STATE OF NORTH DAKOTA

BEFORE THE PUBLIC SERVICE COMMISSION

New Edge Network, Inc./Qwest Corporation Commercial Line Sharing Service Agreements	PU 04-620 REQUEST FOR HEARING, COMMENTS, AND MOTION TO DISMISS FROM DOCKET THE AGREEMENT TITLED "TERMS AND CONDITIONS FOR COMMERCIAL LINE SHARING"

In response to the Notice of Opportunity for Hearing dated January 26, 2005 issued by the North Dakota Public Service Commission (the "Commission") in this docket, Qwest Corporation ("Qwest") respectfully asks the Commission to set this matter for hearing. The commercial line sharing agreements at issue here are distinct from the commercial Master Services Agreements also referenced in the Notice of Opportunity for Hearing. The distinctions between the agreements warrant separate proceedings and separate consideration by the Commission. Indeed, commissions in other states have agreed with Qwest's position that the agreement titled, "Terms and Conditions for Commercial Line Sharing", is not an interconnection agreement and does not need to be filed with state commissions for review and approval under section 252.

Qwest respectfully submits the following Comments to the Commission and Qwest respectfully moves the Commission for an order dismissing the agreement titled "Terms and Conditions for Commercial Line Sharing" from this docket.

I. BACKGROUND AND INTRODUCTION

On November 16, 2004, Qwest and New Edge Network, Inc. ("New Edge") entered into a commercial agreement entitled the "Terms and Conditions for Commercial Line Sharing Arrangements" (the "Commercial Agreement") under which Qwest agreed to provide access to the high frequency portion of its local loops so that New Edge may offer advanced data services simultaneously with Qwest's voice band service. The Commercial Agreement pertains only to line sharing orders placed after October 1, 2004. As a result of the D.C. Circuit's decision in *United States Telecom Association v. FCC* ("*USTA II*"), Qwest is no longer required to provide line sharing as a network element under sections 251 or 252 of the Act for line sharing orders placed after October 1, 2004.[1] The Commercial Agreement does not amend or alter the terms and conditions of existing interconnection agreements between Qwest and New Edge. In fact, all amendments to the interconnection agreement have been filed with the Commission under section 252.

Also on November 16, 2004, Qwest and New Edge entered into an amendment to the parties' interconnection agreement titled "Commercial Line Sharing Amendment to the Interconnection Agreement Between Qwest Corporation and New Edge Networks, Inc. dba New Edge Networks for the State of North Dakota" (referred to hereinafter as the "Line Sharing Amendment"). Qwest has filed that agreement for review and approval by the Commission. In contrast to the Line Sharing Amendment, the Commercial Agreement does not create any terms or conditions for services that Qwest must provide under section 251(b) or (c), and, therefore, it is not an interconnection agreement or an amendment to the existing interconnection agreement between Qwest and New Edge. Qwest submitted the Commercial Agreement to the Commission

[1] *United States Telephone Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004).

for informational purposes only and outlined its reasons for doing so in a detailed cover letter. It is important to note that Qwest made the terms and conditions of the Commercial Agreement available to any carrier who assumed the same obligations as New Edge.

Notwithstanding the public nature of the Commercial Agreement and the continuing offer to make it available to all other carriers, Qwest disputes that the Commercial Agreement falls within the section 252 filing obligation and that the Commission has jurisdiction to review, approve or reject the Commercial Agreement. Accordingly, for the reasons that follow, Qwest respectfully moves for an order dismissing the Commercial Agreement from this docket.

II. ARGUMENT

A. The Authority of the Commission to Review and Approve Agreements Under the Federal Act is Governed by Federal Law.

Whether the Commission has the power to review and approve the Commercial Agreement is a question of federal law governed by the provisions of the 1996 Federal Telecommunications Act (the "Act") and the controlling federal authorities construing the Act. The controlling authorities that must be examined are the provisions of the Act, Federal Communications Commission ("FCC") decisions, rules adopted by the FCC, and rulings by federal courts reviewing the Act. In this particular case, there are three primary controlling authorities. The first is the decision of the United States Court of Appeals for the District of Columbia in *USTA II*, which controls and defines several relevant aspects of the FCC's Triennial Review decisions. The second is the October 2002 FCC decision in a declaratory ruling docket brought by Qwest ("Declaratory Order") that defines "the scope of the mandatory filing requirement set forth in section 252(a)(1)."[2] And finally, the third is the portion of the FCC's

[2] Memorandum Opinion and Order, *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*

Triennial Review Order ("TRO") relating to line sharing.[3] Read together, these authorities definitively establish that the Commercial Agreement is not subject to sections 251 and 252 and is therefore not subject to review and approval by the Commission.

B. The Commercial Agreement Relates to Services That Are No Longer Required to Be Unbundled Pursuant to Sections 251 or 252 of the Act.¶

The D.C. Circuit's recent decision in *USTA II* may have created a false impression that the Court overturned the entire TRO. That is not the case. In fact, major portions of the TRO were not appealed by any party and are in force. With respect to other issues, including line sharing, *USTA II* affirmed the decision of the FCC in the TRO.¶

In the TRO, the FCC determined that there was no impairment with regard to the high frequency portion of the loop and, thus, it declined to make it available as an unbundled network element ("UNE").[4] In section 51.319(a)(1)(i) of its rules, the FCC determined that "[b]eginning on the effective date of the [TRO], the high frequency portion of a copper loop shall no longer be required to be provided as an unbundled network element, subject to . . .transitional line sharing conditions. . ..."[5] One portion of the transitional line sharing rules required ILECs to provide line sharing for new orders placed within one year of the effective date of the TRO, at which point the ILECs' obligation to provide line sharing as a UNE to new customers would cease.[6] October 1, 2004 was the one-year anniversary of the effective date of the TRO. Thus, for line sharing orders placed on or after October 2, 2004, Qwest has no obligation to provide line sharing as a UNE under sections 251 and 252.

Arrangements under Section 252(a)(1), WC Docket No. 02-89, 17 FCC Rcd 19337, 2002 FCC Lexis 4929 (October 4, 2002) ¶ 1.

[3] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338 (FCC rel. August 21, 2003) ("TRO") ¶ ¶ 255-269.

[4] TRO, ¶ 255 *et seq.*

[5] 47 C.F.R. § 51.219(a)(1)(i).

[6] 47 C.F.R. § 51.219(a)(1)(i)(B).

Under section 251(d)(2) of the Act, before an incumbent local exchange carrier such as Qwest can be required to unbundle network elements, the FCC must first lawfully determine, at a minimum, that "access to such network elements as are proprietary in nature is *necessary*" and that "the failure to provide access to such network elements would *impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[7] Absent such a lawful determination, there is no obligation to unbundle under section 251 of the Act.

Section 251 itself makes this clear. Section 251(b)(3) states that ILECs must make network elements available to CLECs, subject to the "necessary" and "impair" standards of section 251(d)(2). Section 251(c)(3) authorizes unbundling only "in accordance with...the requirements of this section [251],"[8] – that is, only if the FCC determines that the "impairment" test of section 251(d)(2) has been satisfied. As the United States Supreme Court and D.C. Circuit have held, the section 251(d)(2) requirements reflect Congress' decision to place a real upper bound on the level of unbundling that regulators may order.[9]

Congress explicitly assigned the task of applying the section 251(d)(2) impairment test and "determining what network elements should be made available for purposes of subsection [251](c)(3)" to the FCC.[10] The Supreme Court confirmed that as a precondition to unbundling, section 251(d)(2) "requires the [Federal Communications] Commission to determine on a

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[7] 47 U.S.C. § 251(d)(2).
[8] 47 U.S.C. § 251(c)(3).
[9] *See AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 390 (1998) ("We cannot avoid the conclusion that if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the [FCC] has come up with, it would not have included § 251(d)(2) in the statute at all."); *USTA v. FCC,* 290 F.3d 415, 418, 427-28 (quoting *Iowa Utilities Board's* findings regarding congressional intent and Section 251(d)(2) requirements, and holding that unbundling rules must be limited given their costs in terms of discouraging investment and innovation).
[10] 47 U.S.C. § 251(d)(2).

rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[11]

As previously noted, the FCC determined in the TRO that line sharing is not required to be unbundled under section 251 of the Act.[12] In *USTA II,* the D.C. Circuit affirmed the FCC's decision that the CLECs' "lack of separate access to the high frequency portion of [ILEC] copper loops" would not cause impairment and that line sharing need not be unbundled.[13] In doing so,, the Court expressly stated:

> We therefore uphold the Commission's rules concerning hybrid loops, FTTH, and line sharing on the grounds that the decision not to unbundle these elements was reasonable, even in the face of some CLEC impairment, in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition from cable ensure the persistence of substantial competition in broadband.[14]

Consequently, Qwest is no longer obligated to provide unbundled access to line sharing under section 251 of the Act for line sharing orders placed after October 1, 2004.

As discussed in Part C below, 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).[15] Consequently, when a service such as line sharing is no longer required by section 251, there is no section 252 obligation to file a privately-negotiated

[11] *Iowa Utilities Board,* 525 U.S. at 391-92.
[12] *TRO,* ¶¶ 258-263, 642-44.
[13] *USTA II,* 359 F.3d at 584-85.
[14] *Id.* at 585.
[15] 47 U.S.C. § 252(a)(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 . . . The agreement . . .shall be submitted to the State commission under subsection (e) of this section.") (emphasis added).

agreement with a state commission nor is there a section 252 power in the state commission to review and approve the agreement.[16]

C. In the Declaratory Order, the FCC Ruled that Agreements Like the Commercial Agreement Need Not Be Filed.

The 2002 Declaratory Order sets out explicit standards governing the circumstances under which agreements between an ILEC and CLEC must be filed with state commissions. The basic standard is that an ILEC must, pursuant to section 252(a)(1), file 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."[17] The FCC characterized these requirements as properly balancing the right of CLECs "to obtain interconnection terms pursuant to section 252(i)" with the equally important policy of "removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs."[18]

With regard to the issue in this case, the FCC could not have been clearer that there is no requirement that an ILEC file all agreements:

> We...disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier.... Instead, we 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).[19]

It is undisputed that the FCC and *USTA II* eliminated the requirement that line sharing be provided as an unbundled network element under section 251(b) or (c). Thus, the Declaratory

[16] The opening phrase of section 252 is instructive on this point. It states that "[u]pon receiving as request for interconnection, services, or network elements *pursuant to section 251* . . . ." 47 U.S.C. § 252(a)(1) (emphasis added). Thus, the obligations of section 252 come into being only if a section 251 service or element is the subject of the agreement.
[17] *Declaratory Order* ¶ 8 (italics in original).
[18] *Id.*
[19] *Id.*, footnote 26 (italics in original).

Order stands for the clear proposition that Qwest has no obligation to file the Commercial Agreement and the Commission has no authority to review and approve it.

D. Contracts for Non-Section 251 Network Elements Are Subject to Federal Jurisdiction.

As shown above, only agreements pertaining to the provision of services required under section 251(b) or (c) of the Act constitute "interconnection agreements" that must be filed under section 252. The FCC has jurisdiction over contracts for non-section 251 network elements for the following reasons: (1) in many cases, certain network elements are required under federal law to be provided by RBOCs such as Qwest under section 271(c)(2)(B) of the Act; as a result, this obligation is federal, as is the jurisdiction to review the contracts for these elements; (2) network elements remain subject to federal jurisdiction even after they have been removed from the list of section 251(c)(3) elements; and (3) contracts between carriers for network elements that do not meet the "necessary" and "impair" tests also fall within express federal filing jurisdiction.

First, in the case of Qwest (and other RBOCs), there is an independent investiture of federal jurisdiction under the Act. Many of the elements that have been removed from the list of network elements must still be provided pursuant to section 271(c)(2)(B) of the Act.[20] The offering of access to loops, for example, pursuant to section 271(c)(2)(B)(vi) is subject to federal jurisdiction.[21] The filing and review (if any) of contracts entered into pursuant to section 271(c)(2)(B) of the Act is a federal matter.[22]

[20] *TRO*, 18 FCC Rcd. at 17383-84, ¶ 652.

[21] The FCC, in the TRO, confirmed this jurisdiction, noting that it would enforce compliance with section 271 offerings (*id.* at 17385-86, ¶ 655) and that it would apply sections 201 and 202 of the Act to such offerings (*id.* at 17389, ¶ 663).

[22] Of course, state jurisdiction over section 271 issues is considerably more limited than is the case with section 251, and is advisory only. *See* 47 U.S.C. § 271(d)(2)(B).

Second, network elements made available under the Act are subject to the jurisdiction of the FCC, subject to specific exceptions.[23] The FCC's jurisdiction is not diminished whenever a network element is removed from the FCC's list of unbundled elements.[24] The fact that the FCC's actions in removing line sharing orders from the list of section 251(c) services is deregulatory, not regulatory, is irrelevant, because deregulatory action by the FCC does not reduce either the federal jurisdiction pursuant to which the deregulation was accomplished or the FCC's ability to preempt inconsistent state regulations.[25]

Third, some network elements, particularly line sharing, are used exclusively for the provision of services that fall within federal jurisdiction because they are interstate in nature. Line sharing is within federal jurisdiction because DSL service is jurisdictionally interstate irrespective of any provisions of the Act.[26]

Fourth, contracts between carriers for network elements that do not meet the "necessary" and "impair" test also fall within express federal filing jurisdiction. That is, the FCC has the authority to require that all such contracts be filed with the agency and to enforce the non-discrimination requirements of section 202(a) of the Communications Act of 1934 with regard to them. As a matter of rule, the FCC has exempted non-dominant carriers from the federal filing obligations applicable to such contracts. No such exemption exists for contracts between ILECs (which are subject to dominant carrier regulation) and CLECs. Furthermore, unlike access services, the Commission has not directed the ILECs to provide these network

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[23] *TRO*, 18 FCC Rcd. at 17100-01, ¶¶ 194-95; *USTA II*, 359 F.3rd at 594.

[24] *AT&T Corporation v. Iowa Utilities Board*, 525 U.S. 366, 385 (1999): "Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specific areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions . . . ."

[25] *See Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 217 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana Pub. Serv. Comm'n v. FCC*, 461 U.S. 938 (1983).

[26] *In the Matter of GTE Telephone Operating Co.*, GTOC Tariff No. 1, GTOC Transmittal No l. 1148, *Memorandum Opinion and Order*, 13 FCC Rcd. 22466, 22474-75 ¶ 16 (1998), *recon. denied*, 17 FCC Rcd. 27409 (1999).

elements as tariffed offerings. Therefore, these contracts must be filed with the FCC, but are not subject to prior FCC approval.

Section 211(a) of the Communications Act of 1934 requires that:

> Every carrier subject to this [Act] shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

This statutory language provides an affirmative grant of power to carriers to order their affairs with other carriers by way of contract unless the FCC's rules (or other provisions of the Communications Act) provide otherwise, even when the same business relationship with an end-user customer would need to be dealt with in a tariff.[27] It stands for the legal proposition that Qwest may enter into commercial negotiations with CLECs for the sale of network elements not subject to section 251(b) or (c), and may enter into binding agreements with those CLECs for the sale of those network elements (even though untariffed sales to end-user customers would generally not be lawful). Pursuant to section 211, Qwest has filed the Commercial Agreement with the FCC, thereby complying with that section and perfecting the FCC's jurisdiction over the Commercial Agreement.

The general prohibition against "unreasonable discrimination" applies to such contracts.[28] Carriers may, of course, purchase services from the tariffs of another carrier or choose to tariff their inter-carrier offerings – section 211(a) provides carriers a choice in those instances where the FCC has not acted to actually require either a contract (network elements) or a tariff

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[27] *Bell Telephone of Pennsylvania v. FCC,* 503 F.2d 1250, 1277 (3d Cir. 1974). *See also In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Notice of Proposed Rulemaking*, 11 FCC Rcd. 7141, 7190 97 (1996); *In the Matter of the Applications of American Mobile Satellite Corporation, Order and Authorization*, 7 FCC Rcd. 942, 945 15 (1992); *In the Matter of Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, Notice of Proposed Rulemaking*, 84 FCC 2d 445, 481, 95 (1981).
[28] *MCI Telecommunications Corp. v. FCC,* 842 F.2d 1296 (D.C. Cir. 1988).

(exchange access). In point of fact, the current structure whereby interexchange carriers purchase access to local exchange carrier facilities and services pursuant to tariff is of relatively recent origin,[29] and the access tariff regime replaced a system governed largely by inter-carrier contracts and partnerships.[30] The statutory federal filing requirements discussed in this section are important because they show a federal regulatory regime already in place that deals with the precise issue of the filing of contracts for interconnection services not covered by section 251(b) or (c).

E. Current Rulings in Other States Support Qwest's Position that the Commercial Line Sharing Agreement Need Not Be Filed For State Commission Review and Approval.

Of the three states that have ruled on the question of whether the Commercial Agreement must be filed with the state commission for review and approval, two of the three states have ruled in favor of Qwest's position. The Minnesota Public Utilities Commission followed the recommendations of the Department and found persuasive the argument that the Commercial Agreement is ***not*** an interconnection agreement and does not have to be filed for commission approval under section 252(a).

Likewise, the New Mexico Public Regulation Commission, citing the Minnesota ruling, concluded that the Commercial Agreement is not subject to the filing requirements of section 252. In its Final Order dated December 23, 2004, the New Mexico Commission discussed the differences between the commercial line sharing and master services QPP agreements at length. It explained why the reasoning of the Washington State Utilities and Transportation Commission in its order on the Master Services Agreement does not apply to the Commercial Agreement.

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[29] *See In the Matter of MTS and WATS Market Structure, Second Supplemental Notice of Inquiry and Proposed Rulemaking*, 77 FCC 2d 224, 226-31 ¶¶ 12-35 (1980).
[30] *See In the Matter of MTS and WATS Market Structure, Third Report and Order*, 93 FCC 2d 241, 246 ¶ 11, 254 ¶ 39, 256-60 ¶¶ 42-55 (1983).

That is, the Commercial Agreement and the Line Sharing Amendment are stand-alone contracts, noted the New Mexico Commission, which makes them distinguishable from the Master Services Agreement and the amendment executed contemporaneously with the Master Services Agreement between Qwest and MCImetro Access Transmission Services, Inc.

Qwest has attached copies of the Minnesota and New Mexico decisions for the Commission's review. The only state to rule against Qwest's position regarding the Commercial Agreement is Montana. The Montana Public Service Commission misread sections 251 and 252 of the Act and Qwest has appealed that Commission's decision to the United States District Court for the District of Montana.

IV. CONCLUSION

For the reasons set forth herein, Qwest respectfully moves the Commission to issue an order dismissing the agreement titled "Terms and Conditions for Commercial Line Sharing" from this docket.

DATED this 28th day of February, 2005.

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CERTIFICATE OF SERVICE

I certify that the original and seven copies of the foregoing **Request for Hearing, Comments, and Motion to Dismiss from Docket the Agreement Titled "Terms and Conditions for Commercial Line Sharing"** was served upon the following party on February 28, 2005:

Ms. Ilona Jeffcoat-Sacco
Executive Secretary
North Dakota Public Service Commission
600 East Boulevard Avenue -- 12th Floor
Bismarck, ND 58505-0480

And that a copy was served by U.S. Mail upon the following, as stated below:

Rob McMillin
New Edge Network Inc
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Debbie Dunnoy

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
Ken Nickolai	Commissioner
Thomas Pugh	Commissioner
Phyllis A. Reha	Commissioner

In the Matter of a Commission Investigation Regarding the Status of the Commercial Line Sharing Agreement Between Qwest Corporation and DIECA Communications d/b/a Covad	ISSUE DATE: September 27, 2004 DOCKET NO. P-5692, 421/CI-04-804 ORDER DIRECTING QWEST TO FILE COMMERCIAL AGREEMENTS

PROCEDURAL HISTORY

On May 14, 2004, Qwest Corporation (Qwest) and DIECA Communications d/b/a Covad (Covad) filed two agreements with the Commission. The parties offered one agreement, entitled "Commercial Line Sharing Agreement" (First Agreement), for Commission approval pursuant to the 1996 Act.[1] The parties offered the second agreement, entitled "Terms and Conditions for Commercial Line Sharing Agreement" (Second Agreement), for informational purposes only, and argue that the Commission need not take any action on it. The current docket addresses the Second Agreement.

On June 21, 2004, AT&T Communications of the Midwest, Inc., and AT&T Local Services on behalf of TCG Minnesota, Inc., (AT&T) filed comments on this matter.

On July 20, 2004, the Commission received comments from both the Minnesota Department of Commerce (the Department) and Qwest.

This matter came before the Commission on August 19, 2004.

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[1] See *In the Matter of the Joint Application for Approval of the March 14, 2004 Amendment to the Interconnection Agreement Between Qwest Corporation (Qwest) and DIECA Communications dba Covad Communications Company (Originally Approved in Docket No. P-5692, 421/CI-99-196); Regarding Commercial Line Sharing*, Docket No. P-5692, 421/IC-04-746.

Attachment 1

FINDINGS AND CONCLUSIONS

I. Background

Gongress adopted the Telecommunications Act of 1996[2] (the 1996 Act) to open all telecommunications markets to competition, including the local exchange market. (Conference Report accompanying S. 652). The 1996 Act opens markets by, among other things, requiring each incumbent telephone company to offer unbundled network elements (UNEs) – that is, offer to rent elements of its network to competitors without requiring the competitor to also rent unwanted elements – on just, reasonable, and nondiscriminatory terms.[3] The 1996 Act authorizes the Federal Communications Commission (FCC) to identify elements that are subject to unbundling.[4] Agreements between telecommunications carriers for the provision of UNEs must be submitted for Commission review and approval.[5]

Also, to encourage cooperation by incumbent Bell operating companies (BOCs), the 1996 Act's § 271 provides for BOCs to gain authority to sell long-distance telecommunications service if they can demonstrate that they have opened their local markets to competition.

On October 2, 2003, the FCC's Triennial Review Order[6] took effect, revising the rules governing the provision of UNEs,[7] including the high-frequency portion of the local loop (HFPL).[8] Among other things, the Order states that incumbents need not accept new requests from competitors for the HFPL after October 1, 2004, and gradually phases out the obligation to serve some existing HFPL orders.

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[2] Pub. L. No. 104-104, 110 Stat. 56, codified in various sections of Title 47, United States Code.

[3] 47 U.S.C. § 251(c).

[4] 47 U.S.C. § 251(d)(2)(B).

[5] 47 U.S.C. § 252(e).

[6] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (released August 21, 2003).

[7] 47 U.S.C. §§ 251(c)(3), 252(d)(1); 47 C.F.R. § 51.307 *et seq.*

[8] Triennial Review Order ¶¶ 251-269. A "loop," or wire that connects a residence to a telecommunications carrier's office, permits the transmission of signals throughout a range of the electromagnetic spectrum simultaneously, much like competing radio stations can transmit signals at various frequencies simultaneously. Whereas voice signals use the low-frequency portion of the loop, other signals – especially high-capacity signals conveying internet traffic – can use the high-frequency portion of the loop, or HFPL. While a telephone company must still permit a competitor to lease a customer's loop, the Triennial Review Order reduces the company's obligation to lease the HFPL separately, "unbundled" from the loop.

On March 2, 2004, a court vacated and remanded several of the Triennial Review Order's rules regarding UNEs, although not the parts pertaining to the HFPL specifically.[9] Given the unsettled state of the law, the FCC subsequently encouraged all telecommunications providers to voluntarily negotiate commercial agreements without awaiting final resolution of all parties' legal obligations.[10]

On May 14, 2004, Covad and Qwest filed the commercial agreements that initiated this docket. The First Agreement pertains to HFPL orders received by October 1, 2004; the Second Agreement pertains to HFPL orders received thereafter.

II. Comments of the Parties

A. AT&T

AT&T argues that the Commission has jurisdiction over the Second Agreement pursuant to the 1996 Act and Minnesota law to review the agreement,[11] approve or disapprove it,[12] and make its terms available to other carriers.[13]

This Commission has discretion to determine initially which agreements constitute "interconnection agreements" for purposes of the 1996 Act, AT&T argues, based on the following FCC finding:

> [S]tate 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.[14]

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[9] *United States Telecom Ass'n v. FCC*, 359 F.3d 553, 564-76 (D.C. Cir. 2004), *pets. for cert. filed*, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

[10] See, for example, the FCC's "Press Statement of Commissioners Powell, Abernathy, Copps, Martin and Adelstein On Triennial Review Next Steps" (March 31, 2004).

[11] 47 U.S.C. § 252(e)(1).

[12] 47 U.S.C. § 252(e)(2).

[13] 47 U.S.C. § 252(h) and (i).

[14] *Qwest Corporation 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)*, Memorandum Opinion and Order, FCC 02-276 (released October 4, 2002) ("Declaratory Order") at ¶ 10.

The FCC has offered guidance in this matter, however, ruling that 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 [the 1996 Act].[15]

While the FCC acknowledges some exceptions to this general principle,[16] AT&T argues that none of these exceptions apply to the Second Agreement.

B. Qwest

Qwest acknowledges that the Commission has jurisdiction over the First Agreement, because it would create ongoing obligations between the parties regarding UNEs. In contrast, Qwest argues that the Commission lacks jurisdiction over the Second Agreement because it only pertains to orders for line sharing using the HFPL after October 1, 2004, and the HFPL is no longer a UNE subject to the 1996 Act. The FCC has ruled that "contracts that do not affect an incumbent LEC's ongoing obligations relating to Section 251 [of the 1996 Act] need not be filed"[17] and "...only those agreements that contain an ongoing obligation relating to Section 251(b) or (c) must be filed under 252(a)(1)" of the 1996 Act.[18]

Qwest disputes AT&T's claim that state law provides authority for reviewing the Second Agreement. Qwest asserts that the Commission has not previously reviewed commercial agreements between parties unrelated to the 1996 Act, and Qwest urges the Commission not to do so now.

C. The Department

The Department agrees with Qwest that the Commission need not approve or reject the Second Agreement. However, the Department agrees with AT&T that the Commission has the authority under both federal and state law to require parties to file such agreements for Commission review, and that the Commission should exercise that authority.

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[15] *Id.* at ¶ 8.

[16] *Qwest Corporation Apparent Liability for Forfeiture*, FCC Docket 04-57, Notice of Apparent Liability for Forfeiture (released March 12, 2004) at ¶ 23. Exceptions include 1) agreements addressing dispute resolution and escalation provisions, 2) settlement agreements that provide only retroactive relief, 3) forms used to obtain service, and 4) certain agreements entered into in bankruptcy.

[17] Declaratory Order, ¶ 8.

[18] Declaratory Order, n. 26.

The Department concludes that the Second Agreement is not an interconnection agreement. After thorough review, the Department concludes that the Second Agreement pertains only to orders for line sharing using the HFPL after October 1, 2004, and the HFPL is no longer a UNE. According to the Department, the Second Agreement does not create an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation, or otherwise contain an ongoing obligation relating to the 1996 Act. Consequently, the Department concludes that the Second Agreement does not require Commission approval.

Nevertheless, the Department recommends that the Commission direct Qwest to file agreements such as the Second Agreement for review. The Department notes that the Commission's authority to require disclosure is not limited to interconnection agreements. In particular, the Commission has authority to investigate matters related to telecommunications service[19] and to issue orders affecting the deployment of infrastructure.[20]

Requiring Qwest to file such agreements would help the Commission to determine if the agreements require approval as interconnection agreements. The FCC has determined that the states have the authority to determine which agreements require approval pursuant to the 1996 Act. The only way for the Commission to exercise this authority is to review the agreements that might potentially require review and approval.

Specifically, the Department recommends that the Commission direct Qwest to file agreements creating an ongoing obligations with competitors. These would include 1996 Act interconnection agreements, plus any other agreements that 1) are associated with elements of Qwest's network, 2) make reference to a UNE, 3) reflect a § 271 obligation, or 4) reflect a state obligation. State obligations include the obligation to file charges for telecommunications services and elements, and to refrain from discriminating in the provision of those services and elements.[21]

In this case the Second Agreement creates ongoing obligations between the parties and is associated with Qwest's 1996 Act obligations. Consequently, the Department argues, the Second Agreement warrants review. Moreover, because the FCC has not entirely eliminated HFPL obligations,[22] the Department recommends that any agreements related to HFPLs be filed for Commission review because they pertain to past HFPL UNE obligations.

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[19] Minn. Stat. § 237.081.

[20] Minn. Stat. § 237.082.

[21] Minn. Stat. §§ 237.07, 237.09.

[22] Triennial Review Order ¶¶ 264-69.

III. Commission Action

Neither Covad nor Qwest has asked the Commission to review their agreement for compliance with the 1996 Act, and the Department concludes that the Commission need not address that question at this time. The Commission finds these arguments persuasive, and will decline to address that question here.

However, the Commission is persuaded of the merits of directing Qwest to file its commercial agreements with the Commission, whether or not those agreements constitute "interconnection agreements" for purposes of the 1996 Act. Specifically, the Commission will direct Qwest to file agreements that –

- are associated with elements of Qwest's network,
- make reference to UNEs,
- reflect a § 271 obligation, or
- reflect a state obligation.

Reviewing such agreements will provide the Commission with information about the evolution of competition in the state generally. Also, the Commission finds that it must review agreements to determine whether or not they violate state prohibitions on discrimination or otherwise warrant approval (or rejection) pursuant to the 1996 Act. Failure to file the necessary agreements can harm the development of the competitive local exchange market.[23] By requiring Qwest to file such agreements, the Commission will provide itself and competing firms with the means to review the agreements' terms. Competitors will then be able to advise the Commission whether or not the agreements warrant additional Commission action.

ORDER

1. Qwest Corporation (Qwest) shall file for review all agreements, such as the Qwest/Covad Line Sharing Agreement, that –

   - are associated with elements of Qwest's network,
   - make reference to UNEs,
   - reflect a § 271 obligation, or
   - reflect a state obligation.

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[23] See *In the Matter of the Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Docket No. P-421/C-02-197 ORDER ASSESSING PENALTIES (February 28, 2003), ORDER AFTER RECONSIDERATION ON OWN MOTION (April 30, 2003).

2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

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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**

FINAL ORDER

This matter comes before the New Mexico Public Regulation Commission ("Commission") as a follow-up to this Commission's Order to Show Cause, issued on June 29, 2004.

I. STATEMENT OF THE CASE

On May 14, 2004, Qwest Corporation ("Qwest") submitted to this Commission a letter relating to a document entitled "Terms and Conditions for Commercial Line Sharing Arrangements." ("Qwest's Letter"). Qwest's Letter states that Qwest and Covad have signed two documents relating to the provisioning by Qwest to Covad of the high frequency portion of the loop. The first document is entitled "Commercial Line-Sharing Amendment to the Interconnection Agreement" ("Line Sharing Amendment") signed April 14, 2004. Qwest's position is that the Line Sharing Amendment is not a final, binding agreement. Nevertheless, without waiving that position, Qwest states in its Letter that it is formally filing the Line Sharing Amendment with this Commission for approval under section 252(e) of the Communications Act, as amended,[1] to eliminate any doubts about Qwest's compliance with the filing requirement.[2]

[1] The Communications Act of 1934, as amended, by the Telecommunications Act of 1996 – Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 151 *et seq.* – is referred to hereafter as the "Act."

[2] Qwest filed the Line Sharing Amendment for Commission approval and it was approved by the Commission by Final Order in Case No. 04-00168.

The second document referred to in Qwest's Letter is entitled "Terms and Conditions for Commercial Line Sharing Arrangements" ("Commercial Line Sharing Agreement"), dated April 14, 2004. Qwest agrees that the Commercial Line Sharing Agreement is a final agreement, but contends that the Commercial Line Sharing Agreement is not within the section 252 filing requirement. Qwest concludes that the Commercial Line Sharing Agreement is not subject to section 251(c)(3) or section 252, and thus it has not been filed formally. Covad apparently concurs with Qwest's position.[3]

This Commission, in its Order to Show Cause, required Qwest and Covad to file pleadings explaining in more detail why the Commerical Line Sharing Agreement should not be filed. The Commission allowed interested parties to file responses to Qwest's and Covad's comments and allowed Qwest and Covad to file replies.

Qwest and Covad filed their initial briefs.[4] The Telecommunications Staff of the Utility Division of this Commission ("Staff") and the New Mexico Attorney General ("AG") filed responses.[5]

On October 26, 2004, this Commission issued an order allowing MCImetro Access Transmission Services, LLC ("MCImetro") to intervene in this case. This Commission allowed intervention based on its Final Order in Case No. 04-00245-UT. In Case No. 04-00245-UT, MCImetro filed its Master Services Agreement, entered into between MCImetro and Qwest, for approval by this Commission under section 252. Qwest moved to dismiss MCImetro's application for approval on the ground that the

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[3] *See* Qwest's Letter at 3 (stating, "*We* believe that the second document, the Commercial Line Sharing Arrangements, which governs DSL services placed after October 1, 2004, is not subject to section 251(c)(3) or section 252, and thus it has not been filed formally.") (emphasis added).
[4] *See* Qwest Corporation's Response to Order to Show Cause ("Qwest's Brief") and Covad's Response to Order to Show Cause ("Covad's Brief"), both filed on July 30, 2004.
[5] *See* 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") and Response of the New Mexico Attorney General ("AG's Response"), both filed on August 19, 2004.

Master Services Agreement does not have to be filed with, or approved by, this Commission under section 252. This Commission's Final Order in Case No. 04-00245-UT, issued on October 12, 2004, approved the Master Services Agreement, subject to this Commission's decision in this case, which will be determinative of whether Qwest has to file the Master Services Agreement. Final Order, ¶ B. In this Commission's order allowing MCImetro to intervene in this case, this Commission also took administrative notice of the pleadings filed in Case No. 04-00245-UT.

On October 26, 2004, MCImetro filed its Comments in this case.

Qwest and Covad filed reply briefs.[6]

II. BACKGROUND

A. Line Sharing

Line sharing occurs when a competitive local exchange carrier ("CLEC") provides digital subscriber line ("DSL") service over the same line that the incumbent local exchange carrier ("ILEC") uses to provide voice service, with the ILEC using the low frequency portion of the loop and the CLEC using the high frequency portion of the loop.[7]

Before issuance of the Triennial Review Order, the FCC had determined that access to the high frequency portion of the loop was an unbundled network element

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[6] *See* Qwest Corporation's Reply Memorandum ("Qwest's Reply"); Covad's Reply to Responses and Comments of Qwest Corporation, Public Regulation Commission Staff, the New Mexico Attorney General and MCI ("Covad's Reply"), both filed on November 5, 2004.

[7] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, ¶ 255, 18 FCC Rcd 16978 (2003), *corrected by* Errata, 18 FCC Rcd 19020 ("Triennial Review Order"), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*).

("UNE").[8] The FCC reversed that determination in the Triennial Review Order, subject to a grandfathering rule and a transition period. The grandfathering rule requires ILECs to continue to provide the high frequency portion of the loop as a UNE to CLECs for the provisioning of DSL service that began before October 1, 2003.[9] A three-year transition period applies to DSL service provided via line sharing beginning on or after October 1, 2003. During the first year, CLECs may continue to obtain new line sharing customers at 25% of the state-approved recurring rates or the agreed-upon recurring rates in existing interconnection agreements for stand-alone copper loops for that particular location. During the second year, the recurring charge for such access for those customers will increase to 50% of the state-approved recurring rate or the agreed-upon recurring rate in existing interconnection agreements for a stand-alone copper loop for that particular location. In the third year, the CLECs' recurring charge for access to line sharing for those customers obtained during the first year after release of the Triennial Review Order will increase to 75% of the state-approved recurring rate or the agreed-upon recurring rate for a stand-alone loop for that location. After the transition period, any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a CLEC has negotiated with the ILEC to replace line sharing.[10]

B. The Line Sharing Amendment and the Commercial Line Sharing Agreement

The Line Sharing Amendment applies to DSL services placed by October 1, 2004. Qwest agrees the Line Sharing Amendment has to be filed under the Act and, in fact, has filed the Line Sharing Amendment with the Commission. Qwest asserts that the Line

[8] *See id.*, ¶ 257.
[9] *See id.*, ¶ 264; 47 C.F.R. 51.319(a)(1)(i)(A).
[10] Triennial Review Order, ¶ 265; 47 C.F.R. 51.319(a)(1)(i)(B).

Sharing Amendment is not a final agreement but, without waiving that assertion, has filed it to eliminate any doubt about Qwest's compliance with the section 252 filing requirement.[11]

The Commercial Line Sharing Agreement applies to DSL services placed after October 1, 2004. Qwest argues, as explained in more detail *infra*, that the Commercial Line Sharing Agreement does not have to be filed under section 252 of the Act.

Section 252(a)(1) of the Act states that, "upon receiving a request for interconnection, services, or network elements pursuant to section 251," an ILEC may negotiate and enter into a binding agreement with the requesting carrier "without regard to the standards set forth in subsections 251(b) and 251(c)." Section 252(a)(1) further states that any such agreement must be submitted to the state commission for approval.

Section 251(b) of the Act imposes duties on all local exchange carriers relating to resale, number portability, dialing parity, access to rights-of-way and reciprocal compensation.

Section 251(c) of the Act imposes the following additional duties on ILECs:

> 1. The duty to negotiate in good faith the terms and conditions of agreements to fulfill the duties imposed by Section 251(b);
> 2. The duty to provide, for the facilities and equipment of any requesting carrier, interconnection with the LEC's network
>   a. for the transmission and routing of telephone exchange service and exchange access;
>   b. at any technically feasible point within the carrier's network;
>   c. that is at least equal in quality to that provided by the LEC to itself or to any subsidiary or to any other carrier to which the LEC provides interconnection; and
>   d. on rates, terms and conditions that are just, reasonable and nondiscriminatory;

[11] *See* Qwest's Letter at 1-2.

3. The duty to provide unbundled network elements ("UNEs") on rates, terms, and conditions that are just, reasonable, and nondiscriminatory;

4. The duty to offer for resale at wholesale rates any telecommunications service that the LEC provides at retail to non-carrier customers, and not to impose unreasonable or discriminatory conditions or limitations on such resale;

5. The duty to provide reasonable public notice of the information necessary for the transmission and routing of services using the LEC's facilities or networks;

6. The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation.

This Commission has held that an agreement must be filed for state commission approval if it is 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."[12]

III. POSITIONS OF THE PARTIES

A. Qwest

Qwest's position is that section 252 only requires the filing of agreements that create terms and conditions pertaining to services that an ILEC must provide under sections 251(b) and (c). Qwest relies in part on a declaratory ruling of the Federal Communications Commission ("FCC"), in which the FCC stated 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

[12] Final Order Regarding Compliance with Outstanding Section 271 Requirements: SGAT Compliance, Track A, and Public Interest, ¶ 285, Utility Case Nos. 3269, 3537, 3495 & 3750, issued Oct. 8, 2002, *modified on other grounds by* Order on Qwest's Motion for Rehearing, Case No. 03-00108-UT, issued on Dec. 9, 2003 ("Section 271 Final Order").

section 252(a)(1)."[13] Qwest argues that the Commercial Line Sharing Agreement concerns products and services that Qwest is *not* obligated to provide under section 251 and therefore does not have to be filed. Qwest's Brief at 3, 7.

Qwest asserts that the Commercial Line Sharing Agreement does not deal with resale, number portability, dialing parity, access to rights-of-way, or reciprocal compensation and therefore does not have to be filed under section 251(b) of the Act. *Id.* at 4-5. No party disagrees with Qwest on this point. Qwest also asserts that the Commercial Line Sharing Agreement does not deal with resale or collocation under section 251(c) of the Act, and no party disagrees with Qwest on this point either.

Qwest further asserts that the Commercial Line Sharing Agreement does not relate to the provisioning of a UNE because the FCC, in its Triennial Review Order, eliminated the obligation to provide the high frequency portion of the copper loop as a UNE, subject to certain transition conditions for line sharing orders placed within one year of the effective date of the Triennial Review Order. Qwest's Brief at 5.

Qwest asserts that the Commercial Line Sharing Agreement does not relate to "interconnection." In support of this assertion, Qwest cites to the FCC's First Report and Order, which states that interconnection "refers only to the physical linking of two networks for the mutual exchange of traffic"[14] and to this Commission's "Interconnection Facilities and Unbundled Network Elements" Rule, which states that interconnection "means the linking of two (2) networks for the mutual exchange of traffic, but does not

[13] *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)*, ¶ 8, WC Docket No. 02-89 (rel. Oct. 4, 2002) ("Declaratory Order").

[14] Qwest's Brief at 5 (citing *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, ¶ 176, CC Docket No. 96-98 (Aug. 8, 1996) ("First Report and Order")).

include the transport and termination of traffic."[15] Qwest's Brief at 5-6. Qwest argues that the Commercial Line Sharing Agreement contains no provision for the physical linking of Qwest's and Covad's networks for the mutual exchange of traffic, so it does not relate to interconnection. *Id.* at 6.

Qwest asserts that the Commercial Line Sharing Agreement does not relate to a request for "services" under section 252(a)(1) because "services" refers only to services that an ILEC is required to provide pursuant to section 251(b) or (c).[16]

Qwest asserts that the Commission cannot require the filing of the Commercial Line Sharing Agreement under section 271 of the Act.[17] Qwest argues that section 271 has no filing requirements for interconnection agreements and delegates no authority to state commissions to enforce the conditions and requirements of section 271. Moreover, Qwest states that there is no independent obligation under section 271 to provide the high-frequency portion of the loop. Qwest's Brief at 8-9.

B. Covad

Covad states that it does not believe that the Commercial Line Sharing Agreement affects Qwest's ongoing obligation to provide UNEs and therefore should not be subject to Commission approval under section 252. However, Covad further states that the Commercial Line Sharing Agreement creates other ongoing obligations, is associated with and makes reference to Qwest's section 251 obligations, and should be filed for Commission review to determine if approval is required. Covad's Brief at 5. In general, Covad recommends that the Commission require the filing of any agreement that:

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[15] 17.11.18.7(I) NMAC.
[16] Qwest's Brief at 7 (citing Declaratory Order, ¶ 8).
[17] Section 271 of the Act allows an ILEC to apply for authority to provide in-region, interLATA service within a state. To be eligible to provide in-region, interLATA services, an ILEC must satisfy the competitive checklist and other requirements of section 271. Section 271 Final Order at 1.

- Is associated with elements of Qwest's network;
- Refers to a section 251 UNE;
- Reflects a section 271 obligation that is not (or is no longer) a section 251 obligation; or
- Reflects a state obligation that is not (or is no longer) a section 251 obligation.

Id. at 4-5.

Covad asserts that the Commercial Line Sharing Agreement is not an interconnection agreement as defined by the FCC because it relates to a network element that Qwest does *not* have to unbundle and does not create ongoing obligations for Qwest's provisioning of section 251 elements. Instead, according to Covad, the Line Sharing Agreement creates obligations and concerns the provisioning of elements independent of sections 251(b) and (c). Nevertheless, Covad recommends that any agreement that includes line sharing should be filed for Commission review to determine if approval is required. Covad makes this recommendation because, under the Triennial Review Order, Qwest *does* have to continue to provide line sharing as a UNE for customers who use line sharing before October 1, 2004. *Id.* at 5-6.

Covad further states that it believes that line sharing is a section 271 obligation and that this Commission can require the filing and review of line sharing agreements under section 271. *Id.* at 7-12. However, Covad states that, because it has raised the issue of this Commission's authority to require unbundling under section 271 in another case, this issue should be deferred until the other case is resolved. *Id.* at 12.

C. Staff

Staff argues that the Commercial Line Sharing Agreement is an interconnection agreement subject to filing with, and approval by, this Commission. Staff's Brief at 5. In support of this argument, Staff relies on this Commission's definition of "interconnection agreement", which appears in this Commission's Section 271 Final Order, quoted *supra*.

In asserting that the Commercial Line Sharing Agreement falls within this Commission's definition of "interconnection agreement," Staff states, "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." Exhibit A to Staff's Response at 10. Staff asserts that, to effect their wholesale relationship, Covad and Qwest must interconnect their separate networks for the mutual exchange of traffic. *Id.*

Staff further argues that requiring the filing and review of the Commercial Line Sharing Agreement is consistent with other applicable law and the public interest. Staff points out that section 252(a) requires the filing of interconnection agreements "without regard to the standards set forth in subsections (b) and (c) of section 251." *Id.* at 12. Staff also cites to state law and Commission regulations that encourage competition, and, more particularly, the provisioning of high-speed data services. *Id.* at 13.

In general, Staff recommends a review procedure for interconnection agreements whereby:

- 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;
- service includes Commission Staff, the New Mexico Attorney General, and any party that requests electronic or paper copies of the filing;
- the public is notified of the filing by the posting of a notice of filing on the Commission's website and the posting of a notice of filing and the entire agreement on the LEC's website;
- the filing is subject to a 15-day review period for review and protest by Staff and any interested party;
- 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
- if protested, the filing is subject to formal Commission proceedings.

Id. at 4-5.

D. AG

The AG limits her response to the issue of whether this Commission can require the filing of the Commercial Line Sharing Agreement under section 271. She takes no position as to whether the Commission can require filing of the Commercial Line Sharing Agreement under section 252, but reserves the right to take a position on that issue at a later time. AG's Response at 1.

IV. DISCUSSION

This Commission is persuaded by the reasoning of the Minnesota Public Utilities Commission ("Minnesota PUC") in its Order Directing Qwest to File Commercial Agreements.[18] In that case, the Minnesota PUC considered whether the Commercial Line Sharing Agreement between Covad and Qwest has to be approved by the Minnesota PUC under section 252(e).[19] In that case, as in this case, Qwest argued that a state commission lacks jurisdiction over the Commercial Line Sharing Agreement because it pertains to the provisioning of a network element that no longer has to be unbundled. Minnesota Order at 4.

The Minnesota Department of Commerce ("the Department"), one of the parties in the case, argued, consistent with Qwest, that the Commercial Line Sharing Agreement is not an interconnection agreement because it pertains only to orders for line sharing using the high frequency portion of the loop after October 1, 2004, when the high

[18] Order Directing Qwest to File Commercial Agreements ("Minnesota Order"), filed in Docket No. P-5692, 421/CI-04-804, on September 27, 2004.
[19] The Commercial Line Sharing Agreement submitted in New Mexico indicates that it also applies in Minnesota. See Terms and Conditions for Commercial Line Sharing Arrangements, attached to Qwest's Letter.

frequency portion of the loop is no longer a UNE. The Department further argued that the Commercial Line Sharing Agreement does not create an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation, or otherwise contain an ongoing obligation relating to the Act. Thus, the Department concluded that the Commercial Line Sharing Agreement did not have to be approved by the Minnesota PUC under section 252. *Id.* at 5. Nevertheless, the Department recommended that the Minnesota PUC direct Qwest to file agreements such as the Commercial Line Sharing Agreement to assist the Commission in determining whether agreements such as the Commercial Line Sharing Agreement require approval as interconnection agreements. *Id.*

In its Order, the Minnesota PUC followed the recommendations of the Department and required Qwest to file its commercial agreements with the Commission, whether or not those agreements constitute "interconnection agreements" for purposes of the Act. Specifically, the Commission directed Qwest to file agreements that:

- are associated with elements of Qwest's network;
- make reference to UNEs;
- reflect a § 271 obligation; or
- reflect a state obligation.

Id. at 6. The Commission explained that:

> Reviewing such agreements will provide the Commission with information about the evolution of competition in the state generally. Also, the Commission finds that it must review agreements to determine whether or not they violate state prohibitions on discrimination or otherwise warrant approval (or rejection) pursuant to the 1996 Act. Failure to file the necessary agreements can harm the development of the competitive local exchange market. By requiring Qwest to file such agreements, the Commission will provide itself and competing firms with the means to review the agreements' terms. Competitors will then be able

> to advise the Commission whether or not the agreements warrant additional Commission action.

Id.

The Minnesota PUC chose not to address whether the Commercial Line Sharing Agreement complies with the Act because neither Covad nor Qwest had asked for Commission approval of the Commercial Line Sharing Agreement and because the Department had concluded that the Commission need not address the question at that time. *Id.*

The Minnesota Order is consistent with this Commission's Order on Qwest's Motion for Rehearing of this Commission's Section 271 Final Order ("Order on Qwest's Motion for Rehearing").[20] This Commission's Section 271 Final Order resolved numerous issues involving Qwest including the Commission's recommendation that Qwest be granted authority to provide in-region, interLATA service originating in New Mexico, subject to certain FCC determinations. The Section 271 Final Order also dealt with issues of Utility Case No. 3750 including adoption of a definition of the term "interconnection agreement" and requirements for filing interconnection agreements under section 252(a)(1).

Qwest's Motion for Rehearing of this Commission's Section 271 Final Order ("Qwest's Motion for Rehearing") argued, in part, that the Section 271 Final Order's requirement that all agreements "related to rates" be filed under the Act conflicted with, and was preempted by, the FCC's Declaratory Order. Qwest cited to language in the

[20] *See* Order on Qwest's Motion for Rehearing, Case No. 03-00108-UT, issued on December 9, 2003.

FCC's Declaratory Order that states that "settlement contracts that do not affect an incumbent LEC's ongoing obligations relating to section 251 need not be filed."[21]

This Commission, in its Order on Qwest's Motion for Rehearing, agreed with Qwest that requiring the filing of all agreements relating to rates conflicted with the FCC's Declaratory Order. Order on Motion for Rehearing at 8. Consistent with the FCC's Declaratory Order, this Commission held that settlement agreements need not be filed as interconnection agreements unless they affect an ILEC's ongoing obligations relating to section 251. *Id.* at 10. This Commission adopted a prefiling review process to review a local exchange carrier's ("LEC") claim that a settlement agreement does not affect its ongoing obligations and does not need to be filed.

Under the prefiling review process established by the Order on Motion for Rehearing, if a LEC enters into what it views as a settlement agreement, and if the LEC believes that such agreement does not affect an ILEC's ongoing obligations relating to section 251, the LEC shall submit (not file) the agreement under seal to Staff for Staff's analysis of whether the agreement affects an ongoing obligation. Staff may recommend, within 15 days of submission of the agreement, that the agreement be filed as an interconnection agreement. A LEC may file a response to Staff's recommendation, and the Commission shall then determine whether the agreement should be filed as an interconnection agreement. If Staff, after reviewing the agreement, decides to not recommend that the agreement be filed, then Staff shall take no further action, and the agreement shall not be filed or submitted to the Commission for review. *Id.* at 11-12.

In adopting this prefiling review process, this Commission observed that the FCC's Declaratory Order seems to contemplate a state commission prefiling review

[21] *See* Declaratory Order, ¶ 12.

process. This Commission observed that, while the FCC order defines the basic class of agreements that should be filed, it makes clear that the state commissions are to determine whether a particular agreement falls within a particular class of agreements that should be filed. This Commission quoted as follows from the FCC's Declaratory Order:

> 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.

Id. at 11 (quoting FCC's Declaratory Order, ¶ 10 (emphasis added)).

Similarly, if a LEC enters into an agreement that it believes is not an interconnection agreement because it pertains to a network element that it is not required to unbundle, the LEC shall submit (not file) the agreement to Staff for Staff's analysis of whether the agreement is an interconnection agreement. If Staff believes that the agreement should be filed as an interconnection agreement, it shall file, within fifteen days of submission of the agreement, a motion stating why Staff believes that the agreement should be filed as an interconnection agreement. The LEC shall have thirteen days from service of the motion to file a response. The Commission shall then determine whether the agreement should be filed as an interconnection agreement. If Staff believes, pursuant to the Final Order in this case and pursuant to this Commission's Follow-Up to Final Order in Case No. 04-00245-UT, that the agreement is not an interconnection agreement and does not file a Motion, no further action shall be taken.

The Commission appreciates Staff's concerns with this type of prefiling review process. Staff observes that this process will create a dual and often overlapping review process for section 251 and section 271 agreements, while shifting the burden to the Commission to decide on a case-by-case basis what filing standard and procedures should apply to a given agreement.[22] However, as this Commission observed in its Order on Motion for Rehearing, the FCC seems to contemplate such a prefiling review process.

This Commission agrees with Staff that this Commission should consider whether a more efficient process exists for reviewing whether an agreement is an interconnection agreement and for reviewing those agreements that are interconnection agreements.[23] Such consideration should occur in a rulemaking, which the Commission intends to initiate after the FCC issues its final rules in its pending rulemaking relating to ILECs' unbundling obligations.[24]

The Commercial Line Sharing Agreement in this case does not have to be filed under section 252(a). The Commercial Line Sharing Agreement is not an interconnection agreement because, for the reasons stated by Qwest, is does not create an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation.

Holdings of the Washington State Utilities and Transportation Commission ("WUTC")[25] and the United States District Court for the Western District of Texas ("Texas District Court")[26] are not applicable to this case. In the case before the WUTC, the WUTC considered whether a "Master Services Agreement" between Qwest and MCI

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[22] Staff's Brief at 3.
[23] *See id.* at 5.
[24] *See In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338.
[25] *See In the Matter of Request of MCIMetro Access Transmission Services, LLC and Qwest Corporation for approval of Negotiated Interconnection Agreement, in its Entirety, Under the Telecommunications Act of 1996*, Order Approving Negotiated Interconnection Agreement in Its Entirety, Docket Nos. UT-96-310 & UT-043084, issued on Oct. 20, 2004.
[26] *Sage Telecom v. Public Utility Comm'n*, 2004 WL 2428672 (W.D. Tex., Oct. 7, 2004).

had to be filed as an interconnection agreement. The subject of the Master Services Agreement was Qwest's provisioning to MCI of Qwest Platform Plus ("QPP") services, consisting primarily of local switching and shared transport. Washington Order, ¶ 5 n.2, ¶ 8. At the same time that Qwest and MCI entered into the Master Services Agreement, they also entered into an amended agreement ("Amended Agreement") governing Qwest's provisioning to MCI of the local loop element. In the case before the WUTC, Qwest argued that the Master Services Agreement did not have to be filed under section 252 because it concerns products and services that Qwest is not required to provide under section 251.

The WUTC found it unnecessary to determine whether section 252(a)(1) and (e) would apply to an agreement that pertained solely to the provision of a network element that is not required to be unbundled because it concluded that the Master Services Agreement and the Amended Agreement are part of "one integrated agreement pertaining to matters that indisputably are subject to the section 252 filing and approval requirements for negotiated interconnection agreements." Washington Order, ¶ 21.

In reaching its conclusion, the WUTC noted that Qwest conceded that the Amended Agreement is a fully negotiated interconnection agreement. *Id.*, ¶ 22. The WUTC explained that both the Amended Agreement and the Master Services Agreement state that Qwest and MCI contemporaneously entered into the Master Services Agreement and the Amended Agreement to provide MCI with services equivalent to the UNE-P arrangements between the companies as they existed on June 14, 2004. It explained that the combination of network elements known as UNE-P includes not only the port, switching and transport elements, but also the local loop, which ILECs are still required to unbundle under section 251. The WUTC identified the whole purpose of the Master Services Agreement as being to provide the port, switching, and shared transport elements in combination with the local loop element, which is provided under Qwest's existing interconnection agreement with MCI. Thus, the WUTC concluded that there can be no serious question that the ongoing obligations concerning rates, terms and conditions for the provision of network elements in the Amended Agreement and the Master Services Agreement are part of a single integrated, non-severable agreement. *Id.*, ¶ 26.

The Texas District Court similarly concluded that an agreement between Southwestern Bell, L.P. d/b/a SBC Texas ("SBC") and Sage Telecom, L.P. ("Sage") had to be filed with, and reviewed by, a state commission under section 252 of the Act. Under the agreement, SBC agreed to provide Sage products and services subject to the requirements of the Act, as well as certain products and services not governed by either section 251 or section 252. SBC and Sage argued that they did not have to file those portions of the agreement that they contended were outside the scope of the Act's coverage. *Southwestern Bell v. Sage*, slip op. at 3. The Texas District Court held that the agreement was a fully integrated agreement and had to be filed in its entirety. *See id.* at 11-12.

In contrast, the Commercial Line Sharing Agreement appears to be stand-alone. No party has identified any provision of the Commercial Line Sharing Agreement, analogous to provisions identified by the WUTC in the Master Services Agreement, that cause it to be part of an interconnection agreement between Covad and Qwest. The Commercial Line Sharing Agreement does require Covad to have interconnection tie pairs as part of its interconnection agreement with Qwest, before ordering line sharing through the Commercial Line Sharing Agreement. Exhibit A to Commercial Line Sharing Agreement. Tie pairs are copper wires that run between two points in the central office. After the loop is terminated in Qwest's central office, the tie cable carries the signals to Covad's splitters, which separate the voice signals from the data signals. Thus, while a tie cable facilitates the provisioning of line sharing, its existence in the interconnection agreement between Covad and Qwest does not render the Commercial Line Sharing Agreement and the interconnection agreement a single integrated agreement.

Staff raises a concern that Qwest might not be honoring the terms of its current interconnection agreements, as it promised to do in Case Nos. 03-00403-UT and 03-00404-UT. Staff cites to an October 13, 2004, letter from Bruce Throne, attorney for Cyber Mesa Computer Systems, Inc. ("Cyber Mesa"), to the Commission, in which Mr. Throne complains of matters relating to the terms and conditions on which Qwest is offering line sharing to Cyber Mesa. Staff's Response at 3. In addition, Staff states that it believes that currently Qwest might not be permitting competitors to opt into its Statement of Generally Available Terms or Commission-approved interconnection agreements that address mass market switching, enterprise loops, and dedicated transport, unless competitors sign a Qwest TRO-USTA II Amendment. *Id.* at 3. This case is not the proper place to address Staff's concerns. If Staff or a CLEC seeks Commission review of these or similar concerns, it should do in a separately filed petition or, perhaps, in Case Nos. 03-00403-UT and 03-00404-UT.

In this Commission's Order to Show Cause, it ordered Qwest and Covad to address whether the Commission can require the filing of the Commercial Line Sharing Agreement under section 271 of the Act. Order to Show Cause at 4, ¶ A. Qwest argues that the Commission lacks such authority. Qwest's Brief at 8-9. The Attorney General, Staff, and Covad argue that the Commission does have such authority.[27] Covad, however, suggests that this Commission defer ruling on this issue, pending a Commission decision in Case No. 04-00208-UT. Covad's Brief at 12; Covad's Reply at 2. The subject of Case No. 04-00208-UT is Covad's Petition for this Commission to arbitrate the terms and conditions of a proposed interconnection agreement between Covad and Qwest.[28] One of the arguments made by Covad in Case No. 04-00208-UT is that this Commission has authority under section 271 to impose unbundling requirements on Qwest. *See* Covad's Petition for Arbitration at 7-11. The Commission agrees with Covad that it should defer, pending a decision in 04-00208-UT, whether it has authority under section 271, to require filing of the Commercial Line Sharing Agreement. A prerequisite to deciding whether the Commission has authority to require the filing of the Commercial Line Sharing Agreement under section 271 is whether the Commission can impose unbundling obligations under section 271. If the final order in Case No. 04-00208-UT indicates that this Commission can require Qwest to provide line sharing under section 271 of the Act, then this Commission may consider, in a future proceeding, whether it can require the filing of agreements, such as the Commercial Line Sharing Agreement, under section 271.

THIS COMMISSION FINDS AND CONCLUDES:

[27] AG's Response at 2-6; Staff's Brief at 6; Covad's Brief at 7-12.
[28] *See* Petition of Dieca Communications, Inc., d/b/a Covad Communications Company, for Arbitration ("Covad's Petition for Arbitration"), filed on June 22, 2004.

1. The Commercial Line Sharing Agreement is not an interconnection agreement subject to the filing requirements of section 252 of the Act.

2. The Statement of the Case, Background, Positions of the Parties, and Discussion, set forth above in this Final Order, are adopted as Findings and Conclusions of the Commission.

3. This Commission should adopt a prefiling review process to review a LEC's claim that an agreement is not an interconnection agreement because it pertains to network elements that Qwest is not required to unbundle.

Consistent with the above Findings and Conclusions, THIS COMMISSION ORDERS:

A. This Docket is closed.

B. This Commission adopts a prefiling review process to review a LEC's claim that an agreement is not an interconnection agreement because it pertains to network elements that the LEC is not required to unbundle. When a LEC submits such an agreement to the Commission, the agreement shall not be assigned a docket number, unless and until Staff files a motion alleging that the agreement is an interconnection agreement.

C. This Order shall be served on all persons on this Commission's Telecommunications Service List.

D. This Order is effective immediately.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 23rd day of December, 2004.

NEW MEXICO PUBLIC REGULATION COMMISSION

HERB H. HUGHES, CHAIRMAN

DAVID W. KING, VICE CHAIRMAN

JEROME D. BLOCK, COMMISSIONER

TELEPHONICALLY APPROVED

LYNDA M. LOVEJOY, COMMISSIONER

TELEPHONICALLY APPROVED

E. SHIRLEY BACA, COMMISSIONER