

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
MOTION FOR
CLARIFICATION

1 Pursuant to WAC 480-07-835, the Commission Staff (Staff) moves for clarification of the Washington Utilities and Transportation Commission's (Commission) final order (Order) dismissing Multiband Communications, LLC's petition for approval of its line sharing agreement with Qwest Corporation (Qwest). Specifically, Staff requests the Commission clarify several elements of the Order to facilitate consistent compliance with the continuing requirements of the Order.¹ Staff does not request that the Commission change the outcome of the Order.

¹ "The purpose of a motion for clarification is to ask for clarification of the meaning of an order so that compliance may be enhanced, so that any compliance filing may be accurately prepared and presented, to suggest technical changes that may be required to correct the application of principle to data, or to correct patent error without the need for parties to request reconsideration and without delaying the post-order compliance." WAC 480-07-835.

A. Clarification Regarding the Requirement that Parties Must Continue to File Their Agreements for Commission Review.

2 In its Order, the Commission requires “Qwest and its counter parties to continue to file their agreements that concern the provisioning of network elements that promote deployment of advanced telecommunications and information technologies and services to end use customers in Washington.”² Staff requests clarification regarding this requirement.

1. Clarification Regarding Commission Review of Agreements.

3 In its Order, the Commission states, “The FCC’s *Declaratory Order* unambiguously provides that the Commission, in the first instance, should review and determine whether individual agreements between CLECs and ILECs require state approval under the Act.”³ In addition, the Commission states, “The Commission also has responsibilities under general provisions of state law to review the contracts of telecommunications companies and to prevent a telecommunications company from giving any undue or unreasonable preference or advantage to itself or any other person providing telecommunications service.”⁴

² Order, ¶ 35.

³ *Id.* (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, ¶ 10 (2002) (FCC Declaratory Ruling).

⁴ *Id.* (citing RCW 80.36.186).

Staff requests the Commission clarify that the reason the Commission is ordering Qwest and its counterparties to file agreements such as the line sharing agreement is to allow the Commission to determine whether the agreements require its approval under the federal Act. Staff further requests the Commission clarify that it is not requiring the parties to file the agreements for Commission review pursuant to RCW 80.36.186, 80.36.150, or WAC 480-120-142.

2. Clarification Regarding the Type of Agreements Qwest and Its CLEC Counterparties Must File Pursuant to the Commission's Order.

4 In its Order, the Commission requires Qwest and its CLEC counterparties to file agreements “that concern the provisioning of network elements that promote deployment of advanced telecommunications and information technologies and services to end use customers in Washington.”⁵ The Commission also said that, “Qwest is required to continue to file for review its agreements with CLECs, such as the agreement at issue here, that refer to past, present, or future obligations imposed on ILECs pursuant to the Telecommunications Act of 1996.”⁶ Staff requests the Commission clarify these provisions.

5 Specifically, Staff requests that the Commission clarify that the filing requirement is not limited to agreements pertaining to elements used to provision advanced services. Staff asks the Commission to clarify that it also intends for

⁵ Order, ¶ 35.

⁶ *Id.* ¶ 50.

Qwest and its counterparties to continue to file, for review purposes, agreements that pertain to the provision of elements of Qwest's network to a CLEC, for the purposes of providing local exchange service, regardless of whether the FCC's rules presently require Qwest to provide CLECs with unbundled access to those elements.

6 In its Order the Commission described the line sharing agreement as an agreement that refers to "past, present, or future *obligations* imposed on ILECs pursuant to the Telecommunications Act of 1996."⁷ However, in other parts of its Order, the Commission expressly held that the line sharing agreement does not pertain to an ongoing obligation under the Act because Qwest is not obligated to provide line sharing pursuant to Section 251(c)(3).⁸ From this language, one might infer that the Commission intends that line sharing agreements, like the agreement at issue in this docket, need not be filed for Commission review because they do not relate to an ILEC's obligations under the Act. Again, Staff requests the Commission clarify that it intends for Qwest and its counterparties to continue to file, for review purposes, agreements that pertain to the provision of elements of Qwest's network

⁷ Order, ¶ 50.

⁸ See Order, ¶ 30 ("The LSA is an ongoing agreement, but it does not reflect an ongoing obligation; Qwest is not obligated to offer line sharing at all after October 4, 1004."); ¶ 33 ("We find that the LSA does not create an ongoing obligation pertaining to an unbundled network element under section 251; the LSA contains no ongoing obligation relating to subsection 251(b) or (c).").

to a CLEC, regardless of whether the FCC's rules presently require Qwest to provide CLECs with unbundled access to those elements.

B. Clarification Regarding the Commission's Interpretation of the FCC's Declaratory Order.

7 The Commission based its decision that the line sharing agreement between Multiband and Qwest is not subject to Commission approval on the language of 47 U.S.C. §§ 251 and 252.⁹ In its Order, the Commission acknowledged that it was unnecessary for the Commission to interpret the FCC's Declaratory Ruling¹⁰ to reach its result.¹¹ Staff is concerned about the implication of the Commission's interpretation of the FCC's Declaratory Ruling and requests the Commission clarify one point of its analysis.

8 The Commission's discussion of the FCC's Declaratory Ruling does not fully appreciate the distinction between the contractual obligations between ILECs and CLECs that are set forth in interconnection agreements with the carriers' statutory obligations under 47 U.S.C. § 251(b) and (c). In its Declaratory Ruling, the FCC determined that "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 is an

⁹ Order, ¶¶ 19-26; 32-34.

¹⁰ See *supra* n. 3.

¹¹ Order, ¶ 27.

interconnection agreement that must be filed pursuant to section 252(a)(1)."¹² The "ongoing obligation" to which the FCC refers is the *contractual* obligation between the ILEC and the CLEC, which pertains to the carriers' *statutory* obligations under 47 U.S.C. § 251(b) and (c) (*i.e.* their statutory obligations regarding resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled access to network elements, or collocation). The FCC addressed the nature of the contractual obligation between the parties to the interconnection agreement because one of the issues the FCC was asked to address in the Declaratory Ruling was whether agreements for backward looking consideration were subject to state commission approval.¹³

9 This distinction is important because many interconnection agreements contain change of law provisions that govern the contractual obligations of parties in the event the statutory obligations are changed by intervening law. While this does not affect the line sharing agreement between Multiband and Qwest, it may affect the line sharing agreements (or other agreements for network elements that ILECs are no longer required to provide) of other parties. If the Commission interprets the "ongoing obligation" as the ILEC's statutory obligation under Section 251, then an ILEC may rely upon that interpretation to argue that its contractual

¹² *FCC Declaratory Ruling*, ¶ 8.

¹³ *See id.* ¶¶ 4, 12.

obligation to provide a network element (*i.e.* interconnection agreement) dissolves immediately if that network element no longer must be provided under Section 251(c)(3), without regard to the change of law provision in the agreement. In other words, the ILEC may argue that the interconnection agreement is no longer valid because the “ongoing obligation” no longer exists.

10 Staff requests that the Commission clarify that the “ongoing obligation” refers to the contractual obligation between the parties that governs their fulfillment of the statutory obligations set forth in 47 U.S.C. § 251. In the alternative, Staff requests that the Commission strike those portions of its Order that interpret the FCC’s Declaratory Ruling.¹⁴ Neither action will change the outcome of this docket or the Commission’s decision that agreements for network elements that ILECs are not required to provide under 47 U.S.C. § 251(c)(3) are not subject to the Commission’s approval.

C. Clarification Regarding What Action “Triggers” the Requirements of Subsection 251(a)(1).

11 In its Order, the Commission calls “a request for interconnection, services, or network elements *pursuant to section 251*” the “threshold event that triggers the requirements of subsection 252(a)(1).”¹⁵ Likewise, the Commission holds that, “The

¹⁴ Order, ¶¶ 27-31, 33.

¹⁵ Order, ¶ 23 (“Staff ignores that the threshold event that triggers the requirements of subsection 252(a)(1) is a “request for interconnection, services, or network elements *pursuant to section 251*.”) (emphasis added)).

LSA is not a negotiated agreement that follows from a request by Multiband asking that Qwest provide a network element pursuant to section 251 of the Telecommunications Act of 1996.”¹⁶ However, the Commission also concludes that the line sharing agreement is not subject to Commission approval because it does not pertain to network elements that Qwest must provide pursuant to 47 U.S.C. § 251(c)(3). Staff asks the Commission to clarify whether the Commission’s jurisdiction to approve an agreement is triggered by (1) a request for interconnection, services, or network elements pursuant to Section 251, or (2) an interconnection agreement that pertains to an ILEC’s duties under Section 251(c)(3). While clarification of this issue would not change the result of this docket, clarification is nevertheless important because the Commission has stated that it will continue to review agreements to determine whether it has jurisdiction to approve or reject them pursuant to 47 U.S.C. § 252(e).¹⁷ Stated another way, Staff requests clarification as to what event (or combination of events) triggers the Commission’s jurisdiction over an agreement.

¹⁶ Order, ¶ 41 (Finding of Fact No. 5).

¹⁷ Order, ¶¶ 35, 47.

12 For example, a CLEC could request negotiations with an ILEC to obtain an interconnection agreement for stand-alone copper loops. ILECs must provide CLECs with copper loops pursuant to 47 U.S.C. § 251(c)(3). This request is a “request for interconnection, services, or network elements pursuant to section 251.”¹⁸ However, during the course of their negotiations, the CLEC and ILEC may agree that the ILEC instead will provide the CLEC with unbundled access to the high-frequency portion of the loop and retain the low-frequency portion to provide the customer with voice service. The parties thereby would execute a line sharing agreement. If the Commission’s jurisdiction is triggered by the request for the stand-alone copper loop, then the agreement would be subject to the Commission’s approval.

13 The converse situation raises the more important policy question, which is whether an ILEC and a favored CLEC can evade the filing and approval requirements set forth in 47 U.S.C. § 252 by the CLEC foregoing a formal request for interconnection, services, or network elements pursuant to Section 251. This situation arose in Texas in the context of an interconnection agreement between Southwestern Bell Telephone d/b/a SBC Texas (SBC), an ILEC, and Sage Telecom,

¹⁸ 47 U.S.C. § 252(a)(1).

L.P. (Sage), a CLEC.¹⁹ In that case, SBC and Sage had negotiated an agreement that contained elements SBC was required to provide Sage pursuant to Section 251(c),²⁰ as well as elements that SBC was not required to provide. SBC and Sage desired to keep the portion of the agreement that pertained to the non-required elements confidential so they did not file it with the Texas Public Utility Commission (Texas PUC).²¹ The Texas PUC held that the parties were required to file the agreement. Sage and SBC sued the Texas PUC, alleging, among other things, that the Texas PUC had no authority under the Telecommunications Act to require the carriers to file the agreement.²²

14 Sage and SBC argued that the Texas PUC had no authority to require them to file the agreement because the agreement did not result from a request by Sage for interconnection pursuant to Section 251.²³ In affirming the Texas PUC, the United States District Court for the Western District of Texas rejected Sage's argument:

¹⁹ *Sage Telecom, L.P. v. Public Util. Comm'n of Texas*, No. A-04-CA-364-SS, 2004 WL 2428672 (W.D. Tex. Oct. 7, 2004) (copy attached for ease of reference).

²⁰ In this sense, *Sage Telecom* differs from this docket because Qwest is not required to provide Multiband with access to the high-frequency portion of the loop pursuant to Section 251(c)(3). The *Sage Telecom* decision does not address the ultimate issue in this docket, which is whether agreements for network elements that ILECs are not obligated to provide to CLECs under Section 251 are subject to state commission approval.

²¹ *Sage Telecom*, at * 3.

²² *Id.*

²³ *Id.* at *4.

First, there is nothing in the statute to suggest the phrase “request . . . pursuant to section 251” is meant to imply the existence of a threshold requirement, the satisfaction of which is necessary to trigger the operation of the statute. Although such a reading is not foreclosed by the somewhat ambiguous language of § 252(a)(1), other language in the statute makes clear such a triggering request is not a prerequisite for the operation of its filing and approval provisions. For instance, § 252(e)(1) states, “[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted” to the State commission for approval. Although § 252(a)(1) is linked to § 252(e)(1) by the language in the last sentence (“The agreement . . . shall be submitted . . . under subsection(e)”) one cannot reasonably conclude the types of agreement subject to the State commission approval requirements of § 252(e)(1) are limited to agreements made pursuant to the § 252(a)(1) scheme. After all, § 252(e) requires the submission not only of voluntarily negotiated § 252(a)(1) agreements, but also arbitrated § 252(b) agreements.

The second deficiency in Sage’s argument is that its proposed “triggering request” requirement would allow the policy goals of the Act to be circumvented too easily. The Act’s provisions serve the goal of increasing competition by creating two mechanisms for preventing discrimination by ILECs against less favored CLECs. First, the State-commission-approval requirement provides an administrative review of interconnection agreements to ensure they do not discriminate against non-party CLECs. Second, the public-filing requirement gives CLECs an independent opportunity to resist discrimination by allowing them to get the benefit of any deal procured by a favored CLEC [under the provisions of Section 252(i)]. If the public filing scheme could be evaded entirely by a CLEC’s election not to make a formal “request . . . pursuant to Section 251,” the statute would have no hope of achieving its goal of preventing discrimination against less-favored CLECs. Under Sage’s interpretation of the statute, other CLECs would be able to obtain preferential treatment from ILECs with respect to § 251 services and network elements without fear the State commission or other CLECs would detect the parties’ unlawful conduct. The CLEC would have to do nothing more than forego the triggering request and it would be free to enter secret negotiations over the federally regulated subject matter.²⁴

²⁴ *Id.*

Although the Commission expressly orders Qwest to continue to file agreements with CLECs, Staff believes clarification is necessary due to the interplay between the filing and approval requirements set forth in Section 252. The Commission appears to have held that Section 252(a)(1) does not apply to agreements that are not the result of a request for interconnection, services, or network elements pursuant to Section 251.²⁵ Under the Commission's analysis, if Section 252(a)(1) does not apply because there was no CLEC request, then the filing requirement of Section 252(e) also does not apply because there is no "interconnection agreement adopted by negotiation within the meaning of Section 252(e)(1)."²⁶ Staff requests the Commission clarify it intends for Qwest and its counterparties to continue to file, for review purposes, agreements that pertain to the provision of elements of Qwest's network to a CLEC, for the purposes of providing local exchange service, regardless of whether the FCC's rules presently require Qwest to provide CLECs with unbundled access to those elements and

²⁵ Order, ¶ 22.

²⁶ Order, ¶ 26 ("Where, as here, the only network element a CLEC requests from an ILEC is one that the FCC has removed from the list of required elements under subsection 251(c)(3), the CLEC cannot be said to have made a request for a network element 'pursuant to section 251.' That is, because the agreement at issue concerns only line sharing, it is not an agreement within the meaning of subsection 252(a)(1). Hence, it is not 'an interconnection agreement adopted by negotiation' within the meaning of subsection 252(e)(1). Therefore, the line sharing agreement between Qwest and Multiband is not one that requires our approval under the Act.").

regardless of whether the CLEC made a formal request for interconnection,
network elements, or services under Section 251(b) or (c).

Dated: April 29, 2005.

Respectfully submitted,

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