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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

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

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

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

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

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

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

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

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

[3]Cmplt. at 3.

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

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

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

I. THE TELECOMMUNICATIONS ACT OF 1996.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. BACKGROUND.

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

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

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

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

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

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

[21]Qwest's Opening Brief at 14.

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

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

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

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[22]Id. at 18.

[23]Cmplt. ex. 2.

[24]Cmplt. ex. 1.

[25]Cmplt. ex. 3.

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

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

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

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

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

[27]Cmplt. ex. 7.

[28]Cmplt. ex. 8.

[29]Cmplt. ex. 9.

[30]Cmplt. at 1.

respect to the CLSA.[31]

III. STANDARD OF REVIEW.

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

IV. DISCUSSION.

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

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

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

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

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

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

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

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

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

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required to provide line sharing as an unbundled network element under section 251(c)(3), Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978, ¶¶ 255, et seq. (2003)("Triennial Review Order" or "TRO"), a conclusion that the D.C. Circuit Court of Appeals has expressly upheld. United States v. Telecom Ass'n v. FCC, 359 F.3d 554, 584-85 (D.C. Cir. 2004) ("USTA II").

[35]Qwest's Opening Brief at 7.

[36]Id. at 10.

[37]Id. at 24-25.

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

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

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

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

The PSC first argues that section 252's plain language

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

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

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

[39]Id. at 9.

[40]Id. at 12.

[41]Id. at 14-18 (citing Memorandum Opinion and Order, In the Matter of Qwest Communications International, Inc., Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), WC Docket No. 02-89, 17 FCC Rcd 19337, 2002 WL 31204893 (Oct. 4, 2002) ("Declaratory Order")).

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

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

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

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

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

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

[44]Id. at 27.

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

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

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

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

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

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

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

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

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

V. CONCLUSION.

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

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

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

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

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

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

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

[49]Cmplt. ex. 2.

approval by the Defendants under section 252 of the FTA.

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

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

The Clerk of Court shall enter Judgment accordingly.

DATED this 9th day of June, 2005.

Carolyn S. Ostby
United States Magistrate Judge

CERTIFICATE OF MAILING
DATE: 6/10/05 BY: [illegible]
I hereby certify that a copy of this order was mailed to:
James Paine
Ted Smith
Monica Prasad

[50] Cmplt. ex. 9.