BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of MULTIBAND COMMUNICATIONS, LLC, For Approval of a Line Sharing Agreement With Qwest Corporation Pursuant to Section 252 of the Telecommunications Act of 1996	DOCKET NO. UT-053005 BRIEF OF COMMISSION STAFF

1 On January 13, 2005, Multiband Communications, LLC (Multiband) filed, and requested the Washington Utilities and Transportation Commission's (Commission) approval of, a line sharing agreement (LSA) it had entered into with Qwest Corporation (Qwest). The Commission Staff (Staff) recommends that the Commission approve the agreement pursuant to 47 U.S.C. § 252.

2 At the Commission's Open Public Meeting on February 23, 2005, the Staff requested the Commission's approval of the LSA, and Qwest contended the LSA does not require Commission approval. The Commission did not approve the LSA at that time, but set the matter over for the adjudication of whether the LSA must be filed with and approved by the Commission pursuant to 47 U.S.C. § 252.

3 The Staff contends that the LSA between Multiband and Qwest must be filed for Commission approval pursuant to 47 U.S.C. § 252(a)(1) and (e)(1). As argued

below, Staff's position is consistent with the plain language of 47 U.S.C. § 252, which requires state commission approval of any interconnection agreement. In addition, Staff's position is consistent with this Commission's prior orders and with federal and state policy to further competition and prevent discrimination in the local telecommunications markets.

4 The line sharing agreement does not discriminate against any carrier not a party to the agreement. The LSA also is not inconsistent with the public interest. Accordingly, the Commission should approve the LSA between Multiband and Qwest pursuant to 47 U.S.C. § 252(a)(1) and (e)(1).

I. BACKGROUND

A. Line Sharing

5 This docket involves a line sharing agreement. The copper loop—over which much of local telecommunications is provided—is capable of supporting transmissions on a wide range of frequencies.[1] Analog voice service (sometimes referred to as "plain old telephone service" or "POTS") is carried on the lower frequency portion of the loop, while broadband services (such as DSL) use a higher

[1] *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*, CC Docket Nos. 98-147 and 96-98, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket 96-98, 14 FCC Rcd 20,912, FCC 99-355, ¶ 64 (1999) (Line Sharing Order), *vacated and remanded United States Telecom Ass'n v. Federal Communications Comm'n*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied sub nom. WorldCom, Inc. v. United States Telecom Ass'n*, 538 U.S. 940 (2003) (USTA I).

frequency range.[2] It is possible for two carriers to share the copper loop in such a way that one carrier will provide broadband services and another carrier will provide voice service to the same end user over the same loop facility.[3]

6 Line sharing is achieved through the deployment of equipment at each end of the customer's loop.[4] At each end of the loop, a splitter is necessary to bifurcate the digital and analog signals that concurrently cross the loop; once bifurcated, the analog traffic is routed to the local switch and the digital traffic is routed through to a digital subscriber line access multiplexer (DSLAM), which is attached to the digital network.[5] The necessary equipment is collocated in the central office at the end of the customer's loop.[6]

B. The Federal Telecommunications Act of 1996

1. The Federal Act Requires Incumbent Local Exchange Companies To Open Their Networks to Competitive Providers.

7 The purpose of the Telecommunications Act of 1996[7] (federal Act) is to "provide for a pro-competitive, de-regulatory national policy framework designed

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[2] *Id.*

[3] *Id.*

[4] *Id.* ¶ 66.

[5] *Id.*

[6] *See, e.g., id.* ¶ 67. The central office is a facility that houses the switching equipment serving a defined area. *See* 480-120-021.

[7] 47 U.S.C. §§ 151, *et seq.*

to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ."[8] Among other things, the federal Act "jump starts" local competition by requiring incumbent local exchange companies (ILECs), like Qwest, to share their networks with competitive local exchange companies (CLECs), like Multiband.[9]

8 The federal Act permits a CLEC to access an ILEC's network in three ways. The competitor can: (1) purchase services at wholesale rates and then resell the services to customers at retail rates; (2) interconnect its network with the incumbent's network in order to exchange traffic; and (3) lease individual, unbundled network elements from the incumbent and provide service over those leased elements.[10] The federal Act requires incumbents to enter into interconnection agreements with competitors that govern the specific terms and prices for such access.[11] If the parties cannot reach an agreement through negotiation, the parties may ask the state commission to arbitrate unresolved issues.[12]

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[8] H.R. Conf. Rep. No. 104-458, 104th Cong. 2d Sess. 113 (1996); *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999).

[9] 47 U.S.C. §§ 251-252. For ease of reference, relevant sections of the federal Act are attached.

[10] 47 U.S.C. § 251(c).

[11] 47 U.S.C. §§ 251(c), 252(a).

[12] 47 U.S.C. § 252(b).

2. The FCC Must Identify the Unbundled Network Elements Incumbents Are Compelled to Provide to Competitors.

9 The federal Act requires incumbent companies to provide access to unbundled network elements (UNEs) to competitive providers.[13] To facilitate this requirement, the federal Act instructs the FCC to determine what UNEs the incumbents are compelled to provide.[14] In deciding the UNEs an incumbent is compelled to provide, the federal Act requires the FCC to determine whether a competitor's access to proprietary network elements is *necessary*, and whether the competitor's ability to compete with the incumbent would be *impaired* without access to the element.[15] The FCC has determined those UNEs through rulemaking, and has narrowed that list of UNEs over the years.[16] Of particular relevance to this docket is the FCC's decision (in 2003) to exclude line sharing in the list of UNEs ILECs must provide to CLECs pursuant to 47 U.S.C. § 251(c)(3).[17]

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[13] 47 U.S.C. § 251(c)(3). The federal Act defines "network element" as "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C. § 153(29).

[14] 47 U.S.C. § 251(d)(2).

[15] *Id.* This generally is called the "necessary and impair" standard. Much of the litigation involving the FCC's list of compelled UNEs has involved whether the selected UNEs satisfy this standard. *See also infra* n.16.

[16] *See, e.g., In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Dockets 96-98, 95-185, First Report and Order, FCC 96-325, 11 FCC Rcd 15499 (1996) (Local Competition Order), *aff'd in part, rev'd in part, and remanded AT&T Corp. v. Iowa*

3. Interconnection Agreements Must Be Filed With and Approved By State Commissions.

10 The federal Act provides that state commissions must approve all interconnection agreements, regardless of whether the agreements are reached through negotiation or arbitration.[18] However, the statutory criteria the state commission must apply in its review of an agreement differ depending on whether the agreement, or a portion of the agreement, was reached through negotiation or arbitration. Regarding negotiated agreements, a state commission may reject such an agreement, or any portion of the agreement, only if the agreement or provision discriminates against a carrier not a party to the agreement or if the agreement or provision is not consistent with the public interest, convenience, or necessity.[19] On the other hand, if the agreement or provision was arbitrated, the state commission

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Utils. Bd., 525 U.S. 366 (1999); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Notice of Proposed Rulemaking, 15 FCC Rcd 3696, FCC 99-238 (1999) (*UNE Remand Order*), *vacated and remanded, in part, United States Telecom Ass'n v. Federal Communications Comm'n*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied sub nom. WorldCom, Inc. v. United States Telecom Ass'n*, 538 U.S. 940 (2003) (USTA I); *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, 96-98, 98-147, Further Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, FCC 03-36 (2003) (*Triennial Review Order*), *vacated and remanded, in part*, *United States Telecom Ass'n v. Federal Communications Comm'n*, 359 F.3d 415 (D.C. Cir. 2004), *cert. denied sub nom. National Ass'n of Regulatory Utils. Comm'rs v. United States Telecom Ass'n*, 125 S. Ct. 313 (2004) (USTA II). *See also* 47 C.F.R. § 51.319.

[17] *Triennial Review Order*, ¶¶ 255-71. The FCC's decision is subject to a three-year grandfathering transition period. *Id.* ¶ 264.

[18] 47 U.S.C. § 252(e)(1).

[19] 47 U.S.C. § 252(e)(2)(A).

has somewhat wider latitude. In that situation, the state commission may reject the agreement or provision only if "it finds that the agreement does not meet the requirements of section 251 [of the federal Act], including the regulations prescribed by the Commission [FCC] pursuant to section 251, or the standards set forth in subsection (d) of this section."[20] In addition to the express state approval requirements, the federal Act preserved state commission authority to establish or enforce state law requirements when reviewing agreements.[21]

4. The federal Act Permits CLECs to Adopt Interconnection Agreements Approved by State Commissions.

11 The federal Act gives CLECs the right to access an ILEC's network on the same terms and conditions as any other CLEC by adopting an approved agreement between an ILEC and the other CLEC.[22] This provision makes interconnection more efficient for CLECs and prevents discrimination among carriers.[23]

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[20] 47 U.S.C. § 252(e)(2)(B).

[21] 47 U.S.C. § 252(e)(3).

[22] 47 U.S.C. § 252(i).

[23] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Notice of Proposed Rulemaking, FCC 96-182, 11 FCC Rcd 14 171, ¶¶ 269-71 (1996). In this notice, the FCC noted Congress' intent in enacting Section 252(i) was to "help prevent discrimination among carriers." *Id.* ¶ 270 & n. 378 (citing S. Rep. No. 104-23, 104th Cong., 1st Sess. 21-22 (1995)). The FCC also noted that Congress intended that Section 252(i) would "make interconnection more efficient by making available to other carriers the individual elements of agreements that have been previously negotiated[.]" *Id.* ¶ 271 (citing S. Rep. No. 104-23, 104th Cong., 1st Sess. 21-22 (1995)).

B. State Policy Favors Local Telecommunications Competition.

12 The federal Act is not the only body of law mandating competition in the local telecommunications markets. Competition in the telecommunications markets is also a matter of state law.

13 In 1985, the Washington state legislature passed the Regulatory Flexibility Act,[24] which, among other things, declared the state policy to promote diversity of supply for telecommunications services.[25] In 1994, the Washington Supreme Court relied on the pro-competitive policy when it rejected arguments that exclusive franchise service areas in the telecommunications industry were the law in Washington.[26]

II. ARGUMENT

14 The Commission's approval of the negotiated line sharing agreement between Qwest and Multiband is consistent with the provisions – and policy goals – of the federal Act. Such approval also is consistent with the policy of the state of Washington to encourage competition for telecommunications services. At issue in this docket is whether the LSA is an interconnection agreement subject to the filing requirements of 47 U.S.C. § 252 even though Qwest is no longer required to provide line sharing as an unbundled network element pursuant to 47 U.S.C. § 251(c)(3).

[24] Laws of 1985, ch. 450, p. 1976, codified at several places in Title 80 RCW.

[25] RCW 80.36.300(5).

[26] *Electric Lightwave, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 530, 869 P.2d 1045 (1994).

A. Section 252 of the Federal Act Requires the Commission's Approval of the Negotiated LSA Between Qwest and Multiband.

15 An important component of the federal Act is the requirement that parties file their interconnection agreements for approval by the state commissions. The federal Act provides:

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251, 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. 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 the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.[27]

The federal Act also states:

> 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.[28]

16 The filing and approval requirements are quite broad. They require the filing of agreements that are voluntarily negotiated without regard to the standards for interconnection and unbundled network elements set forth in 47 U.S.C. § 251(b) and (c). One of the standards for unbundled network elements is that ILECs are

[27] 47 U.S.C. § 252(a)(1).

[28] 47 U.S.C. § 252(e)(1).

obligated to provide the UNEs the FCC has determined meet the "necessary and impaired" standard set forth in 47 U.S.C. § 251(d)(2). Section 252(a)(1) permits voluntarily negotiated agreements for unbundled network elements that ILECs are not compelled to provide. Section 252(a)(1) also requires that the parties submit the voluntarily negotiated agreement to the state commission for its approval.

17 Line sharing is an UNE. The FCC formerly had included line sharing in its list of UNEs ILECs are obligated to provide pursuant to 47 U.S.C. § 251(c)(3).[29] In its 2003 *Triennial Review Order*, the FCC removed line sharing from the bundle of UNEs ILECs are compelled to provide, but continued to require ILECs to provide line sharing on a transitional basis.[30]

18 Nearly three years ago, Qwest requested that the FCC agree with an interpretation of Section 252(a) that would significantly narrow the filing requirement.[31] In its request for a declaratory ruling, Qwest specifically asked the FCC to agree (among other things) that, "agreements regarding matters not subject to sections 251 or 252 (*e.g.* interstate access agreements, local retail services, intrastate long distance, *and network elements that have been removed from the national*

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[29] *See Line Sharing Order, supra* n.1, ¶¶ 4-5. *See also supra* n.14 (definition of network element).

[30] *Triennial Review Order*, ¶¶ 264-71.

[31] *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, Memorandum Opinion and Order, 17 FCC Rcd 19337, FCC 04-57 (2002) (FCC Declaratory Ruling) (emphasis added) (copy attached for ease of reference).

list of elements subject to mandatory unbundling)," are not subject to the state commission filing and approval requirements.[32] The FCC declined to make such a declaration.

19 In its Declaratory Ruling, the FCC stated that the decision as to which agreements are subject to state commission filing and approval is best left to the individual state commissions:

> 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. Therefore, we decline to establish an exhaustive, all-encompassing "interconnection agreement" standard.[33]

20 In its Declaratory Ruling, the FCC determined that an agreement creating "an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)."[34] The FCC reasoned that Section 252(a)(1) "does not

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[32] *Id.* ¶ 4.

[33] *FCC Declaratory Ruling*, ¶ 10.

[34] *Id.* ¶ 8.

further limit the types of agreements that carriers must submit to state commissions."[35]

21 The FCC clarified that certain agreements are not subject to the Section 252(a)(1) filing requirement. The FCC determined that agreements providing for "backward-looking consideration" do not need to be filed.[36] The FCC also exempted from the filing and approval requirements order and contract forms used in placing orders for services.[37] Finally, the FCC stated that agreements with bankrupt competitors that are directed by the bankruptcy court do not need to be filed if those agreements do not change the terms and conditions of underlying interconnection agreements.[38] The line sharing agreement between Multiband and Qwest does not fall within the FCC's narrow exceptions to the filing requirements.

22 The LSA between Multiband and Qwest is an on-going agreement pertaining to a network element. It is a voluntary agreement entered into without regard to the standards set forth in 47 U.S.C. § 251(c)(2) and (3). Therefore, it is subject to the filing requirement of 47 U.S.C. § 252(a)(1) and (e)(1).

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[35] *Id.*

[36] *Id.* ¶ 12.

[37] *Id.* ¶ 13.

[38] *Id.* ¶ 14.

23 In addition, the federal Act expressly allows state commissions to establish or enforce existing state law requirements – such as service quality requirements – in their review of interconnection agreements. In order for state commissions to exercise this authority, interconnection agreements must be filed with state commissions and subject to their approval.

24 The Commission Staff's position that the LSA should be submitted to the Commission for its approval is consistent with the plain language of the federal Act. The Commission should approve the agreement.

B. Approval of the Line Sharing Agreement Is Consistent With the Commission's Prior Orders.

25 Prior to the execution of the LSA at issue in this docket, Multiband and Qwest had executed an interconnection agreement, which the Commission approved. The parties amended their agreement and each successive amendment also was approved by the Commission.

26 The LSA at issue in this docket is intertwined with the rates, terms, and conditions for other network elements and network configurations that are set forth in the parties' approved interconnection agreements. For example, the LSA requires Multiband to have equipment collocated at Qwest's central office pursuant to an interconnection agreement.[39] It also appears that the rates, terms, and

[39] *Line Sharing Agreement*, § 2.1.2.1.1.

conditions for any necessary changes to Qwest's operations support systems may be governed by the underlying approved interconnection agreement.[40] The LSA also provides that new line sharing customers added pursuant to the previously approved line sharing agreement will be included in the customer count to determine pricing under the LSA.[41]

27 The intertwined nature of the LSA and prior approved interconnection agreements create an integrated combination of rates, terms, and conditions for the provision of interconnection, unbundled network elements, and collocation that must be read together to understand the entirety of the interconnection agreement between Multiband and Qwest. By order dated October 20, 2004, the Commission required approval of a similar agreement between Qwest and MCIMetro Access Transmission Services, Inc.[42]

28 In the *MCIMetro Order*, the Commission rejected Qwest's argument that an agreement it had negotiated with MCIMetro – the Qwest Platform Plus Master Service Agreement (QPP) – was not subject to the Section 252 filing requirement. Qwest had argued that because the QPP relates to UNEs that Qwest is no longer

[40] *Id.* at § 2.1.3.1.

[41] *Line Sharing Agreement*, § 2.1.1.1.1.

[42] *In the Matter of Request of MCI Metro Access Transmission Services, LLC and Qwest Corporation for Approval of Negotiated Interconnection Agreement, in its Entirety, Under the Telecommunications Act of 1996*, Docket Nos. UT-960310 & UT-043084, Order No. 1 (Oct. 20, 2004) (*MCIMetro Order*).

obligated to provide pursuant to 47 U.S.C. § 251(c), the QPP did not require approval.[43]

29 In deciding that the QPP must be filed and approved, the Commission did not reach the issue of whether agreements pertaining to UNEs that ILECs are no longer mandated to provide are subject to the state commission filing and approval requirements of 47 U.S.C. § 252.[44] Rather, the Commission held that the integrated nature of the QPP and filed interconnection agreements made the QPP subject to the filing and approval requirements.[45] The same analysis applies to the LSA between Multiband and Qwest.

C. Commission Approval of the LSA Ensures that CLECs Will Be Able to Exercise their Right to Adopt Agreements Pursuant to Section 252(i).

30 As stated above, a CLEC may adopt an existing interconnection agreement between an ILEC and another CLEC.[46] A CLEC cannot choose to adopt an agreement about which it has no knowledge. Therefore, the filing requirement ensures that CLECs will have an opportunity to exercise their rights under Section 252(i).

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[43] *Id.* ¶ 8.

[44] *Id.* ¶ 21.

[45] *Id.* ¶¶ 21-32.

[46] 47 U.S.C. § 252(i).

31 The purposes of Section 252(i) are not better served by a holding that the LSA is not subject to the filing and approval requirements. A CLEC that wishes to adopt an approved interconnection agreement not only competes with the ILEC that is a party to the agreement, but also with the CLEC that is a party to that agreement. Therefore, it is important that agreements do not discriminate against carriers that are not parties to the interconnection agreement. Requiring the parties to file their interconnection agreements at the state commission furthers the non-discrimination purpose underlying Section 252(i). This purpose is thwarted if a CLEC obtains a favorable agreement with an ILEC and the parties do not file the agreement with the state commission.

D. The Line Sharing Agreement Does Not Discriminate Against Other Carriers and Is Consistent with the Public Interest.

32 There is no contention that the line sharing agreement discriminates against carries that are not a party to the agreement. The agreement also is in the public interest because it facilitates the provision of broadband services to consumers. Therefore, there are no grounds for the Commission to reject the agreement.[47]

III. CONCLUSION

33 As argued above, the LSA between Multiband and Qwest is an interconnection agreement that must be filed with and approved by the Commission pursuant to 47 U.S.C. § 252(a)(1) and (e)(1). The agreement sets forth

[47] *See* 47 U.S.C. § 252(e)(2)(A).

the rates, terms, and conditions under which Qwest will provide line sharing, an UNE, to Multiband. The LSA works in concert with interconnection agreements that have been approved by the Commission. In addition, the pro-competitive and anti-discriminatory policies embedded in federal and state law are better served by requiring the filing and approval of the LSA. Accordingly, the Commission should approve the line sharing agreement between Multiband and Qwest.

Dated: March 23, 2005.

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