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 WORLDCOM, INC.; McLEODUSA, INC.; SBC TELECOM, INC.; QWEST CORPORATION; XO COMMUNICATIONS, INC. f/k/a NEXTLINK COMMUNICATIONS, INC., Respondents	Docket No. UT-033011 RESPONSE OF QWEST CORPORATION TO COVAD COMMUNICATIONS COMPANY'S PETITION FOR REVIEW AND CLARIFICATION OF ORDER NO. 05

I. INTRODUCTION

1 On May 10, 2004, Covad Communications Company ("Covad") filed a petition for review and clarification of Commission Order No. 5 in this docket, asking the Commission to reverse its decision that CLECs are obligated to file interconnection agreements and to dismiss all claims

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against Covad. [1] Covad bases its request on the March 12, 2004 FCC decision and Notice of Apparent Liability ("NAL") directed at Qwest in connection with certain agreements.

2 However, the NAL does not provide a basis for the relief sought by Covad. The NAL is not like other "unfiled agreements" orders that specifically addressed CLECs' obligations to file interconnection agreements with state commissions for approval under Section 252 of the Telecommunications Act of 1996.[2] The NAL dealt exclusively with Qwest's conduct, not the conduct or obligations of a CLEC, and Covad's petition for review and clarification of Order No. 05 takes serious liberties with its posture and substance. Because the NAL does not deal in any way with CLECs' filing obligations, or the behavior of any carrier other than Qwest, it affords no basis for reconsidering Order No. 05.

3 Covad also fails to address the important policy reasons supporting Order No. 5's placement of the filing obligation upon both parties to an interconnection agreement. The Commission should deny Covad's petition.

II. DISCUSSION

A. The NAL Did Not Consider Or Address CLECs' Filing Obligations

4 Covad claims that the NAL is "a more recent FCC interpretation of [Section 252's] filing requirements," Covad Petition at 3. Covad goes on to claim that "The FCC Found Only Qwest

[1]/ Worldcom, Inc. filed a letter on May 17, 2004 concurring with Covad's petition. Should the Commission permit Worldcom to join Covad's petition, Qwest asks that this Response be deemed to respond to both.

[2]/ *See, e.g.,* Order Making Tentative Findings, Giving Notice For Purposes Of Civil Penalties, And Granting Opportunity To Request Hearing, *In re AT&T Corporation v. Qwest Corporat*ion, Docket No. FCU-02-2 (Iowa Utilities Board, May 29, 2002) ("When agreement regarding these matters is reached, whether voluntarily negotiated pursuant to § 252(a)(1) or adopted by arbitration pursuant to §252(b)-(d), the agreement must be submitted to the state regulatory commission (in Iowa, the Board) for approval pursuant to § 252(e). The Board has adopted rules that require the filing of "all interconnection agreements" adopted by arbitration or negotiation. 199 IAC 38.7(4). The requirement applies to both parties to the agreement; neither the statute nor the rule releases either party from the filing obligation.") (emphasis added); Final Order Regarding Compliance With Outstanding Section 271 Requirements: SGAT Compliance, Track A, And Public Interest, *In The Matter Of An Investigation Into Unfiled Agreements Between Qwest Corporation And Competitive Local Exchange Carriers*, Utility Case No. 3750 (New Mexico Public Regulation Commission, Oct. 8, 2002)("The Commission's Rule 17 NMAC 11.18.17 F, "NEGOTIATION OF INTERCONNECTION AGREEMENTS," requires the negotiating parties to submit agreements "to the Commission for approval.").

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Liable For Failing To File Interconnection Agreements For Approval With The Minnesota And Arizona Commissions." This contention, in the opening heading of Covad's argument, is seriously misleading. The NAL did not address the issue of CLECs' filing obligations, nor could it given the procedural role and posture of NALs in the regulatory process. The NAL dealt only with whether Qwest violated Section 252 through its failure to file certain agreements that, nearly to a one, were different than those considered in the commission "unfiled agreements" proceedings in Minnesota and Arizona. It represents the FCC's decision, after an investigation, to go forward with enforcement proceedings against Qwest, who is the *only* party named in that particular FCC inquiry.

5 On June 26, 2003, the Enforcement Bureau of the FCC sent Qwest – and only Qwest – a Letter of Inquiry ("LOI") seeking information about and Qwest's response to the allegation that Qwest violated its Section 252 filing obligations with regard to 46 agreements in Minnesota and Arizona. Qwest responded to the FCC's LOI on July 31, 2003. The FCC issued the NAL, which by its nature serves essentially the same function as an administrative complaint, on March 12, 2004. The NAL literally says nothing about CLECs' filing obligations under Section 252, either generally or in the context of any of the agreements at issue; the only mention of this action in the NAL, at 4 n.15, notes that this Commission had "issued an order regarding section 252(e)(1) filing requirements" but says nothing else about it and makes no mention of CLEC obligations. Nor could it: none of the CLECs that were parties to the NAL agreements was the subject of the LOI that gave rise to it, and the CLECs' conduct was not part of the inquiry the FCC directed at Qwest.

6 Neither Covad nor this Commission can fairly read anything about CLECs' filing obligations from the FCC's focus on Qwest in this particular inquiry, nor from the absence (to date) of equivalent inquiry directed at CLECs. Covad fundamentally misconstrues the NAL when it claims that the FCC's discussion of Qwest's apparent liability somehow demonstrates a belief

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that CLECs are not subject to Section 252's filing requirement. And Covad strays even further when it argues that "if the FCC had agreed with the [Washington] Commission that CLECs have an obligation to file, the FCC would have specifically ruled against the CLECs in the NAL." Covad Petition at 5. Not so: if the FCC wanted to address CLECs' filing failures, it would first have issued LOIs to those CLECs, then NALs of their own. When viewed in the proper context, this NAL has no bearing upon or relevance to the issues in this proceeding. The Commission should decline Covad's invitation to revisit Order No. 05's findings regarding CLECs' filing obligations, particularly in light of earlier state commission decisions reaching the same conclusion as this Commission reached in Order No. 05.

B. The Commission Should not Dismiss the Staff's Claims Against Covad, but Should Consider When a Carrier, Including Qwest, Learned of the Filing Requirement When Analyzing Alleged Violations of Section 252

7 Covad also asks the Commission to read into Section 252 a gloss absolving CLECs from liability if they file previously unfiled agreements within a "reasonable period" of learning about their filing obligations. Because Covad stands accused in this case only of failing to file one agreement, and because it claims that it filed that agreement in 2002, Covad's theory would result in dismissal of the Staff's claims.

8 Qwest respectfully suggests that dismissal of the claims against Covad would be premature at this point. Although Qwest agrees with Covad that the Commission should find a violation of Section 252 only if a carrier fails to file within a reasonable period of learning of its obligation to file an agreement, neither Covad nor any other party has offered authority supporting the "reasonable notice" approach. The Commission also has not yet had an opportunity to determine when Covad came to understand its filing obligations or to scrutinize the reasonableness of Covad's decision to file when it did. Should, for example, the "reasonable time to file" begin as of Order No. 05, or from the Iowa Utilities Board's May 29, 2002 ruling? *See supra* n.2. In addition, Qwest respectfully requests that the Commission consider two

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further points in shaping and applying a "reasonable time to file" approach:

1. Any "reasonable time to file" methodology must apply equally to Qwest as well as CLECs. As the Commission explained in Order 05, the Telecommunications Act and the regulations and FCC orders flowing do not distinguish ILECs' and CLECs' filing obligations, and Covad cites nothing supporting its claim that "accepted industry and regulatory practice" obliges only ILECs to file. *See* Covad Petition at 6. It may well be that the Commission would find that Qwest's "reasonable time to file" began running at a different time than Covad's, but there is no reason for the Commission to apply the law differently to Qwest in this regard.

2. If the Commission were to adopt some version of "reasonable notice," Qwest advises the Commission that it will, at the forthcoming hearing, demonstrate the reasonableness of *its* filing decisions in the context of the law, as it was understood at the time, and under the factual circumstances of each agreement.

9 Qwest agrees with Covad that the Commission should consider each carrier's understanding of its filing requirements when assessing liability under Section 252. But to be fair, this principle must apply to all carriers, including Qwest, and consider the full legal and factual context of each carrier's filing decisions at the time the carrier made them.

C. <u>Covad's Request for Relief is Contrary to Existing Commission Rules</u>

10 Furthermore, in asking the Commission to hold that CLECs do not have a filing obligation, Covad is essentially asking the Commission to repeal or amend one of its very recently adopted procedural rules. WAC 480-07-640 now explicitly imposes a filing requirement upon

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both parties to an interconnection agreement.[3] Thus, the general declaratory relief that Covad seeks in asking the Commission to reverse Order No. 5 would impact existing procedural rules in a way that would be inappropriate absent a rulemaking proceeding.

III. CONCLUSION

11 For the foregoing reasons, the Commission should deny Covad's Petition to the extent Covad seeks dismissal of the Staff's claims against it. The Commission should adopt and apply Covad's "reasonable time to file" analysis, but must do so equally for all carriers and should permit Qwest an opportunity to demonstrate the reasonableness of its filing decisions.

RESPECTFULLY SUBMITTED this 18th day of May 2004.

Qwest Corporation

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[3]/ An excerpt of the rule is set forth below. This rule, while not applicable during the time relevant to this proceeding, is now effective and reflects the product of a long rulemaking process in which all industry members had an opportunity to participate. The rule clearly imposes a filing requirement on both parties to an interconnection agreement:

> **WAC 480-07-640 Telecommunications companies -- Review and approval of interconnection agreements under the Telecommunications Act of 1996.** (1) **Scope.** This rule implements the commission review and approval process provisions of section 252 of the Telecommunications Act of 1996, 47 U.S.C. § 252.
>
> (2) **Review and approval of agreements by the commission.**
>
> (a) ***Filing and service of agreements for approval.***
>
> (i) *Negotiated agreements.* Parties to a negotiated interconnection agreement must submit a complete, signed copy of their agreement to the commission for approval under 47 U.S.C. § 252(e) within thirty days after the agreement is signed. Any appendices or attachments to the agreement must be included.

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