COPY

STATE OF NORTH DAKOTA

BEFORE THE PUBLIC SERVICE COMMISSION

New Edge Network, Inc./Qwest Corporation Commercial Line Sharing Service Agreements	PU 04-620 NOTICE OF SUPPLEMENTAL AUTHORITIES

Qwest Corporation ("Qwest") hereby respectfully submits the attached Orders from the United States District Court for the District of Montana and the Washington State Utilities and Transportation Commission, and states:

1. 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"). In February 2005, Qwest filed a Request for Hearing, Comments, and Motion to Dismiss from Docket the Agreement titled "Terms and Conditions for Commercial Line Sharing."

2. To assist the Commission in its review of this case, Qwest hereby respectfully submits an *Order on Qwest's Motion for Judgment on Appeal* from the United States District Court for the District of Montana. The Court issued its decision on June 9, 2005, vacating the decision by the Montana Public Service Commission that required Qwest and Covad Communications Company to submit their commercial line sharing agreement for review and approval by the Commission. The Court concluded that the commercial agreement did not concern an ongoing obligation relating to section 251(b) or (c) of the Federal Telecommunications Act of 1996 and that it was not required to be filed under section 252 for commission review and approval.

3. The Montana District Court cited *Order No. 2 Dismissing Petition* from the Washington State Utilities and Transportation Commission, which Qwest has attached for the Commission's information. The Washington Commission issued this Order on April 19, 2005, holding that a commercial line sharing agreement between Qwest and Multiband Communications, Inc. did not require commission approval under sections 251 and 252.

RESPECTFULLY SUBMITTED this 16th day of June, 2005.

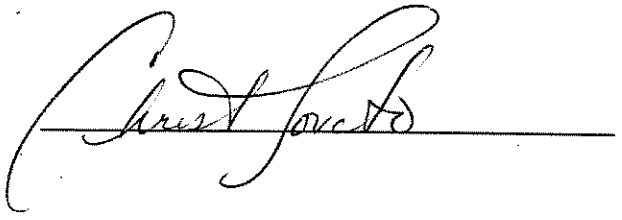
Melissa K. Thompson
QWEST SERVICES CORPORATION
1005 17th Street, Suite 200
Denver, CO 80202
(303) 896-1518

Attorney for Qwest Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2005, an original and 7 copies of the foregoing **QWEST CORPORATION'S NOTICE OF SUPPLEMENTAL AUTHORITY** was served upon the following party:

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



IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

QWEST CORPORATION, a Colorado corporation, Plaintiff, vs. THOMAS J. SCHNEIDER, GREG JERGESON, MATT BRAINARD, JAY STOVALL, and BOB ROWE in their official capacities as Commissioners of the Montana Public Service Commission, and THE MONTANA PUBLIC SERVICE COMMISSION, a regulatory agency of the State of Montana, Defendants.	CV-04-053-H-CSO **ORDER ON QWEST'S MOTION FOR JUDGMENT ON APPEAL**

Plaintiff Qwest Corporation ("Qwest") initiated this action seeking declaratory and injunctive relief against the Montana Public Service Commission ("PSC") and the PSC Commissioners in

their official capacities. Qwest challenges a PSC order concerning an agreement between Qwest and DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"). Qwest generally alleges that the PSC exceeded its authority under the Federal Telecommunications Act of 1996 ("FTA") by requiring Qwest to file the agreement, and by ordering a substantive change to its terms and conditions.[1]

In seeking federal judicial review of the PSC's decision, Qwest relies upon 47 U.S.C. § 252(e)(6) of the FTA,[2] and relies upon that provision and 28 U.S.C. § 1331 in invoking the Court's jurisdiction.[3] By Order filed February 22, 2005, Chief Judge Molloy, with the parties' consent, assigned this case to the undersigned for all purposes.[4]

Before the Court is Qwest's Motion for Judgment on Appeal.[5]

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[1]Complaint ("Cmplt.") (Court's Doc. No. 1) at 1, 12-23.

[2]Id. at 3. 47 U.S.C. § 252(e)(6) provides, in relevant part:

> (e) Approval by State commission
>
> * * *
>
> (6) Review of State commission actions
>
> In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

[3]Cmplt. at 3.

[4]Court's Doc. No. 28.

[5]Plaintiff Qwest Corporation's Motion for Judgment on Appeal ("Qwest's Mtn.") (Court's Doc. No. 31).

On June 1, 2005, following submission of the parties' briefs,[6] the Court heard oral argument on Qwest's motion. Having reviewed the record, and having considered the parties' arguments, the Court is prepared to rule.

I. *THE TELECOMMUNICATIONS ACT OF 1996*.

"Congress passed the [FTA] to foster competition in local and long distance telephone markets by neutralizing the competitive advantage inherent in incumbent carriers' ownership of the physical networks required to supply telecommunications services."[7] To accomplish this objective, Congress, through the FTA, changed significantly the regulatory scheme that governed local telephone service. The FTA "restructured local telephone markets by eliminating state-granted local service monopolies," and replaced exclusive state regulation of local monopolies with a competitive scheme set forth in 47 U.S.C. §§ 251 and 252.[8]

The FTA, under sections 251 and 252,[9] requires established

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[6]On March 2, 2005, Qwest filed Qwest Corporation's Opening Brief in Support of Judgment on Appeal ("Qwest's Opening Brief"). On April 29, 2005, Defendants filed their Response Brief of Defendants Montana Public Service Commission and Bob Rowe, Thomas J. Schneider, Matt Brainard, Jay Stovall and Greg Jergeson ("PSC's Brief") (Court's Doc. No. 34). On May 17, 2005, Qwest filed Qwest Corporation's Reply Brief in Support of Judgment on Appeal ("Qwest's Reply") (Court's Doc. No. 35).

[7]Pacific Bell v. Pac-West Telecomm., Inc., 325 F.3d 1114, 1117-18 (9th Cir. 2003) (citations and footnotes omitted).

[8]MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491, 498 (3d Cir. 2001)("MCI Telecomm.")(citing AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 370 (1999) ("Iowa Util.")).

[9]Hereafter, all references to code sections are to sections of Title 47 of the United States Code unless otherwise indicated.

incumbent local exchange carriers ("ILECs") (defined in 47 U.S.C. § 251(h)(1)) to allow competitive local exchange carriers ("CLECs") access to the ILECs' existing networks or services to permit the CLECs to compete in providing local telephone services.[10]

Generally, both ILECs and CLECs have the duty under section 251(a) "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[.]"[11] Sections 251 and 252 also set forth specific requirements.

Section 251(b) imposes requirements on both ILECs and CLECs. It requires them to: (1) allow resale of their telecommunications services; (2) provide number portability; (3) provide dialing parity; (4) provide access to rights-of-way; and (5) establish reciprocal compensation arrangements.[12]

Section 251(c) imposes requirements applicable only to ILECs. It requires ILECs to: (1) provide interconnection of the ILEC's network to other networks; (2) provide access to unbundled network elements ("UNEs")[13]; (3) allow CLECs to resell services at wholesale rates; and (4) provide for collocation of CLEC

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[10] Pacific Bell, 325 F.3d at 1118; see also US West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1116 (9th Cir. 1999).

[11] Section 251(a)(1).

[12] Sections 251(b)(1)-(5).

[13] UNEs are discrete components of an existing ILEC's network. US West Communications v. Jennings, 304 F.3d 950, 954 (9th Cir. 2002).

equipment in ILEC buildings.[14] Also, section 251(c)(1) requires ILECs to "negotiate in good faith" the "terms and conditions of agreements" that permit CLECs to share the network and to provide service.[15]

Section 252 governs the process for establishing interconnection agreements between ILECs and CLECs, and provides that negotiated or arbitrated interconnection agreements must be submitted to state public utility commissions for approval. Section 252 provides, in relevant part, as follows:

> (a) Agreements arrived at through negotiation
>
> (1) Voluntary negotiations
>
> Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.
>
> * * *
>
> (e) Approval by State commission
>
> (1) Approval required

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[14]Sections 251(c)(2)-(4) and (6).

[15]Section 251(c)(1).

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.[16]

Congress empowered the Federal Communications Commission ("FCC") to promulgate regulations to implement the FTA's requirements.[17] "[T]he FCC's implementing regulations ... must be considered part and parcel of the requirements of the [FTA]."[18]

II. BACKGROUND.

The parties do not dispute the underlying facts.[19] Under the FTA, Qwest is an ILEC and Covad is a CLEC. In early 2004, Qwest and Covad successfully negotiated a line-sharing agreement.[20] Line sharing involves simultaneous use of both the high frequency and low frequency portions of the copper wire or "loop" that connects an end user to a telecommunications network.[21] Companies like Qwest provide high-speed access to the Internet through a service known as a Digital Subscriber Line

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[16]Sections 252(a)(1) and 252(e)(1).

[17]Section 251(d)(1); Iowa Util., 525 U.S. at 384.

[18]Jennings, 304 F.3d at 957.

[19]See Qwest's Preliminary Pretrial Statement (Court's Doc. No. 23) at 2; Preliminary Pretrial Statement of Defendants (Court's Doc. No. 22) at 3.

[20]Complaint Exhibit ("Cmplt. ex.") 2; PSC's Brief at ex. 5.

[21]Qwest's Opening Brief at 14.

("DSL"). DSL service is provided by equipment that splits the frequency of the loop, allowing simultaneous use of the high frequency portion for connection to the Internet, and the low frequency portion for voice communications. The line sharing agreement between Qwest and Covad gives Covad access to line sharing in Qwest's 14-state region for a period that commenced on October 2, 2004.[22]

On May 19, 2004, Qwest and Covad filed with the PSC their agreement, which is titled "Terms and Conditions for Commercial Line Sharing Arrangements" ("Commercial Line Sharing Agreement" or "CLSA").[23] In a separate letter,[24] Qwest informed the PSC that it filed the agreement "for informational purposes only," and that it was not filing the agreement for approval under section 252's requirement that agreements be submitted to state commissions for approval.

On June 3, 2004, the PSC issued an Order to Show Cause and Request for Information[25] directing Qwest and Covad, and allowing any interested parties, to comment about why the CLSA should not be filed and considered by the PSC under sections 251 and 252.

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[22]Id. at 18.

[23]Cmplt. ex. 2.

[24]Cmplt. ex. 1.

[25]Cmplt. ex. 3.

On June 18, 2004, Qwest, Covad and others filed comments.[26]

On July 9, 2004, the PSC entered a Notice of Application for Approval of Commercial Line Sharing Agreement for DSL Services ("Notice").[27] In the Notice, the PSC concluded that the CLSA "is a negotiated agreement pursuant to §§ 251 and 252 of the [FTA,]" stated that it requires PSC approval prior to implementation and set a procedural schedule for considering whether to approve or reject the CLSA. On July 28, 2004, Qwest filed with the PSC a Motion for Reconsideration and to Dismiss.[28]

On September 22, 2004, the PSC issued its Final Order and Order on Reconsideration ("Final Order").[29] The PSC approved the CLSA with the exception of one provision that dealt with the timing of notice required before disconnection of services.

On October 21, 2004, Qwest filed the instant action.[30] Qwest seeks: (1) a declaratory ruling that the Final Order violates section 252; and (2) entry of a permanent injunction to prevent the PSC from enforcing the Final Order against Qwest with

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[26]Cmplt. exs. 4 (Qwest's comments), 5 (Covad's comments) and 6 (Qwest's reply comments). Other entities' comments are found in the Notice of Transmittal of Administrative Record (Court's Doc. No. 14).

[27]Cmplt. ex. 7.

[28]Cmplt. ex. 8.

[29]Cmplt. ex. 9.

[30]Cmplt. at 1.

respect to the CLSA.[31]

III. STANDARD OF REVIEW.

The Court must consider de novo the Montana PSC's interpretation of the FTA and of the FCC's implementing regulations.[32]

IV. DISCUSSION.

The narrow legal issue before the Court is whether the CLSA is an "interconnection agreement" that must be submitted to the PSC for approval under the FTA. The issue of whether the PSC may require agreements to be filed is not before the Court, and the Court takes no position herein on that issue.[33]

The parties agree that line sharing does not fall within the obligations of an ILEC as set forth in sections 251(b) and (c), *i.e.*, line sharing is not a UNE under section 251(c)(3).[34] The

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[31]Qwest's Opening Brief at 1; Cmplt. at 16-23.

[32]US West Communications v. MFS Intelenet, Inc., 193 F.3d at 1117 (citing Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495 (9th Cir. 1997), for proposition that state agency's interpretation of a federal statute is considered de novo).

[33]See, e.g., Order Directing Qwest to File Commercial Agreements, In the Matter of the Commission Investigation Regarding the Status of the Commercial Line Sharing Agreement Between Qwest Corporation and DIECA Communications d/b/a Covad, 2004 WL 2465819 (Minn. PUC, September 27, 2004)(Minnesota Public Utilities Commission directing "Qwest to file its commercial agreements with the Commission, whether or not those agreements constitute 'interconnection agreements' for purposes of the [FTA]" noting, *inter alia*, that "[r]eviewing such agreements will provide the Commission with information about the evolution of competition in the state generally.").

[34]Counsel for the PSC conceded this point at oral argument. The PSC's concession is consistent with the FCC's determination that ILECs are not

parties disagree, however, with respect to the issue of whether the line sharing agreement between Qwest and Covad is nevertheless an interconnection agreement that must be submitted to the PSC for approval.

Qwest generally argues that it has no obligation to file any agreements that relate to services that it, as an ILEC, is not required to provide,[35] and that state commissions have no authority to impose requirements upon ILECs that the FTA does not impose. Qwest argues that the PSC, in taking action with respect to Qwest's CLSA with Covad, "improperly asserted authority over an agreement that does not address a section 251(b) or (c) service or element and hence is not an 'interconnection agreement' governed by that section of the [FTA]."[36]

It is Qwest's position that "[a] simple analysis of the interplay between sections 251 and 252 demonstrate[s] that there is no statutory basis to conclude that the [CLSA] must be filed."[37] Specifically, Qwest argues that there are only two

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required to provide line sharing as an unbundled network element under section 251(c)(3), 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, 18 FCC Rcd 16978, ¶¶ 255, et seq. (2003)("Triennial Review Order" or "TRO"), a conclusion that the D.C. Circuit Court of Appeals has expressly upheld. United States v. Telecom Ass'n v. FCC, 359 F.3d 554, 584-85 (D.C. Cir. 2004) ("USTA II").

[35]Qwest's Opening Brief at 7.

[36]Id. at 10.

[37]Id. at 24-25.

provisions of section 252 that discuss the obligation of parties to file agreements with state commissions, and neither requires submission of the CLSA to the PSC.

The first provision is section 252(a)(1). Qwest argues that the provision's requirement that an agreement be submitted to the state commission is expressly premised on the agreement being for services or elements provided "pursuant to section 251." Because line sharing is not a service or element provided pursuant to section 251, Qwest argues, the CLSA need not be submitted to the PSC for approval.

The second provision is section 252(e)(1). As noted *supra*, it provides that any "interconnection agreement adopted by negotiation ... shall be submitted to the State commission." Qwest argues that the reference to agreements "adopted by negotiation" refers to section 252(a)(1) agreements which, as already discussed, relate only to services or elements provided pursuant to section 251. Again, because line sharing is not a service or element provided pursuant to section 251, Qwest argues, the CLSA need not be submitted to the PSC for approval.

In sum, Qwest argues that because it and Covad were not obligated to submit their CLSA to the PSC for approval, the PSC exceeded its authority when it took action on the CLSA.

The PSC first argues that section 252's plain language

dictates that the CLSA must be submitted to it for approval.[38] The PSC argues that the purpose of section 252(a)(1)'s first sentence "is to reward carriers for independently contracting for interconnection and provisioning of goods and services" and to relieve them from the substantive requirements of sections 251(b) and (c).[39] The sentence, the PSC argues, does not relieve carriers entering voluntary agreements from submitting their agreements to the state commissions for approval. Also, the PSC argues that "[n]othing in section 252(e)(1) limits the filing requirement of interconnection agreements to those that implement duties contained in §§ 251(b) and (c)."[40]

Second, the PSC argues that FCC orders support its position that the CLSA must be submitted to it for approval. The PSC argues that the FCC, in its order on the scope of section 252(a)(1)'s requirement for submission of agreements to state commissions for approval, encouraged state commissions to decide in the first instance which sorts of agreements must be submitted.[41] The PSC argues that the FCC, in a subsequent order, "reiterated the role of state commissions in determining in the

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[38]PSC's Brief at 8-14.

[39]Id. at 9.

[40]Id. at 12.

[41]Id. at 14-18 (citing 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 Arrangements under Section 252(a)(1), WC Docket No. 02-89, 17 FCC Rcd 19337, 2002 WL 31204893 (Oct. 4, 2002) ("Declaratory Order")).

first instance what interconnection agreements must be filed."[42]

Third, the PSC argues that the CLSA is subject to section 252's submission requirement because the networks of Qwest and Covad are physically linked. This physically linking, the PSC argues, makes the CLSA an "interconnection agreement" under section 251, and thus subject to submission to the PSC under section 252.

Fourth, the PSC argues that its interpretation of section 252 is entitled to the Court's deference under Chevron USA Inc. v. Natural Resources Defense Council, Inc.[43] The PSC argues that because its interpretation of section 252 is reasonable, the Court should afford that interpretation deference.

Finally, the PSC argues that section 252's requirement for submission of agreements is not limited to agreements that contain the FCC's current list of unbundled network elements. The PSC argues that it and other state commissions are permitted to expand the list of network elements that must be made available to CLECs "as long as state requirements are consistent with and do not substantially prevent implementation of § 251 and the purposes of the [FTA]."[44]

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[42]Id. (citing In the Matter of Qwest Corporation Apparent Liability for Forfeiture, File No. EB-03-IH-0263 (March 12, 2004)("NAL")).

[43]Id. at 22-26 (citing Chevron, 467 U.S. 837, 842-43 (1984)).

[44]Id. at 27.

Having considered all of the parties' arguments, the Court concludes that section 252's language limits the requirement that agreements be submitted to state commissions for approval to those agreements that contain section 251 obligations. Because line sharing, which is the subject of Qwest's CLSA with Covad, is not an element or service that must be provided under section 251, there is no obligation to submit the CLSA to the PSC for approval under section 252.

As Qwest argues, section 252(a)(1)'s requirement that an agreement be submitted to a state commission is expressly premised on the agreement being for interconnection, services or network elements provided "pursuant to section 251." Here, as the parties agree and as relevant authority establishes, line sharing is not a service or element provided pursuant to section 251. Therefore, Qwest's CLSA with Covad is not the type of agreement contemplated in section 252(a)(1) that must be submitted to the PSC for approval.

Similarly, section 252(e)(1) requires submission to the state commission any "interconnection agreement adopted by negotiation ...." The reference to any agreement "adopted by negotiation" refers to section 252(a)(1) agreements which, as noted, involve only those services provided "pursuant to section 251." Again, line sharing is not a service or element provided pursuant to section 251. Thus, the CLSA at issue is not an "interconnection agreement" as contemplated in section 252, and

thus need not be submitted to the PSC for approval. The PSC's argument that section 252's language dictates a contrary result is unpersuasive.

The Court believes that its conclusion that the CLSA at issue need not be submitted to the PSC for approval is consistent with the FCC's interpretation of the statute's language. In the Declaratory Order, the FCC expressly concluded that "only those agreements that contain an *ongoing obligation relating to section 251(b) or (c)* must be filed under section 252(a)(1)."[45] The PSC's argument that the FCC's orders support its position ignores the clear language of the Declaratory Order, and thus fails.

The Court notes that its conclusion that the CLSA need not be submitted to the PSC for approval is consistent with the conclusion of a another state commission that recently addressed the issue. The commission for the state of Washington recently concluded that an agreement markedly similar to the CLSA submitted to the PSC here is not subject to section 252.[46] Although this decision is not binding on the Court, it is instructive with respect to how another state regulatory body views line sharing agreements in relation to section 252.

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[45]Declaratory Order, ¶ 8, n.26 (emphasis in original).

[46]See Order No. 02: Dismissing Petition, In the Matter of the Petition of Multiband Communications, LLC, for Approval of Line Sharing Agreement with Qwest Corporation Pursuant to Section 252 of the Telecommunications Act of 1996, Docket No. UT-053005 (WUTC April 19, 2005)("Washington commission order")(attached to Qwest's Reply at attachment 1).

Finally, the Court believes that its conclusion herein is consistent with the intent of the FTA. Congress, in enacting the FTA, sought to promote competition by removing unnecessary impediments to commercial agreements entered between ILECs and CLECs, and also to recognize certain ongoing obligations for interconnection agreements. The result reached here is not at odds with either of Congress' purposes in enacting the FTA.[47]

V. *CONCLUSION*.

Based on the foregoing, the Court concludes that the CLSA is not a negotiated interconnection agreement that must be submitted to the PSC for approval under section 252. Accordingly,

IT IS ORDERED that Qwest's Motion for Judgment on Appeal[48] is GRANTED in part and DENIED in part as follows:

1. The CLSA[49] at issue herein is not subject to review and

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[47]The Court finds unpersuasive the PSC's argument that the physical linking of Qwest's and Covad's networks makes the CLSA an "interconnection agreement." The CLSA concerns only line sharing which, as already noted, is not a service or element that must be included in an interconnection agreement.

The Court also declines to afford the PSC's decision Chevron deference. The Ninth Circuit has ruled that a state commission's interpretations of the FTA are subject to de novo review. US West Communications v. MFS Intelenet, 193 F.3d at 1117. The Court declines the PSC's invitation to "revisit the standard of review that should be applied to a state commission's authority to require an interconnection agreement to be filed."

Finally, the Court finds moot the PSC's argument that it may add to the list of required UNEs. Even if this argument had a legal basis, there is no evidence before the Court that the PSC has formally decided to add line sharing to the list of UNEs. Thus, the issue is moot.

[48]Court's Doc. No. 31.

[49]Cmplt. ex. 2.

approval by the Defendants under section 252 of the FTA.

2. The PSC's Final Order and Order on Reconsideration[50] issued on September 22, 2004, is therefore VACATED.

3. All other requested relief is DENIED. The Court determines that Qwest's request for prospective injunctive relief is overly broad and goes beyond the narrow issue presented in this action.

The Clerk of Court shall enter Judgment accordingly.

DATED this 9th day of June, 2005.

Carolyn S. Ostby
United States Magistrate Judge

CERTIFICATE OF MAILING
DATE: 6/10/05 BY:
I hereby certify that a copy of this order was mailed to:
James Caine
Ted Smith
Monica Brand

[50] Cmplt. ex. 9.

[Service Date April 19, 2005]

BEFORE THE WASHINGTON STATE UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of	)	
	)	DOCKET NO. UT-053005
MULTIBAND COMMUNICATIONS, LLC	)	
	)	ORDER NO. 02:
	)	
For Approval of Line Sharing Agreement With Qwest Corporation Pursuant to Section 252 of the Telecommunications Act of 1996	)	DISMISSING PETITION
	)	
	)	
	)	
.....	)	

Synopsis: *The Commission concludes as a matter of law that an agreement between Qwest Corporation and Multiband Communications, LLC, which provides that Qwest will provide line sharing in response to orders placed by Multiband after October 1, 2004, does not require Commission approval under section 252 of the Telecommunications Act of 1996. The Commission determines that Qwest must continue to file its commercial agreements with competitive local exchange carriers for examination by the Commission.*

1 **PROCEEDINGS:** On September 30, 2004, Qwest Corporation entered into a Commercial Line Sharing Arrangement (LSA) with Multiband Communications, LLC. The agreement is effective for a three-year term that commenced on October 2, 2004.[1]

2 Qwest filed the LSA "for the Commission's information" on October 26, 2004. Qwest asserted that the agreement does not need to be filed for the Commission's approval pursuant to section 252 of the Telecommunications Act of 1996 (Act). On January 18, 2005, however, in response to a request from the

[1] The filed document is entitled "Terms and Conditions for Commercial Line Sharing Arrangements provided by Qwest Corporation to Multiband Communications, LLC."

Commission's regulatory staff (Commission Staff or Staff) Multiband filed with the Commission a petition for approval of the LSA.[2]

3 The matter came before the Commission at its regularly scheduled Open Meeting on February 23, 2005. Staff recommended that the Commission approve the LSA under sections 251 and 252 of the Act. Qwest and Multiband argued that the LSA does not require Commission approval and that the matter should be held over for further process.

4 The Commission set the disputed question for hearing, and conducted a prehearing conference before Administrative Law Judge Dennis J. Moss on March 10, 2005. Qwest and Staff filed Initial Briefs on March 24, 2005, and Reply Briefs on March 31, 2005. Commission Chairman Mark H. Sidran, Commissioner Patrick J. Oshie, Commissioner Philip B. Jones, and Administrative Law Judge Moss heard oral argument from all parties on April 4, 2005.

5 **PARTY REPRESENTATIVES:** C. Douglas Jarrett, Keller and Heckman LLP, Washington, D.C., represents Multiband. Lisa Anderl, Qwest Corporation, Seattle, Washington, represents Qwest. Shannon Smith, Assistant Attorney General, Olympia, Washington, represents Commission Staff.

6 **COMMISSION DETERMINATIONS:** The Commission determines that the LSA does not require Commission approval under sections 251 and 252 of the Act. The Commission concludes as a matter of law that Multiband's petition should be dismissed. The Commission also determines that Qwest must continue to file its commercial agreements with competitive local exchange carriers for examination by the Commission.

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[2] Multiband's counsel, at prehearing, described the company's position as being between the proverbial rock and hard place. Multiband did not file a brief in this proceeding.

MEMORANDUM

I. Background and Procedural History.

7 The subject of this proceeding is an agreement between Qwest and Multiband, the exclusive purpose of which is to give Multiband access to the high frequency portion of the "loops" Qwest owns and maintains to connect end use customers' premises to a central office "switch."[3] This is called "line sharing" because Qwest uses the low frequency portion of the loop to provide voice communication to the customer while Multiband uses the high frequency portion to provide the customer with a high-speed broadband connection to the Internet. The service Multiband provides is known as digital subscriber line (DSL) service.[4]

8 The issue before the Commission in this proceeding is whether the agreement between Qwest and Multiband is an "interconnection agreement" subject to approval by the Commission under subsection 252(e)(1) of the Federal Telecommunications Act of 1996.[5] Subsection 252(e)(1) provides that:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement

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[3] The loop, often referred to as the "telephone line," is most commonly a pair of copper wires that runs from the customer's home or business to the central switch. The switch is a computer that provides dial tone, typically to several thousand end use customers through a like number of individual loops. The switch routes a customer's call to its intended destination through "interoffice facilities," which are connections that link Qwest's switches together and that connect Qwest's network to the networks of other telecommunications companies.

[4] DSL requires the installation of a frequency splitter at each end of the loop so that it can be used simultaneously for voice communication and high-speed connection to the Internet. The DSL equipment separates the low frequency portion of the loop (LFPL) from the high frequency portion (HFPL) and directs the LFPL to the public switched telephone network and the HFPL to the Internet.

[5] Pub. L. 104-104, 110 Stat. 56.

> is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

Qwest provided a copy of the LSA to the Commission on October 26, 2004, for informational purposes. Qwest described in a cover letter to its submission why it did not believe the arrangement constituted an interconnection agreement under section 252.[6] Staff did not pursue the question of Commission jurisdiction at the time. Later, Staff asked Multiband to file the LSA for approval. Multiband filed the agreement with the Commission on January 18, 2005, as requested. Multiband, however, agrees with Qwest that state approval under section 252 is not required.

9 The matter was docketed and scheduled for the Commission's Open Meeting on February 23, 2005. Commission Staff recommended in an Open Meeting Memorandum that the Commission approve the LSA under section 252. Qwest and Multiband both argued at the Open Meeting that the matter should be deferred for further consideration. Qwest also presented argument on the merits, recommending that the Commission either take no action, or affirmatively declare that the agreement is not subject to filing and approval requirements under the Act. The Commission requested briefing on the issues.

10 Qwest and Staff filed Initial Briefs on March 24, 2005, and Reply Briefs on March 31, 2005. The Commission heard oral argument from all parties on April 4, 2005.

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[6] The LSA at issue here is a form of agreement Qwest has entered into with other competitive local exchange carriers (CLECs), including Covad, in Washington and other states. Qwest states that it has provided the LSA to all 14 of the commissions in the states where it operates. Minnesota and New Mexico have considered the LSA and have determined that it is not a section 252 agreement. Montana determined to the contrary. Qwest has appealed the Montana decision in Federal District Court. In addition, the Staff of the Colorado Commission has requested that Qwest file the Commercial Agreement for approval, and Arizona has opened a docket to consider the issue. Other states have simply taken no action on the Commercial Agreement.

II. Discussion and Decision

A. Introduction

11 By passing the Telecommunications Act of 1996, Congress meant to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[7] DSL, which both Qwest and Multiband offer in Washington, is one such technology.

12 Congress acted in an environment in which a limited number of companies, the so-called regional Bell operating companies (RBOCs), dominated the industry.[8] These RBOCs, each of which was the largest incumbent local exchange carrier (ILEC) in its respective legacy states, owned and controlled much of the local exchange infrastructure by which telecommunications services were provided to individual customers throughout the United States. To promote the early development of local exchange competition in this environment, Congress established requirements for carriers to interconnect their networks and for ILECs, like Qwest, to offer services at wholesale rates for resale by competitors. Congress also required ILECs to lease individual components of their networks (*i.e.*, network elements) to competitive local exchange carriers (CLECs), a significant number of which emerged in the wake of the Act.[9] The network

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[7] H.R. Conf. Rep. No. 104-458, 104th Cong. 2d Sess. 113 (1996).

[8] The AT&T Bell System, long recognized as a "natural monopoly," lost that status in 1984. The Bell System was broken up into eight regional companies that would provide local exchange service in their respective service territories, and one long distance company AT&T. Pacific Northwest Bell, which became U S WEST Communications, and later Qwest, is one of the legacy companies that survive today. Qwest operates in a 14 state region, including Washington, where it is the largest incumbent local exchange carrier.

[9] 47 U.S.C. § 251(c)(3).

elements that ILECs are obligated to provide are referred to in the Act as "unbundled network elements."[10]

13 The Act requires the FCC to determine what network elements ILECs are required to provide on an unbundled basis pursuant to section 251 of the Act.[11] The FCC makes its determination under the "necessary and impair," or simply "impairment," standard, asking whether a competitor's access to a given proprietary network element is necessary, and whether the competitor's ability to compete with ILECs would be impaired without access to the element.

14 The FCC initially identified line sharing as an unbundled network element under section 251.[12] Qwest and other ILECs appealed that determination. Pending the outcome of the appeal, Qwest began providing line sharing to CLECs via interconnection agreements that were approved by various state authorities, including the Commission.

15 On appeal, the D.C. Circuit found that the FCC had failed to properly apply the Act's impairment standard for line sharing.[13] The Court vacated and remanded the *Line Sharing Order*. The FCC consolidated the remand of the *Line Sharing*

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[10] The term "network element" is defined at 47 U.S.C. 153(29). The subset of required network elements referred to in 47 U.S.C. § 251(c)(3) as "unbundled network elements" is established by the FCC pursuant to 47 U.S.C. § 251(d)(2), which is sometimes referred to as the "impairment standard."

[11] 47 U.S.C. § 251(d)(2).

[12] The FCC ruled that line sharing is a UNE under section 251(c)(3) in 1999. *Third Report and Order, In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*).

[13] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"). The court concluded that the FCC had "completely failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite)." *Id.* at 429.

Order into the agency's Triennial Review docket.[14] The FCC issued its Triennial Review Order (*TRO)* in August 2003.[15]

16 In the *TRO*, the FCC applied the principles of *USTA I* and concluded that there was no impairment for line sharing. Given the lack of impairment, the FCC ruled—subject to a transition period—that ILECs are not required to provide line sharing as an unbundled network element under subsection 251(c)(3).[16]

17 The FCC rules implementing this determination provide in relevant part that "[b]eginning on the effective date of the [*TRO*], the high frequency portion of a copper loop [*i.e.*, line sharing] shall no longer be required to be provided as an unbundled network element, subject to . . . transitional line sharing conditions. . . ."[17] The FCC transition rules "grand father" line sharing provided to customers that were signed up prior to October 2, 2003 (*i.e.*, the effective date of the *TRO*, meaning that line sharing must continue to be provided at the prices set by state commissions until the grand fathered end user "cancels or otherwise discontinues its subscription to the digital subscriber line service. . . ."[18] For new line sharing orders made from October 2, 2003, through October 1, 2004, ILECs are required to provide line sharing as a UNE, but at prices that escalate over a three-year period.[19] Finally, for new orders placed after October 1, 2004, ILECs are relieved from their prior obligation to provide line sharing as an unbundled network element pursuant to section 251 of the Act.

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[14] The Triennial Review docket was created to determine whether UNEs that the FCC previously required ILECs to provide still met the impairment standard. The FCC, in the Triennial Review docket, considered the issues remanded from the Line Sharing Order.

[15] *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*, 18 FCC Rcd 16978 (2003); In *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*"USTA II"*), the Court vacated and remanded the TRO in part, but expressly upheld the FCC's non-impairment decision on line sharing. *Id.* at 585.

[16] *TRO* ¶ 255, *et seq.*

[17] 47 C.F.R. § 51.319 (a)(1)(i).

[18] *Id.* § 51.319 (a)(1)(i)(A).

[19] *Id.* § 51.319 (a)(1)(i)(B).

18 The agreement at issue here pertains only to new line sharing orders placed by Multiband after October 1, 2004.

B. Argument

1. Plain Meaning

19 Staff argues that its "position that the LSA should be submitted to the Commission for its approval is consistent with the plain language of the federal Act."[20] Qwest argues that "a simple analysis of the interplay between sections 251 and 252 demonstrates that there is no statutory basis to conclude that the [LSA] must be filed."[21] Thus, although the parties would have us reach opposite results, they agree that the familiar rules of statutory interpretation require us, among other things, to first consider the plain meaning of the statute.[22]

20 Subsection 252(a)(1) of the Act states:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be

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[20] Staff Initial Brief at ¶ 24.

[21] Qwest Opening Brief at ¶ 47.

[22] *Waste Management of Seattle, Inc., v. Utilities and Transp. Comm'n*, 123 Wn.2d 621, 869 P.2d 1034 (1994); *State Dep't of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 645 P.2d 1076 (1982).

> submitted to the State commission under subsection (e) of this section.[23]

Subsection 252(e)(1) states:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.[24]

21 Staff's argument is grounded in the clause in the first sentence of subsection 252(a)(1) that states ILECs and CLECs "may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers *without regard to the standards set forth in subsections (b) and (c) of section 251.*" Staff contends that the emphasized language means any negotiated agreement that provides for a network element—whether or not it is a required network element under subsection 251(c)(3)—is within the scope of subsection 252(a)(1). In other words, Staff argues subsection 252(a)(1) permits parties to negotiate voluntary agreements "for unbundled network elements that ILECs are not compelled to provide."[25] Staff states that line sharing is one such unbundled network element.[26] It follows, according to Staff, that the LSA is an interconnection agreement adopted by negotiation that must be submitted for approval under subsection 252(e)(1).

22 Qwest argues that Staff's analysis ignores important qualifying language in Subsection 252(a)(1). Specifically, Qwest argues, Staff does not acknowledge that the negotiated agreements described in subsection 252(a)(1) are "expressly

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[23] 47 U.S.C. § 252(a)(1).
[24] 47 U.S.C. § 252(e)(1).
[25] Staff Initial Brief at ¶ 16.
[26] *Id.* at ¶ 17.

premised on the agreement being for services or elements provided 'pursuant to section 251.'"[27] That is, Staff ignores that the threshold event that triggers the requirements of subsection 252(a)(1) is a "request for interconnection, services, or network elements *pursuant to section 251.*" Qwest contends that the only network elements that can be said to be "pursuant to section 251" are required network elements under subsection 251(c)(3). Line sharing is no longer a required network element pursuant to the FCC's clear determination on remand in the *TRO*. It follows, Qwest argues, that it need not file the LSA for approval.

23 Staff does not discuss the qualifying phrase "pursuant to section 251" in its Initial Brief. Qwest's argument in its Opening Brief focuses directly on the interplay between sections 251 and 252 to demonstrate that there is no statutory reason to file the line sharing agreement for approval. Nevertheless, Staff's Reply Brief does not address Qwest's argument on this point.[28] Staff did not resolve on oral argument the tension between Staff's reading of subsection 252(a)(1) to include all network elements and the provision's limiting language "network elements pursuant to section 251." In sum, Staff offers no persuasive rebuttal to Qwest's argument concerning the meaning and significance of the quoted phrase in the context of section 252. It appears that Qwest is correct in asserting, "Staff's reading of the statute would eliminate the modifying clause 'pursuant to section

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[27] Qwest Opening Brief at ¶ 48.

[28] About the closest Staff comes is its argument that:

> Under the negotiation method, ILECs and CLECs may voluntarily enter into an agreement for network elements outside of the standards set forth in Section 251(b) or (c). Thus, the parties could agree that the ILEC would provide a CLEC with access to network elements that the ILEC is not compelled to provide pursuant to Section 251(c).

Staff Reply Brief at ¶ 4. Again, however, Staff ignores the point that the "negotiation method" to which it refers (*i.e.*, negotiation under sections 251 and 252) occurs only following a request by a CLEC for "a network element pursuant to section 251." No such request is present under the facts before us.

251' and require filing of agreements for de-listed elements that an ILEC is not otherwise obligated to provide."[29]

24 It is fundamental, however, that when reading statutes we must neither add to, nor subtract from, the language by which the legislators expressed their intent.[30] We must give meaning to all the words in the statute. Accordingly, we must consider carefully the important qualifying language in subsection 252(a)(1).

25 The requirements for provisioning network elements pursuant to section 251 are set out in subsection 251(c)(3), which describes "unbundled network elements." Subsection 251(d)(1), in turn, requires the FCC to implement subsection 251(c)(3) using the impairment standard to identify what network elements fall within the definition of unbundled network elements. It follows that "a request for . . . network elements pursuant to section 251" is a request for unbundled network elements—network elements that ILECs are required to provide under subsection 251(c)(3).[31]

26 Line sharing is no longer an unbundled network element within the meaning of subsection 251(c)(3). Indeed, it is undisputed that Qwest need not offer line sharing at all.[32] Where, as here, the only network element a CLEC requests from an ILEC is one that the FCC has removed from the list of required elements

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[29] Qwest Reply Brief at ¶¶ 13, 14.

[30] *Restaurant Development, Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 80 P.3d 598 (2003); *Department of Licensing v. Cannon*, 147 Wn.2d 41, 50 P.3d 627 (2002); *Mckay v. Department of Labor and Industries*, 180 Wash. 191 39 P.2d 997 (1934).

[31] Contrary to Staff's argument, the term "unbundled network element" is a term of art defined by subsection 251(c)(3) of the Act. There is, within the meaning of the Act, no such thing as "unbundled network elements that ILECs are not required to provide." *Supra* ¶ 21 (citing Staff Initial Brief at ¶ 16).

[32] Although we do not reach Staff's policy arguments for purposes of our decision, we note here our belief that the potential for adverse consequences that might result from dampening Qwest's willingness to continue to make line sharing available to its direct competitors in the DSL market is as important a policy concern as the potential for benefits that arguably result from forcing competitive access via opt-in arrangements in the short term.

under subsection 251(c)(3), the CLEC cannot be said to have made a request for a network element "pursuant to section 251." That is, because the agreement at issue concerns only line sharing, it is not an agreement within the meaning of subsection 252(a)(1). Hence, it is not "an interconnection agreement adopted by negotiation" within the meaning of subsection 252(e)(1). Therefore, the line sharing agreement between Qwest and Multiband is not one that requires our approval under the Act.

27 We reach the same result below considering the FCC's declaratory ruling in 2002 concerning the filing requirements under sections 251 and 252.[33] Although not essential to our decision in light of our analysis and conclusion above, some brief discussion of the FCC's interpretation is appropriate in light of the parties' emphasis in their briefs on the *FCC Declaratory Order* and our recognition of the federal agency's primary jurisdiction under the Act.

2. FCC Interpretation

28 Staff contends that the FCC declined "to establish an exhaustive, all-encompassing 'interconnection agreement' standard" in response to Qwest's petition for a declaratory ruling on this subject several years ago.[34] Staff argues the FCC left it to the states to determine which agreements are subject to the state commission filing and approval process under the Act. Staff recognizes, however, that the *FCC Declaratory Order* did give important guidance to the states as they make that determination on a case-by-case basis. Staff refers to paragraph 8 of the *FCC Declaratory Order*, which establishes that an agreement that "creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection,

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[33] *In the Matter of Qwest Communications International, Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337, FCC 04-57 (2002) (*FCC Declaratory Order*).

[34] Staff Initial Brief at ¶ 11.

unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)."[35] Although Staff does not say so, the FCC clarified in a footnote to this language that "only those agreements that contain an *ongoing obligation relating to section 251(b) or (c)* must be filed under section 252(a)(1)."[36]

29 Staff argues that the LSA "is an on-going agreement pertaining to a network element," and "is a voluntary agreement entered into without regard to the standards set forth in 47 U.S.C. § 251(c)(2) and (3)." It follows, Staff contends, that the LSA is subject to the filing and approval requirements in subsections 252(a)(1) and (e)(1). It is unclear whether Staff's references to an "ongoing *agreement*" rather than an "ongoing *obligation*," and to a "network element" as distinct from an "*unbundled* network element" are intentional. Assuming deliberate word choices, we cannot dispute the veracity of Staff's statement precisely as written, but from these precise premises, Staff's conclusion does not follow.

30 The LSA is an ongoing agreement, but it does not reflect an ongoing obligation; Qwest is not obliged to offer line sharing at all after October 1, 2004. Though the LSA pertains to a network element, it does not pertain to an unbundled network element within the meaning of section 251. The LSA is, indeed, a voluntary agreement entered into without regard to subsections 251(c)(2) and (3); it is an agreement entered into without regard to section 251 at all.

31 As Qwest contends, "the FCC has clearly stated that telecommunications carriers are only required to file 'interconnection agreements' with other carriers that relate to *ongoing obligations for services that ILECs have a duty to provide under sections 251(b) and (c) of the Act.*"[37] Since Qwest does not have a duty to provide

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[35] *Id.* at ¶ 8.
[36] *Id.* at ¶ 8, n.26.
[37] Qwest Reply Brief at ¶ 3

line sharing under subsections 251(b) or (c), Qwest need not file the LSA for approval under subsection 252(e)(1).

C. Commission Determination

32 We need look no further than the language in sections 251 and 252 to determine that the LSA is not an agreement that requires our review and approval under the Act.[38] The LSA pertains only to Multiband's orders for the high frequency portion of Qwest's loops (*i.e.*, line sharing) after October 1, 2004. Multiband's request for an agreement with Qwest to provide for line sharing after that date was not a request made for a network element "pursuant to section 251" because line sharing is no longer an unbundled network element within the meaning of section 251.

33 Our reading of the statute is consistent with the FCC's interpretation of the relevant statutory language, and the standard it establishes to guide state determinations concerning whether particular agreements must be filed for approval. The FCC's interpretation, as discussed in the *FCC Declaratory Order*, is consistent with the Act's intent to promote competition by removing unnecessary impediments to commercial agreements between ILECs and CLECs while recognizing certain ongoing obligations for interconnection agreements. We find that the LSA does not create an ongoing obligation pertaining to an unbundled network element under section 251; the LSA contains no ongoing obligation relating to subsection 251(b) or (c).

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[38] We reject Staff's argument that the Commission's analysis in the MCIMetro proceeding late last year "applies to the LSA between Multiband and Qwest." Staff Initial Brief at ¶ 29; See *In the Matter of Request of MCI Metro Access Transmission Services, LLC and Qwest Corporation for Approval of Negotiated Interconnection Agreement, in its Entirety, Under the Telecommunications Act of 1996*, Docket Nos. UT-960310 & UT-043084, Order No. 1 (Oct. 20, 2004). The interdependency between the Thirteenth Amendment to the Qwest/MCIMetro Interconnection Agreement and the Master Service Agreement for the Provision of Qwest Platform Service that was the controlling factor in the *MCIMetro* decision simply is not present here.

34 We conclude as a matter of law that the LSA is not a negotiated interconnection agreement that requires our review and approval under subsection 252(e)(1). Accordingly, we determine that Multiband's petition for approval of the LSA should be dismissed.

35 Having made this determination, we also observe that it was entirely appropriate for this matter to have been brought before us and briefed for decision. The FCC's *Declaratory Order* unambiguously provides that the Commission, in the first instance, should review and determine whether individual agreements between CLECs and ILECs require state approval under the Act.[39] The Commission also has responsibilities under general provisions of state law to review the contracts of telecommunications companies and to prevent a telecommunications company from giving any undue or unreasonable preference or advantage to itself or any other person providing telecommunications service.[40] We can perform these functions only if Qwest and its CLEC counter parties continue to file their agreements that concern the provisioning of network elements that promote deployment of advanced telecommunications and information technologies and services to end use customers in Washington. We require that they continue to do so.

FINDINGS OF FACT

36 Having discussed above all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary findings of fact. Those portions of the preceding discussion that include findings pertaining to the ultimate decisions of the Commission are incorporated by this reference.

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[39] *Declaratory Order* at ¶ 10.

[40] *See* RCW 80.36.186.

37 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate rates, rules, regulations, practices, and accounts of public service companies, including telecommunications companies.

38 (2) Multiband owns, operates, and manages facilities used to provide telecommunications for sale to the general public in Washington. Multiband is engaged in the business of furnishing telecommunications services within Washington State as a competitive local exchange carrier. Multiband conducts business subject to the Commission's regulatory authority.

39 (3) Qwest owns, operates, and manages facilities used to provide telecommunications for sale to the general public in Washington and is engaged in the business of furnishing telecommunications services within Washington State as a public service company and as an incumbent local exchange carrier. Qwest conducts business subject to the Commission's regulatory authority.

40 (4) On September 30, 2004, Qwest entered into a Commercial Line Sharing Arrangement (LSA) with Multiband, effective for a three-year term that commenced on October 2, 2004. The LSA pertains only to new line sharing orders placed by Multiband after October 1, 2004.

41 (5) The LSA is not a negotiated agreement that follows from a request by Multiband asking that Qwest provide a network element pursuant to section 251 of the Telecommunications Act of 1996.

42 (6) The LSA is not an agreement that requires filing and approval pursuant to section 252 of the Telecommunications Act of 1996.

CONCLUSIONS OF LAW

43 Having discussed above in detail all matters material to our decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

44 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter of, and parties to, these proceedings.

45 (2) The LSA between Qwest and Multiband does not require Commission approval under sections 251 and 252 of the Telecommunications Act of 1996.

46 (3) Multiband's petition should be dismissed.

47 (4) The Commission should continue to require that Qwest to file its commercial agreements with CLECs for examination by the Commission so that the Commission can determine its jurisdiction and otherwise carry out its statutory responsibility to regulate telecommunications companies in the public interest.

48 (5) The Commission should retain jurisdiction to effectuate the terms of this Order.

ORDER

THE COMMISSION ORDERS THAT:

49 (1) Multiband's petition for approval of its line sharing agreement with Qwest is dismissed, being beyond the Commission's authority to approve pursuant to section 252 of the Telecommunications Act of 1996.

50 (2) Qwest is required to continue to file for review its agreements with CLECs, such as the agreement at issue here, that refer to past, present, or future obligations imposed on ILECs pursuant to the Telecommunications Act of 1996.

51 (3) The Commission retains jurisdiction to effectuate the terms of this Order.

DATED at Olympia, Washington, and effective this 19th day of April 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner

NOTICE TO PARTIES: This is a final order of the Commission. In addition to judicial review, administrative relief may be available through a petition for reconsideration, filed within 10 days of the service of this order pursuant to RCW 34.05.470 and WAC 480-07-850, or a petition for rehearing pursuant to RCW 80.04.200 and WAC 480-07-870.