BEFORE THE
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale. _____ In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale for U S West Communications, Inc. _____ In the Matter of the Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale for GTE Northwest Incorporated.	Docket Nos. UT-960369, UT-960370, and UT-960371 COVAD COMMUNICATIONS COMPANY ANSWER TO MOTIONS AND REQUESTS FOR CLARIFICATION

INTRODUCTION/RELIEF REQUESTED

Intervenor Covad Communications Company ("Covad") opposes the petitions of U S West, GTE, and Staff for clarification/reconsideration to the extent that they seek to interpret the 17th Supplemental Order as being a final order or seek to implement any of its rates or terms prior to the conclusion of Phase III. Premature implementation of the interim rates in the 17th Supplemental Order would not be in the public interest and, moreover, would trigger immediate and piecemeal judicial review of the order.

Covad also seeks clarification of the 17th Supplemental Order as it regards Covad's request for line sharing or "Spectrum Unbundling" to permit CLECs to offer DSL service over a loop that is shared with the ILECs' voice grade services, in the same way that the ILECs share their voice grade loops with their DSL services. Resolution of this issue is particularly urgent if the Commission should grant U S West's or GTE's motion to prematurely implement the new prices.

Finally, absent clarification by the Commission, some parties may be compelled to seek judicial review within 30 days of the 17th order to preserve their appeal rights because there is a possibility that the Commission could "clarify" that some aspects of the 17th Supplemental Order have finality. To eliminate uncertainty and avoid potentially burdensome and needless court proceedings Covad asks that the Commission issue an order on the pending petitions as soon as

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possible and at least prior to September 29, 1999 (30 days after the service of the 17th Supplemental Order).

DISCUSSION

I. The Commission Properly And Reasonably Declined To Implement Permanent Prices For Interconnection, UNEs, And Resale Pending The Conclusion Of Phase III Of This Docket and, Accordingly, Should Deny Any Request For Clarification Or Reconsideration.

The 17th Supplemental Order, by its own terms, is only an "interim" order determining prices. Consistent with the expressed intent that the 17th Supplemental Order was only an interim order, the approximately 15 paragraphs constituting its ordering clauses do not state any effective dates, with one exception. 17th Supplemental Order, ¶¶ 525-540. The one exception is the date for filing new OSS cost studies, which is a procedural directive to produce evidence for Phase III, not a final determination of rights of a party. Some parties have interpreted paragraphs 527 and 528 of the 17th Supplemental Order as directing immediate implementation of certain rates. Such an interpretation appears to be inconsistent with the evident intent of the Commission that the order be only interim, not final.

Because the 17th Supplemental Order does not change any of the interim prices or implement any permanent prices, the Commission should treat the various motions as motions for reconsideration. Because the 17th order was not a final order, the motions for reconsideration should be denied on procedural grounds. WAC 480-09-810(1). Moreover, the Commission should deny the motions and decline to impose any permanent prices or price changes at this time for important substantive reasons.

A. Loop And Loop Conditioning Prices Should Not Be Implemented Until The Conclusion Of Phase III.

Although some parties may be seeking implementation of other prices, the prices with the greatest impact on Covad and many other CLECs are loop and conditioning prices. To date, the Commission has only determined statewide average prices for the loop. Because the Commission has also determined that it is appropriate that the final prices to be charged for particular loops be geographically deaveraged, final pricing of loops has not been accomplished. Similarly, the Commission has established "prices" for loop conditioning but has not made any

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determination of how those "prices" are to be allocated. Under the terms of the 17th Supplemental Order, the parties do not even know who will be paying the "prices" for conditioning, much less how much each party must pay in any given circumstance. In this context, it is easy to see why the 17th Supplemental Order is only interim in nature. Because further proceedings are necessary to determine how the average prices are to be spread among various parties and various specific facilities, it is premature to implement them.

It would not be in the public interest for the Commission to try to address the ILECs' concerns about further delay in implementation of the permanent prices through use of a "true up" mechanism.[1] The prospect of a true up or retroactive application of rates may lead a CLEC to delay its entry into the market. If the CLEC does enter the market, it faces difficulty in pricing its retail services. If it prices high enough to cover its worse case scenario, it makes it more difficult to penetrate the market. If it prices its services according to the best case scenario, its runs the risk of later incurring a substantial loss by learning, after the fact, that its rates did not cover its costs.

The potential harm to competition in this state from imposing the new UNE prices before the remaining issues are resolved is evident. Because UNEs constitute such a large percentage of a CLEC's overall costs, the impact of pricing changes, errors, and uncertainties is huge. In contrast, because of the limited penetration of CLECs into the market in Washington, the ILECs' wholesale revenues and costs are but a small fraction of their operations. Neither U S West nor GTE have contended that they will suffer <u>any</u> meaningful negative impact on their overall earnings if their petitions are not granted. Accordingly, it is in the public interest to resolve the important remaining issues in Phase III before implementing the Phase II prices.

Finally, it is essential for Covad to be able to compete with U S West and GTE that the Commission implement Spectrum Unbundling before increasing the loop rates. This issue is discussed in Covad's request for clarification, Section II, below.

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[1] Either by maintaining the interim rates but trying to make them subject to true up based on the Phase III prices (as hinted in GTE's petition) or by implementing the Phase II averaged prices to be charged in some fashion subject to a later true up.

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B. Granting Reconsideration Or Interpreting The 17th Supplemental Order As Implementing Prices Before The Conclusion Of Phase III Would Force The Parties To Seek Judicial Review Of The 17th Supplemental Order.

Although the Commission has accomplished much in Phases I and II of this proceeding, it has not concluded the work needed to finally determine the rights and obligations of the parties. As noted above, it is still not possible for Covad, for example, to know exactly what it is going to pay for its loops until geographic deaveraging is concluded in Phase III. If, however, the Commission either grants reconsideration or interprets the 17th Supplemental Order as imposing the prices on Covad in some fashion even before this proceeding is concluded, then the Commission will have interpreted or made its 17th Supplemental Order a final order for purposes of judicial review under the APA. Once this occurs, the parties who intend to seek review of any portion of the proceedings in this docket to date will have no choice but to promptly file a petition for review. See RCW 34.05.542(2). The courts in Washington consistently reject petitions for judicial review that are not filed within the required 30 days of the service of the final order, so parties desiring review will not want to take a chance that their petitions might be deemed late filed. See, e.g., Clymer v. Employment Security Depart., 82 Wn.App. 25 (1996).

The APA does not have a precise definition of what is a "final order" for purposes of triggering the judicial review provisions. It is clear, however, that it is the effect of an order, not the designation or title of the order that determines whether the order is reviewable.

Initially, it is noted that whether or not the statutory requirements are satisfied in any given case depends not upon the label affixed to its action by the administrative agency, but rather upon a realistic appraisal of the consequences of such action. Isbrandtsen Co. v. United States, 211 F.2d, 51, 55 (D.C. Cir. 1954). Justice Frankfurter stated in Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 425, 86 L. Ed. 1563, 62 S. Ct. 1194, (1942), that:

> The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

Thus, administrative orders are reviewable when "they impose an obligation, deny a right,

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or fix some legal relationship as a consummation of the administrative process." [Citation omitted].

State Dept. of Ecology v. City of Kirkland, 84 Wn.2d 25, 29-30 (1974). If the Commission denies the requests to implement the Phase II prices until the conclusion of this docket, then the "interim" label given 17th Supplemental Order will be consistent with its effect; it will not be a final order.

Covad respectfully submits that permitting or forcing the parties to commence judicial review at this time could be a substantive and procedural nightmare. By allowing some rates to go into effect, but deferring other matters in the docket to the conclusion of Phase III, it would be clear that the order is "final" for some purposes, but not others. The parties would be forced to seek judicial review of the order because of its aspects of finality as to certain rates that are allowed to go into effect. There is no clear guidance in the APA on whether the parties would be able to or forced to seek review of all the proceedings to date, or only those proceedings that are considered final for review purposes.

Even if a court attempted to review only the "final" provisions of the 17th Supplemental Order and defer the remainder of review until the conclusion of Phase III, some overlap between the continuing Phase III proceedings and the court's review would be inevitable. For example, the costing determinations of Phases I and II that form the basis for the prices that would presumably be on appeal would continue to form the basis for the Commission's proceedings in Phase III. Thus, the parties would be operating under the interim directions of the Commission in Phases I and II for the purposes of Phase III, while at the same time challenging the costing principles and determinations before the court.

If the Commission puts rates into effect now, the prospect of multiple and piecemeal appeals is almost inevitable. The stakes in this docket are simply so high that appeal of the final aspects of Phase II, if any, and Phase III by at least one party (and in all likelihood multiple parties) is a certainty. The Commission can avoid the confusion and burdens of piecemeal appeals simply by clarifying, in response to the petitions, that no portion of the 17th Supplemental Order was intended to be implemented and imposed on any party until the conclusion of the docket in Phase III.

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II. The Commission Should Clarify How and When It Intends to Address Covad's Request For Line Sharing or "Spectrum Unbundling" In This Docket.

During the Phase II hearings and briefs in this docket, Covad asked the Commission to require ILECs to establish pricing for the unbundled high frequency spectrum of the loop so that competitors such as Covad will be able to provide DSL service on an equal footing with the ILECs and not be subjected to an anticompetitive "price squeeze." See Covad Phase II Brief at 37-49. U S West and GTE today are providing a service called ADSL in Washington that allows end users to obtain DSL service over the same wire pair as their voice "POTS" service by the use of a simple device called a splitter. Id. at 38. Covad requested that the Commission allow CLECs to use the DSL portion of the loop in the same way and at the same price as U S West and GTE share the loop with their own DSL service. Id. at 38-45.

The Commission made no direct reference to Covad's Spectrum Unbundling request in the 17th Supplemental Order. On the last page of the order, the Commission stated generally that "All unresolved cost and pricing issues deferred by the Commission in the instant order will be considered in Phase III." Covad asks the Commission to clarify that it will, indeed implement the specifics of Spectrum Unbundling in Phase III.[2] Covad submits that it is logical to deal with Spectrum Unbundling pricing in Phase III, since it is essentially the same exercise as, for example, loop deaveraging. For both issues the question to be answered is, once the average price for a loop is determined, how is that price to be recovered; i.e. which use should pay what share or what geographic users should pay what share of the overall average costs?

Determination of Spectrum Unbundling prices should be accomplished in Phase III for another reason. That is, it is essential for DSL CLECs to be able to compete with the ILECs' ADSL services that the Commission unbundle and price the DSL spectrum over the loop before replacing current interim loop prices with the substantially higher prices announced in the 17th Supplemental Order. This competitive imperative is best illustrated by comparing U S West's average loop price of $18.16, with one of its retail DSL offerings priced at just $19.95. U S West Tariff F.C.C. No. 5, Section 8.4.3, A.1 (effective July 6, 1999). U S West contends its

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[2] Covad could also pursue Spectrum Unbundling under its interconnection agreement and WAC 480-09-530. That option should not, however, stop the Commission from addressing the issues in a generic fashion as well.

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DSL pricing is above cost because it allocates all the costs of the loop to, and recovers all the loop costs from, the POTS services it also provides over those same loops. While it would be technically easy for Covad to share loops with U S West's POTS service the same way U S West does, the Commission has not yet ordered U S West to allow such sharing nor established the relative prices for the two uses. Accordingly, Covad today has a substantial cost disadvantage to U S West and GTE in the DSL market. This disadvantage would be exacerbated if the Commission were to implement the higher loop rates at the conclusion of Phase II, but defer the Spectrum Unbundled pricing until Phase III or some even later proceeding.

The status of federal developments is also instructive. First, the FCC recently announced its decision in Docket CC 96-98 on remand from AT&T Corp. v. Iowa Utilities Board, ___U.S.___, 119 S. Ct. 721 (1999) ("UNE Remand Decision). Although the text of the full order has not yet been released, the FCC announced that states continue to have discretion to identify UNEs in addition to those identified by the FCC. FCC Report CC 99-41. Additionally, the FCC has a separate docket that is specifically addressing whether it will identify Spectrum Unbundling as a UNE. See First Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Docket CC 98-147 (FCC March 31, 1999). If the FCC does so, it will likely leave the pricing of such a UNE to the states. The FCC is expected to issue a decision in the Spectrum Unbundling docket later this year.

Thus, for a variety of reasons, the timing of Phase III of this docket presents a particularly opportune time for this Commission to deal with pricing and policy issues related to Spectrum Unbundling. Covad asks the Commission to clarify that Spectrum Unbundling will be addressed in Phase III so that the parties will be prepared to deal with the implementation issues.

III. The Commission Should Dispose of the Petitions Promptly and In A Way That Clarifies and Preserves the Parties' Rights, If Any, to Seek Judicial Review of the 17th Supplemental Order.

Although Covad interpreted the 17th Supplemental Order as being only an interim order, other parties' apparent different interpretations suggest there may be some ambiguity. Since the question before the Commission deals with the issue of finality, the Commission's

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order on the pending petitions could have a significant impact on whether the 17th Supplemental Order is subject to review, as well as the all-important issue of when such review must be taken. It is essential in a docket of this importance that the parties know clearly whether and when they must seek review. Otherwise, out of caution, the parties will be forced to file review petitions at the earliest date a court might later construe the deadline to have been. Currently that date is September 29, 1999, which is 30 days after the service of the 17th Supplemental Order.

Under the circumstances, Covad believes it is essential that the Commission issue some procedural order before the 29th to eliminate the uncertainty regarding timing of any judicial review petitions. If the 17th Supplemental Order is, or is to become, reviewable, Covad also requests that the Commission fashion an order that gives the parties an additional 30 days to evaluate their positions and, if necessary, prepare and file their petitions for judicial review. Thus, Covad suggests that the order should either deny the petitions for reconsideration on the grounds that the 17th Supplemental Order is not a final order or that declare that the petitions will be treated as petitions for reconsideration, not clarification. The first course of action would eliminate the possibility of review at this time. The Commission could still respond to the issues raised in the petition as "clarification," if it so desired. The second course would extend the time for seeking review because the parties would not have to file review petitions until 30 days after service of the order on reconsideration pursuant to the provisions of RCW 34.05.470(3).

Prompt clarification by the Commission would eliminate the procedural uncertainty that currently exists and avoid potentially burdensome and needless court proceedings while still allowing the parties to preserve their rights.

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CONCLUSION

For the foregoing reasons, the Commission should deny the petitions for reconsideration and issue an order that clarifies the various procedural issues.

Respectfully submitted this 21st day of September, 1999.

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