STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

New Edge Network, Inc./Qwest Corporation **Case No. PU-04-620**
Commercial Line Sharing Agreement
Service Agreement(s)

CORRECTED ORDER

October 18, 2005

Preliminary Statement

On November 22, 2004 Qwest Corporation (Qwest) filed a copy of two Commercial Line Sharing Arrangements (CLSAs) negotiated with New Edge Network. Inc. (New Edge). The CLSAs set forth rates, terms or conditions under which Qwest will provision the high frequency portion of the copper loop, a service known as line sharing. The first CLSA is for line sharing orders placed up to and including October 1, 2004. The second CLSA is for line sharing orders placed after October 1, 2004. 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.

On January 26, 2005 the Commission issued a Notice of Opportunity for Hearing inviting comments and requests for hearing by March 1, 2005. The notice stated that the issue to be considered in this proceeding was whether the CLSAs are interconnection agreements subject to state regulatory Commission approval under section 252 of the Telecommunications Act of 1996 (Act). The Commission notice stated that the same issue was under consideration in Case No. PU-04-402 and may set precedent.

On February 28, 2005 Qwest filed a request for a hearing. Qwest also provided comments supporting its contention that the CLSAs are not interconnection agreements, nor are they amendments to an existing interconnection agreement, and that the Commission has no jurisdiction to review, approve, or reject the CLSAs.

On June 16, 2005 Qwest filed a copy of a June 9, 2005 order of the United States District Court for the District of Montana and an April 19, 2005 order of the Washington State Utilities and Transportation Commission.

On August 25, 2005 the Commission held an informal hearing on the issue in this proceeding.

Discussion

Section 251(c) of the Act requires incumbent local exchange carriers (ILECs) to provide interconnection of its network to other networks and to provide access to unbundled network elements (UNEs).

Section 252 of the Act provides that negotiated or arbitrated interconnection agreements must be submitted to state public utility commissions for approval.

In 1999, the Federal Communications Commission (FCC) ruled that line sharing is a UNE under section 251(c)(3).[1]

In its August 2003 Triennial Review Order (*TRO*)[2], the FCC concluded, subject to a transition period, that ILECs would no longer be required to provide line sharing as a UNE under section 251(c)(3). Under the transition period, ILECs were required to provide line sharing as a UNE through October 1, 2004. For line sharing orders after October 1, 2004, ILECs were relieved from their obligation to provide line sharing as a UNE.[3]

Qwest agrees that the CLSA with New Edge for line sharing orders placed through October 1, 2004 is an interconnection agreement that must be submitted to the Commission for approval.

In its *USTA II*[4] decision, the D.C. Circuit upheld the FCC *TRO* concerning line sharing. As a result, for line sharing orders place after October 1, 2004, Qwest argues that line sharing is no longer a network element under sections 251 or 252 of the Act. Qwest states that when a service such as line sharing is no longer required by section 251, there is no section 252 obligation to file the privately-negotiated agreement with a state commission, nor is there a section 252 power in the state commission to review and approve the agreement.

Section 252(e)(1) of the Act, requiring approval of any interconnection agreement adopted by negotiation or arbitration, is premised on the agreement being for services or elements required to be provided under section 251 as noted in section 252(a)(1) of the Act. We agree that line sharing is no longer a UNE within the meaning of section 251(c)(3) of the Act and that no approval is required for agreements providing only services not required by section 251.

We conclude that the agreement under which Qwest will provide line sharing to New Edge is not an interconnection agreement subject to Commission approval under section 252 of the Act.

Another question to consider is whether all negotiated agreements should be filed with the Commission for review to determine the need for Commission approval or rejection.

In its *Declaratory Order*,[5] the FCC states that "[b]ased on their statutory role provided by Congress and their experience to date, state commissions are well

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[1] *Third Report and Order, In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*).

[2] *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 (2003) (*TRO*).

[3] *TRO* ¶ 255, *et seq*.

[4] *United States Telephone Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[5] 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, WC Docket No. 02-89, 17 FCC Rcd 19337, 2002 FCC Lexis 4929, FCC 02-276 (October 4, 2002). (*Declaratory Order*).

positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected."[6]

We find that it is appropriate for the Commission to continue to review and determine whether individual agreements between competitive local exchange companies (CLECs) and ILECs require state approval under the Act. Qwest should continue to file their agreements that concern the provisioning of network elements.

Order

The Commission orders:

1. The Commercial Line Sharing Arrangement between New Edge Network and Qwest Corporation for line sharing orders placed after October 1, 2004 is not an interconnection agreement subject to Commission approval under section 252 of the Telecommunications Act of 1996.

2. Qwest is required to continue to file for review its agreements with CLECs, such as the agreement at issue here, that refer to past, present, or future obligations imposed on ILECs under the Telecommunications Act of 1996.

PUBLIC SERVICE COMMISSION

Susan E. Wefald **Commissioner**	**Tony Clark** **President**	**Kevin Cramer** **Commissioner**

[6] *Id*. at ¶ 10.