired wire centers based in whole or part upon line counts at any time up to July 1 of each year.'"⁵⁸

⁵³ See Tr. p. 145, line 8 through p. 146, line 15 (Denney).

⁵⁴ In Utah, Qwest initially sought approval for the Midvale wire center based on business line counts and fiber-based collocations. After filing its request with the Commission, Qwest filed a letter stating: "Prior to filing its petition, and as part of its normal validation process, Qwest sought confirmation from all fiber-based collocating CLECs. Qwest received a response from one 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).

⁵⁵ See, e.g., Paragraphs VI(F)(1) & VI(F)(5) (both: "a CLEC or any other party").

⁵⁶ See, e.g., Paragraph VI(F)(2) ("unless the Commission orders otherwise").

⁵⁷ Hrg. Ex. Joint CLEC-1, p. 13, lines 8-9.

Staff cites no legal basis for objection to this provision in Paragraph VI(A)(2) but only indicates that Staff “does not see a need” for it.⁵⁹ Paragraph VI(A)(2) is mutually agreed upon among the Parties to the proposed Settlement Agreement and is integral to the compromise reached.⁶⁰ The paragraph provides for a measure of contractual certainty as the Joint CLECs are engaging in business planning necessary to offer terms to their own customers, which requires them to factor in UNE availability when planning for the associated costs, risks, etc.⁶¹ In addition, Qwest’s position is that it can only use ARMIS data for this purpose. As ARMIS data is available on an annual basis, the annual time period is consistent with Qwest’s claim that it must use ARMIS data. The line counts should be current. Particularly in the event of declining line counts, Qwest should not use old line counts. The annual time period helps ensure use of current data, as Qwest is relying upon ARMIS data that is only available as of December 31st each year.⁶²

3. CLECs MAY CHOOSE TO OPT-IN OR PURSUE THEIR OWN TERMS, IF THE SETTLEMENT AGREEMENT IS APPROVED

Staff recommends that “the non-impairment assignments for wire centers apply to all carriers.”⁶³ As recognized by Staff, Joint CLECs have previously pointed out that there is “no provision in the proposed Settlement Agreement stating that it binds all CLECs.”⁶⁴ Although Qwest’s litigation position was that it wanted an order that binds

⁵⁸ Hrg. Ex. S-4, Staff, Executive Summary, ¶4, p. i.

⁵⁹ Hrg. Ex. S-4, Staff, p. 6, lines 16-22.

⁶⁰ Hrg. Ex. Joint CLEC-1, p. 14, lines 4-6.

⁶¹ Hrg. Ex. Joint CLEC-1, p. 15, lines 6-9.

⁶² Hrg. Ex. Joint CLEC-1, p. 15, lines 9-15.

⁶³ Hrg. Ex. S-4, Staff, p. 7, lines 18-19. This particular recommendation does not appear in the Executive Summary to Staff Testimony.

⁶⁴ Hrg. Ex. S-4, Staff, p. 7, lines 13-15.

all CLECs,⁶⁵ both Qwest and the Joint CLECs are now asking the Commission for approval of the proposed Settlement Agreement with respect to the Parties that have executed the proposed Settlement Agreement. As Qwest has pointed out, Paragraph VII(B) “provides that the agreement is a settlement of controversy, no precedent is established; the agreements is for settlement purposes only. It shall not be used as evidence or for impeachment in any proceeding before the Commission or any other administrative or judicial body except for future enforcement.”⁶⁶ Specifically, Paragraph VII(B) states: “No precedent is established by this Settlement Agreement, whether or not approved by Commissions.” Regardless of whether the proposed Settlement Agreement is sent to CLECs for comment,⁶⁷ no precedent is set even if approved by the Commission. Using a proposed settlement agreement among certain Parties to decide the merits of the underlying issues as to all carriers, however, would be using the proposed agreement as evidence for a ruling that would set a precedent for other carriers.⁶⁸ Under Paragraph VII(B), an order applicable to all CLECs, if any, has to be made without regard to the terms of the proposed Settlement Agreement (*i.e.*, on the merits). In contrast, an order approving the proposed Settlement Agreement as to the executing Parties provides other CLECs with an opportunity to opt in to its terms under Paragraph VII(A)(4) without relinquishing their Section 252 rights to instead negotiate and arbitrate their own terms.

⁶⁵ See proposed Settlement Agreement (fifth “Whereas” clause, stating Qwest’s positions from its petition for a Commission investigation).

⁶⁶ *Id.* p. 8, lines 10-16.

⁶⁷ See Hrg. Ex. S-4, Staff, 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.

⁶⁸ Hrg. Ex. Joint CLEC-1, p. 16, lines 8-11.

Though parties initially brought these issues to the Commission for a decision, as with any proposed settlement, the settlement presents a compromise different from the initial litigation position of the parties.⁶⁹ In this case, the proposed Settlement Agreement is very clear that, absent agreement, the Parties' positions would be different (*i.e.*, "The Settlement Agreement . . . does not represent the position that any Party would take if this matter is not resolved by agreement."). As indicated above, Paragraph VII(B) precludes the use of the Settlement Agreement generally as evidence. The only evidence on the merits (as opposed to a compromise) is the evidence submitted earlier by the parties to the proceeding. If the proposed Settlement Agreement is rejected or terminated, that evidence is on the record and will then be considered as to the merits. If the proposed Settlement Agreement is approved as to the Parties, other CLECs will have an opportunity to opt in to its terms under Paragraph VII(A)(4), while maintaining their Section 252 rights to instead negotiate and arbitrate their own terms.⁷⁰

For example, a CLEC which has currently executed the TRRO amendment (so a \$50 NRC is applied) may simply execute Exhibit B or Exhibit D⁷¹ and obtain instead the lower \$25 rate⁷² -- without expending any of its own or administrative resources on litigating the rate. Or, the CLEC has the right, under Sections 251 and 252, to pursue a

⁶⁹ Hrg. Ex. Joint CLEC-1, p. 17, lines 1-3.

⁷⁰ See e.g. Tr. p. 123, line 20 through p. 124, line 4 (Denney).

⁷¹ Exhibit B is for CLECs who have already executed a TRRO amendment. Exhibit D is for CLECs who do not yet have an executed TRRO amendment. In addition, the language of Exhibit C is available for use in a new ICA, for CLECs negotiating new ICAs (instead of amending their old ICAs).

⁷² 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>. See also Tr. p. 141, lines 12-15 (Denney) and Tr. p. 196, lines 9-17 (Fimbres).

cost-based rate. Practical obstacles exist to pursue the latter course, due to the time and expense of actively participating in an arbitration or cost case (which may potentially explain why some CLECs executed an amendment applying a \$50 rate instead of contesting the rate in this or other dockets). When these obstacles to pursuing a different rate for non-executing CLECs are combined with the number of executing CLECs (which are generally the more active CLECs in regulatory proceedings), there may be little likelihood on these particular facts that any additional regulatory proceedings will occur regarding the issues addressed in the proposed Settlement Agreement. Therefore, the proposed Settlement Agreement, although only approved as to the Parties to that agreement, would serve to minimize future disputes.⁷³

Staff's recommendation specifically relates to the initial Commission-Approved Wire Center List. It appears to go to the issues, with respect to non-executing CLECs, of (1) whether non-executing CLECs may challenge wire centers even though they are on the initial list; and (2) whether Qwest may make UNEs unavailable for wire centers that are on the initial Commission-Approved Wire Center List. The first issue is addressed in the previous paragraph. The non-executing CLECs that do not take advantage of Exhibits B, C, or D, would have the right to challenge the list,⁷⁴ although the practical obstacles of doing so (when the much easier course of opting-in is available to them) may make that unlikely.⁷⁵

⁷³ Hrg. Ex. Joint CLEC-1, p. 17, line 18 through p. 18, line 12.

⁷⁴ 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).

⁷⁵ Hrg. Ex. Joint CLEC-1, p. 19, lines 2-5.

The second issue may be based at least in part on a concern that Qwest would impose a longer list of wire centers on non-executing CLECs (making more UNEs unavailable to them). One way to view this is that non-executing CLECs have the option of avoiding that result by taking advantage of Exhibit B, C, or D to obtain the initial Commission-Approved Wire Center List for themselves. If, however, the Staff is suggesting that Qwest ought to commit to not imposing on other CLECs a list longer than the Commission-Approved Wire Center List, Qwest is a party to the proposed Settlement Agreement and, per that agreement, has agreed to use the Commission-Approved Wire Center List. So, Qwest may be willing to do so (though Qwest would need to indicate whether that is the case). A modification that would appear to capture this concern would provide that Qwest would not impose non-impairment designations or wire centers that are not reflected in the Commission-Approved Wire Center List upon any CLEC, regardless of whether the CLEC executed the proposed Settlement Agreement (or language to that effect). To the extent that this requirement would apply to Qwest's actions and Qwest indicates it would not terminate based on such a requirement, Joint CLECs would not anticipate objecting to such a proposed modification, if adopted.⁷⁶

III. CONCLUSION

The Joint CLECs respectfully request that the Commission approve the proposed Settlement Agreement among the Parties. Alternatively, if the Commission chooses to modify the proposed Settlement Agreement, such as in a manner consistent with the

⁷⁶ Hrg. Ex. Joint CLEC-1, p. 19, line 6 through p. 20, line 2.

Staff's recommendations, the Joint CLECs have provided information regarding their position as to Paragraph VII(C) for the Commission's consideration.

RESPECTFULLY SUBMITTED this 13th day of December, 2007.

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