

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Petition for	)	
Arbitration of	)	DOCKET NO. UT-043045
	)	
COVAD COMMUNICATIONS	)	ORDER NO. 07
COMPANY	)	
	)	ORDER APPROVING
With	)	INTERCONNECTION
	)	AGREEMENT AND LINE
QWEST CORPORATION	)	SPLITTING AMENDMENT;
	)	GRANTING LEAVE FOR COVAD
Pursuant to 47 U.S.C. Section 252(b)	)	TO WITHDRAW PETITION FOR
and the Triennial Review Order	)	RECONSIDERATION
.....	)	

1     **SYNOPSIS.** *The Commission approves the Interconnection Agreement between Qwest and Covad filed on February 24, 2005, as well as the Line Splitting Amendment to that interconnection agreement filed with the Commission on May 24, 2005. The Commission grants Covad’s request to withdraw its petition for reconsideration of Order No. 06.*

2     **NATURE OF THE PROCEEDING:** Docket No. UT-043045 concerns a petition filed by Covad Communications Company (Covad) for arbitration pursuant to 47 U.S.C. § 252(b)(1) of the Telecommunications Act of 1996,<sup>1</sup> (Act) and the Federal Communication Commission’s (FCC) Triennial Review Order,<sup>2</sup> of a proposed Interconnection Agreement between Covad and Qwest Corporation (Qwest).

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<sup>1</sup> Public Law No. 104-104, 101 Stat. 56 (1996).

<sup>2</sup> *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-098, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C. Rcd 16978 (2003) [hereinafter “*Triennial Review Order*”], *aff’d in part and rev’d and vacated in part, United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

- 3     **PROCEDURAL HISTORY.** On February 9, 2005, the Commission entered  
Order No. 06, a final order in the arbitration proceeding, affirming, in part, the  
Arbitrator's Report and Decision, granting, in part, Covad's petition for review,  
and requiring filing of a conforming interconnection agreement.
- 4     Covad filed a petition for reconsideration of Order No. 06 on February 23, 2005.  
Qwest filed a response to Covad's petition on March 9, 2005. On March 14, 2005,  
Covad filed a motion for leave to file a reply, as well as a reply to Qwest's  
response.
- 5     On February 24, 2005, Qwest filed with the Commission for approval an  
interconnection agreement pursuant to Order No. 06.
- 6     On March 21, 2005, Qwest filed a letter with the Commission waiving the 30-day  
requirement to approve the arbitrated interconnection agreement until the  
Commission resolves Covad's petition for reconsideration.
- 7     On March 25, 2005, the Commission issued a Notice of Bench Requests and a  
Notice of Extension of Date for Action on Petition for Reconsideration, extending  
the date for entering an order until April 29, 2005.
- 8     On March 29, 2005, Qwest filed with the Commission a Motion for Leave to File  
Surreply and Surreply in Opposition to Covad Communication Company's  
Petition for Reconsideration.
- 9     On April 1, 2005, April 14, 2005, and April 21, 2005, Qwest and Covad sought  
extensions of time to respond to Bench Requests No. 01 and 02, informing the  
Commission that the parties were engaged in discussions intended to resolve the  
issue presented in Covad's petition for reconsideration. By notices dated April 5,  
2005, April 14, 2005, and April 22, 2005, the Commission granted extensions of

time to file responses. In the April 14 notice, the Commission also extended the date for action on the petition for reconsideration until May 31, 2005.

- 10 By electronic mail on April 29, 2005, counsel for Covad informed the Commission that the parties had reached a settlement on the issues identified in the petition for reconsideration, and requested that the bench requests be withdrawn and that Covad be granted leave to withdraw its petition for reconsideration. Covad further informed the Commission that Covad and Qwest would submit a fully executed amendment to the interconnection agreement, and requested approval of the interconnection agreement and amendment. By notice dated April 29, 2005, the Commission withdrew the bench requests and canceled the requirement to file responses.
- 11 Having not received a settlement of the parties or a fully executed amendment to the agreement from either party, the Commission issued a notice on May 18, 2005, further extending the date for action on Covad's petition for reconsideration until June 30, 2005.
- 12 On May 24, 2005, Qwest filed with the Commission Covad's executed signature page for the February 24, 2005, Interconnection Agreement between Qwest and Covad, and the parties' Line Splitting Amendment to the interconnection agreement. Qwest requests that the Commission approve both the pending interconnection agreement and amendment.
- 13 **APPEARANCES:** Andrew R. Newell, Kryss Boyle P.C., Denver, Colorado, represented Covad at the arbitration hearing and on review. Gregory Diamond, Senior Counsel for Covad, Denver, Colorado, submitted Covad's motion for leave to file a reply, and the reply. Winslow Waxter, Senior Attorney, Denver, Colorado, and John M. Devaney, Perkins Coie, LLP, Washington, D.C., represented Qwest at the arbitration hearing and on review. Mr. Devaney, Lisa

Anderl, Associate General Counsel, and Adam Sherr, Senior Counsel, for Qwest, Seattle, Washington, submitted the response to Covad's petition.

14 **ARBITRATOR'S REPORT AND DECISION.** In Order No. 04, the Arbitrator reached a decision on all five issues presented by the parties, finding in favor of Qwest's proposed language on all issues, except for certain questions posed in Issue No. 4.

15 **COMMISSION'S FINAL ORDER.** In Order No. 06, the Commission affirmed the Arbitrator's Report, in part, and required the parties to file with the Commission within 15 days of the service date of the Order a fully executed Interconnection Agreement conforming to the requirements of the Order.

16 **ORDER APPROVING INTERCONNECTION AGREEMENT AND LINE SPLITTING AMENDMENT.** In this Order, the Commission approves the Interconnection Agreement between Qwest and Covad filed with the Commission on February 24, 2005, and the Line Splitting Amendment to the parties' interconnection agreement, filed with the Commission on May 24, 2005. The Commission also grants Covad's request for leave to withdraw its petition for reconsideration.

## MEMORANDUM

### **A. Covad's Petition and Line Splitting Amendment**

17 Covad sought reconsideration of the Commission's decision to approve Qwest's proposed language for Section 9.21 of the proposed agreement addressing the availability of line splitting<sup>3</sup> provided over UNE-P loops.<sup>4</sup> Covad raised the

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<sup>3</sup> Line splitting is an arrangement where "one competitive LEC provides narrowband voice service over the low frequency of a loop and a second competitive LEC provides xDSL service over the high frequency portion of that same loop." *Triennial Review Order*, ¶ 251.

concern that Section 9.21.2 of the December 16, 2004, proposed agreement, when read together with Qwest's commercial agreement referred to as Qwest Platform Plus, or QPP, would not allow for competitive local exchange carriers (CLECs) to enter into line splitting arrangements.

- 18 Section 9.21.2 of the proposed agreement concerned the availability of Line Splitting, a specific Qwest product described as providing CLECs "with the opportunity to offer advanced data service simultaneously with a new or existing UNE-P [loop] by using the frequency range above the voice band on the copper portion of a Loop."<sup>5</sup> The Section provided:

On the effective date of a Commission determination that Qwest is no longer required to provide UNE-P Combination services in a market area, Line Splitting is also not available in that market area. To the extent CLEC has an embedded base of Line Splitting End User Customers on the effective date of the Commission determination, CLEC shall transition its embedded base of Line Splitting End User Customers in accordance with the Transition Timelines for unbundled switching, as described in Section 9.11.2.0.1. In such markets where Line Splitting is not available, Loop Splitting will continue to be available pursuant to Section 9.24 of this Agreement.

- 19 The last sentence of Section 9.21.2 provided for continued availability of Loop Splitting, a Qwest product described as the opportunity for CLECs "to offer

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<sup>4</sup> UNE-P, or unbundled network element platform, is a combination of UNEs--loops, local switching, and transport. The FCC recently determined that ILECs are no longer obligated to provide CLECs access to local switching, and thus, UNE-P, as an unbundled network element, or UNE. See *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand, FCC 04-290, ¶ 199 (rel. Feb. 4, 2005).

<sup>5</sup> December 16, 2004, Proposed Agreement, § 9.21.1.

advanced data service simultaneously with voice over a new or existing Unbundled Loop," *i.e.*, a stand-alone unbundled loop.<sup>6</sup>

20 The FCC defines "line splitting" as the scenario where one competitive LEC provides narrowband voice service over the low frequency portion of a loop and a second competitive LEC provides xDSL service over the high frequency portion of that same loop.<sup>7</sup> The FCC requires incumbent local exchange companies (ILECs) to provide CLECs "with the ability to engage in line splitting arrangements," when a CLEC requests an unbundled stand-alone loop.<sup>8</sup>

21 Covad's request for leave to withdraw its Petition for Reconsideration is granted.<sup>9</sup> The parties' Line Splitting Amendment resolves the issues identified in Covad's petition by modifying Section 9.21 of the proposed interconnection agreement to make the description of "Line Splitting" in the agreement consistent with the FCC's definition of line splitting, and removing references to Line Splitting as a product offered over UNE-P loops. The amendment makes other changes to Section 9.21 to address operational issues.

22 The parties' amendment is in the public interest: It makes the interconnection agreement consistent with FCC decisions on line splitting arrangements and

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<sup>6</sup> December 16, 2004, Proposed Agreement, § 9.24.1.

<sup>7</sup> *Triennial Review Order*, ¶ 251.

<sup>8</sup> *Id.*

<sup>9</sup> Covad made its request for leave to withdraw in an electronic-mail message to the Commission notifying the Commission that the parties had reached a settlement. In the April 29, 2005, notice, the Commission advised Covad to file a written request with the Commission seeking leave to withdraw. The Commission has not yet received a formal written request from Covad seeking leave to withdraw. The Commission's rules governing adjudicative proceedings require parties to file original, signed documents and paper copies with the Commission, supplemented by electronic versions of the document. *See* WAC 480-07-145. While Section 252 arbitrations conducted by the Commission are not subject to the state Administrative Procedure Act, the Commission may apply its procedural rules to ensure a proper record for review. *See* WAC 480-07-630(2), (11)(b). Given that the parties have reached agreement on this matter and it is not appropriate to delay approval of the agreement and amendment pending receipt of a formal written request for withdrawal, the Commission will act upon the informal electronic request.

resolves the issues presented in Covad's Petition for Reconsideration. We approve the parties' Line Splitting Amendment to the Interconnection Agreement filed on February 24, 2005, as consistent with the public interest.

**B. The Interconnection Agreement**

23 The Commission required the parties in paragraph 149 of Order No. 06 to file an interconnection agreement with the Commission within 15 days of the service date of the Order, including all negotiated terms and arbitrated terms consistent with the Order. On February 24, 2005, Qwest filed an interconnection agreement consistent with the Commission's direction in Order No. 06. In its March 22, 2005, letter, Qwest waived the 30-day approval deadline under Section 252(e)(4) for arbitrated agreements until the Commission resolves the issues pending in Covad's Petition for Reconsideration.

24 Having granted Covad's request for leave to withdraw its petition, we find the Interconnection Agreement between Qwest and Covad filed on February 24, 2005, and modified by the May 24, 2005, Line Splitting Amendment, consistent with the Commission's arbitration decisions in Order No. 06, and Section 251 of the Act. We approve the interconnection agreement and find that the negotiated and arbitrated terms of the parties' Interconnection Agreement are consistent with the public interest and do not discriminate against any other telecommunications carrier.

**FINDINGS OF FACT**

25 The Commission makes the following summary findings of fact, having discussed above the evidence concerning all material matters and having stated our more detailed findings of fact. Those portions of the preceding discussion pertaining to the Commission's ultimate findings in this matter are incorporated by this reference.

- 26 (1) The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities, and practices of telecommunications companies in the state.
- 27 (2) Qwest is engaged in the business of furnishing telecommunications services, including, but not limited to, basic local exchange service within the state of Washington, and is a local exchange carrier as defined in the Act.
- 28 (3) Covad is a Competitive Local Exchange Carrier that furnishes telecommunications services to customers in Washington.
- 29 (4) On May 25, 2004, Covad filed a petition with the Commission seeking arbitration of an interconnection agreement with Qwest.
- 30 (5) On February 9, 2005, the Commission entered a final order in this arbitration proceeding, Order No. 06, requiring the parties to file an interconnection agreement consistent with the Order within 15 days of service of the Order.
- 31 (6) On February 24, 2005, Covad filed a petition for reconsideration of the Commission's decision in Order No. 06 concerning Section 9.21.2 of the December 16, 2004, proposed interconnection agreement.
- 32 (7) On February 24, 2005, Qwest filed with the Commission for approval an interconnection agreement as the Commission required in Order No. 06.



- 33 (8) On April 29, 2005, Covad notified the Commission that the parties had reached a settlement on the issues presented in its Petition for Reconsideration and requested leave to withdraw its petition.
- 34 (9) On May 24, 2005, Qwest filed with the Commission a Line Sharing Amendment to the Interconnection Agreement between Qwest and Covad filed on February 24, 2005, requesting approval of the Amendment and the Interconnection Agreement.

### CONCLUSIONS OF LAW

35 Having discussed above in detail all matters material to this decision, and having stated general findings and conclusions, the Commission now makes the following summary conclusions of law. Those portions of the preceding detailed discussion that state conclusions pertaining to the ultimate decisions of the Commission are incorporated by this reference.

- 36 (1) The Washington Utilities and Transportation Commission has jurisdiction over the subject matter and the parties to this proceeding.
- 37 (2) The Telecommunications Act of 1996 authorizes the Commission to arbitrate and approve interconnection agreements between telecommunications carriers, pursuant to Section 252 of the Act. The Commission is specifically authorized by state law to engage in that activity. *RCW 80.36.610*. This arbitration and approval process was conducted pursuant to and in compliance with 47 U.S.C. § 252 and *RCW 80.36.610*.
- 38 (3) The FCC requires ILECs to provide CLECs the ability to engage in line splitting arrangements when a CLEC requests and obtains an unbundled stand-alone loop. *Triennial Review Order, ¶ 251*.

- 39 (4) Section 9.21 of the parties' February 24, 2005, Interconnection Agreement, as modified by the parties' May 24, 2005, Line Splitting Amendment, allows CLECs to obtain line splitting consistent with the FCC's definition of line splitting.
- 40 (5) The negotiated and arbitrated terms of the parties' February 24, 2005, Interconnection Agreement, as modified by the parties' May 24, 2005, Line Splitting Amendment, are consistent with the public interest and do not discriminate against any other telecommunications carrier.
- 41 (6) The arbitrated provisions of the parties' Interconnection Agreement meet the requirements of Section 251 of the Act, including the regulations prescribed by the FCC pursuant to Section 251, and the pricing standards set forth in Section 252(d) of the Act, or otherwise established by law.
- 42 (7) The laws and regulations of the state of Washington and Commission orders shall govern the construction and interpretation of the parties' Interconnection Agreement and Line Splitting Amendment. The parties' Interconnection Agreement and Line Splitting Amendment are subject to the jurisdiction of the Commission and Washington courts.

**ORDER**

THE COMMISSION ORDERS:

- 43 (1) Covad Communications Company's request for leave to withdraw its Petition for Reconsideration is granted.

- 44 (2) The negotiated and arbitrated Interconnection Agreement of Qwest Corporation and Covad Communications Company for the State of Washington, filed with the Commission on February 24, 2005, including all negotiated and arbitrated terms consistent with the Commission's Final Order, Order No. 06 in this proceeding, and this Order, is approved.
- 45 (3) The Line Splitting Amendment to the February 24, 2005, Interconnection Agreement between Qwest Corporation and Covad Communications Company for the State of Washington, filed with the Commission on May 24, 2005, is approved.

DATED at Olympia, Washington and effective this 6th day of June, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARK H. SIDRAN, Chairman

PATRICK J. OSHIE, Commissioner

PHILIP B. JONES, Commissioner