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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONER

IN THE MATTER OF QWEST CORPORATION'S COMPLIANCE WITH SECTION 252(e) OF THE TELECOMMUNICATIONS ACT OF 1996	DOCKET NO. RT-00000F-02-0271

QWEST CORPORATION'S COMMENTS REGARDING FILING OBLIGATIONS

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INTRODUCTION

Following a motion by the Staff, the Arizona Corporation Commission (the "Commission") issued its procedural order, directing Qwest to provide comments regarding its filing obligations under Section 252 of the Telecommunications Act of 1996 (the "1996 Act") for the unfiled agreements that it provided to the Commission in March 2002 (the "Arizona Agreements"). At issue is the standard for determining what contract provisions are subject to the 90-day approval requirement of Section 252. Qwest respectfully submits that both the structure and the intent of the 1996 Act lead to the inevitable conclusion that Congress intended that the 90-day approval process apply only to rates and associated service descriptions. 1/

It is important to understand what this matter is about -- and what it is not. The issue only relates to agreements between Qwest and CLECs that the parties voluntarily negotiated among themselves. Certain of these agreements clearly are not related to interconnection at all under the Telecommunications Act of 1996 (the "1996 Act" or the "Act"). But even assuming certain of the cited provisions fall within the sphere of Section 251, the only relevant question is whether the provision is the kind of negotiated arrangement that must go through prior Commission review and approval under Section 252(a)(1) -- or not.

This is in many respects a procedural question. Not all ILEC-CLEC agreements must go through a prior approval process (a process that under the 1996 Act can take up to 90 days). Qwest submits that, in the case of negotiated ILEC-CLEC agreements, this prior approval

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1/ Accordingly, on April 23, 2002, Qwest filed a formal petition asking the FCC to issue a declaratory ruling to assist in drawing the line between agreements and provisions that are subject to section 252(a), and those that are not. A copy of Qwest's Petition is attached to this motion. (*See* Attachment 1.) The FCC has issued a scheduling order providing that interested parties are to submit opening comments on May 29, 2002, and responses are due June 13, 2002.

process is reserved for core matters of price and associated service descriptions for interconnection. We note that Section 252(a)(1) focuses on the filing of a "detailed statement of itemized charges," not any and all matters. Qwest reads Section 252(a)(1) to allow an ILEC and CLEC to agree and implement without prior review their agreements on the many other matters that arise in their relationship.

This interpretation of Section 252(a) balances congressional recognition that ILECs and CLECs need to move quickly and flexibly to deal with specific CLEC needs against the preservation of a role for regulators to review certain contract matters to foster fair competition. The 90-day prior approval process established in the statute allows Commissions to review in advance the most important ILEC-CLEC matters, especially price. At the same time, the Act reflects congressional goals that other CLEC-ILEC matters may take effect at once, without prior review.

Importantly, this procedural balancing has limited impact on other CLECs. First, it does not eliminate the ability of CLECs to ask for whatever they want from an ILEC. If the ILEC agrees, the ILEC can respond quickly, again without prior Commission review. If a dispute arises, the parties can arbitrate under a different provision of the Act, Section 252(b). That provision allows arbitration of "any open issue," not just the "schedule of charges."

Second, note that this balancing is about prior Commission review, not the substance of the ILEC-CLEC terms themselves. While AT&T raises unmerited discrimination charges, its primary argument is that the provisions at issue required prior filing and Commission approval under Section 252(a)(1). Again, Qwest submits that prior approval was not required here. But that does not mean that, to the extent an ILEC-CLEC provision falls under Section 251, it cannot be reviewed for discrimination *after* it takes effect.

It is correct that if a particular negotiated provision has not been filed under Section 252(a)(1), CLECs lack immediate notice to determine their interest in and eligibility for opting in to the provision under Section 252(i). But that is the balancing of interests that Congress made in the Act: voluntarily negotiated ILEC-CLEC core terms like pricing must be held up, and go through a notice and prior Commission approval process. But this delaying process does not apply to other voluntary ILEC-CLEC contractual arrangements. This does not mean that other CLECs cannot ask for the similar provisions -- they can ask for anything, and arbitrate "any open issue" under the separate Section 252(b). This interpretation of Section 252(a) also does not mean that negotiated ILEC-CLEC agreements cannot be reviewed by the Commission after the fact -- they can if the Commission otherwise has jurisdiction based on the subject matter of the agreement. But the balancing of the Act provides, as even AT&T must concede, that not all ILEC-CLEC contractual arrangements must go through a *prior approval* process that under the Act can take up to 90 days.

Again, Qwest has no quarrel with the fact that under Section 252(a)(1) some negotiated arrangements must be filed and approved before they take effect. Certainly, Qwest is not seeking to avoid regulatory review where it is called for by the Act. But an overbroad interpretation of Section 252(a)'s 90-day approval process can stand as an obstacle to the ability of ILECs and CLECs to organize their relationships freely, quickly, and on an individualized basis – and to modify particular terms of those relationships – to meet the fast-changing world in which they operate. This flexibility is particularly important as ILECs and CLECs need to adjust the terms of their business dealings going forward. Section 252(a) allows them to do so quickly and without prior review, so long as those matters do not relate to a "schedule of charges." At bottom, Section 252(a)(1) was not intended to create an environment in which regulators micro-managed – especially in advance –the voluntary business relations of ILECs and CLECs.

Qwest continues to believe that the provisions of the negotiated agreements at issue in this matter are not within the filing requirements of the 1996 Act, and that, at the very least, it engaged in good faith line-drawing in an attempt to apply a standard that all parties agree is unclear. As even AT&T must concede, a line must be drawn between negotiated provisions that are subject to the Section 252(a)(1) filing requirements and those that are not subject to those requirements. Moreover, there are no governing Federal Communications Commission ("FCC") precedents on this issue.

Thus, Qwest submits that, in light of the uncertainty about where to draw the line as to those contract provisions requiring prior Commission review, a clarification of the standard by the FCC is warranted, and Qwest has filed a declaratory relief petition seeking such guidance. Moreover, to the extent that the Commission is inclined to consider this issue prior to clarification by the FCC, Qwest submits that the text, legislative history of the Act, as well as other fundamental tools of statutory construction, indicate that the Section 252(a)(1) requirement was intended to preserve the basic statutory framework's emphasis on consensual negotiation of agreements, and excludes contractual provisions that are outside the Section 252(a)(1) framework. Congress did not intend to interfere with consenting ILECs' and CLECs' ability to implement contractual terms and conditions that not only serve the parties' interests but also advance local competition. Accordingly, the filing and 90-day advance approval requirements of Section 252(a) can most logically be construed to apply to those provisions that are most critical to be disclosed and subjected to a regulatory review – *i.e.*, the "detailed schedule of itemized charges for interconnection and each service or network element" referred to in Section

252(a)(1), as well as associated service descriptions. By contrast, the Department's broad and unprincipled approach --- which would either by its terms or as a practical matter require the filing of even the smallest detail having any relation to the matters covered by Section 251, and also encompass matters outside of Section 252 -- is not supported by the Act , and would *not* advance the public interest. Ironically, this result would deter the very conduct – ILEC cooperation with CLECs to meet their needs – for which Qwest has elsewhere been singled out for praise.

Miscategorizing exempt contracts as subject to the Section 252 filing and state approval procedures is contrary to the public interest and the 1996 Act, for a number of reasons. First, it imposes administrative burdens and delays on the parties, who need to file such contracts (or modifications thereof) and wait to put them into effect until receiving approval, and on state commissions that are induced to review these contracts. Second, such miscategorization undermines the incentives for ILECs to negotiate and rapidly settle issues in dispute with other carriers, contrary to the intent of the 1996 Act. Third, it threatens to upset the settled contractual expectations of parties to contracts that have not been filed, because agreements that should have been but are not filed would be null and void. Finally, the incorrect treatment of certain contracts as subject to Section 252 impedes the ability of ILECs and their competitors to develop pro-competitive and creative arrangements that would advance local competition.

Qwest submits that Section 252's filing and approval requirements do *not* apply to the types of contractual provisions at issue in the Arizona Agreements:

- contract provisions defining business-to-business dispute resolution procedures or other administrative matters that spell out the details of interactions between Qwest and its customers at a granular level;
- contract provisions that settle ongoing disputes or litigation between the parties, whether relating to resolution of differences over the ILEC's and the

interconnecting carrier's respective past performance, whether the settlement relates to interconnection agreements, billing disputes, or other matters; and

- contract provisions relating to matters that are not subject to Section 251, such as FCC-regulated interstate common carrier service, state-regulated intrastate long distance service, non-regulated services like information services, and network elements that have been found not to satisfy the statutory "necessary" or "impair" standards.

At a minimum, Qwest submits that it had a good faith basis for not filing these agreements with the Commission, and for maintaining the confidentiality expectations of its CLEC partners. Administrative details, such as whether a dispute resolution term has a six-level escalation process before litigation or a five-level process, are matters properly worked out informally by the parties and are not within the scope of regulatory review under Section 252. Both the public and other carriers are better served by permitting Qwest and CLECs to agree on processes for the implementation of specific terms rather than requiring the Commission to review, consider, and approve each implementation detail that Qwest undertakes or to which the parties agree that Qwest shall undertake.

I. SECTION 252(A)(1) OF THE 1996 ACT REQUIRES THAT A LINE BE DRAWN BETWEEN NEGOTIATED CONTRACTUAL PROVISIONS THAT ARE, AND ARE NOT, SUBJECT TO FILING AND APPROVAL REQUIREMENTS

ILECs and other carriers negotiate and agree to a wide variety of contracts covering numerous legitimate business purposes. Only some -- not all -- of the terms in these negotiated agreements are covered by the detailed procedural requirements of Section 252(a)(1). Any negotiated agreements *not* subject to those requirements become effective whenever the parties decide to put them into effect, and generally need not be disclosed to other parties. By contrast, provisions of negotiated agreements subject to Section 252(a)(1) must be filed publicly with the relevant state public utility commission or commissions. 2/ Moreover, such agreements may not take effect in each state until that state's commission has determined that the agreement is nondiscriminatory and is consistent with the public interest, convenience, and necessity. 3/

Section 252(a)(1) involves a careful balancing of interests. On the one hand, it must be read in the context of Congress's goal of establishing competition in the local exchange market under a framework that is both pro-competitive and deregulatory. 4/ The Act encourages ILECs and CLECs to resolve matters between themselves through private negotiation, without regulatory intervention. At the same time, the Act preserves a residual role for regulators to review and approve certain CLEC-ILEC contract matters, notwithstanding the resulting delays and other costs. And insofar as that review is required, the negotiated terms are available to other CLECs, in accordance with FCC rules, under Section 252(i).

The question, then, for purposes of implementing Section 252(a), is where the line should be drawn between contract terms that must go through the 90-day approval process, and those that do not. Qwest believes a line would most appropriately be drawn by taking into account the statutory language and congressional intent, and properly balancing the competing public interests in the 1996 Act. Such a line would permit normal unregulated business dealings between CLECs and ILECs in most cases. However, it would preserve prior regulatory oversight (notwithstanding the associated costs in terms of delay and the like) in a limited zone covering the most important interconnection matters.

2/ Often more than one commission is involved to the extent the agreements cover multiple states. In this regard, Qwest frequently receives and tries to accommodate requests from CLECs to negotiate multistate agreements.

3/ 47 U.S.C. § 252(e)(1) & (e)(2)(A). If the state commission fails to act, the agreement is deemed approved 90 days after filing. § 252(e)(4).

4/ Telecommunications Act of 1996, Joint Managers Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

It should be noted that a different line-drawing exercise applies to negotiated agreements subject to Section 252(a) than to arbitrated agreements subject to Section 252(b) or Statements of Generally Available Terms ("SGATs") under Section 252(f). These statutory provisions include very different procedural rules – negotiated agreements are subject to a review period of up to 90 days, while arbitrated agreements and SGATs are subject to 30-day and 60-day reviews, respectively. More significantly, as discussed below, the substantive standards spelled out in the Act for what types of terms and conditions should be submitted for the state commission's review differ for negotiated versus arbitrated agreements or SGATs, and the standards of review that the state commission should use in reviewing these agreements also vary widely. This means, first, that precedents regarding what terms and conditions must be included in arbitrated agreements or SGATs are not at all instructive with respect to the matter at issue here – the scope of terms and conditions in *negotiated* agreements that must be filed. Moreover, the Commission should keep in mind that this case solely concerns consensual, negotiated agreements between Qwest and CLECs. CLECs that are unable to reach such consensual agreements will, in all events, retain all their rights under the arbitration process to have the Commission resolve "any term" for which the CLEC is unable to conclude an agreement with Qwest.

A. The Act's Reference to "A Detailed Schedule of Itemized Charges" is the Touchstone of the 90-day Approval Process

1. Statutory Language

Qwest suggests that the touchstone of congressional intent is Section 252(a)(1)'s express reference to "a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement." If Congress did not intend to constrain the Commission's discretion in construing the scope of the filing requirement, it would have broadened the "detailed schedule" language to include other matters. Congress knows how to craft a statute to require a more comprehensive filing. Thus, the narrow statutory language regarding the minimum contents of negotiated agreements that must be filed under Section 252(a)(1) – "a detailed schedule of itemized charges for interconnection and each service or network element" – can be contrasted with the broader scope of the material that the Act requires carriers to file as tariffs pursuant to Section 203: "all charges . . . and the classifications, practices, and regulations affecting such charges," as well as "such other information . . . as the Commission may by regulation require." Of course, an arbitration under Section 252(b)(1) could cover "any open issues" – potentially an even broader category.

In light of this language, Section 252(a) can most logically be read to mean that the obstacle of a mandatory 90-day prior approval process should apply to -- and delay implementation of -- only the most significant aspects of a voluntary agreement: the rates and associated service descriptions for interconnection, services and network elements. Conversely, the mandatory approval process should not apply to other ILEC-CLEC contractual arrangements going beyond this "schedule," such as account team support, mechanics of provisioning and billing for ordered interconnection services or UNEs, or dispute resolution. This line applies whether the contractual arrangements at issue are made at the outset of an ILEC-CLEC relationship, or as a later modification of that arrangement. Either way, ILECs and CLECs should be allowed to implement most voluntary arrangements between them quickly and without regulatory cost or delay.

This reading of Section 252(a) is consistent with the fact that Section 252 itself has three different standards and processes for three different kinds of contracts: negotiated agreements, arbitrated agreements, and SGATs. In contrast to Section 252(a)'s references to a "schedule of itemized charges," Section 252(b) speaks of arbitration of "any open issues." This ensures that a CLEC always has the ability to seek contract provisions on any topic. But the scope of an arbitrated agreement does not define the boundaries of what an ILEC and CLEC can do under Section 252(a) without *mandatory* prior regulatory review.

Similarly, in an SGAT developed under Section 252(f) an ILEC may choose to address many issues, and in great detail. This approach can facilitate the administrative and substantive process of establishing interconnection agreements, and should not be discouraged. But the scope of an SGAT does not define the scope of the *mandatory* filing requirement under Section 252(a). 5/

Furthermore, it is relevant that the 90-day approval process stands in sharp contrast to other elements of Section 252 itself, and to other models present in federal communications law. For example, when an ILEC unilaterally develops an SGAT under Section 252(f), that document is subject to only a 60-day state commission approval process. Arbitration agreements developed under Section 252(b) are subject to a 30-day prior review. For that matter, under Section 211 of the Communications Act, contracts and agreements between carriers covering interstate communications historically have been subject to a filing process, but no pre-approval process at all. Such contracts can be implemented immediately upon execution. And

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5/ Similarly, the fact that an ILEC has *voluntarily* "overfiled" the terms of its negotiated agreements in the past does not answer the question of which contract terms must, as a *mandatory* matter, go through the 90-day approval process in the future. Qwest notes that uncertainty as to the scope of Section 252(a)(1) has influenced its own practices (and presumably those of other ILECs as well) with respect to the filing of negotiated agreements. Qwest has often "overfiled," submitting entire negotiated agreements containing all contractual arrangements. This is not a concession as to the scope of Section 252(a)(1)'s *mandatory* filing requirement. Moreover, ILECs and CLECs are likely to find more need to avoid such "overfiling" in the context of modifications to a contractual arrangement that a CLEC wishes to see implemented at once. Yet absent a ruling here, there is uncertainty as to where the line is drawn.

under Section 204(a)(3) of the Act, the FCC is allowed only 7 to 15 days to review an ILEC's interstate access tariff before it must be allowed to take effect. 6/

To give effect to the structure and intent of the 1996 Act, only the most significant aspects of an ILEC-CLEC relationship, "a detailed schedule of itemized charges" and associated service descriptions, must be filed and approved in advance. But other aspects of their contractual relationship can take effect without regulation.

2. Congressional Intent

This reading of Section 252(a)(1) is fully consistent with the legislative history of the 1996 Act. The Act reflects Congress's preference that ILEC-CLEC agreements be formed to the maximum extent possible through private negotiations between the parties. Thus, the Act intended a significant departure from the tariffing framework of the past, in which regulators step into the shoes of consumers (or interconnecting carriers) to establish a standard set of terms and conditions of regulated service offerings. The Act eschews a system in which regulators, in the first instance, play the most significant role in working through every aspect of the ILEC – CLEC relationship. Instead, the Act establishes a paradigm in which carriers are expected to negotiate matters of mutual interest among themselves. That is a paradigm to which Qwest in particular has sought to adhere in its dealings with CLECs. Under the Act, regulatory involvement, which imposes costs and burdens not present in normal business dealings, is to be carefully circumscribed.

In this regard, it is instructive to consider the Senate and House versions of the draft legislation that ultimately became the 1996 Act: the Senate bill (S. 652) contemplated that interconnection arrangements would be formed through voluntary negotiations, while the House

6/ 47 U.S.C. §§ 204(a)(3), 211, 252(e)(4) & (f)(3).

bill (H.R. 1555) contemplated that ILECs would submit detailed statements, analogous to traditional tariffs, for review by state commissions and the FCC. 7/ As a result of the Conference Committee negotiations, the House receded to the Senate and agreed to the Senate's version relying primarily on negotiations between ILECs and CLECs, with an added provision enabling state commissions to participate as mediators of such negotiations. 8/ In enacting a version of Section 252 drawn primarily from the Senate bill, the Congress essentially endorsed the view of the Senate Committee on Commerce, Science, and Transportation, which stated that it "intends to encourage private negotiation of interconnection agreements." 9/

Section 252(a)(1) captures this Congressional objective more than almost any other provision of the Act. It is not surprising that Section 252 itself opens by discussing negotiated agreements in subsection (a). Yet the Congressional emphasis on negotiated agreements would be undermined if all terms of all negotiated agreements had to go through a 90-day regulatory approval process.

Given the above, it is even more logical to read Section 252(a)(1) as requiring the 90-day approval process to apply only to those contractual provisions that make up a "schedule of itemized charges," including associated descriptions of the services to which the charges apply. ILECs and CLECs otherwise should be left free to implement most arrangements without regulatory delay.

7/ Telecommunications Act of 1996, Conference Report, H. Rep. 104-458, at 124-125 (Jan. 31, 1996).

8/ *Id.* at 125.

9/ S. 652, Telecommunications Competition and Deregulation Act of 1995, *Report of the Committee on Commerce, Science, and Transportation*, S. Rep. No. 104-23, at 19 (March 30, 1995).

B. An Overbroad Reading of the 1996 Act Would Restrict, Rather than Promote, Competition

A broader interpretation of Section 252(a) in which many or all ILEC-CLEC contractual arrangements must first be approved by the Commission before taking effect is not only inconsistent with the intent and language of the Act, but also is neither necessary nor in the public interest.

First, it is important not to exaggerate the practical significance of the filing issue. This is only a procedural matter in important respects. The question is what ILEC-CLEC contract terms require prior approval before taking effect -- not what terms are lawful in and of themselves.

Filing, to the extent required under Section 252(a), serves two functions. First, it provides an opportunity for the Commission to evaluate the contractual arrangement in advance for discrimination and related public interest problems. Yet given the intent of the Act to get away from detailed, tariff-like regulation, it would seem obvious that Congress did not intend to create a mandatory filing requirement that exposed every, or even most, ILEC-CLEC arrangements to pre-effective date micro-management. Significantly, a more limited interpretation of Section 252(a) does not eliminate the ability of third parties to argue later that an unfiled ILEC-CLEC arrangement is unlawfully discriminatory. It only means that the Commission does not engage in prior review. This is a reasonable balancing of the interests under the Act. ILECs and CLECs can put into effect contractual arrangements that do not impact rates without delay. Regulators retain the right to review other negotiated arrangements, on their own motion or under complaints, after the fact.

Second, filing under Section 252(a) places a subsequently approved agreement within the scope of Section 252(i). Qwest emphasizes that it is not trying to reduce CLEC "pick and choose" rights in any respect. Rather, it is an overbroad interpretation of Section 252(a) that would be legally problematic. Section 252(i), and the associated body of law regarding the availability of "pick and choose," applies to only services and UNEs provided "under an agreement approved under" Section 252. This language only begs the question of which negotiated contract terms arising under Section 252(a) must be so approved.

The balance struck by Congress answers this question. Insofar as an ILEC and a CLEC negotiate a "schedule of charges," those rates must be made available to others under Section 252(i). Congress also could have required that each and every other term of a negotiated ILEC-CLEC business relationship go through the pre-approval process as well. It did not do so because it did not view such non-core matters as of the same level importance. This legislative choice reflects a distinction built into the Act based on a desire to minimize regulation when ILECs and CLECs are able to agree to business arrangements on their own.

Furthermore, the substantive impact of this result should not be exaggerated either. Again, rates and charges are available under Section 252(i). These are the most important "pick and choose" matters. To the extent that an ILEC and a CLEC reach agreement on non-rate matters, the only relevant impact on a competing third party CLEC is that it has to ask for the same or similar arrangement. If the ILEC agrees (and Qwest for one tries to accommodate the specific requests of all its CLEC customers), that contract term also can take effect immediately without prior Commission review. If the ILEC disagrees, the CLEC can arbitrate under the broader "any issue" standard of Section 252(b). Parties also can file complaints if they believe discrimination is occurring.

In short, the limitations on the scope of the 90-day approval process in Section 252(a) have less consequence than is suggested by those who argue that every ILEC-CLEC contract provision must be filed. Rather, the Act reasonably balances the interests of the ILEC and CLEC who are prepared to implement their negotiated arrangement, and of any public interest reasons that might exist for delaying that implementation.

An overbroad reading of Section 252 means that ILECs and CLECs would, for all practical purposes, have to file all agreements between them, a great many of which the 1996 Act did not intend would be subject to state commission approval. Such an approach, if it carried the day, would have unintended and harmful consequences, and be contrary to the public interest, for four reasons.

Most importantly, it would mean that in situations where an ILEC is willing to meet the needs of a particular CLEC, the CLEC might be forced to wait up to 90 days to receive the benefit of its bargain. This delay can have serious economic effects in and of itself, to the detriment of local competition. An overbroad reading of Section 252 would hinder local competition by making impossible collaborative arrangements between ILECs and CLECs. If every detail of every business interaction between ILECs and CLECs must be overseen in detail by regulatory authorities, there is little chance that the parties would tailor the details of their business-to-business relationship to their actual businesses or attempt to find innovative solutions to business problems – they simply would opt into the term negotiated by the first ILEC and CLEC, since trying anything else would force a 90-day delay and might not be approved. Regulatory involvement is a necessary component for the core terms and conditions of interconnection agreements that are subject to Sections 251 and 252. But where governmental oversight is not required by statute, the intimate involvement of regulators that would be engendered by an overbroad reading of Section 252 would inhibit the development of collaborative arrangements between ILECs and CLECs who, by necessity, must collaborate on certain issues even as they compete for retail customers, and it would also interpose delays in the process of forming and implementing those deals. By contrast, permitting open collaboration between ILECs and CLECs, with regulatory involvement *only* where necessary and *only* with respect to the elements and services specified in the statute, ultimately will facilitate the development of local competition.

In addition, such delay also could give parties a disincentive to reach negotiated arrangements in the first place. An overbroad interpretation of Section 252 would be contrary to the 1996 Act's goal of encouraging ILECs and CLECs to work out their arrangements through private negotiations, subject only to the specific minimum pre-approval requirements for those contract provisions that fall truly within the scope of Sections 251 and 252. If negotiating parties were required to publicly disclose contractual provisions such as settlements of past disputes, detailed administrative matters, or other aspects of their business relationship with little or no connection to Sections 251 and 252, then both ILECs and CLECs would have a strong disincentive to work out such bilateral arrangements that could benefit both parties. Unless the contractual term at issue is a rate, term or condition of interconnection or network elements and is subject to the nondiscrimination requirements of Sections 251 and 252, there is absolutely no public policy reason to create disincentives to ILECs' and CLECs' ability to resolve such matters through private contracts, or to interpose delay in the process of putting those contracts into effect.

Furthermore, an overbroad interpretation of the filing requirements creates legal uncertainty with respect to the validity of agreements that have not gone through the prior approval process and creates potential conflict among the states when ILECs and CLECs agree to contractual arrangements that involve multi-state operations. Such an overbroad application of Section 252 would implicate the validity of any non-filed ILEC-CLEC agreements covering operations not only in Arizona, but also in multiple states. By law, if a contract provision qualifies as a "term of interconnection" under Section 251 of the 1996 Act, it is valid only after it has been submitted to and approved by a state commission. Section 252(e) plainly requires that interconnection agreements be reviewed and approved by state commissions before they take effect. 10/ Thus, an overbroad interpretation of Section 252 would mean that contract provisions that should have been filed and approved under Section 252 but were not, were never actually valid. As the court held in *GTE Northwest Inc. v. Hamilton*, 971 F. Supp. 1350, 1353 (D. Or. 1997), "[a] binding final agreement will not exist until after the Commission reviews and approves the agreement signed and submitted" by the ILEC and the CLEC. This principle, analogous to the filed rate doctrine in tariff law, means that if a provision of an agreement should have been filed but was not, that agreed-upon provision may be unenforceable, which would be contrary to the public interest, and potentially quite detrimental to the settled contractual expectations of both ILECs and CLECs.

10/ *See, e.g., Global NAPS, Inc. v. Verizon Communications*, File No. EB-01-MD-010, FCC 02-59, ¶ 23 (released Feb. 28, 2002) (dismissing as unripe a claim for enforcement of an interconnection agreement that had not yet been filed with the state commission); *GTE Northwest Inc. v. Hamilton*, 971 F. Supp. 1350, 1353 (D. Ore. 1997); *Indiana Bell Tel. Co. v. Smithville Tel. Co.*, 31 F. Supp. 2d 628, 633 (S.D. Ind. 1998) ("*Before any interconnection agreement may be implemented or enforced*, whether it was produced by negotiation or arbitration, it must be submitted for and receive approval by the State commission.") (emphasis added). In addition, reasoning by analogy, the same result may be compelled by the time-honored Filed Rate Doctrine, which a number of courts have held to apply to interconnection agreements. *See Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 402 (7th Cir. 2000); *Stein v. Pacific Bell Tel. Co.*, 173 F. Supp. 2d 975, 987 (N.D. Cal. 2001). Significantly, regulatory agencies have been deemed to lack the authority to insist upon the enforcement of agreements that should have been but were not filed. *See Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 135 (1990) (ICC); *see also MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994) (FCC).

Finally, an overbroad interpretation raises the regulatory compliance costs of ILECs and CLECs, and the burdens on state commissions. Adding an unnecessary layer of state Commission review would impose administrative delays on the parties to these agreements, and would slow the CLECs' ability to enjoy the benefits of arrangements that they negotiated with ILECs. In addition, such a result would unnecessarily burden all state commissions with added time-consuming review proceedings, and delay the point when such agreements could take effect. It would also add unnecessary administrative burdens to the Commission's docket, and to those of the state and federal courts, as parties seek guidance as to the meaning of provisions that never should have been filed in the first place. Such micro-regulation is the antithesis of the 1996 Act's intent. This argument is underscored by the Commission's own recent decision to allow all interconnection agreements and amendments to be approved administratively after 90 days without any review whatsoever.

In this regard, it should be noted that Qwest takes its obligations under the 1996 Act very seriously. It is always willing to enter into good faith negotiations with CLECs on business issues of interest and concern to them, and to negotiate with and accommodate the concerns of the full range of its wholesale and co-carrier customers, large and small. Indeed, Qwest has aggressively sought to work with CLECs because it highly values its wholesale line of business, and is as eager to work with CLECs as with any other customer. Qwest treats CLECs as valued wholesale customers and co-carriers, and has worked to fashion business-to-business solutions to their problems. The functional differences among the contracts and provisions at issue in the Arizona Agreements are a testament to Qwest's efforts to work closely and individually with CLECs in the manner the 1996 Act contemplated -- efforts that have been lauded by others. 11/ Qwest and other ILECs that are willing to work collaboratively with CLECs should be given the freedom to do so. This is, of course, the very result contemplated by the drafters of the Telecommunications Act of 1996.

III. THE ARIZONA AGREEMENTS ARE NOT WITHIN THE FILING REQUIREMENTS OF SECTION 252

A. Introduction

Qwest submits that the Arizona Agreements did not need to be filed with and approved by the Commission. Those provisions fall into three general categories – none of which requires filing under Section 252.

The first category relates to agreements that define business-to-business administrative procedures at a granular level. Such business process terms go well beyond the level of detail that Section 252 of the 1996 Act requires to be filed in an Interconnection Agreement. For example, Qwest has committed to CLEC-specific escalation procedures for dispute resolution, or actions to address CLEC-specific business issues regarding their use of UNEs. Qwest has agreed to meetings and similar administrative processes to review business questions and concerns. As discussed below, Qwest, like any vendor, tailors its implementation processes to meet the varying needs of its CLEC customers. But it is simply incorrect to suggest

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11/ *See, e.g.,* Letter from Richard Mathias, Chairman, Illinois Commerce Commission, to Edward A. Mueller, President and CEO, SBC/Ameritech, at 5-6 (Oct. 3, 2001) ("[S]ome CLECs noted that Qwest appears to be more responsive than SBC-Ameritech-Illinois in servicing its wholesale customers. . . . In general, the CLECs alleged that, post merger, the Qwest wholesale performance improved significantly. . . . It is my understanding that the Qwest chief executive officer (CEO) articulated orally and in writing to Qwest employees the need to treat CLECs as customers and to attempt to provide quality, CLEC friendly service. . . . Qwest apparently has established an account management/escalation process for operational concerns which incents the parties to reach settlement before arbitration. . . . Such a system apparently frequently leads to settlement before arbitration thus reducing the time and cost to all parties involved.") (in context of discussion of benchmarking SBC/Ameritech's performance against those of other ILECs, like Qwest).

that all this administrative detail must be spelled out in an interconnection agreement filed with and approved by the Commission.

The second category relates to agreements to settle historical disputes or pending litigation. These matters typically relate to differences between Qwest and a CLEC over their respective past performance under an Interconnection Agreement, or billing disputes between them. The parties have managed to reach settlement without troubling this Commission or otherwise proceeding through formal hearings. Contrary to AT&T's apparent view, Section 252 does not require that such settlements be filed as interconnection agreements and approved by the Commission.

The third category relates to agreements on matters outside the scope of Sections 251 and 252. Some agreements have nothing to do with Section 251, do not contain terms of network elements, interconnection, or service as defined by FCC rules, and therefore do not implicate Section 252 at all.

For the Commission's convenience, Qwest has provided a chart that categorizes each agreement according to the analysis discussed above. (*See* Confidential Attachment 2.)

B. Implementation and Administrative Matters, Settlements of Past Disputes, and Matters Not Subject to Section 251 Should Not Be Required To Be Filed Or Approved

1. Agreements Defining Business Relationships and Business-to-Business Administrative Procedures

Section 252 does not contemplate public filing or state commission approval of business-to-business escalation clauses, dispute resolution provisions, or low-level administrative or implementation arrangements between ILECs and CLECs. Escalation clauses are contractual determinations that in the event of disagreement, specified individuals within the respective companies will be brought in to work things out. Dispute resolution provisions specify that, in the event the parties cannot resolve an ongoing disagreement, they agree to bring the dispute to commercial or regulatory arbitration, or that a particular judicial or regulatory forum will be selected for litigation. The low-level administrative arrangements may include provisioning details (*e.g.*, details about the specific numbers and locations of loops or other circuits and the dates on which they are to be provisioned) or arrangements for contacts between the parties (*i.e.*, commitments that certain individuals from the respective companies will meet every week or every other week, or that the ILEC will provide OSS trainers to the CLEC at a particular location). For example, one of the Eschelon agreement that is part of the Arizona Agreements contained provisions for an implementation plan for provisioning services. (*See* November 14, 2000 letter to develop implementation plan.) Similarly, one of the WorldCom agreements that is within the Arizona Agreements provided for quarterly meetings between Qwest and WorldCom executives and for escalation procedures for resolving disputes short of litigation. (*See* April 29, 2001 Business Escalation Agreement.)

Such provisions are not within the schedule of rates and description of services that the 1996 Act contemplated would be subject to the filing requirements for sound, business-oriented reasons. Requiring such agreements to be publicly filed and approved would deter ILECs from crafting business relationships and arrangements to meet the unique needs of particular interconnecting carriers, and would force them to rely on one-size-fits-all solutions to such matters. It would, as a practical matter be impossible to administer, apply or enforce such a requirement, because arguably no detail would be minor enough to guarantee that some party would not "second guess" the carrier's determination not to file it. As a result, a prudent ILEC would either file everything, or agree to nothing. Neither would be good for CLECs or competition. Such an inappropriate requirement could also result in a particular CLEC's business plans and unique needs to be publicly revealed, which would not serve the interests of competition.

Escalation and dispute resolution provisions, in many cases, can define the overall relationship between two companies, and do not involve the kind of detail that Congress intended be subject to filing and pre-approval. For example, some of the Arizona Agreements contain escalation provisions in two separate Qwest contracts with two different CLECs, neither of which had been filed. One of these contracts provided for a three-level escalation process (*e.g.*, if the two companies' service representatives could not resolve an issue, it would be escalated to directors, from there, to vice-presidents; and from there, to executive vice presidents); the other provided for the parties to work out an escalation procedure. 12/ (*See* MCI WORLDCOM June 29, 2001 Business Escalation Agreement; Z-Tel Communications, Inc. May 18, 2001 Memorandum of Understanding.)

Similarly, some of the Arizona Agreements contain provisions in which Qwest agreed to periodic meetings between specified executives and similar administrative processes to review business questions and concerns. (*See* November 15, 2000 Eschelon Confidential Agreement re: Escalation Procedures.) Other contractual provisions in the Arizona Agreements address matters such as whether disputes are to be addressed before a court of law, commercial arbitration panel, or state regulatory commission, and under what procedural and substantive legal rules. (*See* February 28, 2000 Confidential/Trade Secret Stipulation between ATI and U S WEST.)

Contract provisions such as those listed above do not address the core terms of interconnection or network elements. Rather, they address the terms by which the companies are

12/ Moreover, Qwest's SGAT contained detailed escalation procedures. *See* SGAT, § 5.18. Other carriers were therefore on notice that additional details about escalation procedures existed.

agreeing to do business and work out the inevitable disagreements that regularly arise in any business-to-business relationship. If carriers have negotiated and agreed to conduct their relationship in a certain way, then there is no anti-competitive effect.

Qwest, like any vendor, tailors its implementation processes to meet the varying needs of its CLEC customers. There is no basis for requiring all this administrative detail to be spelled out in interconnection agreements filed with and approved by state commissions. To the contrary, as long as an ILEC fully satisfies its obligation to provide interconnection, network elements, and other services mandated under Section 251 on a nondiscriminatory basis – and nothing in the complaint suggests that Qwest has not fulfilled this allegation as to functions and services classically meeting that definition – variations in business-to-business administrative processes are acceptable within the framework of the 1996 Act and should not be subject to the Section 252 filing or state commission approval requirements.

2. Settlement Agreements

Qwest also maintains that settlement agreements that resolve disputes between ILECs and CLECs over past billing disputes or other matters are not interconnection agreements under Section 252. This should hold true even if the dispute related to prior conduct pertaining to elements or services that are subject to Section 251 and 252. For example, Section 252 should not apply to settlement agreements providing for payments to resolve disputes between parties over the quality of interconnection services provided in the past, or to resolve disputes over billing or payments for such services. This would be consistent with the FCC's historic treatment under the Communications Act of settlement agreements relating to tariffed services: settlement payments need not be tariffed, and do not violate the statutory prohibition of unreasonable discrimination or unlawful rebates. 13/ Given that negotiated agreements under Section 252 were intended to be less inclusive than historically micro-managed tariffs, the case is even stronger that such settlement provisions should not be subject to the Section 252 filing or approval requirements.

Moreover, applying Section 252 to settlement agreements would disserve the public interest, because requiring public disclosure and third-party access to the terms of settlement agreements would deter parties from settling their disputes. Clearly, the public interest favors amicable dispute resolution. 14/ And deterring parties from entering settlements would force regulators and courts to resolve many more disputes that could have been settled by the parties. Not only would this be administratively burdensome, but more importantly it could well lead to the imposition of solutions that may be inferior to those that the parties could have worked out on their own.

Thus, the Arizona Agreement provisions that relate to the settlement of disputes between Qwest and other carriers did not need to be filed and approved. Where Qwest settled disputes over reciprocal compensation, for example, and the parties exchanged valuable consideration, such an agreement did not need to be filed with the Commission. (*See* April 28,

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13/ *Allnet Communications Services, Inc. v. Illinois Bell Tel. Co.*, 8 FCC Rcd 3030, 3037, ¶¶ 32-33 & n.78 (1993) (rejecting contention that award of damages to a customer in a complaint case, or a carrier's payment to a customer in settlement of such a dispute, constitutes violation of non-discrimination duty).

14/ *See, e.g., McDermott v. AmClyde and River Don Castings, Ltd.*, 511 U.S. 202 (1994) ("public policy wisely encourages settlements", *id.* at 215, and a rule that "discourages settlement and leads to unnecessary ancillary litigation" is "clearly inferior" to one that promotes settlement of disputes, *id.* at 211); *accord, Bergh v. Dept. of Transportation*, 794 F.2d 1575, 1577 (Fed. Cir. 1986), *citing United States v. Contra Costa County Water District*, 678 F.2d 90, 92 (9th Cir. 1982); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 565 (6th Cir. 1982); *Airline Stewards & Stewardesses Ass'n v. American Airlines*, 573 F.2d 960, 963 (7th Cir. 1978); *Florida Trailer & Equipment Co. v. Deal*, 284 F. 2d. 567, 571 (5th Cir. 1960); *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 205 (Minn. 1986).

2000 McLeod Confidential Billing Agreement.) Similarly, where Qwest and Eschelon settled disputes over Qwest's switched access reporting, such an agreement was not within the filing requirements of Section 252(a). (*See* July 3, 2001 Confidential Qwest Letter regarding Status of Switched Access Reporting.)

However, how the parties are permitted to structure the settlement provisions is far from clear. Qwest submits that the 1996 Act can reasonably be read to permit the parties to introduce dispute resolution methodologies or other provisions that have an effect on a going-forward basis without running afoul of the filing requirements. Thus, for example, where Qwest and Eschelon agreed to an interim dispute methodology in their attempt to resolve their disputes over Qwest's switched access reporting, such an agreement was not clearly within the filing requirements of the 1996 Act. (*See* July 3, 2001 Confidential Qwest Letter regarding Status of Switched Access Reporting.)

3. Agreements Regarding Matters Not Subject to the 1996 Act

The FCC has already held that the substantive and procedural requirements of Sections 251 and 252 do not apply to purely interstate matters within the FCC's traditional, pre-1996 jurisdictional domain, such as interstate access services. 15/ Moreover, the Section 251 and 252 requirements also do not apply to local retail services and intrastate long distance service, which are the province of the state commissions under pre-1996 state law. 16/ Nor do the Section 251/252 rules apply to network elements, such as local switching for large business customers in major metropolitan areas, that the FCC has concluded do not qualify for unbundling

15/ *See, e.g., Local Competition Order*, 11 FCC Rcd 15,499, ¶¶ 191, 873, 1033-34. *See also Competitive Telecommunications Association v. FCC*, 117 F.3d 1068 (8th Cir. 1997).

16/ *Local Competition Order*, 11 FCC Rcd at 15,499, ¶ 1035; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9168 n.66 (2001) ("*ISP-Bound Traffic Remand Order*").

under the "necessary" and "impair" standards of Section 251(d)(2), 17/ nor to the transport and termination of non-local types of traffic, such as information access. 18/ In light of these strong precedents, it is clear that agreements concerning services or elements that are not under the Section 251/252 regulatory framework need not and *should* not be treated as interconnection agreements that must be filed with state commissions under Section 252(e)(1).

Thus, for example, the consulting and network-related services agreement contained in one of the Arizona Agreements falls outside of Section 252. (*See* November 15, 2000 Eschelon Confidential Agreement to Confidential/Trade Secret Stipulation.) Eschelon and Qwest entered into the consulting and network-related services agreement with the good faith belief that Eschelon could provide bona fide services of considerable value to Qwest. First, Eschelon held itself out as an experienced CLEC that could help Qwest better understand and serve the needs of CLECs in the wholesale market and could help Qwest develop and improve processes for many of its product offerings. Second, Eschelon would be buying a sufficient amount of new services and be expanding in new areas that would give Eschelon the expertise to advise Qwest, to provide extensive market research and industry analysis, and to provide regulatory advice and support, thus allowing Qwest an expedient way to improve its service and operational performance in this market, especially in light of the recent and ongoing regulatory

17/ *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶¶ 469-72 (1999) ("*UNE Remand Order*") (noting that Section 252 pricing rules do not apply to network elements that have been removed from the national list of elements subject to mandatory unbundling, even if those elements continue to be included in the Section 271 competitive checklist).

18/ *ISP-Bound Traffic Remand Order*, 16 FCC Rcd at 9189, ¶ 82 ("[C]arriers may no longer invoke section 252(i) to opt into an existing interconnection agreement with regard to the rates paid for the exchange of ISP-bound traffic. Section 252(i) applies only to agreements arbitrated or approved by state commissions pursuant to section 252; it has no application in the context of an intercarrier compensation regime set by this Commission pursuant to section 201.").

and court orders regarding interconnection services. Eschelon represented that it could provide guidance with respect to potential obstacles Qwest might encounter and how to overcome them. This advice would also have the corollary effect of expediting Qwest's fulfillment of the requirements of Section 271 for entry into the long distance markets – a matter of considerable significance and value to Qwest. Third, Eschelon offered to provide assistance to Qwest insofar as the company planned to expand its own out-of-region CLEC business, an area where Eschelon had access to industry expertise and experience and where Eschelon was expecting to grow out of region in Nevada and the old Ameritech territory. While the Commission may dispute the method for determining the payments under the consulting and network-related services agreement, Qwest expected that it would receive considerable value from the consulting services provided by Eschelon.

Moreover, it should be beyond doubt that, with the exception of reciprocal compensation for local traffic, services that *ILECs* purchase from *CLECs* are not subject to Sections 251(c) and 252. For example, a paragraph of Eschelon Agreement IV contains an agreement by which Qwest agreed to pay Eschelon $2 per line per month for Qwest's intraLATA toll traffic terminating to customers served by an Eschelon switch, subject to true up, until Eschelon and Qwest resolved the issue. This agreement cannot be the basis for any claim against Qwest. First, it relates to access service provided by Eschelon to Qwest, and not to a service or element provided by Qwest to Eschelon. Section 252 does not require the filing of terms and conditions of services provided by CLECs such as Eschelon. Moreover, the Commission does not materially regulate Eschelon's access rates. In addition, the FCC has made it very clear that interstate and intrastate access charges, respectively, are subject to the federal and state regulatory regimes that predate the enactment of the Telecommunications Act of 1996, and that access charges are not subject to the provisions of Sections 251 and 252. 19/ Therefore, this agreement concerning the payment of access charges did not need to be filed as an interconnection agreement.

In addition, the 1996 Act's filing requirements do not apply to expressions of corporate goals as opposed to binding commitments. For example, the April 19, 2000 *U S WEST Service Level Agreement with Covad Communications Company* (the "Covad Agreement") set forth goals that were consistent with Qwest's internal service goals for all of its wholesale customers. Prior to the formation of the Covad Agreement, Covad had expressed dissatisfaction regarding the measures U S WEST (Qwest's predecessor) had used to report its service quality to Covad. As a result, Covad and U S WEST sought to clarify Covad's expectations regarding U S WEST's service levels and the measures U S WEST would use when reporting its service performance to Covad. Qwest consistently has treated the Covad Agreement as simply an articulation of Covad's desires and expectations for Qwest's service levels rather than an obligation for Qwest to attain particular standards. As such, the Covad Agreement does not need to be filed as an interconnection agreement because Qwest does not provide, and is not obligated to provide, a different level of service to any customer.

CONCLUSION

There is no national standard for determining what agreements are subject to the extraordinary 90-day preapproval requirement under Section 252. Qwest has sought clarification from the FCC, and respectfully suggests that the Commission defer a decision on this matter

19/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶¶ 176, 1033-35 (1996), *aff'd in pertinent part sub nom. Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997); *subsequent history omitted.*

until the FCC issues its decision. Staying the action will permit the Commission, and other states, to apply a consistent standard.

Moreover, even if the Commission chooses to address this matter, the Arizona Agreements are not within Section 252's filing requirements. They are instead an amalgam of settlement agreements, administrative procedures for business-to-business relationships, and matters outside of Sections 251 and 252. For the foregoing reasons, Qwest respectfully requests that the Commission stay this matter, or in the alternative, find that Section 252 does not require the filing of the Arizona Agreements.

Submitted this 10th day of May, 2002.

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April 23, 2002

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Petition for Declaratory Ruling of Qwest Communications International Inc.

Dear Ms. Dortch:

On behalf of Qwest Communications International Inc., I am enclosing for filing the original and four copies of a Petition for Declaratory Ruling. This petition seeks a Commission ruling on which types of negotiated contractual arrangements between ILECs and CLECs are subject to the mandatory filing and 90-day state commission pre-approval requirements of Section 252(a)(1), and which are not.

If you have any questions regarding this matter, please contact the undersigned.

Respectfully submitted,

David Sieradzki

David L. Sieradzki
Counsel for Qwest Communications International Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of		
	)	
Qwest Communications International Inc.	)	WC Docket No.
	)	
	)	
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)	)))))	
	)	

PETITION FOR DECLARATORY RULING
OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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Dated: April 23, 2002

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of		
	)	
Qwest Communications International Inc.	)	WC Docket No.
	)	
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)	)	
	)	

PETITION FOR DECLARATORY RULING
OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Qwest Communications International Inc. ("Qwest"), by its counsel and pursuant to Section 1.2 of the Commission's rules, 1/ respectfully requests a declaratory ruling with respect to Section 252(a)(1) of the Telecommunications Act of 1996 (the "Act" or "1996 Act").

INTRODUCTION AND EXECUTIVE SUMMARY

This Petition addresses a limited but important question: which types of negotiated contractual arrangements between ILECs and CLECs are subject to the mandatory filing and 90-day state commission pre-approval requirements of

1/ 47 C.F.R. § 1.2.

Section 252(a)(1) – and which are not. 2/ Timely guidance from the Commission is necessary, at a minimum, to achieve a uniform interpretation of federal law and avoid the application of inconsistent requirements to identical agreements and terms in multiple states. Commission guidance may also help ensure that Congress's objectives in the Act are not thwarted. Like other businesses, ILECs and CLECs negotiate and agree to a wide variety of contractual arrangements. These contract provisions run across a broad spectrum of potential business matters. They may range from the basic rates for unbundled loops, to the number and frequency of meetings between ILEC and CLEC executives, to the specific make up of account teams, to the details of reporting tools for information sharing between the parties. Contract provisions can relate to charges for interexchange access, or other non-interconnection related services and facilities that CLECs and ILECs sell each other. Contract terms can cover billing and collection matters. They can settle disputes, and establish procedures for resolving disputes in the future. Contract provisions can involve equipment, real estate or non-telecommunications services.

Indeed, every time that a CLEC submits an order to an ILEC, and that order is accepted, the parties have made a contract. Every time the parties modify a prior contract term, they have created a new contractual agreement.

Only some of these ILEC-CLEC agreements even implicate Section 252 of the Act at all. Furthermore, Section 252 itself establishes three different

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2/ 47 U.S.C. § 252(a)(1).

standards and processes for three different kinds of contracts: (i) negotiated agreements, (ii) arbitrated agreements, and (iii) Statements of Generally Available Terms ("SGATs").

This Petition focuses only on the scope of Section 252(a)(1), and in particular on the scope of the requirement that certain freely negotiated arrangements between ILECs and CLECs must go through a mandatory filing and 90-day prior approval process before taking effect. While Qwest has views on how Section 251(a)(1) should be interpreted,the paramount objective of this petition is to obtain a ruling from the Commission that will eliminate the prospect of multiple, inconsistent rulings by a host of state commissions and federal courts.

With respect to the *direction* of the ruling sought by this Petition, Qwest certainly has no quarrel with the fact that some negotiated arrangements must be filed and approved before they take effect. At the same time, the 1996 Act was not intended to create an environment in which regulators micro-managed -- especially in advance -- the voluntary business relations of ILECs and CLECs. Qwest is not seeking to avoid regulatory review where it is called for by the Act. At the same time, an overbroad interpretation of Section 252(a)'s 90-day approval process can stand as an obstacle to the ability of ILECs and CLECs to organize their relationships freely, quickly, and on an individualized basis -- and to modify particular terms of those relationships -- to meet the fast-changing world in which they operate.

It is important to keep in mind that the Section 252(a) issue is in many respects procedural; the mere fact that a PUC does not review a contract term in advance does not foreclose it from doing so later. Nor does it prevent other CLECs from requesting similar arrangements. The issue here is a narrow one: what kind of negotiated provisions are so important that prior PUC review is required before they can take effect.

As Qwest explains below, it believes prior filing and approval is required only for a "schedule of itemized charges" and related service descriptions. Section 252(a) expressly refers to these matters, and legislative history suggests that Congress did not intend a broader pre-effective approval process to interfere with normal business activity. Furthermore, this interpretation balances competing interests of the CLEC making the arrangement, and of its competitors. The CLEC cannot obtain service at a new rate until the agreement becomes effective (upon PUC approval) and other CLECs have access to the rate under Section 252(i). At the same time, other CLEC-ILEC arrangements having nothing to do with a "schedule of charges" can take effect without prior review. Potential discrimination issues as to the latter, should any arise, may be addressed after the fact.

Again, however, Qwest's primary goal here is to resolve uncertainty and multiple proceedings and inconsistent results regarding the scope of the Section 252(a) prior approval requirement. Indeed, uncertainty on this point threatens to become an even greater problem as ILEC-CLEC dealings mature and expand. The Section 252(a)(1) prior approval process, whatever its scope, applies both to the formation of an ILEC-CLEC relationship -- and to later modifications. The Act does not distinguish between the two. Some might argue that it is less problematic if an initial ILEC-CLEC contract arrangement is delayed for up to 90 days pending approval, and if every element of that arrangement is reviewed by the PUC. Even then, of course, the more PUC involvement, the longer the process can take, and the greater the risk that the PUC will tread into matters that Congress intended to be free of regulation.

But the 90-day approval process becomes an even more serious issue in the context of later modifications of the CLEC-ILEC contractual relationship. As the parties do business with one another, they inevitably will want to make changes to their courses of dealing, or to expand those dealings. Normal business imperatives will create immediate needs, needs that an ILEC like Qwest will want to satisfy. Operational flexibility in contracting with ILECs enables CLECs to better serve their customers. Yet insofar as the 90-day approval process applies, such quick responses are foreclosed. Given that such "modifications" and "expansions" of CLEC-ILEC arrangements are increasingly common -- and to be encouraged -- it is all the more important for the parties to understand the precise requirements of Section 252(a)(1).

Again, Qwest's primary interest is to know where the filing line stands so that it can comply, and ensure that its agreements with CLECs are rendered valid to the extent that prior PUC approval is needed. That said, we state here our understanding of Section 252(a)(1), an interpretation that reflects the Act's balance of regulation and free market forces. We discuss the general line-drawing issue in

Section I. In Section II we discuss why it is particularly important for the Commission to clarify this legal question now. Finally, in Section III we review in more specific terms which ILEC-CLEC contract terms we believe fall into the mandatory review process, and which do not.

I. SECTION 252(a)(1) DOES NOT REQUIRE ALL NEGOTIATED CONTRACT PROVISIONS BETWEEN ILECs AND CLECs TO GO THROUGH A 90-DAY PRIOR APPROVAL PROCESS

A. The Need for Balanced Line Drawing in the Context of the Act's Goals

Section 252(a)(1) involves a careful balancing of interests. On the one hand, it must be read in the context of Congress's goal of establishing competition in the local exchange market under a framework that is both pro-competitive and deregulatory. 3/ The Act encourages ILECs and CLECs to resolve matters between themselves through private negotiation, without regulatory intervention. At the same time, the Act preserves a residual role for regulators to review and approve certain CLEC-ILEC contract matters, notwithstanding the resulting delays and other costs. And insofar as that review is required, the negotiated terms are available to other CLECs under Section 252(i).

As discussed in more detail in Section II below, uncertainty in this area imposes serious public policy costs. It calls into question the legal validity of CLEC-ILEC contract terms that have not gone through the 90-day approval

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3/ Telecommunications Act of 1996, Joint Managers Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

process. It creates compliance jeopardy for ILECs attempting to make good faith efforts to cooperate with CLECs in opening local markets to competition.

Uncertainty also empowers jurisdictions that may assert an overbroad interpretation of the filing requirement that conflicts with the Act's deregulatory, procompetitive objectives. Section 252(a)(1) presents a national issue, yet absent a clear ruling from this Commission, a "lowest common denominator" problem exists. ILECs and CLECs commonly enter into contractual arrangements covering multiple states. Yet in the current cloudy environment, the state taking the broadest view of the filing requirement effectively will control the process. ILECs and CLECs only can rapidly implement the arrangements they negotiate to the extent that *no* state where they both do business asserts a prior review and approval power. If even one state claims such rights under Section 252(a), it affects CLEC-ILEC dealings in all the others.

The question, then, is where Section 252(a) draws the line between contract terms that must go through the 90-day approval process, and those that do not. Qwest agrees that the Act could be clearer on this point; that is one reason why an interpretation from this Commission is necessary and important. All parties need to know the rules of the road.

That said, Qwest believes a line can be drawn based on statutory language and Congressional intent that properly balances the competing public interests in the 1996 Act. Such a line would permit normal unregulated business dealings between CLECs and ILECs in most cases. However, it would preserve regulatory oversight (notwithstanding the associated costs in terms of delay and the like) in a limited zone covering the most important interconnection matters.

B. The Act's Reference to "A Detailed Schedule of Itemized Charges" is the Touchstone of the 90-day Approval Process

1. Statutory Language

Qwest suggests that the touchstone of Congressional intent is Section 252(a)(1)'s express reference to "a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement." If Congress intended to constrain the Commission's discretion in construing the scope of the filing requirement, it would have broadened the "detailed schedule" language to include other matters. 4/ In light of this language, Section 252(a) can most logically be read to mean that the obstacle of a mandatory 90-day prior approval process should apply to -- and delay implementation of -- only the most significant aspects of a voluntary agreement: the rates and associated service descriptions for interconnection, services and network elements. Conversely, the mandatory approval process should not apply to other ILEC-CLEC contractual arrangements going beyond this "schedule," such as account team support, mechanics of

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4/ Congress knows how to craft a statute to require a more comprehensive filing. Thus, the narrow statutory language regarding the minimum contents of negotiated agreements that must be filed under Section 252(a)(1) – "a detailed schedule of itemized charges for interconnection and each service or network element" – can be contrasted with the broader scope of the material that the Act requires carriers to file as tariffs pursuant to Section 203: "all charges . . . and the classifications, practices, and regulations affecting such charges," as well as "such other information . . . as the Commission may by regulation require." Of course, an arbitration under Section 252(b)(1) could cover "any open issues" – potentially an even broader category.

provisioning and billing for ordered interconnection services or UNEs, or dispute resolution. This line applies whether the contractual arrangements at issue are made at the outset of an ILEC-CLEC relationship, or as a later modification of that arrangement. Either way, ILECs and CLECs should be allowed to implement most voluntary arrangements between them quickly and without regulatory cost or delay.

This reading of Section 252(a) is consistent with the fact that Section 252 itself has three different standards and processes for three different kinds of contracts: negotiated agreements, arbitrated agreements, and SGATs. In contrast to Section 252(a)'s references to a "schedule of itemized charges," Section 252(b) speaks of arbitration of "any open issues." This ensures that a CLEC always has the ability to seek contract provisions on any topic. But the scope of an arbitrated agreement does not define the boundaries of what an ILEC and CLEC can do under Section 252(a) without *mandatory* prior regulatory review.

Similarly, in an SGAT developed under Section 252(f) an ILEC may choose to address many issues, and in great detail. This approach can facilitate the administrative and substantive process of establishing interconnection agreements, and should not be discouraged. But the scope of an SGAT does not define the scope of the *mandatory* filing requirement under Section 252(a). 5/

5/ Similarly, the fact that an ILEC has *voluntarily* "overfiled" the terms of its negotiated agreements in the past does not answer the question of which contract terms must, as a *mandatory* matter, go through the 90-day approval process in the future. Qwest notes that uncertainty as to the scope of Section 252(a)(1) has influenced its own practices with respect to the filing of negotiated agreements (and

Furthermore, it is relevant that the 90-day approval process stands in sharp contrast to other elements of Section 252 itself, and to other models present in federal communications law. For example, when an ILEC unilaterally develops an SGAT under Section 252(f), that document is subject to only a 60-day state commission approval process. Arbitration agreements developed under Section 252(b) are subject to a 30-day prior review. For that matter, under Section 211 of the Communications Act, contracts and agreements between carriers covering interstate communications historically have been subject to a filing process, but no pre-approval process at all. Such contracts can be implemented immediately upon execution. And under Section 204(a)(3) of the Act, the FCC is allowed only 7 to 15 days to review an ILEC's interstate access tariff before it must be allowed to take effect. 6/

In these circumstances, it is reasonable to read the scope of the mandatory Section 252(a) 90-day approval process in a limited way. The most significant aspects of an ILEC-CLEC relationship, "a detailed schedule of itemized charges" and associated service descriptions, must be filed and approved in

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presumably those of other ILECs as well). Qwest has often "overfiled," submitting entire negotiated agreements containing all contractual arrangements. This is not a concession as to the scope of Section 252(a)(1)'s *mandatory* filing requirement. Moreover, ILECs and CLECs are likely to find more need to avoid such "overfiling" in the context of modifications to a contractual arrangement that a CLEC wishes to see implemented at once. Yet absent a ruling here, there is uncertainty as to where the line is drawn.

6/ 47 U.S.C. §§ 204(a)(3), 211, 252(e)(4) & (f)(3).

advance. But other aspects of their contractual relationship can take effect without regulation.

2. Congressional Intent

This reading of Section 252(a)(1) is fully consistent with the legislative history of the 1996 Act. The Act reflects Congress's preference that ILEC-CLEC agreements be formed to the maximum extent possible through private negotiations between the parties. Thus, the Act intended a significant departure from the tariffing framework of the past, in which regulators step into the shoes of consumers (or interconnecting carriers) to establish a standard set of terms and conditions of regulated service offerings. The Act eschews a system in which regulators, in the first instance, play the most significant role in working through every aspect of the ILEC – CLEC relationship. Instead, the Act establishes a paradigm in which carriers are expected to negotiate matters of mutual interest among themselves. That is a paradigm to which Qwest in particular has sought to adhere in its dealings with CLECs. Under the Act regulatory involvement, which imposes costs and burdens not present in normal business dealings, is to be carefully circumscribed.

In this regard, it is instructive to consider the Senate and House versions of the draft legislation that ultimately became the 1996 Act: the Senate bill (S. 652) contemplated that interconnection arrangements would be formed through voluntary negotiations, while the House bill (H.R. 1555) contemplated that ILECs would submit detailed statements, analogous to traditional tariffs, for review by state commissions and the FCC. 7/ As a result of the Conference Committee negotiations, the House receded to the Senate and agreed to the Senate's version relying primarily on negotiations between ILECs and CLECs, with an added provision enabling state commissions to participate as mediators of such negotiations. 8/ In enacting a version of Section 252 drawn primarily from the Senate bill, the Congress essentially endorsed the view of the Senate Committee on Commerce, Science, and Transportation, which stated that it "intends to encourage private negotiation of interconnection agreements." 9/

Section 252(a)(1) captures this Congressional objective more than almost any other provision of the Act. It is not surprising that Section 252 itself opens by discussing negotiated agreements in subsection (a). Yet the Congressional emphasis on negotiated agreements would be undermined if all terms of all negotiated agreements had to go through a 90-day regulatory approval process.

Given the above, it is even more logical to read Section 252(a)(1) as requiring the 90-day approval process to apply only to those contractual provisions that make up a "schedule of itemized charges," including associated descriptions of the services to which the charges apply. ILECs and CLECs otherwise should be left free to implement most arrangements without regulatory delay.

7/ Telecommunications Act of 1996, Conference Report, H. Rep. 104-458, at 124-125 (Jan. 31, 1996).

8/ *Id.* at 125.

9/ S. 652, Telecommunications Competition and Deregulation Act of 1995, Report of the Committee on Commerce, Science, and Transportation, S. Rep. No. 104-23, at 19 (March 30, 1995).

C. An Overbroad 90-day Approval Requirement Is Unnecessary and Would Conflict with the Act's Goals

Some may argue for a broad interpretation of Section 252(a) in which many or all ILEC-CLEC contractual arrangements must first be approved by a PUC before taking effect. We already have discussed why that position is inconsistent with the intent and language of the Act. It also is neither necessary nor in the public interest.

First, it is important not to exaggerate the practical significance of the filing issue. This is only a procedural matter in important respects. The question is what ILEC-CLEC contract terms require prior approval before taking effect -- not what terms are lawful in and of themselves. The procedural question is the only issue before the Commission here.

Filing, to the extent required under Section 252(a), serves two functions. First, it provides an opportunity for regulators to evaluate the contractual arrangement in advance for discrimination and related public interest problems. Yet given the intent of the Act to get away from detailed, tariff-like regulation, it would seem obvious that Congress did not intend to create a mandatory filing requirement that exposed every, or even most, ILEC-CLEC arrangements to pre-effective date micro-management. Significantly, a more limited interpretation of Section 252(a) does not eliminate the ability of third parties to argue later that an unfiled ILEC-CLEC arrangement is unlawfully discriminatory. It only means that the PUC does not engage in prior review. This is a reasonable balancing of the interests under the Act. ILECs and CLECs can put into effect contractual arrangements that do not impact rates without delay. Regulators retain the right to review other negotiated arrangements, on their own motion or under complaints, after the fact.

Second, filing under Section 252(a) places a subsequently approved agreement within the scope of Section 252(i). Qwest emphasizes that it is not seeking a ruling regarding the scope of that section, or trying to reduce CLEC "pick and choose" rights in any respect. Rather, it is an overbroad interpretation of Section 252(a) that would be legally problematic. Section 252(i), and the associated body of law regarding the availability of "pick and choose," only applies to services and UNEs provided "under an agreement approved under" Section 252. This language only begs the question of which negotiated contract terms arising under Section 252(a) must be so approved.

The balance struck by Congress answers this question. Insofar as an ILEC and a CLEC negotiate a "schedule of charges," those rates must be made available to others under Section 252(i). Congress also could have required that each and every other term of a negotiated ILEC-CLEC business relationship also go through the pre-approval process. It did not do so because it did not view such non-core matters as of the same level importance. Some may view this as a "limitation" on Section 252(i), but it is one that reflects a distinction built into the Act based on a desire to minimize regulation when ILECs and CLECs are able to agree to business arrangements on their own.

Furthermore, the substantive impact of this result should not be exaggerated either. Again, rates and charges are available under Section 252(i).

Theses are the most important "pick and choose" matters. To the extent that an ILEC and a CLEC reach agreement on non-rate matters, the only relevant impact on a competing third party CLEC is that it has to ask for the same or similar arrangement. If the ILEC agrees (and Qwest for one tries to accommodate the specific requests of all its CLEC customers), that contract term also can take effect immediately without prior PUC review. If the ILEC disagrees, the CLEC can arbitrate under the broad "any issue" standard of Section 252(b). Parties also can file complaints if they believe discrimination is occurring.

In short, the limitations on the scope of the 90-day approval process in Section 252(a) have less consequence than is suggested by those who argue that every ILEC-CLEC contract provision must be filed. Rather, the Act reasonably balances the interests of the ILEC and CLEC who are prepared to implement their negotiated arrangement, and of any public interest reasons that might exist for delaying that implementation.

At the same time, an overly broad reading of Section 252(a) would have unintended and harmful consequences. For one thing, it would mean that in situations where an ILEC is willing to meet the needs of a particular CLEC, the CLEC might be forced to wait up to 90 days to receive the benefit of its bargain. This delay can have serious economic effects in and of itself, to the detriment of local competition. Such delay also could give parties a disincentive to reach negotiated arrangements in the first place.

Moreover, an overly broad reading of Section 252(a) has other adverse consequences. It creates legal uncertainty with respect to the validity of agreements that have not gone through the prior approval process. It creates potential conflict among the states when ILECs and CLECs agree to contractual arrangements that involve multi-state operations. It raises the regulatory compliance costs of ILECs and CLECs, and the burdens on state PUCs. These problems are discussed further in Section II below.

Qwest believes that Section 252(a)(1) was never intended to have such a broad reach. Indeed, it would be absurd to suggest that every time a CLEC and ILEC reach a contractual arrangement, or change a contract provision, they must seek prior PUC approval before moving ahead to carry out the new agreement. That approach would be the very opposite of the deregulatory goal of the Telecommunications Act.

Rather, Qwest submits that Section 252(a)(1) balances the goal of normal commercial contracting among ILECs and CLECs, outside the bounds of government review, with a limited regulatory backstop. If carriers can work out their arrangements themselves, that is best. Those agreements should be allowed and encouraged. PUCs have a residual role in these circumstances, but only to review the most important of those terms through the 90-day approval process. Otherwise, the primary PUC role under Section 252 is elsewhere -- to focus on other tasks such as arbitrations and SGATs.

II. UNCERTAINTY AS TO THE SCOPE OF THE SECTION 252(a)(1) PRE-APPROVAL REQUIREMENT IS A SIGNIFICANT PROBLEM REQUIRING A COMMISSION RULING

A. Uncertainty Makes the Most Overbroad Interpretation of the 90-day Filing Requirement the De Facto Policy Until Clarified by this Commission.

As Qwest emphasized at the outset, a definitive ruling on the scope of the Section 252(a) filing requirement is as important as the substance of the ruling itself. Qwest certainly has views as to the correct interpretation of Section 252(a)(1). However, the Commission should not lose sight of the primary purpose of this Petition -- to obtain a consistent nationwide determination of the filing obligations created by the Act. Uncertainty regarding the scope of the 90-day pre-approval process for negotiated arrangements has important and harmful consequences. It chills the normal ILEC-CLEC business processes favored by the Act. Uncertainty can lead parties to become more conservative and less willing to move quickly to implement new arrangements without first seeking PUC blessing.

Furthermore, uncertainty can empower the authority taking the most overreaching view of the 90-day filing and approval requirement. Insofar as one authority asserts that the details of all negotiated arrangements must be filed and approved, it creates incentives and pressures on ILECs to apply the same overbroad interpretation in all jurisdictions to avoid the risk of second-guessing and potential enforcement actions. At a minimum, dissimilar filing requirements when applied to multistate arrangements can be an administrative nightmare.

These are not unimportant issues, both as matters of statutory jurisdiction and communications policy. Uncertainty regarding the scope of Section 252(a)(1) already has lead Qwest and other ILECs to file negotiated arrangements going well beyond the "schedule of charges" referenced in that section of the Act. This "overfiling" has its own costs to competition and the parties, and still does not prevent second-guessing as to where lines are drawn. As discussed above, these costs increase to the extent that uncertainty slows the ability of ILECs and CLECs to modify their arrangements quickly in a maturing competitive environment.

Uncertainty regarding the 90-day pre-approval requirement also leaves room for third parties to urge PUCs to try and expand their jurisdiction beyond the matters left to their authority under the Act. Indeed, Qwest anticipates that some parties will respond to this Petition by arguing that state commissions should first review virtually any and all ILEC-CLEC agreements -- irrespective of the impact on competition, the statutory language, or Congressional intent.

Indeed, this issue was brought into focus for Qwest by recent events in Minnesota. On February 14, 2002, the Minnesota Department of Commerce ("DOC") filed a complaint with the Minnesota Public Utilities Commission, alleging that Qwest's ILEC subsidiary, Qwest Corporation, violated the Section 252(a)(1) requirement to file a number of provisions of agreements with CLECs before the PUC. In its Answer, Qwest Corporation demonstrated that none of the contractual provisions raised in the DOC complaint are subject to the Section 252(a)(1) filing and pre-approval process. A proceeding to examine these issues is underway before the Minnesota PUC. AT&T has requested each of the other states in Qwest's region to investigate the DOC allegations as well; a number have at least preliminary proceedings under way. The risk that different jurisdictions will reach divergent conclusions on the very same Qwest/CLEC contracts makes it even more urgent that the FCC clarify the law in this area.

Qwest disagrees with the DOC's contentions in two respects. First, we think the DOC incorrectly interprets Section 252(a) and the filing requirements in the Act. But second, and moreover, Qwest takes issue with the DOC's allegations that Qwest has acted in bad faith. The DOC is assuming that its interpretation of Section 252(a) is not only correct, but self-evident.

For present purposes, however, Qwest simply notes that the DOC Complaint threatens to accelerate trends towards an overbroad interpretation of Section 252(a) -- adding more gum to the works for ILECs and CLECs trying to do normal business. Qwest has taken pride in its efforts to listen to its wholesale CLEC customers, and to craft solutions to their needs at their request in a negotiated process, without burdening regulators with costly arbitrations as much as possible. CLECs have commended us for this attitude. Indeed, Qwest has often implemented agreements early, before a PUC has made them valid and enforceable under the Act by approving them. Again, we have done this to accommodate CLEC needs.

But, in view of the second-guessing in the DOC Complaint, Qwest inevitably now will be cautious about implementing contractual arrangements with CLECs without going through the 90-day approval process. This has adverse impact on its ability to respond promptly to CLEC needs, but it is the only way the

Company can protect itself against the risk of second-guessing and enforcement actions by third parties in the future -- at least pending clarification of the law regarding mandatory filing requirements. The result will be that carrier to carrier relationships are micromanaged through the regulatory process. That hardly is what Congress envisioned when it passed an Act it described expressly as "deregulatory."

B. Uncertainty Raises Issues and Problems for ILECs and CLECs Alike.

Qwest already has discussed a primary reason why a declaratory ruling is needed in this matter. An overbroad interpretation of the 90-day filing and approval process would reduce the incentives and abilities of ILECs and CLECs to implement bilateral arrangements that could benefit both parties. For example, it would be much more difficult for ILECs to address CLEC-specific solutions regarding provisioning or billing matters, or to solve day-to-day problems regarding these matters. Moreover, if negotiating parties were required to publicly disclose contractual provisions such as settlements of past disputes, detailed administrative matters, or other aspects of their business relationship with little or no connection to Sections 251 and 252, then they might prefer not to enter such arrangements.

A declaratory ruling also is needed to protect the settled contractual expectations of CLECs as well as ILECs. By law, if a negotiated contract provision truly qualifies as a matter that must be filed with a PUC under Section 251(a)(1) of the Act, it is valid only after it has been approved by a state commission. Section 252(e) plainly requires that interconnection agreements be reviewed and approved by state commissions before they take effect. 10/ Thus, an overbroad interpretation of Section 252, such as that asserted by the Minnesota DOC, would mean that contract provisions that should have been filed and approved under Section 252 but were not, were never actually valid. A declaratory ruling by this Commission will restore certainty to the legal validity of the terms of numerous non-filed ILEC-CLEC agreements that otherwise will increasingly be called into question.

Third, an overbroad reading of the 90-day approval process imposes real costs at a time when the resources of the telecommunications industry and commissions are stretched to handle other challenges. It certainly imposes costs on ILECs, and on CLECs who participate in the filing process. Excessive prior approval requirements would unnecessarily burden all state commissions with added time-consuming review proceedings, and delay the point when such agreements could take effect. It would also add unnecessary administrative burdens to this Commission's docket, and to those of the federal courts, as parties

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10/ *See, e.g., Global NAPS, Inc. v. Verizon Communications*, File No. EB-01-MD-010, FCC 02-59, ¶ 23 (released Feb. 28, 2002) (dismissing as unripe a claim for enforcement of an interconnection agreement that had not yet been filed with the state commission); *GTE Northwest Inc. v. Hamilton*, 971 F. Supp. 1350, 1353 (D. Ore. 1997) ("[a] binding final agreement will not exist until after the [state] Commission reviews and approves the agreement signed and submitted" by the ILEC and the CLEC); *Indiana Bell Tel. Co. v. Smithville Tel. Co.*, 31 F. Supp. 2d 628, 633 (S.D. Ind. 1998) ("*Before any interconnection agreement may be implemented or enforced*, whether it was produced by negotiation or arbitration, it must be submitted for and receive approval by the State commission.") (emphasis added). In addition, reasoning by analogy, the same result may be compelled by the time-honored Filed Rate Doctrine, which a number of courts have held to apply to interconnection agreements. *See Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 402 (7th Cir. 2000); *Stein v. Pacific Bell Tel. Co.*, 173 F. Supp. 2d 975, 987 (N.D. Cal. 2001).

seek guidance as to the meaning of provisions that never should have been filed in the first place.

In sum, clarifying the scope of Section 252(a)(1) would advance local competition by making possible collaborative arrangements between ILECs and CLECs without regulatory delay, would protect all parties' existing contractual expectations, and would reduce administrative burdens on regulators as well as on ILECs and CLECs. Permitting negotiated collaboration between ILECs and CLECs, with prior regulatory review *only* to the limited extent specified in the statute, ultimately will facilitate the development of local competition.

C. The FCC Has Authority To Resolve The Issues Raised Here, And Is Well-Positioned To Do So Expeditiously.

The Commission should issue a declaratory ruling "terminating a controversy" and "removing uncertainty" 11/ regarding which negotiated contractual provisions are subject to the public filing and state commission approval requirements of Section 252(a)(1). The FCC clearly has authority to resolve this issue, it has experience with closely related matters, and it is the only entity that can establish a national policy regarding the important ILEC-CLEC negotiation process.

First, it is well established that the Commission has authority to interpret provisions of the Act, including Section 252(a)(1). The Supreme Court specifically upheld the FCC's authority to make rules interpreting the scope of

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11/ 47 C.F.R. § 1.2.

Section 252, even though it deals largely with intrastate communications and provides a major implementing role for state commissions. 12/ Moreover, the Commission not only has authority to interpret and enforce the provisions of Section 252, it may be the *only* regulatory body that has such authority, since only the Commission's interpretation will be binding upon or receive deference from the courts. 13/ This makes it all the more pressing that the Commission exercise that authority to clarify the scope of the statute.

Second, the Commission has already addressed closely related issues, and it would be a logical next step for the Commission to provide greater clarity regarding which negotiated matters are, and are not, subject to the 90-day Section 252(a)(1) filing and approval process. Indeed, the Commission addressed a number of issues relating to the Section 252 negotiation process in the 1996 *Local Competition Order*. 14/ For example, the Commission held that ILECs and other

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12/ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 384-85 (1999).

13/ *See BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.*, 278 F.3d 1223, 1236-37 (11th Cir. 2002) (holding that state commissions lack authority to interpret or enforce interconnection agreements under Section 252). *But see Starpower Communications*, 15 FCC Rcd 11277 (2000); *Bell Atlantic Md. v. MCI WorldCom*, 240 F.3d 279, 301-07 (4th Cir. 2001); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Tex.*, 208 F.3d 475, 479-80 (5th Cir. 2000); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla, Inc.*, 235 F.3d 493, 496-97 (10th Cir. 2000).

14/ *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15569-87, ¶¶ 138-171 (1996) ("*Local Competition Order*) (subsequent history omitted) (discussing scope of duty to negotiate in good faith under Section 252(a)); *id.* at 16122-42, ¶¶ 1269-1323 (construing other Section 252 substantive and procedural requirements).

carriers could simultaneously negotiate regarding matters subject to Section 252 and regarding resolution of other disputes between the parties – and that, far from violating the duty of negotiating interconnection agreements in good faith, such linked negotiations "could offer additional potential solutions . . . [and] may be pro-competitive." 15/ This statement demonstrates that the Commission recognized that ILECs and interconnecting carriers may well enter agreements covering matters that are not subject to Section 252(a)(1), and that such separate, unfiled agreements, even if negotiated in tandem with agreements concerning interconnection matters that must be filed, may be conducive to competition.

Third, and perhaps most fundamentally, a national policy is needed in this area. At the request of CLECs, Qwest's ILEC subsidiary, Qwest Corporation, frequently enters negotiations with CLECs regarding interconnection matters not in a single state, but across Qwest Corporation's 14-state region. 16/ Indeed, given the benefits of such multi-state negotiations, CLECs demanded them both before the 1996 Act was adopted, 17/ and afterwards, and the Commission adopted merger

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15/ *Local Competition Order*, 11 FCC Rcd at 15576, ¶ 153.

16/ Similarly, Qwest's out-of-region CLEC and long distance affiliate, Qwest Communications Corp., enters multi-state negotiations with the ILECs with which it competes.

17/ S. 1822, The Communications Act Of 1994, Hearings Before The Committee On Commerce, Science, And Transportation, 103rd Cong., 2d. Sess., at 582 (Feb. 23, 1994) ("ALTS has recently filed with the Commission a proposal asking the Commission to immediately convene a negotiation among the parties interested in access and interconnection to the local exchange. . . . We propose to have the Commission staff oversee these meetings as a facilitator . . . .") (prepared statement of Gary E. Lasher, President and CEO, Eastern TeleLogic Corp., and Chairman, Association for Local Telecommunications Services).

conditions intended to induce such multi-state negotiations in its *SBC-Ameritech* and *GTE-Bell Atlantic* merger decisions. 18/ Yet would be much more difficult to negotiate such agreements if different states were to apply materially different standards regarding which arrangements create a filing and approval duty under Section 252(a)(1). As noted above, current proceedings in a number of states across Qwest's region raise the risk that different states will reach divergent conclusions regarding the identical set of Qwest contracts with CLECs. This not only creates confusion regarding these existing contracts, it could make multi-state negotiations for all carriers even more difficult or impossible in the future.

Uniformity in the interpretation of the Act facilitates negotiations and promotes local competition, as the Commission concluded in the *Local Competition Order*: "fair negotiations will be expedited by the promulgation of national rules. * * * [N]ational rules will reduce the need for competitors to revisit the same issue in 51 different jurisdictions, thereby reducing administrative burdens and litigation for new entrants and incumbents." 19/ Moreover, given that reviewing courts accord deference to the FCC – but *not* to state commissions – with regard to

18/ *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee,* 14 FCC Rcd 14712, ¶ 389 (1999), *rev'd in part on other grounds, Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001); *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee,* 15 FCC Rcd 14032, ¶ 306 (2000).

19/ *Local Competition Order*, 11 FCC Rcd at ¶ 56. *See also id.* at ¶ 60 (uniform national rules adopted by the FCC could "serve as a useful guide for negotiations by setting forth minimum requirements that will apply to parties if they are unable to reach agreement. This is consistent with the broad delegation of authority that Congress gave the Commission to implement the requirements set forth in section 251.").

interpretations of the Act, a clear FCC statement of the scope of the Act in this regard would reduce potentially repetitive litigation.

Finally, the Commission has an obligation to put into place the policies adopted by Congress. As discussed above, the framework established by Congress relies primarily on negotiations, in which the affected parties – ILECs and CLECs – can in most cases work out the details of their own interconnection arrangements, with resort to regulators only as a last resort. The Commission, as the primary agency entrusted with implementing the Telecommunications Act of 1996, has a responsibility to see that the business-to-business negotiation system is implemented consistent with Congress's overall intent of promoting such negotiations and reducing regulation.

III. THE COMMISSION SHOULD ISSUE A DECLARATORY RULING THAT CLEARLY SPECIFIES WHICH NEGOTIATED PROVISIONS ARE SUBJECT TO A 90-DAY PRE-APPROVAL PROCESS, AND WHICH ARE NOT

Qwest already has discussed how Section 252(a)(1) involves a careful balancing of policy interests: (a) allowing ILECs and CLECs to commence most voluntary arrangements quickly as in a normal business, while (b) delaying implementation in certain core matters where Congress though prior review was necessary. Qwest also has discussed where it believes that the line should be drawn between those matters that Congress intended to put through pre-effective review, and those it did not. In this Section Qwest elaborates on the types of provisions that it believes the Commission should declare fall on either side of the filing line.

A. A "Schedule of Charges" and Related Service Descriptions Must Be Filed and Approved

As discussed above, Qwest believes that the touchstone of Section 252(a)(1) is its focus on "a detailed schedule of itemized charges for interconnection and each service or network elements included in the agreement." 20/ This statutory language reflects Congress's goal of limiting regulation when CLECs and ILECs are able to work out voluntary arrangements as in a standard business context. It follows that a negotiated arrangement should be filed for prior state commission approval insofar as it includes:

(i) a description of the service or network element being offered, with a focus on the functionality to be received by the interconnecting carrier;

(ii) the various options available to the requesting carrier (*e.g.*, the capacities of loops or transport trunks that are available) and any binding contractual commitments regarding the quality or performance of the service or network element; and

(iii) the rate structures and rate levels associated with each such option, including all applicable recurring and non-recurring charges, as well as any volume or term commitments that are necessary prerequisites for eligibility for a certain set of rates.

In addition, since the Commission has defined operational support systems ("OSS") to constitute a required network element, 21/ a description of the basic OSS functionalities and options to which an ILEC and a CLEC have agreed should be filed and subjected to state commission approval. But as discussed below, the specific details of OSS implementation, particularly provisions that are tailored to the needs of an individual carrier, need not be filed or approved.

20/ 47 U.S.C. § 252(a)(1).

B. Other Negotiated CLEC-ILEC Contract Arrangements Do Not Require Filing and Prior PUC Approval Under the Act's 90-day Process

On the other hand, Qwest submits that the Commission should hold that ILEC – CLEC matters going beyond a "schedule of charges" and related service descriptions are *not* subject to the Section 252(a)(1) filing and 90-day approval requirements. It is not practical to spell out all of the possible voluntary contractual arrangements that might arise between an ILEC and a CLEC. As local competition continues to grow, the spectrum of such arrangements is likely to grow as well. This is the way matters work in a normal unregulated business environment.

Again, the fact that Section 252(a) does not require a 90-day approval process for all terms does not mean that such matters are beyond regulatory reach. It only means that they can take effect once the CLEC and ILEC reach their negotiated agreement.

All that said, we can suggest at least some categories of CLEC – ILEC arrangements that should not require a 90-day process under the Act:

(i) contract provisions concerning business-to-business relationships, mechanics of how interconnection is provided to the specific CLEC, and administrative matters;

(ii) contract provisions concerning settlements of past disputes; and

(iii) contract provisions concerning regulated or unregulated services that are not subject to Section 251.

21/ *Local Competition Order*, 11 FCC Rcd at ¶ ____.

1. Agreements Defining Business Relationships and Business-to-Business Administrative Procedures

The Commission should clarify that Section 252(a)(1) does not contemplate public filing or state commission approval of negotiated arrangements concerning how the business-to-business relationship between ILECs and CLECs will be managed, nor arrangements regarding implementation or operational matters. For example, the following types of provisions (and other similar matters) should not be subject to the filing and 90-day approval processes:

- Escalation clauses – *e.g.*, contractual determinations that in the event of disagreement, specified individuals within the respective companies will be brought in to work things out.
- Dispute resolution provisions – *e.g.*, provisions specifying that, in the event the parties cannot resolve an ongoing disagreement, they agree to bring the dispute to commercial or regulatory arbitration, or that a particular judicial or regulatory forum will be selected for litigation.
- Administrative arrangements regarding the mechanics of provisioning, billing and other activities between the ILEC and CLEC.
- Arrangements for contacts between the parties – *e.g.*, commitments that certain individuals from the respective companies will meet, that the ILEC will provide OSS trainers to the CLEC at a particular location, or other specifics of account team support.
- Non-binding standards and statements of expectations regarding service quality or performance.

None of these provisions constitute "interconnection, services, or network elements pursuant to section 251," nor do they have anything to do with a "detailed schedule of itemized charges," and therefore the Act does not require any of them to be filed with or receive approval from state commissions. Requiring such agreements to be publicly filed and approved would deter ILECs from crafting business relationships and arrangements to meet the unique needs of particular interconnecting carriers, and would force them to rely on one-size-fits-all solutions to such matters. Such an inappropriate requirement could also result in a particular CLEC's business plans and unique needs to be publicly revealed, which would not serve the interests of competition. Most significantly, the procedural delay entailed by waiting for state commission approval – up to 90 days – could make it impossible for ILECs and CLECs to make even the most basic arrangements for their day-to-day business operations, which routinely require all sorts of agreements.

Escalation and dispute resolution provisions, in many cases, can define the overall relationship between two companies, and relate to matters having little or nothing to do with the rates, terms, or conditions of interconnection or network elements. For example, the Minnesota DOC complaint alleged Section 252 violations with respect to Qwest's failure to file its administrative escalation arrangements with two different CLECs. One of these arrangements provided for a *four*-level escalation process (*e.g.*, if the two companies' service representatives could not resolve an issue, it would be escalated to vice-presidents; from there, to executive vice presidents; from there to CEOs; and from there to arbitration or litigation); the other provided for a *five*-level process with an additional layer of internal review. Similarly, the DOC complaint also alleges filing violations with respect to contract provisions in which Qwest agreed to weekly meetings between specified executives and similar administrative processes to review business questions and concerns. Other contractual provisions targeted by the complaint address matters such as whether disputes are to be addressed before a court of law, commercial arbitration panel, or state regulatory commission, and under what procedural and substantive legal rules.

Clearly, dispute resolution arrangements such as those listed above do not address a "schedule of charges" or the core terms of interconnection or network elements. Rather, they address the terms by which the companies are agreeing to do business and work out the inevitable disagreements that regularly arise in any business-to-business relationship. The Act anticipated and encouraged just this kind of responsiveness to specific CLEC needs as the requirements of a CLEC might change from time to time. Under Section 252(a), such arrangements are to take effect without PUC approval.

For similar reasons, the Commission should make it clear that detailed administrative procedures, whether relating to interconnection or other matters, need not be filed with or approved by state commissions. For example, in one case, Qwest Corp. agreed to provide, and the CLEC agreed to pay for, the services of a dedicated provisioning team from the ILEC to work on the CLEC's premises to assist the CLEC with OSS matters (such as training CLEC personnel on how to correctly input data into the system. Qwest would submit that such a provision need not be filed or be subject to the state commission approval process. Nevertheless, given the ambiguity of Section 252(a), Qwest and the CLEC had filed it with the Minnesota PUC, and had obtained the PUC's approval. Even so, the Minnesota DOC alleged a Section 252 violation because Qwest had not filed the separate agreement containing implementation provisions such as the number and pay grades of the Qwest personnel to be detailed to the CLEC's premises. The Commission should issue a ruling to preclude such blatant over-reaching.

In sum, Qwest, like any vendor, tailors its implementation processes to meet the varying needs of its CLEC customers. The Commission should make it clear that there is no basis for requiring all this administrative detail to be filed with and approved by state commissions. To the contrary, negotiated variations in business-to-business administrative processes are acceptable within the framework of the Telecommunications Act and should not be subject to the Section 252 filing or state commission approval requirements

2. Settlement Agreements

Settlement agreements that resolve disputes between ILECs and CLECs over billing or other matters are not interconnection agreements under Section 252, and in any event are not subject to the 90-day approval process in Section 252(a)(1). This should hold true even if the dispute related to elements or services that are subject to Section 251 and 252, and part of an interconnection agreement. For example, Section 252(a)(1) should not apply to settlement agreements providing for the payment of a lump sum to resolve disputes between parties over the quality of interconnection services provided in the past, or to resolve disputes over billing or payments for such services. This would be consistent with the Commission's historic treatment of settlement agreements relating to tariffed services: settlement payments need not be tariffed, and do not violate the statutory prohibition of unreasonable discrimination. 22/ It stands to reason, consistent with Congressional intent, that negotiated agreements under Section 252 should be less inclusive than historically micro-managed tariffs; thus, the case is even stronger that such settlement provisions should not be subject to the Section 252(a)(1) filing or approval requirements.

Moreover, applying Section 252(a)(1) to settlement agreements would disserve the public interest, because requiring public disclosure and third-party access to the terms of settlement agreements would deter parties from settling their disputes. Clearly, the public interest favors amicable dispute resolution. 23/ And deterring parties from entering settlements would force regulators and courts to resolve many more disputes that could have been settled by the parties. Not only would this be administratively burdensome, but more importantly, it could well lead to the imposition of solutions that may be inferior to those that the parties could have worked out on their own.

22/ *Allnet Communications Services, Inc. v. Illinois Bell Tel. Co.*, 8 FCC Rcd 3030, 3037, ¶¶ 32-33 & n.78 (1993) (rejecting contention that award of damages to a customer in a complaint case, or a carrier's payment to a customer in settlement of such a dispute, constitutes violation of non-discrimination duty).

23/ *See, e.g., McDermott v. AmClyde and River Don Castings, Ltd.*, 511 U.S. 202 (1994) ("public policy wisely encourages settlements", *id.* at 215, and a rule that "discourages settlement and leads to unnecessary ancillary litigation" is "clearly inferior" to one that promotes settlement of disputes, *id.* at 211); *accord, Bergh v. Dept. of Transportation*, 794 F.2d 1575, 1577 (Fed. Cir. 1986), *citing United States v. Contra Costa County Water District*, 678 F.2d 90, 92 (9th Cir. 1982); *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 565 (6th Cir. 1982); *Airline Stewards & Stewardesses Ass'n v. American Airlines*, 573 F.2d 960, 963 (7th Cir. 1978); *Florida Trailer & Equipment Co. v. Deal*, 284 F. 2d. 567, 571 (5th Cir. 1960).

3. Agreements Regarding Matters Not Subject to the 1996 Act

The Commission has already held that the substantive and procedural requirements of Sections 251 and 252 do not apply to purely interstate matters within the FCC's traditional, pre-1996 jurisdictional domain, such as interstate access services. 24/ It should reaffirm that conclusion. Moreover, the Section 251 and 252 requirements also do not apply to local retail services and intrastate long distance service, which are the province of the state commissions under pre-1996 state law. 25/ Nor do the Section 251/252 rules apply to network elements, such as local switching for large business customers in major metropolitan areas, that the FCC has concluded do not qualify for unbundling under the "necessary" and "impair" standards of Section 251(d)(2), 26/ nor to the transport and termination of non-local types of traffic, such as information access. 27/ In light of these strong

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24/ *See, e.g., Local Competition Order*, 11 FCC Rcd at ¶¶ 191, 873, 1033-34. *See also Competitive Telecommunications Association v. FCC*, 117 F.3d 1068 (8th Cir. 1997).

25/ *Local Competition Order*, 11 FCC Rcd at ¶ 1035; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, n.66 (2001) ("*ISP-Bound Traffic Remand Order*").

26/ *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 ¶¶ 469-72 (1999) ("*UNE Remand Order*") (noting that Section 252 pricing rules do not apply to network elements that have been removed from the national list of elements subject to mandatory unbundling, even if those elements continue to be included in the Section 271 competitive checklist)

27/ *ISP-Bound Traffic Remand Order*, 16 FCC Rcd at 9189, ¶ 82 ("[C]arriers may no longer invoke section 252(i) to opt into an existing interconnection agreement precedents, the Commission should make it clear that agreements concerning services or elements that are not under the Section 251/252 regulatory framework need not and *should* not be treated as interconnection agreements that must be filed with state commissions under Section 252(e)(1). And it should be beyond doubt that, with the exception of reciprocal compensation for local traffic, services that *ILECs* purchase from *CLECs* are not subject to Sections 251(c) and 252. Moreover, in the case of voluntary agreements that contain both provisions relating to elements and services subject to Sections 251, and elements or services not subject to the statute, the Section 252(a)(1) filing and approval process should extend *only* to rates and service descriptions regarding the former.

CONCLUSION

For the foregoing reasons, Qwest respectfully requests that the Commission expeditiously grant its Petition for Declaratory Ruling.

with regard to the rates paid for the exchange of ISP-bound traffic. Section 252(i) applies only to agreements arbitrated or approved by state commissions pursuant to section 252; it has no application in the context of an intercarrier compensation regime set by this Commission pursuant to section 201.").

Respectfully submitted,

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ATTACHMENT 2

CONFIDENTIAL AND PROPRIETARY

(Redacted Version)