[Service Date May 20, 2005]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition of	)	
	)	DOCKET NO. UT-053005
MULTIBAND COMMUNICATIONS, LLC	)	
	)	ORDER NO. 03:
	)	
For Approval of Line Sharing Agreement with Qwest Corporation Pursuant to Section 252 of the Telecommunications Act of 1996	)	DENYING MOTION FOR CLARIFICATION
. . . . .	)	

SUMMARY

1 **PROCEEDINGS:** The Commission entered Order No. 02, its Final Order in this proceeding, on April 19, 2005. On April 29, 2005, Staff filed its Motion for Clarification pursuant to WAC 480-07-835. Staff requests the Commission to "clarify several elements of the Order to facilitate consistent compliance with the continuing requirements of the Order."[1]

2 Qwest filed a Motion for Leave To File an Answer and its Answer on May 9, 2005.

3 **PARTY REPRESENTATIVES:** C. Douglas Jarrett, Keller and Heckman LLP, Washington, D.C., represents Multiband. Lisa Anderl, Qwest Corporation, Seattle, Washington, represents Qwest. Shannon Smith, Assistant Attorney General, Olympia, Washington, represents Commission Staff.

[1] Staff Motion at ¶1 (footnote omitted).

4 **COMMISSION DETERMINATIONS:** The Commission grants Qwest's Motion for Leave to File an Answer. The Commission denies Staff's Motion for Clarification.

MEMORANDUM

I. Rationale for Filing Requirement.

5 Focusing on the second and third sentences of ¶ 35 in Order No. 02, Staff requests clarification 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;

and

> The Commission 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.

6 The discussion at ¶ 35 in Order No. 02 states the rationale for a continuing filing requirement as follows:

> 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.[2] 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

[2] *Declaratory Order* at ¶ 10.

> unreasonable preference or advantage to itself or any other person providing telecommunications service.[3]

We take at face value, for purposes of discussion, Staff's suggestion that ¶ 35 somehow fails to state plainly that the reasons we found it appropriate for Qwest and Multiband to file the agreement at issue in this proceeding was that it gave the Commission an opportunity to carry out its responsibilities as discussed in the FCC's *Declaratory Order* and under state law. Our meaning in ¶ 35, to the extent arguably unclear, is clarified by our conclusion of law at ¶ 47 of the Final Order (emphasis added):

> The Commission should continue to require that Qwest file its commercial agreements with CLECs for examination by the Commission *so that the Commission can determine its jurisdiction* and otherwise carry out its statutory responsibility to regulate telecommunications companies in the public interest.

The Commission's determination of its jurisdiction necessarily includes a determination of whether an agreement requires our approval under Sections 251 and 252 of the Telecommunications Act of 1996. Order No. 02 does not require clarification on this point.

7 Turning to the second part of Staff's request, Order No. 02 includes citation to RCW 80.36.186 in the third sentence of ¶ 35. There is nothing prescriptive in this sentence. It simply supports by way of example our statement that one of our responsibilities under general provisions of state law is to prevent regulated companies from giving any undue or unreasonable preference or advantage to themselves or any other person providing regulated services. This is part of our broader responsibility to regulate in the public interest.

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[3] *See* RCW 80.36.186.

8 The context and the signal "*see*" make clear that the cited statute does not stand directly for the proposition stated, but logically supports the proposition. More significantly, there is nothing in the Final Order expressing or implying the idea that the Commission is requiring Qwest to file agreements for "review pursuant to RCW 80.36.186." In sum, there is nothing in Order No. 02 that suggests we are requiring parties to file the agreements for Commission review pursuant to RCW 80.36.186. This statute imposes requirements on telecommunications companies only in accordance with its terms.

9 RCW 80.36.150 also imposes requirements on Qwest and others in accordance with its terms. We, however, had no occasion to consider this statute in the context of this proceeding. Order No. 02 makes no reference to RCW 80.36.150. Accordingly, there is no basis for confusion concerning the point that the Commission, in Order No. 02, did not require the parties to file their agreements for Commission review pursuant to RCW 80.36.150.

10 WAC 480-120-142 was repealed effective January 29, 1999. In any event, we cited no provisions from the current or prior Washington Administrative Code in the body of Order No. 02. There simply is nothing in Order No. 02 that suggests the Commission requires parties to file agreements pursuant to any current or prior rule.

11 We conclude this part of our discussion with the straightforward observation that Order No. 02 requires parties to file agreements for Commission review for the reasons stated in Order No. 02. Nothing more is implied by the terms of our Order, and nothing more should be inferred.

II. Breadth of Filing Requirement.

12 Again with reference to ¶ 35, Staff requests clarification of the Commission's requirement that Qwest and its CLEC counterparties "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."[4] Staff asks the Commission to clarify that the filing requirement in Order No. 02 is not limited to agreements that pertain to elements used to provision advanced services.

13 The filing requirement in Order No. 02 is not set forth in ¶ 35. It is stated by our second ordering paragraph (*i.e.*, ¶ 50), which states:

> 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.[5]

The Commission's second ordering paragraph is broad and inclusive by its terms. It would include, for example, agreements for the provisioning of network elements a competitive local exchange carrier might use to provide so-called plain old telephone service. There is nothing in the language of our second ordering paragraph that suggests the filing requirement in Order No. 02 is limited to agreements pertaining to network elements used to provision advanced services. Paragraph 35, read in the context of this ordering paragraph, thus identifies by the language emphasized above only one type of agreement covered by the second ordering paragraph—the type of agreement at issue in this proceeding—an agreement that promotes deployment of an advanced service known as digital subscriber line (DSL).

14 Staff argues there is confusion arising from our ordering language in Order No. 02 that covers agreements pertaining to "past, present, or future *obligations*" [Staff's emphasis] when that language is considered in the context of our

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[4] Staff Motion at ¶¶ 2 and 4 (quoting Order No. 02 at ¶35).
[5] Order No. 02 at ¶ 50 (emphasis added).

discussion in other parts of the Order to the effect that line sharing is not an "ongoing obligation" within the meaning of the FCC's *Declaratory Order*.[6] A line sharing agreement, "such as the agreement at issue here," exemplifies an ongoing contractual obligation concerning a past statutory obligation. Thus, ¶ 50 in our Final Order requires that Qwest continue to file line sharing agreements, and any other wholesale agreements that provide for network elements or services the FCC has delisted (*i.e.,* no longer considers an unbundled network element under Section 251(c)(3) of the Telecommunications Act).[7]

15 As we stated earlier, it remains important for the Commission to receive for filing the types of commercial agreements at issue here. This is so even if we ultimately conclude that some of the filed agreements, such as the line sharing agreement at issue in this proceeding, are not subject to our approval under Sections 251 and 252 of the Telecommunications Act.

III. FCC Declaratory Order.

16 Although Staff acknowledges in ¶ 7 of its Motion that our discussion of the FCC's *Declaratory Order* in Order No. 02 is not the basis for the Commission's decision, Staff nevertheless asks us to clarify this discussion. Staff states:

> 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 [sic] the carriers' statutory obligations under 47 U.S.C. § 251(b) and (c)."[8]

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[6] Staff Motion at ¶ 6.
[7] We note Qwest's Answer reflects that it understands this requirement in these very terms. Qwest Answer at ¶ 2.
[8] *Id.* at ¶ 8.

17 The "distinction" between contractual and statutory obligations implicated by Staff's Brief is the one we perceived in connection with Staff's argument that the LSA "is an on-going agreement pertaining to a network element."[9] Order No. 02 expressly recognizes and discusses this distinction as follows:

> It is unclear whether Staff's references to an "ongoing *agreement*" rather than an "ongoing *obligation*," and to a "network element" as distinct from an "*unbundled* network element" are intentional. Assuming deliberate word choices, we cannot dispute the veracity of Staff's statement precisely as written, but from these precise premises, Staff's conclusion does not follow.[10]
>
> The LSA is an ongoing agreement, but it does not reflect an ongoing obligation; Qwest is not obliged to offer line sharing at all after October 1, 2004. Though the LSA pertains to a network element, it does not pertain to an unbundled network element within the meaning of section 251.[11]

Thus, we recognize in Order No. 02 the ongoing nature of the parties' contract (*i.e.*, agreement); yet we also recognize that it is not a contract or agreement "*relating to section 251(b) or (c).*" That is, it is not a contract that relates to an ILEC's continuing (*i.e.*, ongoing) obligation to provide certain network elements under Section 251(c)(3).

18 Finally, considering Staff's discussion at ¶ 9 of its Motion concerning how "other parties" may be affected by our discussion of the FCC *Declaratory Order*, we decline to entertain hypothetical speculation. As Staff acknowledges in its Motion, our granting clarification along the lines requested would have no

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[9] *Id.* at ¶ 22.
[10] Order No. 02 at ¶ 29.
[11] *Id.* at ¶ 30.

bearing on the line sharing agreement that is the subject of this proceeding.[12] We can address any of the issues Staff suggests may arise, if and when they do.

IV. Triggers.

19 "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). . . . Stated another way, Staff requests clarification as to what event (or combination of events) triggers the Commission's jurisdiction over an agreement."[13]

20 Staff's request effectively proposes that we set standards of general applicability. That is best done by rule, when necessary, not by adjudication of individual cases.

21 In addition, we decline to take up on a motion for clarification what is essentially a new line of argument. To the extent the District Court's decision in *Sage Telecom*[14] might arguably have any bearing on the controversy before us, Staff should have made out its argument on brief or during oral argument.[15]

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[12] Staff Motion at ¶ 9.

[13] *Id.* at ¶ 11.

[14] *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). The only mention of this federal case prior to Staff's Motion is Qwest's contention on brief that the decision is not applicable under the facts of this proceeding. Staff did not dispute Qwest's contention in its response brief or at oral argument. Indeed, Staff acknowledges in its Motion the inapplicability of the decision to "the ultimate issue in this docket." Staff Motion at ¶13, fn. 20.

[15] We note in this regard that Qwest mentions *Sage Telecom* in the section of its initial brief that disputes Staff's argument that our determination in *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) is dispositive here. Staff did not pursue this line of argument through the course of the proceeding. Moreover, by its discussion of *Sage Telecom* in its Motion Staff demonstrates that the case is distinguished by its facts from the matter before us. Finally,

V. Conclusion.

22 We close by observing, as Staff noted in its Motion, that

> 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."[16]

23 We do not find clarification is necessary to serve these purposes. Qwest's Answer makes clear that the Company understands what it is required to do in response to the filing requirement set forth in Order No. 02.

24 For these reasons and the reasons stated in the body of this Order, we conclude Staff's Motion for Clarification should be denied.

ORDER

THE COMMISSION ORDERS THAT:

25 (1) Commission Staff's Motion for Clarification is denied.

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we noted in Order No. 02 our rejection of Staff's argument that the Commission's analysis in the MCIMetro proceeding "applies to the LSA between Multiband and Qwest." Thus, Staff's argument grounded in *Sage Telecom* is inappropriate for consideration in this Order not only because it is developed for the first time in Staff's Motion, but also because it would require us to reconsider our rejection of Staff's "integration" argument in Order No. 02 without any petition for reconsideration having been filed.

[16] WAC 480-07-835. Staff Motion at ¶ 1, fn. 1.

26 (2) Qwest's Motion for Leave to File an Answer is granted.

27 (3) The Commission retains jurisdiction to effectuate the terms of this Order and all prior orders in this proceeding.

DATED at Olympia, Washington, and effective this 20th day of May, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner