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May 24, 2004

VIA FEDERAL EXPRESS

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 Reply to Staff's and Qwest's Responses
to Petition for Review and Clarification of Order No. 5;
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 reply dated May 24,
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 REPLY TO STAFF'S AND
QWEST'S RESPONSES TO PETITION
FOR REVIEW AND CLARIFICATION
OF ORDER NO. 05

INTRODUCTION

1. Staff suggests that the Washington Utilities and Transportation Commission ("Commission") use an unwarranted and novel public interest standard to deny review of Covad Communications Company's ("Covad") Petition for Review and Clarification of Order No. 05¹ ("Petition").² The *Petition* is based on the *NAL*,³ which was issued one

¹ *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.

² *See* Staff's Response to Covad Communications Company's Petition for Review and Clarification of Order No. 05 ("*Staff's Response*") at ¶¶ 3 – 8.

COVAD COMMUNICATIONS COMPANY'S REPLY TO
STAFF'S AND QWEST'S RESPONSES TO PETITION FOR
REVIEW AND CLARIFICATION OF ORDER NO. 05 - 1
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month after *Order No. 05*. Staff's interpretation of the public interest standard seems to suggest that Covad should have used some type of psychic power to ascertain what the Federal Communications Commission ("FCC") was going to say in the *NAL* weeks before its release date in order to file the *Petition* within ten-days after the Commission issued *Order No. 05*.⁴ Staff states that it is a "waste of time"⁵ and not in the public interest for the Commission to review the *Petition* even though a review at this point in the proceeding and in light of the *NAL* could conserve and better utilize the parties' and the Commission's limited and valuable resources. Covad respectfully urges the Commission to reject Staff's public interest interpretation and review the *Petition* accordingly.

2. Staff and Qwest argue that in determining whether competitive local exchange carriers ("CLECs") have a duty to file under Section 252,⁶ the Commission should totally ignore the *NAL* because it is the result of a Qwest-only docket that does not directly apply to CLECs.⁷ Staff and Qwest are more than willing, however, to accept the Commission's use of the *Declaratory Ruling* to find that CLECs have a filing obligation, even though the *Declaratory Ruling* is also the result of a Qwest-only docket that does not directly apply to CLECs. The *NAL* is a more recent FCC interpretation of Section 252 filing

³ *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")*.

⁴ *Staff's Response* at ¶¶ 4 – 5.

⁵ *Id.* at ¶ 7.

⁶ 47 U.S.C. § 252.

⁷ *Staff's Response* at ¶¶ 9 – 17; Response of Qwest Corporation to Covad Communications Company's Petition for Review and Clarification of Order No. 05 ("*Qwest's Response*") at ¶¶ 4 – 6.

requirements. The FCC cites the *Declaratory Ruling* extensively in the *NAL*,⁸ which supports the CLECs' position that only Qwest has the duty to file interconnection agreements for approval. Review and reversal of the Commission's finding that CLECs must file interconnection agreements is warranted based on the *NAL*.

3. If the Commission affirms its decision that CLECs have Section 252 filing obligations, then the *NAL* provides significant guidance that the Commission may use to implement a reasonable time period in which CLECs should file agreements, subject to this docket, without sanctions or penalties. The *NAL* is not as useless as Staff alleges.⁹

DISCUSSION

1. **Review And Clarification Of Order No. 05 In Light Of The NAL Is Appropriate And In The Public Interest.**

4. A party that seeks review of an interlocutory order should file a petition for review with the Commission within ten days after the order is issued.¹⁰ However, the Commission has broad discretionary powers to hear a late petition for review at any time if the review can save the Commission and parties substantial effort or expense¹¹ and is consistent with the public interest.¹²

5. The Commission's broadest responsibilities are governed by a public interest standard:

The utilities and transportation commission shall: * * * (3) Regulate in the *public interest*, as provided by the public service laws, the rates, services,

⁸ See, fn. 18, *infra*.

⁹ Staff's Response at ¶¶ 8, 23.

¹⁰ WAC 480-07-810(3).

¹¹ WAC 480-07-810(2)(c).

¹² WAC 480-07-810(3).

facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities; including, but not limited to, electrical companies, gas companies, irrigation companies, **telecommunications companies**, and water companies.¹³

A public interest analysis is not a one-sided exercise that should always work against companies doing business in Washington. Rather, the analysis requires that the Commission balance the rights and concerns of not only ratepayers, but also those of the regulated utilities and their shareholders and those of the general public.¹⁴ A review of *Order No. 05* at this point in the proceeding and in light of the *NAL* would be in the public interest. The time, effort, and costs of the Commission and the parties would be reduced, albeit some more than others, if the Commission applies the principles found in the *NAL*.

6. Covad used the *NAL* as the underlying basis and primary support for the *Petition*. The FCC released the *NAL* one month after the Commission issued *Order No. 05* and several weeks after the general ten-day period in which to file petitions for review lapsed. Staff argues that Covad did not provide any justification or excuse for filing the *Petition* within the required ten-day time frame.¹⁵ There is no way that Covad could have filed the *Petition* during that time. The basis for the *Petition*, the *NAL*, did not yet exist.

¹³ RCW 80.01.040 (emphasis added).

¹⁴ *See, e.g., In the Matter of the Application of Qwest Corporation Regarding the Sale and Transfer of Qwest Dex to Dex Holdings, LLC, a non-affiliate*, Docket No. UT-021120, Tenth Supplemental Order: Approving and Adopting Settlement Agreement; Granting Application and Accepting Notice, Subject to Conditions at ¶ 42 (August 1, 2003).

¹⁵ *Staff Response's* at ¶¶ 4 – 5.

7. Staff states that there is nothing of overwhelming significance contained in the *NAL*,¹⁶ and if Covad thought the *NAL* was a significant change in law, Covad could have filed the *Petition* earlier.¹⁷ Covad filed the *Petition* electronically Friday afternoon, May 7, 2004, and served hard copies via first class mail that same day. The Commission received the paper filing of the *Petition* on May 10, 2004. The parties were not prejudiced. Covad and the other CLECs did not oppose Staff's motion for a one-week extension of time to file its direct testimony, which was granted May 21, 2004.

8. Covad submitted the *Petition* to inform the Commission of the existence of the *NAL* because Staff chose not to. It is interesting that Staff does not consider the *NAL* to be important to this proceeding. The *NAL* is a seminal unfiled interconnection agreement case against Qwest in which the FCC seeks to impose a \$9 million penalty for Qwest's failure to file 46 agreements with the appropriate state commissions for approval. Failing to file many interconnection agreements, of which Qwest is a party to each agreement, is the core issue of this Docket No. UT-033011. Staff does not dispute that the Commission relied considerably on the *Declaratory Ruling* in finding that both the incumbent local exchange carriers ("ILECs") and CLECs are obligated to file interconnection agreements for approval under Section 252. The *NAL* interprets, notes, quotes, cites, mentions, and/or uses the *Declaratory Ruling* at least 46 times¹⁸ and is a more recent FCC interpretation of the Section 252 filing requirements. The parties and the Commission

¹⁶ *Id.* at ¶ 25.

¹⁷ *Id.* at ¶ 4.

¹⁸ *See NAL* at ¶¶ 6, 11, 12, 13, 15, 16 (twice), 17, 22, 23, 24 (three times), 25, 29 (three times), 30, 31, 32, 33 (twice), 34 (twice), 41 (twice), 44, 45 (three times), 50; *NAL* footnotes 16, 34 (twice), 36, 46 (twice), 70, 71, 75, 95, 96 (twice), 101, 105, 106.

did not have access to the *NAL* during briefing of or ruling on dispositive motions. As such, the Commission's review of *Order No. 05* is appropriate considering the FCC's more recent Section 252 interpretations contained in the *NAL*.

9. Staff suggests that if Covad is so concerned with saving the Commission and parties "time",¹⁹ Covad should have filed the *Petition* sooner.²⁰ Covad is very interested in conserving the Commission's and parties' limited and valuable resources, which include more than just time. They also include tens of thousands of dollars, if not more, from Washington taxpayers, ratepayers, and businesses that would be better spent on procuring and providing competitive telecommunications services than on attorneys and experts over the next seven months to litigate issues that could be rendered moot if the Commission applies the *NAL* principles to this proceeding. A more compelling and pertinent question should be why isn't Staff *more* interested in judicial economy and conserving the Commission's and parties' resources? It is puzzling that Staff considers review of *Order No. 05* at this point a "waste of time"²¹ It is not.

II. The NAL Confirms That Only ILECs Have Section 252 Filing Obligations.

10. Staff and Qwest claim that the *NAL* is not pertinent to this proceeding because it is the result of a Qwest-only docket and does not directly address a CLEC's Section 252 filing obligations.²² Staff and Qwest support the Commission's use of the *Declaratory Ruling* to find that CLECs have a filing obligation, but ignore the fact that the

¹⁹ Staff misquotes the *Petition* on this issue. *See Staff's Response* at ¶ 25.

²⁰ *Staff's Response* at ¶ 4.

²¹ *Staff's Response* at ¶ 7.

Declaratory Ruling is also the product of a Qwest-only docket that does not directly address a CLEC's duty to make Section 252 filings.

11. The Commission acknowledged, and Qwest and Staff do not dispute, that there is a significant amount of ambiguity related to FCC's orders on whether CLECs must file interconnection agreements for approval.²³ However, there is nothing ambiguous about the FCC's view set forth in the *NAL* that the *Declaratory Ruling*

clarified the *incumbent LECs'* obligation to file interconnection agreements under section 252(a)(1),²⁴ [and that] '*incumbent LECs* have had adequate notice of their legal obligations under section 252(a)' since the *Declaratory Ruling*.²⁵

12. The FCC made it clear in the *NAL* that the *Declaratory Ruling* did not directly address the CLECs' Section 252 filing requirement. The Commission agreed, but in its final analysis, the Commission determined that CLECs are obligated to file due in large part to the FCC's use of the word "carriers" in 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.²⁶

Indeed, on its face, section 252(a)(1) does not further limit the types of agreements that *carriers* must submit to state commissions. *FCC Declaratory Ruling*, ¶ 8 [emphasis added].

* * *

Merely inserting the term "settlement agreement" in a document *does not excuse carriers of their filing obligation* under section 252(a). *Id.*, ¶ 12 [emphasis added].²⁷

²² *Id.* at ¶¶ 9 – 17; "Qwest's Response" at ¶¶ 4 – 6.

²³ *See, e.g., Order No. 05* at ¶ 46.

²⁴ *NAL* at ¶ 17 (quoting *Qwest Minnesota 271 Order*, fn. 31, *infra*) (emphasis added).

²⁵ *NAL* at ¶ 45 (citing *SBC Michigan 271 Order*, fn. 29, *infra*) (emphasis added).

²⁶ *Order No. 05* at ¶ 47.

²⁷ *Id.*

The Commission inferred that the FCC's use of the word "carriers" in the *Declaratory Ruling* meant that both ILECs and CLECs have a duty to file.

"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."²⁸

13. A closer review of the underlying material quoted by the FCC in the *NAL*, however, shows that the FCC used the word "carriers" to mean that ILECs have Section 252 filing obligations, not both the CLECs and ILECs.

As we have noted previously, the [FCC] clarified the obligation of *incumbent LECs* to file interconnection agreements under section 252(a)(1) in the *Qwest Declaratory Order* released October 4, 2002. Given that *incumbent LECs* have had adequate notice of *their* obligations under section 252(a), we will consider appropriate enforcement action when *carriers* fail to meet those obligations.²⁹ See, e.g., *Qwest Minnesota Order* at para. 93 (referring to the Enforcement Bureau allegations that *Qwest* failed to file 34 interconnection agreements with the Michigan [sic] Commission until shortly before filing its 271 application with the [FCC]).³⁰

At the same time, we are seriously troubled by *Qwest's* decision to delay filing 34 agreements with the Minnesota Commission until March 25-26, 2003, and refer this matter to the Enforcement Bureau for investigation and appropriate action. The Commission 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.³¹

²⁸ *Id.* at ¶ 48.

²⁹ *In the Matter of Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Authorization To Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order ("*SBC Michigan 271 Order*"), WC Docket No. 03-138, 18 FCC Rcd 19024 at ¶ 180 (Released September 17, 2003) (emphasis added).

³⁰ *Id.* at fn. 639 (emphasis added).

³¹ *In the Matter of Application by Qwest Communications International Inc., for Authorization to Provide In-Region, InterLATA Services in Minnesota*, Memorandum Opinion and Order ("*Qwest*

While the *Declaratory Ruling* may provide inferences of a CLEC's filing obligations, the more recent *NAL* and supporting material cited therein provide specific references to the contrary. The FCC pursued only Qwest, not the CLECs, through the *NAL* proceeding because only Qwest, as the ILEC, has the duty to file interconnection agreements for approval. Accordingly, Covad respectfully requests that the Commission reverse its decision that the CLECs have the duty to file interconnection agreements and, in turn, dismiss all claims against Covad.

III. The NAL Supports Giving CLECs Reasonable Time After Receiving Notice Of A Filing Obligation To Make Required Filings Without Sanctions Or Penalties.

14. Staff argues that the section of Covad's *Petition* that requests a reasonable amount of time for CLECs to file interconnection agreements after learning of their filing obligations, if any, should be rejected because it is an improper motion for clarification,³² inappropriate dispositive motion,³³ or does not meet the public interest standard.³⁴

Pursuant to WAC 480-07-810, Covad properly seeks in the alternative

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.³⁵

The *Petition* also meets appropriate public interest standards as discussed previously.³⁶

Minnesota 271 Order"), WC Docket No. 03-90, 18 FCC Rcd 13323 at ¶ 93 (Released June 26, 2003) (emphasis added).

³² *Staff's Response* at ¶¶ 18 – 20.

³³ *Id.* at ¶ 21.

³⁴ *Id.* at ¶ 22.

³⁵ *Petition* at ¶ 14 (emphasis added).

³⁶ *See* Section I, *infra*.

15. Staff states that the *NAL* sheds very little, if any, light on what constitutes a reasonable time to file.³⁷ Staff ignores the underlying benchmark date of the *Declaratory Ruling* that the FCC uses throughout the *NAL* to determine that Qwest did not timely file interconnection agreements for approval.

On March 25-26, 2003, ***more than four months after the Declaratory Ruling***, Qwest sought the Minnesota Commission's section 252 approval for 34 previously unfiled agreements, including four agreements that had been the subject of the Minnesota enforcement proceedings.³⁸

On May 23, 2003, ***more than seven months after the Declaratory Ruling***, Qwest filed twelve previously unfiled Arizona interconnection agreements with the Arizona Commission.³⁹

The Commission 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.***⁴⁰

Although section 252(a)(1) is explicit in its filing requirements, ***the Declaratory Ruling provided certainty to those requirements.***⁴¹

The [FCC]'s ***Declaratory Ruling and the Qwest 9-State 271 Order made clear our filing requirements. Qwest nevertheless apparently delayed filing the Minnesota and Arizona agreements***, while at the same time filing similar unfiled agreements with the state commissions for which it had pending 271 applications before the [FCC].⁴²

Qwest then sought to clarify the filing requirements of section 252 by filing the Qwest Petition, but ***even after the release of the Declaratory Ruling, Qwest still failed to file the Minnesota and Arizona unfiled agreements.***⁴³

Qwest did not file the 34 Minnesota agreements until March 25 and 26, 2003, * * * ***more than five months after the release of the Declaratory***

³⁷ *Staff's Response* at ¶ 23.

³⁸ *NAL* at ¶ 15 (emphasis added).

³⁹ *Id.* at ¶ 16 (emphasis added).

⁴⁰ *Id.* at ¶ 17 (quoting *Qwest Minnesota 271 Order*) (emphasis added).

⁴¹ *Id.* at ¶ 22.(emphasis added).

⁴² *Id.* at ¶ 41 (emphasis added).

⁴³ *Id.* at ¶ 44 (emphasis added).

Ruling. * * * Even if we assume that Qwest did not realize that the Minnesota and Arizona agreements should have been filed when the contracts were executed, ***by any reasonable measure Qwest should have filed those agreements shortly after October 4, 2002, under the guidance of the Declaratory Ruling.*** * * * 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.***⁴⁴

Even if we assume that Qwest did not have clear notice of its obligations under section 252(a)(1) ***until the release of the Declaratory Ruling, Qwest delayed filing the Minnesota and Arizona agreements for at least an additional five and seven months, respectively.***⁴⁵

16. Contrary to Staff's assertions, the *NAL* provides support for the Commission to determine that a party with Section 252 filing obligations may make appropriate filings prior to or within a reasonable time after learning of its specific filing duties, without penalties or sanctions.⁴⁶ The FCC put Qwest on specific notice of its filing obligations October 4, 2002, the release date of the *Declaratory Ruling*. The Commission put the CLECs on specific notice of their filing obligations February 12, 2004, the service date of *Order No. 05*. Covad respectfully requests that the Commission dismiss all claims related to agreements filed by the respective parties prior to or within a reasonable time period after these applicable notice dates. Because Covad would meet the preceding compliance time periods related to its agreements that are still subject to this docket,⁴⁷ further adjudication against Covad is not necessary, and all claims against Covad should

⁴⁴ *Id.* at ¶ 45 (emphasis added).

⁴⁵ *Id.* at ¶ 50 (emphasis added).

⁴⁶ If the Commission affirms its decision that CLECs have an obligation to file interconnection agreements for approval under Section 252, then Covad does not disagree with Staff that future agreements should be filed within the prescribed time period from the execution date of the agreement.

⁴⁷ Agreement Nos. 7A and 16A.

be dismissed. The interest of judicial economy supports Covad's dismissal⁴⁸ despite Qwest's opposing arguments on the issue.⁴⁹

CONCLUSION

17. Based on the foregoing reasons and the rationale set forth in the *Petition*, 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, subject to this docket, 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 24th day of May, 2004.

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⁴⁸ See *Order No. 05* at ¶ 125 (dismissing all causes of action against ATG in the interest of judicial economy).

⁴⁹ *Qwest's Response* at ¶¶ 7 – 9.

CERTIFICATE OF SERVICE

Docket UT-033011
[REPRESENTATIVES]

I hereby certify that I have this day served the foregoing COVAD COMMUNICATIONS COMPANY'S REPLY TO STAFF'S AND QWEST'S RESPONSES TO 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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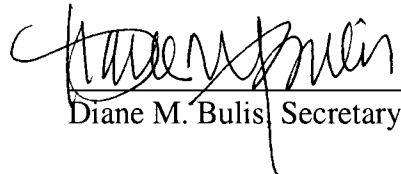
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DATED at Seattle, Washington this 24th day of May, 2004.


Diane M. Bulis, Secretary