Agenda Date: February 23, 2005

Item Number: **A 3**

Docket: **UT-053005**

Company Name: Multiband Communications, LLC
Qwest Corporation

Staff: Deborah Reynolds, Telecommunications Regulatory Analyst
Kristen Russell, Telecommunications Regulatory Analyst

Recommendation:

Approve the Line Sharing Agreement between Qwest Corporation and Multiband Communications, LLC under Sections 251 and 252 of the Telecommunications Act in Docket No. UT-053005.

Background:

On January 18, 2005, Multiband Communications, LLC (Multiband) filed a request for approval of a line sharing arrangement[1] (Line Sharing Agreement or LSA). This LSA was signed by Multiband and Qwest Corporation (Qwest) on September 29 and 30, 2004, respectively, and took effect on October 2, 2004.

Qwest filed this LSA for informational purposes only on October 26, 2004. Although both parties agree that the LSA is binding, Qwest asserts that this LSA does not need to be filed for the Commission's approval pursuant to Section 252 of the Telecommunications Act of 1996 (the Act).

Discussion:

The Agreement

The Line Sharing Agreement filed by Multiband provides rates, terms and conditions for using the high frequency range above the voice band on a copper loop to offer advanced data services, like DSL for faster internet access, simultaneously with an existing end user customer's plain old telephone service. The rates in the agreement are tiered, with lower rates as Multiband gets more customers. *LSA at Exhibit A.*

The parties cannot use the Line Sharing Agreement on a stand-alone basis because the rates, terms and conditions for the network elements in the LSA are intertwined with some of the rates, terms and conditions for other network elements and configurations in existing interconnection agreements between Multiband and Qwest. On Page 3, the Line

[1] Entitled *Terms and Conditions for Commercial Line Sharing Arrangements provided by Qwest Corporation to Multiband Communications, LLC* dated September 28, 2004.

Sharing Agreement states, "to order the HFPL [high frequency portion of the loop], CLEC must have a splitter installed in the Qwest wire center .... Splitters may be installed ... per the Collocation Section of CLEC's interconnection agreement with Qwest." This is restated on Exhibit A to the Line Sharing Agreement. These references to an existing Interconnection Agreement between the two parties show that another company can not adopt this LSA unless it has its own interconnection agreement already in effect. Even if it could, access to the HFPL is meaningless without collocation of its DSLAM and splitter at the Qwest Wire Center.

Another connection to the existing interconnection agreement can be seen on Page 2, where the LSA refers to the existing Interconnection Agreement amendment[2] dated *April 14, 2004*[3] that was approved by the Commission on January 12, 2005 in Docket UT-003127. The LSA generally states that any new customers added between October 1, 2003, and September 30, 2004, will be included in the count of new customers for determining the rate on October 2, 2004, under this new LSA. The result of this clause is lower rates under the LSA that depend on customers added under the existing Interconnection Agreement.

Finally, although the TRO eliminates line sharing, it grandfathers existing line sharing arrangements for three years (one year of which has already passed), subject to a yearly escalation of the rate CLECs must pay for line sharing under existing Interconnection Agreements. *TRO at ¶ 265.* The LSA addresses this grandfathering requirement by providing that, during the term of the LSA, the CLEC may convert any existing line sharing arrangements to the LSA, subject to a conversion charge. *LSA at 2.1.1.1.1.3.* Thus, the terms and conditions that pertain to the FCC-required grandfathering are contained both in the existing Interconnection Agreement and the LSA.

Qwest's Position

As justification for filing the Line Sharing Agreement for informational purposes, Qwest refers to the FCC's October 2003 Triennial Review Order (TRO). Qwest claims that the TRO eliminates an incumbent's obligation to provide the high frequency portion of a copper loop under Section 251(c) of the Act. Transitional rules, including line sharing conditions, did result from the TRO; however,

Qwest asserts that the transitional rules do not apply to new DSL services provisioned one year after the effective date of the TRO. According to Qwest, there is no Section

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[2] On October 26, 2004, Qwest filed a line sharing agreement amendment (Agreement A) in Docket UT-003127 that applied to all activity before October 1, 2004, and a second line sharing agreement (Agreement B or Line Sharing Agreement) that applied to all activity after October 2, 2004. The Commission approved Agreement A on January 12, 2005. Agreement B was filed for informational purposes only, and Staff did not pursue Qwest's Section 252 filing obligation at that time.

[3] The April 14, 2004, date in the LSA does not coincide with the September 28, 2004, date on the filed amendment. Staff believes this to be an error that Qwest and Multiband will address.

251(c) obligation upon Qwest to provide the HFPL as an UNE, and thus there is no Section 252 filing obligation.

Legal Analysis

The Attorney General's office has provided the legal analysis below:

Section 252(e)(1) requires that "[a]ny interconnection agreement adopted by negotiation or arbitration be submitted for approval to the State commission." Under Section 252(a)(1), a binding agreement for "interconnection, services, or network elements" that is negotiated "without regard to the standards set forth in subsections (b) and (c) in section 251" is treated as an interconnection agreement. Although FCC rules do not presently mandate unbundling of the HFPL (i.e., line sharing), the LSA nonetheless pertains to matters such as collocation, which the parties have properly addressed in the interconnection agreement they have previously filed in accordance with Section 252(e). In fact, the LSA and the parties' existing Interconnection Agreement are best viewed as a single integrated agreement. As such, the Commission need not consider whether the Section 252(a)(1) and (e) filing and approval requirements would apply to an agreement that pertained in no way to the requirements of Section 251(c).

In *In the Matter of Qwest Communications International, Inc.'s 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)*, FCC 02-276 (2002), the FCC said that "Based on their statutory role provided by Congress and their experience to date, state commissions are well positioned to decide on a case-by-case basis whether a particular agreement is required to be filed as an 'interconnection agreement' and, if so, whether it should be approved or rejected. . . . The statute expressly contemplates that the section 252 filing process will occur with the states, and we are reluctant to interfere with their processes in this area." The FCC went on to say "the states should determine in the first instance which sorts of agreements fall within the scope of the statutory standard. . . ."

In this Commission's *Order Approving Negotiated Interconnection Agreement in Its Entirety* in Docket UT-960310 and UT-043084 (October 20, 2004), the Commission found that Qwest and MCI's "Master Service Agreement for the Provision of Qwest Platform Plus" (QPP) and the simultaneously filed Thirteenth Amendment to the parties' interconnection agreement were parts of one integrated agreement and as such, were subject to Commission approval under Sec. 252(e) of the Telecommunications Act. The reasoning of that order applies equally to this Line Sharing Agreement and the parties' existing interconnection agreement (with its amendments).

Similar to the QPP, which provides MCI with a substitute for UNE-P following the elimination of switching as an unbundled element, the LSA provides Multiband with a substitute for line sharing following the elimination of the HFPL as an unbundled element. In both cases, all other aspects of the carriers' contractual relationship are covered by an interconnection agreement, and in both instances the terms and conditions

covered by the existing interconnection agreement are integral to the allegedly separate and distinct "commercial agreement."

The QPP provides a substitute for UNE-P, a part of which is the unbundled loop. Provision of the loop is necessarily still governed by the interconnection agreement. Thus, the two agreements are really parts of an integrated whole. Similarly, under this agreement, collocation of the CLEC's DSLAM equipment and splitter, both of which are integral to line sharing, are necessarily still governed by the parties' filed interconnection agreement (collocation is required by Sec. 251(c)). Thus, they too are parts of an integrated whole.

As in the QPP order, the Commission may in this case also conclude that the LSA is part of the negotiated interconnection agreement between Multiband and Qwest. If the Commission does so conclude, then the LSA is subject to the Commission's jurisdiction and review. 47 U.S.C. 252(e).

Policy Analysis

Although Qwest states that the Line Sharing Agreement is posted on its wholesale web site and is available to any telecommunications carrier to adopt in its entirety, other carriers need to be able to rely on the legal right to adopt the agreement knowing the rates, terms, and conditions are fair. The approval process by the Commission ensures that competing carriers have access to the same rates, terms and conditions, which may not be the case if they simply review a copy of an agreement on Qwest's wholesale web site. Staff is also concerned that the availability of line sharing arrangements can disappear quickly[4] unless the LSA is filed and approved under Section 252 of the Act. Based on the analysis of the filing requirements contemplated by the Act and FCC's order, Staff concludes that the terms and conditions of the Line Sharing Agreement that Multiband requested Commission approval of on January 18, 2005, constitutes a voluntary negotiated agreement subject to the Commission's approval under Section 252(a) of the Telecommunications Act. Staff believes the Commission has the authority to approve the Line Sharing Agreement, and such approval is consistent with public interest, convenience, and necessity.

Recommendation:

Approve the Line Sharing Agreement between Qwest Corporation and Multiband Communications, LLC under Sections 251 and 252 of the Telecommunications Act in Docket No. UT-053005.

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[4] This is an important point because Staff has learned that Qwest recently sent out notices to CLECs informing them that Qwest Platform Plus (QPP) will no longer be available after January 31, 2005. The QPP is an interconnection agreement that Qwest originally filed with the Commission for "informational purposes" claiming Commission approval was not required. That agreement also was posted on its web site and made available for adoption. The Commission approved the QPP at the request of MCI, the other party to the QPP on October 20, 2004 (UT-960310, UT-043084).