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BEFORE THE ARIZONA CORPORATION C
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COMMISSIONERS

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

2007 DEC 20 P 3:46

AZ CORP COMMISSION
DOCKET CONTROL

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 NO. T-03632A-06-0091
T-03406A-06-0091
T-03267A-06-0091
T-03432A-06-0091
T-04302A-06-0091
T-01051B-06-0091

**NOTICE OF POST-HEARING BRIEF
ERRATA FILING**

On December 19, 2007, the Arizona Corporation Commission ("Commission") Staff filed its Post-Hearing Brief in the above-captioned matter. Staff has made several minor corrections to its Brief and has attached a substitute Brief containing the revisions to this Notice.

RESPECTFULLY SUBMITTED this 20th day of December 2007.

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Original and thirteen (13) copies
of the foregoing were filed this
20th day of December, 2007 with:

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Arizona Corporation Commission
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Raymond Christensen

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 **COMMISSIONERS**

3 MIKE GLEASON, Chairman
4 WILLIAM A. MUNDELL
5 JEFF HATCH-MILLER
6 KRISTIN K. MAYES
7 GARY PIERCE

8 IN THE MATTER OF THE APPLICATION OF
9 DIECA COMMUNICATIONS DBA COVAD
10 COMMUNICATIONS COMPANY,
11 ESCHELON TELECOM OF ARIZONA, INC.,
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**POST-HEARING BRIEF OF COMMISSION
STAFF**

15 **I. INTRODUCTION.**

16 This proceeding stems from the FCC's Triennial Review Remand Order ("TRRO") released
17 on February 4, 2005. In the underlying Triennial Review Order ("TRO") released on August 21,
18 2003, the FCC established criteria for determining which unbundled network elements ("UNEs") had
19 to be made available by Incumbent Local Exchange Carriers ("ILECs") to Competitive Local
20 Exchange Carriers ("CLECs") under Section 251(c) of the Telecommunications Act of 1996
21 ("Federal Act"). Large portions of that Order were overturned by the D.C. Circuit Court of Appeals.
22 The FCC then issued the TRRO in response to the D.C. Circuit Court of Appeal's decision.

23 The Joint CLECs¹ and Qwest Corporation ("Qwest") submitted a Settlement Agreement
24 which resolves many of the disputed issues in this case. The Commission Staff was an active party in
25 this proceeding, but is not a signatory to the Agreement. The Staff believes the Settlement
26 Agreement is in the public interest with certain clarifications and modifications discussed herein.

27 ¹ The Joint CLECs in Arizona consist of DIECA Communications, Inc., doing business as Covad Communications
28 Company, Mountain Telecommunications, Inc., Eschelon Telecom of Arizona, Inc., McLeodUSA
Telecommunications Services, Inc., and XO Communications Services, Inc. Other CLECs signing the Agreement
and encompassed within the definition of "Joint CLECs" contained in the Agreement include Onvoy, POPP.Com,
and US Link, Inc. d/b/a TDS Metrocom, Inc.

1 **II. BACKGROUND AND PROCEDURAL HISTORY.**

2 The FCC issued its Report and Order in its third Triennial Review proceeding on August 21,
3 2003.² The FCC's Triennial Review proceedings are designed to examine the Section 251(c)(3)
4 requirement that ILECs make elements of their networks available on an unbundled basis to new
5 entrants at cost-based rates. The FCC found in the TRO that a requesting carrier is impaired when
6 lack of access to a network element of an ILEC would pose a barrier or barrier to entry, including
7 operational and economic barriers, that are likely to make entry into a market uneconomic. States
8 were assigned the task of making more granular determinations regarding whether impairment was
9 present given market conditions within the markets in the State at issue. The TRO was affirmed in
10 part, reversed in part and remanded to the FCC for further consideration. The D.C. Circuit Court of
11 Appeals ruled that the FCC could not delegate its authority to make impairment determinations to the
12 State.

13 Thereafter, on February 4, 2005, the FCC issued its remand order, the TRRO.³ That Order
14 established that CLECs were no longer impaired without unbundled network switching. This spelled
15 the demise of what was known as the Unbundled Network Element-Platform, or UNE-P. UNE-P is
16 the equivalent of all of the elements needed to provide Plain Old Telephone Service ("POTs") and
17 interexchange access. The FCC further established certain criteria for determining whether CLECs
18 were impaired without access to other unbundled network elements. If a finding of impairment is
19 made for a particular Qwest Wire Center for an unbundled network element or UNE, the CLEC is
20 entitled to TELRIC pricing for the UNE pursuant to Section 252(d) of the Federal Act.

21 On February 15, 2006, the Joint CLECs filed a request with the Commission to address issues
22 arising from the FCC's TRRO, including approval of Qwest Non-Impaired Wire Center Lists.
23
24
25

26 ² See *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers;*
27 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline*
28 *Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147 (rel. August
21, 2003)("TRO").

³ *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of*
Incumbent Local Exchange Carriers; CC Docket No. 01-0338, Order on Remand, (Released February 4,
2005)("TRRO").

1 A Procedural Order dated June 2, 2006 established a schedule for the filing of testimony and
2 for a hearing in this matter in October, 2006. Testimony was filed by all of the parties, including
3 Commission Staff. Thereafter, Qwest and the Joint CLECs requested a postponement of the hearing
4 so that they could undertake settlement negotiations. On May 31, 2007, Qwest and the Joint CLECs
5 indicated during a telephonic procedural conference that a settlement had been reached. On June 22,
6 2007, the Joint CLECs and Qwest filed a Joint Motion for Approval of Settlement Agreement and
7 Narrative Supporting Agreement.

8 On July 29, 2007, a procedural conference was held. Staff witness Armando Fimbres filed
9 testimony regarding the Settlement Agreement on September 10, 2007. Qwest and the Joint CLECs
10 filed responsive testimony on September 28, 2007. A hearing on this matter was held on October 30,
11 2007.

12 Following is Staff's Brief on the Settlement Agreement filed by Qwest and the Joint CLECs
13 in this matter.

14 **III. ARGUMENT.**

15 **A. The Public Interest Standard of Review Applies.**

16 During the hearing on this matter, Qwest argued that the Commission's review of this matter
17 was limited to whether the Settlement Agreement complies with the provisions of the TRRO. Staff
18 believes that Qwest is attempting to inappropriately limit or narrow the Commission's review in this
19 case. In addition to determining whether the Settlement complies with the provisions of the TRRO,
20 the Commission should review the Agreement to ensure that it is consistent with the public interest.
21 This is consistent with Arizona law and the Commission's review of settlement agreements that have
22 come before it in the past.

23 This is also consistent with how the Joint CLECs view the Commission's standard of review
24 in this case. Joint CLEC witness Douglas Denney stated the following in his pre-filed testimony:

25
26 "The intent of the Joint CLECs is to be party to a settlement in this matter
27 only if the resolution is in the public interest. By filing the Notice of Joint
28 Filing and Amended Motion for Order Approving Settlement Agreement
and requesting Commission approval, the Parties recognized that the

1 proposed Settlement Agreement must meet a public interest test to obtain
2 Commission approval before any implementation.”

3 **B. Certain Portions of the Settlement Agreement Require Clarification.**

4 Before discussing those portions of the Settlement Agreement that Staff believes should be
5 clarified and/or modified, a brief overview of the Settlement Agreement follows. The Settlement
6 Agreement provides non-impairment designations for the initial set of proposed Wire Centers in
7 Arizona, Colorado, Minnesota, Oregon, Utah and Washington.⁴

8 The Settlement Agreement is divided into seven sections. Sections I and II are the
9 Introduction and Definitions. Sections III through VII consist of the following:

- 10 Section III: Initial Commission –Approved Wire Center List
11 Section IV: Non-Recurring Charge for Conversions Using the Initial Wire Center List and
12 for Future Commission-Approved Additions to that List.
13 Section V: Methodology
14 Section VI: Future Qwest Filings to Request Commission Approval of Non-Impairment
15 Designations and Additions to the commission-Approved Wire Center List.
16 Section VII. Other Provisions

17 **1. Section II of the Agreement may need to be reconciled with Commission
18 processes.**

19 At the hearing on this matter, an issue arose with respect to the definition of the Effective
20 Date of Non-Impairment Designations. There was concern that the parties’ definition of Effective
21 Date of Non-Impairment Designations may subvert normal Commission processes. Both parties
22 indicated in data responses to Commission Staff on this issue, that the Settlement Agreement was not
23 intended to replace normal Commission review and approval processes that would apply with respect
24 to filings that are made with the Commission. The Commission should review this portion of the
25 Agreement and Section VI(F) for consistency with Commission processes.

26 **2. Section III of the Settlement Agreement should be clarified to specify the
27 vintage of the data used to determine the initial list of non-impaired wire
28 centers.**

Section III of the Settlement Agreement identifies the initial set of Qwest Non-Impaired Wire
Centers which are listed in Attachment A of the Agreement. Those designations are retroactive to
March 11, 2005.⁵ It also provides the effective date of the initial set of Non-Impaired Wire Centers

⁴ Armando Fimbres Settlement Test. (Ex. S-1) at 2.

⁵ Armando Fimbres Settlement Test. (Ex. S-1) at 3.

1 which the Commission is being asked to approve, along with the Settlement Agreement. However,
2 Staff witness Fimbres pointed out in his testimony that this section of the Agreement is silent with
3 respect to the vintage of the data used to determine the initial list of non-impaired Qwest Wire
4 Centers.⁶ Staff believes that it is important that the Agreement be clarified to include the vintage of
5 data used to make the initial non-impairment designations. In response to Staff Data Requests on the
6 Agreement, Qwest and the Joint CLECs explained that 2004 ARMIS Data was the base information
7 utilized to derive the initial set of non-impaired Qwest Wire Centers.⁷

8
9 During the hearing on this matter, both Qwest and the Joint CLECs stated that this would not
10 be a material modification of the Agreement such that they might exercise their right to withdraw
11 from the Agreement. Joint CLEC witness Douglas Denney also stated in his pre-filed testimony that
12 “Joint CLECs anticipate no objection if such a modification were made to the proposed Settlement
13 Agreement of the Parties.”⁸ The Commission should require that the Agreement be clarified to
14 include the vintage of the data used to determine the initial list of non-impaired Wire Centers.

15 **3. Section IV of the Agreement does not address the conversion process
16 which was a disputed issue.**

17 Section IV of the Agreement lists the terms and conditions that will apply to the conversion of
18 UNEs to Qwest alternative services in Wire Centers that are designated as non-impaired by the
19 Commission.⁹ First, the parties have agreed upon a \$25 non-recurring conversion charge for a period
20 of three years.¹⁰ While Staff’s initial recommendation was zero, Staff recognizes that the Agreement
21 is a product of negotiation and compromise. Given that there is agreement between Qwest and the
22 CLECs on the rate, Staff believes that the charge is reasonable.¹¹ Staff’s use of the term “just and
23 reasonable” was not meant to make reference to a specific pricing standard such as TELRIC.¹² Staff
24 recognizes that the rate is the product of “compromise.”

25 ⁶ *Id.*

26 ⁷ *Id.*; *Accord*, Douglas Denney Response Test. (Ex. JC-1) at 4.

27 ⁸ Douglas Denney Response Test. (Ex. JC-1) at 4.

28 ⁹ Armando Fimbres Settlement Test. (Ex. S-1) at 4.

¹⁰ Douglas Denney Response Test. (Ex. JC-1) at 5.

¹¹ *Id.*

¹² Joint CLEC witness Denney expressed concern in his pre-filed testimony that Staff may be referring to a pricing standard. *Id.* at 5.

1 Joint CLEC witness Douglas Denney also stated in his pre-filed testimony that “[t]he
2 negotiated rate is about halfway between Qwest’s litigation position of \$50.00 and the Joint CLEC’s
3 position that no charge, or only a minimal charge, should apply.”¹³
4

5 However, Staff has a more general concern about this section of the Agreement. During the
6 underlying proceeding, the Joint CLECs expressed great concern regarding the amount of customer
7 harm that could result from the conversion process.¹⁴ Yet the Agreement is silent with respect to the
8 conversion process itself.

9 During the hearing on this matter and in its testimony, Qwest offered the following
10 observation. Qwest relies primarily upon the fact that it has processed more than 1,500 conversions
11 of UNEs to Qwest alternative services and there have been no issues raised by CLECs regarding
12 customer harm.¹⁵

13 However, in his pre-filed testimony, Joint CLEC witness Douglas Denney stated the
14 following:

15 “...[C]ustomer impact remains a concern for the reasons provided in my
16 previous testimony. Nothing in the proposed Settlement Agreement
17 authorizes Qwest to use its proposed method of conversion [Cite omitted]
18 or precludes the Commission from ruling on the manner of conversion in
19 another matter. Joint CLECs raised customer impact concerns in the
20 course of discussing the conversion charge and how, if Qwest appropriately
21 treats the conversion as a billing change, adverse customer impact may be
22 avoided. [Cite omitted]. The Joint CLECs were willing to discuss
23 procedures in this proceeding or in interconnection negotiations. [Cite
24 omitted]. Since then, the Joint CLECs reached a proposed Settlement
25 Agreement with Qwest in this proceeding that does not address the manner
26 of conversion, leaving the subject open for ICA negotiation and
27 consideration in other proceedings.”¹⁶

28 At the hearing, Mr. Fimbres also stated that he was not reassured by the following passage
29 from Mr. Denney’s testimony:

30 “Qwest’s conversion procedures were announced unilaterally by Qwest in
31 non-CMP Qwest ‘TRRO’ notices of changes to its PCAT. Qwest
32 previously said that it would update its SGATs and deal with TRO/TRRO
33 issues in CMP, but did not do so. (See, e.g., June 30, 2005 CMP minutes,

34 ¹³ Douglas Denney Response Test. (Ex. JC-1) at 5.

35 ¹⁴ Settlement Test. of Armando Fimbres at 4.

36 ¹⁵ Tr. at 24.

¹⁶ Douglas Denney Response Test. (Ex. JC-1) at 7.

1 stating "...as SGAT language changes, we will have a comment period and
2 that the States will engage you when decisions are made. Cindy also said
3 that PCAT changes will brought through the CMP," available at
4 http://www.qwest.com/wholesale/cmp/cr/CR_PC102704-1ES.htm.) Qwest
5 also would not negotiate these terms in ICA negotiations, so that the manner
6 of conversion became an arbitration issue between Eschelon and Qwest
7 (discussed below). Qwest's conversion terms are merely a proposal by
8 Qwest, as they were not mutually developed. [Cites omitted].¹⁷

9 Joint CLEC witness Mr. Douglas Denney also opines that since the matter is now being
10 negotiated in the Qwest-Eschelon ICA arbitration proceeding, other CLECs may opt into the specific
11 conditions and language ultimately approved by the Commission.¹⁸ However, Staff does not believe
12 that this is necessarily sufficient since, unless offered to other CLECs as an amendment to their
13 current ICA, other CLECS would not be able to derive the benefit until their existing ICAs with
14 Qwest expire or terminate.

15 Qwest and the Joint CLECs have not provided adequate assurance that this Section of the
16 Agreement as it now stands is in the public interest, given earlier testimony on this issue regarding
17 the potential harm to CLEC customers.

18 **4. Section V of the Agreement is in need of clarification.**

19 Section V of the Settlement Agreement outlines the methodology that will be used to support
20 future filings by Qwest when seeking additional Non-Impaired Wire Center designations.

21 Staff witness Fimbres raised several concerns regarding this section of the Agreement and the
22 need for clarification. First, Section V.B. (Collocation) requires clarification with respect to the
23 determination of affiliated, fiber-based collocators.¹⁹ Staff believes that the Agreement should
24 provide an inclusive date-range for the determination of affiliated, fiber-based collocators.²⁰ In
25 earlier testimony filed in this case, Staff had taken the position that "[r]egardless of the data vintage,
26 affiliated fiber-based collocators should not be counted separately if their legal affiliation exits at the
27 date of a Commission Order designating a wire center as non-impaired."²¹ As Mr. Fimbres noted,

28 ¹⁷ *Id.* at 6.

¹⁸ Douglas Denney Response Test. (Ex. JC-1) at 7.

¹⁹ Settlement Test. of Armando Fimbres (Ex. S-1) at 5.

²⁰ *Id.*

²¹ Armando Fimbres Rebuttal Test. (Ex. S-3) at 13.

1 taking into account the affiliated status of companies is important and such information is readily
2 available from the public record.²²

3 Joint CLEC witness Douglas Denney provided the following pre-filed testimony regarding
4 Staff witness Fimbres' recommendation:

5 "Staff recommended that 'Regardless of the data vintage, affiliated
6 fiber-based collocators should not be counted separately if their legal
7 affiliation exists at the date of a Commission Order designating a wire
8 center as non-impaired. [Cite omitted]. In addition, regarding
9 Paragraph VI(E)(1), staff recommends that the 'timing of the affiliated,
10 fiber-based collocator information ... must also be properly addressed in
11 this section.' [Cite omitted]. These recommendations are consistent
12 with the definition of fiber-based collocator. Joint CLECs do not
13 anticipate objecting to these proposed modifications, if adopted."²³

14 A second concern noted by Staff witness Fimbres was with respect to the time period
15 contained in the Agreement for CLECs to respond to a letter from Qwest concerning the fiber-based
16 collocation status of carriers.²⁴ The Agreement provides for a 10 day turn-around time by the CLEC
17 to provide feedback before Qwest files its request. Staff believes that this period of time is too short
18 and recommends that the CLECs have 60 days to respond given the importance of the information to
19 the non-impairment determination.²⁵

20 While Joint CLEC witness Doug Denney discusses other safeguards in the rules which would
21 allow CLEC objections or the information ultimately submitted by Qwest to the Commission to be
22 questioned²⁶, Staff still believes that the initial 10 day period of time is insufficient. A longer period
23 of time would ensure more accurate information in the end. During the hearing, Staff witness
24 Fimbres testified that given the importance of the issues in this proceeding, a 10-day turn-around time
25 constituted a "rush-to-judgment."²⁷ In matters of such importance, constructive time devoted at the
26 beginning of the process should eliminate the need for corrective actions at a later time in the process.

27 ...

28 ...

26 ²² *Id.* at 5.

27 ²³ Douglas Denney Response Test. (Ex. JC-1) at 10.

28 ²⁴ *Id.*

²⁵ *Id.* at 6.

²⁶ *See Id.* at 10-11.

²⁷ Tr. at 186-187.

1 **5. Section VI should be clarified with respect to fiber-based collocation**
2 **information and related process steps.**

3 This section of the Agreement provides and explains the processes for future filings by Qwest
4 when seeking additional, Non-Impaired Wire Center designations. Section VI.A.2 of the Agreement
5 allows Qwest to file a request for additional “non-impaired wire centers based in whole or part upon
6 line counts at any time up to July 1 of each year, based on prior year line count data” thus restricting
7 filings in the second-half of each year.²⁸ Staff believes that Qwest should have the opportunity to file
8 for additional non-impaired wire centers without the restriction of having to do so before July 1 of
9 each year. Staff believes that the Agreement should be modified to allow Qwest to file once a year
10 but at such time as Qwest deems appropriate as long as Qwest provides the appropriate data
11 consistent with the methodologies described in the final Agreement and approved by the
12 Commission.²⁹

13 Joint CLEC witness Doug Denney responded in his pre-filed testimony that the July 1st
14 deadline is mutually agreed upon and integral to the compromise reached.³⁰ He also stated the
15 following:

16 “The paragraph provides for a measure of contractual certainty as the
17 Joint CLECs are engaging in business planning necessary to offer
18 terms to their own customers, which requires them to factor in UNE
19 availability when planning for the associated costs, risks, etc. In
20 addition, Qwest’s position is that it can only use ARMIS data for this
21 purpose. As ARMIS data is available on an annual basis, the annual
22 time period is consistent with Qwest’s claim that it must use ARMIS
23 data. The line counts should be current. Particularly in the event of
24 declining line counts, Qwest should not use old line counts. The
25 annual time period helps ensure use of current data, as Qwest is
26 relying upon ARMIS data that is only available as of December 31st
27 of each year.”³¹

28 Notwithstanding, the CLECs concern about current data, Staff still believes that Qwest should
29 have the flexibility or discretion to choose its filing date; but that it be allowed to make a filing only
30
31

27 ²⁸ *Id.*

28 ²⁹ *Id.*

29 ³⁰ Douglas Denney Response Test. (Ex. JC-1) at 12.

30 ³¹ *Id.* at 12-13.

1 once a year. No matter what particular date Qwest chooses, Qwest is going to use annual ARMIS
2 data so the date of filing should really not matter.

3 This section of the Agreement also needs to be clarified with respect to the determination of
4 affiliated, fiber-based collocator information as discussed above.³²

5 **6. Section VII of the Agreement also is in need of clarification.**

6 This section of the Agreement contains information regarding the application of the
7 Settlement Agreement to other CLECs. In response to a Staff data request, the Joint CLECs stated
8 that “[t]here is no provision in the proposed Settlement Agreement stating that it binds all CLECs.”
9 Mr. Denney further testified that: “Although Qwest’s litigation position was that it wanted an order
10 that binds all CLECs, [Cite omitted], both Qwest and the Joint CLECs are now asking the
11 Commissions for approval of the proposed Settlement Agreement with respect to the Parties that have
12 executed the proposed Settlement Agreement.”³³

13 While only certain CLECs signed onto the Agreement, the Agreement’s provisions will
14 ultimately affect all CLECs operating in Arizona. In other words, the Commission would not want to
15 use different criteria to determine non-impaired wire-centers for CLECs that did not sign on to the
16 Agreement. Therefore, Staff believes that the Agreement’s provisions will necessarily extend or
17 impact to non-signatory CLECs as well.³⁴

18 At the hearing, Qwest noted that all active CLECs on the service list were provided with a
19 copy of the Settlement Agreement and notified of the hearing on the matter. Staff acknowledges that
20 all CLECs with operating authority in Arizona were initially apprised of this Docket and that many
21 CLECs chose not to actively participate. Staff also acknowledges that active CLECs were provided
22 with a copy of the Settlement Agreement and notified of the hearing on the matter. However, since
23 the Settlement Agreement is likely to impact all CLECs operating in Arizona, the Staff believes that
24 that further notice and opportunity for comment of 60 days is appropriate for inactive CLECs as well
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28 ³² *Id.* at 7.

³³ Douglas Denney Response Test. (Ex. JC-1) at 13.

³⁴ *Id.*

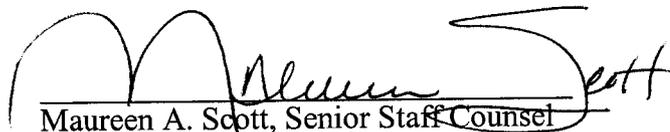
1 since they will be impacted by the Agreement.³⁵ Otherwise, such carriers will be impacted by the
2 Commission's Order and Settlement Agreement but will not have had an opportunity for comment.

3 The Joint CLECs stated that they have no objection to sending the Agreement out to other
4 CLECs for comment.³⁶

5 **IV. CONCLUSION.**

6 Staff believes the Settlement Agreement should be modified or clarified as discussed above,
7 and that with such clarifications and/or modifications it is in the public interest and should be
8 approved by the Commission.

9 RESPECTFULLY SUBMITTED this 20th day of December 2007.

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21 20th day of December, 2007 with:

22 Docket Control
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27 this 20th day of December, 2007 to:

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29 ...
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31 _____
32 ³⁵ Armando Fimbres Settlement Test. (Ex. S-1) at 7-8.

33 ³⁶ Douglas Denney Response Test. (Ex. JC-1) at 14.

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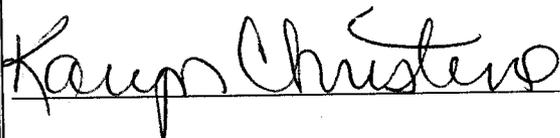
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