Service Date: September 22, 2004

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF Commercial Line Sharing Agreement for DSL Services Provisioned After October 1, 2004, Between Qwest and DIECA Communications, Inc. d/b/a Covad Communications Company	)))))	UTILITY DIVISION DOCKET NO. D2004.6.89 ORDER NO. 6572a

FINAL ORDER AND

ORDER ON RECONDSIDERATION

A. Introduction and Procedural Background

1. On February 8, 1996, the Telecommunications Act of 1996 (1996 Act)[1] was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to the local exchange markets. The 1996 Act sets forth methods by which local competition may be encouraged in historically-monopolistic local exchange markets. The 1996 Act requires companies like Qwest Corporation (Qwest) to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. §§ 251 and 252.

2. On May 19, 2004, Qwest and DIECA Communications, Inc., d/b/a/ Covad Communications (Covad) filed their Commercial Line Sharing Agreement with the Commission, stating in a cover letter that the filing was being made for "informational purposes" only.[2] On June 3, 2004, the Commission issued an Order to Show Cause and Request for Information, seeking comments on why the agreement between Covad and Qwest should not be filed under 47 U.S.C. § 252 as a negotiated interconnection agreement.[3]

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).
[2] On the same date, Qwest and Covad filed a separate agreement, titled "Commercial Line-Sharing Amendment to Interconnection Agreement," which was submitted to the Commission under §252 of the Act.
[3] PSC Order No. 6572 in D2004.6.89, issued June 3, 2004.

3. Several parties, including Qwest, filed comments in response to the Commission's Show Cause Order, and Qwest filed Reply comments, responding to comments filed by other parties.

4. Having considered the comments received, the Commission voted to treat the agreement filed by Qwest and Covad as a negotiated interconnection agreement, and subsequently issued a Notice of Filing and Opportunity to Intervene and Comment on July 9, 2004, setting the agreement on the 90 day procedural schedule set forth in the Act. 47 U.S.C. §252(e)(4).

5. The July 9, 2004 Notice of Application for Approval and Notice of Opportunity to Intervene and Comment gave public notice of the requirements that the Commission must approve the Agreement unless it finds the Agreement discriminates against other telecommunications carriers not parties to the agreement, or is not consistent with the public interest, convenience and necessity. The notice stated that no public hearing was contemplated unless requested by an interested party by August 3, 2004. The notice further stated that interested persons could submit limited comments on whether the agreements met these requirements no later than August 16, 2004.

6. On July 29, 2004, Qwest filed a motion for reconsideration of the Commission's decision to treat the negotiated agreement between Covad and Qwest as an interconnection agreement subject to the filing requirement of 47 U.S.C. §252(a)(1).

7. No hearing has been requested and no comments, other than Qwest's motion for reconsideration, or requests for intervention were received.

B. Applicable Law and Commission Decision

1. Decision to treat the Qwest – Covad filing as a negotiated interconnection agreement subject to the filing requirements of 47 U.S.C. §252

a. The Declaratory Ruling

8. On April 23, 2002, Qwest filed a petition for a declaratory ruling with the Federal Communications Commission (FCC), seeking a ruling on the scope of the mandatory filing

requirement set forth in section 252(a)(1) of the Act (Declaratory Ruling).[4]

9. In its petition to the FCC, Qwest argued that under Section 252(a)(1) a negotiated agreement should be filed for state commission approval only if it includes (i) a description of the service or network element being offered; (ii) the various options available to the requesting carrier and any binding contractual commitments regarding the quality or performance of the service or network element; and (iii) the rate structures and rate levels associated with each such option. Declaratory Ruling, ¶2.

10. Qwest argued in its petition to the FCC that agreements regarding elements that have been removed from the national list of elements subject to mandatory unbundling should not be required to be filed under 252(a)(1). Declaratory Ruling ¶3.

11. In the Declaratory Ruling the FCC declined to establish an exhaustive, all-encompassing "interconnection agreement standard" and encouraged state commissions to decide in the first instance which sorts of agreements fall within the statutory standard. Declaratory Ruling, ¶10-11.

12. The FCC found that agreements containing an ongoing obligation relating to Section 251(b) or (c) must be filed under 252(a)(1). Declaratory Ruling, footnote 26.

13. The agreement between Qwest and Covad contains a description of the service or element being offered (Section 2.1.1 "Description"); options available to the requesting carrier and performance quality commitments (Section 2.1.6 "Performance Measures"); and rate structures and elements (Section 2.1.3 "Rate Elements").

b. The Triennial Review Order

14. Pursuant to its statutory authority contained at 47 U.S.C. §251(d), on August 21, 2003, the FCC issued its Triennial Review Order (TRO), in which it declined to make the high

[4] Qwest Communications International Inc., *Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-89, released October 4, 2002.

frequency portion of the loop available as an unbundled network element.[5]

15. On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit issued its decision on the appeals taken from the TRO, upholding the FCC's decision with respect to line sharing, finding that "even if the CLECs are right that there is some impairment with respect to the elimination of mandatory line sharing, the Commission reasonably found that other considerations outweighed any impairment. And again, we note the ambiguous state of the record on the price-constraining effect of CLEC DSL service." [6]

16. Since the decision of the D.C. Circuit Court of Appeals was issued in USTA II, two of the eleven CLECs offering UNE-P in Montana have withdrawn or stopped marketing their services in Montana.[7]

17. Petitions for a grant of a writ of certiorari from the United States Supreme Court to the D.C. Circuit for review of its decision in USTA II regarding line sharing have been filed by at least three parties: the National Association of Regulatory Utility Commissioners (NARUC); AT&T; and The California Public Utility Commission. Those petitions are pending.

c. Notice of Apparent Liability

18. On March 12, 2004, the FCC issued a Notice of Apparent Liability For Forfeiture (NAL) against Qwest, in which the FCC found that fines in the amount of 9 million dollars were appropriate for Qwest's failure to file interconnection agreements with state commissions as required by 47 U.S.C. §252. In the NAL, the FCC interpreted its Declaratory Ruling of 2002, and reiterated that "on its face, section 252(a)(1) does not further limit the types of agreements that carriers must submit to state commissions." (NAL ¶11, citing Declaratory Ruling ¶8.)

19. In the NAL the FCC imposed fines on Qwest in part for Qwest's failure to file an

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[5] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (TRO), ¶¶255 – 271.

[6] *United States Telecom Association v. Federal Communications Commission et al*, 359 F.3d. 554 (D.C.Cir. 2004) (USTA II).

[7] As of 1/31/04, Qwest informed the Commission that the CLECs purchasing UNE-P in Montana were Three Rivers, Excel Telecommunications; Ionex; MCI Metro; McLeod; New Access; NOS Communications; One Eighty (Avista); OptiCom; Vartec; and Z-Tel. Since March of 2004, Z-Tel informed the Commission it would no longer be offering service in Montana, and MCI has ceased marketing its services in Montana.

Internetwork Calling Name Delivery Service Agreement (ICNAM) for review and approval, as required by §252(a). NAL ¶13. The FCC concluded that the ICNAM agreement was required to be filed because it did not appear on its face to fall within one of the filing requirement exceptions set forth in the Commission's Declaratory Ruling, and accordingly it should have been filed for review and approval by the appropriate state commission. NAL, ¶13.

20. In the NAL the FCC stated that while §252(a)(1) is explicit in its filing requirements, the declaratory ruling provided certainty to those requirements by stating that any agreement creating an ongoing obligation and pertaining to the requirements of §251 is an interconnection agreement that must be filed with the state commission. NAL ¶22.

21. The FCC stated that interconnection agreements must be filed with the state commissions so that Qwest's competitors are able to opt into these agreements, and concluded that "Section 252(a)(1) is not just a filing requirement. Compliance with Section 252(a)(1) is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors." NAL, ¶¶31, 46.

d. Arguments of the Parties and Commission Decision

22. In its motion for reconsideration, Qwest argues that the agreement is not subject to the filing requirements of Section 252 because: 1) line sharing is not an element that is required to be made available under Section 251; 2) the declaratory ruling sets out explicit standards governing circumstances under which ILEC and CLEC agreements must be filed; and 3) the FCC preempts filing of private contracts with state commissions.

23. The Commission finds that the agreement between Covad and Qwest is subject to the filing requirements of 47 U.S.C. §252(a)(1). In reaching this conclusion, the Commission has not made a determination with regard to the status of line sharing as an element that is required to be offered under 47 U.S.C. §251. Qwest has argued that it is not obligated to offer line sharing as an unbundled network element pursuant to the TRO and the decision in USTA II. The Commission does not reach that argument. Regardless of Qwest's obligations under the TRO and USTA II, the agreement between Qwest and Covad is a public contract that pertains to the

obligations of 47 U.S.C. §251. The agreement sets forth a description of services and elements to be offered; it contains performance measurements and obligations; and it contains rate structures and elements. According to Qwest's own arguments to the FCC in its petition for a Declaratory Ruling, these sections satisfy the obligation Qwest has to file the agreement with the state commission for review and approval.

24. Qwest argues that the Declaratory Ruling sets out explicit standards governing the circumstances under which agreements between an ILEC and a CLEC must be filed with state commissions.[8] The Commission rejects Qwest's interpretation of the Declaratory Ruling. Contrary to Qwest's argument, the FCC stated in its Declaratory Ruling that "we believe that the state commissions should be responsible for applying in the first instance, the statutory interpretation we set forth today to the terms and conditions of specific agreements." Declaratory Ruling ¶7. The FCC declined to establish an exhaustive, all-encompassing interconnection agreement standard, leaving it to the state commissions to decide in the first instance whether a specific agreement should be filed under §252. Declaratory ruling ¶10.

25. The fact that the FCC in exercising its authority under 47 U.S.C. §251(d)(3) has concluded that line sharing is not an element that is currently required to be offered under 47 U.S.C. §251(c)(3) does not persuade the Commission that the agreement is therefore not subject to the filing requirements of §252. In the NAL the FCC concluded that an ICNAM agreement was subject to the filing requirements of §252 and imposed fines on Qwest for failing to make the requisite filing under §252. Calling Name Delivery has no greater relationship to the obligations of an ILEC under §251 than line sharing, and in fact, probably a lesser relationship. Consequently, requiring an agreement relating to line sharing to be filed under §252 is well within the range of agreements that are subject to the §252 filing requirements.

26. The agreement between Qwest and Covad pertains to the obligations a carrier has under §251, and that is all that is required for an agreement to be subject to the filing requirements of §252. Line sharing is not currently on the list of required elements that is established by the FCC. However, it was on that list until June 15, 2004 and it may be there

[8] Qwest brief page 6, Section C.

again, contingent on the outcome of appeals and current petitions to the FCC. Without question, line sharing, regardless of its current status of being on or off the list of required elements, is related to the obligations set forth in §251. The FCC has stated that an agreement relating to §251(b) or (c) must be filed with a state commission for approval (Declaratory Ruling footnote 26) and that any agreement pertaining to unbundled network elements must be filed pursuant to §252(a)(1). (NAL ¶22, citing the declaratory ruling ¶8.)

27. Whether an agreement must be filed under §252 depends on whether the agreement is related to any of the obligations an ILEC has under §251(b) and (c) to make its network available to its competitors. The controlling factor is whether the agreement pertains to the obligations contained in §251(b) or (c). The agreement between Qwest and Covad for line sharing unquestionably pertains to the obligations Qwest has to open its network to its competitors under §251, and as a result the agreement is a public agreement subject to the filing requirements of §252. The dispositive issue is whether the agreement relates to Qwest's obligations under §251, and the answer to that question is yes. Consequently the agreement must be filed under §252.

28. Finally, the FCC has clearly left it to each state commission to determine in the first instance whether a specific agreement is to be filed under §252. Declaratory ruling ¶7, ¶¶10-11. In Montana two of eleven UNE-P providers have exited the market since the issuance of the D.C. Circuit Court of Appeals decision in USTA II. The Commission finds that Qwest is required to submit its agreement with Covad to the Commission for approval, and that the agreement is thereby available to competitors as a matter of law. Requiring the agreement to be filed under §252 accomplishes the objectives of the Act, as reiterated by the FCC in its NAL, that filing of interconnection agreements under §252 is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors. The Commission finds that it is critical to ensure this protection is afforded to competitors operating in the Montana market, and consequently finds that the agreement between Qwest and Covad must be filed under §252, resulting in its availability to all of Qwest's competitors as a matter of law.

2. Approval of the Qwest – Covad agreement

29. Having concluded that the agreement filed with the Commission on May 19, 2004 is an interconnection agreement, the Commission has reviewed the agreement for compliance with the Act. The standards for approving an interconnection agreement differ, depending on whether the agreement has been voluntarily negotiated or has been arbitrated by a state commission. 47 U.S.C. § 252(e)(2). The Agreement submitted for approval in this proceeding was negotiated voluntarily by the parties and thus must be reviewed according to the provisions in 47 U.S.C. § 252(e)(2)(A).

30. The Commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1). Section 252(e)(2)(A) prescribes the grounds for rejection of an agreement reached by voluntary negotiation:

> (2) GROUNDS FOR REJECTION. – The State commission may only reject –
>
> (A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. § 252(a)] if it finds that
>
> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
>
> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity[.]

31. Notwithstanding the limited grounds for rejection in 47 U.S.C. § 252(e)(2)(A), the Commission's authority is preserved in § 252(e)(3) to establish or enforce other requirements of Montana law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to § 253 of the 1996 Act, which does not permit states to impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

32. Unlike an agreement reached through arbitration, a voluntarily negotiated agreement need not comply with standards set forth in §§ 251(b) and (c). 47 U.S.C. §§ 251(b), 252(c) and 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and that are not determined according to the pricing standards included in § 252(c) of the Act, as would be

required in the case of arbitrated rates set by the Commission.

33. By approving this Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that §§ 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

34. No comments have been received that indicate the Agreement does not comply with federal law as cited above or with state telecommunications requirements. The Montana Consumer Counsel, who represents the consumers of the State of Montana, has not intervened in this approval proceeding, and has not filed comments to indicate that any portion of the Agreement is not consistent with the public interest, convenience and necessity. There have been no objections raised that the Agreement discriminates improperly or is not consistent with the public interest, convenience and necessity.

35. The Commission finds that the terms in the Agreement appear to conform to the standards required by the Act and should be approved. In approving this Agreement, the Commission is guided by provisions in state and federal law that have been enacted to encourage the development of competitive telecommunications markets. Section 69-3-802, MCA, for example, states that it is the policy of the State of Montana to encourage competition in the telecommunications industry and to provide for an orderly transition to a competitive market environment.

36. Covad and Qwest can agree that nothing in their Agreement prohibits certain conduct, but if that conduct otherwise violates the law, the provision in the Agreement that sanctions such conduct is void. §§ 28-2-604, 28-2-701, 28-2-702, MCA. Any provision or term of this Agreement that is in conflict with the law, whether or not specifically addressed by the Commission, is rejected as a matter of law and not in the public interest.

37. The Commission rejects those portions of the agreement that do not conform with the requirements the Commission has imposed on previous interconnection agreement as being in the public interest. Specifically, the following section of the agreement is rejected:

Section 3.2.3 is rejected as it requires only ten days notice prior to disconnection.

The Montana Commission has consistently rejected this language as contrary to the public interest, and has required carriers to provide at least thirty days notice prior to disconnecting services.

C. Conclusions of Law

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. Qwest is a public utility offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the* Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the state agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

4. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

5. The Commission finds that the agreement between Covad and Qwest is a negotiated interconnection agreement subject to the requirements of 47 U.S.C. §252(a)(1) and the Commission has treated the filing made on May 19, 2004, as a negotiated interconnection agreement filed with the Commission subject to §252(a)(1).

6. The Commission has jurisdiction to approve the agreement negotiated by the parties and submitted to the Commission according to § 252(e)(2)(A). Section 69-3-103, MCA.

7. Approval of interconnection agreements by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(e) limits the Commission's review of a negotiated agreement to the standards set forth therein for rejection of such agreements. Section 252(e)(4) requires the Commission to approve or reject the Agreement by August 17, or the Agreement will be deemed approved.

8. The Commission may reject a portion of a negotiated agreement and approve the remainder of the agreement if such action is consistent with the public interest, convenience and necessity and does not discriminate against a carrier not a party to the agreement. 47 U.S.C. § 252(e)(2)(A).

Order

THEREFORE, based upon the foregoing, it is ORDERED that the Agreement of the parties submitted to this Commission for approval pursuant to the 1996 Act is approved subject to the following condition:

Section 3.2.3 is rejected subject to the terms and conditions set forth in Paragraph 37 of this Order. The remainder of the agreement is approved.

The parties shall file subsequent amendments to the Agreement with the Commission for approval pursuant to the 1996 Act.

IT IS FURTHER ORDERED that the Motion for Reconsideration is denied.

DONE AND DATED this 17th day of August 2004, by a vote of 4 to 1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

BOB ROWE, Chairman, dissenting (dissent attached)

THOMAS J. SCHNEIDER, Vice Chairman

MATT BRAINARD, Commissioner

GREG JERGESON, Commissioner

JAY STOVALL, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.

Statement of Chairman Rowe
Docket 2004.6.89, Covad – Qwest Interconnection Agreement

Line sharing is an entry path that competitive data providers have used successfully and which several continue to rely upon, including but not limited to Covad. Many disagree with the Federal Communications Commission's decision to remove line sharing from the list of required elements (possibly including a majority of FCC Commissioners). However, the FCC's decision as to line sharing is not subject to any stay, and at present has the effect of law. If it is revised by the FCC's or reversed through litigation then an agreement such as the one before us would clearly have to be filed under Section 252.

Narrowly, the issue to be decided is whether the Montana Public Service Commission has the authority to impose the Section 252 requirements on this specific voluntarily-negotiated line sharing agreement. The question of when Section 252 filing is required is likely to recur, but the answer will probably be very fact-specific and case-specific during this period of vertiginous flux. There are countervailing arguments. However, on balance, as to the present facts, the more direct analysis leads to the conclusion that this specific agreement does not come within the ambit of Section 252 of the federal law.

Less narrowly, the issue is how should the Commission use any discretion it has as to Section 252 filing requirements in order to facilitate the execution of voluntary agreements for de-listed elements. Apart from any public interest concerns with the agreement identified by the Commission, it would not be necessary to answer the question of whether filing is required. In an environment of substantial legal and economic uncertainty and disruption, the Commission almost has no choice but to identify new ways to facilitate the achievement of commercially feasible wholesale agreements. Rather than leaping with both feet into the jurisdictional bogs of Lake Serbonis, the Commission could have identified its policy goals and developed a strategy best calculated to achieve them, given the current state of the law. There is more than slight risk that the Montana Commission's action to require Qwest to file under Section 252 an agreement it was not required to enter under Section 251 will trigger an equal and opposite reaction, discouraging the very behavior we all agree is valuable, if not essential.

In this case, Qwest voluntarily entered into facilitated mediation with Covad; reached a voluntary commercial agreement; made an informational filing of the agreement with the Montana PSC; posted the agreement to the web; and makes the agreement available for other wholesale customers to "opt in." In the absence of a legal requirement that line sharing (or other currently de-listed elements) be made available, this is conduct to be encouraged. Intending to promote access to wholesale service, the Commission may unintentionally thwart such access.

Instead of its current problematic course, I suggest the Commission make the following declarations:

1. In the absence of an unbundling requirement, the PSC strongly encourages voluntary negotiations.
2. The Commission is especially concerned that small facilities-based CLECs, such as those serving much of Montana, are able to reach commercially viable agreements.
3. CLECs should have sufficient commercial certainty about the terms that will be available to them that they may execute their business plans.
4. The Commission expects voluntary agreements to be made publicly available, both by informational filing with the Commission and by posting to the web.
5. The Commission expects Qwest to be neutral as between wholesale customers, and to make this and any other non-Section 251 agreements available on neutral terms to other wholesale customers.

RESPECTFULLY SUBMITTED this 20th day of September, 2004

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BOB ROWE, Chairman