

**BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND	)	
TRANSPORTATION COMMISSION,	)	DOCKET NO. UT-033011
	)	
Complainant,	)	STAFF’S RESPONSE TO COVAD
	)	COMMUNICATIONS
v.	)	COMPANY’S PETITION FOR
	)	REVIEW AND CLARIFICATION
	)	OF ORDER NO. O5
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	)	
WORLDCOM, INC.; McLEODUSA,	)	
INC.; SBC TELECOM, INC.; QWEST	)	
CORPORATION; XO	)	
COMMUNICATIONS, INC. f/k/a	)	
NEXTLINK COMMUNICATIONS,	)	
INC.,	)	
	)	
Respondents.	)	
.....	)	

**I. INTRODUCTION**

1           Chris Swanson, Assistant Attorney General, for the Washington Utilities  
and Transportation Commission (Commission) Staff (Staff) responds to Covad

Communications Company's Petition for Review and Clarification of Order No. 5 (Petition).

2           In its Petition Covad Communications Company (Covad) requests the Commission to review and reverse its decision that a competitive local exchange carrier (CLEC) is obligated to file interconnection agreements with the Commission for approval under 47 U.S.C. § 252 of the Telecommunications Act of 1996 (Act). Additionally, Covad asks the Commission to clarify what constitutes a reasonable period of time to file agreements. Covad also argues that it filed the agreements identified as 7A and 16A in the Amended Complaint in a reasonable period of time and, as a result, it should be dismissed from this proceeding. The Commission set a deadline of May 18, 2004, for parties to respond to Covad's Petition.<sup>1</sup>

## II. THE COMMISSION SHOULD NOT ACCEPT REVIEW

### A. Review is not in the public interest.

3           WAC 480-07-810 requires petitions for interlocutory review to be filed and served within ten days after service of the order for which review is requested.

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<sup>1</sup> A deadline of March 24, 2004, was also provided for any replies. Staff objects to the provision of a reply deadline in addition to an answer deadline since WAC 480-07-810 appears to contemplate only petitions and answers. However, Staff recognizes that perhaps the provision of a reply deadline was found to be in the public interest pursuant to WAC 480-07-810(3).

The Commission may waive the deadline when doing so is in the public interest.

Covad has not shown that accepting review is in the public interest.

4 Covad's Petition was filed approximately three months after 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, McLeodUSA, SBC, and XO*, (Order No. 5) was issued, two and a half months after the deadline for filing for review of Order No. 05, and two months after the Federal Communications Commission's (FCC) decision in *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, FCC 04-57, File No. EB-03-1h-0263 (Released March 12, 2004) (NAL), the basis of the Petition, was released.<sup>2</sup> If the NAL represents a significant development in the law, as Covad seems to suggest, certainly Covad could have filed the Petition shortly after its release. Likewise, if Covad was truly concerned with saving the Commission or the parties time it would have filed the Petition promptly. Instead, it chose to file its Petition approximately three weeks prior to the deadline for parties to file their direct cases.

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<sup>2</sup> Order No. 5 was issued on February 12, 2004. The NAL was released on March 12, 2004.

5           In order for the WAC 480-07-810 ten-day deadline to be meaningful, the party requesting the waiver must be required file its petition in a timely manner or explain, to the satisfaction of the Commission, why the filing is late. Covad does not provide any justification or excuse for failing to file the Petition in a timely manner. Covad’s Petition should not be accepted for review.<sup>3</sup>

**B.     No substantial effort or expense will be saved by review of Order No. 5.**

6           WAC 480-07-810(2) lists the three instances when the commission may accept review of an initial decision. In summary, they are: (a) the ruling terminates a parties participation; (b) a review is necessary to prevent substantial prejudice to a party; or (c) a review could save the commission and parties substantial effort or expense.

7           Covad asks the Commission to find that “substantial effort or expense” will be saved by review and that review is consistent with the public interest. Petition, paragraph 3. Contrary to Covad’s assertions, additional review is duplicative. The parties’ previous briefing extensively analyzed the issue of CLEC filing requirements. In fact, due to the number of CLEC parties in this case with virtually identical interests relating to this issue, the Commission may be

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<sup>3</sup> Since a petition for clarification of an interlocutory order does not explicitly fall within WAC 480-07-810, Staff will address the standards to be applied to this issue in another section of its Response. However, for the reasons discussed above, Covad also could have sought *clarification* shortly after the NAL was issued.

assured that substantial time and effort has already been spent and that the expenditure of any more time and effort is a waste of time.

8           The Commission may also be assured that no CLEC party, Covad included, is prejudiced. Furthermore, as will be discussed below, CLEC filing obligations are not specifically addressed in the NAL. Therefore, the NAL should not serve as the basis for review and does not clarify the FCC's position on CLEC filing obligations.

### **III. THE NAL IS NOT AN INTERPRETATION OF CLEC FILING OBLIGATIONS**

9           If the Commission decides to accept review, it should affirm Order No. 05 because the NAL is not an interpretation of CLEC filing obligations. Covad's argument that the NAL impliedly clarifies and reverses the FCC's position is without merit. The Commission determined that both parties to an interconnection agreement bear the responsibility to file agreements with the Commission. Order No. 05, paragraph 158. The FCC's issuance of the NAL has done nothing to change the soundness of that decision.

10           To the extent the issue is addressed in the NAL, it is generally supportive of the Commission's interpretation. Footnote 15 of the NAL is the only section specifically mentioning enforcement of filing requirements against CLECs. In

footnote 15 the FCC recognized that this Commission “initiated an enforcement action against Qwest and thirteen CLECs, alleging, *inter alia*, that Qwest and the other carriers had not filed all their interconnection agreements for state review”. The FCC also recognized that the Commission issued Order No. 05 relating to section 252(e)(1) filing requirements. NAL, footnote 15. The NAL contained no criticism of the Commission’s actions. Nor did the FCC criticize its prior declaratory ruling on the scope of the duty to file and obtain prior approval of negotiated contractual arrangements under section 252(a)(1).<sup>4</sup> In fact, in paragraph 22 and in paragraph 11 of the NAL, the FCC reaffirmed that “carriers” must file interconnection agreements for review and approval under section 252 of the Act.<sup>5</sup> In paragraph 33 of the NAL, the FCC used the term “carrier” and LEC (local exchange carrier) as opposed to CLEC or ILEC when speaking to filing obligations generally:

The statute clearly contradicts Qwest’s argument. Under section 252 (a)(1), LECs must file interconnection agreements with state commissions for approval. In the Declaratory Ruling, [we] clarified the types of agreements that must be filed. Any interconnection agreement filed and approved by the state commission under section 252 must be made

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<sup>4</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 Section 252(a)(1)*, WC Docket No. 02-89, Memorandum Opinion and Order, FCC 02-276 (Released October 4, 2002).

<sup>5</sup> 47 U.S.C. § 153(10) defines carrier as “any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy[.]”

available to *any other requesting carrier* upon the same terms and conditions, in accordance with section 252(i). [emphasis added].

In summary, the NAL speaks little about CLEC filing requirements, but its discussion of general LEC filing requirements is supportive of the Commission's decision in Order No. 05.

11           Despite this fact, Covad asks the Commission to compare the detailed discussion Qwest in the NAL to the lack of discussion of CLECs, and come to the conclusion that the FCC determined that CLECs are not obligated to file interconnection agreements. Petition, paragraphs 5 – 7. There is, in fact, a very good reason the FCC details Qwest's filing obligations and misconduct in the NAL and does not specifically address the CLECs: *the NAL is directed at Qwest*. Since Qwest is an ILEC there was no reason for the FCC to specifically address CLEC filing obligations. If the FCC wanted to issue an advisory opinion or issue a rule having general application, it certainly could do so. It has not.

12           Nonetheless, Covad argues that the fact that an enforcement action was *not* taken against the CLECs is significant, in and of itself. Covad reasons that if the FCC agreed with the Commission's decision to bring an enforcement action against the CLECs, the FCC necessarily would have proposed a finding against

the CLECs.<sup>6</sup> Petition, paragraph 8. This argument is inconsistent with the administrative enforcement process and traditional notions of prosecutorial discretion. Even if the FCC ultimately decides not to take enforcement action against any other carrier (be it an ILEC or CLEC), the decision not to take action is likely a matter of resource allocation and enforcement priorities. In fact, federal agencies, like Washington state agencies, have broad prosecutorial discretion as this reference from Charles H. Koch, Jr., Administrative Law and Practice, § 5.30[3] (2d ed. 1997) indicates:

Not only does the agency have extreme latitude in making the initial decision to prosecute it also has a great deal of freedom in deciding who it will prosecute. Frequently, the agency must choose from a number of potential targets for prosecution. At best, this decision may reflect some consideration of cost-effectiveness and a general desire to optimize the use of scarce law enforcement resources.

13 Covad's interpretation of the NAL is very strained indeed and is akin to the old adage "you only hear what you want to hear". A "notice of apparent liability" is the FCC's charging vehicle.<sup>7</sup> If one were to accept Covad's proposition about the significance of the NAL and apply it generally, a prosecuting agency

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<sup>6</sup> There is no indication in the NAL that other enforcement actions are ruled out. Nor is the FCC, by issuing the NAL, foreclosed from taking such enforcement actions at a later date.

<sup>7</sup> 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f). See NAL, paragraph 18 which discusses NAL procedures.



could not charge one party without including reference to all other potential offenders so as not to inadvertently let other parties off the hook.<sup>8</sup>

14 Furthermore, it becomes clear when the NAL is examined that the FCC chose to take action against Qwest, as a matter of prosecutorial discretion, because Qwest, unlike other carriers, was particularly blameworthy. In speaking to the issue of the nine million dollar fine it proposed to levy against Qwest in the NAL, the FCC noted:

We propose a forfeiture of such size against Qwest because of Qwest's disregard for the filing requirements of section 252(a) of the Act and the Commission's Orders and the potential anticompetitive effects of Qwest's conduct. Qwest's failure to comply with section 252(a) of the Act undermines the effectiveness of the Act and our rules by preventing competitive LECs (or "CLECs") from adopting interconnection terms otherwise available only to certain favored CLECs.

NAL, paragraph 2.

15 The FCC then goes on to detail the reasons why it is taking action against Qwest, including Qwest's failure to comply with its own internal policies, Qwest's decision to strategically not file agreements in Minnesota, and Qwest's cavalier attitude toward the filing requirements of the Act which, according to the FCC, "shows a disregard for Congress's goals of opening local markets to

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<sup>8</sup> For example, a minor conspirator could rest easy knowing it would not be prosecuted once charges detailing the misconduct of the chief conspirator were issued. In fact, it might be taken as clear evidence that the minor conspirator did nothing wrong. Covad's interpretation is plainly wrong.

competition and permitting interconnection on just, reasonable, and nondiscriminatory terms.” NAL, paragraph 3. The FCC clearly articulated the reasons for its action against Qwest. Although it did not expressly address why it was singling Qwest out for an enforcement action, a reasonable inference may be drawn that the FCC was concerned with Qwest as opposed to other carriers because of documented evidence of the willful disregard for the filing requirements of the Act and because Qwest’s actions resulted in frustration of the Act’s goals of creating a competitive local marketplace.

16           Each carrier who failed to file an agreement, whether it be Qwest or a CLEC, engaged in wrongdoing. Admittedly, some carriers are more culpable than others. However, the mere fact that a particular carrier is the chief wrongdoer does not excuse others’ actions. The Commission is the regulatory entity responsible for regulating carriers in Washington. It, like the FCC, has prosecutorial discretion and must weigh and balance its enforcement priorities in deciding when and against whom to take enforcement action. It is not bound by the enforcement priorities of the FCC or any other state commission and should not feel constrained by them. The Commission may express its opinion that all wrongdoers should be penalized and may vary the penalties depending on the

degree of culpability it attaches to each carrier. Ultimately the result of this litigation is up to the Commission.

17           Since the NAL is directed at Qwest, it sheds little light on the specifics of CLEC filing requirements. Therefore, the Commission should not accept review of Order No. 05. If it does, it should affirm in whole its prior interpretation relating to the obligation of CLECs to file interconnection agreements.

#### **IV. COVAD'S PETITION FOR CLARIFICATION IS IMPROPER**

##### **A. Covad's petition for clarification of a reasonable time to file does not seek "clarification".**

18           Although WAC 480-07 does not explicitly provide for a petition for clarification of an interlocutory order, it is reasonable to assume that such a petition may be necessary if and when an interlocutory order is ambiguous. Since there is no rule on point, Staff suggests that the Commission apply the standards for a motion for clarification of a final order by analogy. When these standards are applied, it becomes clear that what Covad filed is improper.

WAC 480-07-835(1) provides:

Any party who does not seek to change the outcome with respect to an issue may file a motion for clarification within ten days after the order is served. 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 data, or to correct patent error. A motion for clarification may also request that obvious or ministerial changes in orders be corrected[.]

WAC 480-07-835(2) states in pertinent part, “if a party seeks to change an outcome with respect to one or more issues resolved by a final order, or challenge a finding of fact or conclusion of law stated in the order, it *may not do so* [emphasis added] by motion for clarification[.]”

19 Covad seeks clarification of what constitutes a reasonable period of time in which to file interconnection agreements. However, Covad fails to cite any portion of Order No. 05 which is ambiguous or otherwise requires clarification of this issue. Furthermore, Covad goes on to advocate a particular way in which this term should be interpreted and asks for relief in the form of dismissal from the case entirely. This is not a petition for clarification. If the standards for clarification of a final order are applied by analogy, Covad’s Petition is clearly improper.

20 Covad is either attempting to challenge a finding of fact or conclusion of law contained in Order No. 05 (a petition for review) or is bringing a dispositive motion. Covad’s petition for clarification is inappropriate and should be rejected. If the Commission chooses to treat the petition for clarification as either a

dispositive motion or petition for review of this issue, the request is still inappropriate.

**1. Covad has waived its right to bring a dispositive motion.**

21 In Order No. 1, the Commission set a deadline of November 7, 2003, for parties to file dispositive motions. Order No 1, Prehearing Conference Order, Notice of Prehearing Conference, paragraph 16. Although Covad responded to Staff's Motion for Partial Summary Determination, Covad chose not to file a dispositive motion of its own.<sup>9</sup> Covad had every opportunity to bring a dispositive motion relating to this issue on November 7, 2003, and to ask the Commission to dismiss it from the case, but chose not to do so. If Covad is of the opinion that it was prejudiced by not having the March 12, 2004, NAL, at the time of the dispositive motion deadline, it could have promptly petitioned for leave to file a late dispositive motion. It did not do so, and it has now waived its right to bring a dispositive motion.

**2. This issue does not meet the standards of WAC 480-07-810.**

22 If the petition for clarification is treated as a petition for review, it is still improper and should be rejected. Covad's tardy filing of the Petition requires

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<sup>9</sup> See Covad Communication Company's Answer to Staff's Motion for Partial Summary Determination, filed December 12, 2003. In fact, Covad did not make any arguments of its own. Rather, it adopted by reference the positions of other CLECs. *Id.*, pages 1 – 2.

that the “public interest” justifying the review be something more than mere argument that the factors listed in 480-07-810(2) are present. It has not met this standard.

23           The NAL sheds very little, if any, light on this issue of what constitutes reasonable time to file. In the single direct quote from the NAL Covad cites, the FCC draws no conclusions. Rather, the FCC posits a hypothetical situation and answer. NAL, paragraph 12. Specifically, the FCC hypothesizes that “by *any* [emphasis added] reasonable measure” Qwest should have filed the agreements at issue by October 4, 2002, the date the Declaratory Ruling was issued. *Id.* The FCC may be speculating on the upper limit of *conceivable* measures of time it considers “reasonable”, but it by no means is mandating adoption of a particular measure of reasonableness.<sup>10</sup>

24           In fact, Covad acknowledges the discretion inherent in the reasonableness standard and the nonbonding nature of the FCC’s statements in the NAL by asking the Commission to “extend the same *courtesy* [emphasis added] to the CLEC’s” that Covad hypothesizes the FCC would extend to Qwest.<sup>11</sup> Petition,

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<sup>10</sup> In paragraph 50 of the NAL, the FCC posits a similar hypothetical.

<sup>11</sup> Covad speculates that “the FCC would not likely have imposed sanctions or penalties on Qwest had Qwest complied with the *Declaratory Ruling* shortly after its release date”. Petition, paragraph 13. It should be noted that Covad does not claim that the FCC *would not have authority* to impose sanctions on Qwest for its failure to file prior to Declaratory Ruling, only that, in its opinion, it is *unlikely* that the FCC would do so.

Paragraph 13. Covad makes a further plea for the Commission to exercise its discretion on this issue by asking the commission to consider “equitable principles” and factual testimony about industry practice. Petition, paragraph 8, 9.

25 Covad contends that clarification of Order No. 5 in light of the NAL “would help conserve and best utilize the parties’ and Commission’s limited and valuable time”. Petition, paragraph 3. Since there is nothing of overwhelming significance contained in the NAL on this issue and Covad’s argument is composed primarily of hypothetical situations, conjecture, pleas for discretion, and reliance on improper testimony, the substance of the petition for clarification if treated as a petition for review does not meet the standards of WAC 480-07-810 for review of interlocutory orders and should not be accepted as such. Furthermore, if the Commission decided to interpret Order No. 5 in light of Covad’s Petition and the NAL, a reasonable interpretation would be that the Commission retains discretion to determine what a reasonable period of time in which to file interconnection agreements should be.

26 For all of the above reasons, the Commission should decline to clarify Order No. 05.

**3. A reasonable period of time for filing Interconnection Agreements is an amount of time less than five months from the date of execution.**

27 If the Commission chooses to clarify its prior order it should clarify that a reasonable period of time in which to file interconnection agreements is: (1) measured from the date of execution, not the date Declaratory Ruling was issued, nor the date Order No 05 was issued, and (2) is some amount of time less than five months from the date of execution.<sup>12</sup> The Commission should permit the parties to address what that shorter than five month period of time is in their testimony and briefing.

28 Order No. 05 concluded “if a carrier is required to file an interconnection agreement with a state commission under subsection 252(e)(1), it is rational to infer that the carrier is required to do so in a reasonable period of time”. Order No. 5, paragraph 167. The Commission also analyzed what constitutes a reasonable period of time to file interconnection agreements. The Commission counted the period of time that had elapsed between the date of execution and the date of filing and commented specifically that periods of time of over one

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<sup>12</sup> Covad argues that it was not put on “official and specific” notice of its obligations until February 12, 2004, the date Order No. 05 was issued or October 4, 2002, the date the declaratory ruling was released. Petition, paragraph 9, 13. This statement is not accurate. 47 USC § 252 is explicit in its filing requirements. See NAL, paragraph 22. Order No. 05 and the declaratory ruling only provide certainty to those requirements. *Id.*



year, five months and eight months respectively “are way beyond *any* [emphasis added] perception of a reasonable period of time to file interconnection agreements with the commission.” Order No. 05, paragraph 82.

29           Therefore, if the Commission chooses to clarify Order No. 05, it should clarify that a reasonable period of time to file interconnection agreements is an amount of time less than five months from the date of execution. It should also clarify that the parties are free to address the issue of what that period of time (shorter than five months) should be in their testimony and briefing.

## V. CONCLUSION

30           Covad’s petition for review and clarification is improper because the Petition represents either an untimely request for review or an untimely dispositive motion. Covad has failed to provide any justification for the tardiness of its Petition.

31           Covad relies on the NAL as a basis for requesting review and/or clarification of Order No. 05. The NAL sheds very little light on CLEC filing obligations because the FCC chose to take enforcement action against Qwest not the CLECs. The FCC’s decision appears to be based on prosecutorial discretion and enforcement priorities rather than any re-interpretation of CLEC filing obligations. To the extent the NAL does address CLEC filing obligations it was

generally supportive of the Commission's position. Therefore, the Commission should decline to review and/or clarify Order No. 05.

32 If the Commission decides to issues a decision interpreting Order No. 05 it should: (1) affirm that CLECs are required to file interconnection agreements for approval with the Commission; and (2) decide that a reasonable period of time in which to file interconnection agreements is some period of time shorter than five months from the date of execution of the agreements.

DATED this 18<sup>th</sup> day of May, 2004.

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