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AZ CORP COMMISSION
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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 REPLY
COMMENTS**

Qwest Corporation ("Qwest") submits the following comments in reply to the filings made by Covad Communications Company ("Covad"). Based on the admissions made by Covad in its filings in this docket, the Commission should find that Covad utilizes the high frequency portion of the loop ("HFPL") it purchases from Qwest under the commercial line sharing agreement (the "Arrangement Agreement") to provide an "information service." Covad has not demonstrated that it uses the HFPL to provide a "telecommunications service."

I. Procedural Posture of These Comments

In its Order denying Qwest's motion to dismiss, the Commission concluded that it did not have sufficient information to determine whether the Arrangement Agreement between Qwest and Covad is an interconnection agreement that is subject to the Commission's review under

1 Section 252(e)(1) of the Telecommunications Act of 1996 (“the Act”). The Commission ordered
2 the parties to provide additional information that would allow a determination of whether Covad
3 uses line sharing only to provide an information service and not a telecommunications service, as
4 those terms are defined by the Act. On April 14, 2009, Covad filed its “Notice of Filing
5 Compliance With Decision No. 70749” (the “Compliance Filing”). Qwest captioned its April
6 14, 2009 compliance filing as “Comments In response To Motion To Dismiss And Motion for
7 Leave to File Response Comments.” The Commission has not ruled on Qwest’s Motion for
8 Leave to File Response Comments; however, on April 20, 2009, without procedural
9 authorization, Covad filed “Response Comments.” Accordingly, Qwest submits these comments
10 in reply to Covad’s Compliance Filing and Covad’s Response Comments.

11 12 **II. Discussion**

13
14 The complete facts regarding how Covad uses line sharing are within Covad’s
15 possession, and the facts that have been disclosed demonstrate that Covad uses line sharing to
16 provide an information service. As Qwest pointed out in its initial comments, Covad bears the
17 burden of demonstrating that it uses line sharing provided under the Arrangements Agreement
18 for something other than an information service since Covad possesses the most relevant facts.
19 In order to support the position that it uses line sharing to provide a telecommunications service,
20 one would expect Covad to marshal facts regarding its service, and to examine those facts in the
21 context of the Act. But Covad has not demonstrated facts sufficient to show that its use of line
22 sharing is to provide telecommunications service as a common carrier. Covad’s Compliance
23 Filing does not analyze its services under the relevant definitions in the Act. In particular, Covad
24 fails to describe its network, its service, or most importantly, its customers' uses and applications
25 of those services.

26 Rather than providing meaningful facts and analysis, Covad’s Compliance filing merely

1 recites that it has “elected” to treat its broadband transmission service as telecommunications
2 service, citing the FCC’s Wireline Broadband Order.¹ However, this assertion is belied by
3 Covad’s own statements. Covad expressly admits in its Notice of Filing Compliance that it
4 offers DSL services using the high frequency portion of the loop.² This admission is, by itself,
5 enough to defeat any assertion that Covad is providing a telecommunications service over the
6 HFPL because the FCC has repeatedly stated that DSL is an information service.³

7 Moreover, Covad does not provide any facts or legal argument to support its purported
8 “election” to provide a telecommunications service. Covad’s description of its services consists
9 only of a listing of services by trade name (“Telesurfer” and “SOHO”), or by technology (“frame
10 relay” and “ATM”). There is no description of these services and no facts provided from which
11 it is possible to conclude that the services are anything other than information services. One
12 would expect, at a minimum, an affidavit or some other sworn statement of facts setting forth the
13 grounds upon which Covad claims that these services that use the HFPL to access the Internet
14 are telecommunications services. Instead, Covad’s filing amounts to nothing more than an
15 unsupported conclusion.

16 Covad does not refute Qwest’s contention that in each and every instance the HFPL is
17 used to access the Internet, and is therefore an information service. In fact, Covad’s submission
18 admits that every one of the products it lists is used for Internet access. Lines 6-9 at page 2 of
19 Covad’s Compliance Filing describes those products, each of which is offered over line sharing,
20 as “Internet access.” Covad confirms that its Internet access service, sold with each of the
21 services listed, “provides direct access to the public Internet.” Covad Compliance Filing, p. 2,

22 ¹ Covad’s Notice of Filing Compliance at 2-3.

23 ² *Id.* at 2.

24 ³ *In re Jurisdictional Separations and Referral to the Federal-State Joint Board, Order and*
25 *Further Notice of Proposed Rulemaking*, 21 FCC Rcd. 5516, at n.78 (2006) (describing the
26 *Wireline Broadband Order* as “classifying wireline broadband Internet access service, including
DSL Internet access service, as an information service”); *In re Development of Nationwide*
Broadband Data, Statement of Chairman Kevin J. Martin, 23 FCC Rcd. 9691 (2008) (“We have
classified DSL, BPL and Wireless broadband as ‘information services’”).

1 lines 15-16.

2 Additionally, as Qwest noted in its initial comments, Covad's claim that it provides a
3 telecommunications service requires a factual demonstration that it meets each of the legal
4 criteria that define a common carrier. The FCC has described the term "common carrier," as
5 construed by the courts, as follows:
6

7 Courts construing "common carrier" have held, inter alia, that "the
8 primary sine qua non of common carrier status is a quasi-public
9 character, which arises out of the undertaking to carry for all
10 people indifferently;" and a "second prerequisite to common
11 carrier status" is that "customers transmit intelligence of their own
12 design and choosing." Such offering of service indiscriminately to
13 the public may be either a wholesale offering to other carriers or a
14 retail offering to end users.⁴

15 Covad has failed to make that showing, either by its Compliance Filing, or by its Response
16 Comments. Covad's Compliance Filing does not address the issue at all. Its Response
17 Comments are merely a submission of price lists for various services, devoid of any terms or
18 conditions or legal argument. The price lists do not constitute proof of common carrier status.
19 Specifically, nothing in the price list establishes a "quasi-public character" or that "customers
20 transmit intelligence of their own design and choosing."

21 Covad's Compliance filing speaks of providing the services it claims are
22 telecommunications services to its "wholesale partners."⁵ Further, Covad has stated to Qwest
23 that the pricing that it extends to ISPs is confidential. Such arrangements are completely
24 inconsistent with the broadly available public offering that is essential to common carriage.

25 For the foregoing reasons, the Commission should find that Covad has not shown that it
26 uses line sharing to provide telecommunications services under the Act. In fact, all the

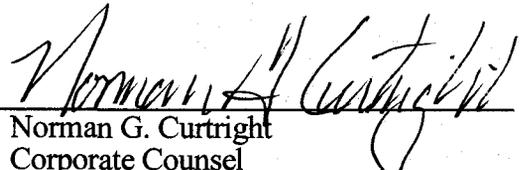
25 ⁴ *In re Salsgiver Telecom, Inc., v. North Pittsburgh Telephone Co.*, Memorandum Opinion and
26 Order, 22 FCC Red. 9285, at ¶ 8 (2007).

⁵ Covad's Notice of Filing Compliance at 2-3.

1 comments lead to a contrary conclusion.

2 RESPECTFULLY SUBMITTED this 27th day of April, 2009.

3 QWEST CORPORATION

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1 Original and 13 copies of the foregoing
2 were filed this 27th day of April, 2009 with:

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