

October 25, 2004

VIA FACSIMILE AND OVERNIGHT DELIVERY

Ms. Annette M. Taylor
Legal Secretary
Oregon Public Utility Commission
550 Capitol Street NE, Suite 215
PO Box 2148
Salem, OR 97308-2148

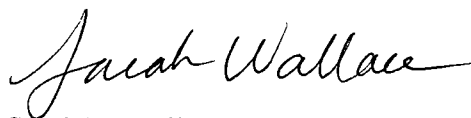
Re: UM 1168 – Time Warner Telecom of Oregon’s and Covad Communications
Company’s Reply to Qwest’s Response to Petitions to Intervene

Dear Ms. Taylor:

Enclosed for filing in the above-referenced docket are the original and five copies of
Time Warner Telecom of Oregon’s and Covad Communications Company’s Reply to Qwest’s
Response to Petitions to Intervene.

Please contact me with any questions.

Very truly yours,



Sarah E. Wallace

Enclosures

cc: UM 1168 Service List
Brian Thomas

1
2
3 **BEFORE THE PUBLIC UTILITY COMMISSION**
4 **OF OREGON**
5 **UM 1168**

6 In the Matter of

7 PUBLIC UTILITY COMMISSION OF
8 OREGON STAFF

9 Investigation into Qwest Corporation's (and
10 possibly other parties) Failure to File
11 Interconnection Agreements for Commission
Approval under Section 252(a)(1) of the
Telecommunications Act

TIME WARNER TELECOM OF OREGON'S
AND COVAD COMMUNICATIONS
COMPANY'S REPLY TO QWEST'S
RESPONSE TO PETITIONS TO INTERVENE

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13 Time Warner Telecom of Oregon LLC ("Time Warner Telecom") and Covad
14 Communications Company ("Covad") respectfully submit this reply to Qwest's Response to
15 Covad's and Time Warner Telecom's Petitions to Intervene, filed on October 5, 2004.¹ For the
16 reasons set forth below, the Public Utility Commission of Oregon ("Commission") should grant
17 Time Warner Telecom's and Covad's petitions to intervene without limitations or conditions.

18 **INTRODUCTION**

19 On September 7, 2004, the Commission adopted the Commission Staff's
20 recommendation to open a formal investigation into Qwest's alleged failure to file
21 interconnection agreements for Commission approval under Section 252(a)(1) of the
22 Telecommunications Act. The scope of the docket includes the determination of appropriate
23

24
25 ¹ On October 18, 2004, Administrative Law Judge Smith granted Time Warner Telecom and Covad an extension
in which to reply to Qwest's Response. Time Warner Telecom and Covad must file their reply by noon on
October 25, 2004.

1 remedies, including penalties, in the event the Commission determines that Qwest did in fact
2 fail to file certain interconnection agreements in violation of Section 252(a)(1).²

3 Time Warner Telecom and Covad filed their petitions to intervene on September 30,
4 2004. Under OAR 860-013-0021(2), intervention is allowed if the Commission or
5 Administrative Law Judge finds that the “petitioner has sufficient interest in the proceeding and
6 the petitioner’s appearance and participation will not *unreasonably* broaden the issues, burden
7 the record, or *unreasonably* delay the proceeding” (emphasis added).

8 ARGUMENT

9 1. Time Warner Telecom and Covad Have Sufficient Interest in This Proceeding

10 As a preliminary matter, Time Warner Telecom and Covad have a substantial interest in
11 the outcome of this proceeding. Both parties have interconnection agreements with Qwest.³
12 One of the primary reasons for the requirement that ILECs file interconnection agreements for
13 approval by state commissions is to protect CLECs from discriminatory treatment by the
14 ILECs. As the Staff stated in the Staff Report, “Qwest’s secret contracts provided a small
15 number of CLECs with preferential interconnection-related rates, terms, and conditions.” Had
16 Time Warner Telecom and Covad known about these “secret contracts,” they could have
17 elected to opt-in to these more favorable provisions. Therefore, they have arguably been
18 harmed by the inability to do so.⁴

20
21 ² Staff Report, *In the Matter of the Public Utility Commission of Oregon Staff Investigation into Qwest Corporation’s (and possibly other parties) Failure to File Interconnection Agreements for Commission Approval under Section 252(a)(1) of the Telecommunications Act*, dated August 30, 2004, at page 7 (“Staff Report”).

22 ³ Time Warner Telecom and Covad also have reason to believe, based upon similar proceedings in other states,
23 that they are in direct competition with some of the CLECs that entered into the interconnection agreements with
Qwest that are at issue in this docket.

24 ⁴ At the time of the alleged violations of Section 252(a)(1), the FCC’s “pick and choose” rule was still in effect
25 and CLECs were permitted to opt-in to specific sections of other CLECs’ interconnection agreements. Time
Warner Telecom and Covad could have elected to opt-in to the entire agreement or specific provisions. The FCC
has since eliminated the “pick and choose” rule.

1 Time Warner Telecom's and Covad's ability to seek reparations for any harm incurred by
2 Qwest's failure to file certain interconnection agreements, whether pursued in the course of this
3 proceeding or in a subsequent court case (as discussed further below), is dependent on this
4 Commission's determination of whether or not Qwest did in fact fail to file these agreements.
5 Therefore, Time Warner Telecom and Covad have a significant interest in this proceeding.

6 **2. Time Warner Telecom's and Covad's Participation in this Docket Will Not**
7 **Unreasonably Broaden the Issues, Burden the Record, or Unreasonably Delay the**
8 **Proceedings**

9 There are two basic issues in this docket as set forth in the Staff Report: (1) whether
10 Qwest (and possibly other parties) failed to file interconnection agreements in violation of
11 Section 252(a)(1) of the Telecommunications Act; and (2) the appropriate remedies, including
12 penalties, for any such violation. Time Warner Telecom and Covad intend to present
13 arguments and evidence that are squarely within the issues as defined by the Commission Staff
14 and nothing more.

15 Qwest argues that Time Warner Telecom and Covad are attempting to unduly broaden
16 the issues by raising the issue of possible reparations or credits to CLECs for any harms caused
17 by Qwest's failure to file interconnection agreements. Qwest argues that it is inappropriate to
18 raise this issue because: (1) this issue is beyond the scope of this proceeding, which is limited
19 to penalties under 759.990; and (2) the Commission does not have the authority to issue such
20 reparations or damages.

21 As a preliminary matter, Qwest's attempt to limit the scope of the Staff's investigation to
22 possible penalties under ORS 759.990 is without foundation. Qwest states that "the original
23 intent of Staff's recommendation for a formal investigation docket was solely with respect to
24 ORS 759.990 penalties." But this is inconsistent with the Staff Report, which specifically
25 states that there are two issues in this proceeding: whether a violation of Section 252(a)(1)

1 occurred and the appropriate remedies, *including penalties*, for any such violation.⁵ Staff did
2 not limit the scope of the investigation of remedies to the question of appropriate penalties
3 under ORS 759.990 alone.

4 In support of the argument that the Commission does not have authority to order Qwest
5 to pay reparations or damages to the CLECs for harms caused by the failure to file the
6 interconnection agreements, Qwest relies upon a memorandum prepared by the Department of
7 Justice and cited by Staff in the Staff Report.⁶ This issue, however, has not been yet been
8 decided by the Commission. Because the issues in this proceeding include the appropriate
9 remedies for the alleged violation of Section 252(a)(1), it is the correct forum for the
10 Commission to determine whether it has the authority to include reparations to CLECs as one
11 of those remedies.

12 Moreover, even if Qwest is correct that the Commission does not have the authority to
13 award damages or reparations to CLECs in this proceeding, Time Warner Telecom and Covad
14 have a clear interest in ensuring that the Commission enter appropriate findings in this case
15 because, as Qwest acknowledged, the CLECs may have claims against Qwest for damages in
16 another docket or forum.⁷ In addition, CLECs have a general interest in ensuring that the
17 Commission orders appropriate remedies for violation of Section 252(a)(1) to deter future
18 violations, even if those remedies do not include reparations or damages to CLECs.

19 Qwest also argues that Time Warner Telecom's and Covad's participation in this docket
20 will unreasonably delay the proceedings and burden the record because a determination of
21 whether reparations, credits, or damages could be awarded to CLECs would require that the
22 parties fully litigate that issue, as well as each CLECs' alleged harm or damages. But, as stated

23 ⁵ Staff Report at 7.

24 ⁶ Staff Report at 6-7.

25 ⁷ Qwest's Response to Covad Communications Company and Time Warner Telecom of Oregon's Petitions to Intervene at 4, 8.

1 above, the Commission's authority to award reparations or damages to CLECs is squarely
2 within the issue of the "appropriate remedies" for violations of Section 252(a)(1). In addition,
3 it is true that each CLECs' alleged harm or damages would need to be litigated, but only if the
4 Commission determined that it had the authority to award such damages or reparations.

5 Qwest's fundamental argument seems to be that the CLECs' participation in this docket
6 will put its settlement agreement with Staff in jeopardy and a formal investigation may be
7 required as a result. But the Staff Report contemplated the possibility of a formal investigation,
8 stating that Staff is prepared to "go ahead with a formal case, including testimony and
9 hearings" if a settlement is not reached with Qwest or if the Commission rejects a settlement.
10 In addition, given the fact that the primary purpose of Section 252(a)(1) filing requirement is to
11 protect CLECs from discriminatory treatment by ILECs, the propriety of a settlement between
12 Qwest and Staff without the participation of the CLECs is questionable. The harm to CLECs
13 that has resulted from Qwest's failure to file these interconnection agreements is a critical issue
14 in this case, not only because of possible remedies due to the CLECs, but also because the
15 Commission cannot determine the appropriate penalties to be assessed against Qwest without
16 an understanding of any such harm.

17 As an alternative to rejecting the petitions to intervene, Qwest argues that Time Warner
18 Telecom and Covad's participation should be limited and expressly conditioned pursuant to the
19 Commission's authority under OAR 860-013.0021(2). Specifically, Qwest requests that their
20 participation be limited solely to the issues of penalties under ORS 759.990. However, Staff
21 has not recommended that the scope of these proceedings be limited solely to the issue of
22 penalties under ORS 759.990. As discussed above, Time Warner Telecom and Covad are
23 raising issues that are clearly within the scope of issues presented by Staff. There is no basis to
24 limit or condition their participation in this proceeding.⁸

25 ⁸ Time Warner Telecom and Covad have been granted full intervenor status in similar proceedings in other states,
including Minnesota, Washington, Arizona, and New Mexico.

1 **CONCLUSION**

2 Time Warner Telecom and Covad have a significant interest in this proceeding and, for
3 the reasons stated above, their participation will not unreasonably broaden the issues, burden
4 the record, or delay the proceedings. Accordingly, Time Warner Telecom and Covad
5 respectfully request that the Commission grant their petitions to intervene, without conditions
6 or limitations.

7 RESPECTFULLY SUBMITTED this 25th day of October, 2004.

8 ATER WYNNE LLP

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10 By: 

Lisa F. Rackner, OSB No. 87384
Sarah Wallace, OSB No. 00262
222 SW Columbia, Suite 1800
Portland, OR 97201-6618
Telephone: (503) 226-8693
Facsimile: (503) 226-0079
E-mail: lfr@aterwynne.com

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15 Attorney for Time Warner Telecom of
16 Oregon, LLC
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CERTIFICATE OF SERVICE
UM 1168

I hereby certify that a true and correct copy of **TIME WARNER TELECOM OF OREGON'S AND COVAD COMMUNICATIONS COMPANY'S REPLY TO QWEST'S RESPONSE TO PETITIONS TO INTERVENE** was served via U.S. Mail on the following parties on October 25, 2004:

Mr. Dave Booth
Oregon Public Utility Commission
550 Capitol Street NE, Suite 215
PO Box 2148
Salem OR 97308-2148

Alex M. Duarte
Qwest Corporation
Suite 810
421 SW Oak Street
Portland OR 97204

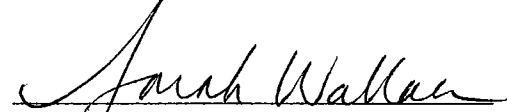
Ms. Karen S. Frame
Covad Communications Company
Government & External Affairs
7901 Lowry Boulevard
Denver CO 80230-6906

Karen J. Johnson
Integra Telecom of Oregon, Inc.
Suite 500
1201 NE Lloyd Boulevard
Portland OR 97232

Gregory Scott
Integra Telecom of Oregon, Inc.
Suite 500
1201 NE Lloyd Boulevard
Portland OR 97232

Michael T. Weirich
Oregon Department of Justice
General Counsel Division
100 Justice Building
1162 Court Street NE
Salem OR 97301

ATER WYNNE LLP


Sarah Wallace