BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of MULTIBAND COMMUNICATIONS, LLC For Approval of Line Sharing Agreement with Qwest Corporation Pursuant to Section 252 of the Telecommunications Act of 1996	Docket No. UT-053005 QWEST CORPORATION'S REPLY BRIEF

1 In accordance with the schedule established by the Administrative Law Judge in this matter, Qwest Corporation ("Qwest") hereby files its reply brief to the opening brief filed by Commission Staff ("Staff"). Both Qwest and Staff filed opening briefs, and Qwest has already addressed a number of the points Staff raises. That discussion will not be repeated here. Rather, Qwest will respond to several specific issues raised by Staff.

2 Before addressing the specific points in Staff's brief, Qwest observes that Staff spends little time addressing the key issue in this case – whether the Commercial Agreement is an interconnection agreement under section 252. That question demands an analysis of what constitutes an interconnection agreement, and whether the Commercial Agreement has any of the attributes that would make it a section 252 agreement. Rather than look at that issue, Staff's brief instead discusses the requirements under section 252 that a Commission approve

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

or reject negotiated interconnection agreements and how section 252(i) gives CLECs certain "opt-in" rights to interconnection agreements. However, this discussion assumes that the Commercial Agreement is an interconnection agreement, an assumption that is not borne out by the fact or the law, and never describes what it is about the Commercial Agreement that makes it an interconnection agreement under section 252 as interpreted by the FCC and this Commission.

3 Qwest, on the other hand, included it its opening brief a full description of the FCC's Declaratory Ruling, with a detailed explanation of what types of terms and conditions must be contained in an agreement to make it an interconnection agreement subject to section 252 filing and approval requirements. Specifically, the FCC has clearly stated that telecommunications carriers are only required to file "interconnection agreements" with other carriers that relate to *ongoing obligations for services that ILECs have a duty to provide under sections 251(b) and (c)* of the Act.[1] The only services that Qwest has a duty to provide under sections 251(b) and (c) of the Act are: number portability; dialing parity; access to rights-of-way; reciprocal compensation; interconnection; access to unbundled network elements; resale of services at wholesale rates; and, collocation of CLEC equipment.

4 No one in this case has argued that the Commercial Agreement addresses number portability; dialing parity; access to rights-of-way; reciprocal compensation; interconnection; or resale of services at wholesale rates. Thus, the only question is whether the Commercial Agreement contains ongoing obligations pertaining to unbundled network elements or collocation. As Qwest described in its opening brief, and as Staff largely agrees, the answer is clearly no.

5 Line sharing, for orders placed on or after October 2, 2004, is no longer an unbundled network

[1] *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, 17 FCC Rcd 19337, 2002 FCC LEXIS 4929, ¶ 8 (Oct. 4, 2002) ("Declaratory Order").

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

element. Staff agrees.[2] The Commercial Agreement deals exclusively with line sharing for orders placed after October 2, 2004. Thus, the Commercial Agreement does not contain ongoing obligations pertaining to unbundled network elements.

6 And, the Commercial Agreement does not pertain to collocation or operational support systems ("OSS") under section 252. (See, Qwest's opening brief at ¶ 65 for a discussion about why the "collocation" mentioned in the Commercial Agreement is not collocation under section 251.) The same analysis applies to access to Qwest's OSS. Access to OSS is only a UNE when it is provided in support of other services that must be offered under section 251.[3] As the FCC explained "e conclude that in order to comply fully with section 251(c)(3) an incumbent LEC must provide, upon request, nondiscriminatory access to operations support system functions for pre-ordering ordering, provisioning, maintenance and repair, and billing of *unbundled network elements* under section 251(c)(3) and resold services under section 251(c)(4)."[4] Thus, Qwest's obligation under Section 251 to provide access to its OSS to order services or obtain loop qualification information applies only to a CLEC's ordering of section 251 services. Line sharing orders placed after October 1, 2004 under the Commercial Line Sharing Agreement do not qualify as section 251 services.

7 At ¶¶ 7-13 of the Opening Brief, Staff discusses the state and federal requirements around interconnection agreements. At ¶¶ 7-8, Staff describes how the Act requires Qwest to open its network to competitors, and requires parties to enter into interconnection agreements to facilitate competition. Qwest does not take issue with that general statement of the law. However, this discussion fails to include any mention of how one makes the determination that

---

[2] *Staff Brief ¶ 9, ¶ 14*. While ¶ 17 seems to state the contrary, that appears to be a typographical error based on the context provided by the rest of that paragraph.

[3] 47 C.F.R. 51.319(g)

[4] *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, released August 8, 1996 ¶ 525 (Emphasis added).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

an agreement really is an interconnection agreement under section 252. Staff next acknowledges, at ¶ 9, that it is the FCC who may determine what elements need to be provided on an unbundled basis and which ones do not. This is also correct, but Staff here ignores the fact that the FCC has already decided that line sharing is not a UNE. If the Commission follows Staff's recommendation and holds that the Commercial Agreement is an interconnection agreement, it will in effect be a decision that line sharing is an unbundled network element – a decision that this Commission is pre-empted from making. Finally, at ¶¶ 10-11, Staff discusses the filing and opt-in requirements for interconnection agreements. However, this discussion is premature until one has first made the determination that a particular agreement contains an ongoing obligation pertaining to services that Qwest is obligated to provide under section 251(b) or (c), a discussion that is simply absent from Staff's brief.

8 At ¶ 16 of its Opening Brief, Staff discusses the filing requirements under the Act, characterizing them as "quite broad". Staff also asserts that Section 252(a)(1) permits voluntarily negotiated agreements "for unbundled network elements that ILECs are not compelled to provide," and that those negotiated agreements are "interconnection agreements" subject to the filing and approval requirements of section 252. Staff's reading of the law on this issue is simply incorrect.

9 As the FCC has clarified, the filing requirements are not broad, but rather are specifically limited. Further, contrary to any suggestion that the Commission has discretion to craft a filing standard, the FCC's *Declaratory Order* sets forth explicit standards that state commissions and carriers must apply to determine if an agreement should be filed.[5] The FCC characterized this standard as properly balancing the right of CLECs "to obtain interconnection terms pursuant to

[5] The standard is that ILECs must, pursuant to section 252(a)(1), file any agreement that "creates an *ongoing* obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation." *Declaratory Order ¶ 8.*

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

section 252(i)" with the equally important policy of "removing unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs."[6] Staff's interpretation of section 252 would require Qwest to file virtually every agreement it has with CLECs – but this interpretation flies in the face of the FCC's conclusive ruling that there simply is no requirement that an ILEC file *all* wholesale agreements with CLECs:

> We . . . disagree with the parties that advocate the filing of *all* agreements between an incumbent LEC and a requesting carrier . . . . Instead, we find that only those agreements that contain an *ongoing obligation relating to section 251(b) or (c)* must be filed under section 252(a)(1).[7]

10 Staff also argues that the Commercial Agreement is subject to section 252 because the language in section 252 applies to agreements negotiated "without regard to the standards set forth in subsections (b) and (c) of section 251."[8] Staff argues that one of the standards for unbundled network elements is that ILECs are obligated to provide those elements that the FCC has determined meet the "necessary and impair" standard in section 251(d)(2), and that section 252(a)(1) therefore allows negotiated agreements for network elements the ILEC is not required to provide.

11 A careful reading of the statutory language shows that Staff's analysis is incorrect. Section 252 applies only to negotiations (or arbitrations) for network elements when such a request has been received *under section 251*. Under section 251, carriers are only permitted to request those elements that the FCC has ordered to be unbundled. 47 U.S.C. 251(c)(3). Section 252(a) allows carriers to enter into negotiations and reach agreement *on the items required by section 251,* but to negotiate terms different from those mandated by the section 251 standards, such as, for example, pricing of interconnection or resold services. The requirement that an

---

6 *Id.*

7 *Id.* n.26 (italics in original; underlining added).

8 *Staff Brief* ¶ 16, citing section 252(a)(1).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

unbundled network element be determined in accordance with the "necessary and impair" standard is a requirement of section 251(d) – but section 252(a) speaks only to the standards contained in subsections (b) and (c) of section 251, not subsection (d). Thus, only those negotiations for *required* unbundled elements result in section 252 agreements. As noted above, Staff's reading of section 252(a)(1) would render the clause "pursuant to section 251" meaningless.

12 Next, Staff claims that the FCC specifically declined to exempt from the filing requirement those agreements pertaining to network elements that have been removed from the national list of elements subject to mandatory unbundling.[9] Staff then argues that the FCC intended that the decision about which agreements are subject to state filing and approval should be left to the state commissions.[10] Qwest disagrees. Qwest anticipated and addressed Staff's argument in its opening brief at ¶¶ 80-81. In short, the discretion to determine if an agreement must be filed is limited to conducting fact finding to ascertain if the agreement falls within the statutory standard as articulated by the FCC, it does not mean that the Commission has discretion to expand or modify the filing standard.

13 Staff concludes that the Commercial Agreement is subject to filing and approval under section 252 because it "is an on-going agreement pertaining to a network element."[11] This conclusion absolutely misinterprets applicable law, and impermissibly broadens the filing and approval requirements under section 252. Under the clear language of section 252, only those agreements that pertain to *unbundled* network elements under section 251(c)(3) are interconnection agreements subject to the filing standard. Staff leaves out this limiting requirement, and broadens the standard so that agreements that pertain to any network elements

---

[9] *Staff Brief* ¶ 18.

[10] *Id*. at ¶ 19.

[11] *Staff Brief ¶* 22.

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

at all would be included, even those that have been “de-listed” by the FCC. But this Commission has already recognized that such an interpretation would be contrary to the law.[12]

14 When the Commission asserts jurisdiction to approve an agreement under section 252, it means that the agreement contains terms that the ILEC is obligated to provide. The Act very clearly states that interconnection agreements are those that result from “a request for interconnection, services, or network elements *pursuant to section 251* . . .”[13] The only network elements that may be requested under section 251 are *unbundled* network elements, which are those that the FCC has ordered. As discussed above, everyone in this case agrees that line sharing is not an unbundled network element for orders placed on or after October 2, 2004. But Staff’s reading of the statute would eliminate the modifying clause “pursuant to section 251” and require filing of agreements for de-listed elements that an ILEC is not otherwise obligated to provide. However much discretion this Commission has to interpret and apply the federal statutes, that discretion does permit it to ignore a crucial provision in the statute.

15 Staff’s position does not garner any additional support by reference to subsection (e) of section 252.[14] Subsection (e)(1) merely requires carriers to file interconnection agreements with the state commission for approval, whether those agreements were adopted by negotiation or arbitration. However, there is no basis for reading subsection (e)(1) as expanding the definition of “interconnection agreement”. Rather, a fair reading of the filing requirement under subsection (e)(1) must relate back to subsection (a), which limits interconnection agreements to those agreements reached after a request is made pursuant to section 251.

[12] In the recent Covad Arbitration, (*In the Matter of the Petition for Arbitration of Covad Communications Company with Qwest Corporation Pursuant to 47 U.S.C. Section 252(b) and the Triennial Review Order*, Docket No. UT-043045, Order No. 06, February 9, 2005, ¶¶ 52-54) the Commission found that while it has authority under section 252 to require access to unbundled network elements, a state-imposed requirement for Qwest to unbundle elements “de-listed” by the FCC from section 251(c)(3) would “be in direct conflict with federal law.”[12] In that decision the Commission rejected Covad’s proposal that would have required Qwest to provide de-listed elements “on the basis of conflict with federal law.” Requiring filing and approval under section 252 of an agreement that contains “de-listed” elements is the same as requiring Qwest to unbundle those elements, and is equally unlawful.

[13] 47 U.S.C. 252(a)(1), emphasis added.

[14] *Staff Brief* ¶ 22

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

16 Along these same lines, and contrary to Staff's assertion at paragraph 23 of its opening brief, nothing in subsection (e)(3) of section 252 confers upon the Commission authority to expand the definition of an interconnection agreement, or to enforce service quality or other state law requirements with regard to wholesale commercial agreements that are not interconnection agreements in the first instance.

17 Since the parties filed their opening briefs in this matter, the FCC has released another order that further supports Qwest's position regarding the lack of state authority to require services to be provided when the FCC has removed them from the list of network elements that are required to be unbundled. On March 25, 2005, the FCC released its order in the case concerning Bellsouth's petition for a declaratory ruling that state commissions may not require it to continue to provide DSL service when the customer has selected another carrier for voice service.[15] Four state commissions had in fact imposed that requirement on Bellsouth. The FCC held that those states were pre-empted from imposing that requirement, as it was tantamount to ordering Bellsouth to unbundle the low frequency portion of the loop, a network element that the FCC had specifically decided did not meet the "necessary and impair" standard.

18 In essence, the FCC decided that the state law decisions requiring this unbundling were in conflict with federal law, and could not survive under section 251(d)(3)(A). A similar result would apply in this case. A Commission ruling here that the Commercial Agreement is subject to filing and approval under section 252 would make the agreement available for opt-in under section 252(i). This, in turn, would result in Qwest being *required* by a state commission to offer line sharing, an element the FCC has specifically de-listed. It is difficult to see how such

---

[15] *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, Memorandum Opinion and Order and Notice Of Inquiry, (released March 25, 2005).

Qwest
1600 7th Ave., Suite 3206
Seattle, WA 98191
Telephone: (206) 398-2500
Facsimile: (206) 343-4040

a decision could be rationalized with the clear rulings of the FCC to date.

19 For the reasons set forth herein, Qwest respectfully requests that the Commission enter an order concluding that the Commercial Agreement is not an agreement that contains ongoing obligations pertaining to services that Qwest has a duty to provide under section 251(b) or (c) and that it is therefore not subject to filing or approval under section 252 of the Act.

DATED this 30th day of March, 2005.

QWEST

____
Lisa A. Anderl, WSBA #13236
Adam L. Sherr, WSBA #25291
1600 7th Avenue, Room 3206
Seattle, WA 98191
Phone: (206) 398-2500