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 COMMISSION STAFF'S RESPONSE BRIEF

1 The line sharing agreement (LSA) between Multiband Communications, LLC (Multiband), and Qwest Corporation (Qwest) must be filed with and approved by the Washington Utilities and Transportation Commission (Commission). Contrary to Qwest's arguments in its opening brief, the Telecommunications Act of 1996 (federal Act)[1] expressly and unequivocally requires that all interconnection agreements for the provision of network elements must be filed with and approved by the state commission. Qwest has offered no compelling legal or policy arguments why the LSA should be exempt from the statutory requirement. Accordingly, the Commission should approve the agreement.

[1] The Telecommunications Act of 1996, H.R. Conf. Rep. No. 104-458, 104th Cong. 2d Sess. 113 (1996) (federal Act) is codified in scattered sections of Title 47 U.S.C. Sections 251 and 252 of the federal Act are codified at 47 U.S.C. §§ 251 and 252, respectively. Copies are appended to the Commission Staff's opening brief.

I. ARGUMENT

A. The Plain Language of Section 252 Requires Commission Approval of the Line Sharing Agreement Between Qwest and Multiband.

2 At issue in this docket is whether Qwest's voluntary agreement to provide Multiband with a network element (the high-frequency portion of the local loop, or line sharing), that Qwest is no longer compelled to provide under Section 251(c)(3) of the federal Act, is subject to the filing and approval requirements set forth in Section 252(a). Qwest has argued that when an ILEC is not obligated to provide a network element to a CLEC, the state commission has no authority to approve an agreement regarding the ILEC's provision of that network element.[2] Qwest's contention is at odds with the plain language of Section 252.

3 Section 252 of the federal Act provides:

> (a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATION.—
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> (1) VOLUNTARY NEGOTIATIONS.—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.
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> . . . .

[2] Qwest's Brief, ¶ 52.

> (e) APPROVAL BY STATE COMMISSION.—
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> (1) APPROVAL REQUIRED.—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.[3]

There is no mistaking Congress's intent that the filing and approval requirements are very broad.[4] In Section 252(a)(1), Congress requires the filing and approval of agreements voluntarily negotiated "without regard to the standards set forth in section 251(b) and (c)." Therefore, Qwest's argument that the filing and approval requirements apply only where a service or network element is mandated by Section 251 is at odds with the plain language of Section 252(a).

4 Qwest's strained reading of Section 252(1)(a) conflicts with the federal Act's procedures for interconnection agreements. Congress afforded ILECs and CLECs two methods for entering into interconnection agreements—by negotiation or arbitration. Under the negotiation method, ILECs and CLECs may voluntarily enter into an agreement for network elements outside of the standards set forth in Section 251(b) or (c). Thus, the parties could agree that the ILEC would provide a CLEC with access to network elements that the ILEC is not compelled to provide pursuant to Section 251(c); or the parties could agree that the ILEC will provide

[3] 47 U.S.C. § 252(a)(1); (e)(1) (emphasis added).

[4] Congress's intention for broad filing and approval requirements also is reflected in its decision to include interconnection agreements executed prior to the passage of the federal Act among those that must be submitted to state commissions for their approval. 47 U.S.C. § 252(a)(1).

unbundled network elements that it is obligated to provide, but for a price different than the cost-based rate the state commission would establish in an arbitration.[5] The agreement would be submitted to the state commission for its approval,[6] and the state commission could reject the agreement only if it discriminates against a carrier that was not a party to the agreement or if it is not in the public interest.[7]

5 If an ILEC and a CLEC are unable to reach an agreement through negotiation, then either party may request the state commission to arbitrate any open issue.[8] When arbitrating open issues, the state commission must ensure that its resolution of the issues meets the requirements of Section 251 and the pricing standards of Section 252(d).[9] Unlike negotiated agreements, arbitrated agreements must comply with Section 251(b) and (c). In other words, the unbundled network elements an ILEC is compelled to provide pursuant to Section 251(c) (as set forth in the FCC's rules) are subject to arbitration, and the elements the ILEC is not compelled to provide are not subject to arbitration because they are not subject to the requirements of Sections 251(b) and (c) and 252(d).[10]

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[5] 47 U.S.C. § 252(a)(1).

[6] *Id.*

[7] 47 U.S.C. § 252(e)(2)(A).

[8] 47 U.S.C. § 252(b)(1).

[9] 47 U.S.C. §252(c).

[10] *See* 47 U.S.C. § 252(a) and (b).

6 The federal Act encourages voluntary negotiations between ILECs and CLECs by exempting their negotiated interconnection agreements from the standards set forth in Sections 251(b) and (c) and 252(d). The rigors of complying with Section 251(b) and (c)—including the mandatory provision of those network elements the FCC determined that ILECs must provide—come into play when the parties request the state commission to arbitrate their agreement.

7 Negotiated and arbitrated agreements are both subject to state commission approval. Section 252(a)(1) requires the parties who have voluntarily negotiated their agreements outside of the standards set forth in Section 251(b) and (c) to submit their agreement to the state commission for its approval pursuant to Section 252(e). Section 252(e) requires parties to negotiated or arbitrated agreements to submit their agreement to the state commission for its approval.[11]

8 Congress's decision to create two separate processes for reaching interconnection agreements furthers the anti-discriminatory policy underpinning the federal Act. The arbitration process ensures that ILECs do not discriminate against CLECs in favor of their own business interests by (for example) requiring the ILECs to provide interconnection and network elements at any technically feasible point in the ILEC's network at cost-based rates.[12] The negotiation process

[11] 47 U.S.C. § 252(a)(1) and (e)(1).

[12] 47 U.S.C. §§ 251(b), (c); 252(b), (d).

ensures that ILECs and CLECs do not discriminate against carriers that are not a party to their interconnection agreement by requiring state commission approval those agreements, which in turn makes the terms and conditions in those agreements available to other CLECs pursuant to Section 252)(i).[13] This is important because not only do CLECs compete against the ILECs with which they interconnect, they also compete against other CLECs. Congress's intent that the transition to a competitive local market be nondiscriminatory to all participants is embodied in the requirement that voluntarily negotiated interconnection agreements between ILECs and CLECs for access to network elements be filed with and approved by the state commission, and made available to other carriers.[14]

B. The FCC Did Not Exempt Agreements for Network Elements That Are Not Subject to Mandatory Unbundling From the Filing and Approval Requirements.

9 Qwest's contends that the Federal Communications Commission (FCC), in its 2002 *Declaratory Ruling*, held that agreements for network elements that ILECs are not obligated to provide to CLECs under Section 251(c)(3) are excluded from the filing requirements of Section 251(a)(1).[15] This contention fails. Contrary to Qwest's

[13] 47 U.S.C. § 252(a)(1), (e)(2)(A); (i).

[14] 47 U.S.C. § 252(a)(1). *See also infra* ¶¶ 16-18.

[15] Qwest's Brief, ¶ 51 (citing *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)).

argument, the FCC did not determine that an agreement pertaining to a network element that an ILEC is no longer compelled to provide need not be filed with and approved by the state commission. Rather, in its *Declaratory Ruling*, the FCC set forth the "basic class of agreements that should be filed."[16] The FCC included within that basic class "an 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 . . . ."[17] The FCC fully anticipated that state commissions would provide "further clarity" regarding the agreements the state commissions would require to be submitted for their approval.[18]

10 In its *Declaratory Ruling*, the FCC expressly "decline[d] to establish an exhaustive, all-encompassing 'interconnection agreement' standard."[19] The FCC also declined to exempt from the filing and approval requirements those agreements pertaining to network elements that ILECs are not compelled to provide under Section 251(c), even though Qwest had expressly requested an

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[16] *FCC Declaratory Ruling*, ¶ 10 ("We encourage state commissions to take action to provide further clarity to incumbent LECs and requesting carriers concerning which agreements should be filed for their approval. At the same time, nothing in this declaratory ruling precludes state commission enforcement action relating to these issues.").

[17] *Id.*

[18] *Id.*

[19] *Id.*

exemption for such agreements.[20] Rather, the FCC excluded a very narrow group of agreements from the filing and approval requirements[21] and committed any further filing and approval requirements to the discretion of the state commissions.[22] In fact, the FCC is "reluctant to interfere" with the state commissions' decisions regarding whether a particular agreement is an interconnection agreement subject to the filing and approval requirements.[23]

11 Qwest's argument is further defeated by the fact that in 2004, the FCC decided to incorporate three requests for declaratory rulings asking the FCC to exempt agreements pertaining to network elements that ILECs are not compelled to provide from the Section 252(a)(1) filing and approval requirements into another

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[20] *FCC Declaratory Ruling*, ¶ 3 (citing *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, Qwest's Petition, at 36-37 (filed April 23, 2002)).

[21] The FCC exempted the following types of agreements from the filing and approval requirements: (1) agreements addressing dispute resolution and escalation procedures relating to Section 251(b) and (c) obligations if information regarding those agreements is made generally available to carriers; (2) settlement agreements that simply provide for backward-looking consideration and do not affect an ILEC's ongoing obligations under Section 251; (3) forms completed by carriers to obtain service pursuant to an underlying interconnection agreement that do not constitute an amendment to the underlying agreement or a new interconnection agreement; and (4) agreements with bankrupt competitors that are executed at the direction of the bankruptcy court and that do not otherwise change the terms and conditions of the underlying interconnection agreement.. *Id.* ¶¶ 9, 12, 13, 14. The line sharing agreement between Multiband and Qwest does not fall within this narrow class of agreements.

[22] *Id.* ¶¶ 10-11.

[23] *Id.* ¶ 10 ("The statute expressly contemplates that the section 252 filing process will occur with the states, and we [FCC] are reluctant to interfere with their processes in this area.").

proceeding.[24] If the FCC already had exempted those agreements in its *Declaratory Ruling*, it would have had no reason to incorporate that issue into a subsequent rulemaking.

12 Even if the FCC's *Declaratory Ruling* is the final word on the universe of agreements that must be filed with and approved by the state commissions—which by its plain language it is not—the LSA between Qwest and Multiband falls within the FCC's class of agreements that must be filed under Section 252(a)(1). The LSA establishes an ongoing obligation under which Qwest will provide Multiband with the high-frequency portion of the local loop, which is a network element.

13 In its brief, Qwest states that the high-frequency portion of the loop (or line sharing) is not an unbundled network element.[25] Qwest is incorrect. Although Qwest no longer is mandated to provide CLECs with unbundled access to the high-frequency portion of the loop, the high-frequency portion of the loop is still a network element.[26]

14 Requiring Qwest and Multiband to submit their LSA to the Commission for its approval also makes sense given the similarity between the high-frequency

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[24] *See In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Companies*, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, 19 FCC Rcd 16,783, FCC 04-179, ¶ 13 (2004). The FCC has not ruled on those petitions in any order issued in that docket.

[25] Qwest's Brief, ¶ 35.

[26] 47 U.S.C. § 153(29) (defining "network element").

portion of the local loop and two other network elements that Qwest is compelled to provide under Section 251(c)(3), the copper local loop and line splitting.[27] The local loop is a stand-alone local loop comprised entirely of copper wire or cable that is capable of providing analog voice service and digital (broadband) service.[28] Line splitting is an arrangement where one CLEC provides voice service on the low-frequency portion of an unbundled copper local loop obtained from an ILEC and another CLEC provides broadband service over the high-frequency portion of that loop.[29] ILECs must permit line-splitting arrangements between CLECs.[30]

15 ILECs must provide CLECs with local copper loops and line splitting pursuant to Section 251(c)(3). As with line sharing, ILECs and CLECs may enter into voluntary negotiations for these elements without regard to the standards set forth in Section 251(b) and (c). The difference between an agreement for line sharing and an agreement for the stand-alone local copper loop or line splitting is that if the ILEC and CLEC cannot agree on the terms and conditions for access to the local copper loop or line splitting, the parties can request the state commission to arbitrate the agreement. Because an ILEC is not compelled to provide line sharing, if parties cannot agree on the terms and conditions for that network

[27] *See* 47 C.F.R. § 51.319(a)(1), (a)(1)(ii).

[28] *Id.* § 51.319(a)(1).

[29] *Id.* § 51.319(a)(1)(ii).

[30] *Id.*

element, the CLEC must make other arrangements to provide its intended service.[31] In fact, the LSA between Qwest and Multiband demonstrates the similarity between line sharing and the stand-alone local loop and line splitting:

> A Party shall provide ninety (90) days written notice to terminate the services under the [Line Sharing] Agreement upon or after expiration. Prior to expiration, a Party may terminate this Agreement only for cause and shall provide ninety (90) days' written notice to terminate the services under the Agreement. After receiving notice of expiration or termination, [Multiband] shall convert all Commercial Line Sharing arrangements to a line splitting arrangement, to a stand-alone unbundled loop, or to such other arrangement as [Multiband] may have negotiated with Qwest to replace such Commercial Line Sharing arrangement."[32]

It would make no sense to require parties to file agreements for the local loop and line splitting, but not require parties to file agreements for line sharing, and the federal Act does not contemplate this result.

C. The Filing and Approval Requirements Are the Federal Act's Most Significant Anti-Discrimination Provisions.

16 Once a state commission has approved an interconnection agreement between an ILEC and a CLEC, which was reached either through voluntary negotiation or arbitration, the ILEC must make the agreement available to any other carrier pursuant to Section 252(i) of the federal Act.[33] According to Qwest, the

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[31] Such other arrangements could include obtaining the local copper loop and line splitting pursuant to 47 U.S.C. § 251(c)(3) and 47 C.F.R. § 51.319(a)(1).

[32] Line Sharing Agreement, § 3.1.3 (emphasis added).

[33] 47 U.S.C. § 252(i).

applicability of Section 252(i) to the LSA between Qwest and Multiband, which will allow other carriers to have access to the high-frequency portion of the local loop on the same terms and conditions as Multiband, will effectuate nothing more than Staff's "mere desire" to allow that result.[34] Qwest couldn't be more wrong. To the contrary, making the terms of the LSA available to other carriers is precisely what Congress intended in order to facilitate non-discriminatory competition in the local telecommunications market.

17 Just over a year ago, the FCC issued a Notice of Apparent Liability (*NAL*) in which it imposed a $9 million fine against Qwest for Qwest's failure to file interconnection agreements for state commission approval.[35] In the *NAL*, the FCC explained the nexus between the filing requirement and a non-discriminatory market:

> Section 252(a)(1) is not just a filing requirement. Compliance with section 252(a)(1) is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors.[36]

The FCC also cited the Minnesota Department of Commerce's determination that the failure to file interconnection agreements as required by Section 252 discriminates against other carriers:

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[34] Qwest's Brief, ¶ 74.

[35] *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, Notice of Apparent Liability for Forfeiture, 19 FCC Rcd 5169, FCC 04-57 (2004) (*NAL*).

[36] *Id.* ¶ 46.

> In each of the twelve interconnection agreements cited by the Minnesota Department of Commerce, Qwest provided terms, condition[s], or rates to certain CLECs that were better than the terms, rates, and conditions that it made available to the other CLECs, and, in fact, it kept those better terms, conditions, and rates a secret from the other CLECs. In so doing, Qwest unquestionably treated those select CLECs better than the other CLECs. In short, Qwest knowingly and intentionally discriminated against the other CLECs in violation of Section 251.[37]

The FCC also addressed the requirement to file agreements in a timely manner. The FCC noted that the failure to file an agreement until after the agreement expired "could lead to a permanent alteration in the competitive landscape or a skewing of the market in favor of certain competitors."[38] The potential harm to the market is the same regardless of whether the preferential terms pertain to network elements that the ILEC is no longer obligated to provide.

18 Because Section 252(i) would require Qwest to make its LSA with Multiband available to other carriers, Qwest contends that requiring the submission of the LSA to the Commission for its approval "will be tantamount to a ruling that line sharing is a UNE and is required to be offered." This contention has no merit. The requirement to file all ongoing interconnection agreements for state commission approval discourages ILECs from offering "sweetheart" deals to certain CLECs,

[37] *Id.* ¶ 47 (citation omitted).

[38] *Id.* ¶ 43.

which gives those CLEC a competitive advantage over other CLECs. Qwest does not have to provide line sharing, but if it does, it cannot discriminate among carriers.

II. CONCLUSION

19 For the foregoing reasons, and for the reasons set forth in Staff's initial brief in this docket, the Commission should approve the LSA between Qwest and Multiband. Approving the agreement is consistent with the plain language of the federal Act, the FCC's *Declaratory Ruling*, and the anti-discriminatory policy underlying the federal Act.

Dated: March 30, 2005.

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