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1 P R O C E E D I N G S

2 JUDGE MOSS: Good morning, everyone. We are
3 convened this morning in the matter concerning the
4 petition of Multiband Communications LLC for Approval of
5 a Line Sharing Agreement with Qwest, Docket Number
6 UT-053005. For the record, I'm Dennis Moss, an
7 Administrative Law Judge with the Utilities and
8 Transportation Commission, and the Commissioners are
9 presiding today. We're convened for the purpose of
10 hearing oral argument with respect to the question of
11 whether the line sharing agreement is one that requires
12 the Commission's approval under Section 252 of the
13 Telecommunications Act of 1996.

14 Let's take appearances, and then I will have
15 a preliminary remark on our procedure, and then we'll
16 move directly into the arguments from there. So,
17 Ms. Anderl, short form will be fine today.

18 MS. ANDERL: Thank you, Your Honor. Lisa
19 Anderl, in-house counsel with Qwest representing Qwest
20 Corporation.

21 JUDGE MOSS: Thank you.

22 MS. SMITH: Shannon Smith representing
23 Commission Staff.

24 JUDGE MOSS: All right.

25 And, Mr. Jarrett, are you on the telephone

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1 line with us?

2 MR. JARRETT: Yes, I am, Judge Moss. This is
3 Douglas Jarrett from Keller and Heckman, appearing on
4 behalf of Multiband.

5 JUDGE MOSS: All right.

6 And I have had some brief discussion with
7 Ms. Anderl and Ms. Smith off the record, and they have
8 both informed me that they probably would not require
9 their 45 minutes that we had previously discussed
10 allowing them, subject of course to the number and
11 complexity of questions that may come from the Bench. I
12 had also had some off the record communication with
13 Mr. Jarrett and the other parties concerning Multiband's
14 request that it be allowed five minutes at the outset to
15 essentially state its position in the case since it has
16 not briefed the matters at issue and does not intend to
17 present argument. So I think we should take Multiband's
18 statement first, and then after that we will have
19 argument from Staff as the proponent of Commission
20 action here, followed by argument by Qwest. And,
21 Ms. Smith, you may reserve a portion of your time for
22 rebuttal if you wish. Do you wish to do that?

23 MS. SMITH: Yes, Your Honor, just a couple of
24 minutes, please.

25 JUDGE MOSS: Shall we say five?

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1 MS. SMITH: Five would be great, thank you.

2 JUDGE MOSS: I don't think I have ever seen a
3 lawyer's couple of minutes that was less than five.

4 All right, with that then, unless there's
5 anything else preliminary from the parties or the Bench?

6 All right, then, Mr. Jarrett, why don't we
7 hear your statement concerning Multiband's interest in
8 this proceeding.

9 MR. JARRETT: Commissioners, Judge Moss, our
10 position is that we are in agreement with Qwest that the
11 agreement is not -- should not be subject to the
12 Commission's jurisdiction. We particularly support for
13 lack of a better word a forbearance approach. But for
14 the fact that there is this agreement, we would not,
15 Multiband, would not be in a position to secure line
16 sharing at this point in time. Line sharing is viewed
17 as the least cost Telco based option for providing
18 broadband service, and it's desirable from an entry
19 point of view for starting up CLECs such as Multiband.
20 For this reason, we would urge the Commission to for
21 lack of a better word forbear from exercising its
22 jurisdiction in this case, allow the commercial
23 agreement to go into effect, and thereby promote
24 broadband services in probably the least cost manner
25 that is currently available in the marketplace. And

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1 with that, that's our position.

2 JUDGE MOSS: Any questions for Mr. Jarrett?

3 COMMISSIONER JONES: Mr. Jarrett,

4 Commissioner Jones, how are you this morning?

5 MR. JARRETT: I'm quite well, Commissioner.

6 COMMISSIONER JONES: I noticed that you
7 signed this agreement with Qwest effective September
8 30th, 2004.

9 MR. JARRETT: Mm-hm.

10 COMMISSIONER JONES: I'm just curious, why
11 did it take three or four months for you to file it, I
12 think you filed it with the Commission on January 18th;
13 is that correct?

14 MR. JARRETT: Yes.

15 COMMISSIONER JONES: Why is there such a time
16 lag? I would think that with an agreement of this
17 importance that you would have made a decision pretty
18 early on whether or not to file it with the Commission.

19 MR. JARRETT: Commissioner Jones, I can't
20 fully speak to that. I was brought into the item --
21 into this matter as the item went on public notice for I
22 believe it was a February 23 meeting. There is debate
23 in other jurisdictions, as you know, as to whether line
24 sharing agreements are subject to state approval or not,
25 and quite honestly the time to focus and the

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1 implementation were such that once it was finalized, it
2 is a multistate arrangement in the sense that the
3 agreement applies or the substance of the agreement
4 applies in other jurisdictions, and to the best of my
5 knowledge Multiband focused their initial rollout in
6 other states such that they did not focus on the state
7 of Washington initially.

8 COMMISSIONER JONES: When were you brought
9 into the case, Mr. Jarrett?

10 MR. JARRETT: I believe the day -- it was
11 Washington's birthday.

12 COMMISSIONER JONES: Okay.

13 MR. JARRETT: No, no, it was that recent.

14 COMMISSIONER JONES: Just one other question
15 for you, there's a lot of debate, and we'll hear this
16 during the discussion period, under Section 252 it calls
17 for, 252(e)(4), it calls for, you know, the state
18 commissions to rule, approve or reject the agreement
19 within 90 days after submission by the parties of an
20 agreement adopted by negotiation under Subsection A.
21 What is your reading of this? Is this agreement in your
22 view subject to the 90 day timetable after submission of
23 the agreement on January 18th? Because I noticed that
24 it was submitted by only one party, first of all, and
25 secondly, I mean is it your legal interpretation that

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1 this -- that the state commission even has jurisdiction
2 over approval or rejection of this agreement?

3 MR. JARRETT: Well, I think that's the issue
4 before the Commission. You're assuming -- the time line
5 I think assumes the fact that you have jurisdiction.

6 COMMISSIONER JONES: Right.

7 MR. JARRETT: And therefore I would disagree,
8 I don't think you do have jurisdiction, so I don't think
9 the 90 days apply as a legal matter.

10 COMMISSIONER JONES: Yeah, that was the
11 thrust of my question.

12 MR. JARRETT: Yeah.

13 COMMISSIONER JONES: That's fine, okay.

14 That's all, Judge.

15 CHAIRMAN SIDRAN: Mr. Jarrett, Mark Sidran, I
16 have a couple of questions. First, what, if any, effect
17 do you think the Commission's determination that filing
18 is required or that filing -- that the agreement
19 requires Commission approval to take effect would have
20 on competition? You mentioned something to the effect
21 that forbearance, as you put it, would be desirable from
22 the start -- from the standpoint of a startup CLEC
23 interested in broadband access over these line sharing
24 agreements. Do you believe that how this case comes out
25 would affect the ability of companies like Multiband

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1 that you represent to effectively compete in the market
2 one way or the other?

3 MR. JARRETT: I think to the extent your
4 decision asserts jurisdiction, it puts the ball back
5 into Qwest's court to decide how to proceed in
6 subsequent situations. And I can't speak to how they're
7 going to respond, but I think in the -- if they were
8 treated -- if it was treated in a, for lack of a better
9 word, a non-regulated commercial agreement, it would
10 provide a measure of certainty that's been lacking with
11 regard to broadband over wireline facilities at least
12 for the next several years for one type of an
13 arrangement, and I think that would be positive to keep
14 it in that. I don't know what Qwest would do, and I'm
15 not in a position to predict, but I would think
16 generally I would rather have the three year agreement
17 that Multiband has entered into because Qwest went into
18 it voluntarily and be in a position to have that for
19 three years. I think if you assert jurisdiction and
20 other jurisdictions do, it's going to put a cap on the
21 amount -- on the degree of line sharing, and I think
22 that would be unfortunate.

23 CHAIRMAN SIDRAN: Second question is whether
24 you view the line sharing agreement as integral and
25 nonseverable from the interconnection agreement that you

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1 have, that Multiband has with Qwest?

2 MR. JARRETT: That's a good question.

3 CHAIRMAN SIDRAN: Thank you.

4 MR. JARRETT: We have not given a lot of
5 attention to that to be quite honest. I think the
6 opportunity here to provide -- I don't know what the
7 reaction would be. I'm going to have to just stand down
8 and respond I don't know. My sense is the line sharing
9 would probably be stand alone, but I would -- I'm not --
10 I did not discuss that with the client to a great
11 extent.

12 CHAIRMAN SIDRAN: Thank you.

13 COMMISSIONER OSHIE: Thank you, Your Honor.

14 Mr. Jarrett, this is Commissioner Oshie. I
15 just want to follow up on a statement you made about
16 whether the filing requirement in this situation for
17 approval with this Commission would result in a, and I
18 think you called it a cap on competition with regard to
19 the service. Can you explain why you believe that to be
20 true?

21 MR. JARRETT: Well, what we're putting -- you
22 put Qwest that's not authorized, that is now not
23 obligated by virtue of the commission decision, the FCC
24 decision, to offer line sharing arrangements as an
25 unbundled network element, they voluntarily decided to

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1 offer it. Therefore, if you're saying the agreement
2 that embodies that voluntary agreement has to -- is
3 subject to Commission jurisdiction for purposes of
4 approval, you -- from a service -- from a competitor's
5 point of view, from a CLEC's point of view looking at
6 this that doesn't have an arrangement, it probably says,
7 do I want to get into this because Qwest is not
8 obligated to do it, and I don't know what Qwest is going
9 to do.

10 COMMISSIONER OSHIE: Doesn't it make the,
11 subject to our approval, and let's assume that it is
12 approved by this Commission, wouldn't it make that
13 agreement available for adoption by other CLECs entering
14 the market and make it easier for them to enter the
15 competitive marketplace as a result?

16 MR. JARRETT: If you assume -- again, I kind
17 of look at it as a circle, and we're kind of in various
18 points on that circle. If you don't have jurisdiction
19 in the first hand, how can you approve it? I mean it is
20 a very much jurisdictional question here.

21 COMMISSIONER OSHIE: Well, let's just assume
22 for the purposes of a hypothetical that we do have
23 jurisdiction and that we could approve it, doesn't its
24 availability as for adoption to other CLECs make it
25 easier for those adopting CLECs to enter the market as

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1 opposed to some prolonged negotiation with Qwest or any
2 other provider for a voluntary agreement to purchase
3 that service or bundle of services?

4 MR. JARRETT: Responding to the hypothetical,
5 yes. And I'm not aware of what happened in Washington,
6 but this agreement, my understanding is it was modeled
7 after a Covad agreement, and I would defer to counsel
8 for Qwest to confirm that, so it -- my sense was it was
9 made available, perhaps not with the full benefit of the
10 Commission's jurisdiction and assurance, but it was made
11 available.

12 COMMISSIONER OSHIE: All right, thank you.

13 JUDGE MOSS: Ms. Smith, are you ready?

14 MS. SMITH: I am, thank you, Judge Moss.

15 As I stated earlier before we began the
16 formal argument session, I don't believe I'm going to
17 need the 45 minutes of time allotted for oral argument,
18 and that's because I believe the parties have really
19 briefed the issues in their written submissions. And so
20 I'm going to try not to be too repetitive of what's in
21 my written pleadings, but there are some points that I
22 would like to highlight in my time this morning.

23 And one of them start -- well, I guess the
24 first point is to start with the language of the Federal
25 Act itself, and I'm going to start a little bit in

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1 reverse order and draw the Commission's attention to 47
2 U.S.C., Section 252(e)(1), and it's the provision of the
3 Act that requires state commission approval of any
4 interconnection agreement adopted by negotiation or
5 arbitration and that the Commission shall approve or
6 reject the agreement with written findings as to any
7 deficiencies. And the grounds for rejection of an
8 arbitrated agreement are whether or not the agreement
9 discriminates against parties who are not a party to
10 that interconnection agreement or whether the agreement
11 is inconsistent with the public interest.

12 Now turning back to Section 252(a)(1), which
13 is I think the provision that encompasses the dispute
14 this morning, that is the provision that provides for
15 voluntary negotiations. And those are negotiations for
16 interconnection agreements between incumbent companies
17 like Qwest and competitors like Multiband to enter into
18 agreements without regard to the standards that are set
19 forth in Subsections (b) and (c) of Section 251.

20 JUDGE MOSS: Let me back you up there just a
21 half a step, Ms. Smith. Is it Staff's contention that
22 in this situation Multiband made, as the statute says at
23 252(a)(1), that Multiband made a request for
24 interconnection services or network elements pursuant to
25 Section 251?

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1 MS. SMITH: Yes, and I'm getting to that
2 point, Your Honor.

3 This agreement falls within the Section
4 252(a)(1) provision because it's an agreement for a
5 network element. Line sharing is a network element.
6 And we agree with Qwest that Qwest is not obligated to
7 provide line sharing under Section 252(c)(3). It's off
8 the FCC's list of those network elements that the FCC
9 has decided meet the necessary and impaired standard, it
10 is no longer a required unbundled network element per
11 terms of the FCC's rules. But you've got to get --
12 you've got to get though to what Congress means when
13 it's talking about these voluntary agreements. And in
14 Subsection (a)(1), Congress is talking about agreements
15 that are not entered -- that are entered into without
16 regard to the standards set forth in 251(b) and (c), and
17 that means that ILECs and CLECs can enter into
18 agreements for interconnection, for unbundled elements,
19 for all of these kinds of things without complying with
20 some of the other standards in the statute.

21 For example, with respect to those elements
22 that an ILEC is compelled to provide, an ILEC and a CLEC
23 can negotiate pretty much any price they want for those
24 elements that the ILEC is compelled to provide. If the
25 CLEC doesn't like the rate it's getting from the ILEC,

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1 it can request that the state commission negotiate or
2 that state commission arbitrate that provision. In
3 those arbitrations, the state commission has to apply
4 the pricing standards set forth in Section 252 and set
5 those prices based on cost and comply with the FCC's
6 TELRIC rules.

7 The standards for -- the standards in 251(b)
8 and (c) also include the FCC's list of mandatory
9 unbundled network elements. That's one of the
10 standards. If you just read Subsection (3) of 252(c),
11 it talks about unbundled access, but it itself doesn't
12 contain the FCC's list of elements that meet the
13 necessary and impaired standard. Those elements are
14 filled in by FCC rule, and the FCC makes the list of
15 those compelled network elements by applying the
16 necessary and impaired standards. So whether a network
17 element is required to be provided, mandated to be
18 provided, is within the standards set forth in Sections
19 251(b) and (c).

20 So incumbents and CLECs can enter into
21 negotiation for network elements under Subsection (a)
22 without regard to those standards, which means without
23 regard to whether those elements are mandated. If the
24 incumbent and the CLEC reach an agreement through
25 voluntary negotiation for network elements that are no

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1 longer required to be provided by the incumbent, then
2 those agreements, those voluntary agreements, must be
3 submitted to the state commission for approval under the
4 plain language of Section 252(a)(1).

5 CHAIRMAN SIDRAN: Ms. Smith, let me interrupt
6 you and ask in light of your argument, which sounds to
7 me like every agreement about any network element must
8 be filed.

9 MS. SMITH: That's correct.

10 CHAIRMAN SIDRAN: That's correct. Then how
11 do you respond to Qwest's argument and the language in
12 the FCC order of October, I guess it's adopted October
13 2nd, 2002, which appears at page 5 of the order, in
14 which the FCC says, we find that an agreement that
15 creates an ongoing, emphasis, obligation pertaining to,
16 and then they list a number of factors that you are
17 familiar with, is an interconnection agreement that must
18 be filed pursuant to 252(a)(1), and then there's a
19 footnote, and it says:

20 We therefore disagree with the parties
21 that advocate the filing of all
22 agreements between an incumbent LEC and
23 a requesting carrier. Instead we find
24 that only those agreements that contain
25 an ongoing obligation relating to 251(b)

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1 or (c) must be filed under 250(a)(1).

2 So my question is, explain to me where line
3 sharing fits into this language.

4 MS. SMITH: Line sharing fits into that
5 language because line sharing is a network element. And
6 while it's not a mandated network element, it is
7 nevertheless a network element. In fact, the FCC at one
8 time had included that on its list of mandatory
9 unbundled network elements and removed it. And Staff
10 isn't taking issue with that. We know that we can not
11 compel Qwest to provide Multiband with line sharing.
12 That's not the issue here.

13 The issue is once Qwest does that, is that an
14 intersection agreement pertaining to an ongoing
15 obligation to provide network elements under Section
16 251, and we say, yes, it is. Because Qwest doesn't have
17 to provide that, but it is a network element, and once
18 Qwest voluntarily enters into an agreement to provide a
19 network element, that agreement must be filed with the
20 state commission.

21 The FCC's footnote in fact is very consistent
22 with the rest of the FCC's order. The FCC says, well,
23 we're saying that if there is an ongoing obligation
24 pertaining to these elements, these items, then it's an
25 interconnection agreement that must be filed.

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1 And read that in terms of -- in light of what
2 the FCC said it wasn't going to require filing of. It
3 exempted from the filing requirement agreements between
4 CLECs and ILECs that pertained to backward looking
5 consideration. If, for example, payment wasn't fully
6 made under an interconnection agreement, they entered
7 into an agreement to make the payment, technically the
8 payment had to do with one of those elements, but it was
9 backward looking, it wasn't ongoing.

10 The FCC also said, well, when the competitive
11 company and the ILEC have an interconnection agreement
12 and they go back and forth trying to order and get these
13 orders filled, the order forms themselves, even though
14 they pertain to the interconnection or the network
15 elements, those order forms themselves we're not going
16 to require that those be filed because it's not really
17 an ongoing obligation, it's just sort of the method of
18 fulfilling the ongoing obligation that's contained in
19 the underlying interconnection agreement.

20 The FCC also said, if you have one company in
21 bankruptcy and the bankruptcy court orders a different
22 or another interconnection agreement, we're not going to
23 require that.

24 So the FCC didn't in this order, in its
25 declaratory order, the FCC did not impose a filing

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1 requirement on all agreements between ILECs and CLECs,
2 but its filing requirement is very broad nonetheless.

3 CHAIRMAN SIDRAN: So let me just interrupt
4 for a minute and ask you then if based on your argument
5 that any network element fits within the mandatory
6 filing requirements, then would you concede that it
7 doesn't matter whether this is an integral non-severable
8 element of the interconnection agreement, it stands
9 alone, if there was no interconnection agreement and
10 this agreement which you have just defined I think as an
11 agreement related element, that would have to be filed?

12 MS. SMITH: Yes.

13 CHAIRMAN SIDRAN: Okay, thank you.

14 MS. SMITH: Yes, I think we would. And our
15 position in this case is that while we believe that
16 there is a link between the line sharing agreement and
17 Qwest and Multiband's filed, approved interconnection
18 agreements, that isn't the determining factor. We
19 believe what makes this an interconnection agreement
20 that must be filed is because it's a voluntary agreement
21 between a CLEC and an ILEC for a network element and it
22 needs to be filed and approved by the state commission.

23 And the importance of that, and this is
24 something that's also in our brief and I wanted to touch
25 on Multiband's response to questions from the Bench with

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1 respect to this, is that the point of the Act is to
2 promote competition. And to do that, the incumbents are
3 required to open up their networks to competitors, to
4 lease piece parts in the form of unbundled network
5 elements, and to interconnect with the CLECs. And with
6 respect to the mandatory provisions, that in a way
7 assures that when the CLEC and the ILEC sit down to
8 negotiate these agreements, the incumbent doesn't favor
9 itself. The incumbent provides to the CLEC
10 interconnection on any technically feasible point in the
11 network, that the incumbent provides to the CLEC those
12 network elements that the FCC says the CLEC needs in
13 order to be able to enter the marketplace and
14 effectively compete. That's the safety net to make sure
15 that the ILEC and the CLEC compete on an even playing
16 field, but that's only part of the point.

17 JUDGE MOSS: Well, with respect to that
18 point, it is true though that Qwest does not have to
19 offer line sharing at all?

20 MS. SMITH: That's true, yes.

21 JUDGE MOSS: So that purpose is not
22 satisfied.

23 MS. SMITH: That purpose isn't satisfied, but
24 the other purpose and the other side of this is that
25 competitors compete among themselves. CLECs to CLECs

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1 compete among themselves in a non-discriminatory
2 fashion. If one CLEC is able to negotiate an agreement
3 for unbundled network elements that are mandatory but at
4 a price less than what the state commission likely would
5 order in an arbitration, the competing CLECs will be
6 able to get that price too under Section 252(i), the
7 provision that allows any carrier to obtain the terms
8 and conditions between an approved -- of an approved
9 interconnection agreement at the same terms and
10 conditions between the ILEC and the CLEC. And that's
11 important with respect to delisted or non-mandatory
12 unbundled network elements as well, because a CLEC that
13 is able to negotiate with an incumbent for favorable
14 access to network elements that are no longer required
15 to be provided will have a competitive advantage over
16 other competitors who are trying to compete with that
17 CLEC in the marketplace. And by requiring Qwest, who is
18 not obligated to provide line sharing, but when it does
19 provide line sharing to one CLEC, it needs to provide
20 those same terms and conditions for line sharing that
21 any other CLEC may want to have as well.

22 CHAIRMAN SIDRAN: So how would you respond to
23 the concern expressed by Multiband and I think echoed in
24 the dissent of the Chair of the Montana Commission that
25 the risk of an unintended consequence for consumers

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1 would be that the CLECs would no longer have the
2 opportunity to use Qwest's line for Multiband?

3 MS. SMITH: It's very convenient for
4 Multiband to say that, because Multiband has the line
5 sharing agreement that it considers very favorable to
6 Multiband. It's very easy for Multiband to say, well,
7 you know, we're glad we have it and we're pleased, but
8 what about the other competitors.

9 CHAIRMAN SIDRAN: So your position is we
10 shouldn't worry about the risk that Qwest may pull the
11 plug on this?

12 MS. SMITH: No, because that would lead to a
13 level playing field. What we are concerned about --

14 CHAIRMAN SIDRAN: Well, it would be a level
15 playing field, but wouldn't it be a playing field that
16 was to the disadvantage to consumers who want Multiband
17 access?

18 MS. SMITH: For those consumers that want
19 Multiband access, but Multiband has a line sharing
20 agreement, and the argument is --

21 CHAIRMAN SIDRAN: I'm not talking about --
22 I'm sorry, I meant to say broadband, not Multiband.

23 MS. SMITH: Right, well, then --

24 CHAIRMAN SIDRAN: They would have Qwest, but
25 that would be it.

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1 MS. SMITH: I mean likely other competitors
2 would find ways to provide that either through line
3 splitting or by leasing the whole loop. But what we
4 want to prevent is we want to prevent a situation where
5 only one competitor, in this case it might be Multiband,
6 who has a line sharing agreement, that's it. Somebody
7 else could come in and say, gee, Qwest, we would like to
8 compete with you and Multiband for broadband, and we
9 would like the same terms and conditions, Qwest would
10 say, no, we gave it to Multiband, that's it, you know,
11 that's our favorite CLEC or however you want to look at
12 it.

13 JUDGE MOSS: How do you respond to Qwest's
14 argument in this regard that the company, meaning Qwest,
15 has an obligation -- is an obligation to file these
16 types of agreements with the FCC and that there are
17 general prohibitions against discrimination that would
18 preclude the sort of results you have just hypothesized?

19 MS. SMITH: I'm not exactly sure that they
20 would, and what the requirement -- those requirements
21 don't take the place of the 252(a)(1) and (e)(1) filing
22 requirements. If that's what -- if that were the case,
23 we wouldn't have those filing requirements at all.

24 JUDGE MOSS: Granted, that's true. Do you
25 agree that Qwest would have an ongoing obligation to

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1 file these with the FCC?

2 MS. SMITH: I can't answer that question, I
3 don't know.

4 JUDGE MOSS: Oh, okay, then there's no point
5 in pursuing it.

6 MS. SMITH: I will say that the state
7 commission approval is important because the state
8 commission will determine whether or not the agreement
9 discriminates against a carrier who is not a party to
10 the agreement, and the state commission also will
11 determine whether the agreement is consistent or not
12 inconsistent with the public interest. And those are
13 two obligations and responsibilities that the state
14 commission has that the FCC doesn't have.

15 JUDGE MOSS: Okay, now we continue to have to
16 regulate in this state in the public interest, and we do
17 have in our statutes language concerning discrimination,
18 prohibiting it basically, undue discrimination; do those
19 statutes afford any protection to the CLECs that you
20 described?

21 MS. SMITH: I don't think they do, Your
22 Honor, and I believe you are, and I don't have those
23 statutes in front of me, but I believe that you are
24 referring to the RCW 80.36.180 and 186 that prevent --
25 that preclude one carrier from giving an unfair

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1 advantage or preference to another carrier. And one
2 problem with that is that those provisions tend to
3 relate more to the provision of finished services as
4 opposed to agreements for piece parts, and the
5 agreements also don't apply to -- or those provisions
6 also don't apply to finished services that have been
7 competitively classified, so that doesn't quite get us
8 the level of protection we believe Congress intended and
9 is afforded by the filing and approval requirements set
10 forth in Section 252.

11 So what we're trying to make sure of here is
12 that if Qwest decides that it's going to provide line
13 sharing to a competitive provider, then this Commission
14 needs to review that agreement to be sure that it
15 doesn't discriminate against a non-party to the
16 agreement, to ensure that the agreement is not
17 inconsistent with the public interest, and to make that
18 agreement available to other competitors who will take
19 that agreement as it stands so that there isn't
20 discrimination among CLECs. And that's the issue here,
21 and that is why we believe that it is not only
22 consistent with the plain language of Section 252, but
23 it's also consistent with the policy that underlies the
24 Federal Act, which is to fairly open the markets to
25 competition, and that means fair competition for all.

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1 COMMISSIONER JONES: Ms. Smith, on that
2 point, since we're diving into some of these issues now,
3 I understand your position on Section 252 and 251, but
4 what would be your reaction to a filing requirement, as
5 done in the state of Minnesota and I think in some other
6 commissioners had mentioned this, where Qwest would be
7 obligated to file for review all agreements, such as the
8 Qwest-Covad line sharing agreement that, (a) are
9 associated with elements of Qwest's network, (b) make
10 reference to UNEs, (c) reflect a 271 obligation, et
11 cetera, and I'm sure you're familiar with that, what
12 would -- what's inadequate about that filing requirement
13 if Qwest were to do it?

14 MS. SMITH: And I think your question is the
15 agreements would be filed, but then the state commission
16 would decide whether or not to approve it depending on
17 what the terms of the agreement were.

18 COMMISSIONER JONES: I think so.

19 MS. SMITH: That would get us -- I mean that
20 certainly would give the Commission the opportunity to
21 determine whether or not the agreement as filed
22 discriminates against a company that isn't a party to
23 the agreement at that moment or whether the agreement is
24 inconsistent with the public interest, but it wouldn't
25 get us that other step, the next step that commission

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1 Staff is advocating, which is to create a level playing
2 field between not only the ILEC and the CLEC, which is
3 covered by the mandatory unbundling and interconnection
4 provisions, but get us to a situation where you have
5 competitors who have equal access to these favorable
6 agreements so they can compete on those same terms and
7 conditions. So it would allow the Commission to review
8 the agreement for public interest standard, but it
9 wouldn't go that one step farther to mitigate against an
10 unfair advantage that one CLEC may have against another.

11 COMMISSIONER JONES: I will have more
12 questions later, thank you.

13 CHAIRMAN SIDRAN: Let me just follow up on
14 that point, which is how then would you respond to the
15 comment in the FCC order that was addressing this very
16 issue of sort of the balancing, if you will, between
17 regulation and competition where the FCC said that on
18 the one hand it had to protect the competitive
19 interests, if you will, on the regulatory side, but the
20 equally important policy of "removing unnecessary
21 regulatory impediments to commercial relationships
22 between incumbents and competitive LECs"? I mean isn't
23 that what we're struggling with here is where the
24 balance between public information and a regulatory
25 model on the one hand and a deregulatory competitive

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1 model on the other?

2 MS. SMITH: You know, I think Staff's
3 position fits really nicely into that balance, and I
4 think what the FCC was concerned about was that the FCC
5 was concerned about sort of overregulating the agreement
6 process. We're not really doing any regulating on the
7 voluntary agreement process. We didn't compel Qwest and
8 Multiband to the table. Certainly because none of
9 these --

10 CHAIRMAN SIDRAN: Well, wait, wait, wait, I
11 mean that's not entirely true, is it? I mean if you
12 require approval by the Commission of these agreements,
13 not just filing to protect these other public interests
14 but approval by the Commission, wouldn't you call that
15 regulation?

16 MS. SMITH: I don't call -- I guess I don't
17 -- I understand that that's Qwest's point, I just don't
18 see it as being -- I suppose it's I guess a small degree
19 of regulation, but it certainly isn't highly regulated.
20 The Commission didn't have a hand in the terms and
21 conditions that Qwest and Multiband arrived at, and the
22 Commission wouldn't because the Commission would have no
23 authority to arbitrate it because it's not a compelled
24 -- an unbundled element that Qwest is compelled to
25 provide. So to that extent, there isn't regulation from

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1 this Commission. All we -- and quite frankly, the
2 Commission approval should mean very little to Multiband
3 because Multiband has its agreement, and the approval
4 really shouldn't mean that much to Qwest because Qwest
5 obviously is in a position where it's good for Qwest's
6 business to provide Multiband with line sharing at
7 whatever price they have negotiated, then it shouldn't
8 be bad for Qwest business interests to provide it to
9 another competitor at those same terms and conditions.

10 CHAIRMAN SIDRAN: I don't think the issue is
11 approval, the issue is disapproval. If the Commission
12 has this authority and jurisdiction and we reject this
13 agreement --

14 MS. SMITH: Then --

15 CHAIRMAN SIDRAN: -- wouldn't that be a
16 regulatory --

17 MS. SMITH: It would be, but you have to
18 understand that the Commission would reject the
19 agreement only if the agreement itself actually
20 discriminated against another carrier, which is contrary
21 to the provision of the Act so it shouldn't discriminate
22 against another carrier, and secondly the Commission can
23 reject the agreement if it's contrary to the public
24 interest. We have an obligation to regulate in the
25 public interest, and having an agreement out there

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1 between a competitor and an incumbent that's contrary to
2 the public interest should be rejected whether it's for
3 a compelled or a non-compelled unbundled network
4 element. I mean I just don't think that anything about
5 what the FCC was addressing in its order would bless
6 interconnection agreements that are contrary to the
7 public interest.

8 In fact, you know, the FCC in its declaratory
9 order exempted a narrow category, four narrow categories
10 of agreements from the, you know, from the filing
11 requirement and said essentially we're going to let the
12 state commissions sort of sort out in the first instance
13 what agreements need to be filed and what don't given
14 that, you know, we're requiring the filing of ongoing
15 obligations. So the FCC really wasn't I believe
16 concerned too much about state commissions rejecting
17 agreements that were contrary to the public interest or
18 flat out discriminatory, so I -- and Staff's position
19 fits nicely within the FCC's balance.

20 JUDGE MOSS: Since this isn't a mandatory
21 element, does Staff read the current situation where I
22 think we probably have two of these floating around out
23 there, Covad and Multiband at least, and there's a term,
24 three year term I think, is there an opportunity for
25 Qwest to decide say three years from now, we're not

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1 going to do this any more, we think the burden of having
2 to file these things, seek approval, et cetera and so
3 forth is contrary to our interests so we're not going to
4 provide this any more to anybody, do you think that
5 opportunity will arise?

6 MS. SMITH: Yes, I think that opportunity
7 will arise, and that opportunity also arose when Qwest
8 sat down with Multiband and negotiated this agreement,
9 didn't have to.

10 JUDGE MOSS: Right, and that's where --

11 MS. SMITH: So the opportunity --

12 JUDGE MOSS: -- I'm going with my question.

13 MS. SMITH: The opportunity was there at the
14 time, and the opportunity will be there in the future.

15 JUDGE MOSS: Sure, and that's where my
16 question was exactly going. Qwest is voluntarily
17 providing this today as I understand it to anyone who
18 asks for it. Is that, maybe that's not right, but it
19 seems to me that's what it says, that this is available
20 on their Web site and --

21 MS. SMITH: I don't know that.

22 JUDGE MOSS: Okay, we'll ask Qwest about
23 that.

24 But I guess my question to you is, why would
25 they stop making this available? They are making it

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1 available voluntarily.

2 MS. SMITH: I can not speculate as to why
3 Qwest would or wouldn't provide it.

4 JUDGE MOSS: I guess that's my question is
5 Staff's position seems to be that it's necessary to
6 promote competition to ensure that if Qwest makes this
7 available at all, it makes it available under an
8 interconnection agreement and it's available to all
9 comers, yet Qwest on its own is responding to the market
10 in some fashion by voluntarily doing this, and so does
11 it become a question of which is better or which is more
12 longlasting, enduring?

13 MS. SMITH: Well, I suppose you could look at
14 it that way. But, you know, Commission Staff is
15 concerned and is reacting to information it's received
16 that in other instances that have been similar, Qwest
17 has said, well, we're just not going to provide this any
18 more. And that being the case, you have, you know, you
19 have some carriers who have entered into binding
20 agreements such as Multiband to receive this network
21 element, the line sharing, and Qwest will say, well, you
22 know, you don't have to approve it even though it's a
23 binding agreement and Multiband gets it for three years
24 because we're going to give it to everybody else anyway,
25 but Qwest can decide not to. So then you would be in a

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1 situation where Multiband had the favored agreement and,
2 you know, sort of had the deal that was binding, at
3 least for the terms of that agreement, and Qwest has
4 decided not to provide it to any other carrier.

5 JUDGE MOSS: I would want to back up for half
6 a second and make sure that I'm clear on something in
7 terms of Staff's analysis and position here. Our
8 Telecommunications Act and indeed the long history of
9 its regulation is full of parsing of terms, and that's
10 what I'm concerned about here. I have understood
11 unbundled network element to be a term of art, is that
12 how Staff sees it as well, a term of art under the Telco
13 Act?

14 MS. SMITH: No. Well, yes and no. This
15 issue hasn't come up before. At least this is the first
16 time the issue of whether agreements that are for
17 network elements that are not compelled network elements
18 need to be filed for state commission approval. In
19 every other case I have been involved in we have talked
20 about unbundled network elements, it was always about
21 unbundled network elements that were obligated, that the
22 ILEC was obligated to provide. They were the ones that
23 were on the list, and I have never used the term
24 unbundled network element outside of a dispute
25 surrounding access to those elements.

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1 So I would say that you have network
2 elements, some of them are an ILEC is obligated to
3 provide. Whether you want to call those the UNEs, the
4 unbundled network elements, or mandatory network
5 elements is sort of terms of how you phrase it. So I
6 would have to say no, unbundled network element isn't a
7 term of art in the sense that an unbundled network
8 element means only those network elements that are
9 subject to the mandatory unbundling requirements.
10 Because this issue just hasn't -- it hasn't come up, and
11 then you would get into a situation, well, okay, you
12 have an -- you have network elements, those of them that
13 -- those that are mandatory are called UNEs, and those
14 that aren't are called something else. I guess in terms
15 of Staff's position, we really don't care what they're
16 called.

17 JUDGE MOSS: I guess that gets back to an
18 earlier question I asked you, and that's concerning the
19 language there in an early clause in Section 252(a)(1)
20 where there's qualifying language there, a network
21 element pursuant to Section 251. And I guess, you know,
22 that's where I'm going here is, is line sharing a
23 network element pursuant to Section 251?

24 MS. SMITH: If you ask Staff, the answer is
25 yes. If you were to ask Qwest, I bet you the answer

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1 would be no.

2 JUDGE MOSS: Well, who's right?

3 MS. SMITH: Well, we're right of course.

4 JUDGE MOSS: Anything further from the Bench?

5 COMMISSIONER JONES: Just one point for

6 Ms. Smith.

7 If we were to agree with your position, I
8 just wonder what course you would pursue on appeal if
9 you could engage perhaps in a little bit of a
10 hypothetical here. Is it correct to assume that, and I
11 say this especially in light of the fact you aren't
12 disagreeing with the FCC's decision in the TRO
13 subsequently upheld in court that this is a delisted,
14 that line share is a delisted UNE?

15 MS. SMITH: We agree.

16 COMMISSIONER JONES: You agree with that. So
17 on what basis would you -- can we understand the basis
18 of your arguments to be basically what you have laid out
19 both in the first brief and the response brief, that
20 you're very concerned about the discriminatory aspects
21 of this on other CLECs, that you're quite concerned
22 about the Commission's authority on approval, what sort
23 of arguments would you make?

24 MS. SMITH: I'm going to answer your question
25 carefully, and I hope that in doing so I give you the

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1 information you need without going too far.

2 COMMISSIONER JONES: Okay.

3 MS. SMITH: I am today the advocate for
4 Commission Staff, and Commission Staff is a separate
5 party before the Commission today. I am advocating
6 Staff's position. If the Commission were to order and
7 find that this agreement is subject to the filing and
8 approval requirements and Qwest were to appeal that
9 decision, I would no longer be the advocate for
10 Commission Staff, I would be the advocate for the
11 Commission. And if the Commission were to arrive at its
12 conclusion with analysis a little bit differently than
13 what Staff has proposed today, I would be defending the
14 Commission's analysis on appeal. I would not expect the
15 Commission to issue an order that would conflict with
16 the FCC's decision that line sharing is no longer a
17 network element that is required to be provided by
18 ILECs, so I would not anticipate that being part of the
19 Commission's order, and that being the case, I would not
20 anticipate having to defend that kind of decision.

21 COMMISSIONER JONES: Thank you.

22 JUDGE MOSS: Okay, I think I have just one
23 final question then, Ms. Smith, and that is I was
24 wanting to know what does Staff view to be the ongoing
25 obligation, is it the line sharing itself that is the

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1 ongoing obligation to use the FCC's standard in the
2 declaratory order?

3 MS. SMITH: It is the obligation to provide
4 line sharing under the terms of the agreement between
5 Qwest and Multiband. I believe that agreement is for a
6 three year duration, so it would be ongoing for three
7 years, and that is the ongoing obligation. It is not an
8 agreement that pertains to any line sharing that had
9 occurred in the past.

10 JUDGE MOSS: Okay.

11 If there's nothing further from the Bench,
12 and you're within your allotted time, and of course
13 we'll have five minutes for rebuttal.

14 MS. SMITH: Thank you, Your Honor.

15 JUDGE MOSS: Thank you.

16 So I think we can turn to Ms. Anderl.

17 MS. ANDERL: Thank you, Your Honor, Chairman
18 Sidran, Commissioner Oshie, Commissioner Jones, good
19 morning, Lisa Anderl for Qwest. Since you have
20 obviously read the pleadings, I can state the obvious,
21 and that is that we couldn't disagree with Staff more.
22 I especially couldn't disagree more with the recent
23 contention that UNE is not a term of art. UNE most
24 certainly is a term of art, has been for nine years
25 since the passage of the Act and almost nine years now

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1 since the issuance of the first report and order
2 implementing local competition. There is a clear, clear
3 difference set forth in the statutes and the FCC rules
4 between an unbundled network element and a basic network
5 element that is not required to be unbundled. The FCC
6 has recognized that in countless orders and many, many
7 sections and subsections of rules. The Act recognizes
8 it very, very clearly, and I think that is where we
9 should start, which is at the statutory language.

10 There are really three provisions of law that
11 are relevant to our consideration here. The first is
12 the language of the Act, the second is the FCC's
13 declaratory order, and the third is the FCC's delisting
14 of the line sharing element. Line sharing is a network
15 element, it is not an unbundled network element, and
16 that distinction is really critical.

17 Under Section 252(a)(1), only those
18 agreements reached through voluntary negotiation
19 pursuant to Section 251 are interconnection agreements
20 that need to be filed. Staff talks a lot about the
21 public policy interests around interconnection
22 agreements, around making them available, around having
23 them be public, around having them be non-discriminatory
24 and in the public interest, all of those policy
25 standards only apply if the agreement is in fact an

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1 interconnection agreement, and you have to look at what
2 is an interconnection agreement, what's the definition.
3 Under Section 252(a)(1), and both parties quote it in
4 their briefs, the Congress had said:

5 Upon receiving a request for
6 interconnection services or network
7 elements pursuant to Section 251, an
8 incumbent local exchange carrier may
9 negotiate, enter into a voluntary
10 agreement, et cetera.

11 What does pursuant to 251 mean? It means for
12 an element or service or interconnection that the
13 incumbent is required or obligated to provide under
14 Section 251. Section 251(c)(3) requires unbundled
15 access to network elements as subsequently defined by
16 the FCC. The statutory language is very clear. It says
17 that the ILEC or the RBOC has a duty to provide to any
18 requesting telecommunications carrier for the provision
19 of the telecommunications service non-discriminatory
20 access to network elements on an unbundled basis at any
21 technically feasible point, and then it goes on.
22 Unbundled network elements are those that are required
23 to be provided by Section 251, thus the only request
24 that a carrier can make for interconnection services or
25 network elements pursuant to Section 251 is a request

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1 for unbundled network elements, and those are the ones
2 that the FCC has mandated the carrier provide. If this
3 is a request for a network element that is not mandated
4 or in fact as with line sharing affirmatively delisted,
5 that is not a request for that service or that network
6 element pursuant to Section 251, the resulting agreement
7 for provision of that service or network element is
8 therefore not an interconnection agreement under Section
9 252(a)(1).

10 COMMISSIONER JONES: Ms. Anderl, just briefly
11 on that point, it's a grammatical question but may have
12 some substantive implications as well, so pursuant to
13 Section 251 and 252(a)(1), does that apply to all three
14 nouns, interconnection, services, or does it just apply
15 to network elements, what's your reading of that?

16 MS. ANDERL: I think it applies to all three.

17 COMMISSIONER JONES: Because you would agree
18 that you can read it both ways, can't you?

19 MS. ANDERL: Not really.

20 COMMISSIONER JONES: No?

21 MS. ANDERL: No, although I don't think it
22 would really hurt our position, because it modifies
23 network elements either way. But if you read Section
24 251, you see that Section 251 does require access to
25 things that are defined as interconnection in some

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1 cases, access to services and other --

2 COMMISSIONER JONES: What would services be,
3 just a quick question?

4 MS. ANDERL: Well, one of the obligations
5 under Section 251 is that Section 251(b) requires all
6 carriers to make their services available for resale.

7 COMMISSIONER JONES: Okay.

8 MS. ANDERL: And Section 251(c) requires
9 incumbents to make their services available for resale
10 at a wholesale discount. So I believe that that is what
11 the reference that was there for services --

12 COMMISSIONER JONES: I see.

13 MS. ANDERL: -- is referring back to that
14 identification in Section 251.

15 COMMISSIONER JONES: Okay.

16 MS. ANDERL: As a service that's obligated to
17 be provided.

18 I understand that Staff's argument is, well,
19 you know, you have to read that whole section, and if
20 carriers decide to negotiate an agreement without regard
21 to the standards set forth in Subsections (b) and (c) of
22 Section 251, that's what we have here. That's not
23 right. It's not right because if you read that language
24 the way Staff reads it, you have eliminated the
25 qualifier, pursuant to Section 251. It's written right

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1 out of the statute. And I don't think that anybody
2 would agree that that's an appropriate rule of statutory
3 construction.

4 In fact, what the without regard to the
5 standards set forth in Subsections (b) and (c) of
6 Section 251 means is that you can negotiate different
7 terms and conditions for services, interconnection, or
8 elements that are required to be provided. You can come
9 up with different pricing standards, you can come up
10 with limitations that maybe the Act by itself wouldn't
11 countenance but the parties can agree to, but only with
12 regard to those services that a carrier has a right to
13 request or has requested pursuant to Section 251.
14 That's all that it can mean. And I realize this is
15 consistent with my client's position, but I will tell
16 you I have read this statute over and over and over
17 again, and I can not think of what else that qualifying
18 clause can mean, and Staff's reading of it reads that
19 qualifier right out of existence.

20 Once you look at the statutory framework, you
21 next go to the FCC's declaratory order. Everyone has
22 read this a million times, Paragraph 8 is where the FCC
23 lays out the statutory framework. Footnote 26 makes it
24 very clear that it's not a broad standard for filing,
25 but it is a limited standard. I don't think the FCC

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1 used the word only accidentally. The FCC said, we find
2 that only those agreements that contain an ongoing
3 obligation relating to Section 251(b) or (c) must be
4 filed. Since line sharing is not an unbundled network
5 element and is not an obligation under Section 251(b) or
6 (c), this is not an agreement, a line sharing agreement
7 is not an agreement that needs to be filed.

8 And I think that the FCC got that right and
9 described that there is a need to balance procompetitive
10 deregulatory framework with the filing requirements. I
11 think Staff's argument that we need to protect
12 competitive relationships by regulating them is just
13 from a policy basis wrong. You don't protect
14 competitive relationships by disincenting carriers from
15 entering into things that they are otherwise not
16 obligated to enter into.

17 To your point, Chairman Sidran, maybe the
18 recommendation here is to approve this agreement and
19 that's great, what could we possibly have to complain
20 about, but if there is authority to approve, there is
21 authority to reject as well. What if, for example,
22 parties to a commercial agreement for a network element
23 that Qwest has no obligation to provide determined that
24 because of a carrier's payment history or credit
25 worthiness that there was a five day turnaround on

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1 payment of bills or that disconnection could be done on
2 some expedited basis for the particular element or
3 service that Qwest was providing. If this was a
4 provision that was agreeable to both parties, could it
5 still conceivably come before the Commission and have
6 Staff recommend or the Commission decide that such an
7 agreement, such a provision is not in the public
8 interest, not consistent with the public interest.

9 CHAIRMAN SIDRAN: Ms. Anderl, do you agree
10 there is a distinction between a filing requirement and
11 a filing subject to approval requirement?

12 MS. ANDERL: Sure, there is, yes, yes, Your
13 Honor.

14 CHAIRMAN SIDRAN: And what's Qwest's response
15 to the decision by the Minnesota Commission?

16 MS. ANDERL: We didn't appeal it, but I think
17 that in Washington a filing requirement may be somewhat
18 redundant, because in the unfiled agreements case in
19 Docket 033011, which is now a final unappealed
20 Commission order, one of the provisions of the
21 settlement agreement that we entered into with Staff and
22 Public Counsel was to have a, you will love this
23 acronym, a WARC monitor, that is WARC, and it stands for
24 wholesale agreement review committee. The wholesale
25 agreement review committee is an internal committee

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1 within Qwest through which all of these agreements now
2 pass to make sure they are filed if necessary and to
3 make sure that we don't have issues like we did in the
4 unfiled agreements case. And the monitor is going to be
5 an independent third party, I believe there's a parallel
6 provision in the Arizona settlement as well, who will be
7 permitted then to review the decisions and results of
8 that committee.

9 CHAIRMAN SIDRAN: Wholesale agreement, and
10 what's the RC?

11 MS. ANDERL: Review committee.

12 CHAIRMAN SIDRAN: Review committee. So
13 bottom line is Qwest would not dispute the authority of
14 the Commission to require the filing of these types of
15 agreements?

16 MS. ANDERL: That's right.

17 CHAIRMAN SIDRAN: Thank you.

18 MS. ANDERL: I think in fairness for you to
19 make a decision that it doesn't count as an agreement
20 that needs to be filed, you need to be able to look at
21 it.

22 JUDGE MOSS: Ms. Anderl, you made the point a
23 second ago that the provision being protecting
24 competitive relationships by regulating them is not a
25 pretty good idea. On the other side of that coin,

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1 what's Qwest's incentive for continuing to make line
2 sharing available on a non-discriminatory basis?

3 MS. ANDERL: To the extent that the
4 agreements that we have entered into with carriers are
5 financially rational for us, there is the incentive of
6 the market for us to do that, which is exactly what
7 competition -- when competition flourishes, it is
8 because the market is regulating it, not a regulatory
9 body. And so to the extent that we have the freedom to
10 negotiate agreements that are beneficial to both, of
11 course, why wouldn't we continue to offer these
12 services. But we don't have to.

13 I mean and that's kind of the problem that
14 the Commission finds itself faced with. If there is
15 overregulation, what is the next network element that
16 maybe the FCC hasn't provided that carriers would find
17 beneficial that Qwest will just say, you know what, in
18 the interplay between regulation and competition, it
19 seems like the regulatory burdens are too great for us
20 to be entering into these agreements if we have to file
21 them, if we have to face approval or potential
22 disapproval with all of our state commissions on these
23 agreements that we believe are not jurisdictional under
24 the Act.

25 CHAIRMAN SIDRAN: And what's the status of

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1 the Montana Commission's decision?

2 MS. ANDERL: We appealed it to Federal
3 District Court in Montana. I believe that oral argument
4 is scheduled in June. And I don't remember this
5 specifically, but I thought that the judge had indicated
6 to the parties that it would be a fairly rapid decision,
7 maybe in the summer.

8 JUDGE MOSS: Speaking of regulatory burden,
9 the understanding is that Qwest is continuing to make
10 line sharing available basically on the terms of this
11 form of agreement to all the CLECs in its various
12 states. Why wouldn't it be less burdensome to Qwest to
13 just continue doing that under the interconnection
14 agreements? Then you wouldn't have to be in here making
15 this argument today.

16 MS. ANDERL: Well, it's not just that, it's
17 the risk that I described, that a state commission may
18 choose to disapprove certain terms, try to insert their
19 judgment about what really is in the public interest or
20 not.

21 JUDGE MOSS: Well, are the terms that you're
22 offering under the line sharing agreement substantially
23 different than those under the interconnection
24 agreement, or are they quite similar? You have line
25 sharing under your interconnection agreement.

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1 MS. ANDERL: Right.

2 JUDGE MOSS: So I'm asking if this is just a
3 continuation of the same terms and conditions but under
4 a separate form of agreement.

5 MS. ANDERL: Right. Well, the reason we --
6 the interconnection agreement is for elements that are
7 required under Section 251, and we do not believe that
8 it is in our interests to have in those agreements
9 elements that are subject to commercial negotiations and
10 not regulatory oversight, and so we have a separate
11 agreement. We are making it available, but we, you
12 know, from a jurisdictional standpoint, I guess it's not
13 a question of, well, is the exercise of the Commission's
14 jurisdiction good or bad for us from a business
15 standpoint, but is it lawful, and we don't believe that
16 the Commission exercising jurisdiction over these
17 agreements would be lawful.

18 JUDGE MOSS: So we're being purists here, we
19 want to make sure that the law is adhered to?

20 MS. ANDERL: Yes.

21 JUDGE MOSS: Small matters of principle and
22 all that.

23 Go ahead.

24 COMMISSIONER OSHIE: Just I'm going to follow
25 up on a question that was asked by Judge Moss. What

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1 options do the CLECs have should Qwest not continue to
2 offer line sharing as a product?

3 MS. ANDERL: Well, I guess that would be --
4 there would be a couple of options. They could offer --
5 they can lease the entire loop from Qwest.

6 COMMISSIONER OSHIE: And what's the general,
7 what's the approximate cost of that?

8 MS. ANDERL: There are five zones in the
9 state of Washington, deaveraged pricing for loops, I
10 believe the lowest price is somewhere in the \$10 range,
11 and the highest price is --

12 COMMISSIONER OSHIE: Around \$50?

13 MS. ANDERL: -- quite high, but there are
14 very, very, very few lines in zone 5, and, you know,
15 most of them -- I would think all four, I think the
16 first four zones are all under \$20.

17 COMMISSIONER OSHIE: And what's the --

18 MS. ANDERL: So a carrier has an absolute
19 legal right to lease the entire unbundled copper loop
20 from Qwest.

21 COMMISSIONER OSHIE: And what's the cost of
22 the product that you're offering in the line sharing
23 element itself?

24 MS. ANDERL: I need to get --

25 COMMISSIONER OSHIE: I'm just trying to get

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1 a, you know, differential here, what's the delta
2 between?

3 MS. ANDERL: I think, Your Honor, I haven't
4 looked at the pricing in the interconnection agreement
5 for a while, let me just double check that.

6 Oh, well, I can't find it in my pile because
7 I already pulled it out. The pricing for the unbundled
8 loop, or for the shared loop rather for line sharing, is
9 depending on volumes \$5, \$6, \$7, or \$8 per location.

10 COMMISSIONER OSHIE: And is that deaveraged
11 as well?

12 MS. ANDERL: No, it's not.

13 COMMISSIONER OSHIE: So if you were in zone 4
14 or 5, you would be, well, let's say you're in zone 4,
15 you're in the mid \$20's for the entire loop and maybe as
16 high as \$8 for --

17 MS. ANDERL: Right.

18 COMMISSIONER OSHIE: -- for the line sharing
19 service?

20 MS. ANDERL: Right, but --

21 COMMISSIONER OSHIE: I stopped you in the
22 middle of your -- I think you had another option
23 available as well.

24 MS. ANDERL: Yes.

25 COMMISSIONER OSHIE: That would be resale I'm

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1 assuming?

2 MS. ANDERL: Well, the carriers can offer
3 line -- a carrier can obtain access to the high
4 frequency portion of the unbundled loop through line
5 splitting, and that is that two CLECs can arrange, make
6 an arrangement, and Qwest is obligated under law to
7 allow CLECs to do this, and that is that one CLEC would
8 take the entire unbundled loop for provision of voice
9 services and lease to another CLEC the high frequency
10 portion of the loop for provision of broadband. And
11 that is functionally the same as line sharing except
12 that the voice provider is not Qwest. In fact, that's
13 the difference between line splitting and line sharing.
14 With line sharing the voice provider is Qwest, with line
15 splitting the voice provider is another CLEC, one of two
16 who are making the service available.

17 To the extent that there are line sharing
18 agreements out there, I suppose a third option might be
19 that if a carrier felt as though it were being
20 unreasonably discriminated against by Qwest not making
21 that available under the general non-discrimination
22 provisions of the 1934 Act, they might have a claim to
23 the FCC and ask the FCC, should Qwest make this
24 available even though it's not required to do this under
25 251, the fact that it's making it available to similarly

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1 situated carriers and not to me is an unreasonable
2 discrimination. So that would be a decision for the FCC
3 to make, and that would not be a question to be decided
4 on at a state level.

5 So those are the options.

6 COMMISSIONER OSHIE: Okay, thank you.

7 JUDGE MOSS: Might it take substantially
8 longer for a CLEC to obtain relief from the FCC than it
9 would to obtain relief at the state level?

10 MS. ANDERL: It might.

11 JUDGE MOSS: Wouldn't that be rather typical
12 in today's environment considering what we see going on
13 at the FCC?

14 MS. ANDERL: The FCC -- I have seen the
15 Washington Commission issue decisions on a fairly speedy
16 schedule, I have not seen the same at the FCC.

17 JUDGE MOSS: Thank you.

18 MS. ANDERL: But, you know, Your Honor, that
19 again is, and I don't mean to sound callous, but largely
20 irrelevant to the question of whether this Commission
21 has jurisdiction. The fact that this Commission sees
22 itself as well positioned to assist a CLEC or otherwise
23 carry out particular policy goals has to take a back
24 seat to whether the clear language of the Act allows the
25 Commission to operate in that role under these

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1 circumstances.

2 JUDGE MOSS: Well, while I agree that the
3 Commission must act lawfully, isn't it the case that
4 certain authority was under the Telecommunications Act
5 delegated to the states precisely for the reason that I
6 suggest, which is that the states are in the best
7 position to deal with this sort of thing on an expedited
8 basis?

9 MS. ANDERL: Well, that's exactly right, Your
10 Honor, and I'm glad you kind of put it that way, and
11 that is because the state commissions need the authority
12 to deal with these things on an expedited basis when
13 you're dealing with unbundled network elements, and
14 unbundled network elements are those elements that the
15 FCC has decided meet the necessary and impaired test.
16 In other words, they are necessary for the CLEC's
17 operation, and without them the CLEC is impaired. And
18 so of course it's important that the state be deputized
19 to act rapidly to protect these relationships when that
20 is the case. When you have the opposite case where the
21 FCC has made an affirmative determination that these
22 CLECs are not impaired and that these elements are not
23 necessary, then all that rationale goes away.

24 Couple of points that Staff raised in their
25 response brief that I thought would just bear a quick

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1 response. At Paragraph 11 Staff mentions that the FCC
2 has opened a docket to look at the state of the law with
3 regard to the filing requirements and states that if the
4 FCC had already exempted the types of agreements we're
5 talking about here in its declaratory ruling, it would
6 have no reason to incorporate that issue into a
7 subsequent rulemaking. I think some clarification on
8 that docket is in order. That docket is not a sua
9 sponte rulemaking by the FCC. It is in fact a
10 consolidation of three decisions for declaratory ruling
11 filed by RBOCs, and frankly the reason those petitions
12 for declaratory ruling have been filed is that even
13 though the law in the declaratory order is clear in our
14 view, states have disagreed and have in fact been
15 requiring filing and approval of commercial agreements
16 such as this. Those three petitions for declaratory
17 ruling by RBOCs other than Qwest I believe are what
18 prompted the FCC to take action. That does not in my
19 view mean that the state of the law isn't as the FCC
20 said in the declaratory ruling. I think it is, and the
21 states under the current rule of law have gotten it
22 wrong.

23 Now what the FCC does in a subsequent docket,
24 we don't know. They may clarify their ruling, they may
25 expand the scope of the filing requirements, they may

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1 further narrow the limits of those requirements, we
2 don't know. But what we do know is what the FCC said
3 interpreting the clear language of the Act in the
4 declaratory order, and I believe that there can't really
5 be any question that an agreement such as the line
6 sharing agreement before you today is not a 252(a)(1)
7 agreement.

8 CHAIRMAN SIDRAN: Are there other states
9 besides Minnesota, New Mexico, and Montana that have
10 ruled on this issue?

11 MS. ANDERL: No, not in Qwest territory that
12 I know of. And as I think in my opening brief, our
13 Footnote 2 gives you a little summary, I don't think I
14 have anything to update there.

15 CHAIRMAN SIDRAN: So this matter that's
16 before the FCC that you just referenced, does that
17 involve to your knowledge other states outside Qwest's
18 area that are addressing this same issue?

19 MS. ANDERL: That's exactly it.

20 CHAIRMAN SIDRAN: Do you happen to know which
21 states those are off the top of your head?

22 MS. ANDERL: No, I don't.

23 CHAIRMAN SIDRAN: Okay, thank you.

24 MS. ANDERL: Would you like me to provide
25 that, Your Honor? I can get that information fairly

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1 easily.

2 CHAIRMAN SIDRAN: That would be helpful,
3 thank you.

4 MS. ANDERL: Okay, I think I made a legible
5 enough note that I will be able to remember that.

6 Going back to Staff's response brief, I guess
7 one final point is in Paragraph 14 Staff begins making
8 what seems to be kind of a policy argument that because
9 of the similarity between the high frequency portion of
10 the loop and the other elements that Qwest isn't
11 actually obligated under law to provide, it makes no
12 sense not to require filing of the agreement addressing
13 the high frequency portion of the loop. But I don't
14 believe that similarity to an unbundled network element
15 is the standard. In fact, it's not. And because we
16 have such a clear and, you know, unassailed ruling by
17 the FCC that line sharing is not a network element, I
18 don't think it would matter how much it looks like a
19 network element that is required to be provided, because
20 it is not required to be provided. You simply can't
21 bootstrap it in because it looks like or even uses
22 certain network elements that are lawfully provided.

23 And then finally I guess Staff closes with
24 this argument that I have addressed a little bit
25 already, which is the concern about a sweetheart deal.

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1 And I think that the analysis there is really that it
2 may be that Qwest is prohibited from offering sweetheart
3 deals to carriers and prohibited under other provisions
4 of the Telecommunications Act or the Communications Act
5 of 1934 from engaging in undue or unreasonable
6 discrimination, but when those alleged sweetheart deals
7 concern elements outside the Commission's jurisdiction,
8 then the Commission is not the one to remedy that type
9 of discrimination.

10 Consistent with that and as this Commission
11 recognized in the unfiled agreements case, certain
12 contracts when they concern say for example nothing but
13 interstate services are not agreements that this
14 Commission has exercised any jurisdiction over without
15 regard to what the terms and conditions of those
16 agreements are, without regard to whether or not other
17 carriers ought to be allowed to have identical or
18 similar terms and conditions, without regard to whether
19 Qwest may or may not be discriminating in those
20 agreements against other carriers, the Commission agreed
21 in the unfiled agreements order these agreements are
22 concerned only with interstate services. Staff agreed
23 when they were agreements that concerned only interstate
24 services, they should be dismissed from the unfiled
25 agreements case as not addressing 252, as not being 252

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1 agreements. And so what we have here really is that
2 line sharing is very analogous to that, because it is
3 essentially an interstate service. It is one over which
4 the FCC has exclusive jurisdiction, and the FCC having
5 exercised that jurisdiction has the final word on that.

6 And that concludes my remarks.

7 JUDGE MOSS: I'm just pondering your comment
8 that it's essentially an interstate service and trying
9 to make sure I understand what that means. We're
10 talking about a local loop here.

11 MS. ANDERL: Yes, Your Honor, it's
12 essentially an interstate service jurisdiction though
13 because of the FCC's --

14 JUDGE MOSS: Or perhaps parallel to or
15 analogous to but not -- the distinction between
16 interstate and intrastate has been very important in
17 this area of the law, so I'm --

18 MS. ANDERL: Well --

19 JUDGE MOSS: -- to press the point a little
20 bit.

21 MS. ANDERL: DSL is an interstate service.
22 DSL is not offered at the state level through state
23 tariffs. Data services, Internet access is seen by the
24 FCC to be an interstate service. It is, but it's --

25 JUDGE MOSS: But all you're provisioning here

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1 is the local loop.

2 MS. ANDERL: We're provisioning --

3 JUDGE MOSS: It's somebody else who is
4 offering the DSL.

5 MS. ANDERL: We're provisioning the high
6 frequency portion of the local loop.

7 JUDGE MOSS: Okay, if there are no further
8 questions from the Bench for Ms. Anderl at this time,
9 then we'll give you back your five minutes, Ms. Smith.

10 MS. SMITH: Thank you, Your Honor, and I am
11 going to be very brief in my reply comments. The first
12 I want to -- the first comment I want to make is in
13 response to Ms. Anderl's reply to the statement in
14 Staff's brief that the FCC has ruled the declaratory
15 order requests for declaratory orders directly on this
16 issue into another rulemaking. Certainly we don't --
17 we're not saying that the commission or the FCC
18 initiated another rulemaking just to determine this
19 issue. They just took those petitions for declaratory
20 order and pushed them into another rulemaking docket for
21 consideration. What's significant about that is if the
22 FCC in its declaratory order had intended to or had said
23 that agreements, voluntarily negotiated agreements for
24 network elements that are no longer required to be
25 mandated don't need to be filed, they wouldn't have

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1 needed to do that. It would just -- it would have been
2 plain from the declaratory order that they didn't need
3 to be filed.

4 The other point about that too is that Qwest
5 had expressly asked the FCC to decide in the declaratory
6 order that agreements for delisted or non-mandated
7 network elements need not be filed, and you can read the
8 FCC order time and time again, it did not exempt those
9 agreements expressly. What it said was ongoing
10 agreements for these things need to be filed, and as I
11 said earlier, we believe that this is that kind of
12 agreement.

13 Also I want to respond to the point that the
14 big danger here is that the Commission may actually
15 reject these agreements as opposed to approve them and
16 allow them to be adopted by other agreements pursuant to
17 Section 252(a). Staff is aware of, I don't know,
18 hundreds of voluntarily negotiated interconnection
19 agreements that come before the Commission for approval.
20 From what I understand from Staff, there have been
21 perhaps 200 per year since 1996, and the Commission
22 hasn't rejected any under its discriminatory and public
23 interest standard.

24 CHAIRMAN SIDRAN: So which way does that cut?
25 Because if after all of that they have never been

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1 rejected, doesn't that argue for perhaps a filing
2 requirement so that there's notice and we have an
3 opportunity to protect the public interest, but if none
4 are being rejected, what is the public -- isn't that
5 sort of a benchmark in terms of determining the need for
6 this kind of oversight on the approval end?

7 MS. SMITH: No, I just think that means that
8 the companies, because they know they're going to come
9 before the Commission for approval or rejection, govern
10 themselves accordingly in their negotiation process, and
11 they're not going to bring before the Commission and
12 they're not going to enter into an agreement that is
13 discriminatory or that is contrary to the public
14 interest. You know, without that State Commission
15 authority, who knows what these agreements would
16 actually include without --

17 CHAIRMAN SIDRAN: Well, we will know, because
18 they would be filed.

19 MS. SMITH: And then what? And then if we
20 file them and then say, well, you know, it's not
21 jurisdictional or this, that, or the other thing, they
22 -- just requiring filing without allowing the Commission
23 to approve and reject as set forth in the Act is a
24 pretty hollow arrangement. It just doesn't really -- it
25 just doesn't really serve much of a purpose. I mean

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1 certainly, you know, it's better than the Commission not
2 knowing about them at all. But once they're filed, the
3 Commission needs to exercise its authority to either
4 approve it because it doesn't discriminate and it's
5 consistent with the public interest or reject it because
6 it is inconsistent with the public interest. So we
7 think that the, you know, if the parties were to come to
8 an agreement where Qwest said, you know, you're sort of
9 a shaky CLEC and we want to get paid right away, I think
10 the Commission would think that that would be
11 reasonable. There may be other terms that the
12 Commission would find unreasonable, and I would
13 anticipate the Commission would have real good reason
14 for that.

15 Another point that I wanted to make quickly
16 in response is that we're not talking about interstate
17 services here, we're talking about local services, we're
18 talking about services provided over the local loop,
19 these aren't interstate services.

20 And finally, I want to respond to
21 Ms. Anderl's point that Staff's reading of Section
22 252(a)(1) reads out the requirement, that reads out the
23 language upon receiving a request for interconnection
24 services or network elements pursuant to Section 251,
25 that we read that out of the statute. Our reading is --

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1 our interpretation of the statute is wholly consistent
2 with that. When you go back and you look at Section
3 251(c)(3) when it talks about unbundled access, there's
4 nothing in the Act in Section (c)(3) that would exempt
5 any kind of network element from the mandatory
6 requirement. That happens when the FCC goes through and
7 applies its necessary and impaired analysis, which is
8 one of the standards that Section 251 refers to. So to
9 say that Staff is reading that out of the statute is not
10 correct. We actually read that into the statute. We
11 read the FCC's decision-making authority as to what
12 network elements need to be provided as one of the
13 standards that is contained in Section 251(b) and (c) of
14 the act.

15 JUDGE MOSS: I just want to try to connect
16 the dots on your points concerning the purpose of the
17 Commission review and approval process vis a vis
18 discrimination. What I think I heard you say just now
19 was that the point is that Commission exercise of
20 jurisdiction and approval prevents an RBOC, Qwest in
21 this instance, from filing or entering into an agreement
22 that is discriminatory on its face.

23 MS. SMITH: That's correct, I mean that's --

24 JUDGE MOSS: Okay, well, that's where I'm
25 having a disconnect. I thought Staff's argument was

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1 that this was to cure the possibility of discrimination
2 by not making the same agreement available to all.

3 MS. SMITH: It's both, Your Honor, and I
4 guess where it says in the Act, it says that the state
5 commission reviews the agreement to make sure that it's
6 not inconsistent with the public interest and it doesn't
7 discriminate against another carrier, I mean the
8 Commission won't know what other carriers might be out
9 there who may want that agreement until after it's been
10 filed and approved, so the Commission when it's looking
11 at an individual agreement to decide whether or not to
12 approve and reject it, the Commission really is looking
13 at the terms of that agreement and whether the terms of
14 that agreement discriminate against another carrier.

15 The sort of overall discrimination to make
16 sure that all CLECs compete on a level playing field,
17 that is assured by filing and approving the agreement,
18 and that way you know the agreement is there, it's been
19 found not to discriminate against another carrier, and
20 then another carrier can adopt that agreement and have
21 the same terms and conditions. So when the Commission
22 exercises its authority to approve or reject the
23 agreement, it's really looking at that agreement itself.
24 And once that agreement is approved, then the
25 antidiscrimination intent of 251, 252(i) comes into

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1 play.

2 JUDGE MOSS: Other questions from the Bench
3 for either party?

4 COMMISSIONER JONES: I've just got a couple
5 of questions for Ms. Anderl, I'm sorry, I missed the
6 first part. Can you give me a rough idea of what
7 percentage of your line sharing arrangements now or your
8 traffic is controlled by ICAs versus commercial,
9 voluntary commercial agreements of the sort that we have
10 before us today with either Covad or, well, today is
11 Multiband?

12 MS. ANDERL: Well, Your Honor, there are line
13 sharing arrangements that are provided under the
14 interconnection agreements still because they were
15 ordered prior to October 2nd of 2004.

16 COMMISSIONER JONES: Right.

17 MS. ANDERL: And there are line sharing
18 arrangements that are provided or offered under the line
19 sharing agreement because they were post October, on or
20 after October 2nd, 2004. If in the universe of line
21 sharing lines that we have out there you're asking me to
22 say how much are under the interconnection -- how many
23 are under the interconnection agreements and how many
24 are under the line sharing --

25 COMMISSIONER JONES: Yeah, that's the thrust

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1 of my question.

2 MS. ANDERL: I don't know the answer to that,
3 but I can provide the answer --

4 COMMISSIONER JONES: Could you provide that
5 for the record.

6 MS. ANDERL: I can do that.

7 COMMISSIONER JONES: And secondly, is there a
8 conversion provision, and what is Qwest's position on
9 converting those line sharing agreements under the ICAs
10 to this new commercial agreement, is it going to be your
11 intent to encourage conversion under the -- I think
12 there's a provision in the Multiband agreement to this
13 new commercial agreement?

14 MS. ANDERL: There is a provision that allows
15 the carrier to convert. I do not believe that we're
16 taking a position one way or the other as to whether
17 they need to or should.

18 COMMISSIONER JONES: And is there any
19 economic justification for a conversion such as volume,
20 volume discounting or as Commissioner Oshie mentioned
21 before the, you know, the pricing of the lines?

22 MS. ANDERL: Not that I'm aware of, no.

23 COMMISSIONER JONES: And final question, what
24 provisions, this agreement with Multiband, is it subject
25 to the laws of the -- what's the controlling law, is it

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1 Washington or Colorado?

2 MS. ANDERL: Do you mean for things like
3 dispute resolution or --

4 COMMISSIONER JONES: Yes, things like that.

5 MS. ANDERL: Let me just find that for you,
6 Your Honor.

7 Now for Multiband, as I look at the agreement
8 here, I believe the Covad agreement and Multiband
9 agreements are the same. Multiband apparently only
10 operates in five states, so you can see on the cover
11 sheet it's checked Colorado, Idaho, Montana, Washington,
12 and Wyoming.

13 COMMISSIONER JONES: Okay.

14 JUDGE MOSS: You might look at provision
15 3.14.1, Ms. Anderl.

16 MS. ANDERL: Thank you, Your Honor. 3.14.1,
17 I have not spent that much time with this agreement,
18 needless to say, nor could I check the controlling
19 law --

20 COMMISSIONER JONES: Page 16.

21 MS. ANDERL: It is under Colorado law.

22 COMMISSIONER JONES: Okay. Then my last
23 question would be under either Colorado law or
24 Washington State law, one of Staff's main concerns is
25 the possible impact of discrimination with other CLECs

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1 or other types of not only dispute resolution but other
2 -- I think their concern revolves primarily around
3 discrimination. What sorts of state statutes in
4 Colorado or the State of Washington could you cite that
5 could give us some reference as to how we would protect
6 the State's interests, the State's public interests?

7 MS. ANDERL: Well, to the extent that that
8 choice of law provision there refers to the laws of
9 Colorado, I don't know that it means the laws of
10 Colorado with regard to discrimination or those types of
11 concerns.

12 COMMISSIONER JONES: Okay.

13 MS. ANDERL: I continue to believe that our
14 non-discrimination obligation for a delisted element is
15 contained under the Communications Act of 1934.

16 COMMISSIONER JONES: Section 211 or 203?

17 MS. ANDERL: 203.

18 COMMISSIONER JONES: So the --

19 MS. ANDERL: Well, one of those is the filing
20 requirement, and one of those is the --

21 COMMISSIONER JONES: Is the
22 non-discrimination requirement, right, and I think you
23 cite that in your brief, that those provisions would
24 still apply at the federal level.

25 MS. ANDERL: Yes.

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1 COMMISSIONER JONES: So that would be your
2 contention, that the public interest of the state would
3 be best protected by the filing requirements under the
4 Federal Communications Act under those two provisions?

5 MS. ANDERL: That's exactly right.

6 COMMISSIONER JONES: Thank you.

7 JUDGE MOSS: Bear with us for just a moment.

8 (Discussion on the Bench.)

9 JUDGE MOSS: All right, well, I believe that
10 will conclude our argument, and we appreciate the
11 parties being here today and presenting their very lucid
12 arguments along with the well-written briefs, and with
13 that, we will be off the record.

14 (Hearing adjourned at 11:40 a.m.)

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