BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

In the Matter of the Request of	)	
	)	
MCImetro Access Transmission Services, LLC.	)	**DOCKET NO. ARB 6**
	)	
and	)	
	)	
QWEST CORPORATION	)	
	)	
For Approval of Negotiated Agreement Under the Telecommunications Act of 1996	)	**MCI Response to Qwest Motion to Dismiss Application for Approval**
. . . . .	)	

MCImetro Access Transmission Services, LLC ("MCImetro") hereby files its Response to Qwest's Motion to Dismiss filed in this docket. For the following reasons, MCImetro opposes the motion.

INTRODUCTION

Qwest Corporation moved to dismiss any review and approval of what is known as the Qwest Master Services Agreement (the "Commercial Agreement") under which Qwest agreed to provide to MCImetro Qwest Platform Plus™ services under Section 271 of the federal Telecommunications Act of 1996 ("federal Act"). These Section 271 services consist primarily of local switching

and shared transport *network elements* in combination with certain other services. (Emphasis supplied.)[1]

In support of its motion, Qwest states that the Commercial Agreement expressly provides that it does not amend or alter the terms and conditions of any existing interconnection agreements ("ICA") between MCI and Qwest. Qwest also states that since the Commercial Agreement contains no terms and conditions for services that Qwest must provide under Section 251(b) and (c), it is not an ICA or an amendment to an ICA between Qwest and MCI. Accordingly, Qwest argues that this Commission has no authority under Section 251 or 252 of the federal Act to review or approve the Commercial Agreement.[2]

Relevant sections of the portion of the Commercial Agreement entitled "Qwest Master Services Agreement" provide in pertinent part:

> 4.3 The provisions in this Agreement are intended to be in compliance with and based on the existing state of the law, rules, regulations and interpretations thereof, including but not limited to Federal rules, regulations, and laws, as of the Effective Date regarding Qwest's obligation under Section 271 of the Act to continue to provide certain *Network Elements* ("Existing Rules").
>
> 4.5 To receive services under this Agreement, MCI must be a certified CLEC under applicable state rules. MCI may not purchase or utilize services or *Network Elements covered under this Agreement* for its own administrative use or for the use by an Affiliate.
>
> 4.6 Except as otherwise provided in this Agreement, the Parties agree that *Network Elements and services provided under this*

[1] Qwest's Motion to Dismiss, page 1.
[2] *Id*. at pages 1-3.

> *Agreement* are not subject to the Qwest Wholesale Change Management Process ("CMP") requirements, Qwest's Performance Indicators (PID), Performance Assurance Plan (PAP), or any other wholesale service quality standards, liquidated damages, and remedies. Except as otherwise provided, MCI hereby waives any rights it may have under the PID, PAP and all other wholesale service quality standards, liquidated damages, and remedies with respect to *Network Elements and services provided pursuant to this Agreement*. Notwithstanding the foregoing, MCI proposed changes to QPP attributes and process enhancements will be communicated through the standard account interfaces. Change requests common to shared systems and processes subject to CMP will continue to be addressed via the CMP procedures.

Finally, that portion of the Commercial Agreement entitled, Service Exhibit 1 - Qwest Platform Plus™ Service, provides in Section 1.1 entitled "General QPP™ Service Description:"

> QPP™ services shall consist of the Local Switching *Network Element* (including the basic switching function, the port, plus the features, functions, and capabilities of the Switch including all compatible and available vertical features, such as hunting and anonymous call rejection, provided by the Qwest switch) and the Shared Transport *Network Element* in combination, at a minimum to the extent available on UNE-P under the applicable interconnection agreement or SGAT where MCI has opted into an SGAT as its interconnection agreement (collectively, "ICAs") as the same existed on June 14, 2004.

ARGUMENT

A. Federal Law requires that the Commercial Agreement be filed for Review and Approval.

Section 252(a) (1) of the federal Act, entitled "Voluntary Negotiations" states:

> (1) Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement, including any interconnection agreement negotiated before the date of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

Section 252(e) (1) and (3) provide in part:

> (1) Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission

> (3) Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

This section was interpreted by the Federal Communications Commission ("FCC") in October 2002. The FCC stated:

> 7. . . .we believe that the state commissions should be responsible for applying, in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements. Indeed, we believe this is consistent with the structure of section 252, which vests in the states the authority to conduct fact-intensive determinations relating to interconnection agreements

> 8. . . . we find that an agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1).26

> 10. Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an "interconnection agreement" and, if so, whether it should be approved or rejected.[3]

As noted by Qwest, footnote 26 referenced in Paragraph 8 states: "we find that only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)." However, in March 2004, in its Notice of Apparent Liability for Forfeiture issued to Qwest, the Commission states in Paragraph 21: "We have historically given broad construction to Section 252(a) (1)." The FCC goes on to state:

> any agreement that creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a) (1).

In this latter instance, the FCC does not limit its direction to only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1).[4]

The FCC recently issued FCC Order 04-179 in the WC Docket No. 04-3134 (Released August 20, 2004). This order makes it clear that the issue of whether to

[3] Memorandum Opinion and Order FCC 02-276 issued in WC Docket 02-89, entitled *Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Paragraphs 7, 8 and 10.

[4] *In the Matter of Qwest Corporation Apparent Liability for* Forfeiture, File No. EB-03-IH- 0263, NAL Account No. 200432080022, FRM No. 0001-6056-25, Paragraph 22.

file commercial agreements that do not provide for section 251 network elements is not settled by the FCC. That order states in pertinent part at paragraph 13:

> Additionally, we incorporate three petitions regarding incumbent LEC obligations to file commercial agreements, under section 252 of the Act, governing access to network elements for which there is no section 251(c)(3) unbundling obligation.[5] To that end, should we properly treat commercially negotiated agreements for access to network elements that are not required to be unbundled pursuant to section 251(c)(3) under section 252, section 211, or other provisions of law?

As is clear from that passage, the FCC's order does not affect this Commission's jurisdiction over the filing of the Commercial Agreement for state review and approval, since the issue of filing obligations for commercial agreements is one of the issues that the FCC's explicitly seeks comment upon in its ongoing rulemaking. Indeed, the fact that the FCC has not squarely determined this issue is reinforced by the concurring statement of FCC Commissioner Kathleen Abernathy, who lamented the fact the FCC did not clarify the status of commercial agreements:

> Yet I am disappointed that the Commission did not clarify in this Order the legal status of commercial agreements that pertain to services or facilities for which no section 251 mandate exists. Because both incumbent LECs and competitors have cited lingering uncertainty on this issue as a stumbling block to further agreements, we should have removed that obstacle now. I only hope that the Commission does so in the near future.

[5] SBC Communications, Inc., Emergency Petition for Declaratory Ruling, Preemption, and Standstill, WC Docket No. 04-172 (filed May 3, 2004); BellSouth, Emergency Petition for Declaratory Ruling (filed May 27, 2004); BellSouth, Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Section 252 with Respect to Non-251 Agreements (filed May 27, 2004).

Qwest asserts that the FCC only requires interconnection agreements to be filed that have on-going obligations relating to network elements offered pursuant to Section 251. If the FCC had clearly made such a determination as asserted by Qwest, the FCC has muddied the waters with its request for comments on this very issue in FCC Order 04-179, as Commissioner Abernathy highlights. Had Qwest's assertion been fully supported by the FCC, one would think the FCC would have said so and reiterated such a ruling in FCC Order 04-179, rather than putting the issue in play by requesting comments and clearly disappointing at least one FCC commissioner.

Because this agreement creates an ongoing obligation pertaining to Qwest's provision of unbundled network elements (albeit pursuant to Section 271, not Section 251), the parties have an obligation to file the Commercial Agreement with the state so that the state can determine whether the Commercial Agreement discriminates against a telecommunications carrier not a party to the Commercial Agreement and whether approval of the Commercial Agreement is not consistent with the public interest, convenience and necessity as described in Section 252(e)(2)(A).

Section 252(e) requires that a voluntarily negotiated agreement be filed with state commissions for review and approval to ensure that such voluntarily

negotiated agreements do not discriminate against other carriers not parties to the agreement and that the agreement is not contrary to the public interest.

The FCC has clearly left the first determination of what is an interconnection agreement to the states.[6]

The FCC emphasized the states' roles in a footnote to paragraph 7 stating:

> As an example of the substantial implementation role given to the states, throughout the arbitration provisions of section 252, Congress committed to the states the fact-intensive determinations that are necessary to implement contested interconnection agreements. *See, e.g.,* 47 U.S.C. § 252(e)(5) (directing the Commission to preempt a state commission's jurisdiction only if that state commission fails to act to carry out its responsibility under section 252).[7]

Finally, in its Declaratory Order, the FCC did not interpret Section 252(e) directly, and therefore, did not address the filing of voluntarily negotiated agreements under the section, nor provide as to the requirements of Section 252(e). Qwest's petition for a declaratory ruling only sought a declaratory ruling on the scope of the mandatory filing requirement set forth in section 252(a)(1) of the Communications Act of 1934, as amended.[8] Thus, MCI believes the Commercial Agreement must be filed with the state under federal law.

B. Activity in Other States.

[6] Memorandum Opinion and Order FCC 02-276 issued in WC Docket 02-89, entitled *Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Paragraphs 7.
[7] *Id*. at ftnt 23.
[8] *Id*. at ¶ 1.

1. Responses to Qwest motions to dismiss in other states by state staffs.

MCImetro filed the same Commercial Agreement in all of the 14 states in Qwest Corporation's ("Qwest") region. Attached here are Responses filed by the staff of state commissions in Arizona and New Mexico (including Staff's filing in the Qwest/Covad case before the New Mexico Public Regulation Commission) addressing the same issue contained in Qwest's motions to dismiss that were filed in those states. These are the first responses from commission staffs that MCImetro has received. MCImetro has not received any other responses from other state commissions or their staff addressing this issue, but will provide any subsequent responses from other state commissions should this Commission so desire. These responses received to date provide further legal argument that support MCI's position that the Commercial Agreement should be filed for review and approval by state commissions.

MCImetro supports the legal arguments contained in each of the Arizona and New Mexico staff responses to Qwest motions to dismiss filed in those states. Those staff responses provide further legal argument and support for MCImetro's position on this issue as stated in its Response to Qwest's motion to dismiss filed in this docket. Their responses are attached as Exhibit A and B and the arguments made there are incorporated by reference here.

2. Michigan – SBC/Sage Agreement

Recently, the Michigan Commission found that most of the provisions of Sage Commercial Agreement and the eighth amendment qualify for review and approval under the federal Act. Specifically, the Michigan Commission concluded that, except for the commercially sensitive information redacted from the public version of the agreement filed by SBC and Sage, the remainder of the Commercial Agreement and eighth amendment are subject to the Commission's review and approval.

The Michigan Commission also found that:

> SBC and Sage should be obligated to make the LWC Agreement pricing schedule public. The Commission finds that the LWC Agreement pricing schedule, which is an attachment to the LWC Agreement, is an integral part of the arrangement that must be disclosed. Further, any of the redacted provisions of the LWC Agreement that refer to the pricing schedule should also be disclosed. The FCC's recent decision to change its "pick and choose" rule (47 CFR 51,809) to an "all or nothing" rule provides further support for requiring the disclosure of the bulk of the LWC Agreement because there is no reason for SBC to now claim that a provider can choose to be bound by only certain provisions of the agreement and attempt to negotiate better terms regarding those provisions not chosen.

Here like the SBC/Sage LWC Agreement, the Commercial Agreement is an integral part of the arrangement and available under the FCC's recent "all or nothing" pick and choose rule.

C. <u>Responses to Qwest's Motions to Dismiss by AT&T.</u>

AT&T has filed its response in this proceeding, it has also filed responses to the similar motions to dismiss filed by Qwest in other states. Its response provides rulings and information about activities in other states concerning the filing of commercial agreements for state commission review. Rather than repeating those arguments now, MCImetro concurs in AT&T's arguments stated in its Oregon response dated September 13, 2004.

CONCLUSION

Therefore, for the reasons stated, Qwest's motion to dismiss should be denied.

Dated this 20th day of September 2004

MCImetro ACCESS TRANSMISSION SERVICES, LLC

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I served a true and exact copy of the within Response to Qwest's Motion to Dismiss, upon the following, either by hand delivery, first class mail or e-mail, as stated below:

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Dated: September 20, 2004

_____

BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS
Marc Spitzer, Chairman
William A. Mundell
Jeff Hatch-Miller
Mike Gleason
Kristin K. Mayes

IN THE MATTER OF THE APPLICATION OF MCImetro ACCESS TRANSMISSION SERVICES, LLC, FOR APPROVAL OF AN AMENDMENT FOR ELIMINATION OF UNE-P AND IMPLEMENTATION OF BATCH HOT CUT PROCESS AND QPP MASTER SERVICES	Docket No. T-01051B-04-0540 T-03574A-04-0540

STAFF'S RESPONSE TO QWEST'S MOTION TO DISMISS APPLICATION FOR REVIEW OF NEGOTIATED COMMERCIAL AGREEMENT

I. INTRODUCTION

On July 16, 2004, Qwest Corporation ("Qwest") and MCImetro Access Transmission Services, L.L.C. ("MCI") entered into two separate agreements. The first agreement was labeled an Amendment to their Interconnection Agreement. The second agreement was labeled the QPP Master Service Agreement. The first agreement both MCI and Qwest filed for Commission approval under 47 U.S.C. Section 252(e). The second agreement Qwest filed with the Commission for informational purposes only. However, MCI subsequently filed the second agreement with the Commission for approval under 47 U.S.C. Section 252(e). On August 6, 2004, Qwest filed a Motion to Dismiss MCI's Application for Commission review and approval of this Agreement. For the following reasons, Qwest's Motion to Dismiss should be denied.

II. DISCUSSION

A. State Commission Have Broad Authority Under Section 252 Over the Review and Approval of Interconnection Agreements

Under Section 252 of the Federal Act, State commissions are given broad authority to review and approve "interconnection agreements" between carriers. The Act encourages carriers to

undertake voluntary negotiations and to enter into voluntary binding agreements without regard to the standards set forth in subsections (b) and (c) of Section 251 of the Act. If disputes arise, the State commission resolves them through an arbitration which is binding on both parties. In addition, the State commissions are the designated repository for all such agreements, whether arrived at through arbitration or voluntary negotiation.

The FCC has addressed the types of agreements which fall within the scope of Section 252 several times, the most recent being in response to a Petition for Declaratory Ruling filed by Qwest. In its Declaratory Ruling in response to Qwest's Petition, the FCC stated that if the agreement pertained to an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation, it was an interconnection agreement over which the State commission has jurisdiction.

The FCC also stated that the State commissions should be responsible for applying, in the first instance, the statutory interpretation to the terms and conditions of specific agreements. The FCC went on to state that "…we believe this is consistent with the structure of section 252, which vests in the states the authority to conduct fact-intensive determinations relating to interconnection agreements."

The importance of the Section 252 review and filing requirements was underscored by the FCC in the following passage from their *Local Competition First Report and Order*.

> "State commissions should have the opportunity to review all agreements, including those that were negotiated before the new law was enacted, to ensure that such agreements do not discriminate…and are not contrary to the public interest…Requiring all contracts to be filed also limits an incumbent LEC's ability to discriminate among carriers, for at least two reasons. First, requiring public filing of agreements enables carriers to have information about rates, terms, and conditions that an incumbent LEC makes available to others. Second, any interconnection, service or network element provided under an agreement approved by the state commission under section 252 must be made
>
> available to any other requesting telecommunications carrier upon the same terms and conditions, in accordance with section 252(i)…Conversely, excluding certain agreements from public disclosure could have anticompetitive consequences."

B. Section 252(e) Requires State Commission Review and Approval of "Any" Interconnection Agreement

Section 252(e)(1) requires that "**any**" agreement for interconnection be filed with and reviewed by the State commission. Section 252(e)(1) provides:

> "**Any** interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies." (Emphasis added).

Qwest relies upon a recent FCC Declaratory Ruling and Section 252(a)(1) of the Act to argue that the Arizona Commission has no authority to review and approve its QPP Master Service Agreement with MCI, despite the fact that the Agreement governs the provision of unbundled network elements, interconnection and access by Qwest to MCI. With regard to Section 252(a)(1), Qwest argues that the language of that section limits the Commission's authority to the provision of network elements, interconnection or services made under Section 251 of the Act. That provision of the Act states in relevant part: "Upon receiving a request for interconnection, services, or network elements **pursuant to section 251**, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251."

However, this language addresses only voluntary requests for interconnection, services or network elements and is not meant to limit the scope of the review authority of state commissions under the Act. The provision which governs the review authority of state commissions is actually Section 252(e) which is cited above. As already discussed, under this provision the Commission is given review and approval authority over any interconnection agreement. There is no limiting language as Qwest suggests that only interconnection agreements addressing network elements, interconnection or access under Section 251 must be filed, reviewed and approved by the Commission. Had Congress intended to limit the scope of the filing obligation or the State commission's review and approval authority in this fashion, it is presumed that Congress would merely have added the same language to Section 252(e) which it did not. The fact that Congress did not underscores that the Commission's review authority under Section 252 is very broad and extends

to any agreement which addresses an ongoing obligation relating to interconnection, network elements or access.

Qwest also relies upon the language of Section 251(a)(1) as the basis for its second argument that "the entire premise of the duty to file an agreement with a state commission under Section 252 is based on the fact that the service or element provided is required by Section 251(b) or (c)." Qwest also relies upon a statement in a recent FCC Declaratory Ruling that only agreements "that contain on ongoing obligation relating to section 251(b) or (c) must be filed under section 252(a)(1)." However this ignores the fact that Section 251(a)(1) itself expressly permits parties to negotiate and enter into a binding interconnection agreement **without regard to** the standards set forth in Section 251 of the Act. Still, these interconnection agreements are subject to the state filing and review process.

1. Network Elements Which Qwest Must Continue to Make Available Under Section 271 are Interconnection and Access Obligations

At issue as a result of Qwest's Motion, is whether the Commission has jurisdiction under Section 252 to review and approve the "Qwest Master Service Agreement" which Qwest calls a "commercial agreement," in which Qwest has agreed to provide Qwest Platform Plus services to MCI. Qwest concedes on page 1 of its Motion that Qwest is required to continue to make these services available under Section 271 of the Federal Act and that the elements consist primarily of the local switching and shared transport network elements in combination with other services.

The services that the QPP Master Services Agreement covers are several network elements that have been affected by the D.C. Circuit's vacatur in *USTA II*. Thus, even though Qwest may no longer have to make an element available under Section 252(d)(3), Qwest may still have to make that element available under Section 271 as part of its obligations under the Competitive Checklist. The provisions of Section 271 at issue are contained at 47 U.S.C. Section 271(c)(2)(B) and provide in relevant part that access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of the 271 Competitive Checklist if it includes:

"(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.
(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.
(vi) Local switching unbundled from transport, local loop transmission, or other services."

These provisions require Qwest to continue to provide certain network elements, irrespective of any findings of impairment under Section 251(d)(2).

There can be little doubt that the obligations contained in Section 271 of the Federal Act are "interconnection" and "access" obligations which are properly included in an interconnection agreement under Section 252. In fact this is supported by the plain language of Section 271. The title of the 271 section in which these specific unbundling obligations are contained is entitled "SPECIFIC INTERCONNECTION REQUIREMENTS".

Moreover, under sub-part (A) of Section 271(c)(2), the BOC is deemed to meet the requirements of that section if it is providing such access or interconnection in a Statement of Generally Available Terms and Conditions ("SGAT") or an Interconnection Agreement. Under Section 252, the State commission is given authority to review and approve both the SGAT and all interconnection agreements entered into between carriers operating within the State's jurisdiction. No separate review and approval process for interconnection agreements or SGAT provisions containing 271 related provisions was established in Section 271, and therefore, it must be presumed that Congress intended this review to take place in the context of the regular Section 252 review process by State commissions.

2. There is no Express Federal Filing Jurisdiction Under the Federal Act.

Qwest's arguments to the contrary notwithstanding, there is no express federal filing jurisdiction under the Federal Act. See Qwest Motion at p. 7. As just indicated there was no separate review and approval process established in Section 271 for interconnection agreements or SGATs containing 271 related provisions, therefore, it must be presumed that this review is to take place in the Section 252 review process by State commissions.

Qwest also argues that there "is an independent investiture of federal jurisdiction under the 1996 Act". Qwest goes on to argue that "[t]he offering of the switching element…is subject to

federal jurisdiction." *Id.* Or, that the "filing and review (if any) of contracts entered into pursuant to Section 271(c)(2)(B) of the 1996 Act is a federal matter which has not been delegated to the states." *Id*. What Qwest ignores is that the States' authority pursuant to section 252 extends to both interstate and intrastate matters. Qwest makes a similarly flawed argument that "the federal nature of the service under the Federal Act automatically brings them into the 'zone of federal jurisdiction.' Qwest Motion at p. 8.

In the *Local Competition First Report and Order*, the FCC discussed its role with that of the states over local competition matters:

> "We conclude that, in enacting sections 251, 252, and 253, Congress created a regulatory system that differs significantly from the dual regulatory system it established in the 1934 Act. (cite omitted). That Act generally gave jurisdiction over interstate matters to the FCC and over intrastate matters to the states. The 1996 Act alters this framework, and expands the applicability of both national rules to historically intrastate issues, and state rules to historically interstate issues. Indeed, many provisions of the 1996 Act are designed to open telecommunications markets to all potential service providers, without distinction between interstate and intrastate services.
>
> For the reasons set forth below, we hold that section 251 authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection, services and access to unbundled elements. We also hold that the regulations the Commission establishes pursuant to section 251 are binding upon states and carriers and section 2(b) does not limit the Commission's authority to establish regulations governing intrastate matters pursuant to section 251. **Similarly, we find that the states' authority pursuant to section 252 also extends to both interstate and intrastate matters**. Although we recognize that these sections do not contain an explicit grant of intrastate authority to the Commission or of interstate authority to the states, we nonetheless find that this interpretation is the only reasonable way to reconcile the various provisions of sections 251 and 252, and the statute as a whole. (Emphasis added).

Finally, Qwest is just plain wrong when it argues that State filing and review requirements are not permissible because they are inconsistent with this preemptive federal policy. Qwest Motion at p. 8. Staff is not aware of a federal policy favoring market agreements for elements offered under Section 271, and that this is presumptively preemptive of inconsistent state regulations. See Qwest Motion at p. 8. In fact the FCC has gone to great lengths not to preempt state jurisdiction except where warranted based upon case by case determinations.

In fact in its recent Declaratory Ruling, the FCC stated:

> "Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-b6-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected. Should competition-affecting inconsistencies in state decisions arise, those could be brought to our attention through, for example, petitions for declaratory ruling. The statute expressly contemplates that the section 252 filing process will occur with the states, and we are reluctant to interfere with their processes in this area. Therefore, we decline to establish an exhaustive, all-encompassing 'interconnection agreement' standard. The guidance we articulate today flows directly from the statute and services to define the basic class of agreements that should be filed. We encourage state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval. At the same time, nothing in this declaratory ruling precludes state enforcement action relating to these issues.
>
> * * * * * *
>
> Consistent with our view that the states should determine in the first instance which sorts of agreements fall within the scope of the statutory standard, we decline to address all the possible hypothetical situations presented in the record before us."

Declaratory Ruling at paras. 10 and 11.

Accordingly, it hardly appears that the FCC has preempted the States with respect to the determinations regarding the Section 252 filing obligation, as Qwest argues.

C. The Federal Act Does Not Carve Out Any Exception to the Section 252(e) Filing Requirement for What Qwest Calls a "Commercially Negotiated" Agreement.

Once again, Staff is not aware, nor has Qwest identified, any provision in the Federal Act which defines "commercially negotiated" agreements and carves them out of the filing requirement of Section 252(e). This is merely a fiction created by Qwest and the RBOCs to escape their state filing obligations under the Federal Act.

Indeed, in its recent Declaratory Ruling involving 252(e) filing obligations, the FCC expressly identified only a few exceptions to the Section 252(e) filing obligation. Those included settlement agreements, order and contract forms completed by carriers to obtain service pursuant to terms and conditions set forth in an interconnection agreement and agreements with bankrupt competitors that are entered into at the direction of a bankruptcy court or trustee and do not otherwise change the

terms and conditions of the underlying interconnection agreement. See Declaratory Ruling at paras. 12, 13 and 14.

The Commission should reject Qwest's fictitious carve-out for "commercially negotiated" agreements and Qwest's attempt to once again shoot a cannon ball through the Federal Act's filing requirements.

D. The FCC Order Approving Qwest's 271 Application for Arizona, States that The FCC and Arizona Commission are to Work together to Ensure Enforcement of Qwest's 271 Obligations.

On December 3, 2004, the FCC granted Qwest's Application for Authorization to Provide In-Region, InterLATA Services in Arizona. As part of its Memorandum Opinion and Order, the FCC specifically discussed the relationship of the FCC and the Arizona Commission in the post-271 approval enforcement process. At para. 59, the FCC stated:

> "Working in concert with the Arizona Commission, we intend to monitor closely Qwest's post-approval compliance for Arizona to ensure that Qwest does not "cease to meet any of the conditions required for [section 271] approval."

Qwest is required to meet the Competitive Checklist requirements through provisions in its SGAT and interconnection agreements. This hardly appears to be a situation where the FCC intended to preempt State commission involvement in the post-271 approval enforcement process, as argued by Qwest.

III. CONCLUSION

The Commission should reject Qwest's Motion to Dismiss MCI's Application for Review and Commission Approval of the Master Services Agreement entered into between Qwest and MCI.

Respectfully submitted this 10th day of September, 2004.

ARIZONA CORPORATION COMMISSION

By_____

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE AMENDMENT TO THE INTERCONNECTION AGREEMENT BETWEEN MCI AND QWEST, DATED JULY 16, 2004 AND THE MASTER SERVICES AGREEMENT BETWEEN MCI AND QWEST, DATED JULY 16, 2004	)	Case No. 04-00245-UT

STAFF'S REPONSE TO QWEST'S MOTION TO DISMISS APPLICATION FOR REVIEW OF NEGOTIATED COMMERCIAL AGREEMENT

Telecommunications Bureau Staff ("Staff") of the New Mexico Public Regulation Commission, by Staff Counsel, pursuant to 17.1.2.12.C NMAC, responds in opposition to Qwest's ("Commission") Motion to Dismiss Application for Review of Negotiated Commercial Agreement ("Motion") filed herein on August 27, 2004. For the reasons set forth below, Qwest has not met it burden of establishing that the Master Service Agreement ("MSA") should be dismissed from this proceeding because Qwest has not established, as required by Commission Rule 17.1.2.15.B NMAC, lack of Commission jurisdiction, failure to meet burden of proof, failure to comply with the rules of the Commission or other good cause; and, therefore, Qwest's Motion should be denied. As grounds for this response, Staff further argues and responds as follows:

Qwest's Motion is based on the incorrect premises, unsupported by applicable law, that (1) the duty to file an agreement with a state commission under section 252 is based on the fact that the service or element provided is required by section 251(b) or (c) [Motion at p. 5]; and (2) that this Commission has no authority to determine what

agreements qualify as interconnection agreements subject to Section 252 and 17.11.18.17.F and 17.11.18.17.G NMAC filing requirements [Motion at pp. 7-10] in order to carry out its statutory duty of determining whether negotiated interconnection agreements are discriminatory and consistent with the public interest. 47 U.S.C. § 252(e) (requiring the filing of voluntarily negotiated interconnection agreement with state commissions for review and approval to determine non discrimination and consistency with the public interest); NMSA 1978 § 63-9A-2 (providing that the legislative intent of the New Mexico Telecommunications Act is to encourage competition); NMSA 1978 § 63-9A-8.2 (providing that he Commission shall promulgate rules that ensure the accessibility of interconnection by CLECs); 17.11.18 NMAC, Interconnection Facilities and Unbundled Network Elements; and NMSA 1978 § 63-7-7.1 (providing the Commission's broad powers to determine any matters of public interest and convenience and necessity with respect to matters subject to its regulatory authority, including rate setting for transmission companies including telephone companies).

Qwest's Motion additionally is based on the incorrect premise that the interconnection agreement ("ICA") amendment and resulting amended ICA and the MSA, that are the subject matter of this docket, are not interdependent agreements that as a practical matter cannot function without each other for the provisioning of service through network elements that Qwest is required to provide at a minimum pursuant to Section 271. 47 U.S.C. § 271(c)(2)(B) (setting forth the 14 point checklist requirements for Qwest's section 271 authority to provide InterLATA long distance telephone service). For example, as pointed out by AT&T in its response, both agreements have clauses that the other can be terminated by either party if a material provision of one agreement is

rejected or modified by the FCC, a state commission or any other governmental agency. (AT&T Response pp. 2-3.) Further, the MSA itself, at Section 1.1. of Exhibit a, clearly states that Qwest's Platform services will be purchases in combination with loops purchases out of the parties proposed amended ICA.

Moreover, Qwest's approach to Section 252 filing requirements would result in an absurd result as these interdependent agreements regarding the provisioning of services through the purchasing of network elements and collocation would be regulated pursuant to two different agreement subject to two different sets of rules- one set of rules that would provide that this Commission has review authority for a determination of discriminatory impact and consistency with the public interest and one set of rules that would provide that this Commission does not have such authority. Such a piecemeal review process for this Commission is inconsistent with applicable law, is contrary to sound regulatory policy and the public interest. Qwest's Motion therefore should be denied.

Staff addressed in detail Qwest's 3 premises and related legal arguments cited above in the Staff 's Legal Memorandum Filed in Support of Stafff's Response to Qwest's and Covad's Responses to Order to Show Cause and Recommendation to Establish a Streamlined Interconnection Agreement Filing and Review Process Comments ("Staff's Brief") filed in Utility Case No. 04-00209-UT on August 19, 2004 as Exhibit A to Staff's Response filed therein. To promote administrative efficiency and economy, Staff respectfully requests that the Hearing Examiner take administrative notice in this proceeding of Staff's Brief filed in Utility Case No. 04-00209-UT as Staff will not repeat these arguments in detail herein. Moreover, many of these legal

arguments are repeated in AT&T's Objections to Qwest's Motion to Dismiss and in MCImetro's Response to Qwest's Motion to Dismiss filed herein and Staff generally supports these filings to the extent that AT&T and MCI believe that the MSA and the amendment to the amendment to the existing interconnection agreement need to be filed with the Commission for review and approval pursuant to Section 252(e)(1) of the Act.

Qwest's Response, however, raises a presumptive preemption argument that it did not address in its comments filed in Utility Case No. 04-00209-UT. This argument, as made herein, is made without any analysis of applicable state law. Further it is made without any analysis of the specific federal law that provides that state commissions are the ultimate arbitrator of what is an interconnection agreement required to be filed pursuant to Section 252. Moreover, Qwest's argument is made without specific analysis of federal law that provides that agreements that create ongoing obligations for network elements are interconnection agreements and without specific analysis of the Federal Communications Act itself that expressly provides that voluntarily negotiated agreements are required to be filed, reviewed and approved pursuant to Section 252(e) irrespective of whether that were negotiated with regard to Section 251(b) and (c). Staff therefore believes that Qwest's presumptive preemption is without merit as a basis for dismissing the MSA agreement from this proceeding because Qwest has not met it burden of establishing that the Commission has been preempted.

Qwest, MCI and AT&T do not appear to dispute that Qwest, in light of the TRO[1] and subsequent D.C. Circuit Court action,[2] is no longer required to provide MCI or any other requesting carrier unbundled access to the local switching network element or the

[1] **In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers**, CC Docket 01-338, released August 21, 2003 (**TRO**).
[2] **United States Telecom Association v. FCC**, 359 F. 3d 544 (D.C. Cir. 2004)

shared transport network element associated with the purchase of the local switching network element pursuant to Section 251. All agree, however, that Qwest is still required to do so pursuant to Section 271.[3] What this means is three things. First, if access to an unbundled network element ("UNE") is not required pursuant to section 251, but still is required pursuant to section 271, the TELRIC pricing standards contained in Section 251 do not apply to that UNE that Qwest will continue to provide under market based rates filed but not set by the FCC because the FCC does establish rates in evidentiary rate making proceedings Second, according to Qwest, if the Commission has no authority over an agreement relating to that UNE, the Commission has no authority to require the filing review and approval of a voluntarily negotiated agreements relating to that UNE, no authority to arbitrate a dispute regarding that UNE, no authority to set pricing for that UNE and presumably no authority to resolve any inter-carrier disputes regarding the provisioning of the UNE. Lastly this means that according to Qwest, two separate sets of rules apply to the same UNEs- one set of rules over which this Commission has authority and one set of rules over which this Commission does not have authority. Qwest's no authority argument is made irrespective of its Section 271 requirements to continue to provide access to these UNEs, without an analysis of relevant state law or applicable federal law that repeatedly preserves state commission authority and recognizes state commission authority to be the ultimate arbitrator of what is an interconnection agreement required to be filed under Section 252, and irrespective of the interdependent nature of its ICA and commercial agreement at issue in this docket.

[3] See for example, Qwest's Motion at pp. 7-8, and footnote 23, citing the TRO for the proposition that many element removed from Section 251 unbundling requirements must still be provided pursuant to Section 271.

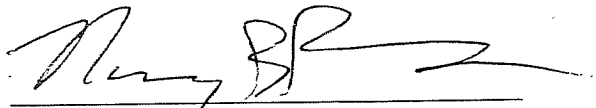
Qwest, MCI and AT&T do not dispute that the subject matter of the Qwest MSA, Qwest Platform Plus or "QPP", consists of the local switching network element and the shared transport network element. QPP is defined in Section 1.1 of Service Exhibit 1 to the MSA as consisting of the local switching element and the shared transport network element. Neither Qwest, MCI nor AT&T dispute that these two network elements, when combined with the purchase of the local loop network element off of a Commission approved interconnection agreement, constitutes the functional equivalent what is known as UNE-P. (The purchase of collocation off of the parties' interconnection agreement is also required for the actual provisioning of this service.) There also appears to be no dispute that that the ICA amendment at issue in this docket effectively eliminates the purchase of UNE-P from the parties interconnection agreements on file with the Commission (Section 4 of the Interconnection Agreement Amendment) by removing rates, terms and conditions for the purchase of the of the local switching network element and the shared transport network element to the MSA. Therefore, by purchasing QPP off of the MSA and the local loop network element and collocation off of the interconnection agreement between Qwest and MCI as proposed to be amended in this docket, Qwest for all practical purposes will continue to provision MCI with UNE-P albeit under a different name and under two agreements rather than one agreement. The only difference will be that this Commission, under Qwest's approach, will have no authority over the rates, terms and conditions of the "commercial agreement."

Qwest's approach is not consistent with sound regulatory practice and policy and is not supported by applicable law. It would result in the absurd result of having the same contractual arrangements for the provisioning of one service regulated pursuant to two

different agreement subject to two different sets of rules, one under which this Commission has no authority to assert its statutory duty of determining whether such agreements are discriminatory of consistent with the public interest. For these reasons, Qwest's Motion should be denied.

Respectfully submitted by:

NM PUBLIC REGULATION COMMISISON
UTILITY DIVISION



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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE AMENDMENT TO THE INTERCONNECTION AGREEMENT BETWEEN MCI AND QWEST, DATED JULY 16, 2004 AND THE MASTER SERVICES AGREEMENT BETWEEN MCI AND QWEST, DATED JULY 16, 2004	)	**Case No. 04-00245-UT**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **Staff's Response To Qwest's Motion To Dismiss Application For Review of Negotiated Commercial Agreement,** filed September 9, 2004, was mailed first-class, postage prepaid, to each of the following:

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Montgomery & Andrews, P.A.
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Santa Fe, NM 87504-2307

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Qwest Corporation
Attn: Nita A. Taylor
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and hand-delivered to:

Nancy Burns, Esq.
Staff Counsel
N.M. Public Regulation Commission
224 E. Palace Avenue
Santa Fe, NM 87501

Dated this 9th day of September, 2004.

NEW MEXICO PUBLIC REGULATION COMMISSION

Pam S. Castañeda

PAM S. CASTAÑEDA, Legal Assistant

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF AN AGREEMENT BETWEEN QWEST CORPORATION AND COVAD ENTITLED "TERMS AND CONDITIONS FOR COMMERCIAL LINE SHARING ARRANGEMENTS"	)	**Case No. 04-00209-UT**

Staff's Response to Qwest's and Covad's Responses to Order to Show Cause and Recommendation to Establish a Streamlined Interconnection Agreement Filing and Review Process

Telecommunications Staff of the Utility Division (Staff) of the New Mexico Public Regulation Commission pursuant to the Commission's **Order Granting Joint Motion for Extension of Time** issued July 15, 2004 responds as follows to Qwest Corporation's Response to Order to Show Cause and Covad's Response to Order to Show Cause filed on July 30, 2004. In support of this Response is Staff's Legal Memorandum attached hereto as Exhibit A.

It is Staff's position that the Commercial Line Sharing Agreement (CLSA) is an interconnection agreement subject to section 252(a), section 252(e) and rule 17.11.18.17 NMAC filing, review and approval standards. As set forth in the attached legal memorandum, Staff's position at this time is consistent with a reasonable interpretation of applicable state and federal law, the public interest and common sense. Qwest and Covad disagree.

Qwest comments that voluntarily negotiated commercial agreements between Qwest and another carrier that concern only products and services Qwest is not obligated to provide under section 251 (b) and (c) [here linesharing] are not within the purview of section 252 and do not require filing with or approval by this Commission. Qwest also

comments that the CLSA does not concern its interconnection related obligations contained in section 251 (b) and (c) because the term interconnection as defined by this Commission means the linking of two networks for the mutual exchange of traffic. Qwest additionally comments that it has no independent obligation under section 271 checklist item 2 to unbundled UNEs for the provision of linesharing and that therefore no independent 271 source of Commission authority exits to require the filing and review of the CLSA .

At the bottom of Qwest's comments is Qwest's current post-TRO position, taken in various forms in scattered proceedings currently pending before this Commission, that this Commission has no jurisdiction, whether rate making, quality or service, enforcement or otherwise, over any wholesale product or service Qwest is not required to provide pursuant to section 251, even if it relates to interconnection and even if Qwest is required to provide it under section 271.

Despite its legal position, however, Qwest currently has developed and implemented a practice of promoting transparency in its New Mexico wholesale dealings by the posting all of its "commercial" agreements on its web site, and by making the rates, terms and conditions of these agreements available to its wholesale customers. Moreover, Qwest has committed to honor the terms of its existing interconnection agreements and is taking the lead on a national level on entering into commercial agreements with its wholesale customers for the continued provisioning of DSL and transitioning off of other UNEs it believes it is no longer required to provision.

Covad, on the other hand, while agreeing that the CLSA is not an interconnection agreement subject to section 252, disputes Qwest's position that Qwest is not obligated to

continue to provision unbundled access to HFPL under section 271. Covad comments that section 271 checklist item 4 is the source of this obligation and comments that this Commission has authority derived from section 271 to require the CLSA to be filed and reviewed so that this Commission can determine whether it should be subject to approval under applicable state law.

Covad essentially advocates for Commission establishment of a second and separate filing and review process for agreements that are not interconnection agreements related to Qwest's section 251 (b) and (c) obligations, but rather are commercial agreements relating to Qwest's continuing section 271 obligations. This filing and review process would be in addition to the Commission's current section 252 and 17.11.18.17 NMAX filing procedures[1] and would permit this Commission the opportunity to decide if these allegedly non section 251 non interconnection agreements are in fact interconnection agreements subject to its section 252(e) approval or rejection and/or otherwise discriminatory or anticompetitive.

Covad's proposed process would promote transparency in wholesale dealings and would preserve Commission oversight of wholesale dealings to reduce the risk of discrimination and anti competitive conduct. Such a process, moreover, would also create a dual and often overlapping filing, review and approval process for section 251 and section 271 agreements without the prescription of any clear filing standards, while shifting the burden to the Commission to decide on a case by case basis what filing standard and what filing procedures should apply to a given agreement.

[1] This proposed commercial agreement filing and review procedure would also be in addition to the informal filing and review process for backwards looking settlement agreements approved by this Commission in the Order on Qwest's Motion for Rehearing issued December 9,. 2003in Utility Case No. 03-00108-UT. It would also be additional to the informal filing and review process recommended by the Hearing Examiners regarding Qwest's SS7 Infrastructure Agreements in Utility Cases.

As a common sense way to resolve the issues presented by this proceeding, Staff recommends that this Commission at this time establish a streamlined filing and review process for interconnection agreements. As proposed below, this streamlined process would eliminate undue regulatory burdens, promotes administrative efficiency and reduce the possibility of discriminatory and anti competitive conduct in New Mexico's wholesale markets. Moreover, the adoption of a streamlined filing process, if unopposed, would be a common sense way for the Commission to resolve the issues presented in this proceeding in a time of limited administrative resources when federal standards are being determined and interpreted by this Commission in various proceedings pending before this Commission. Lastly, the adoption of this streamlined process would cause no undue burden on Qwest because it is consistent with its current practice of making all of its wholesale agreements available for review and adoption by requesting carriers whether deemed by Qwest and requesting carriers to be interconnection and/or commercial.

Staff recommends, as a practical way to resolve the matters presented by this show cause proceeding, that the Commission establish streamlined process for interconnection agreements whereby:

1) one original and one copy of an interconnection agreement are filed with the Commission in a numerically assigned docket with a notice of filing and proposed form of final order attached;

2) service includes Commission Staff, the New Mexico Attorney General and any party that requests electronic or hard copies of filing from the respective ILEC;

3) the public is notified of the filing by the posting of the notice of

filing on the Commission's web site and the posting of the notice of filing and entire agreement on the ILEC's web site;

4) the filing is subject to a 15 day period for review and protest by Staff and any interested party;

5) the filing, if not protested, is permitted to take effect by operation of law by order of the Commission at an open meeting, which simultaneously closes the docket; and

6) if protested, the filing is subject to formal Commission proceedings.

At this time, the Commission should apply this streamlined procedure to all agreements between telecommunications carriers that define or affect their prospective interconnection relationship, whether deemed interconnection or commercial by ILECs an another carrier.

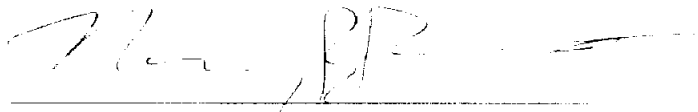
This recommended procedure is consistent with this Commission's broad definition of interconnection agreement set forth in its Final 271 Order, is consistent with section 252(a) and 17.11.18.17 NMAC filing, review and approval requirements and is consistent with the Commission's obligation to streamline regulatory processes where appropriate. For routine filings, it will greatly reduce administrative and regulatory costs by eliminating the appointment of a hearing examiner to issue procedural orders; eliminating publication, service and copying costs to ILECs; eliminating the preparation and filing of Staff affidavits; and eliminating the drafting of final orders as a proposed form of final order will be attached to each filing. At the same time, if adopted by the Commission, Staff's proposed filing process will promote continued transparency in New

Mexico's wholesale telecommunications markets thereby reducing the possibility of discriminatory dealings amongst telecommunications carriers.

Wherefore, Staff respectfully requests that the Commission issue an order consistent with its recommendations contained in this response.

Respectfully Submitted By:

NM PUBLIC REGUALTION COMMISSION
UTILITY DIVISION STAFF



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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF AN AGREEMENT BETWEEN QWEST CORPORATION AND COVAD ENTITLED "TERMS AND CONDITIONS FOR COMMERCIAL LINE SHARING ARRANGEMENTS"	))))))	**Case No. 04-00209-UT**

Staff's Legal Memorandum in Support of Staff's Response to Qwest's and Covad's Responses to Order to Show Cause and Recommendation to Establish an Streamlined Interconnection Agreement Filing and Review Process

Telecommunications Staff of the Utility Division (Staff) of the New Mexico Public Regulation Commission (Commission) hereby files Staff's Legal Memorandum in Support of Staff's Response to Qwest's and Covad's Responses to Order to Show Cause and Recommendation to Establish a Streamlined Interconnection Agreement Filing and Review Process (Staff's Response).

I. Introduction and Staff's Recommendation

Staff's Response recommends that the Commission take the opportunity presented by this show cause proceeding to establish a streamlined filing, review and approval process for interconnection agreements as that term broadly has been defined by this Commission, regardless of whether deemed "commercial" or "interconnection" by ILECs and other carriers. As set forth below, Staff's recommendation is consistent with applicable state and federal law and the public interest. Staff's recommendation, however, also is made with recognition of the fluctuating status of federal unbundling requirements, the disparate views amongst ILECs and CLECs, regarding these requirements and the numerous proceedings currently pending before this Commission

that directly or indirectly address TRO and 271 issues raised directly or indirectly in this proceeding. [1]

Staff therefore has recommended a streamlined process that, if not opposed, could be adopted without ruling on the TRO and 271 related questions of law presented by this proceeding. The adoption of an unopposed streamlined filing process would permit this Commission to preserve its jurisdiction to consider the legal issues raised in this proceeding and would permit Staff, Qwest, Covad and any other intervener to advocate their respective positions in any other proceedings before this Commission.

II. Summary of Positions

A. Qwest and Covad Agree that their Commercial Line Sharing Agreement (CLSA) is not an Interconnection Agreement

Both Qwest and Covad argue in their respective responses to the Commission's Order to Show Cause that their CLSA falls outside of the definition of "interconnection agreement" and therefore THE section 252(a)(1) filing requirement. Both positions are based on the Federal Communications Commission's (FCC's) Triennial Review Order's (TRO's)[2] post TRO effective date elimination of new CLEC orders of unbundled access to the High Frequency Portion of the Loop (HFPL or line sharing) on a three-year transitional basis.[3] This position also is based on the interpretation that section 252(a)(1)

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[1] Legal issues regarding unbundling and or section 251 and or section 271 requirements raised either directly or indirectly in this show cause proceeding currently are pending either directly or indirectly before the Commission in the TRO impairment proceeding in Utility Case No. 03-00403-UT and 03-00404-UT; the Covad, Qwest arbitration in Utility Case No. 04-00208-UT; the Qwest MCI UNE-P Agreement review in Utility Case Nos. 04-00245-UT and 04-00252-UT; the Covad Qwest line sharing interconnection agreement in Utility Case Nos. 04-00168-UT and 04-00243-UT as well as expected to be presented to the Commission in a Qwest SGAT TRO Amendment as well as other TRO related interconnection agreement amendment proceedings

[2] **In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers**, CC Docket 01-338, released August 21, 2003 (**TRO**).

[3] However, under the TRO, RBOC's like Qwest are required to grandfather in the provision of service to CLECS of old line sharing orders acquired prior to the October 1, 2003 effective date of the TRO. In

only requires the filing with state commissions of agreements that contain ongoing obligations relating to section 251 (b) or (c). Because in the wake of the TRO, Qwest and Covad agree that Qwest is no longer obligated to provision new line sharing orders to Covad pursuant to section 251(d)(2) after October 1, 2004, Qwest and Covad agree that their CLSA that defines the rates, terms and conditions of line sharing orders acquired after October 1, 2004 is not an interconnection agreement required to be filed pursuant to Section 252(a)(1). Qwest's and Covad's positions then diverge with Qwest arguing for no filing and no subsequent review and approval and Covad arguing for filing and review under section 271 authority and subsequent Commission determination of whether state law approval is required.

B. Covad Argues that this Commission Has Authority and Should Require the Filing and Review of the CLSA and other Agreements Relating to Qwest's Section 271 Obligations

Covad argues here, as well as in its pending arbitration proceeding with Qwest in Utility Case No. 04-00208-UT, that Qwest is required to continue to provide line sharing under section 271 checklist item 4, independent from its section 251 and 271 item 2 unbundling obligations. Covad further argues that this Commission, under authority derived from section 271, has the authority to require Qwest to file, for Commission review, agreements regarding network elements no longer required to be unbundled pursuant to section 251 but required to be unbundled pursuant to section 271. Covad, further argues, without making a specific state law argument, that after review, this Commission then has the authority under federal law to determine if an allegedly non

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addition, as a transitional measure, Qwest is required to permit Covad to acquire new line sharing customers from October 1, 2003 through October 1, 2004 and is required to provision service to these new customer only until three years after the TRO's effective date during which time CLECs will pay an increasing fraction of the UNE loop rates. **TRO** Appendix B, 47 C.F.R. 51.319(sa)(1)(i).

section 251, section 271 agreement, is subject to approval under state law. Hence, in Covad's view, this Commission has the authority to require Qwest to file the CLSA under section 271 so that this Commission can review this agreement to determine whether it should be filed under state law requirements. Covad additionally argues that this Commission should require such filing and review to prevent discriminatory and anti-competitive wholesale dealings amongst carriers.

Covad, in its response, however, does not address whether state law requires the CLSA to be subject to this Commission's state law approval. Rather Covad advocates that this Commission establish a dual filing and review system for section 252(a)(1) agreements and section 271 agreement for this Commission to determine on a case by case basis whether state law requires the approval of a given agreement.

C. Qwest Argues that it is not Required to Provision Line Sharing UNDer Section 271 and that this Commission has no Authority to Require the Filing and Review of the CLSA and Other Agreements Not Related to its Section 251 (b) and (c) Obligations

Qwest argues that a voluntarily negotiated commercial agreement between Qwest and another carrier that concerns only products and services that Qwest is not obligated to provide under section 251 (here line sharing) is not within the purview of section 252 and does not require filing to or approval by this Commission. This argument, as posited by Qwest in its arbitration with Covad cited above, extends to the position that the Commission has no jurisdiction to arbitrate disputes regarding network elements no longer required to be unbundled pursuant to section 251(d)(2). Without addressing its obligations under section 271 checklist item 4, Qwest further argues here that it has no independent obligation under section 271 checklist item 2 to provision the HFPL to Covad. Therefore, without addressing state law requirements or its checklist item 4

obligations and without making a preemption argument, Qwest concludes that this Commission has no jurisdiction to require the filing, review or approval of the CLSA at issue in this proceeding because it has no authority over agreements regarding network elements that Qwest is not required to unbundle under section 251. [4]

In response to the Commission's specific questions in its show cause order, Qwest further bolsters its "no authority" argument by maintaining that an agreement for the provisioning of a UNE it is no longer required to provide access to under federal law (here line sharing) does not relate to the provisioning of interconnection, because, as defined by the Commission, interconnection is limited to the linking of two networks. Therefore, in Qwest's view despite the fact that interconnection is required for its continued provisioning of line sharing to Covad, the CLSA does not relates to its section 251 obligations regarding interconnection. Qwest thereby advocates that this Commission eliminate all filing requirements for agreements relating to network elements no longer required to be unbundled under section 251(d)(2). Qwest, however, in advocating this position, does not provide a comprehensive and understandable standard for determining what is and what is not an interconnection agreement.

D. It is Staff's Position that the Commission has Authority to Require the Filing, Review and Approval of the CLSA and other Voluntarily Negotiated Interconnection Agreements whether Negotiated With or Without Regard to Section 251 (b) and (c) Obligations

It is Staff's position that the CLSA is a voluntarily negotiated section 252(a)(1) interconnection agreement subject to filing, review and approval by this Commission pursuant to section 252(a)(1), section 252(e) and 17.18.11.18 NMAC. Staff's position is

[4] Again, it appears as if this Qwest argument extends to all products and services Qwest that Qwest is not obligated to provide under section 251.

based on this Commission's broad definition of the term interconnection agreement.[5] This standard requires the filing of all voluntarily negotiated agreements which define or affect the prospective interconnection relationship between telecommunications carriers or which amend or modify any existing part of an interconnection agreement.[6] Staff position is also based on section 252(a)(1) and section 252(c) and 17.18.11.18 NMAC which provide no exception from filing for any voluntarily negotiated interconnection agreements, regardless of whether they are negotiated with or without regard to the standards set forth in Sections 251(b) and (c).[7]

Further, while it is not necessary under Staff's view for the Commission to make a determination on this legal issue at this time in this case because Staff believes that the CLSA is an interconnection agreement, Staff agrees with Covad that Qwest is required to provide access to line sharing on an unbundled basis pursuant to section 271 checklist item 4.[8] Staff further agrees with Covad that this Commission has an independent source of authority derived from section 271 to require the filing and review of agreements relating to Qwest's section 271 obligations and that the filing and review of these types of agreements is consistent with the public interest. Therefore, at a minimum, it is Staff'

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[5] **Final Order Regarding Compliance with Outstanding Section 271 Requirements: SGAT Compliance, Track A and Public Interest** issued on October 8, 2002 in Utility Case No. 3269 *et. al.* **(Final 271 Order)**, ¶¶271-286, as modified by the **Order on Qwest's Motion for Rehearing (Order on Rehearing)** issued December 9, 2003 in Utility Case No. 03-001080-UT pp 8-14.

[6] **Id.**

[7] See for example the specific language of Section 252(a)(1) that requires the filing of and permits the negotiation of voluntarily negotiated interconnection agreements between carriers "*without regard to the standards set forth in subsection (b) and (c) of section 251.* 47 U.S.C. § 252(a)(1). See also the specific language of Commission rule 17.11.18.17 NMAC that permits ILECs to "negotiate and enter into binding agreements for interconnection with a requesting LEC pursuant to 47 U.S.C. Section 252(a)(1) *without regard to the requirements set fort in17.11.18.8 NMAC through 17.11.18..16 NMAC*"; and at subsection F, requires the filing of all such voluntarily negotiated agreements with this Commission. 17.11.18.17.F NMAC. [emphasis added].

[8] See generally for example the Commission's **Order on Rehearing of Aspects of Group 4 Order and Qwest's Demonstration of Compliance Regarding Access to Unbundled Loops** issued July 9, 2002 in Utility Case Nos. 3269 and 3536 where access to line sharing is extensively discussed a specific requirement for the Commission's provisional finding of compliance with section 271 checklist item 4.

position that the CLSA, and similar agreements, should be filed for review under the Commission's section 271 authority to promote transparency in New Mexico's wholesale markets and reduce the possibility of discrimination and anti competitive conduct.

III. The CLSA is an Interconnection Agreement Required to be Filed with and Reviewed and Approved by This Commission

A. Federal Law Recognizes State Commission Primacy in Defining Interconnection Agreements

In its Declaratory Order, the FCC determined that states "in the first instance" should determine which sorts of agreements fall within the scope of section 252(a)(1).[9] Recognizing the primacy of state commission decision making under the dual state and federal regulatory regime of the Telecom Act for the filing review and approval of voluntarily negotiated section 252(a)(1) interconnection agreements, the FCC explicitly concluded:

> Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an "interconnection agreement" and, if so, whether it should be approved or rejected...The statute expressly contemplates that the section 252 filing process will occur with the states and we are reluctant to interfere with their processes in this area. Therefore, we decline to establish an exhaustive, all-encompassing "interconnection agreement" standard. **Id.** ¶ 10.

Without announcing an all encompassing filing standard, the FCC did however conclude that "an agreement that creates on ongoing obligation pertaining to interconnection must be filed. **Declaratory Order,** ¶ 8. As pointed out by both Qwest and Covad to support their position that the CLSA is not an interconnection agreement subject to section

[9] **In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)**, WC Docket No. 02-89, Released October 4, 2004, ¶ 9.

252(a)(1) filing, the FCC did find that "only those agreements that contain an ongoing obligation relating to section 251 (b) or (c) must be filed under section 252(a)(1)." **Id.**, fn 26. However this conclusion was expressly made in rejecting an argument that advocated for the filing of *all* agreements between an ILEC and a requesting carriers. **Id.** While, the FCC did not define the meaning of an " agreement that contains an ongoing obligation relating to section 251(b) or (c)"; expressly did not provide an all encompassing definition of the term interconnection agreement and expressly left this filing standard up to state commissions. Moreover, no rule provides for the filing and review of portions of voluntarily negotiated agreements.

Staff therefore takes the position that Qwest's no Commission authority argument based on the FCC's Declaratory Order filing standard is unpersuasive. It is made without analyzing state law or presenting a preemption analysis when the FCC itself concluded in its Declaratory Order that state commission will be the ultimate decision makers on the filing standard, when this commission has articulated a filing standard in the wake of the Declaratory Order with that order in mind, and when the FCC itself concluded that agreements regarding matters such as "dispute resolutions" and "escalation provisions" are not per se outside the scope of section 252(a)(1) if they relate to section 251(b) and (c) obligations. **Id.**, ¶ 8. If an escalation or dispute resolution provision relating to a section 251(b) or (c) obligation is within the scope of the section 252(a)(1) filing standard, it only makes sense the a line sharing agreement relating to Qwest's obligations to interconnect with Covad, falls within the scope of the section 252(a)(1) filing standards. Because federal law directs this Commission in the first instance to determine what sorts of agreements fall within the section 252(a)(1) filing standards and because

there is no rule or applicable preemption order specifically directing otherwise, this Commission should apply its interconnection agreement standards to the CLSA.

B. The Scope of the Commission's Interconnection Agreement Filing Standard requires the Filing of Voluntarily Negotiated Agreements which Define or Affect the Prospective Interconnection Relationship between Telecommunications Carriers or which Amend or Modify any Existing Part of an Interconnection Agreement

This Commission adopted a broad definition of interconnection agreement in its **Final 271 Order** in the unfiled agreement section of its public interest analysis of Qwest's New Mexico 271 application proceeding.[10] In doing so, the Commission concluded that:

> The terms "interconnection agreement" or "agreement" as used in 47 U.S.C. §§ 251(c) and 252(a) and 17 NMAC 11.18.17 are defined to include, *at a minimum*, a negotiated or arbitrated contractual arrangement between an incumbent LEC and a CLEC that is binding; relates to interconnection, services or network elements pursuant to 47 U.S.C. 251(b) and (c), or defines or affects the prospective interconnection relationship between two LECs. This definition also includes any agreement modifying or amending any part of an existing interconnection agreement." **Final 271 Order** ¶ 285. [emphasis added].

The Commission expressly included the term "at a minimum" in this definition "as important in reducing the potential abuses predicted by the Attorney General if a definition is narrowly crafted." **Id.** ¶ 284. Explaining the broad scope of this term, this Commission concluded that it did "not intend the foregoing definition to establish an exhaustive all-encompassing standard for purposes of the filing requirement set for the in section 252(a)(1). Id. ¶ 285. Further characterizing the purpose of this definition of

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[10] **Final Order Regarding Compliance with Outstanding Section 271 Requirements: SGAT Compliance, Track A and Public Interest** issued on October 8, 2002 in Utility Case No. 3269 *et. al.* (**Final 271 Order**), ¶¶271-286, as modified by the **Order on Qwest's Motion for Rehearing (Order on Rehearing)** issued December 9, 2003 in Utility Case No. 03-001080-UT pp 8-14.

interconnection agreement to be that of providing "useful guidance" in its instant public interest analysis as well as for interested entities in the future, the Commission stated that "[g]iven the myriad and ever evolving technologies involved, it is impossible to predict with any degree of certainty all of the various types of future arrangements that may implicate the policies behind the filing approval and publication requirements of the Act. Lastly the Commission expressly concluded that the "definition for 'interconnection agreement' must be broad enough to encompass those agreements between an incumbent LEC and a CLEC that could discriminate against a CLEC not a party to such agreements and the Commission concluded that "any agreement with an incumbent LEC that provides a CLEC a competitive advantage over other CLECs should be subject to the fling and publication requires and the 'pick and chose' provision.' Id at ¶ 280.

C. The Commercial Line Sharing Between Qwest and Covad Falls within the Commission's Requirements

The CLSA defines the rates, terms and conditions by which Qwest will continue to provide Covad with unbundled access to HFPL so that Covad can continue to provision DSL to it new customers after the elimination of this section 251 unbundling requirement.. Under the terms of the agreement, Qwest will continue to provide Covad with unbundled access to the high frequency portion of the same loop that Qwest uses to provision voice grade services to Qwest's customers. It is difficult to imagine two companies being more interconnected than providing separate services to their respective customers over the same loop at the same time.

Further, in order to effectuate this wholesale relationship, Covad and Qwest are required to interconnect or link their separate networks for the mutual exchange traffic. Because Qwest and Covad are required to interconnect their networks for Qwest to

provide unbundled access to the HFPL to Covad under the rates, terms and conditions of the CLSA, this agreement defines and affects that portion of the prospective interconnection relationship of Qwest and Covad regarding the provisioning of unbundled access to the HFPL by Qwest to Covad. Moreover, the CLSA is a modification of that portion of Qwest and Covad's current interconnection agreement regarding the rates, terms and conditions of line sharing. Under the terms of the CLSA unbundled access to HFPL will be provided to Covad under different rates terms and conditions than it will continue to be provided under the current interconnection agreement between Qwest and Covad. The CLSA, because it defines and affects the interconnection relationship between Qwest and Covad and modifies their existing interconnection agreement regarding the ongoing provisioning of unbundled access to the HFPL, therefore, should be filed, reviewed, subject to Commission approval and subject to "pick and choose" pursuant to sections 252(a)(1), 252(eof Telecommunications Act of 1996 (Act) and Commission Rule 17.11.18 17 NMAC.

IV. Requiring the Filing and Review of the CLSA and other Commercial Agreements regarding network Elements no Longer Subject to Section 251 Unbundling Requirements is Consistent with other Applicable Law and the Public Interest

A. The Federal Telecom Act Requires the Filing of All Voluntarily Negotiated Interconnection Agreements Regardless of Whether they Were Negotiated with or without Regard to the Standards Set Forth in Section 251(b) and (c)

The Federal Act establishes a dual state federal regulatory framework for voluntary negotiations of agreements for interconnection, services or network elements and requires the filing of all such agreements with state commissions pursuant to section 252(e). Under this dual state federal regulatory scheme, all voluntarily negotiated

interconnection agreements between telecommunication carriers are required to be filed for Commission review and approval or rejection under Section 252(e). **Verizon v. Strand**, 309 F. 3d 935, 941, (6th Cir. 2002). Section 252(e) provides no exceptions from filing for any voluntarily negotiated interconnection agreements regardless of whether negotiated with or without regard to the standards of sections 252(b) and (c). In addition, Commission rules 17.18.11.18 NMAC provides for the filing of all interconnection agreements regardless of whether negotiated with or without regard to the standards set forth in that rule. 17.18.11.18 NMAC. Moreover, no rule provides for the filing of piece meal portions of interconnection agreements.

After this section 252(e) review, section 252(e)(6) provides that any party aggrieved by the state commissions determination may appeal that determination in the federal district courts. Under this scheme, network elements are required to be unbundled pursuant to Section 251 if the necessary and impair standards are met; moreover, state commissions are "armed with the power granted them by 47 U.S.C. section 251(d)(3) to 'establish access and interconnection obligations of local exchange carriers' and by 47 U.S.C. section 261(c) to impose 'requirements on a telecommunications carrier for intrastate services that are necessary to further competition' as long as such obligations and requirements are consistent with the Act." **Id.** While it is true that the FCC's TRO order eliminated the requirement to unbundled new orders for line sharing after October 1, 2004, it is equally true that the RBOCs like Qwest have independent section 271 unbundling obligations which, as pointed out by Covad in its response, include the obligation to provide access to HFPL or line sharing. In Addition, Qwest presented no preemption analysis in its comments.

B. It is New Mexico Policy to Promote Competition and the Deployment of High Speed Data and to Provide an Orderly Transition to Competition Upon a Showing of Effective Competition

It is the policy of the state of New Mexico to encourage competition in the telecommunications industry. NMSA 1978 § 63-9A-2. The express purpose of the New Mexico Telecommunication Act is to permit a regulatory framework that will allow an orderly transition from a regulated telecommunications industry to a competitive market environment. **Id.** Only after a showing of effective competition may this Commission reduce or eliminate regulation. NMSA 1978 § 63-9A-8. The legislature also directed this Commission to implement rules to promote the deployment of high speed data services in both urban and rural areas of the state and ensure the accessibility of interconnection by competitive local exchange carriers in both urban and rural areas of the state. **Id.** § 63-9A-8.2(B)(3) and (4).

One express objective of the Commission's High Infrastructure and High Speed Data Services Rule, 17.11.17.6 NMAC, passed pursuant to this legislative directive, is to encourage the competitive supply of high-speed data services. This rule requires ILECs to provide CLECs with access to UNEs and interconnection arrangements for the provision of line sharing in compliance with all applicable Commission and FCC orders and rules. **Id.** at subsection 14. These requirements are in addition to the requirements of the federal Act. **Id.** at subection 16. Therefore, under applicable federal and state law, numerous requirements exist giving the Commission authority and responsible for the filing, review and approval of interconnection agreements.

C. Requiring the Filing, Review and Approval of the CLSA is Consistent with the Public Interest in Manner Respects Including Fostering Transparency and Fair Dealings in New Mexico's Wholesale Market

Requiring the filing and review of the commercial agreements regarding network elements no longer subject to section 251 unbundling requirements is consistent with the public interest. Both Qwest and Covad argue for separate filing requirements for separate portions of what, on a practical level, can only be considered the same interconnection agreements between themselves. Such a dual filing standard, however, would increase the possible of discriminatory and anticompetitive conduct amongst telecommunication carriers. Under Qwest's dual filing standard, some pieces of agreements governing the wholesale relationship between itself and its competitors would be filed while others would not be filed. Further, the dual filing standard advocated by Covad, whereby the Commission would discern on a case by case basis whether an agreement required to be filed and reviewed would be subject to approval or rejection would create administrative confusion and regulatory uncertainty in a time of limited administrative resources when federal standards are being determined and interpreted by this Commission.

V. This Commission Should Approve the CLSA

Lastly, it is Staff's position that the Commission should approve the CLSA. While Staff disagrees with the interconnection agreement filing standard set forth by Qwest and Covad in their response comments and with Qwest's position that the Commission lacks jurisdiction over network elements no longer required to be unbundled under section 251, regardless of state law requirement and regardless of its independent

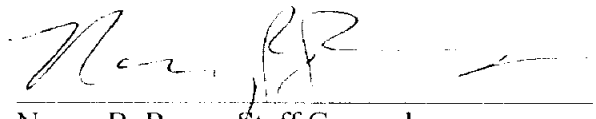
section 271 requirements, Staff believes that the CLSA is nondiscriminatory and consistent with the public interest of promoting wholesale competition in New Mexico.

VI. Conclusion

Therefore, at this time, it is consistent with applicable law and in the public interest for the Commission to continue to apply its current filing, review approval and availability requirements to voluntarily negotiated interconnection agreements amongst telecommunications carriers, including agreement regarding network elements no longer required to unbundled pursuant to section 251. The continued application of these requirements to voluntarily negotiated interconnection agreements will promote the continued exercise of the Commission's state and federal statutory duty to prevent discrimination and promote competition in the New Mexico telecommunications markets. It will provide regulatory certainty while the Commission addresses the numerous, unsettled questions of law and fact presented by the FCC's TRO and DC Circuit Court opinion currently pending before the Commission in numerous scattered proceedings thereby promoting administrative economy and efficiency and a regulatory framework that will allow an orderly transition from a regulated telecommunications industry to a competitive market environment. Lastly, it will be consistent with Qwest's current practice of making its "commercial agreements" publicly available for its wholesale customers.

Respectfully Submitted By:

NM PUBLIC REGUALTION COMMISSION
UTILITY DIVISION STAFF



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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF AN AGREEMENT BETWEEN QWEST CORPORATION AND COVAD ENTITLED "TERMS AND CONDITIONS FOR COMMERCIAL LINE SHARING ARRANGMENTS"	)	**Case No. 04-00209-UT**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **Staff's Response to Qwest's and Covad's Responses to Order to Show Cause and Recommendation to Establish a Streamlined Interconnection Agreement Filing and Review Process,** filed August 19, 2004, was mailed first-class, postage prepaid, to the following:

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NEW MEXICO PUBLIC REGULATION COMMISSION

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