BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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 QWEST CORPORATION'S OPENING BRIEF

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

TABLE OF CONTENTS

I. INTRODUCTION 2

II. LEGAL BACKGROUND 3
- A. The 1996 Act 3
  - 1. Relevant Provisions of the 1996 Act 5
    - a) ILECs and CLECs 5
    - b) Sections 251(b) and (c). 6
    - c) UNEs—Section 251(d)(2) Impairment Standard. 7
  - 2. Role of State Commissions Under the Federal Act 8
  - 3. The FCC's *Declaratory Order* Defines the Filing Standard Under Section 252 10
- B. The Line Sharing Network Element 12
  - 1. Technical Description of Line Sharing 12
  - 2. The Legal History of Line Sharing 14

III. WASHINGTON FACTUAL BACKGROUND 17
- A. The Multiband Agreements 17
- B. Actions before the Washington Commission 18

IV. ARGUMENT 19
- A. The Staff's Recommendation Urges Unlawful Action and Must be Rejected 19
  - 1. The FCC has Exclusive Authority to Decide Which Network Elements Must Be Provided Under Section 251(c). 19
  - 2. The Authority of the Commission to Review and Approve Agreements Under the Federal Act is Governed by Federal Law. 20
  - 3. The Section 252 Filing Requirement Relates Solely to Services or Elements Required by Section 251. 21
- B. None of Staff's Justifications for Asserting Jurisdiction over the Commercial Agreement is Valid. 23
  - 1. Staff's contention that the Commercial Agreement and the ICA form a Single Integrated Agreement is Wrong and Should be Rejected. 24
    - a) There are no terms and conditions in the Commercial Agreement that control or otherwise impact terms and conditions in the ICA. 27
    - b) The fact that new customers added under the ICA count in determining the rates for line sharing under the commercial agreement is irrelevant and does not cause the commercial agreement to be integrated with the ICA. 28
    - c) The fact that line sharing is grandfathered does not affect the ICA, nor does it integrate the Commercial Agreement into the ICA. 29
  - 2. Staff's Desire to Drive a Policy Result Can Not Subvert Section 252 30
  - 3. Staff's Suggestion that the FCC Did Not Adopt an Enforceable Filing Standard in the *Declaratory Order* is Inconsistent with the Order. 33

V. CONCLUSION 34

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

1 This matter is before the Washington Utilities and Transportation Commission ("Commission") for a determination of whether the commercial agreement entered into between Qwest Corporation ("Qwest") and Multiband Communications LLC ("Multiband") is an interconnection agreement subject to approval by the Commission under section 252(e)(1) of the Federal Telecommunications Act of 1996 (the "Act")[1].

2 On September 30, 2004, Qwest and Multiband entered into a commercial arrangement for line sharing services (referred to herein as the Commercial Agreement or the Line Sharing Arrangement) in the state of Washington. October 25, 2004 Qwest provided a copy of the terms of the Commercial Agreement to the Commission for informational purposes. In that filing, Qwest described why it did not believe that the arrangement constituted an interconnection agreement under section 252.[2] Later, on January 18, 2005, Multiband filed the arrangement with the Commission for approval under section 252.

3 The matter was assigned a docket number and scheduled for the Commission's Open Meeting on February 23, 2005. Commission Staff, in its Open Meeting Memorandum ("Staff Memo"), recommended that the arrangement be approved under section 252. Qwest and Multiband both argued that the matter should be deferred for further consideration, and Qwest also presented argument on the merits, recommending that the Commission either take no action, or affirmatively declare that the Commercial Agreement was not subject to filing and approval. Thereafter, the Commission requested briefing on the issues presented. In accordance with the

[1] Pub. L. 104-104, 110 Stat. 56. Section 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 is submitted shall approve or reject the agreement, with written findings as to any deficiencies."

[2] Qwest has provided the Commercial Agreement to all 14 of its state commissions. Of these, Minnesota and New Mexico have considered it and have correctly ruled that the Commercial Agreement is not a section 252 agreement. Montana has ruled to the contrary, and that decision is currently on appeal 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. The New Mexico and Minnesota Commission decisions are attached hereto as Exhibit A.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

schedule established by the Administrative Law Judge, Qwest hereby files its opening brief.

I. INTRODUCTION

4 Under federal law, 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 25 (b) and (c)* of the Act.[3] The authority of state commissions to review and approve interconnection agreements is limited to agreements that involve such obligations. This Commission has recognized that principle in prior cases.[4] However, Staff's recommendation in this case would expand the standard so that it loses every vestige of meaning. Pursuant to an unambiguous ruling from the Federal Communications Commission ("FCC")—the federal agency charged with implementing the Act—that has been affirmed by the United States Court of Appeals for the D.C. Circuit,[5] Qwest no longer has any obligation under section 251 to provide the "line sharing" service that is the subject matter of the Commercial Agreement.

5 Qwest's voluntary decision to provide a line sharing service through the Commercial Agreement thus does not involve a facility or service that Qwest has a duty to provide under sections 251(b) or (c), and there is, therefore, no requirement for Qwest to file the agreement with the Washington Commission for review and approval and no jurisdictional basis for the Commission to assert authority over the agreement. Requiring Qwest to file the Commercial

---

[3] *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 FCC LEXIS 4929, ¶ 8 (Oct. 4, 2002) ("Declaratory Order").

[4] *See In the Matter of Request of MCIMetro Access Transmission Services, LLC and Qwest Corporation for Approval of Negotiated Interconnection Agreement, in its Entirety, Under the Telecommunications Act of 1996, Order No. 01, Approving Negotiated Interconnection Agreement in Its Entirety*, Docket Nos. UT-960310 and UT-043084, Oct. 20, 2004. ("MCI/QPP Order")

[5] *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"); United States Telecom Ass'n v. FCC, 359 F.3d 554, 585 (D.C. Cir. 2004) ("USTA II").

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Agreement, and exercising jurisdiction to approve it, would exceed the Commission's authority under the Act. The Commission does not have authority over consensual, privately-negotiated commercial agreements that do not involve ongoing obligations for services provided under sections 251(b) and (c). An unlawful exercise of that authority conflicts directly with the Act's fundamental objective of transitioning the telecommunications industry away from a regime of extensive regulation and toward a more market-driven, deregulatory structure.[6]

6 Staff's recommendation that the Commission approve the Commercial Agreement would exceed the Commission's authority under the Act, and the Commission should therefore deny Staff's request and take no action on the Commercial Agreement.

II. LEGAL BACKGROUND

A. The 1996 Act

7 The 1996 Act was a watershed event in the history of the telecommunications industry because Congress fundamentally altered the regulatory scheme that had been followed by federal and state regulators for nearly 100 years. For many decades, the telecommunications industry was regulated under the assumption that the provision of telephone services was a natural monopoly. Thus, the law that pre-dated the 1996 Act (1) provided for the enfranchisement of one provider of telephone service in each geographical area, (2) limited or banned competitive entry by other providers into that exclusive area, and (3) pervasively regulated the revenues, costs, and profits of the monopoly provider. This form of regulation is commonly known as "rate base, rate-of-return" regulation.

8 However, in the latter part of the twentieth century, this form of pervasive regulation largely came to an end as a result of dramatic technological and legislative changes that fundamentally altered the industry. The AT&T Bell System was divested in 1984, resulting in the creation of

[6] *TRO* ¶ 62 n.198.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Regional Bell Operating Carriers ("RBOCs") that were the exclusive providers of local telephone service in their individually designated regions of the country. The divestiture also paved the way for the development of the robust competition in the long distance market. In addition, wireless telephone service was introduced in the early 1980s, and revolutionized the industry by evolving from a service targeted at a few elite customers into a mass market service that competes directly with traditional telephone service. Cable television companies also have reconfigured their networks in many parts of the country to emerge as additional providers of telephone service and high-speed access to the Internet. Access to the Internet has become ubiquitous. Recent technological advances also permit companies to provide voice telephone service over the Internet, resulting in yet another form of competition. At the same time, many carriers have widely deployed fiber optic networks that now criss-cross the country and bring consumers the broad bandwidth ("broadband"[7]) needed to support advanced telecommunications services.

9 A by-product of these extraordinary changes in the industry over the past two decades has been the emergence of many new competitive companies that were formed to provide long distance, broadband, local, and wireless services. With the nationwide entry of these new companies into the telecommunications industry, the single-provider monopoly model became an anachronism. In the mid-1990s, recognizing that this model no longer made sense and was not in the public interest, Congress and state legislatures dismantled the prior regulatory structure and replaced it with a new, pro-competitive policy, de-regulatory regime.

10 The Act is the most significant of these legislative changes because it represents an effort by Congress to implement, through a single federal statute and FCC rules, a comprehensive pro-

[7] "Broadband" is a term used to describe high-speed data connections, particularly connections to the Internet. The traditional 56K dial-up connection is, in contrast, a "narrowband" connection. Broadband connections—DSL and cable modem—provide customers with much faster Internet access, including faster ability to upload and download data much faster.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

competitive telecommunications policy throughout the United States. By establishing requirements for carriers to interconnect their networks and for incumbent local exchange carriers ("ILECs") like Qwest to resell their retail services and lease piece-parts of their networks to competitors, the Act seeks to promote competition in local exchange markets.[8]

11 But Congress's goal was not just pro-competitive, it was also deregulatory; Congress contemplated a system where the markets, not regulators, governed the delivery of telecommunications services. For example, Congress expressed the goal of simultaneously moving to a "*pro-competitive, deregulatory system*" to replace the heavily regulated environment that has existed for many decades.[9] In other words, Congress has mandated a telecommunications industry in which regulatory mandates take a back seat to the workings of the marketplace and, in particular, to arms-length commercial transactions and consensual, privately-negotiated agreements like the Commercial Agreement.[10]

1. Relevant Provisions of the 1996 Act

a) ILECs and CLECs

12 The Act distinguishes among different types of competitors. Under the Act, for example, Qwest is an ILEC,[11] while non-incumbent carriers in the local exchange markets are referred to

---

[8] *TRO* ¶ 1.

[9] It is clear from the legislative history that the "goals of the Act were to provide for a *pro-competitive, deregulatory national framework* designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans by opening all telecommunications markets to technology . . . .'" *Id.* ¶ 62 n.198, quoting Joint Manager's Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) (Joint Conference Report) (emphasis added).

[10] While the Act requires carriers to enter into "interconnection agreements" that set forth the terms and conditions for interconnecting their networks and for the leasing of network elements by competitive local exchange carriers ("CLECs") from incumbent local exchange carriers ("ILECs"), Congress has established a preference for negotiated interconnection agreements instead of agreements imposed by regulatory fiat. Thus, even where regulatory mandates still govern, they are designed to mimic conditions in the competitive marketplace. *See, e.g.,* 47 U.S.C. § 252 (a).

[11] ILECs include the former Bell System companies—"Bell Operating Companies," or "BOCs"—that provided local exchange service before and after the Bell System breakup in 1984. In Washington, Qwest, the successor to Pacific Northwest Bell and U S WEST Communications, is an ILEC and is therefore subject to the provisions of the Act that apply to ILECs.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

as competitive local exchange carriers ("CLECs").[12] To help achieve Congress's goal of promoting competition for local exchange service, the Act requires ILECs and CLECs to interconnect their networks in order to exchange traffic with each other and also requires ILECs to lease to CLECs certain piece-parts of the ILECs' networks, referred to as "unbundled network elements" or "UNEs."[13]

b) Sections 251(b) and (c).

13 The duties of ILECs and CLECs are described in section 251. Section 251(b) requires both ILECs and CLECs to: (a) allow the resale of each others' services, 47 U.S.C. § 251(b)(1); (b) provide number portability, *id.* § 251(b)(2); (c) provide dialing parity, *id.* § 251(b)(3); (d) provide access to rights-of-way, *id.* § 251(b)(4); and (e) establish reciprocal compensation arrangements, *id.* § 251(b)(5).

14 Section 251(c) defines four other requirements that apply only to ILECs: (a) provide interconnection of the ILEC network to other networks, *id.* § 251(c)(2); (b) provide access to UNEs, *id.* § 251(c)(3); (c) allow CLECs to resell services at wholesale rates, *id.* § 251(c)(4); and (d) provide for collocation of CLEC equipment in ILEC buildings, *id.* § 251(c)(6).

15 Each of these requirements imposes specific duties that are defined further in the FCC's rules and orders implementing the Act. These implementing rules and orders are binding on carriers, state commissions, and courts.

16 The Act requires carriers to set forth the terms and conditions relating to the duties imposed by sections 251(b) and (c) in negotiated or arbitrated interconnection agreements that must be filed with state public utility commissions for approval.[14] Significantly, in one of its binding

[12] There are hundreds of CLECs in the United States. In Washington alone, Qwest has interconnection agreements with over 100 CLECs, including Covad, MCI, AT&T, and Multiband.

[13] 47 U.S.C. § 251(a)(1); *id.* § 251(c)(3).

[14] 47 U.S.C. § 252(e)(1).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

orders, the *Declaratory Order*, the FCC concluded that the only agreements carriers must file for approval are interconnection agreements that create the ongoing obligations of the duties imposed by sections 251(b) and (c).[15] Consistent with the Act's de-regulatory purpose, there is no requirement for carriers to file and seek regulatory approval of agreements that do not address the section 251(b) and (c) requirements, and states have no authority under the Act to require carriers to file such agreements.

17 This dispute arises because of Staff's recommendation that the Commission should require Qwest and Multiband to file the Commercial Agreement for Commission approval, an agreement that does not involve any ongoing obligations to provide any of the services required by sections 251(b) or (c). While carriers must file for approval interconnection agreements relating to the UNEs that an ILEC must provide under section 251(c)(3), there is no obligation to file agreements relating to network elements that an ILEC is not required to provide and that the ILEC provides through commercial, arms-length negotiations and agreements. Here, the Commercial Agreement between Qwest and Multiband involves a network element known as "line sharing," which the FCC in the *TRO* and the U.S. Court of Appeals for the D.C. Circuit in *USTA II* have unequivocally ruled is *not* a section 251(c)(3) UNE for orders placed after October 1, 2004.[16] Because there is no section 251 requirement for Qwest to provide line sharing for such orders, and because the Qwest/Multiband Commercial Agreement pertains to only line sharing orders placed *after* October 1, 2004, it does not involve an "ongoing obligation" relating to a section 251(b) or (c) requirement and the Commission therefore had no authority to require that the parties file it for regulatory approval.

c) UNEs-—Section 251(d)(2) Impairment Standard.

18 The obligation of an ILEC under section 251(c)(3) to provide particular UNEs is limited.

---

[15] *Declaratory Order* ¶ 8, n. 26.

[16] *TRO* ¶ 255, *et seq.*; *USTA II*, 359 F.3d at 585.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

While the Act imposes a requirement on ILECs to allow CLECs to lease portions of the ILECs' networks, section 251(d)(2) states that ILECs have an obligation to do so *only* where the FCC finds that "the failure to provide access to such network elements *would impair* the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[17] Thus, unless the FCC specifically determines that the failure to provide a specific element *would impair* the ability of competitors to provide the services they seek to offer, the ILEC has no duty to provide the particular element to CLECs under section 251(c)(3). The FCC's and federal court's conclusions resulting from their application of the impairment test to the services addressed in the Commercial Agreement are central to the issues in this case.[18]

2. Role of State Commissions Under the Federal Act

19 The Act represents a clear assertion of federal authority over telecommunications regulation. The Supreme Court has ruled that the Act *preempts* state regulation with regard to matters covered by the Act.[19] Thus, the FCC—not state commissions—has the primary responsibility, subject to federal court review, to adopt rules that lawfully implement the Act.[20]

20 At the same time, Congress delegated several specifically and narrowly enumerated tasks to the states and their public utility commissions. These tasks, and the state commission's authority to perform them, derive from the Act, not from the state commission's state statutory authority.[21] Federal circuit courts describe this authority as a federal "gratuity" and characterize

---

[17] 47 U.S.C. § 251(d)(2) (emphasis added).

[18] Nothing prevents an ILEC from agreeing with a CLEC to provide a service no longer required by section 251(c)(3). In that case, as in the case of the Commercial Agreement, the agreement is a private, consensual agreement and not a matter of legal compulsion under the Act.

[19] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 378 n.6, 119 S. Ct. 721, 730 n.6 (1999) ("*Iowa Utilities Board*").

[20] *Id.*, 525 U.S. at 378, 119 S. Ct. at 730 (based on section 201(b) of the Act, "[t]he FCC has rulemaking authority to carry out the 'provisions of the Act,' with include §§ 251 and 252").

[21] *MCI Telecommunications Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323, 343-44 (7th Cir. 2000) ("*MCI Telecom*") ("authority to act [is] derived from provisions of the Act and not from [its] own sovereign authority"); *see also* Richard J. Pierce, Jr., *Administrative Law Treatise* §14.2 ("An agency has the power to resolve a dispute or an issue only if Congress has conferred on the agency statutory jurisdiction to do so.").

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

state commissions as "deputized federal regulators."[22] The Ninth Circuit has unequivocally ruled that "the FCC's implementing regulations . . . must be considered part and parcel of the requirements of the Act."[23] Thus, state commissions are required to make their decisions consistent with the Act, as interpreted by the FCC and the federal courts, and only have the powers that Congress has expressly and unequivocally delegated to them.

21 Congress delegated to the states three primary functions. First, although the FCC defined the pricing methodology to be employed to set prices for UNEs, the actual proceedings to set those prices are conducted by the state commissions.[24] Second, state commissions are authorized to resolve disputes over the terms and conditions of the interconnection agreements that govern the ILECs' and CLECs' section 251(b) and (c) obligations when the parties are unable to agree on all of the terms.[25] Finally, Congress gave state commissions the power to approve both arbitrated and negotiated interconnection agreements addressing the terms and conditions of services required by section 251.[26]

22 In *Pacific Bell v. Pac West Telecomm, Inc.* ("*Pac West*"),[27] the Ninth Circuit recently described the Act's narrowly confined delegation of authority to state commissions:

> It is clear from the structure of the Act, however, that the authority granted to state regulatory commissions is confined to the role described in § 252—that of arbitrating, approving, and enforcing interconnection agreements. As the Supreme Court noted in *AT&T v. Iowa Utilities Board*, the Act *limited* state commissions' authority to regulate local telecommunications competition. . . . The Act did not grant state

[22] *See MCI Telecom.*, 222 F.3d at 343-44; *MCI Telecommunications Corp. v. Public Service Commission of Utah*, 216 F.3d 929, 938-39 (10th Cir. 2000) ("Thus, with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity.").

[23] *US West Communications v. Jennings*, 304 F.3d 950, 957 (9th Cir. 2002).

[24] 47 U.S.C. § 252 (d).

[25] *Id.* § 252 (b) & (c). Typically, most terms are agreed to and the state commission's role is to rule on only those provisions that the parties are unable to agree upon.

[26] 47 U.S.C. § 252 (e).

[27] 325 F.3d 1114 (9th Cir. 2003).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

> regulatory commissions additional general rule-making authority over interstate traffic: ". . . State Commissions have been given only the power to resolve issues in the arbitration and to approve and reject interconnection agreements, not to issue rulings having the force of law beyond the relationship of the parties to the agreement."[28]

Thus, the controlling Ninth Circuit authority holds that a state commission's role under the Act is limited to the specific tasks, and only those tasks, that Congress has expressly delegated to the states. A state commission has no authority to impose requirements on ILECs that do not exist under the Act.

23 In this case, the question is precisely the extent of the Commission's jurisdiction to review and either approve or reject negotiated agreements. Staff's recommendation, if followed, would have the Commission improperly asserting 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 Act. Congress did not give state commissions that authority, and, therefore, Staff's recommendation, if followed, would result in unlawful conduct by the Commission. Of equal concern is the fact that the Commission's assertion of authority where it has none would effectively impose a requirement on Qwest to file for approval all future commercial agreements, including those related to elements that are not required by section 251.

3. The FCC's *Declaratory Order* Defines the Filing Standard Under Section 252

24 In 2002, Qwest filed a petition with the FCC seeking a declaratory ruling defining the scope of the section 252(a)(1) requirement that carriers file agreements with state commissions for review and approval. The petition requested the FCC to define which agreements constitute "interconnection agreements" that must be filed with state commissions under section 252.

[28] 325 F.3d at 1126-27 quoting *MCI Telecomm. Corp. v. Bell Atlantic-Pa.*, 271 F.3d 491, 516 (3d Cir. 2001) (italics in original).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

The FCC's Order, the "*Declaratory Order*," sets forth explicit standards that state commissions and carriers must apply to determine if an agreement should be filed. The standard is that ILECs must, pursuant to section 252(a)(1), file any agreement that "creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, <u>unbundled network elements</u>, or collocation."[29] The FCC characterized this standard as properly balancing the right of CLECs "to obtain interconnection terms pursuant to section 252(i)" with the equally important policy of "removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs."[30] The FCC conclusively ruled that there is no requirement that an ILEC file *all* wholesale agreements with CLECs:

> We . . . disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier . . . . Instead, we find that only those agreements that contain an *ongoing obligation relating to section 251(b) or (c)* must be filed under section 252(a)(1).[31]

25 On this particular issue, Staff has pointed out language in that same order noting that state commissions are "well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an interconnection agreement", and that state commissions should "determine in the first instance which sorts of agreements fall within the scope of the statutory standard."[32] Staff argues that that is what the Commission may do in this case. Staff is wrong. What the FCC did in the declaratory order is to explain the clear statutory standard for filing, and to simply defer to the commissions the factual analysis as to whether a particular agreement fits under the standard. What the FCC clearly did not do was to delegate to the state commissions the authority to promulgate an entirely new and different standard for filing,

---

[29] *Declaratory Order* ¶ 8 (italics in original; underlining added).

[30] *Id.*

[31] *Id.* n.26 (italics in original; underlining added).

[32] Staff Memo at p. 4.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

especially a standard so broad as to capture commercial agreements that the FCC had just held are not subject to filing.

B. The Line Sharing Network Element

26 Line sharing is also referred to as the "high frequency portion of the loop."[33] In the subsections that follow, Qwest provides a technical description of line sharing and a summary of the law showing that ILECs do not have any obligation under section 251 to provide the line sharing services addressed in the Commercial Agreement.

1. Technical Description of Line Sharing

27 A telecommunications network consists of many pieces of hardware and software. At a high level, a telecommunications network is comprised of three key elements: (1) loops, (2) switches, and (3) interoffice facilities:

- The loop—also commonly referred to as a "line"—is the connection (usually a pair of copper wires[34]) that directly links the end user customer to the switch that provides that customer with dial tone. A loop is dedicated only to that customer.
- A switch[35] is a sophisticated computer that provides dial tone, typically to several thousand end user customers. A switch consists of the hardware and software necessary to route calls to and from those customers depending on the digits entered by the customer.
- Interoffice facilities are the connections—typically fiber optic cable—that link one company's switches together, and that connect the network of one telecommunications company to the network of another company.[36]

28 While the line sharing element is not a loop, its functions are located in the loop portion of the

---

[33] As will be discussed in more detail below, the term "line sharing" describes the situation where the CLEC uses only the high frequency portion of the loop for its service and the ILEC continues to use the low frequency portion of the loop to provide voice communications. Thus, the CLEC and ILEC "share" the line.

[34] Most loops are copper wire, although in some cases, the loop may be a combination of fiber optic cable and copper wire. Whether all copper or a combination of copper and fiber, the loop is the dedicated link between the customer and the switch serving the customer.

[35] In telecommunications jargon, a switch may also be referred to as a "central office" or in other contexts as a "wire center," though those terms are also broader references to both the switch and the building in which it is located.

[36] As with most telecommunications terms, inter-office facilities also have some synonyms. In some contexts, inter-office facilities are known as "trunks" or as "transport facilities."

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

network. Historically, loops were the connection that gave customers access to the network in order to speak to each other (*i.e.*, voice communications). The function of loops has expanded in the past decade, however, as the personal computer/Internet revolution has dramatically changed the way that customers use telecommunications networks. While customers of course still use loops for voice calls, a majority of homes now also use them to gain access to the Internet.

29 Originally, Internet access was accomplished over telephone lines with relatively slow transmission speeds. Over time, many customers have become frustrated with the slow speed of dial-up connections, thus creating a large demand for high-speed broadband connections. Responding to that demand has created a highly competitive market for broadband connections, which has been filled by several types of competitors using different technologies: (1) cable TV companies provide high-speed service over their coaxial cable network ("cable modem service"); (2) other companies provide high-speed access through wireless technologies; and (3) telephone companies like Qwest provide high-speed Internet access over copper loops through a service known as Digital Subscriber Line ("DSL"). The Commercial Agreement relates to DSL-type services over Qwest's network in Washington.

30 DSL is provided by equipment (a "splitter") that allows a loop to be used simultaneously for a high-speed Internet connection and voice communications. The equipment does this by splitting the frequency of the loop; the high frequency portion is used for the Internet connection and the low frequency portion is used for voice communications. The DSL equipment separates the two frequencies, directing the high-frequency portion to the Internet and the low-frequency portion to the traditional public switched telephone network. Thus, DSL allows a customer to use a single loop simultaneously for both Internet and voice communications without having one form of communication interfere with the other.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

31 The FCC has determined that CLECs are impaired without access to the "complete loops" (known as "unbundled loops") used to serve homes and small businesses.[37] Thus, CLECs can obtain a complete unbundled loop from Qwest as a UNE under section 251(c)(3). The issues in this case, however, arose because some CLECs do not want access to the entire loop, but only access to the high frequency portion of the loop. These CLECs focus primarily on providing DSL to customers under an arrangement where the ILEC continues to provide voice communications to the end user.[38] Because these CLECs have no desire for the entire loop, they petitioned the FCC to designate line sharing as a separate UNE under section 251(c)(3).[39]

2. The Legal History of Line Sharing

32 In 1999, the FCC (in its *Line Sharing Order*[40]) ruled that line sharing is a UNE under section 251(c)(3).[41] Qwest and other ILECs appealed, but nevertheless began providing line sharing to CLECs. On appeal, in the *USTA I* decision,[42] the D.C. Circuit found that the FCC had failed to properly apply the Act's impairment standard for line sharing.[43] Because the court concluded that the FCC had failed, as the Supreme Court requires, to "'apply *some* limiting standard rationally related to the Act,'"[44] it vacated and remanded the *Line Sharing Order*.[45] The remand

[37] *TRO* ¶ 249.

[38] *Id.* ¶ 255.

[39] They also asked state commissions to set the price for line sharing at significantly less than the cost of an unbundled loop.

[40] *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").

[41] *Id. ¶* 25.

[42] *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*").

[43] 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. In invalidating the FCC's impairment finding for line sharing, the court relied in part on Justice Breyer's separate opinion in *Iowa Utilities Board*, 525 U.S. at 427-31, 119 S.Ct. at 753-54 (J. Breyer, concurring in part and dissenting in part), in which he explained that "mandatory unbundling comes at a cost, including disincentives to research and development by both ILECs and CLECs." *USTA I*, 290 F.3d at 429.

[44] *Iowa Utilities Board*, 525 U.S. at 388, 119 S.Ct. at 734 (emphasis in original).

[45] *USTA I*, 290 F.3d at 429.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

of the *Line Sharing Order* was consolidated into the FCC's Triennial Review docket.[46] In August 2003, the FCC issued its order in the Triennial Review docket, known as the "*TRO*."

33 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 a UNE under section 251(c)(3).[47] The FCC rules implementing this determination provide in relevant part, per Section 51.319(a)(1)(i), 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 . . . ."[48]

34 Under the FCC transition rules, line sharing provided to customers that were signed up prior to October 2, 2003 (the effective date of the *TRO* is "grandfathered," meaning that line sharing must continue to be provided at the prices set by state commissions until the grandfathered end user "cancels or otherwise discontinues its subscription to the digital subscriber line service . . . ."[49] For new orders for line sharing 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.[50] Line sharing for orders placed on or after October 2, 2004 is not a UNE and, to the extent an ILEC elects to provide line sharing in response to such orders, the applicable terms and conditions are to be determined not through regulatory requirements, but through commercial negotiations between the ILEC and the CLEC.[51] Importantly, the

---

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

[47] *TRO* ¶ 255, et seq.

[48] 47 C.F.R. § 51.319 (a)(1)(i).

[49] *Id.* § 51.319 (a)(1)(i)(A).

[50] *Id.* § 51.319 (a)(1)(i)(B).

[51] *Id.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Multiband Commercial Agreement pertains to only new line sharing orders placed by Multiband after October 1, 2004.

35 In *USTA II*, the D.C. Circuit specifically upheld the FCC's decision to eliminate line sharing as a UNE required by section 251(c)(3).[52] As a result, line sharing for orders placed after October 1, 2004 is indisputably not a UNE, which the Commission Staff acknowledges.[53]

36 Under the Hobbs Act, the federal courts of appeal have "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or determine the validity of (a) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47."[54] Thus, the Hobbs Act grants exclusive jurisdiction over appeals of FCC decisions to the federal appellate courts and, absent reversal of an FCC determination by a federal appellate court, federal district courts and state commissions are obligated under the Hobbs Act to apply and abide by FCC rules and orders. Further, as state entities implementing a federal act, state commissions must follow decisions of federal courts interpreting the Act.[55] Thus, the Commission, and all parties in this case are bound by the decision in *USTA II* upholding the validity of the FCC's line sharing rules and by the FCC's ruling in the *Declaratory Order* establishing the standard for determining which agreements must be filed for review and approval by state commissions.

---

[52] *USTA II*, 359 F.3d at 585.

[53] Staff Memo, p. 2.

[54] 28 U.S.C. § 2342 (1) (emphasis added). 47 U.S.C. § 402 (b) sets forth a few specific exceptions to 47 U.S.C. § 402(a), none of which applies here.

[55] *See* 47 U.S.C. § 408 (Orders of the FCC "shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order."); *see also Hawaiian Tel. Co. v. Hawaii Pub. Util. Comm'n*, 827 F.2d 1264, 1266 (9th Cir. 1987); *Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 907 (8th Cir. 1984) *vacated on other grounds*, 476 U.S. 1167 (1986); *Southwestern Bell Tel. Co. v. Texas Pub. Util. Comm'n*, 812 F. Supp. 706, 708 (W.D. Tex. 1993).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

III. WASHINGTON FACTUAL BACKGROUND

A. The Multiband Agreements

37 When the FCC removes a network element from the regulatory requirements of section 251 and eliminates it as a required UNE under sections 251(c)(3), an ILEC and a CLEC may nevertheless enter a voluntary commercial agreement for the continued provision of the element. Such an agreement, however, is no longer the result of legal compulsion under section 251(c)(3), but is instead a voluntary agreement between a willing buyer and seller. In the wake of the *USTA II* decision, the FCC has encouraged ILECs and CLECs to enter private "commercial agreements": "On March 31, 2004, the [FCC] unanimously called on industry participants to engage in 'good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements.'. . . To date there have been numerous *commercial agreements* reached between incumbent LECs and competing carriers."[56]

38 In the weeks following the *USTA II* decision, Qwest successfully negotiated the Commercial Agreement with Covad, a CLEC who is a large user of line sharing services. This agreement is precisely the type of voluntary commercial agreement that the FCC has commended the industry for entering into.[57] Subsequently, Multiband requested the same terms and conditions that Covad had negotiated, and that is the Commercial Agreement at issue in this proceeding. The Commercial Agreement gives Multiband access to line sharing into the foreseeable future in Washington, and other states in Qwest's 14-state region. It specifically governs line sharing between Qwest and Multiband for new orders placed after October 1, 2004. Section 1.1 of the Commercial Agreement states that it "was negotiated and entered into *on commercial terms*

---

[56] *Order and Notice of Proposed Rulemaking, In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783 ¶ 7 (2004) (footnotes omitted; emphasis added).

[57] *Id.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

and conditions mutually agreed upon and without regard to the standards set forth in Sections 251, 252, 271 and other relevant provisions of the Act . . . ." (Emphasis added.)

39 Qwest and Multiband also executed another completely separate agreement (the "Interconnection Agreement") that addresses the provision by Qwest of line sharing for Multiband for new orders placed *up to* October 1, 2004, the period in which new line sharing orders remained a UNE under the FCC's rules. However, this case relates to the Commercial Agreement only, as there is no dispute regarding the filing and approval of the amendment to the parties' interconnection agreement. All of the rates, terms and conditions for line sharing orders placed before October 2, 2004 are contained in the Interconnection Agreement; there is no interdependency between the Interconnection Agreement and the Commercial Agreement.

B. Actions before the Washington Commission

40 Qwest submitted both agreements described above to this Commission. The Interconnection Agreement was filed for approval pursuant to section 252. However, by separate letter, Qwest informed the Commission that it had entered into the Commercial Agreement and that it was providing a copy of the agreement for informational purposes only. Qwest informed the Commission that it was specifically *not* filing the agreement for approval under section 252. No action was taken on the Commercial Agreement for many months. Then, on January 18, 2005, Multiband filed the Commercial Agreement for approval by the Commission, prompting the recommendation by Staff and this action.

41 Staff's recommendation, contained in the Open Meeting Memorandum of February 23, 2005, is that the Commission should approve the Commercial Agreement under sections 251 and 252 of the Act. Qwest believes that the Commission lacks jurisdiction under section 252 to approve the agreement, and therefore opposes such approval.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

IV. ARGUMENT

42 Ultimately, Staff's recommendation would have the Commission ignore the clear mandates of the FCC with regard to the types of agreements that are subject to filing and approval. The Commission should not take unlawful action by reaching beyond the clear standard for filing that has been articulated by the FCC. Nor should the Commission engage in a strained interpretation of the Commercial Agreement to somehow force a conclusion that it is an integrated part of the ICA.

A. The Staff's Recommendation Urges Unlawful Action and Must be Rejected

1. The FCC has Exclusive Authority to Decide Which Network Elements Must Be Provided Under Section 251(c).

43 An important starting point for an analysis of filing requirements under section 252 is the principle set forth in section 251(d)(2) that the FCC is *solely* authorized to determine which elements under section 251(c)(3) must be unbundled or that no longer need to be unbundled. Federal courts construing the Act support that conclusion.[58] In a decision issued in January 2005, the United States District Court for the Eastern District of Michigan observed that in *USTA II*, the D.C. Circuit "rejected the argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling determinations."[59] The court emphasized that, while the Act permits states to adopt some "procompetition requirements," they cannot adopt any requirements that are inconsistent with the statute and FCC regulations. Specifically, the court held that a state commission "cannot act in a manner inconsistent with federal law and then claim its conduct is authorized under state law."[60]

---

[58] *See Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) (stating that "we cannot now imagine" how a state could require unbundling of an element consistently with the Act where the FCC has not found the statutory impairment test to be satisfied).

[59] *Michigan Bell Tel. Co. v. Lark*, Case No. 04-60128, slip op. at 13 (E.D. Mich. Jan. 6, 2005).

[60] *Id.* The limitations on state authority were recently recognized by the Oregon commission, when it stated that a state commission "may not lawfully enter a blanket order requiring continuation of unbundling obligations that have been

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

44 This Commission has recognized this as a correct statement of the law, and has followed that law in its recent decision in the Covad Arbitration.[61] In Covad, the Commission found that while it has authority under section 252 to require access to unbundled network elements, a state-imposed requirement for Qwest to unbundle elements "de-listed" by the FCC from section 251(c)(3) would "be in direct conflict with federal law."[62] In that decision the Commission rejected Covad's proposal that would have required Qwest to provide de-listed elements "on the basis of conflict with federal law."[63]

2. <u>The Authority of the Commission to Review and Approve Agreements Under the Federal Act is Governed by Federal Law.</u>

45 The second important point is that the filing standards under section 252 are likewise governed by federal law. Whether the Commission has jurisdiction to approve or the agreement is a question of federal law governed by the Act and the controlling federal authorities. The controlling authorities that must be examined are the Act, the binding, relevant rules and orders of the FCC, and decisions of federal courts reviewing the Act.[64]

46 In this case, there are three primary controlling authorities. The first is the language of sections 251 and 252 which, on its face, demonstrates that the section 252 filing requirement relates only to services or elements required by section 251(b) or (c). The second is the *Declaratory Order*, in which the FCC defined "the scope of the mandatory filing requirement set forth in

---

eliminated by the *TRO* or *USTA II*." *In the Matter of the Investigation to Determine Whether Impairment Exists in Particular Markets if Local Circuit Switching is no longer available*, Oregon Docket UM-1100, Order Denying CLEC Motion at 6 (Oregon P.U.C. June 11, 2004). The Oregon Commission adopted the order issued by an Oregon administrative law judge.

[61] *In the Matter of the Petition for Arbitration of Covad Communications Company with Qwest Corporation Pursuant to 47 U.S.C. Section 252(b) and the Triennial Review Order*, Docket No. UT-043045, Order No. 06, February 9, 2005, ¶¶ 52-54.

[62] *Id.* at ¶ 52.

[63] *Id.*

[64] For example, several aspects of the FCC's Triennial Review decision are now controlled and defined by the decision of the D.C. Circuit in *USTA II*.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

section 252(a)(1)."[65] The third is the FCC order (the *TRO*) establishing that line sharing is not a UNE after October 1, 2004,[66] the rules implementing the *TRO*,[67] and the *USTA I* decision affirming the FCC's decision and rules.[68] Read together, these authorities conclusively establish that the Commercial Agreement is not an interconnection agreement under sections 251 or 252 and is therefore not subject to review or approval by the Commission. While the last two controlling authorities are discussed above, the first source of authority—the interplay between sections 251 and 252—bears closer scrutiny.

3. The Section 252 Filing Requirement Relates Solely to Services or Elements Required by Section 251.

47 Line sharing is no longer a required UNE for new orders after October 1, 2004. Given that undisputed principle, the question is whether a state commission has any basis under section 252 to require the parties to the privately-negotiated line Commercial Agreement to file it and whether the state commission has the authority to approve or amend it. A simple analysis of the interplay between sections 251 and 252 demonstrates that there is no statutory basis to conclude that the Commercial Agreement must be filed.

48 There are only two portions of section 252 that discuss the obligation of parties to file agreements with state commissions. The first, section 252(a)(1), 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*

---

[65] Declaratory Order, ¶ 1. See discussion in section II.A.3, supra.

[66] *TRO*, ¶¶ 255-69.

[67] 47 C.F.R. § 51.319 (a)(1)(i).

[68] A detailed discussion of these authorities is set forth in section II.B.2, *supra*.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

> *agreement . . . shall be submitted to the State commission under subsection (e) of this section.*[69]

The requirement to file the agreement is thus expressly premised on the agreement being for services or elements provided "pursuant to section 251."

49 The second reference to filing requirements is in section 252(e)(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.[70]

50 The reference in this section to agreements "adopted by negotiation" is to section 252(a)(1), which, as discussed above, relates only to services or elements required by section 251. Second, the reference to agreements "adopted by . . . arbitration" is to section 252(b) and (c), the subsections that define the state commissions' duties and powers to arbitrate agreements. Section 252(c)—the section that defines the standards for arbitration—requires that the state commission, in exercising its section 252 authority, "ensure that such resolution and conclusions meet the requirements of *section 251*, including the regulations prescribed by the [FCC] pursuant to *section 251*."

51 For both negotiated and arbitrated agreements, the filing requirement and state commission approval authority explicitly relate back to section 251. Thus, the obligations of section 252 come into being only if a section 251 service or element is the subject of the agreement. In the *Declaratory Order*, the FCC interpreted the section 252 filing requirement in precisely the same way.

52 When an element is no longer required by section 251, there is no section 252 obligation to file

---

[69] 47 U.S.C. § 252 (a)(1) (emphasis added).

[70] *Id.* § 252 (e)(1) (emphasis added).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

a privately-negotiated agreement with a state commission, nor does a state commission have section 252 power to review, approve, or amend the agreement. This Commission's recent interlocutory order in the "unfiled agreements" case repeatedly affirms that the FCC's *Declaratory Order* establishes the proper standard under which agreements should be evaluated,[71] yet Staff appears to be recommending a contrary result.

B. None of Staff's Justifications for Asserting Jurisdiction over the Commercial Agreement is Valid.

53 Staff claims that the Commercial Agreement should be filed under section 252 because the Commercial Agreement and the parties' interconnection agreement are "best viewed as a single integrated agreement. As such, the Commission need not consider whether the Section 252(a)(1) and (e) filing and approval requirements would apply to an agreement that pertained in no way to the requirements of Section 251(c)."[72] Staff advances three reasons why, in Staff's view, the two agreements are integrated.

54 As will be shown in the following discussion, Staff is wrong that the agreements are integrated – they are not. The interconnection agreement is a stand alone agreement, and none of the section 251 obligations contained in that agreement is governed in any way by the Commercial Agreement. Further, Staff misinterprets and applies the rationale from the Commission's MCI/QPP decision in support of its argument. In fact, the Commission must decide the exact question that Staff seeks to avoid – does an agreement that in no way pertains to section 251(b) or (c) obligations fall under the section 252 filing requirement? Qwest submits that the only correct and lawful answer is no, it does not.

---

[71] "As a matter of law, the Commission will apply the definition of an interconnection agreement reached by the FCC in its Declaratory Ruling to the resolution of factual disputes in this proceeding." *WUTC v. Advanced Telecom., et al.*, Docket No. UT-033011, Order No. 5, ¶ 104. In that order, the Commission held that a number of agreements were not subject to filing under section 252 precisely because they did not contain terms relating to ongoing obligations under section 251. Included in the agreements that were dismissed were agreements that addressed interstate services only, as being exclusively within the province of the FCC. *Id.* at ¶¶ 105-109.

[72] Staff Memo, p. 3.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

55 Staff's three reasons for its conclusion that the Commercial Agreement and the ICA are integrated appear to be as follows:

1. The parties cannot use the Line Sharing Agreement on a stand-alone basis because the rates, terms and conditions for the network elements in the Commercial Agreement are intertwined with some of the rates, terms, and conditions for other network elements and configurations in existing interconnection agreements between Multiband and Qwest.[73]

2. New customers added under the ICA (though September 30, 2004) will count in determining the rates for line sharing under the Commercial Agreement. The result is lower rates under the Commercial Agreement based on customers previously added under the ICA.[74]

3. Line sharing is grandfathered for three years – the Commercial Agreement allows existing line sharing arrangements under the ICA to be converted to the ICA, subject to a conversion charge. Thus, terms and conditions pertaining to the grandfathered customers are contained in both the ICA and the Commercial Agreement.[75]

56 Finally, Staff argues that as a policy matter, line sharing arrangements should continue to be available, and requiring filing under section 252 assures this result. None of these arguments has merit.

1. Staff's Contention that the Commercial Agreement and the ICA Form a Single Integrated Agreement is Wrong and Should be Rejected.

57 Each of Staff's three reasons why the Commercial Agreement and the ICA are integrated will be discussed and rebutted in turn. However, it is necessary to point out that Staff's entire rationale on this point is dependent upon a misreading of the Commission's order addressing the MCI QPP agreement.

---

[73] *Id,* p. 2.

[74] *Id.*

[75] *Id.*, pp. 2-3.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

58 The decisions of this Commission[76] and the United States District Court for the Western District of Texas[77] are not applicable to this case. In the MCI/QPP case the Commission considered whether a "Master Services Agreement" between Qwest and MCI had to be filed as an interconnection agreement. The subject of the Master Services Agreement was Qwest's provisioning to MCI of Qwest Platform Plus ("QPP") services, consisting primarily of local switching and shared transport. At the same time that Qwest and MCI entered into the Master Services Agreement, they also entered into an amended agreement ("Amended Agreement") governing Qwest's provisioning to MCI of the local loop element. Qwest did not believe that the Master Services Agreement had to be filed under section 252 because it concerns products and services that Qwest is not required to provide under section 251.

59 The Commission found it unnecessary to determine whether section 252(a)(1) and (e) would apply to an agreement that pertained solely to the provision of a network element that is not required to be unbundled because it concluded that the Master Services Agreement and the Amended Agreement are part of "one integrated agreement pertaining to matters that indisputably are subject to the section 252 filing and approval requirements for negotiated interconnection agreements."[78]

60 The Commission held that both the Amended Agreement and the Master Services Agreement state that Qwest and MCI contemporaneously entered into the Master Services Agreement and the Amended Agreement to provide MCI with services equivalent to the UNE-P arrangements between the companies as they existed on June 14, 2004. The Commission noted that the combination of network elements known as UNE-P includes not only the port, switching and transport elements, but also the local loop, which ILECs are still required to unbundle under

---

[76] MCI/QPP Order.

[77] *Sage Telecom v. Public Utility Comm'n*, 2004 WL 2428672 (W.D. Tex., Oct. 7, 2004).

[78] MCI/QPP Order at ¶ 21.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

section 251. The Commission identified the whole purpose of the Master Services Agreement as being to provide the port, switching, and shared transport elements in combination with the local loop element, which is provided under Qwest's existing interconnection agreement with MCI. In addition, the Commission reasoned that the rates for the switching and transport elements under the Master Services Agreement would change in the event the loop rates charged under the interconnection agreement would change. Thus, the Commission concluded that there can be no serious question that the ongoing obligations concerning rates, terms and conditions for the provision of network elements in the Amended Agreement and the Master Services Agreement are part of a single integrated, non-severable agreement.[79]

61 The Commission determined that the commercial agreement which encompassed terms and conditions and pricing for transport and switching (currently not section 251 elements) bore so directly on the terms and conditions and pricing for the loop in the ICA, that the agreements were not stand alone agreements, and that for anyone to clearly understand what the terms and conditions were for the section 251 element, one needed to read the QPP agreement in conjunction with it. Thus, the Commission held that the agreements were integrated and that both bore on the 251 elements.

62 In contrast, the Commercial Line Sharing Agreement is a stand-alone agreement. Staff has not identified any provision of the Commercial Line Sharing Agreement analogous to provisions in the Master Services Agreement that cause it to be part of an interconnection agreement between Multiband and Qwest. During the Open Meeting discussion on this issue, there seemed to be some misunderstanding about the scope of the ICA amendment and the Commercial Agreement. The Commercial Agreement addresses only line sharing orders placed after October 1, 2004, and all of the terms and conditions pertaining to those orders are in the Commercial Agreement. For line sharing orders placed before October 2, 2004, all of

[79] *Id.*, ¶ 26.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

the terms and conditions have been placed into the ICA amendments. Staff seemed to assume that the Commercial Agreement applied to all line sharing services provided after October 1, 2004, and thus there was integration of the Commercial Agreement with the pre-October 2, 2004 orders. The Staff is wrong on this point. The Commercial Agreement has all of the terms for post-October 1, 2004 orders, and the ICA amendment has all of the terms for pre-October 2, 2004 orders, even for services provided after October 2, 2004.

63 In this case, Staff's arguments are generally to the effect that the Commercial Agreement *references* the ICA, or depends on the existence of an underlying ICA in order to be implemented. This is *completely different* from what the Commission held in the MCI/QPP case. Here, there is not even a contention that one cannot understand the terms and pricing of the ICA without reference to the Commercial Agreement. Indeed no such contention could be made, because there are simply no terms in the Commercial Agreement that control, affect, or pertain to the ICA's section 251 obligations.

a) There are no terms and conditions in the Commercial Agreement that control or otherwise impact terms and conditions in the ICA.

64 Staff advances the argument that the parties cannot use the Commercial Agreement on a stand-alone basis because the rates, terms and conditions for the network elements in the Commercial Agreement are intertwined with some of the rates, terms, and conditions for other network elements and configurations in existing interconnection agreements between Multiband and Qwest. Staff points specifically to the fact that the Commercial Agreement references the "Collocation Section" of the ICA for terms and conditions related to the installation of a splitter.

65 First, Staff's argument utterly fails to demonstrate any way in which the Commercial Agreement supposedly impacts the terms of the ICA. That is because it does not. Qwest and

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Multiband are free, in a commercial agreement, to reference terms that are contained in the ICA. So, as the parties have done in this case, Qwest may agree, in the Commercial Agreement, to provision collocation for a splitter under the terms of the ICA. This does not impact the ICA, nor does it make the Commercial Agreement an interconnection agreement.

66 Further, Staff incorrectly claims that "collocation" is required by section 251(c). In this particular instance, "collocation" of a splitter is not collocation under section 251. Collocation under section 251(c)(6) is limited to collocation of equipment necessary for interconnection or access to unbundled network elements. Collocation of the splitter is necessary only for access to line sharing, which Staff admits is not an unbundled network element. Thus, the Commercial Agreement pertains in no way to any ongoing obligations under section 251(b) or (c).

b) The fact that new customers added under the ICA count in determining the rates for line sharing under the commercial agreement is irrelevant and does not cause the commercial agreement to be integrated with the ICA.

67 Staff next point out that new customers added under the ICA (through September 30, 2004) count in determining the rates for line sharing under the Commercial Agreement, resulting in lower rates under the Commercial Agreement based on customers previously added under the ICA. It is unclear how or why this causes the agreements to be integrated. Again, the question is whether there are any terms or conditions in the Commercial Agreement that impact an ongoing obligation under section 251(b) or (c). Staff points to no such terms – and in fact there are none.

68 The ICA controls the terms and conditions for line sharing orders that are placed prior to the cut-off of October 2, 2004, and the ICA governs for services provided pursuant to those orders even if such services are provided after October 2, 2004. All terms and conditions, including

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

any volume counts that affect rates, for the orders placed before October 2, 2004, are contained in the ICA. In contrast, the Commercial Agreement controls the terms and conditions for new line sharing orders placed after October 2, 2004. Line sharing services for orders placed after this date are wholesale commercial services, not UNEs. There is no overlap, nor is there a situation where the terms of one agreement influences or impacts the terms of another.

69 The mere fact that the same two parties entered into two agreements does not make those agreements an integrated whole, even if each agreement acknowledges the existence of the other. What Staff seems to be missing here is that *Qwest does not have to offer line sharing at all.* It is simply not required under any provision of the Act. That is has chosen to do so, at terms that both parties find beneficial, should be encouraged, not stifled with undue regulatory requirements, and the unlawful exercise of jurisdiction.

70 An example might be helpful. If Qwest were selling paper to Multiband, which it has no legal obligation to do, and Qwest established pricing for that paper based on historic volumes of a regulated service that is now no longer offered, it seems unlikely that Staff could claim that the paper contract should be regulated, but that is exactly the (incorrect) analysis that Staff claims applies in this case.

c) The fact that line sharing is grandfathered does not affect the ICA, nor does it integrate the Commercial Agreement into the ICA.

71 Staff next claims that the fact that line sharing is grandfathered for three years causes the agreements to be integrated. The Commercial Agreement allows existing line sharing arrangements under the ICA to be converted to the Commercial Agreement, subject to a conversion charge. Thus, Staff claims, terms and conditions pertaining to the grandfathered customers are contained in both the ICA and the Commercial Agreement.

72 This does not cause the contracts to be integrated. Multiband has a choice – to either convert

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

customers or not. If Multiband chooses to convert the customers, then the rights and obligations pertaining to these new line sharing orders for those customers are contained in the terms of the Commercial Agreement. If Multiband chooses not to convert those customers, which it has no obligation to do, the rights and obligations pertaining to line sharing for those customers are contained in the terms of the ICA. However, the Commercial Agreement does not impact Multiband's rights to maintain the grandfathered customers under the terms of the ICA until the FCC-mandated grandfathering terminates.

2. Staff's Desire to Drive a Policy Result Can Not Subvert Section 252

73 Finally, Staff argues that as a policy matter, line sharing arrangements should continue to be available, and requiring filing under section 252 assures this result. Staff cites previous concerns about the availability of the QPP product as justification for raising concerns about the continued availability of line sharing.

74 Staff's arguments are unavailing. A mere desire to see certain services continue to be available cannot subvert the clear limitations in section 252. Indeed, if the Commission holds that it will approve this agreement so that line sharing will continue to be available under section 252(i), it will be tantamount to a ruling that line sharing is a UNE and is required to be offered. Yet it is clear that such a holding is absolutely preempted by the FCC's determination that line sharing is not a UNE, and the Commission is without authority under either federal or state law to change that outcome.

75 As noted above, Qwest is not legally obligated to offer line sharing for orders placed after October 2, 2004. Improper regulation of a service that Qwest is not required to offer will not guaranteed the continued availability of that service, but may well work a contrary result – it will discourage Qwest from entering into these relationships in the first place. In this regard, the dissent of Chairman Rowe from the Montana Commission's decision to exercise

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

jurisdiction over these types of agreements is right on point. He concluded that, "on balance, as to the present facts, the more direct analysis leads to the conclusion that [the Commercial Agreement] *does not come within the ambit of Section 252 . . . .*"[80] He suggested that instead of leaping into the "jurisdictional bogs" created by the decision to assert jurisdiction,[81] the Commission should encourage commercial agreements:

> In this very case, Qwest voluntarily entered into a facilitated agreement with Covad; reached a voluntary commercial agreement; made an informational filing of the agreement with the Montana PSC; posted the agreement on 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.[82]

76 Chairman Rowe's dissent captures well one of the fundamental errors of Staff's recommendation: Staff's belief that the Commission may review the agreement even though new line sharing orders are no longer UNEs and despite the fact that Qwest and Covad developed, on a privately-negotiated consensual basis, an agreement that is completely acceptable to both parties. This action will discourage the very conduct that the FCC, the federal agency charged by Congress to administer this federal Act, has specifically directed must be encouraged and fostered to realize the Act's deregulatory goals and the transition to a more market-driven system. Congress has been very clear that the "goals of the Act were to provide for a pro-competitive*, deregulatory national framework.*"[83] To that end, in the

---

[80] *Statement of Chairman Rowe* at 1 (emphasis added). A copy of Chairman Rowe's statement is attached as Exhibit B.

[81] "Rather than leaping with both feet into the jurisdictional bogs of Lake Serbonis, the Commission could have identified the policy goals and developed a strategy best calculated to achieve them, given the current state of the law. There is more than a 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 and equal and opposite reaction, discouraging the very behavior we all agree is valuable, if not essential." *Id.* (emphasis added).

[82] *Id.* (emphasis added).

[83] *TRO ¶* 62 n.198, citing *Joint Manager's Statement*, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) (Joint Conference Report) (emphasis added).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

Declaratory Order, the FCC stated that it was important that "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs" be removed"[84] and the agency has accordingly encouraged private commercial agreements.[85]

77 An improper attempt by a state commission to inject itself into these commercial relationships directly undermines this policy, for carriers will have little incentive to negotiate commercial arrangements if state commissions can change the terms of those negotiated arrangements through regulatory fiat.

78 Further, it should be noted that Staff's concerns about the availability of this and other commercial arrangements have a forum at the FCC. Qwest has an obligation to file the line sharing agreement with the FCC under section 211 of the Communications Act of 1934, and has non-discrimination obligations under section 202 of that same law.[86] The FCC has jurisdiction to enforce those requirements, and any carrier may complain to the FCC if circumstances warrant. However, this Commission does not have overlapping jurisdiction to enforce sections 203 or 211, nor can it impose state non-discrimination obligations on a service over which it lacks jurisdiction.

79 Another significant problem with Staff's position is that it erroneously treats the obligations imposed by section 251 and the filing requirement of section 252 as being essentially unrelated to each other. This ignores the fact that the entire premise of an ILEC's duty to file an agreement under section 252 is based on the fact that the element provided is required by section 251(b) or (c). Sections 251 and 252 only make sense in relation to each other and do not operate independently of each other. When the subject matter of a privately-negotiated

[84] Declaratory Order ¶ 8.

[85] *Order and Notice of Proposed Rulemaking, In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783 ¶ 7 (2004).

[86] 47 U.S.C. §203 and §211.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

agreement is no longer required by section 251, there is no section 252 obligation to file it with a state commission nor does the state commission have a section 252 power to approve, or amend it. The Ninth Circuit has made it clear that a state commission's role is limited and that it lacks the authority to "fill gaps in the statute."[87] Creating a filing standard that is inconsistent with the Act would clearly run afoul of that prohibition.

3. Staff's Suggestion that the FCC Did Not Adopt an Enforceable Filing Standard in the *Declaratory Order* is Inconsistent with the Order.

80 Staff suggests that the *Declaratory Order* does not establish a clear filing standard: "the FCC went on to say 'the states should determine in the first instance which sorts of agreements fall within the scope of the declaratory standard'."[88] However, Staff apparently reads this to mean that state commissions have essentially been granted *carte blanche* to decide which agreements need to be filed.

81 But that is not what the FCC concluded in the *Declaratory Order*. Indeed, the FCC makes it clear in the *Declaratory Order* that any discretion held by the state commissions is to be exercised *within the framework* of the filing standard adopted in the *Declaratory Order*. For example, the FCC stated 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."[89] Elsewhere, the FCC stated that *"[t]he guidance we articulate today* flows directly from the statute and serves to define the basic class of agreements that should be filed."[90] Thus, while state commissions have some latitude to interpret and apply the standard in the *Declaratory Order*, they do not have the freedom to apply the standard in such a way as

---

[87] *See Pac West*, 325 F.3d at 1126-17, (quoting *MCI Telecomm. Corp. v. Bell Atlantic-Pa.*, 271 F.3d 491, 516 (3d Cir. 2001)).

[88] Open Meeting Memo, p. 4.

[89] Declaratory Order ¶ 7 (emphasis added).

[90] *Id.* ¶ 10 (emphasis added).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

to render it meaningless. The Commission can require the filing of an agreement "*only*" if it contains ongoing obligations to provide services required under section 251(b) or (c).

V. CONCLUSION

82 For the reasons set forth herein, Qwest respectfully requests that the Commission enter an order concluding that the Commercial Agreement is not an agreement that contains ongoing obligations pertaining to services that Qwest has a duty to provide under section 251(b) or (c) and that it is therefore not subject to filing or approval under section 252 of the Act.

DATED this _____ day of March, 2005.

QWEST

____

Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500