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Alex M. Duarte
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VIA EMAIL (E-FILING) AND U. S. MAIL

April 11, 2005

Frances Nichols-Anglin
Administrative Specialist
Oregon Public Utility Commission
P. O. Box 2148
Salem, OR 97308-2148

Re: ARB 584- Qwest's Response to Covad's Motion to Compel

Dear Ms. Nichols-Anglin:

Enclosed please find the original and five copies of Qwest's Response to Covad's Motion to Compel in this docket. I have also filed it through the Commission's E-Filing process, and have mailed this through U. S. Mail.

If you have any questions regarding this matter, please feel free to call Carla Butler at 503-242-5420 at your convenience. Thank you for your attention to this matter.

Very truly yours,

Alex M. Duarte

cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 584

In the Matter of
COVAD COMMUNICATIONS COMPANY

Petition for Arbitration of an Interconnection
Agreement with Qwest Corporation

**QWEST’S RESPONSE TO COVAD’S
MOTION TO COMPEL**

Qwest Corporation (“Qwest”) hereby submits its response to the motion to compel further responses to data requests that petitioner DIECA Communications, Inc.’s d/b/a Covad Communications Company (“Covad”) filed on March 25, 2005 in this docket.

INTRODUCTION

Covad’s motion seeks to compel answers to data requests that are unduly burdensome and designed to gather information that is not relevant to the issues in this interconnection arbitration. Covad seeks information regarding Qwest’s current and planned use of its fiber facilities in Oregon, in addition to information relating to the capabilities of individual facilities in the Oregon network. These requests are improper and irrelevant to Issue No. 1 (Copper Retirement) because they are premised on the incorrect assumption that the right of an incumbent local exchange carrier (“ILEC”) to retire a copper loop – a right the FCC confirmed in the *Triennial Review Order* (“TRO”)¹ – depends on whether the ILEC is actually using the fiber facility that replaced the copper loop to provide advanced telecommunications services. According to Covad’s theory, if an ILEC does not use the replacement fiber facility for this purpose, it cannot retire the copper loop.

¹ Report and Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Red. 16978 (FCC 2003) *aff’d in part and rev’d and vacated in part, United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

This flawed legal theory underlying Covad’s discovery requests is also the foundation for Covad’s proposed contract language relating to Issue No. 1 and copper retirement. Under Covad’s proposal, Qwest would be prohibited from retiring copper loops that it replaces with fiber facilities unless it provides Covad with an “alternative service,” at “no increase in cost,” that Covad could then use to provide digital subscriber line (“DSL”) service to its customers. All state commissions that have considered this proposal (in Colorado, Minnesota, Utah, and Washington) have ruled that it is unlawful, and thus have rejected it.² Nonetheless, Covad continues to advance the proposal, and worse, to seek highly burdensome discovery in a vain attempt to support it.

In its motion to compel, Covad apparently takes the position that if a party propounds discovery in an attempt to support a legal theory, the responding party must answer such discovery regardless of the validity or lawfulness of the underlying legal theory. Thus, even though four state commissions have already found its proposal to be unlawful, and further, that there is no support for the proposal in the Telecommunications Act of 1996 (“the Act”), any FCC order, or any court order, Covad would still have this Commission require Qwest to conduct extremely time-intensive studies and searches for detailed information on various issues. These issues include, for example, the capabilities of thousands of loops that Qwest has deployed in Oregon, the numbers of fiber loops that Qwest has deployed in every wire center in Oregon, and the number of Qwest customers in Oregon who are served by both fiber and copper loops. An

² See *In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Co.*, Colorado Commission Docket No. 04B-160T, Decision No. C04-1037, Initial Commission Decision ¶¶ 139-40 (Colo. Commission, Aug. 19, 2004) (“*Colorado Arbitration Order*”); *In the Matter of the Petition of Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b)*, Minnesota Commission Docket No. P-5692, 421/IC-04-549, Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement at 8 (Minn. Commission, March 14, 2005) (“*Minnesota Arbitration Order*”); *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Utah Commission Docket No. 04-2277-02, Arbitration Report and Order at 11 (Utah Commission, Feb. 8, 2005) (“*Utah Arbitration Order*”); *In the Matter of the Petition for Arbitration of Covad Communications Company with Qwest Corporation*, Washington Commission Docket No. UT-043045, Order No. 06, Final Order Affirming in Part, Arbitrator’s Report and Decision; Granting, In Part, Covad’s Petition for Review; Requiring Filing of Conforming Interconnection Agreement ¶ 21 (Wash. Commission, Feb. 9, 2005) (“*Washington Arbitration Order*”).

attempt to gather this information, and the other information that Covad seeks, would require Qwest to devote a significant amount of time and resources to conduct manual searches and compile data. In the end, the information that Qwest would produce would have no legal relevance to Qwest's right -- as the FCC has established -- to retire the copper facilities that it replaces with fiber. It would be wasteful and prejudicial to require Qwest to attempt to gather this irrelevant information.

In sum, the problem with Covad's discovery requests and its motion to compel is that the FCC has *not* conditioned an ILEC's right to retire copper facilities on whether it is actually "using" the replacement fiber facilities to provide advanced telecommunications services. Moreover, several of Covad's requests seek information that Qwest does not keep in the regular course of business. Responding to these requests would be highly burdensome, as Qwest would be forced to conduct special studies and to develop information that does not already exist. Nothing in the Commission's rules or in the Oregon Rules of Civil Procedure requires Qwest to undertake such efforts to respond to discovery requests. Accordingly, Qwest respectfully requests that the Commission deny Covad's motion.

BACKGROUND

On March 9, 2005, Covad served its first set of data requests on Qwest. These data requests were identical to the data requests that Covad served on Qwest in their interconnection agreement arbitrations in other states, and likewise sought irrelevant information regarding the reasons for Qwest's retirement of copper loops and whether Qwest deployed advanced services over its replacement fiber facilities.

Qwest timely responded to Covad's requests on March 23, 2005 with responses and objections that were consistent with the responses and objections that Qwest provided to Covad in the parties' other interconnection arbitrations. Upon receiving Qwest's responses, Covad

immediately sent a letter to Qwest requesting supplemental answers. (*See* Exhibit A to Covad’s Motion to Compel.) On March 25, 2005, contrary to the representation in Covad’s motion, Qwest responded by letter and renewed its objections to Covad’s improper data requests. (A copy of Qwest’s letter is attached as Exhibit A to this response.) Covad now seeks to compel answers to Data Requests Nos. 01-006, 01-007, 01-009 through 01-014, and 01-019.³

ARGUMENT

The Commission should deny Covad’s motion to compel because the data requests seek information that is irrelevant to this interconnection agreement arbitration, and that is unduly burdensome. As an initial matter, Qwest’s objections are hardly “lazy discovery objections,” as Covad calls them. Rather, Qwest’s objections are grounded in fact, and they adequately alert Covad to the reasons why Qwest believes the data requests are improper.

For example, Qwest’s answers to Request Nos. 01-006, 01-007 and 01-010 specifically cite to the *TRO*, and further explain that the information that Covad seeks is irrelevant under this FCC authority. Similarly, Qwest’s answers to Request Nos. 01-007, 01-009, 01-010, 01-011, 01-012, 01-013 and 01-014 explain that Qwest does not keep the information that Covad seeks, and that gathering the information would require Qwest to conduct special studies. Qwest further explained its objections in its March 25, 2005 letter to Covad. (*See* Exhibit A.) In that March 25th letter, Qwest specifically responded to each contention that Covad had raised, and explained in more detail the grounds for its objections. These explanations sufficiently informed Covad of the reasons for Qwest’s objections. Thus, Covad’s claim that Qwest’s answers are nothing more than general objections is simply inaccurate.

³ Although Covad’s motion includes Request No. 1-005, Qwest has provided a supplemental response to that request, and Covad’s counsel has advised Qwest that the request is no longer part of the motion.

I. Covad's data requests seek irrelevant information

Covad's data requests are designed to elicit information regarding: (1) Qwest's marketing plans for providing advanced services; (2) the technical capabilities of an unlimited number of loops that Qwest has deployed in Oregon; (3) whether Qwest ever "re-routes" or "re-uses" copper facilities when it places fiber facilities in any state within Qwest's 14-state region; (4) the amounts of certain loops that Qwest has deployed in Oregon, and the numbers of Qwest customers served by such loops; (5) a statement regarding every time in the past five years that Qwest has "relocated facilities" in Oregon as a result of a government requirement; and (6) a statement whether Qwest has "ever" extended the length of a pre-existing fiber loop and, if so, a description of where that occurred. (*See e.g.*, Data Requests Nos. 01-006, 01-007, 01-009 and 01-010.) Covad claims that these far-reaching requests are relevant to the "policy decisions" that the Commission will face in this arbitration in resolving Issue No. 1. (Covad Motion to Compel, pp. 2-3.)

Covad's argument in support of its attempt to compel further responses is simply without merit because it is based on the false presumption that Qwest's right to retire copper facilities is somehow contingent on its "motivation" for retiring copper facilities and the type of services that Qwest deploys on its fiber facilities. Contrary to Covad's assertion, however, Qwest's reasons for retiring copper feeder plant and the services that Qwest deploys over its fiber facilities have no bearing on Qwest's *right* to retire copper facilities, which is the issue in this arbitration. The FCC has made this clear, and thus has confirmed in the *TRO* an ILEC's right to retire copper facilities without obtaining regulatory approval before doing so. Specifically, in paragraph 271 of the *TRO*, the FCC ruled:

As we note below in our discussion of FTTH loops, we decline to prohibit incumbent LECs from retiring copper loops or copper subloops that they have replaced with fiber. Instead, we reiterate that our section 251(c)(5) network modification disclosure requirements (with the minor modifications also noted below in that same discussion) apply to the retirement of copper loops and copper subloops.

As this excerpt reflects, the *only* retirement condition that the FCC established is that the ILEC provide notice to CLECs of its intent to retire specific copper facilities when those facilities are being replaced by fiber loops (so that CLECs can object to the FCC if they deem appropriate). There is, however, no limitation based on the reasons why an ILEC retires copper facilities, or whether an ILEC provides advanced services over the new facilities. These factors simply do not affect Qwest's right to retire copper facilities, and thus any inquiry into them is irrelevant to this arbitration.

Covad argues that Qwest's "motivation" for retiring copper facilities and the services that Qwest deploys over its fiber facilities needs to be examined because such motivation might run afoul of the policies underlying the Act. The FCC, however, has already determined that copper retirement, regardless of motivation or subsequent services deployed, fulfills the purposes of the Act. Specifically, paragraph 243 of the *TRO* states:

Upgrading telecommunications loop plant is a central and critical component of ensuring the deployment of advanced telecommunications capability to all Americans is done on a reasonable and timely basis and, therefore, where directly implicated, our policies must encourage such modifications. Although a copper loop can support high transmission speeds and bandwidth, it can only do so subject to distance limitations and its broadband capabilities are ultimately limited by its technical characteristics. The replacement of copper loops with fiber will permit far greater and more flexible broadband capabilities.

Thus, Covad's claims that "policy considerations" make these data requests relevant are unavailing.

In other proceedings, Covad has argued that in the FCC's *Section 271 Forbearance Order*,⁴ the FCC ruled that ILECs can avoid unbundling a fiber-to-the-curb-loop ("FTTC loop") only if the ILEC is actually using the FTTC loop to provide broadband service. According to Covad, it follows as a matter of inference that an ILEC can *only* retire a copper loop that has been replaced with a fiber facility that is "actually providing" broadband service. The FCC has

⁴ Memorandum Opinion and Order, *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, 19 FCC Rcd. 21496 (FCC 2004) (*Section 271 Forbearance Order*).

said no such thing, however. Moreover, the FCC did not rule that ILECs must be using FTTC loops for broadband service in order to avoid having to unbundle them.⁵ Instead, the FCC emphasized that its objective of encouraging the deployment of fiber facilities that support broadband services is advanced by the deployment of fiber loops that are *capable* of providing broadband service. Therefore, consistent with this statement, the FCC ruled that ILECs are not required to unbundle FTTC loops.⁶

Nor is there any support for Covad's claim that the FCC established in the *Section 271 Forbearance Order* that ILECs are only permitted to retire copper loops which have been replaced with fiber facilities that are serving mass market customers. There is simply no such statement anywhere in the *TRO*. The *Section 271 Forbearance Order*, like the *TRO*, does not condition the right to retire copper facilities in a manner that Covad advocates. Consequently, any inquiry into how Qwest uses fiber facilities, or why Qwest may retire copper loops, is completely irrelevant. The information does not change or alter Qwest's right to retire copper facilities.

In addition, even if there were any support for Covad's legal theory that the manner in which Qwest uses fiber facilities dictates whether it can retire copper loops, several of the discovery requests that Covad raises in its motion have no apparent relationship to its theory. Indeed, Covad has not even attempted to explain the alleged relevance of those requests. For example, Request Nos. 01-013 and 01-014 seek information concerning whether Qwest has "relocated facilities" as a result of "government action." The request has nothing to do with Qwest's use of fiber facilities, and Covad offers no explanation in its motion why or how the request seeks relevant information. Similarly, Request No. 01-012 asks Qwest to state whether it

⁵ *Id.*

⁶ *See e.g. TRO*, ¶ 25 (noting the "competitive benefit of the BOCs' continued investment in fiber-based broadband facilities.").

has “ever deployed Fiber Loops in a manner that extends the length of pre-existing Fiber Loops,” and to list every “wire center where such deployment(s) occurred.” Again, there is no apparent relationship between Covad’s flawed theory about the relevance of Qwest’s use of fiber facilities and this information, and Covad does not attempt to explain its relevance.

Similarly, Covad has failed to explain the alleged relevance of Request No. 01-006, which seeks highly confidential information regarding Qwest’s marketing and operational plans for providing advanced services in Oregon. Under Covad’s flawed legal theory, the relevant inquiry is whether Qwest is *currently* using a fiber facility to provide advanced services. According to Covad, Qwest should be permitted to retire a copper loop only if Qwest is actually “using” a fiber facility for that purpose. Even under this theory, however, there is no legitimate reason for discovery of Qwest’s *future* plans for offering advanced services over fiber facilities in Oregon. Qwest’s future plans have no bearing on whether Qwest is actually using individual fiber loops to provide advanced services today. Covad has not provided any explanation why confidential information regarding Qwest’s plans for the future have any relevance to Issue No. 1.

Finally, Covad entirely fails to explain any relevance of Request No. 19, which asks Qwest to describe any process that it has for determining if its customers may be affected by the retirement of a copper loop. Covad’s motion is premised on the assertion that “it is important for this Commission to understand *why* Qwest retires copper feeder plant.” (Covad Motion, p. 2 (emphasis in original).) However, information about what Qwest may or may not do to determine if its customers will be affected by a copper retirement is wholly unrelated to that subject. Moreover, Qwest’s response to Request No. 01-019 specifically explains the steps Qwest takes to determine if services that it is providing may be affected by the retirement of a copper loop. Covad has not provided any explanation why the Commission should require any further response.

II. Covad's data request are overly burdensome

OAR 860-016-0030(5), which governs discovery in interconnection arbitrations, provides:

Unresolved discovery disputes will be resolved by the arbitrator upon request of a party. The arbitrator will order a party to provide information if he/she determines the requesting party has a reasonable need for the requested information and that the request is not overly burdensome.

Generally, a request for a party to create information or conduct a special study is considered unduly burdensome, and data requests that “require a party to make extensive investigations, research, or compilation or evaluation of data for the opposing party are in many circumstances improper.” Wright, Miller & Marcus, *Federal Practice and Procedure: Civil 2d*, § 2174; *see also* Oregon Public Utility Commission Discovery Guidelines, at <http://www.puc.state.or.us/hearings/gidlines/discover.htm> (“A party will not be required to develop information or prepare a study for another party, unless: (a) the capability to prepare the study is possessed uniquely by the party from whom discovery is sought (such as a run of a party’s computer program with different variables); (b) the discovery request is not unduly burdensome; and (c) the information sought has a high degree of relevance to the issues in the proceedings”).

For example, in *Hicks v. Arthur*, 159 F.R.D. 468, 470 (E.D. Pa. 1995), the plaintiffs requested information from the defendant regarding the racial composition of its workforce. Although the race of the defendant’s was not impossible to ascertain, defendant asserted that it did not keep records on its employees’ race, and thus that gathering such information would be unduly burdensome. *Id.* at 469. The court agreed with the defendant and found that because the only way to gather the requested information was to conduct an expensive and time-consuming survey of its employees, the defendant did not need to answer plaintiffs’ interrogatories. *Id.* at 470.

Here, Covad is asking Qwest to conduct an expensive survey of its facilities, and thus to gather, compile and analyze data it does not regularly keep. Accordingly, Qwest is providing with

this response a declaration from Qwest employee and witness Michael Norman, in which Mr. Norman explains that substantial portions of the information that Covad seeks are not kept in the normal course of Qwest's business. (A copy of Mr. Norman's declaration is attached as Exhibit B to this response.) This declaration demonstrates that if the information exists at all, Qwest could only collect it through time- and resource-intensive searches and special studies. (See Exhibit B.) As discussed above, the Commission's discovery rules do not require parties to conduct special studies, particularly if, as here, the information sought lacks relevance in the first place. Thus, Qwest respectfully submits the Commission should not force Qwest to incur significant expense and engage in time-consuming searches for the sake of responding to improper data requests.

CONCLUSION

For the reasons stated above, the Commission should deny Covad's motion to compel.

DATED: April 11, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

ARB 584

I hereby certify that on the 11th day of April, 2005, I served the foregoing **QWEST'S RESPONSE TO COVAD'S MOTION TO COMPEL** 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 11th day of April, 2005

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