December 31, 2008

Oregon Public Utility Commission
Attn: Filing Center
P.O. Box 2148
Salem, OR 97308-2148

Re: UCB-35; Supplement to Frontier’s Motion for Summary Judgment

Dear Commission,

By this letter and attachments, Citizens Telecommunications Company of Oregon d/b/a Frontier Communications of Oregon (Frontier) hereby provides Supplemental Authority in support of Frontier’s Motion for Summary Judgment. Enclosed are four copies of the Order from the Minnesota Public Utilities Commission issued December 29, 2008 in Docket No. P-407, 405, 421/C-09-1056. The Minnesota case was decided on substantially similar facts to those in UCB 35. This Order was previously referenced in footnote 1 of Frontier’s Motion but had not yet been issued.

If you have any questions regarding this filing, please don’t hesitate to contact me.

Very truly yours,

Charles L. Best

encls
CERTIFICATE OF SERVICE

I certify that on December 31, 2008, I served the foregoing Supplement to Motion for Summary Judgment upon all parties of record in Docket No. UCB 35 by email and for parties who have not waived paper service, by U.S. mail, postage prepaid.

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By:

Charles L. Best  
Attorney for Citizens Telecommunications Company of Oregon, dba Frontier Communications of Oregon  
OSB No. 781421
In the Matter of the Petition of Frontier Communications of Minnesota, Inc. and Citizens Telecommunications Company of Minnesota, LLC for Immediate Relief Against Qwest Corporation

PROCEDURAL HISTORY

On September 4, 2008, Frontier Communications of Minnesota, Inc. and Citizens Telecommunications Company of Minnesota, LLC (collectively, Frontier) filed a petition seeking immediate relief against Qwest Corporation (Qwest). The petition alleged that, commencing in July 2008, Qwest began to unilaterally charge Frontier for Extended Area Service (EAS) transit traffic. Frontier’s petition requested the Commission to direct Qwest to stop billing Frontier for providing transiting service for EAS traffic in Minnesota and to continue transiting Frontier’s local EAS traffic until such time as the Commission can fully investigate the issues raised.

On October 1, 2008, Qwest filed its Answer, Motion to Dismiss and Affidavit of Thomas P. Staebell, in response to the petition.

On October 10, 2008, Frontier filed its Response to Qwest’s Motion to Dismiss.

On October 24, 2008, the Minnesota Department of Commerce (DOC), CenturyTel and the Minnesota Independent Coalition (MIC)¹ and Qwest filed comments.

On December 4, 2008, the Commission met to consider the matter.

¹ The Minnesota Independent Coalition is an ad hoc organization composed of small, rural independent telephone companies operating in Minnesota.
FINDINGS AND CONCLUSIONS

I. Legal and Factual Background

A. Legal Background Regarding EAS

The issue of Qwest’s transit costs arises in the context of Extended Area Service. Extended Area Service is a service arrangement permitting neighboring telephone exchanges to become part of a single local calling area with toll-free calling. The criteria for establishing EAS and the procedures for determining EAS costs and rates were set by Commission Orders (the EAS Orders) following an industry-wide fact-finding and policymaking proceeding.²

As an integral part of the EAS process established over many years by the Commission, the companies serving the affected exchanges must determine the costs of installing and operating the proposed EAS route, using Commission-approved costing methods, and file studies with the Department of Commerce and the Commission identifying their costs (including facilities costs and lost access revenue) associated with provision of EAS traffic. Qwest has routinely participated in the establishment of EAS costs through Commission proceedings.

B. Factual Background

In October 2007 Qwest sent a letter to Frontier, stating that as of May 1, 2008, it was terminating all agreements with Frontier related to Qwest transiting Frontier’s EAS traffic.³ Qwest further stated that if Frontier wanted to continue to utilize Qwest’s transit service for EAS traffic, that Frontier must execute a new agreement which Qwest claimed was pursuant to section 259 of the federal Telecommunications Act of 1996.⁴ Under the proposed agreement, Frontier would be required to compensate Qwest at a rate of $.0045 per minute for transit service that Frontier’s customers originate and that transits Qwest’s network.

Frontier thereafter requested that Qwest identify the agreements Qwest was purporting to terminate. Frontier told Qwest that Qwest could not unilaterally disrupt the transiting EAS


³ Qwest defined the transit service for which it was seeking compensation as switching and transport of intraLATA calls that originate on Frontier’s network, transit Qwest’s network and terminate to yet another telecommunications carrier’s network.

arrangements established by the Commission and begin billing Frontier for transiting service
without seeking the Commission’s approval.

Qwest rejected Frontier’s position and since July 2008, has issued transiting service invoices to
Frontier. In Minnesota those invoices have totaled approximately one half million dollars for the
three month period May - July. According to Qwest, the invoiced amount represents Qwest’s
charge for transit service during the months of May, June and July 2008, billed at a rate of $0.0045
per minute of use.5

In September 2008 Frontier filed its petition, challenging Qwest’s EAS transit charge, and arguing
that there is already in place a Commission-approved rate design to recover all of the costs
associated with EAS traffic, including transit. Frontier also asserted that Qwest was
discriminating against Frontier by billing and seeking to collect such transiting charges from
Frontier, but not from other Incumbent Local Exchange Carriers (ILECs). Frontier asked the
Commission to order Qwest to:

• immediately cease and desist billing Frontier for transit service for local EAS traffic until
such time that Qwest has sought and received Commission approval to impose such a
charge; and

• continue to transit Frontier’s local EAS traffic.

In October 2008 Qwest filed its Answer and Motion to Dismiss Frontier’s petition. Qwest argued
that the relief sought by Frontier would require it to provide Frontier with transit service for free,
rewarding Frontier for its refusal to negotiate with Qwest for compensation for providing such
transit service. Qwest also asserted that it is not the Commission, but the Federal Communications
Commission (FCC), which has exclusive jurisdiction over the local intrastate transit services at
issue herein. Qwest stated that it was in the process of initiating a complaint before the FCC.

II. Commission Jurisdiction Over EAS and Local Transit Traffic

A. Positions of the Parties

1. Frontier

Frontier asserts that the Commission clearly has jurisdiction over the matters here in dispute. The
local EAS traffic exchanged by Frontier and Qwest is intrastate traffic subject to the Commission’s
jurisdiction. The transiting function performed by Qwest in routing local intrastate EAS traffic is
an intrastate service provided by Qwest which is subject to the Commission’s jurisdiction.

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5 At the hearing Frontier stated that Qwest has continued to submit invoices to Frontier
assessing transiting charges that amount to approximately one million dollars over a six month
period.
Frontier argues that the general rule is that the states, like Minnesota, regulate intrastate service and that the FCC regulates interstate service. Frontier further argues that there is no dispute that the traffic at issue in this proceeding is intrastate Extended Area Service traffic, and not interstate traffic.

Frontier argues that Qwest has identified no FCC preemption authority which would support its position, noting that Qwest has not cited to a single statute, court decision or FCC Order that holds that the FCC has exclusive jurisdiction over transit arrangements which would preempt the Commission’s ability to consider intrastate EAS transit service charges. Frontier further argues that none of the preemption conditions established by United States Supreme Court decisions are met here.

Finally, Frontier argued that in a previous Commission docket\(^6\) Qwest had taken the position that the Commission had jurisdiction to consider the issue of whether Qwest was entitled to receive compensation for transiting EAS traffic – the same issue present in this dispute.\(^7\)

At the December 4, 2008, hearing, Frontier asserted that, based upon Qwest’s Answer and Motion to Dismiss, the Commission had sufficient undisputed facts before it to make an immediate decision on the issues raised.

Frontier argued that Qwest has conceded that there are no facts in dispute with respect to the issues presented. Frontier stated that in its Answer, Qwest has acknowledged that there is no tariff currently in place which authorizes the EAS transit charges it seeks to impose. Finally, Frontier asserted that Qwest had not charged EAS transit fees until recently and now seeks to impose such a fee on only certain of the ILECs with which it does business.\(^8\)

2. CenturyTel and the Minnesota Independent Coalition

CenturyTel and the MIC (jointly, CenturyTel) filed comments urging the Commission to grant the relief sought by Frontier and to reject Qwest’s claim that federal law preempts Commission

\(^6\) In the Matter of a Complaint by the Minnesota Telecom Alliance Against Qwest Communications, Inc. Regarding Traffic Terminating from Qwest Communications, Inc. Tandem Switches, Docket No. P-421/C-04-200.

\(^7\) In Docket 04-200, Qwest asserted in its counterclaim that the Commission had jurisdiction to consider its request for compensation for transiting local traffic. The Commission did not consider the issues Qwest raised in its counterclaim, finding that the issues raised with respect to compensation to Qwest for transiting traffic were beyond the scope of the MTA docket.

\(^8\) Qwest acknowledged in its response to Frontier’s petition that it has only charged some ILECs for transit service.
authority over Qwest's EAS transit rates. CenturyTel asserted that Qwest unilaterally decided to impose unapproved transit charges on Frontier for local intrastate service without seeking Commission approval.

CenturyTel argued that the Commission's decision in the 2004 complaint of MTA, rejecting Qwest's argument that the Commission lacked authority to resolve the complaint, demonstrates the existence of Commission jurisdiction over local transit service pursuant to Minn. Stat. §§ 237.12, subd. 1, and 237.081 as part of the Commission's:

- authority to investigate and make appropriate orders concerning interconnections and compensation between telephone companies,
- authority to investigate, address, and remedy acts or omissions in telephone service or services in connection with telephone service, respectively.9

CenturyTel further argued that Qwest's claim that federal law preempts the Commission's authority over rates for intrastate transit service is without basis and that its unilateral imposition of a charge for transit traffic is unlawful. CenturyTel argued that state authority over intrastate activity such as the transit services at issue herein was not preempted by the 1996 Telecommunications Act, and that Qwest's arguments to the contrary fail to support such a notion.

CenturyTel argued that 47 U.S.C. § 152(b) specifically precludes the FCC from regulation of intrastate services, except as expressly provided in the Telecommunications Act. Pointing to the absence of any provision in the federal Act granting the FCC express authority over intrastate transit traffic, CenturyTel argued that the FCC has no role with respect thereto, or at most a concurrent role.

At the hearing on this matter, CenturyTel urged the Commission to reject Qwest's claim that federal law preempts the Commission's authority over Qwest's local transit rates. Agreeing with Frontier, CenturyTel argued that Qwest cannot unilaterally bill transit charges to Frontier or any other carrier. Should Qwest be permitted to charge an intrastate tandem transit rate that has not been agreed upon, any such rate must be approved by the Commission and set forth in Qwest's intrastate tariffs or a contract approved by the Commission.

Finally, CenturyTel argued that there has been no demonstration that the proposed rate for transit traffic is just and reasonable or that the cost of transit traffic is not already recovered through existing EAS rate design.

3. Department of Commerce

The Department of Commerce (the Department) initially recommended that the Commission deny Qwest's Motion to Dismiss, order Qwest to cease billing Frontier for transit charges until such

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9 Notice and Order for Hearing, Docket No. 04-200 at 6 (July 29, 2004).
time as there is a Commission-approved rate for transit and to send the case to the Office of Administrative Hearings (OAH) for a contested case proceeding.

The Department agreed that the Commission has the authority under Minnesota law to regulate the charges Qwest imposes for transport and switching of local transit traffic. The Department stated that the transit function is an integral part of certain EAS arrangements which are intrastate and under the Commission’s authority. The Department urged the Commission to find that Minnesota law requires Qwest’s rates to be fair and reasonable, and that it is the Commission that is charged with the authority to so ensure.

The Department argued that Qwest has attempted to unilaterally institute a new pricing regime for a function, local transit, over which the Commission has long exercised authority.

At the hearing, the Department modified its position, no longer believing it necessary for the Commission to send the case to the OAH for investigation, and specifically agreeing with the arguments raised by CenturyTel with respect to the Commission’s authority to determine the matter.

4. Qwest

Qwest asserted that the dispute arises out of the changing nature of regulation and telecommunications traffic. With new competition in the telecommunications arena, the Company said Qwest’s role as a telecommunications provider has shifted from incumbent monopoly telephone service provider to contender in a fiercely competitive market.

Qwest argued that the FCC has exclusive jurisdiction over the dispute in this matter and that the Commission therefore lacks jurisdiction over the amount Qwest charges for transit traffic. Qwest argued that it is the FCC, and not the Commission, which has jurisdiction over such transit traffic by virtue of the FCC’s role as administrator of the new “comprehensive scheme of telecommunications regulation” created by the Telecommunication Act of 1996.

Qwest argued that the Telecommunications Act gives states authority under sections 251 and 252 over local competition issues like interconnection, but that those provisions do not apply to the transit services at issue here. Arguing from the FCC definition of “interconnection” as “the linking of two networks for the mutual exchange of traffic” and not “the transport and termination of traffic,” Qwest concludes that the federal Act’s reciprocal compensation provisions for local traffic do not address the compensation to be paid to Qwest when it simply relays traffic that Frontier customers originate.

Qwest also argued that the provisions found in section 271 of the Telecommunications Act10 are exclusively federal in nature, with states being limited to an advisory capacity alone. Section 271

10 Section 271 obligations include “access and interconnection.”
requires Qwest to provide, *inter alia*, unbundled local transport and unbundled local switching. While such elements could not be used solely to provide transit services, Qwest posits that once a local exchange company has access to them for the provision of local exchange service, nothing prevents the local exchange company from utilizing such elements for transit services also.\(^{11}\)

Finally, Qwest argued that it is under no obligation to provide transit services and cannot be put under an obligation to provide transit service to a local exchange company in the absence of a contract or tariffed offering. Relying on the infrastructure sharing provisions of section 259 of the Act, Qwest argues that section 259 obligates ILECs to provide, under certain conditions, “public switched network infrastructure, technology, information and telecommunications facilities and functions” to requesting carriers. However, Qwest asserts that such infrastructure sharing is specifically exempt from common carrier regulation under Title II of the federal Act.

**B. Commission Action - Jurisdiction Over EAS and Local Transit Traffic Is Not Preempted**

The Commission concurs that the issues presented in Frontier’s petition are able to be resolved at this time, without referring the matter to the Office of Administrative Hearings, as no material facts are in dispute.

Having carefully considered the written and oral presentations of the parties, the Commission first concludes that it has jurisdiction over the intrastate EAS and local transit traffic at issue herein. The Commission has broad authority and the obligation under Minn. Stat. §§ 237.06, 237.07, 237.12 and 237.081 to ensure just and reasonable rates for intrastate telecommunications services. This authority applies to Qwest’s intrastate EAS and local transit service.

Qwest’s intrastate EAS service has long been the subject of Commission oversight.\(^{12}\) No telecommunications service is more intensely local than EAS, which links as one local calling area communities in Minnesota that the Commission has found to be integrally related to one another.

\(^{11}\) Qwest further asserted that states may not regulate the price of, or require the offering of, those network elements that Qwest offers by way of contract in order to comply with the requirements of section 271. State commissions are granted specific authority for the approval of contracts under section 252(e)(1), but their authority is limited to those agreements entered into "pursuant to section 251," not section 271.

\(^{12}\) In the Matter of an Investigation into the Appropriate Local Calling Scope, in Accordance with Minn. Stat. § 237.161 (1994), Docket No. P-999/CI-94-296, Order Reactivating the Processing of EAS Petitions (October 24, 1995) and Order After Reconsideration (February 23, 1996).
First, the Commission authority under section 237.06 is broad, covering both services and facilities, and encompassing all rates, tolls and charges of a telephone company such as Qwest.

Second, as part of Qwest’s obligation to allow physical connections with other carriers under Minn. Stat. § 237.12, subd. 1, the Commission has the authority to determine compensation for those connections and the services delivered over those connections.

Finally, while Qwest concedes that the Commission has jurisdiction to determine whether Qwest can discontinue providing transiting service to Frontier, it disputes that the Commission has jurisdiction to say whether Qwest can require Frontier to pay the EAS transiting charges Qwest unilaterally seeks to impose.

The Commission finds that it clearly has the authority to address the issues raised in Frontier’s complaint. In summary, the Commission finds that the local EAS traffic at issue is intrastate traffic long subject to the Commission’s jurisdiction. The transiting function performed by Qwest in routing intrastate EAS traffic is an intrastate service provided by Qwest which is subject to the Commission’s jurisdiction.

While federal law can preempt state law, courts favor statutory interpretations that avoid this result. The U.S. Supreme Court recognizes a “well established presumption against finding preemption of State law in areas traditionally regulated by the States.” And the Court clarifies that “[i]t will not be presumed that a federal statute was intended to supersede the exercise of power of the state unless there is a clear manifestation of intention to do so.”

The claim that Congress adopted the 1996 Telecommunications Act with the intent to preempt any specific state policy faces an unusually difficult challenge due to the amount of explicit language to the contrary:

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13 On page 8 of Qwest’s Motion to Dismiss, Qwest references Minn. Stat. § 237.12, which requires Commission approval before a telephone company severs a connection with another telephone company, and explains that, “Qwest cannot disconnect Frontier under Minnesota law without a Commission order.”


47 U.S.C. § 152(b)
... nothing in this chapter shall be construed to apply or to give the [Federal Communications] Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service...

47 U.S.C. § 253(b) State Regulatory Authority
Nothing in this chapter shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

1996 Act § 601(c)(1). This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.¹⁶

The Conference Committee Report for the 1996 Act expounds on the purpose of the uncodified language at § 601(c)(1) as follows: “The conference agreement adopts the House provision stating that the bill does not have any effect on any other . . . State or local law unless the bill expressly so provides. This provision prevents affected parties from asserting that the bill impliedly preempts other laws.”¹⁷

Qwest’s suggestion that the 1996 Act gave the FCC exclusive jurisdiction over local transiting service does not withstand scrutiny, and the Commission is not persuaded.

None of the provisions of the Act relied upon by Qwest manifest the Congressional intent to preempt state commission authority over intrastate EAS transit. Importantly, Congress largely eliminated the need for conjecture about whether or not it intended to preempt state regulation by declaring that where there is no explicit preemption, there is no implicit preemption. Where the 1996 Act is concerned, “it takes a stretch to get from permissive statutory silence to a statutory right” to be free from regulatory authority.¹⁸


¹⁸ Verizon Communications Inc. v. FCC, 535 U.S. 467 (2002); see also AT&T Corp. v. Iowa Utilities Bd, 525 U.S. 366, 394.
Nor do the cases relied upon by Qwest in its Motion to Dismiss on preemption grounds even address intrastate transit service. The cases certainly do not conclude that state commissions are excluded entirely from regulating intrastate telecommunications services. While the 1996 Telecommunications Act extended FCC authority into some areas of traditionally state-regulated telecommunications related to local competition, even in those areas the Act does not preempt state authority so long as states do not act in conflict with federal law or FCC requirements.

Here, the statutory provisions Qwest claims preempt state authority over EAS transit services do not even mention transit services and are not pertinent to the issues before this Commission. Qwest’s reliance on Section 259 and 271 of the Telecommunications Act to support federal preemption of state regulation of transit rates is misplaced. Section 259 does not preempt state regulation of intrastate transit rates. Instead, Section 259 is limited in scope and applies only to agreements for infrastructure sharing. Nowhere in Section 271 are transit or transit rates even discussed.

The Commission finds that Qwest has failed to demonstrate that Congress has preempted state regulation of intrastate EAS transit traffic. Neither Congress nor the FCC has undertaken the kind of comprehensive regulation of intrastate transiting services that would demonstrate an attempt to “occupy the field.” Qwest has identified no federal law or FCC order that gives rise to a conflict.

III. Qwest’s Actions Seeking Compensation for EAS and Local Transit Traffic

Having found jurisdiction over the local and EAS transit traffic at issue, the Commission will address the merits of Frontier’s petition.

The Commission finds that Qwest’s action, unilaterally commencing to bill Frontier for transit service without seeking Commission approval, is in violation of Minn. Stat. §§ 237.06, 237.07, 237.09, 237.12 and 237.60.

Minnesota law requires Qwest’s rates and charges to be fair and reasonable. Qwest has violated Minn. Stat. § 237.06, by failing to establish that its rates, tolls and charges are fair and reasonable. Qwest has not provided to the Commission any cost data and information or otherwise

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20 It would also appear that Qwest’s action is in violation of the terms of its Alternative Form of Regulation (AFOR) Plan, approved by the Commission in Docket No. P-421/AR-05-1081, either by revising the rates for existing EAS service, which is price regulated, or, alternatively, offering a New Service without filing a price list and proposed classification with the Commission.
demonstrated the "reasonableness" for the rate its seeks to charge and collect from Frontier. Thus, Qwest’s proposed rate of $0.0045/minute for transiting is not fair or reasonable.

The Commission finds that Qwest has violated Minn. Stat. § 237.07, which states that:

Every telephone company shall keep on file with the department a specific rate, toll, or charge for every kind of noncompetitive service and a price list for every kind of service subject to emerging competition, together with all rules and classifications use by it in the conduct of the telephone business, including limitations on liability.

Qwest has acknowledged that it has not filed a tariff, rate schedule, price list or other agreement with the Department evidencing the charges it billed Frontier for transiting local and EAS traffic.

Further, Qwest’s attempt to revise its existing compensation arrangement and impose an additional compensation arrangement for performing the tandem switching or transiting function of local EAS traffic without the agreement of Frontier, or Commission review and approval, violates Minn. Stat. § 237.12, subd. 1, which provides:

In case of failure of the telephone companies concerned to allow or agree upon such physical connection or connections, or the terms and conditions upon which the same shall be made, application may be made to the commission for an order requiring such connection and fixing the compensation, terms and conditions thereof, and if after investigation and hearing the commission shall find that such physical connections will not result in irreparable injury to such telephone properties, the commission shall by order direct that such connections be made, and prescribe reasonable conditions and compensation therefore and for the joint use thereof, and by whom the expense of making and maintaining such connection or connections shall be paid.

Finally, Qwest has sought to impose a charge on Frontier for performing the transiting function that it has not uniformly sought from other local exchange companies that route local and EAS traffic through Qwest’s tandems. The Commission finds that such action violates Minn. Stat. §§ 237.09, which prohibits discrimination\(^2\) and Minn. Stat. § 237.60, which requires the “rates of a telephone company . . . to be the same in all geographic locations of the state unless for good cause.” As Qwest is charging different transiting rates to some carriers and billing Frontier rates that have not been approved by the Commission for transiting traffic, it is in violation of Minn. Stat. §§ 237.09 and 237.60.

\(^2\) Minn. Stat. § 237.09, subd. 1 provides:

No telephone company . . . shall, directly or indirectly, knowingly or willfully, charge, demand, collect, or receive from any person, firm, or corporation, a greater or less compensation for any intrastate service rendered . . . than it charges, demands, collects, or receives from any other firm, person, or corporation for a like and contemporaneous intrastate service under similar circumstances.
The Commission hereby grants Frontier’s petition, and determines that no transit charges are appropriate unless and until Qwest has sought and obtained Commission approval to impose a new charge for transit traffic. Qwest is required to continue to handle transit traffic and to cease charging Frontier, or other ILECs, for transit traffic.

ORDER

1. Frontier’s petition is granted.

2. Qwest shall continue to handle transit traffic and cease charging Frontier, or other ILECs, for transit traffic, without first obtaining Commission approval.

3. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

[Signature]

Earl W. Haar
Executive Secretary

(SEAL)
STATE OF MINNESOTA
COUNTY OF RAMSEY

AFFIDAVIT OF SERVICE

I, Margie DeLaHunt, being first duly sworn, deposes and says:

That on the 29th day of December, 2008 she served the attached ORDER FINDING JURISDICTION, GRANTING PETITION, AND DIRECTING QWEST TO HANDLE LOCAL EAS TRANSIT TRAFFIC WITHOUT ADDITIONAL CHARGE.

MNPUC Docket Number: P-407,405,421/C-08-1056

By depositing in the United States Mail at the City of St. Paul, a true and correct copy thereof, properly enveloped with postage prepaid

By personal service

By inter-office mail

To all persons at the addresses indicated below or on the attached list:

Commissioners
Carol Casebolt
Peter Brown
Eric Witte
Marcia Johnson
Kate Kahlert
Mark Oberlander
Ganesh Krishnan
Lillian Brion
Mary Swoboda
DOC Docketing
AG - PUC
Julia Anderson - OAG
John Lindell - OAG

Subscribed and sworn to before me,
a notary public, this 29 day of December, 2008

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