

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

UM 1168

In the Matter of 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

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

Qwest Corporation ("Qwest") hereby responds to the petitions to intervene that Covad Communications Company ("Covad") and Time Warner Telecom of Oregon LLC ("Time Warner") (sometimes collectively referred to as "petitioning CLECs") filed on September 30, 2004. For the reasons set forth below, the Commission should deny the petitions to intervene, or alternatively, it should limit and condition the petitioning CLECs' participation only to the Staff investigation regarding penalties pursuant to ORS 759.990 for the non-filing of agreements.

**INTRODUCTION AND SUMMARY OF CASE**

**A. The Commission's initiating this docket based on Staff's recommendation**

On September 7, 2004, the Commission adopted Commission Staff's recommendation that the Commission initiate a formal investigation docket to investigate whether Qwest and *possibly other parties* failed to file interconnection agreements for Commission approval under Section 252(a)(1) of the Telecommunications Act ("Act"), and if so, to determine appropriate remedies, including penalties. Thus, the Commission opened this docket, UM 1168.

**1. The Staff Report recommending an ORS 759.990 penalty investigation**

In its August 30, 2004 Staff Report for the September 7, 2004 Public Meeting, Staff discussed the background of this matter, including requirements under section 252(a)(1) of the

Act that both incumbent local exchange carriers (ILECs) and their competitors (CLECs) have to file interconnection agreements with state commissions, and the history of this matter beginning with a February 2002 complaint by the Minnesota Department of Commerce with the Minnesota Public Utilities Commission. Staff's report also discussed that it began an informal investigation of this matter in March 2002, as well as Qwest's FCC petition regarding filing requirements in 2002. The Staff report also discussed Qwest's filing of 16 interconnection agreements in Oregon in September 2002, which the Commission approved, and that Qwest has filed additional agreements for approval.<sup>1</sup> Staff's report then discussed the Qwest/U S WEST merger in 1999 and 2000 and the section 271 proceedings, as well as investigations in other Qwest states.

In its report, Staff also discussed its informal investigation that it began in March 2002, and discussed the fact that Qwest has provided a total of 89 contracts, and that Staff is hopeful that it can reach a stipulated agreement to resolve this investigation. The report then discussed the Department of Justice (DOJ) has advised Staff that ORS 759.990 governs the assessment of penalties against Qwest and perhaps other parties. Notably, Staff's report concluded: "DOJ advises that the Commission does not have authority to order Qwest to pay money directly to CLECs on the basis of the CLECs having been damaged by Qwest's failure to file." Thus, Staff recommended that "[t]hat the Commission should open a docket for [the investigation of Qwest's and possibly other carriers' failure to file agreements] even though Staff hopes to resolve this matter by stipulation." The Commission adopted Staff's recommendation at the September 7, 2004 Public Meeting, and thus opened this docket.

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<sup>1</sup> Qwest notes that Staff's report mistakenly concluded that Qwest filed for Commission approval 16 previously unfiled agreements "following the FCC declaratory ruling." However, Qwest actually filed the 16 agreements on September 4, 2002, one month before the FCC issued its Declaratory Ruling on October 4, 2002.

2. **The DOJ's legal memo advising of no PUC authority to order money to CLECs**

In addition, on or about August 19, 2004, the DOJ, in a legal memorandum to Commission Chairperson Lee Beyer, answered an inquiry that Chairperson Beyer had made about whether the Commission has authority to require Qwest, in a contemplated penalty proceeding against Qwest under ORS 759.990(6), to pay money directly to CLECs on the basis of the CLECs having been damaged by Qwest's failure to file interconnection agreements. The DOJ's answer was that the penalty provisions of ORS 759.990 control the Commission's actions in response to Qwest's failure to file agreements, and that "neither that statute nor any other provides the Commission with authority to direct payment of a penalty to one or more CLECs." The DOJ concluded that "[a]lthough the PUC has broad regulatory power under ORS 756.040, a court likely would conclude that the legislature, through enactment of ORS 759.990, has circumscribed that power with respect to responding to violations of OAR 860-016-0020(3)." The DOJ further concluded: "The PUC may seek penalties for such violations, but the penalties must be deposited in the General Fund, and an alternative remedy is not clearly authorized."

B. **The September 30th meeting and CLEC arguments for "reparations" in this docket**

On September 30, 2004, Staff convened a meeting with Qwest and any interested CLECs to discuss the background of this matter, including Staff's informal investigation begun in March 2002 and the recent discussions and settlement meetings with Qwest. A number of CLECs, including Covad and Time Warner, appeared in person and/or by telephone.

At the September 30th meeting, Staff discussed the history of the matter, and further advised the CLECs that Qwest and Staff had reached a settlement in principle in which Qwest would make a monetary payment to resolve the penalty investigation. (See Confidential

Attachment for details regarding the settlement.)<sup>2</sup> Staff advised the parties it was Staff's and Qwest's intent to memorialize the settlement in principle in a stipulation or memorandum of understanding (MOU) which would be submitted to the Commission for comment and approval.

During that September 30th meeting, however, it became clear that the CLECs, including Covad and Time Warner, intend to seek to *expand* the scope of the investigation to include so-called "reparations" or "credits" to CLECs for what they alleged were the "damages" they purportedly suffered as a result of Qwest's not filing certain agreements. They did so despite that Staff made it very clear that (1) "the Commission does not have the authority to order Qwest to pay money directly to CLECs on the basis of the CLECs having been damaged by Qwest's failure to file," and (2) the purpose of this investigation docket is to resolve the penalties that the Commission can seek under ORS 759.990. Moreover, both Staff and Qwest reiterated that nothing in the stipulation that Staff and Qwest intend to enter into and submit to the Commission for comments and approval would waive any rights that CLECs might otherwise have to bring a claim against Qwest for alleged individualized damages in an appropriate forum. Qwest expects that the stipulation will specifically provide that the settlement will be *without prejudice* to any CLECs filing any complaints they deem warranted against Qwest in any appropriate forum.

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<sup>2</sup> Qwest notes that the settlement with Staff is only a settlement *in principle* at this point, and it is contingent on the Commission approving the stipulation and closing this docket. Further, even though both Staff and Qwest disclosed the settlement amount to the CLEC participants at the September 30th meeting, Qwest still considers the amount to be confidential at this point, at least until such time as Staff or Qwest publicly disclose it in a public filing or in the stipulation or MOU that they plan to file with the Commission for approval. In fact, Qwest and Staff have agreed all settlement discussions are without prejudice to either party's right to assert that any particular interconnection agreement was required, or not required, to be filed, in the event that the settlement cannot be consummated and that the parties instead litigate these issues. Qwest and Staff have also agreed that the settlement in principle (and any settlement discussions) cannot be used as evidence against either party pursuant to ORS 40.190 (ORE 408). Thus, the fact of a settlement in principle cannot be used in evidence against any party in the event the settlement is not consummated and the docket is not closed, and thus the parties are forced to litigate these issues. Accordingly, because Qwest and Staff

## **RESPONSE AND OBJECTION TO PETITION TO INTERVENE**

### **A. Standards for intervention under OAR 860-013-0021**

The petitioning CLECs do not cite to the administrative rule for petitions to intervene.

However, they necessarily bring their petitions to intervene pursuant to OAR 860-013-0021.

OAR 860-013-0021(1) provides that the petition shall contain certain information, including “the nature and extent of the petitioner’s interest in the proceeding,” “the issues petitioner intends to raise at the proceeding,” and “any special knowledge or expertise of the petitioner which would assist the Commission in resolving the issues in the proceeding.” OAR 860-013-0021(1)(d), (e), (f).

In addition, OAR 860-013-0021(2) allows intervention if the Commission or Administrative Law Judge (ALJ) “finds the petitioner has sufficient interest in the proceeding and the petitioner’s appearance and participation will not unreasonably *broaden the issues, burden the record, or unreasonably delay the proceeding.*” (Emphasis added.) Finally, the Commission or ALJ “may impose *appropriate conditions* upon any intervenor’s participation in the proceeding.” *Id.* (Emphasis added.)

### **II. The CLECs’ attempts to broaden this investigation would violate OAR 860-013-0021**

The petitioning CLECs’ identical petitions to intervene are defective in several respects.

First, their petitions to intervene are required to contain information regarding “the nature and extent” of their participation in the proceeding. OAR 860-013-0021(1)(d). The petitioning CLECs’ petitions to intervene fail to describe the nature and extent of their participation. Rather, they merely state, in conclusory form, that they have “knowledge and expertise that will assist the Commission and the parties in resolving the issues presented in this proceeding.”

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have reached a settlement in principle, but the amount has not been publicly disclosed in any formal filing with the Commission, Qwest discloses the amount in a confidential attachment to this response.

Second, the petitions to intervene are required to contain information regarding “the issues [each] petitioner intends to raise at the proceeding,” OAR 860-013-0021(1)(e). Again, the petitions to intervene fail to describe the issues the petitioning CLECs intend to raise at the proceeding.

Third, the petitions to intervene are required to contain information regarding “any special knowledge or expertise of [each] petitioner which would assist the Commission in resolving the issues in the proceeding.” OAR 860-013-0021(1)(f). Once again, the petitions to intervene fail to describe any special knowledge or expertise of the petitioning CLECs which would assist the Commission in resolving the issues. As stated above, the petitions merely state, in conclusory form, that the petitioning CLECs have “knowledge and expertise that will assist the Commission and the parties in resolving the issues presented in this proceeding.”

Finally, and most importantly, the petitions to intervene state that the petitioning CLECs’ participation “will not unduly broaden the issues or burden the record” (although they fail to mention that they will also “not unreasonably delay the proceeding”). However, despite these boilerplate assertions, it is evident from these (and other) CLECs’ participation in the recent September 30th meeting which Staff convened that they (and the other CLECs) plan to attempt to broaden this investigation docket to include questions about “reparations” or “credits” to CLECs.

This attempt to expand the nature and scope of this investigation is far beyond the ORS 759.990 penalty investigation that is the basis for Staff’s recommendation to the Commission, and that was the basis for the Commission’s acceptance of that recommendation by establishing this docket. As such, this attempt to expand the docket will necessarily result in an attempt to *unduly broaden the issues*, in violation of the intervention standards in Oregon. This is especially so because the current issues in the docket pertain to possible penalties under ORS 759.990, and Staff and Qwest have reached a settlement in principle on those monetary issues, thus resolving the issues

in the docket if the Commission approves the settlement. Consideration of additional issues, even if there were a legal basis (which Qwest denies, and assumes Staff will also deny), would necessarily broaden the issues. This is especially so because the alleged reparation/credit issues, as well as very likely the ORS 759.990 penalty issues themselves, would need to be litigated in their entirety.

Further, any attempt to broaden this investigation docket to include questions about “reparations” or “credits” to CLECs beyond the ORS 759.990 penalty investigation would also constitute *unreasonable delay* of this proceeding. Such a broadening of issues would necessarily require an analysis of each CLECs’ alleged “harm” or “damages.” Also, the original intent of Staff’s recommendation for a formal investigation docket was solely with respect to ORS 759.990 penalties. Since the parties would need to fully litigate reparation/credit issues, and quite possibly the ORS 759.990 penalties issues as well, resolution of the docket would be unreasonably delayed.

Finally, any attempts to expand the issues in this docket beyond the ORS 759.990 penalty investigation would *burden the record*. This is especially so because it would necessarily require an analysis of each CLECs’ alleged “harm” or “damages,” and because Staff and Qwest contemplate that the stipulated settlement they have reached will resolve this docket (assuming the Commission approves it). Thus, there would not be a need for a full-blown regulatory litigation docket (i.e., no need for discovery, testimony or an evidentiary hearing). However, having the issues in the docket expanded to include the issues the petitioning CLECs (and the other CLECs) advocate would, in fact, burden the record and delay the proceeding, especially because Qwest will be forced to litigate such “reparations” and “credit” issues, and even the settlement with Staff will likely also be in jeopardy.

Accordingly, based on the CLECs’ comments on September 30th, it appears very likely that the petitioning CLECs do not intend to voluntarily comply with the petition to intervene standards

and conditions in OAR 860-016-0021. Thus, Qwest respectfully submits that the Commission should deny the CLECs' petitions to intervene in their entirety.

**III. Any intervention should be limited to participation regarding ORS 759.990 penalties**

Finally, to the extent that the Commission does not deny these petitions to intervene, Qwest respectfully submits that any intervention by the petitioning CLECs (or any other CLECs) should be limited and expressly conditioned. That is, intervention should be limited solely to, and expressly conditioned upon, participation regarding ORS 759.990 penalties against Qwest and against any other CLECs whose interconnection agreements with Qwest were not filed with the Commission when they should have been filed. Qwest would not have any objection to any such conditioned intervention (by Covad, Time Warner or other CLECs) limited solely to the ORS 759.990 penalty issues. However, Qwest does indeed object to any intervention of a CLEC that seeks or advocates that the Commission go beyond ORS 759.990 penalties, including but not limited to alleged "reparations," "credits" or "damages" that any CLEC might attempt to seek in this docket.

Qwest's objection to these CLECs' intervention (and intervention of any other CLECs) is especially appropriate given that Staff and its attorneys from the Oregon Department of Justice have previously advised the CLECs that "the Commission does not have authority to order Qwest to pay money directly to CLECs on the basis of the CLECs having been damaged by Qwest's failure to file." Qwest's objection to the CLECs' intervention is further appropriate because all CLECs will retain any rights they otherwise might have to seek any alleged "reparations," "credits" or "damages" in any appropriate complaint in an appropriate forum.

Finally, Qwest notes that OAR 860-013-021(2) provides that the Commission or ALJ "may impose appropriate conditions upon any intervenor's participation in the proceeding." Qwest submits that if the Commission or ALJ grants the petitions to intervene, it should be under



*express conditions* that such participation be limited solely to the issues of ORS 759.990 penalties, and that these CLECs cannot raise the issues of “reparations,” “credits” or “damages” that they believe Qwest should pay to CLECs in this proceeding. The CLECs would, of course, retain any rights they otherwise might have to argue for “reparations,” “credits” or “damages” in any individualized complaint proceedings that they may wish to bring in the appropriate forum.

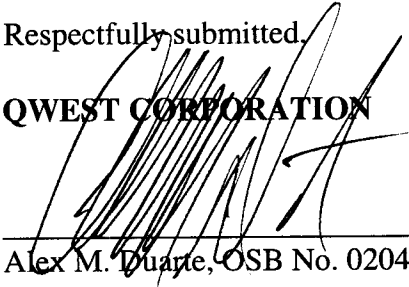
### **CONCLUSION**

Accordingly, Qwest respectfully submits the Commission should deny Covad’s and Time Warner’s petitions to intervene if they intend to seek to expand the investigation in this docket beyond ORS 759.990 penalties, including but not limited to alleged “reparations,” “credits” or “damages.” Alternatively, Qwest respectfully submits the Commission allow intervention by these CLECs (and any other CLECs) only to the extent these CLECs (and any other intervening CLECs) limit such participation to the issues of potential penalties under ORS 759.990.

DATED: October 5, 2004

Respectfully submitted,

**QWEST CORPORATION**



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**CERTIFICATE OF SERVICE**

**UM-1168**

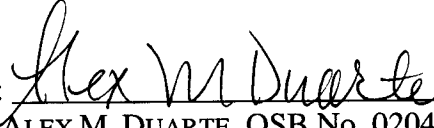

I hereby certify that on the 5<sup>th</sup> day of October, 2004, I served the foregoing **QWEST CORPORATION'S RESPONSE TO COVAD COMMUNICATIONS COMPANY'S AND TIME WARNER TELECOM OF OREGON'S PETITIONS TO INTERVENE** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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DATED this 5<sup>th</sup> day of October, 2004.

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