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May 7, 2004

**VIA FIRST CLASS MAIL**

Ms. Carol J. Washburn  
Executive Secretary  
WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION  
1300 S. Evergreen Park Drive S.W.  
Olympia, WA 98504-7250

Subject: Covad Communications Company's Petition for Review and Clarification of  
Order No. 05;  
WUTC -v- Advanced Telecom Group, Inc., et al;  
**DOCKET NO. UT-033011**

Dear Ms. Washburn:

Enclosed are an original and 12 copies of above referenced petition dated May 7,  
2004. Please do not hesitate to call me if you have any questions or comments. Thank you.

Sincerely,



William R. Connors

Enclosures

cc: Docket No. UT-033011 Service List

**BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Complainant,

v.

ADVANCED TELECOM GROUP, INC.;  
ALLEGIANCE TELECOM, INC.; AT&T CORP;  
COVAD COMMUNICATIONS COMPANY;  
ELECTRIC LIGHTWAVE, INC.; ESCHELON  
TELECOM, INC. f/k/a ADVANCED  
TELECOMMUNICATIONS, INC.; FAIRPOINT  
COMMUNICATIONS SOLUTIONS, INC.;  
GLOBAL CROSSING LOCAL SERVICES,  
INC.; INTEGRA TELECOM, INC.; MCI  
WORLD COM, INC.; McLEODUSA, INC.; SBC  
TELECOM, INC.; QWEST CORPORATION; XO  
COMMUNICATIONS, INC. f/k/a NEXTLINK  
COMMUNICATIONS, INC.,

Respondents.

Docket No. UT-033011

COVAD COMMUNICATIONS  
COMPANY'S PETITION FOR REVIEW  
AND CLARIFICATION OF  
ORDER NO. 05

**INTRODUCTION**

1. Based on a decision released by the Federal Communications Commission ("FCC")<sup>1</sup> after the Washington Utilities and Transportation Commission ("Commission") issued *Order No. 05*,<sup>2</sup> Covad Communications Company ("Covad") respectfully requests that the Commission review and reverse its decision that a competitive local exchange

<sup>1</sup> *In the Matter of Qwest Corporation Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture, FCC 04-57, File No. EB-03-IH-0263 (Released March 12, 2004) ("NAL").*

<sup>2</sup> *Order No. 05, Order Granting Commission Staff's Motion for Partial Summary Determination; Granting in Part and Denying in Part the Motions to Dismiss and for Summary Determination of Qwest, ATG, AT&T/TCG, Eschelon, Fairpoint, Global Crossing, Integra, MCI, McLeodUSA, SBC, and XO, is an interlocutory order issued by the Commission in this proceeding on February 12, 2004.*

carrier ("CLEC") is obligated to file interconnection agreements with the Commission for approval under Section 252<sup>3</sup> and, in turn, dismiss all claims against Covad.

2. Alternatively, if the Commission affirms its decision that CLECs have a duty to file, then Covad seeks clarification of *Order No. 05* from the Commission that the NAL supports giving impacted CLECs a reasonable amount of time after receiving notice of their filing obligations to make required filings without sanctions or penalties.
- Order No. 05*, issued on February 12, 2004, provided the CLECs with such notice. The Commission approved Covad Agreement Nos. 7A and 16A<sup>4</sup> on September 25, 2002, well before *Order No. 05*. Thus, Covad necessarily has complied with any filing time frame that the Commission may determine is reasonable. No further adjudication is warranted, and Covad respectfully requests that the Commission dismiss all claims against Covad.

### **LEGAL AUTHORITY FOR REVIEW**

3. The Commission has broad discretionary powers to review an interlocutory order, such as *Order No. 05*, at any time under WAC 480-07-810 if the review can save the Commission and the parties substantial effort or expense<sup>5</sup> and is consistent with the public interest.<sup>6</sup> The Commission relied significantly on the FCC's *Declaratory Ruling*<sup>7</sup>

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<sup>3</sup> 47 U.S.C. § 252.

<sup>4</sup> On August 22, 2002, Qwest submitted to the Commission for approval in Docket No. UT-980312 the two Covad agreements that are still subject to this proceeding: (1) U S WEST Service Level Agreement with Covad Communications Company dated April 19, 2000, ("Agreement 7A"); and (2) Facility Decommissioning Agreement dated January 3, 2002, ("Agreement 16A"). The Commission approved the agreements on September 25, 2002, in *Order Approving Negotiated Fourth Amended Agreement Consisting of a Settlement Agreement*.

<sup>5</sup> WAC 480-07-810(2).

<sup>6</sup> WAC 480-07-810(3).

<sup>7</sup> *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*

in finding that CLECs have Section 252 filing obligations.<sup>8</sup> The *NAL*, released by the FCC after the Commission issued *Order No. 05*, is a more recent FCC interpretation on the filing requirements. Review and clarification of *Order No. 05* by the Commission at this point in the proceeding and in light of the *NAL* would help conserve and best utilize the parties' and Commission's limited and valuable resources. The Commission can reduce the number of agreements at issue, reduce the number of respondents, and narrow the scope of this docket by applying the FCC's recent interpretation set forth in the *NAL*.

### DISCUSSION

#### **I. The FCC Found Only Qwest Liable For Failing To File Interconnection Agreements For Approval With The Minnesota And Arizona Commissions.**

4. Prior to the FCC's release of the *NAL*, the Commission found that the Section 252 filing requirements fall on both ILECs and CLECs.<sup>9</sup> The parties sufficiently briefed the issue, and *Order No. 05* accurately summarizes the respective positions.<sup>10</sup> Covad is not interested in revisiting the same arguments. Rather, Covad requests that the Commission review its opinion in light of the *NAL* in which the FCC assessed a \$9 million penalty against Qwest, not the CLECs, for failing to file 46 interconnection agreements for approval with the Minnesota Public Utilities Commission and Arizona Corporation Commission.<sup>11</sup>

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*Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276, 17 FCC Rcd 19337 (Released October 4, 2002) ("*Declaratory Ruling*").

<sup>8</sup> *Order No. 05* at ¶¶ 47 – 48.

<sup>9</sup> *Id.*, at ¶¶ 48, 158.

<sup>10</sup> *Id.*, at ¶¶ 22 – 49.

<sup>11</sup> *NAL* at ¶¶ 1, 52 – 53.

5. In deciding that both ILECs and CLECs are obligated to file, the Commission relied heavily on the *Declaratory Ruling* that refers several times to “carriers” having the filing responsibility.<sup>12</sup> However, the *Declaratory Ruling* “clarified the *incumbent LECs*’ obligation to file interconnection agreements under section 252(a)(1).”<sup>13</sup> The *Declaratory Ruling* gave ILECs, not CLECs, adequate notice of their legal obligations under Section 252.<sup>14</sup> It did not address the CLECs’ Section 252 filing obligations, if any.

6. The *NAL* is a more recent FCC interpretation of the filing requirements, and the FCC made it clear that Qwest, as the ILEC, is the party responsible for filing interconnection agreements with state commissions for approval. The FCC refers often in the *NAL* to Qwest’s duty to file with state commissions for approval an ICNAM agreement<sup>15</sup> with Allegiance.

We rejected Qwest’s claim that, because the [ICNAM] terms were available through Qwest’s SGATs, it did not have to file this agreement in Colorado and Washington.<sup>16</sup>

With regard to that one agreement, we stated that Qwest likely should have filed an ICNAM agreement, even though Qwest claimed that the *Declaratory Ruling* did not require that filing because the agreement was a “form agreement” the terms of which were available through SGATs in two states. We reiterated this finding in the *Qwest 3-State Order*.<sup>17</sup>

In rejecting [Qwest’s] argument, we held that Qwest “likely should have” filed the ICNAM agreement with the Colorado and Washington state commissions, despite its alleged “form” status

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<sup>12</sup> *Order No. 05*, at ¶ 47.

<sup>13</sup> *NAL* at ¶ 17 (quoting *Qwest Minnesota 271 Order*, 18 FCC Rcd at 13371, ¶ 93), (emphasis added).

<sup>14</sup> *Id.*, at ¶ 45 (citing *SBC Michigan 271 Order*, 18 FCC Rcd at 19122 – 23, ¶ 180).

<sup>15</sup> Internetwork Calling Name Delivery Service Agreement.

<sup>16</sup> *NAL* at ¶ 13.

<sup>17</sup> *Id.*, at ¶ 24.

and Qwest's allegation that its terms were available through Qwest's SGATs for those states.<sup>18</sup>

Subsequently, we discussed the unfiled agreements issue in the *Qwest 9-State 271 Order*, in which we held that Qwest "likely should have filed" an ICNAM agreement even though the terms were available through Qwest's SGATs for the relevant jurisdictions, and that "failure to file this agreement . . . could subject Qwest to federal and/or state enforcement action."<sup>19</sup>

Notably, the FCC did not find that Allegiance, as Qwest's CLEC counterparty, was required to file the ICNAM agreement with any state commissions for approval.

7. The FCC made additional statements that Qwest, not the CLECs, had the duty to file other interconnection agreements.

We conclude that Qwest apparently failed to comply with section 252(a)(1) of the Act regarding 34 interconnection agreements in Minnesota and twelve interconnection agreements in Arizona. Rather than promptly seeking state commission review of its agreements, as required under section 252(a)(1), Qwest apparently withheld nearly four dozen agreements to avoid the negative reaction that would accompany such a filing.<sup>20</sup>

Qwest ignored the potential for discrimination and competitive harm by withholding the agreements at issue here.<sup>21</sup>

8. The *NAL* contains language similar to that in the *Declaratory Ruling* quoted by the Commission to support its determination that the CLECs have a duty to file interconnection agreements.<sup>22</sup> The FCC also noted this proceeding and *Order No. 05*.<sup>23</sup> However, if the FCC agreed with the Commission that CLECs have an obligation to file, the FCC would have specifically ruled against the CLECs in the *NAL*. It did not. The

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<sup>18</sup> *Id.*, at ¶ 30.

<sup>19</sup> *Id.*, at ¶ 44.

<sup>20</sup> *Id.*, at ¶ 39.

<sup>21</sup> *Id.* at ¶ 48.

<sup>22</sup> *See, e.g.*, *NAL* at ¶ 11 (citing *Declaratory Ruling*).

<sup>23</sup> *Id.*, at footnote 15.

FCC completely ignored 46 potential CLEC filing violations because Qwest, not the CLECs, is obligated to make the required filings under Section 252. Covad respectfully requests that the Commission reverse its decision that the CLECs have a duty to file interconnection agreements for approval and, in turn, dismiss all claims against Covad.

**II. CLECs Must Be Given Reasonable Time After Receiving Notice Of A Filing Obligation To Make Required Filings Without Sanctions Or Penalties.**

9. If the Commission ultimately finds that CLECs have an obligation to file agreements under Section 252, then the *NAL* and equitable principles support giving the CLECs a reasonable amount of time to comply after being put on notice of such filing obligation. On September 25, 2002, the Commission approved Agreement Nos. 7A and 16A, the two remaining Covad agreements subject to this proceeding. This is well before the February 12, 2004, service date of *Order No. 05*, which is the earliest date on which Covad had official and specific notice of an obligation to file. Regardless of what reasonable compliance time period the Commission may find appropriate in this docket for the CLECs, Covad has already met the standard. Further adjudication against Covad is moot and unwarranted.
10. For over 8 years since the implementation of the Telecommunications Act of 1996, it was accepted industry and regulatory practice that the ILECs, not the CLECs, were responsible for filing interconnection agreements with state commissions for approval under Section 252. A CLEC's obligation to file was not an issue anywhere at the federal or state levels until the Commission filed the amended complaint in this docket against Qwest and the respondent CLECs in August 2003.

11. The Commission issued the first regulatory ruling of its kind in *Order No. 05*, which specifically and unambiguously imposed Section 252 filing responsibilities on the CLECs. In this decision, the Commission acknowledged that the relevant statutes, legislative history, and FCC's interpretations in the *First Report & Order*<sup>24</sup> and *Declaratory Ruling* are either ambiguous, contradictory, unresponsive, not directly on point, and/or unpersuasive.<sup>25</sup> In its final analysis, the Commission relied considerably on the *Declaratory Ruling*.

The FCC did not directly address the issue of responsibility for the filing requirement in its declaratory ruling. The FCC did, however, make several references to "carriers" filing agreements:

\* \* \*

The FCC appears to interpret in its Declaratory Ruling that subsection 252(a), and therefore subsection 252(e)(1), require both ILECs and CLECs to file agreements with state commissions. The FCC's interpretation is a permissible reading of the statute, as well as a reasonable one, given the implications of carrier-to-carrier discrimination when a CLEC does not take responsibility to file an agreement it has entered into with an ILEC.<sup>26</sup>

12. On October 4, 2002, the FCC released the *Declaratory Ruling*, which clarified Qwest's Section 252 filing obligations. The FCC appeared very willing to give Qwest a reasonable amount of time after this date to file applicable agreements without sanctions or penalties, or explain why there was a delay in filing.

Even if we assume that Qwest did not realize that the Minnesota and Arizona agreements should have been filed when the contracts

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<sup>24</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Dockets 96-98, 95-185, First Report and Order, FCC 96-325, 11 FCC Rcd 15499, (1996) ("*First Report & Order*").

<sup>25</sup> *See Order No. 05*, at ¶¶ 39, 40, 46, 47.

<sup>26</sup> *Id.*, at ¶¶ 47, 48.



were executed, *by any reasonable measure Qwest should have filed those agreements shortly after October 4, 2002*, under the guidance of the *Declaratory Ruling* and in keeping with its own internal policy of section 252(a) compliance, initiated in May 2002. As we held in the *SBC Michigan 271 Order*, “incumbent LECs have had adequate notice of their legal obligations under section 252(a)” since the *Declaratory Ruling*.<sup>27</sup>

The [FCC] clarified the incumbent LECs’ obligation to file interconnection agreements under section 252(a)(1) in a Declaratory Ruling on October 4, 2002, nearly six months before Qwest filed the Minnesota agreements. We note that Qwest has provided no explanation in the record for this delay in filing the interconnection agreements. Given that it had adequate notice of its legal obligations under section 252(a), we intend to review with careful scrutiny any explanation that Qwest may provide in the context of a potential enforcement action.<sup>28</sup>

13. The FCC would not likely have imposed sanctions or penalties on Qwest had Qwest complied with the *Declaratory Ruling* shortly after its release date. This Commission should extend the same courtesy to the CLECs—especially in light of the Commission’s acknowledged uncertainty and confusion<sup>29</sup> regarding the CLECs’ duty to file. The Commission should provide the CLECs with at least a reasonable period of time after the February 12, 2004, issuance date of *Order No. 05* to make any required filings without sanctions or penalties. Because this is well after September 25, 2002, when the Commission approved Covad Agreement Nos. 7A and 16A, Covad would meet any compliance time period that the Commission may establish in this proceeding. Further adjudication against Covad is not necessary, and all claims against Covad should be dismissed. Even if the Commission were to adopt the October 4, 2002, *Declaratory Ruling* release date as the time that CLECs had notice of their filing obligation, this is

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<sup>27</sup> NAL at ¶ 45 (emphasis added).

<sup>28</sup> *Id.*, at ¶ 17. (quoting *Qwest Minnesota 271 Order*, 18 FCC Rcd at 13371, ¶ 93).

<sup>29</sup> *See* footnote 25, *infra*.

still after the Commission approved the two Covad agreements. Covad would again meet a reasonable compliance time period that the Commission may authorize in this docket. Further adjudication against Covad is still not warranted, and all claims against Covad should be dismissed.

### CONCLUSION

14. For the foregoing reasons, Covad respectfully requests that the Commission review *Order No. 05*, reverse its decision that CLECs are obligated to file agreements for approval under Section 252, and dismiss all claims against Covad. In the alternative, Covad respectfully requests that the Commission review *Order No. 05*, clarify its decision regarding a CLEC's obligation to file agreements for approval under Section 252 such that no sanctions or penalties are warranted if the CLEC makes required filings prior to or within a reasonable time period after February 12, 2004, and dismiss all claims against Covad.

Respectfully submitted this 7<sup>th</sup> day of May, 2004.

MILLER NASH LLP



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**CERTIFICATE OF SERVICE**

Docket UT-033011  
[REPRESENTATIVES]

I hereby certify that I have this day served the foregoing COVAD COMMUNICATIONS COMPANY'S PETITION FOR REVIEW AND CLARIFICATION OF ORDER NO. 05 to the parties of record in this proceeding by mailing a copy thereof, properly addressed with postage prepaid, or by electronic mail to the following parties:

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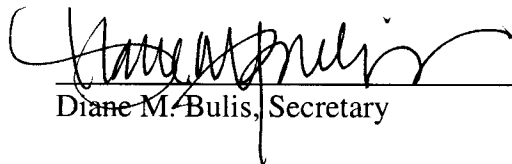
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DATED at Seattle, Washington this 7<sup>th</sup> day of May, 2004.

  
Diane M. Bulis, Secretary