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1 P R O C E E D I N G S

2 JUDGE MOSS: Good morning, we are assembled
3 this morning in the matter of the request of Multiband
4 Communications, LLC for Approval of a Line Sharing
5 Arrangement with Qwest Corporation Under the
6 Telecommunications Act of 1996. Our docket number is
7 UT-053005. My name is Dennis Moss, I'm an
8 Administrative Law Judge with the Utilities and
9 Transportation Commission, and I will be presiding along
10 with the commissioners in this proceeding. I am sitting
11 alone today simply for the reason that this is a
12 procedural conference and it's not necessary for the
13 commissioners to be here.

14 First order of business will be to take
15 appearances, and I will start with those in the hearing
16 room, and then we'll take your appearance, Mr. Jarrett,
17 so let's start with you, Ms. Anderl.

18 MS. ANDERL: Thank you, Your Honor, Lisa
19 Anderl, in-house attorney for Qwest Corporation, and I
20 assume you would like the long appearance.

21 JUDGE MOSS: Yes, for the first appearance,
22 please.

23 MS. ANDERL: My business address is 1600
24 Seventh Avenue, Room 3206, Seattle, Washington 98191, my
25 E-mail is lisa.anderl@qwest.com. My telephone is (206)

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1 345-1574, and my fax is (206) 343-4040.

2 JUDGE MOSS: Thank you.

3 Mr. Thompson.

4 MR. THOMPSON: I'm Jonathan Thompson,
5 Assistant Attorney General representing the Commission
6 Staff. My street address is 1400 Evergreen Park Drive
7 Southwest, or excuse me, South Evergreen Park Drive
8 Southwest, Olympia, Washington 98504. It is P.O. Box
9 40128. My telephone number is (360) 664-1225, fax is
10 (360) 586-5522, and my E-mail is jonat@atg.wa.gov.

11 JUDGE MOSS: Okay, and you also have an
12 E-mail address jthompso@wutc.wa.gov, don't you?

13 MR. THOMPSON: That's right, I have two of
14 them.

15 JUDGE MOSS: Okay.

16 All right, Mr. Jarrett, let's have your
17 appearance, please.

18 MR. JARRETT: My name is C. Douglas Jarrett,
19 and I'm appearing on behalf of Multiband Communications,
20 LLC, and I'm at Keller and Heckman, LLP, 1001 "G" Street
21 Northwest, Suite 500 West, Washington, D.C. 20001. My
22 E-mail address is jarrett@khlaw.com. My telephone
23 number is (202) 434-4180, and our fax number is (202)
24 434-4646.

25 JUDGE MOSS: Thank you. There's no one else

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1 in the hearing room to enter an appearance, but let me
2 ask if there is anyone else on the conference bridge
3 line.

4 Apparently not, so we have the parties, and I
5 can dispense with the motions to intervene since there
6 apparently are none, but let me ask if there are any
7 other motions or requests before we turn to the
8 discussion of the process and procedural schedule.

9 Apparently there are none. Let me ask then,
10 and this is based on the papers that have been filed
11 thus far, this appears to be a fairly straightforward
12 matter in terms of facts, so I am starting with the
13 thought that perhaps we will take this matter up as one
14 that we can handle either by cross-motions for summary
15 determination, or if we do need facts in evidence
16 beyond, outside of that process that we could proceed on
17 a paper record.

18 Multiband Communications is actually the
19 requesting party here, and so let me ask you,
20 Mr. Jarrett if my thoughts on that are consistent with
21 your own.

22 MR. JARRETT: Well, I appreciate that. Our
23 view is that facts are really not in dispute, and it's
24 really a question of jurisdiction and perhaps the
25 appropriateness of exercising jurisdiction with respect

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1 to the line sharing agreement. So in my view, it's a
2 legal and to some extent a policy decision on the part
3 of the Commission.

4 JUDGE MOSS: All right.

5 MR. JARRETT: And that the expedited
6 schedule, I mean the paper proceeding makes the most
7 sense.

8 JUDGE MOSS: Sure. And I should mention we
9 are of course on a short fuse here. I think we have
10 until April 18th to conclude this in accordance with the
11 Telco Act, is that -- Ms. Anderl, you're shaking your
12 head to the negative.

13 MS. ANDERL: That's right, Your Honor, and I
14 will talk about that in a second or right now if you
15 would like.

16 JUDGE MOSS: I think Mr. Jarrett has
17 concluded his remarks, so why don't you go ahead.

18 MS. ANDERL: We don't have any problem with
19 the paper record as you have outlined. In fact,
20 Mr. Thompson and Mr. Jarrett and I have corresponded via
21 E-Mail and I think reached agreement in principle on
22 what something like that might look like.

23 But I think that assuming that you were on an
24 expedited schedule really assumes a conclusion in favor
25 of Staff's position, and that is that you are only on a

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1 90-day clock if it is, in fact, an agreement that needs
2 to be filed under Section 252, and that's the only issue
3 in this case, is it an agreement that needs to be filed
4 under Section 252. So I would suggest to you that it
5 may well be that the better reading of the law is that
6 this 90-day clock does not begin to run until there's,
7 when there's an agreement where there's a legitimate
8 dispute as to whether it falls within the filing
9 requirements, that the 90 days does not begin to run
10 until there is a formal Commission determination that it
11 is such an agreement. I don't mind trying to get this
12 wrapped up quickly, but I don't think we should be
13 necessarily laboring under what I don't think has been
14 determined yet, which is that the witching hour is April
15 18th.

16 JUDGE MOSS: All right, well, I certainly did
17 not mean to presume a conclusion. On the other hand,
18 were the Commission to reach the conclusion that this is
19 within the ambit of the Telco Act and needs to be
20 approved under that, then I would not want to have the
21 Commission make that determination and then have to slap
22 itself on the wrist for having failed to meet the
23 statutory guideline that it just found applies. So I
24 would like to wrap it up fairly quickly absent some
25 compelling reason to postpone.

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1 It strikes me, and, Mr. Thompson, we'll hear
2 from you on this as well, but as we have heard some
3 discussion here and you all have apparently discussed
4 amongst yourselves, seems to me this is something that
5 could be briefed pretty quickly, and we could get it to
6 the commissioners. What's your thought on that?

7 MR. THOMPSON: Well, just to go back to the
8 issue of what the facts are, I think the facts are
9 limited to just what's contained in the line sharing
10 agreement itself and the company's existing
11 interconnection agreements that are on file with the
12 Commission, of which the Commission could just take
13 notice I think. So I don't think there is a need for
14 any hearings, and I agree that it ought to just be maybe
15 two rounds of briefing is what I would propose.

16 As far as the 90-day deadline is concerned,
17 I'm not sure I agree with Ms. Anderl. The operative
18 statutory provision I believe is 252(e)(4) of the
19 Telecom Act, and it says:

20 If the commission does not act to
21 approve or reject the agreement within
22 90 days after submission by the parties
23 of an agreement, then it becomes -- it's
24 deemed approved basically.

25 Having said that, I'm not sure that there's

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1 anything that would preclude the parties stipulating to
2 a longer period of time in the interests of making sure
3 that the issues are adequately briefed and the new
4 commissioners are able to be fully apprised of the
5 arguments and so forth.

6 JUDGE MOSS: Well, I wondered about that
7 myself. I don't know if this particular statutory
8 deadline, assuming it applies for the sake of
9 discussion, can be waived by the parties. And,
10 Mr. Thompson, you're expressing the opinion that you
11 think it can, that you don't see any barrier to it at
12 least.

13 Ms. Anderl, do you have a thought on that?

14 MS. ANDERL: I think it also can be waived,
15 assuming that it applies.

16 JUDGE MOSS: Right, I understand.

17 MS. ANDERL: And I think it would be -- we
18 have not submitted the agreement for approval though, so
19 I would suggest that it would probably be Multiband who
20 would have to waive if we were running up against time
21 constraints.

22 I agree with Mr. Thompson that we can do two
23 rounds of briefing on a fairly expedited schedule. We
24 would specifically request oral argument though and so
25 would ask that there be some time built into the

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1 schedule for that in April.

2 JUDGE MOSS: Okay.

3 MS. ANDERL: Not knowing what the
4 commissioners' schedules or calendars look like, I don't
5 know if that creates a problem for meeting a deadline or
6 needing to extend it.

7 JUDGE MOSS: All right.

8 Well, Mr. Jarrett, let's hear from you on the
9 legal question of whether parties can waive this
10 deadline, assuming for the sake of discussion that it
11 does apply.

12 MR. JARRETT: I would tend to go along with
13 Qwest on this. I have not researched the point at
14 length to speak to it, to be quite honest, so I think I
15 would defer to Qwest and the Attorney General to that
16 point.

17 JUDGE MOSS: Okay, well, we will talk about
18 schedule, and we'll see if it might be an appropriate
19 thing to do. And, you know, personally, while I don't
20 think the matter justifies a great deal of research and
21 effort, if all of the parties to the proceeding are
22 willing to submit something in writing that says they
23 waive that deadline because that's in their best
24 interests in presenting their arguments and having this
25 resolved, then I suppose I can be comfortable with that.

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1 I suspect that even if it turns out that there is some
2 case out there or some authority of which we're
3 presently unaware that says this is not waiveable, then
4 I doubt that any of us will be taken out and shot. So I
5 think we can proceed in a way that best suits the needs
6 of the case, and on that point then, let's talk about
7 schedule.

8 Mr. Jarrett, are you in agreement that you
9 would like to have two rounds of briefing here?

10 MR. JARRETT: Let me explain from an interest
11 point of view and then to the extent we're going to be
12 involved in the briefing.

13 JUDGE MOSS: All right.

14 MR. JARRETT: We are caught between a rock
15 and a hard spot. The FCC has said that line sharing is
16 no longer a mandatory UNI. We think it makes a lot of
17 sense to do line sharing, and we entered into an
18 agreement with Qwest that it deemed satisfactory. From
19 that point of view as a CLEC, one of the bigger things
20 that CLECs are looking for is a degree of regulatory
21 certainty. We can live perhaps with -- we would like
22 the agreement, so we are in somewhat the middle of the
23 battleground between Qwest and the State. We believe an
24 expedited decision as has been suggested is in our best
25 interests. We are not going to participate extensively

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1 in the briefing, in the legal briefing of the issue.

2 JUDGE MOSS: All right, I appreciate your
3 position.

4 And let me get back to you, Ms. Anderl, and
5 you, Mr. Thompson, on the question of two rounds. Is
6 the issue sufficiently complicated that we really need
7 two rounds?

8 MS. ANDERL: Yes.

9 JUDGE MOSS: All right, then I will take your
10 word for it.

11 MS. ANDERL: Not to put any dread in your
12 heart, but we just filed a 40 page brief in Montana on
13 this same or very related issue. It's Covad in Montana,
14 and the rationale of the commission for approving the
15 agreement, it's virtually the same agreement, the
16 rationale of the commission differed somewhat from what
17 Staff's position is, it's certainly not identical. But
18 I think it will be helpful for the commissioners,
19 especially the new commissioners, to have opening briefs
20 of the parties that kind of set up the background and
21 the legal theory. And then even though we pretty much
22 know what each other is going to say, I think it kind of
23 ties it up nicely and closes it by being able to respond
24 to each other.

25 JUDGE MOSS: I suppose the thought I had of

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1 limiting you to one round of 25-page briefs is a
2 non-starter.

3 MS. ANDERL: With all due respect, I would
4 request an exception to that.

5 JUDGE MOSS: No, I was thinking that it might
6 be that straightforward, but obviously coming in today I
7 don't know that, so I appreciate --

8 MS. ANDERL: There's a lot of history,
9 there's a fair amount of discussion of what has come
10 before in terms of FCC history, there's going to be some
11 discussion for, you know, what's going on in other
12 states just to kind of fairly present the whole picture.

13 JUDGE MOSS: And if I make you spell out all
14 the acronyms, it will probably go 60 pages.

15 MS. ANDERL: I will need a glossary.

16 JUDGE MOSS: All right, well, have the
17 parties discussed a schedule or not?

18 MR. THOMPSON: Well, I had proposed a
19 schedule assuming that we would have to have a decision
20 prior to the 90-day deadline.

21 JUDGE MOSS: Okay.

22 MR. THOMPSON: Which I agree with you I think
23 would end on April the 18th. And, well, in order to
24 give the commissioners say two weeks even to decide the
25 issue, I think we would need to have briefs due by,

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1 let's see, by next Friday, the 18th, initial briefs, and
2 then replies by the following Friday, the 25th, if we're
3 trying to get in on a 90-day deadline. I hadn't frankly
4 given any thought to how it might look if we were to
5 agree to a longer period of time.

6 JUDGE MOSS: Then oral argument sometime
7 during the week of the 28th you would think under that
8 schedule?

9 MR. THOMPSON: Right.

10 JUDGE MOSS: Now, Ms. Anderl, it seems that
11 Qwest is going to be the principal briefing party on the
12 issue based on what Mr. Jarrett said, so I will turn
13 next to you and ask how that fits with your own ideas
14 about how we ought to schedule this thing.

15 MS. ANDERL: We could pull a brief together
16 in a week. It would be nice to have, you know, two
17 weeks and have the briefs due on perhaps Friday the 25th
18 with responsive briefs due on April 1st I think is the
19 following Friday.

20 JUDGE MOSS: No superstitions?

21 MS. ANDERL: None whatsoever.

22 I think we could do oral argument the, you
23 know, maybe even the following Friday the 8th or the
24 week after that. I don't know how much time the
25 commissioners want to deliberate on it or how long or

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1 involved an order is going to be. So we could take two
2 weeks to start briefing and still meet the 90 days, or
3 everybody could stipulate that the 90 days expires on
4 May 18th and we could all, you know, do this at a more
5 leisurely pace. I don't want to drag this out, and so I
6 suggest if we do waive the statutory deadline we do it,
7 you know, only for a short period of time with a
8 definite end date.

9 JUDGE MOSS: Well, it seems to me that we can
10 probably fit it in the briefer time frame. The parties
11 will appreciate the fact, and Mr. Jarrett is probably
12 not aware of events locally here, but Ms. Anderl and
13 Mr. Thompson certainly are aware that the Commission is
14 going through a period of transition at the moment in
15 terms of a changeover in two of our three commissioners,
16 that process is underway, I therefore do not walk in
17 here today with a firm sense of what the commissioners'
18 preferences will be. I will need to discuss that with
19 them of course.

20 So what I would propose that we do then is go
21 ahead and set a schedule that will fit within the time
22 frame for an order by the 18th, and then if the parties
23 wish to discuss among themselves a more leisurely
24 approach and would like to send up a joint motion, and I
25 would anticipate something very brief, proposing an

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1 alternative schedule, then certainly I would require
2 something in writing anyway if we were going to have a
3 waiver, if you all want to do that, I certainly would
4 take a favorable view of that and would consider it, and
5 give me a little time frankly to consider whether there
6 might be some law on this question out there. So that's
7 how I would -- we'll put forth a tentative schedule
8 today, and if you all wish to do that, and you can even
9 let me know off the record this morning if that's
10 something you plan to do, and we'll take it from there.

11 So let's see if this will work. I'm looking
12 at my own schedule too. What if we had the initial
13 briefs on let's say March 23rd and the reply brief say
14 on, well, probably a week would be sufficient, the 30th
15 for the reply brief. And then we can try to schedule an
16 oral argument during the week of April 4th.

17 And what time, do you think half an hour per
18 side, is that adequate?

19 MS. ANDERL: We might want to --

20 JUDGE MOSS: The Court of Appeals only gives
21 you 20 minutes, I'm being generous here.

22 MS. ANDERL: Well, the Court of Appeals is a
23 different venue.

24 JUDGE MOSS: Yes, it is.

25 MS. ANDERL: And that's why these

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1 administrative agencies are delegated the authority to
2 hear these more detailed cases.

3 JUDGE MOSS: I see. Do you think you need
4 more than 30 minutes?

5 MS. ANDERL: Yeah, I think I talked without
6 taking a breath for 30 minutes at the open meeting when
7 the issue first came up, I would assume with
8 commissioners' questions and I think to be safe I would
9 set it for an hour and a half.

10 JUDGE MOSS: All right.

11 Is that -- you thought 30 minutes was enough,
12 didn't you, Mr. Thompson?

13 MR. THOMPSON: Now I have to come up with
14 more material.

15 JUDGE MOSS: You don't have to fill the time
16 just because it's available to you.

17 Mr. Jarrett, 90 minutes suitable?

18 MR. JARRETT: I'm going to defer to the
19 pleading parties.

20 JUDGE MOSS: All right, well, we can set the
21 90 minutes, and we'll see how it goes.

22 Okay, so I will look for that sometime during
23 the week of the 4th, and that still gives plenty of
24 time, so that will be the tentative schedule then,
25 initial briefs March 23rd, reply briefs March 30, and

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1 oral argument I will schedule some time, a 90 minute
2 period, sometime during the week of April 4. Again, the
3 parties are free to file a motion for some other
4 schedule if they wish.

5 Under our rules there is a 60 page limit on
6 briefs, and given your description of a 40 page brief in
7 Montana, Ms. Anderl, I think I will just not set a short
8 limit and hope that you can keep it as brief as
9 possible, as short as possible, as reasonable and
10 appropriate under the circumstances. Because that's a
11 lot of reading and writing, but perhaps the issue is
12 more complicated than appears at first blush.

13 MS. ANDERL: Well, like I said, I think
14 there's a lot of background and contextual information
15 that will help. I'm not sure how much of that 40 pages
16 is attributable to Federal Court rules on margins and
17 spacing, so maybe it will be shorter.

18 JUDGE MOSS: Is this issue pending in other
19 jurisdictions for Qwest?

20 MS. ANDERL: Well, we filed the agreement in
21 all of our jurisdictions for informational purposes.
22 Most of the state commissions and staffs have taken no
23 action on it, and some have affirmatively said that it
24 is not an interconnection agreement. I believe the only
25 states in which it's a contested issue are Washington,

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1 Montana, and Colorado.

2 JUDGE MOSS: Oh.

3 MS. ANDERL: And as indicated, in Colorado or
4 in Montana we already have a final commission order that
5 is on appeal to the Federal District Court.

6 JUDGE MOSS: In Colorado you do?

7 MS. ANDERL: In Montana.

8 JUDGE MOSS: I'm sorry, I apologize, that
9 slipped my listening. So it's on appeal there?

10 MS. ANDERL: Yes.

11 JUDGE MOSS: Okay. Therefore leading me to
12 the assumption that it was adverse to your position?

13 MS. ANDERL: Oh, yes, I'm sorry, the Montana
14 Commission decided the matter in a way consistent with
15 what Staff's recommendation is here.

16 JUDGE MOSS: All right.

17 MS. ANDERL: And it may, you know, it always
18 sounds a little odd to someone who is maybe new to the
19 issue to say that we're appealing the commission's
20 approval of our agreement, but it is the exercise of
21 jurisdiction that we take issue with.

22 JUDGE MOSS: Now this is a matter under the
23 federal statute, so the appeal is then to the federal
24 circuit court?

25 MS. ANDERL: Yeah.

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1 JUDGE MOSS: And that's probably on a rather
2 long schedule?

3 MS. ANDERL: I think oral argument is in
4 June.

5 JUDGE MOSS: Decision sometime within the 12
6 months thereafter?

7 MS. ANDERL: You know, I was talking to
8 counsel on that case, and they indicated that the judge
9 had indicated that she was going to be fairly aggressive
10 about getting a ruling out, so.

11 JUDGE MOSS: Well, good.

12 All right, well, is there any other business
13 we need to take up today?

14 MS. ANDERL: Well, Your Honor, let me just
15 clarify this one thing.

16 JUDGE MOSS: Sure.

17 MS. ANDERL: This is always kind of a funny
18 thing with these actions under the federal Telecom Act.
19 I don't know that this is really legally an adjudicative
20 proceeding under the state APA even though a notice of
21 prehearing conference has been issued, but I think we
22 have in the past in cost dockets and other dockets that
23 were more formal stipulated that the ex-parte rules
24 should apply to communications with the commissioners
25 and yourself in these types matters. When they're set

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1 up for formal process, that's really the only process
2 that ought to be taking place. There shouldn't be kind
3 of lobbying on the side, which otherwise might be
4 appropriate and not unlawful. And so I just thought I
5 would air that issue out and ask if the parties have the
6 same understanding as I do that the ex-parte rules
7 should apply to this case.

8 JUDGE MOSS: Okay, Mr. Thompson, any comment
9 on that?

10 MR. THOMPSON: That was certainly my
11 assumption, that they would apply.

12 JUDGE MOSS: All right.

13 Mr. Jarrett?

14 MR. JARRETT: I'm going to have to defer
15 simply because I'm not aware, that steeped in the
16 procedural rules of the Commission.

17 JUDGE MOSS: Sure. I would be inclined to
18 agree with you, Ms. Anderl, and certainly to the extent
19 a ruling is required, I would say that the ex-parte rule
20 is in effect. And that would mean of course that the
21 only contact the commissioners or I will have with any
22 parties on this issue other than on strictly procedural
23 matters will occur in the hearing room. So that is
24 basically our rule, Mr. Jarrett.

25 MR. JARRETT: Certainly.

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1 JUDGE MOSS: It's sort of the standard
2 ex-parte rule as you understand it from your court
3 practice or administrative practice in Washington.

4 And I might mention to you, Mr. Jarrett, you
5 can obtain a copy of our procedural rules either on our
6 web site, which is wutc.wa.gov, or by requesting a copy
7 from our records center.

8 MR. JARRETT: I appreciate that.

9 JUDGE MOSS: Anything else?

10 All right, well, I appreciate you all
11 attending either in person or by telephone today, and we
12 will take matters as we have scheduled them or subject
13 to further scheduling if appropriate.

14 MS. ANDERL: Thank you, Your Honor.

15 MR. JARRETT: Thank you.

16 JUDGE MOSS: We will be off the record.

17 (Hearing adjourned at 9:55 a.m.)

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