

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 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:

## EXHIBIT B

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