

March 7, 2005

VIA E-FILING AND US MAIL

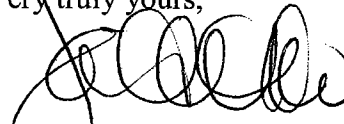
Filing Center
Oregon Public Utility Commission
550 Capitol Street NE #215
PO Box 2148
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**Re: UX 29 – COMMENTS OF COVAD COMMUNICATIONS COMPANY
REGARDING PROPOSED COMPETITION SURVEY**

Dear Sir or Madam:

Enclosed for filing in the above-referenced docket is the original Comments of Covad Communications Company Regarding Proposed Competition Survey. Please contact me with any questions.

Very truly yours,



Jessica A. Centeno

Enclosures

cc: UX 29 Service List (via U.S. Mail)
Gregory T. Diamond

1 **ARGUMENT**

2 **I. THE COMMISSION LACKS THE JURISDICTION TO CONDUCT AN**
3 **INQUIRY INTO VoIP DEPLOYMENT**

4 The powers of a regulatory agency or agent are not without limits. This Commission’s
5 authority is limited by the legislature; the Commission’s power arises from and cannot go beyond
6 that expressly conferred upon it. *Pacific Northwest Bell Telephone Co. v. Sabin*, 534 P.2d 984,
7 991 (Or.App. 1975).

8 **A. The Commission Does Not Regulate Enhanced or Information Services**

9 Under ORS Chapter 759, this Commission is charged with regulating only those carriers
10 providing “intrastate telecommunications service on a for-hire basis.”¹ ORS 759.005(g) defines
11 “telecommunications service” as:

12 Two-way switched access and transport of voice communications
13 but does not include:

- 14 (a) Services provided by radio common carrier.
- 15 (b) One-way transmission of television signals.
- 16 (c) Surveying
- 17 (d) Private telecommunications networks
- 18 (e) Communication of the customer which take place on the
customer side of on-premises equipment.

19 The term “telecommunications service” under Oregon law should be interpreted
20 consistently with federal law to apply only to pure transmission services – and not enhanced
21 services;² this would be consistent with OPUC precedent. The OPUC has never regulated an
22

23 ¹ ORS 759.020.

24 ² The FCC has long distinguished between “basic” and “enhanced” services. *See In the Matter of IP-Enabled*
25 *Services, Notice of Proposed Rulemaking*, FCC 04-28 ¶¶ 25-26, March 10, 2004 “*IP-Enabled Services NPRM*”
26 Since the *Computer Inquiry* line of decisions, the FCC has specified that a “basic” service is one offering
transmission capacity for the delivery of information without net change in form or content. The 1996 Act similarly
defines “telecommunications” as “the transmission, between or among points specified by the user, of information
of the user’s choosing, without change in the form or content of the information as sent and received.” 47 U.S.C.
§153(43).

1 enhanced service provider—that is, a provider who offers enhanced services as defined by federal
2 law, not just basic “transmission”—as a provider of telecommunications services.

3 The FCC has long distinguished “basic (telecommunications) services” from “enhanced
4 services” or “information services.” In the 1980 *Computer II* decision,³ the FCC specified that a
5 “basic service” is a service offering “pure transmission capability over a communications path
6 that is virtually transparent in terms of its interaction with customer-supplied information.”⁴ In
7 contrast, an “enhanced service” contains a basic service component and is offered over common
8 carrier transmission facilities, but also

9 employ[s] computer processing applications that act on the format,
10 content, code, protocol or similar aspects of the subscriber’s
11 transmitted information; provide the subscriber additional,
different, or restructured information; or involve subscriber
interaction with stored information.

12 *Computer II* at 420.

13 This is the three-part definition of an “enhanced service” that is currently contained in 47
14 CFR § 64.702(a).⁵

15 In subsequent orders, the FCC decided that ESPs should not be subjected to originating
16 access charges for ESP-bound traffic.⁶ Instead, the FCC has given ESPs and ISPs the option of
17 acting as end users and subscribing to flat-rated business lines and other local end user services.⁷

18 The Telecommunications Act of 1996 (the “Act”) codified the FCC’s distinction between
19 “basic” and “enhanced” services. The Act defined “telecommunications” as “the transmission,

20
21 ³ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d
384 (1980) (“*Computer II*”).

22 ⁴ *Id.* at 420.

23 ⁵ 47 CFR §64.702(a) states: “For the purpose of this subpart, the term enhanced service shall refer to services,
24 offered over common carrier transmission facilities used in interstate communications, which employ computer
processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s
transmitted information; provide the subscriber additional, different, or restructured information; or involve
subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.”

25 ⁶ See *IP-Enabled Services NPRM*, ¶ 25; *MTS and WATS Market Structure*, CC Docket No. 78-72 Phase I,
Memorandum Opinion and Order, 97 FCC 2d 682, 715, ¶ 83 (1983) (“*MTS/WATS Market Structure Order*”);
26 *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, CC Mp/ 87-215, Order,
3 FCC Rcd 2631, 2633, ¶ 17 (1988) (“*ESP Exemption Order*”).

⁷ See, e.g., *MTS/WATS Market Structure Order*, ¶ 77.

1 between or among points specified by the user, of information of the user's choosing, without
2 change in the form or content of the information as sent and received.”⁸ In contrast, “information
3 service” was defined as:

4 [T]he offering of a capability for generating, acquiring, storing,
5 transforming, processing, retrieving, utilizing, or making available
6 information via telecommunications, and includes electronic
7 publishing, but does not include any use of any such capability for
8 the management, control, or operation of a telecommunications
9 network or the management of a telecommunications service.⁹

10 47 U.S.C. § 153(20).

11 In a 1998 report to Congress regarding universal service (the “*Stevens Report*”), the FCC
12 explained that the new terms Congress had adopted to describe different types of
13 communications services were based on the same distinction between “basic” and “enhanced”
14 services.¹⁰

15 Based upon the foregoing, it is clear that this Commission does not, and should not,
16 endeavor to impose regulation on VoIP providers, especially the subset of those providers that
17 also happen to provide telecommunications service.

18 **B. The Reporting Requirements Embodied By the Survey Constitute**
19 **Regulation and are Therefore Unlawful**

20 The reporting requirements in the survey clearly constitute regulation. Inasmuch as those
21 reporting requirements include VoIP, they impose regulatory burdens on a service outside the
22 Commission's jurisdiction. They are therefore inconsistent with Oregon law, federal law, and
23 this Commission's previous treatment of VoIP services.

24 Specifically, ORS 756.075 limits the Commission's right of entry to examine records to
25 instances “reasonably required in the administration of ORS chapter 756, 757, 758 or 759,” and

26 ⁸ Telecommunications Act of 1996, Pub. L. No 104-104, 110 Stat. 56, 47 U.S.C. §153, ¶43.

⁹ *Id.* at 20.

¹⁰ *In re Federal-State Joint Board on Universal Service*, CC Docket No. 906-45, Report to Congress, 13 FCC Rcd. ¶ 21, at 11511 (1998) (“*Stevens Report*”).

1 such information is not to be used, “for any purpose inconsistent with any statute administered
2 by the commission or to make a disclosure thereof for other than regulatory purposes.” ORS
3 756.105 requires telecommunications utilities to provide all information “required by the
4 Commission to carry into effect the provisions of ORS chapters 756, 757, 758 and 759...”
5 Because VoIP is outside the Commission’s regulatory purview, any actions that constitute
6 regulation of VoIP fall outside the Commission’s broad, but nevertheless statutorily limited,
7 powers to gather information.

8 It is true that there are some circumstances in which information regarding a utility’s
9 unregulated business dealings can be relevant to the conduct of its regulated business. For
10 instance, utilities commissions have, in the past, examined the books and records of incumbent
11 LECs engaged in unregulated businesses, such as telephone directories and real estate. These
12 investigations can be relevant to determine whether a rate-regulated utility is engaged in cross-
13 subsidization or similar behavior that may impact end user rates. These situations are inapposite
14 to the issues raised in the present docket. In this docket, the Survey seeks to gather information
15 on an *unregulated* business solely for the purpose of housing data on that unregulated business.¹¹
16 The Commission lacks jurisdiction to conduct such a review of businesses beyond its regulatory
17 reach.

18 **II. INFORMATION REGARDING VoIP DEPLOYMENT IS IRRELEVANT TO**
19 **THE ISSUES IN THIS DOCKET**

20 Perhaps a more important question than whether the Commission has authority to gather
21 sensitive VoIP deployment data is how this data could possibly be relevant to this docket. In this
22 docket, Qwest seeks deregulation of its business basic local exchange services. Even if one were
23 to believe that VoIP deployment could be an indicator of effective competition in the market for
24

25 ¹¹ Perhaps an argument could be made that VoIP deployment is of interest, in some extremely tangential way, as the
26 Commission considers the deregulation of competitive telecommunications services. However, for the reasons set
forth below, the inherent limitations in the Commission’s ability to gather this data make it logically impossible for
the information to be used for this purpose.

1 these services (a belief that is unlikely to be supported by any real data), this concept is a double-
2 edged sword: the VoIP market is undeniably open to all carriers, including Qwest, which has in
3 fact entered it aggressively. To the extent Qwest truly believes that VoIP is a substitutable
4 product for business basic exchange service today, it would not bother with deregulation but
5 would instead focus its efforts on entering the VoIP market. Because Qwest is not excluded
6 from the VoIP market by the current regulatory regime, any potential overlap between VoIP and
7 basic exchange markets is irrelevant to the inquiry in this docket.

8 Furthermore, the fact that some end users may be electing to purchase VoIP service is not
9 relevant to the core inquiry in this docket, which put simply is: what level of regulation, if any, is
10 appropriate to protect end users of business basic exchange service? It is undisputed that the vast
11 majority of business telecommunications consumers continue to purchase basic exchange service
12 rather than VoIP. If VoIP has not become relevant to those consumers, the Commission cannot
13 consider it relevant either if it is to reach a result in this docket that has any practical
14 significance.

15 **III. EVEN IF THE COMMISSION WERE TO GATHER INFORMATION FROM**
16 **CERTIFICATED CARRIERS, THE INFORMATION GATHERED WOULD**
17 **BE INCOMPLETE AND THEREFORE USELESS IN THIS DOCKET**

18 While the Commission may be successful in forcing certain VoIP providers that also
19 happen to be subject to the Commission's jurisdiction to provide data, the vast majority of VoIP
20 providers in the market are not parties to this docket and will not provide responsive information.
21 As a result, the Commission will get incomplete and useless data in response to the Survey.

22 As the Commission is no doubt aware, there are hundreds, if not thousands of companies
23 providing VoIP service. Most of these companies have never sought authority to provide
24 telecommunications service in Oregon and are undeniably beyond the scope of the Survey.¹²
25

26 ¹² A representative list of such companies: Vonage, Speakeasy, Skype, Multitech, ECR, Packet8, BMG, MERA, Fractalcom, HControl, Callevryone.com, Icenet, and Xatek.

1 It is impossible to know how many of these companies are providing service in Oregon, let alone
2 the quantity and nature of customers they may be serving.

3 This gap in the Commission's ability to gather information makes any information that
4 may be gathered completely useless. Without some method of determining some key baseline
5 facts about the VoIP market (an impossible task), any information gathered by the Commission
6 cannot even be used as sample data. This situation is analogous to polling methodology:
7 pollsters use scientific methods, in combination with solid demographic data, to lend meaning to
8 information gathered from a sample group. Without knowing anything about the group they are
9 sampling (such as its size, demographic makeup, etc.) any information gathered by a pollster is
10 little more than random, anecdotal information. That is essentially the situation the Commission
11 will be faced with here.

12 Worse yet, the Commission's goal in gathering the information would be to generate base
13 demographic data, not just gather sample information. An attempt to gather this information
14 through the existing Survey is analogous to counting the number of people that cross a specific
15 street in Portland, Oregon, for an hour to determine how many people live within the city limits.
16 The task and the proposed method of achieving it have absolutely no relation to each other.

17 **IV. THE COMMISSION SHOULD WEIGH THE LIMITED UTILITY OF THE**
18 **INFORMATION GATHERED AGAINST THE SEVERE BUSINESS RISKS**
19 **OF PROVIDING THE DATA**

20 As established above, the VoIP information sought by the Survey will have virtually no
21 use in this proceeding, due to both its irrelevance and the inherent unreliability of the data
22 collected. Even if this Commission were to determine it had the authority to collect this
23 information from telecommunications utilities, it should refrain from doing so as a policy matter.
24 The Commission should weigh the value of the information to be provided against the risks
borne by carriers providing the information.

25 It is bad policy to collect information just for the sake of collecting information. Unless
26 the VoIP data sought by the Survey can be put to some productive use, the Commission should

1 refrain from collecting it. In this case, Covad respectfully suggests that the Commission
2 evaluate: (1) whether there is even a theoretical possibility that the information provided will
3 have any meaning; (2) whether that data, assuming it has any meaning, has even a theoretical
4 possibility of relevance to this docket; (3) if there is a theoretical possibility of relevance, what is
5 that possibility? For instance, would data indicating there are at least 500 VoIP subscribers in
6 Oregon be relevant to the deregulation of business basic exchange service? 5000 VoIP
7 customers? 50,000? It is likely that any critical evaluation of these questions will reveal that
8 none of these questions can be answered positively.

9 On the other side of the equation are the risks involved with disclosing the requested
10 information, even under protective order. While the VoIP business may be a fledgling one, it is
11 extremely competitive. Covad has invested substantial amounts in its VoIP offerings and is not
12 at all interested in giving its competitors, including Qwest, any market intelligence. Even if the
13 Commission Staff aggregates all of the data provided, there are no guarantees that this
14 aggregation will be sufficient to protect this market data. For instance, Covad has no idea how
15 many other carriers will respond to the survey, and to what extent those carriers have been
16 successful in obtaining customers in the Oregon market. Finally, it will be virtually impossible
17 for Covad or any other carrier providing VoIP data in response to the Survey to prove that its
18 market data was used improperly. Even if substantial harm was suffered by an unlawful
19 disclosure, Covad would likely be left with no remedy.

20 While forcing carriers to sustain these risks may be in the public interest in certain
21 circumstances, Covad respectfully requests that the Commission not assume that disclosure of
22 confidential business information is always in the public interest. Instead, Covad asks the
23 Commission to determine that the limited, perhaps even non-existent, benefits of the information
24 gathered are vastly outweighed by the risks borne by carriers in providing this extremely
25 sensitive data.

1 **CONCLUSION**

2 For the reasons set forth above, Covad respectfully requests that the Commission remove
3 all instructions, questions, or supporting documentation from the Survey that refer to VoIP
4 services, or request information from telecommunications utilities regarding their provision of
5 VoIP services.

6 Respectfully submitted,

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CERTIFICATE OF SERVICE
UX 29

I hereby certify that a true and correct copy of **COMMENTS OF COVAD COMMUNICATIONS COMPANY REGARDING PROPOSED COMPETITION SURVEY** was served via U.S. Mail on the following parties on March 07, 2005:

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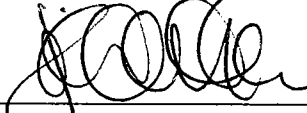
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