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:

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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)

[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

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[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(e) 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

[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(cof 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, (6[th] 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.

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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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DATED this 19th day of August 2004.

NEW MEXICO PUBLIC REGULATION COMMISSION

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