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EXCEPTION

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

DOCKET NOS. T-03632A-04-0603
T-01051B-04-0603

QWEST CORPORATION'S
EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S
ORDER DENYING QWEST'S
MOTION TO DISMISS FOR LACK OF
JURISDICTION

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Qwest Corporation ("Qwest") submits these exceptions to the Order of the
Administrative Law Judge issued December 2, 2008 that denies Qwest's motion to dismiss for
lack of jurisdiction.

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I. Introduction

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This matter arises from a commercial agreement between Qwest and Covad
Communications Company ("Covad") under which Qwest provides a service known as line
sharing. Line sharing provides Covad with access to the high frequency portion of loops,
permitting Covad to use that portion of a loop to offer wireline broadband Internet services to its
Arizona customers. In an order known as the *Triennial Review Order* issued in 2003, the FCC
removed line sharing from the unbundled network elements ("UNEs") that incumbent local

1 exchange carriers ("ILECs") like Qwest are required to provide to competitive local exchange
2 carriers ("CLECs") pursuant to the network unbundling obligations imposed by Section
3 251(c)(3) of the Telecommunications Act of 1996 ("the Act" or "the 1996 Act").¹ The FCC
4 determined that because access to the high frequency portion of the loop is available from
5 multiple sources other than ILECs, eliminating the ILECs' obligation to provide the service will
6 not impair CLECs in seeking to offer services to their customers.² The FCC's elimination of line
7 sharing from the unbundling requirements of Section 251 removes this element from the
8 regulatory scheme of the 1996 Act, as line sharing also is not included in the only other provision
9 of the Act – Section 271 – that imposes network unbundling requirements.

10 Notwithstanding the absence of any legal obligation under the 1996 Act to make line
11 sharing available to CLECs, Qwest continued to provide this service to CLECs after the *TRO*
12 through voluntary, negotiated commercial agreements. Qwest and Covad entered into such an
13 agreement on April 24, 2004 (the "Arrangements Agreement"), and Qwest submitted the
14 Agreement to this Commission shortly thereafter for informational purposes. In its submission,
15 Qwest stated that it was not submitting the agreement for approval under the provision of the Act
16 – Section 252(e) – that authorizes state commissions to approve or reject interconnection
17 agreements.³ As Qwest explained in the submission, the "interconnection agreements" subject to
18 review under that section are limited to agreements for the services that ILECs are required to
19 provide under Sections 251(b) and (c). Because the FCC has removed line sharing from Section
20 251(c), the Arrangements Agreement is not an interconnection agreement and is not subject to
21 review by the Commission under Section 252.

22 In response to Qwest's submission, the Commission's Staff filed the Arrangements
23

24 ¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local*
25 *Exchange Carriers*, 18 F.C.C.R. 16978 at ¶ 258 (August 21, 2003) ("*TRO*"), *vacated in part,*
remanded in part, U.S. Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

25 ² *Id.* at ¶ 259.

26 ³ Section 252(e)(1) provides that "[a]ny interconnection agreement adopted by negotiation or
arbitration shall be submitted for approval to the State commission."

1 Agreement with the Commission's Docket Control and requested that the Commission review
2 the Agreement for approval or rejection under Section 252(e). Qwest then filed a motion to
3 dismiss based on the ground that the Commission is without jurisdiction over agreements for
4 services like line sharing that the FCC has removed from Section 251. In an Order issued
5 December 2, 2008, the ALJ denied Qwest's motion to dismiss, while also ruling that whether the
6 Arrangements Agreement is an interconnection agreement subject to Commission review under
7 Section 252 still depends upon whether the line sharing service provided under the Agreement is
8 for the provision of "information services" or "telecommunications services."⁴ The Order directs
9 Qwest and Covad "to provide additional information" to permit that determination.⁵ If it is found
10 that line sharing is provided under the Agreement to permit Covad to offer a telecommunications
11 service, the Order contemplates that the Agreement will be subject to review by the Commission
12 under Section 252.⁶

13 As explained below, the determination that the Commission may have jurisdiction over
14 the Arrangements Agreement is not correct, and the Order denying Qwest's motion to dismiss
15 should not be approved. First, the Order posits incorrectly that Covad could use the line sharing
16 provided under the Arrangements Agreement to provide a "telecommunications service," and
17 that it is therefore possible that the Agreement is an "interconnection agreement" subject to the
18 Section 252 filing requirement. However, the FCC has ruled that the digital subscriber line
19 ("DSL") services that are facilitated by line sharing and used to access the Internet are not
20 telecommunications services. This determination precludes a finding that the Arrangements
21 Agreement is subject to the Section 252 filing requirement, because the requirement applies only
22 to "telecommunications services."

23 Second, the Order conflicts with *Qwest v. Arizona Corporation Commission*,⁷ in which
24

25 ⁴ Order at ¶ 48.

⁵ *Id.* at ¶ 52.

⁶ *Id.*

⁷ 496 F.Supp.2d 1069 (D. Ariz. 2007).

1 the United States District Court for Arizona ruled that the Commission's authority under the Act
2 to regulate network elements is limited to the UNEs that ILECs are required to provide under
3 Section 251(c)(3). Because the FCC has removed line sharing from Section 251(c)(3) and from
4 the 1996 Act's regulatory scheme altogether, the federal district court's decision establishes that
5 the Commission is not authorized to approve or reject the terms under which Qwest provides that
6 network element.

7 Third, the Order conflicts with *Qwest v. Montana Public Service Commission*⁸ in which
8 the United States District Court for Montana ruled that the Arrangements Agreement – the same
9 agreement at issue here – is not subject to review under Section 252 because line sharing is not a
10 Section 251 service. Finally, the Order runs afoul of the FCC's pronouncement that "only"
11 agreements containing Section 251(b) or (c) obligations are subject to review by state
12 commissions under Section 252.⁹

13 For these reasons and those set forth below, Qwest respectfully requests that the
14 Commission grant these exceptions and, in turn, grant the motion to dismiss this proceeding.

15 II. Argument

16 A. Line Sharing Is Not Used For "Telecommunications Services," And The 17 Arrangements Agreement Therefore Cannot Be An "Interconnection Agreement" Subject To The Section 252 Filing Requirement.

18 The ALJ's Order correctly recognizes that wireline broadband Internet access services
19 and wireline broadband technologies used to provide Internet access services are "information
20 services" and are not "telecommunications services."¹⁰ The Order also accurately concludes that
21 the Arrangements Agreement is not subject to the Section 252 filing requirement if the line
22 sharing service described in the Agreement is for the purpose of providing an information
23

24 ⁸ *Qwest Corp. v. Schneider*, CV-04-053-H-CSO, 2005 U.S. Dist. LEXIS 17110 (D. Mont. 2005).
25 ⁹ Memorandum Opinion and Order, *In the Matter of Qwest Communications International, Inc.*
26 *Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of*
Negotiated Contractual Arrangements under Section 252 (a)(1), WC Docket No. 02-89, 17 FCC
Rcd. 19337, ¶ 8, n.26 (Oct. 4, 2002) ("*Declaratory Order*") (emphasis added).

¹⁰ Order at ¶ 45.

1 service. This conclusion, the Order correctly concludes, flows from the fact that the Section 252
2 filing requirement applies only to "interconnection agreements" that are, by definition,
3 agreements "for the provision of telecommunications services."¹¹

4 After properly setting forth this legal framework, however, the Order takes a wrong turn
5 by positing that the line sharing provided under the Arrangements Agreement could be for the
6 purpose of providing something other than an information service. However, line sharing is a
7 wireline technology provided for the purpose of facilitating Internet access, and under the FCC's
8 rules, it is therefore used for the purpose of providing an information service. As described by
9 the FCC, line sharing requires ILECs "to share their telephone lines with competitive providers
10 of high-speed Internet access, namely digital subscriber line (DSL) services."¹² The requirement
11 for ILECs to provide line sharing was specifically designed to facilitate easier access to the
12 Internet, as the FCC made clear when it stated that "[I]ine sharing eliminates the need for
13 consumers to obtain a second phone line when they choose a company other than the incumbent
14 LEC for high-speed access to the Internet."¹³

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16
17 In its *Wireline Broadband Order* issued in 2005, the FCC ruled that DSL transmission
18 service used for Internet access is not a telecommunications service.¹⁴ As demonstrated, line
19 sharing is specifically defined as the use of the high frequency portion of a loop to provide DSL

20
21 ¹¹ *Id.* at ¶ 49. Under the 1996 Act, interconnection agreements are only available for
22 "telecommunications carriers," which are carriers that are providing telecommunications
23 services. Section 153(44) Act defines a "telecommunications carrier" as "any provider of
24 telecommunications services."

25 ¹² FCC Press Release, Docket Nos. CC 98-147, CC 96-98, 2001 FCC LEXIS 417 (Jan. 22,
26 2001). *See also Newton's Telecom Dictionary* at 552 (24th Ed. 2008) (With line sharing "[a]
DSL provider cuts a deal with an ILEC to run DSL service for Internet access purposes over the
same local loop that the ILEC, or voice CLEC, uses for voice service.) (emphasis added).

¹³ *Id.*

¹⁴ *In the Matter of Appropriate Framework for Broadband Access to Internet Order Wireless
Facilities, et al.*, CC Docket No. 02-33, et al., FCC 05-150, Report and Order and Notice of
Proposed Rulemaking (Sept. 25, 2005) ("*Wireline Broadband Order*").

1 service for Internet access purposes. Under the *Wireline Broadband Order*, therefore, the service
2 supported by line sharing is not a telecommunications service.¹⁵

3 Because it is established as a matter of law that line sharing is used to provide an
4 information service, not a telecommunications service, the Commission should rule now that the
5 Arrangements Agreement is not subject to the Section 252 filing requirement. There is no need
6 for "additional information" from the parties relating to this issue. Instead of conducting an
7 evidentiary proceeding to obtain additional information, as the ALJ recommends, the
8 Commission should conserve its resources and those of the parties by ruling that as a matter of
9 law, the Section 252 filing requirement does not apply to the Arrangements Agreement.
10

11 **B. The Order Is Inconsistent With The Limitations On The Commission's Authority
12 Recognized In *Qwest v. Arizona Corporation Commission*.**

13 In *Qwest v. Arizona Corporation Commission*, the United States District Court for
14 Arizona established the starting point for the Commission's review of whether particular services
15 offered by an ILEC are subject to state regulation under the 1996 Act. The threshold inquiry is
16 whether a specific provision of the Act expressly authorizes the state commissions to regulate the
17 matter:

18 Regulating local telecommunications competition under the 1996 Act no
19 longer is a lawful or permissible activity for a state. Rather, it is an
20 activity in which states and state commissions are not entitled to engage
21 except by express leave of Congress.¹⁶

22 Related to this ruling, the district court also held that with respect to network elements,

23 ¹⁵ The fact that line sharing is used for a service that is not a telecommunications service further
24 confirms that line sharing is not covered by the 1996 Act. Under the Act, a "network element"
25 (as distinguished from the "*unbundled* network elements" addressed in Section 251(c)(3)) is
26 defined as "a facility or equipment used in the provision of a telecommunications service." 47
C.F.R. § 51.5. Line sharing is not within this definition because it is not used to provide a
telecommunications service.

¹⁶ 496 F.Supp.2d at 1076.

1 the Act limits the authority of this Commission and other state commissions to regulating only
2 the UNEs that ILECs are required to provide under Section 251(c)(3) of the Act. Thus, the court
3 held that the Act does not grant authority to this Commission to impose terms in an
4 interconnection agreement under which Qwest would be required to provide access to network
5 elements that the FCC had eliminated from the unbundling obligations of Section 251(c)(3).¹⁷
6 The court emphasized that "it is not the ACC's role to impose such requirements in an ICA *so*
7 *that they may thereafter be monitored by the state.*"¹⁸

8 These binding rulings from the Arizona district court show that Qwest's motion to
9 dismiss should be granted and that the line sharing agreement is outside the purview of Section
10 252. Indeed, the issue in the *Qwest v. Arizona Corporation Commission* case is essentially the
11 same as the one here, and that is whether the state commissions may require non-251 elements to
12 be regulated though the Section 252 filing requirement for interconnection agreements – the
13 court said "No." Under the federal court's decision, Qwest's motion to dismiss must be granted if
14 the Commission does not have an express grant of authority to regulate the line sharing element
15 that is the subject of the agreement between Qwest and Covad. Absent such a grant of authority,
16 there is no legal basis upon which line sharing, in the words of the court, "may thereafter be
17 monitored by the state." State commissions indisputably have no authority to regulate line
18 sharing and, therefore, the Commission does not have jurisdiction to approve or reject the terms
19 and conditions under which Qwest provides that network element.

20 In the *Triennial Review Order*, the FCC removed line sharing from list of UNEs that
21 ILECs are required to provide under Section 251(c)(3). In doing so, the FCC explained that
22 CLECs are now able to obtain line sharing from other CLECs and from cable providers and
23 therefore are not competitively impaired without mandated access to that element from ILECs.¹⁹
24 The FCC emphasized that continuing the regulation of line sharing in the form of mandatory

25 ¹⁷ *Id.* at 1075-77.

26 ¹⁸ *Id.* at 1077 (emphasis added).

¹⁹ *TRO*, at ¶ 258.

1 unbundling under Section 251 would "skew competitive LECs' incentives," discourage
2 "innovative arrangements between voice and data competitive LECs," and discourage "product
3 differentiation" in the competitive offerings of ILECs and CLECs.²⁰

4 Upon the FCC's removal of line sharing from Section 251, any authority this Commission
5 had to regulate that element ended. This is confirmed by the district court's ruling in *Qwest v.*
6 *Arizona Corporation Commission* and by other federal court decisions establishing that the only
7 network elements over which state commissions have jurisdiction are those that are within the
8 unbundling obligations of Section 251(c)(3).²¹ This limiting principle was reaffirmed just three
9 weeks ago in a decision from the Seventh Circuit holding that state commissions are without
10 authority to regulate non-251 elements and are specifically without authority to regulate the
11 network elements that Bell Operating Companies ("BOCs") provide under Section 271.²²

12 And, there also is no state commission jurisdiction under Section 271. As the district
13 court held in *Qwest v. Arizona Corporation Commission*, state commissions have no authority to
14 regulate the network elements that BOCs provide under Section 271. But even if the
15 Commission had such authority, line sharing is not among the elements that BOCs must provide
16 under Section 271 and is thus not subject to regulation under either Section 251 or 271. In *Dieca*
17 *Communications, Inc. v. Florida Public Service Commission*,²³ the court rejected Covad's
18 contention that line sharing is among the network elements that BOCs must provide under
19 Section 271 and is therefore subject to regulation by state commissions.²⁴

20 The fact that line sharing is neither a Section 251 UNE nor a Section 271 network
21 element distinguishes this case from *Qwest v. Public Utilities Commission of Colorado*,²⁵ a non-
22 binding decision from the 10th Circuit that the Order relies upon in denying Qwest's motion to

23 ²⁰ *Id.* at ¶ 261.

24 ²¹ *See, e.g., Bellsouth Telecommunications, Inc. v. Georgia Pub. Serv. Commission*, Nos. 1:06-
CV-00162-CC, 1:06-CV-00972-CC, 2008 WL 4999187, at *5 (N.D. Ga. Jan. 3, 2008).

25 ²² *Illinois Bell Tel. Co. v. Box*, Nos. 08-1489, 08-1494, Slip op. at 8-11 (7th Cir. Nov. 26, 2008).
²³ 447 F.Supp.2d 1281 (N.D. Fla. 2006).

26 ²⁴ *Id.* at 1288-89.

²⁵ 479 F.3d 1184 (10th Cir. 2007).

1 dismiss. In that case, the parties expressly entered into the commercial agreement at issue
2 "pursuant to Section 271," and the agreement involved a service that was being provided
3 pursuant to that section. In concluding that Qwest was required to file the agreement with the
4 Colorado and Utah Commissions for review under Section 252, the court relied on the
5 conclusion that a network element used to provide the service – shared transport – is "a network
6 element that Qwest is providing on an unbundled basis."²⁶ According to the court, the FCC has
7 concluded that "a lack of access to shared transport impairs a CLEC's ability to provide services"
8 and is "related to the ILEC's § 251(c)(3) duty to provide access to unbundled network elements
9 whose absence would impair the CLEC's ability to provide services."²⁷

10 Here, in contrast to the Tenth Circuit's conclusion about shared transport in *Qwest v.*
11 *Public Utilities Commission of Colorado*, the FCC and the courts have expressly found that line
12 sharing is not a UNE under Section 251 or a mandated network element under Section 271 and
13 that ILECs have no obligation at all under the 1996 Act to provide that facility. It is thus
14 established as a matter of law that a lack of access to line sharing does not impair a CLEC's
15 "ability to provide services." Accordingly, the Tenth Circuit's ruling relating to the shared
16 transport at issue in that case does not apply, because line sharing is not "related to the ILEC's §
17 251(c)(3) duty to provide access to unbundled network elements."

18 The only federal court that has addressed the precise question presented in this case has
19 ruled that there is no requirement to file a commercial agreement involving line sharing – *the*
20 *same agreement at issue here* – under Section 252. In *Qwest v. Montana Public Service*
21 *Commission*,²⁸ the Montana district court reversed the Montana Commission's determination that
22 the line sharing agreement was subject to the Section 252 filing requirement. The court ruled
23 that because the FCC has eliminated the ILECs' former obligation to provide line sharing as a

24
25 ²⁶ 479 F.3d at 1194.

26 ²⁷ *Id.* at 1194 (emphasis in original).

²⁸ *Qwest Corp. v. Schneider*, CV-04-053-H-CSO, 2005 U.S. Dist. LEXIS 17110 (D. Mont. 2005).

1 UNE under Section 251, the line sharing commercial agreement does not relate to Section 251
2 and therefore is not subject to the Section 252 filing requirement.²⁹

3 The Montana court observed that two provisions in Section 252 impose a requirement to
4 file interconnection agreements with state commissions, and it ruled that the line sharing
5 commercial agreement does not come within either provision. First, Section 252(a)(1) provides
6 that voluntarily negotiated agreements entered into "pursuant to Section 251" must be filed with
7 state commissions for approval under Section 252(e)(1). The court ruled that because "line
8 sharing is not a service or element provided pursuant to section 251," the line sharing
9 commercial agreement was not entered into "pursuant to Section 251" and is therefore not
10 subject to this filing requirement.³⁰ Second, Section 252(e)(1) requires submission to state
11 commissions of any "interconnection agreement adopted by negotiation" The court held
12 that this provision refers back to the voluntary agreements described in Section 252(a)(1) which,
13 again, are limited to interconnection agreements involving services provided "pursuant to section
14 251" and therefore do not include the line sharing agreement.³¹

15 In further support of this ruling, the court relied on the FCC's clear pronouncement that
16 that under Section 252, carriers are required to file only agreements that contain Section 251(b)
17 and (c) duties: "[W]e find that *only* those agreements that contain an *ongoing obligation relating*
18 *to section 251(b) or (c)* must be filed under section 252(a)(1)."³² The court found that this

19 ²⁹ *Id.* at * 20.

20 ³⁰ *Id.* at * 21.

21 ³¹ *Id.* In *Qwest Corporation v. Public Utilities Commission of Colorado*, the Tenth Circuit
22 expressed disagreement with the Montana court's interpretation of the Section 252 filing
23 requirement. 479 F. 3d at 1197. However, the Tenth Circuit did not purport to rule upon the
24 filing standard for an agreement relating to a service that, like line sharing, is not within any of
25 the unbundling requirements of the 1996 Act. Moreover, the Tenth Circuit specifically premised
26 its holding in that case on its conclusion that switching and shared transport are network
elements "used in the provision of telecommunications service." *Id.* at 1193. As discussed
above, the line sharing service addressed in the Arrangements Agreement is not for the provision
of a telecommunications service.

³² Memorandum Opinion and Order, *In the Matter of Qwest Communications International, Inc.*
Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of
Negotiated Contractual Arrangements under Section 252 (a)(1), WC Docket No. 02-89, 17 FCC
Rcd. 19337, ¶ 8, n.26 (Oct. 4, 2002) (emphasis added).

1 statement – consistent with the language of Section 252 – plainly limits the Section 252 filing
2 requirement to interconnection agreements containing Section 251 obligations and that the
3 Montana Commission had improperly ignored this "clear language."³³ Relatedly, the court
4 emphasized that its ruling "is consistent with the intent of the [1996 Act]" and Congress's goal of
5 promoting competition by removing unnecessary impediments to commercial agreements
6 entered between ILECs and CLECs"³⁴

7 The ALJ's order denying Qwest's motion to dismiss fails to give effect to the decision of
8 the Montana court and, instead, applies the reasoning of the Tenth Circuit in *Qwest v. Public*
9 *Utilities Commission of Colorado* to the line sharing agreement. As described above, however,
10 the regulatory status of line sharing is fundamentally different from that of the shared transport
11 element that the Tenth Circuit considered, and that difference should have caused the ALJ to be
12 guided by the Montana decision. Indeed, the ALJ recognized that line sharing is
13 "distinguishable" from the service that was at issue in the Tenth Circuit's decision and is
14 therefore "eligible for a lighter regulatory touch."³⁵ Instead of applying a lighter touch, however,
15 the ALJ concluded that the line sharing agreement may be subject to the same level of Section
16 252 review that the Act reserves for interconnection agreements involving Section 251 services.
17 That result is improper for a service that is not within the unbundling requirements of either
18 Section 251 or Section 271.

19 The ALJ's decision also cannot be reconciled with Congress's intent to establish a "pro-
20 competitive, *deregulatory*" system and the FCC's goal of encouraging carriers to enter into
21 commercial agreements under which CLECs continue to have access to network elements that
22 ILECs are no longer required to provide under Section 251(c)(3). The goal of moving the
23 telecommunications industry toward a market-driven, deregulatory system is why the FCC, in
24 explaining the Section 252 filing standard in the *Declaratory Order*, emphasized that the

25 ³³ *Schneider*, 2005 U.S. Dist. LEXIS 17110 at *21.

26 ³⁴ *Id.* at *22-23.

³⁵ Order Denying Motion to Dismiss at ¶ 45.

1 standard it adopted strikes a "statutory balance" between preserving meaningful filing and
2 approval requirements and "removing unnecessary regulatory impediments to commercial
3 relations between incumbent and competitive LECs."³⁶ The ALJ's order upsets that balance by
4 potentially subjecting the terms of agreements for services that are not regulated under the 1996
5 Act to review and possible rejection by this Commission. That result will reduce the incentive of
6 carriers to enter into commercial agreements, thereby undermining a basic purpose of the Act.

7 For these reasons, the Commission should adopt the reasoning of the Montana federal
8 court and grant Qwest's motion to dismiss.

9 **III. Conclusion**

10 For these reasons, Qwest respectfully requests that the Commission grant these
11 exceptions and, in turn, grant the motion to dismiss this proceeding.

12
13 RESPECTFULLY SUBMITTED this 19th day of December, 2008.

14 QWEST CORPORATION

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26 ³⁶ *Declaratory Order* at ¶ 8.

1 Original and 13 copies of the foregoing
2 were filed this 19th day of December, 2008 with:

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