Service Date November 7, 2003

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. ADVANCED TELECOM GROUP, INC.; ET AL. Respondents.	)	DOCKET NO. UT-033011 BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

A complaint must be dismissed if it fails to state a cause of action. A cause of action exists only where there is a legal duty and a violation of that duty. The complaint in this case alleges violations of certain filing requirements under federal and state law. But to the extent there was any obligation to file the agreements in question, the obligation was Qwest Corporation's ("Qwest"), not McLeodUSA Telecommunications, Inc.'s ("McLeodUSA"). Therefore, all causes of action in the complaint should be dismissed insofar as they relate to McLeodUSA.

DISCUSSION

I. THE FILING REQUIREMENTS UNDER THE TELECOMMUNICATIONS ACT OF 1996 DO NOT APPLY TO MCLEODUSA.

The complaint alleges that the respondent telecommunication companies, including McLeodUSA, violated the obligation to file interconnection agreements under sections 252(a) and (e) of the Telecommunications Act of 1996 ("Act"). But the filing requirement under the Act applies only to Incumbent Local Exchanges Carriers ("ILECs"), such as Qwest, not

Competitive Local Exchange Carriers ("CLECs"), such as McLeodUSA. Therefore, to the extent there was a statutory duty to file the agreements in question, that duty was Qwest's and no cause of action exists against McLeodUSA.[1]

Sections 252(a) and (e) of the Act require that interconnection agreements be filed with State commissions. But those sections are silent on who bears the filing obligation. In the absence of express direction on who has the obligation to file, the Commission should look to the underlying purpose and intent of the filing requirement. The context of sections 252(a) and (e), as well as surrounding provisions and FCC interpretation, make it abundantly clear that Congress intended to apply the filing requirement exclusively to ILECs as a check on ILEC market power and enforce the nondiscrimination imperative of the Act.

A. The Filing Requirements Of Section 252 Are Intended Solely For ILECs As A Mechanism To Enforce The Substantive Requirements Of Section 251 That Apply Exclusively To ILECs.

The Act was intended to open local monopoly markets to competition. To achieve this end, section 251 of the Act imposes a number of specific duties on ILECs, as the carriers who control the infrastructure in those local markets. These duties include: (1) the duty to negotiate;[2] (2) the duty to interconnect its network with the networks of competing carriers;[3] (3) the duty to provide unbundled access to its network elements;[4] and (4) the obligation to provide interconnection and unbundled access on a nondiscriminatory basis to all other carriers.[5] Importantly, these duties in section 251 apply exclusively to ILECs.

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[1] McLeodUSA is assuming, but does not concede, that the agreements in question were interconnection agreements within the meaning of the Telecommunications Act of 1996 ("Act").
[2] 47 U.S.C. § 251(c)(1).
[3] 47 U.S.C. § 251(c)(2).
[4] 47 U.S.C. § 251(c)(3).
[5] 47 U.S.C. § 251(c)(2) and (3).

In placing these obligations on ILECs, Congress understood that the key to opening local markets to competition would be the conduct of the incumbent carriers as the entities who control the legacy network infrastructure. It would make no sense to apply these obligations to CLECs such as McLeodUSA, who do not control the infrastructure necessary for competitive access to local markets.

Sections 252(a) and (e) are intended, at their core, to enforce the ILEC obligations of section 251. These obligations in section 251 are intended as a bulwark against the market power of incumbent carriers and as protection for competitive carriers such as McLeodUSA. It would, therefore, make little sense to apply the enforcement mechanisms of section 252 to the very carriers that those mechanisms are intended to protect.

Indeed, when a CLEC enters into a contract with an ILEC, the CLEC has no idea what the ILEC has offered other competitors. Only the ILEC is in a position to know the terms of entry that all carriers are receiving. As a result, only the ILEC actually knows who among its wholesale customers is befitting more than another from a particular agreement. As the party with this unique knowledge, and as the party required by section 251 to provide nondiscriminatory access to its network elements, the ILEC must necessarily be the party responsible for filing the agreements that memorialize those obligations. Placing the filing burden on CLECs such as McLeodUSA would be inconsistent with the purpose and structure of the Act.

B. The FCC Has Concluded That The Filing Obligation Of Section 252 Applies Exclusively To ILECs.

The Federal Communications Commission ("FCC") has confirmed Congress' intent to place the filing burden on the ILEC. Specifically, in paragraph 1230 of its *First Report and Order,* the FCC noted that "***section 252 does not impose any obligations on utilities other than***

incumbent LECs . . . (emphasis added)."[6] Similarly, in discussing the availability of interconnection agreements under section 252(i) of the Act, which is closely related to the filing requirement under sections 252(a) and (e), the FCC stated that ***"[i]ncumbent LECs***, including small incumbent LECs, ***are required to file*** with state commissions all interconnection agreements entered into with other carriers, including adjacent incumbent LECs (emphasis added)."[7] The FCC states further that it is the ILEC's obligation, not only to file agreements, but to make them available for opt-in by other carriers, providing that "***[i]ncumbent LECs must*** permit third parties to obtain access under section 252(i) to any individual interconnection, service, or network element arrangement (emphasis added)."[8]

These FCC interpretations of section 252 leave no doubt that the Act's filing obligation was aimed at ILEC, not their wholesale customers such as McLeodUSA. As the Washington Supreme Court has observed, "where the legislative intent does not clearly appear on the face of the statutory language, the court may resort to various tools of statutory construction . . . [including] administrative interpretation of the statute."[9] Moreover, the interpretation adopted "should always be one which best advances the legislative purpose."[10] The FCC's administrative interpretation that the filing burden falls on the ILEC is clear, and it advances the Act's intent to impose market-opening obligations specifically on the ILECs who own and control the bottleneck facilities on which competitors rely to offer competitive alternatives to customers.

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[6] *In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996) ("First Report and Order") at ¶ 1230.
[7] *Id.* at ¶ 1437.
[8] *Id.* at ¶ 1314.
[9] *Rozner v. City of Bellevue,* 116 Wash.2d 342 at 347, 804 P.2d 24 (1991).
[10] Id.

II. STATE LAW DOES NOT REQUIRE A CLEC TO FILE INTERCONNECTION AGREEMENTS.

In its Fourth Cause of Action, the Complaint alleges that the Respondents, including McLeodUSA, violated RCW 80.36.150 by failing to file the agreements in question. Although this statute refers broadly to the filing of telecommunications contracts, it did not require McLeodUSA to file the agreements at issue in this case for several reasons.

First, the statute requires a company to file an agreement with the Commission "as and when required by [the Commission]." Therefore, by its terms, the statute requires an independent order or rule to trigger the mandate to file any particular agreements or class of agreements. The Commission never directed McLeodUSA to file the agreements in question specifically or interconnection agreements generally.

Although the Commission has addressed the adoption and availability of interconnection agreements generally in two Interpretive Policy Statements, neither statement required McLeodUSA specifically or CLECs generally to file interconnection agreements. To the contrary, the Commission's Policy Statement in Docket UT-990355 clearly recognized the ILEC as the party responsible for making sure interconnection agreements are available under section 252(i). As the Commission stated therein, "[the Act] is intended to foster local exchange competition ***by imposing certain requirements on incumbent local exchanges companies (ILECs)*** (emphasis added)."[11] And as the Commission further noted, "***an ILEC must*** make available any individual interconnection, service, or network element arrangement contained in any approved agreement (emphasis added)."[12] Therefore, to the extent the Commission has addressed obligations related to the availability of interconnection agreements, the Commission

[11] Interpretive Policy Statement, Docket UT-990355 (April 12, 2000) at ¶ 1.
[12] *Id.* at ¶ 13

has clearly put all providers on notice that it is the ILEC that bears the burdens related to the availability of those agreements.

Second, state statute requires the Commission to "adopt rules that provide for the filing" of agreements. To date, the Commission has not adopted rules to implement this statute and, therefore, this state statute did not require McLeodUSA to file the agreements in question. The Washington courts have held that, where a statute requires the promulgation of implementing rules, the statute cannot be violated unless those rules are adopted and a violation of the rules occurs.[13] The purpose of rulemaking is to give notice of specific obligations that may not be clear from a statute and to avoid ad hoc policy determinations.[14] Without rules or a specific directive to file the agreements in question, McLeodUSA was not on notice that it was required to file these agreements and had no obligation to do so. When the Legislature specifically requires rulemaking, as it did in RCW 80.36.150, the implementing agency must promulgate rules to give effect to the requirements of the particular statute. Absent any such rules, the RCW 80.36.150 did not require McLeodUSA to file the agreements or to file them on any particular time frame.

[13] Judd v. AT&T, et. al. 66 P.3d 1102.
[14] *Newman v. Chater*, 87 F.3d 358, 361 (9th Cir. 1996).

CONCLUSION

Based on the foregoing, the First, Second and Fourth Causes of Action the complaint should be dismissed as to McLeodUSA.

Respectfully submitted,

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