

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND  
TRANSPORTATION COMMISSION,

Petitioners,

v.

ADVANCED TELECOM GROUP, INC.,  
et al,

Respondents.

DOCKET NO. UT-033011

COMMISSION STAFF'S REPLY  
TO COVAD'S PETITION FOR  
REVIEW

**INTRODUCTION**

1 Chris Swanson, Assistant Attorney General, representing Washington Utilities and Transportation Commission Staff replies to the responses of Eschelon, Integra, WorldCom, Inc., and Qwest relating to Covad Communications Company's Petition for Review and Clarification of Order No. 05 (Petition). On May 10, 2004, Covad filed its Petition. On May 18, 2004, the responding parties filed their responses.

**CLECS**

2 Integra suggests the Commission review and revisit an issue contained in its Motion for Summary Disposition. Integra Letter, page 1. For the reasons discussed

in Staff's response to the Petition, if any CLEC, Integra included, was interested in re-examining those issues, it should have done so in a timely manner.<sup>1</sup> None of the CLECs petitioned for review in a timely manner. Therefore, Staff asks the Commission to decline to review Order No. 05.

### QWEST

3 Staff objects to the further expansion and confusion of the issue of timing and notice by Qwest and asks the Commission to decline to consider it at this time. If, however, the Commission decides to consider the issue now, it should adopt Staff's suggested approach.

4 Qwest indicates agreement with Covad that "the Commission should consider each carrier's understanding of its filing requirements when assessing liability under Section 252" and 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." Response of Qwest Corporation to Covad Communications Company's Petition for Review and Clarification of Order No. 05 (Qwest Response), paragraph 8, 9. Qwest also argues that, as a matter of principle, the law should apply to it and the CLECs in the same way. See Qwest Response, paragraph 1, 9. Qwest's argument appears to confuse the issue of consistent application of the law, as well as the issues of timing and notice. Staff will attempt

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<sup>1</sup> The other competitive local exchange carrier responding parties simply support or concur with Covad's Petition. See WorldCom, Inc., letter and Eschelon letter.

to clarify the issues as well as suggest the role timing should play in the Commission's decision.<sup>2</sup>

5           The Commission should consider the issue of timing in deciding the ultimate penalty against each carrier, but not to determine whether or not a carrier has violated the Act. The Act plainly states that interconnection agreements must be filed for approval with the state commission. 47 U.S.C. § 252(e).<sup>3</sup> The parties received clear notice of this obligation at the time the Act went into effect. Furthermore, as the FCC has noted, the Act is explicit in its filing requirements.<sup>4</sup> The Declaratory Ruling only provides certainty to those requirements (including to the issue of what types of agreements need to be filed). *Id.* If any carrier is found not to have complied with the law, a Commission finding indicating that a violation occurred should be entered. If the Commission finds any carrier's actions to be more culpable than the other carriers, the penalty should be greater to that degree.

6           The issue of timing is not an issue of notice because the filing requirements are clear. Therefore, Qwest and CLEC violators should be held accountable in that each should be found to have violated the Act. The amount of penalties for each violation, however, may vary depending on the culpability of each carrier taking into account such factors of timing of

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<sup>2</sup> There appear to be two issues of notice raised by Covad and Qwest: 1. notice that the filing requirement applies to CLECs, and 2. notice of what type of agreements are required to be filed.

<sup>3</sup> The carriers either chose to assume the risk of not filing, assumed that another carrier would file (and, as a result, they were not required to file), or intentionally did not file for the purpose of gaining competitive or strategic advantage. Even if the parties chose to explicitly or implicitly allocate responsibility for filing among themselves (through course of dealing/usage of trade or explicitly by oral or written contract), it is unreasonable to force the Commission to exercise its police power based on the contractual arrangements or assumptions, thoughts, speculations, or expectations of private parties when objectively the requirements are clear.

<sup>4</sup> *In the Matter of Qwest Corporation Apparent Liability for Forfeiture*, FCC 04-57, File No. EB-03-1h-0263 (Released March 12, 2004) (NAL), paragraph 22.

filing, intent, motivation, damage to the market, damage to other carriers, bargaining position, etc.

### CONCLUSION

7 Staff requests that Commission to decline to review and/or clarify Order No. 05. If the Commission decides to issue 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 as discussed in Staff's response to Covad's Petition. Furthermore, the Commission should consider the issue of timing of filing only for the issue of appropriate penalties.

DATED this 24<sup>th</sup> day of May, 2004.

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