

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**ARB 584**

In the Matter of	)	
	)	
COVAD COMMUNICATIONS COMPANY	)	COVAD COMMUNICATIONS
	)	COMPANY'S MOTION TO
Petition for Arbitration of an Interconnection	)	COMPEL QWEST
Agreement with Qwest Corporation	)	CORPORATION'S RESPONSES
	)	TO DATA REQUESTS
	)	

**CERTIFICATION PURSUANT TO OAR 860-014-0070(2)**

Pursuant to OAR 860-014-0070(2), undersigned counsel certifies that he has conferred with Qwest Corporation's counsel and has been unable to resolve matters addressed in this motion.

**MOTION TO COMPEL RESPONSES TO DATA REQUESTS**

Covad Communications Company ("Covad"), pursuant OAR 860-014-0070(2) respectfully moves the Commission for an order compelling Qwest Corporation ("Qwest") to respond to certain discovery requests propounded by Covad. As grounds for this motion, Covad states the following:

1. On March 23, 2005, undersigned counsel wrote to Qwest's attorney, John Devaney, detailing deficiencies and/or otherwise improper responses and objections by Qwest to Covad's First Set of Data Requests. *See Exhibit A.* That letter included a request that Qwest supplement its answers to specified Data Requests by March 25, 2005. Qwest has provided a supplemental response to Covad's request numbered 01-005, but has not otherwise responded to the letter.

2. The specified Data Requests that are at issue in this motion include Covad's requests numbered 01-006, 01-007, 01-009 through 01-014, and 01-019 ("Data Requests"). Those specific Data Requests and Qwest's responses to those requests are set forth below in paragraph 14.

### **I. The Relevance of Covad's Data Requests.**

3. Covad believes that the information sought pursuant to the specific Data Requests at issue herein, is directly relevant to the policy considerations to be made by the Commission in determining what, if any, copper retirement policies should be followed in the State of Oregon.

4. Covad's Data Requests seek information regarding the details of Qwest's deployment of outside plant capable of providing advanced services to Oregon's telecommunications consumers. Covad believes this information is highly relevant to the policy determinations that remain within the authority of this Commission following the FCC's *Triennial Review Order*, which made clear that state commissions remained free to adopt their own copper retirement policies. Because the FCC did make clear that § 706 of the Act (designed to promote the rapid deployment of broadband service) was the primary motivation for the FCC's new rules favoring Incumbent LECs that deploy fiber, it is important for this Commission to understand *why* Qwest retires copper feeder plant. To the extent these retirements do not involve the deployment of advanced services, any copper retirement policies implemented in this arbitration cannot, as a logical matter, conflict with the Act or the FCC's new rules.

5. In objecting to the Data Requests on the basis of relevance, Qwest is essentially relying on its over-reading of the FCC's new unbundling and copper retirement rules. Qwest believes the information is not relevant to this docket because this Commission cannot, as a legal matter, make policy determinations designed to ensure that copper retirements are performed in a

manner consistent with the Commission's goals to promote competition and broadband deployment. Because this argument fails, Qwest's objection must fail. Regardless of whether the Commission ultimately adopts Covad's proposals in this arbitration, the information Covad seeks is vital to determining whether or not Qwest's current copper retirement projects are protected by federal law, and whether they should be tolerated by this Commission if they disrupt service to end users. Without responses to the Data Requests, Covad is deprived of key information that can be used to support its proposals in this arbitration.

6. The fact that Qwest disagrees with Covad's proposals, and the legal basis for those proposals, is not a sufficient basis to object to the Data Requests. Qwest is free to argue the relative merits and lawfulness of the dueling proposals in this proceeding in its briefs, but it is not free to deprive an adverse party of its right to obtain lawful discovery because it disagrees with that party's legal theories. If that were the standard for judging objections to discovery, parties would never exchange information. As discussed below, the Commission's policy and the State of Oregon's policy concerning discovery contradict Qwest's position on this point.

## **II. Discovery Standards and Qwest's Objections to Covad's Data Requests.**

7. The Commission's policy regarding discovery, as evidenced by the Commission's Discovery Guidelines, provides: "parties shall fully disclose all material relating to the pending proceeding that bears upon or could reasonably lead to matters that bear upon, any issue in the proceeding."

8. In responding to Covad's Data Requests, Qwest has based its refusal to answer the Data Requests on one or more of the following objections:

- (a) First, Qwest objects to each Data Request on the grounds that the requests are not reasonably calculated to lead to the discovery of admissible evidence;
- (b) Second, Qwest objects to Data Request No. 01-006 on the ground that the request seeks confidential, competitively-sensitive business information; and
- (c) Third, Qwest objects to the Data Requests on the basis that the requests are unduly burdensome to the extent the requests call for a special study or the gathering of data that do not already exist.

9. Qwest's objections to the Data Requests that are at issue in this matter are without merit and are an insufficient basis to warrant Qwest's refusal to answer Covad's Data Requests.

10. The Oregon Supreme Court, long ago, recognized that general objections, like the objections that have been asserted by Qwest, are an insufficient basis for a party's refusal to respond to discovery requests. *See, Wallace v. American Toll Bridge Co.*, 124 Or. 179, 185, 264 P. 351, 353 (Or. 1928).

11. Other courts have echoed the Oregon Supreme Court's view concerning general objections to discovery requests. In *Sherman Park Cmty. Ass'n v. Wauwatosa Realty Co.*, 486 F.Supp. 838, 845 (D. Wis., 1980), the court held that objecting to interrogatories on the ground that they are not likely to lead to the discovery of relevant or admissible evidence, without more, is an insufficient basis for refusal to answer. In *IBP, Inc. v. Mercantile Bank of Topeka*, 179 F.R.D. 316, 322 (D. Kansas 1998), the court held that a party who asserts an objection and resists discovery has the burden to show specifically the applicability of any objection it asserts. In *Pulsecard, Inc. v. Discover Card Services, Inc.*, 168 F.R.D. 295, 304 (D.Kansas 1996) the court held that an objecting party has the burden of showing that responding to discovery is unduly burdensome.

12. Qwest's objections to the Data Requests, as reflected in paragraph 14, are nothing more than general objections or "lazy discovery objections" that fail to provide any explanation as to how the requested information is irrelevant to the issues pending in this matter, or as to how responding to the Data Requests would be unduly burdensome. Because Qwest's objections are nothing more than general objections that fail to show specifically the applicability of the objections to each Data Request, and because Qwest has not met its burden of showing that responding to the Data Requests would be unduly burdensome, Qwest's objections should be overruled and Qwest should be required to provide complete and meaningful responses to Covad's Data Requests.

13. With regard to Qwest's objection to Data Request No. 01-006 on the ground that the request seeks confidential, competitively-sensitive business information, Qwest's objection is disingenuous. The Commission entered a Protective Order in this matter specifically for the purpose of facilitating the exchange of confidential and competitively-sensitive business information in this proceeding. Also, both Qwest and Covad have executed non-disclosure agreements for precisely this purpose.

14. Covad's respective Data Requests and Qwest's responses to those requests, which are the subject of this motion are as follows:

**Covad 01-005.**

Please state the number of Hybrid Copper-Fiber Loops that Qwest has deployed in the State of Oregon (a) as of today; (b) during the past 6 months; (c) during the past 12 months; (d) during the past 18 months; (e) during the past 24 months; (f) during the past 36 months; and (g) before and after the Triennial Review Order became effective.

Response: Qwest objects to this request on the ground that it is not reasonably calculated to lead to the discovery of admissible evidence. In particular, the right of an ILEC to retire copper facilities, as confirmed in the Triennial Review Order, is not conditioned upon or related to the number of loops incorporating fiber optic technology that it has in service. Notwithstanding these objections, Qwest is researching the number of hybrid

loops it has deployed in Oregon and will provide that number when it is available. Information relating to the dates on which Qwest installed these loops is not readily available and could only be gathered, if at all, through a highly labor intensive special study. Accordingly, Qwest objects to Covad's request for information relating to the timing of Qwest's installation of hybrid loops on the ground that it would be unduly burdensome to attempt to gather that information.

**Covad 01-006.**

Please admit that Qwest has no specific marketing, network, and/or operational plans to provide advanced services utilizing FTTH, FTTC, or hybrid copper fiber loops in the state of Oregon. If the response is other than an unqualified admission, please provide any and all documents that support Qwest's response.

Response: Qwest objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. Specifically, the right of an ILEC to retire copper loops it has replaced with fiber, as confirmed in the Triennial Review Order, is not conditioned upon the ILEC's marketing, network, or operational plans. Qwest objects further on the ground that the request seeks confidential, competitively-sensitive business information.

**Covad 01-007.**

Please provide the number of loops deployed in Oregon that utilize Qwest-provisioned:

- (a) Packet-switching technology; and
- (b) Asynchronous Transfer Mode (ATM) technology.

Response: Qwest objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. Specifically, the right of an ILEC to retire copper loops it has replaced with fiber, as confirmed in the Triennial Review Order, is not conditioned upon whether the ILEC has deployed packet switching or ATM technology. Qwest objects further to this request to the extent that it implies that Covad may be entitled to access to packet switching or ATM technology, as the FCC has established that ILECs are not required to provide such access. In addition, Qwest objects to this request to the extent it calls for a special study or the gathering of data that do not already exist. It would be unduly burdensome for Qwest to gather such information.

**Covad 01-009.**

With respect to Qwest's deployment of Fiber Loop facilities in Oregon, please state the number of customers:

- (a) Served by those Fiber Loops, and

(b) Of those customers that are served by Fiber Loops, how many are also served by copper facilities?

Response: Qwest objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. Qwest also objects to this request on the ground that it calls for a special study, or the gathering of data that do not already exist, and thus is unduly burdensome.

**Covad 01-011.**

For each Qwest wire center in Oregon, please provide the number of fiber facilities deployed.

Response: Qwest objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. Qwest also objects to this request to the extent it calls for a special study or the gathering of data that do not already exist. To the extent the request seeks such information it is unduly burdensome.

**Covad 01-012.**

Has Qwest ever deployed Fiber Loops in a manner that extends the length of pre-existing Fiber Loops? If Qwest's previous response is "yes," please disclose the wire center where such deployment(s) occurred.

Response: Qwest objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. Qwest also objects to this request to the extent it calls for a special study or the gathering of data that do not already exist. To the extent the request seeks such information it is unduly burdensome.

**Covad 01-013.**

For the past five years in Oregon, please disclose the number of times Qwest has been required to relocate facilities as a result of government (federal, state, or any local) action.

Response: Qwest objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. Qwest also objects to this request to the extent it calls for a special study or the gathering of data that do not already exist.

**Covad 01-014.**

With respect to the disclosures in response to the above Data Request 1.13, please state the number of times Qwest retired copper loop facilities and replaced them with Fiber Loops.

Response: Qwest objects to this request on the ground that the reference to “disclosures” is vague and ambiguous. In addition, please see response to Covad 01-013.

**Covad 01-019.**

When Qwest retires a copper loop, copper feeder or a copper subloop, describe in detail:

(a) the process Qwest undertakes to determine if any of its own customers are impacted by such copper retirement; and

(b) each individual step Qwest takes to determine if any of its own customers are impacted by such copper retirement.

In connection therewith, specifically describe how Qwest determines the (c) identity; (d) address; (e) circuit identification number or unique identification number; and (f) cable and pair information for any of its customers impacted by such copper retirement.

Response: Qwest objects to this request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding this objection, Qwest states that as a general practice, it attempts to leave copper facilities in place and, when technically feasible, does not retire them. Accordingly, the data request excludes the most common scenario that occurs when Qwest deploys a fiber facility, which is that it does not retire the copper facility. If Qwest does retire a copper facility upon deploying fiber, it initially identifies the services – not the customers – that are being carried on the copper facility by viewing telephone numbers and circuit identification numbers. If local exchange services are carried on the facility, Qwest cuts those services over to the new fiber facility without using any additional identifying information. If there are other services on the facility (e.g., high-capacity private line services), a Qwest design engineer determines the best method of continuing those services. As part of this process, the design engineer extracts the information needed to redesign the circuit (e.g., the address) from a Qwest database.

15. With regard to the relevance of each Data Request and the impropriety of Qwest’s responses, Covad incorporates herein by reference the specific statements concerning each request as set forth in Exhibit A, in addition to the statements in Section II above.

16. In light of the parties’ agreement to waive the hearing in this matter, Covad does not seek a decision on this motion to compel and production of information prior to the previously scheduled hearing dates of April 7 and 8, 2005. Instead, Covad merely requests that an order be entered requiring that Qwest provide responses ten days prior to initial briefing in



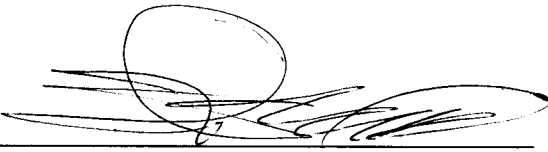
this matter, by April 19, 2005. Covad further requests leave to include relevant information disclosed in its post-hearing briefs in this matter.

WHEREFORE, Covad respectfully requests the entry of an order compelling Qwest to provide meaningful and complete responses to the Data Requests that are the subject of this Motion.

Dated this 25<sup>th</sup> day of March, 2005.

Respectfully submitted,

Covad Communications Company

By 

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Its attorneys.

## CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of **MOTION TO COMPEL RESPONSES TO DATA REQUESTS** was mailed by U.S. Mail, postage prepaid, and electronically mailed this 25<sup>th</sup> day of March 2005, to the following:

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March 23, 2005

**Via Electronic and U.S. Mail**

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Qwest Corporation  
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**Re: Oregon PUC Docket ARB 584; Qwest's Responses to Covad's First Set of Data Requests**

Dear John and George:

I am writing in connection with Qwest's Response to Covad's First Set of Data Requests in the above-referenced proceeding. For the reasons set out below, I request that Qwest supplement its answers to the specified Data Requests.

**Covad 01-005**

Covad cannot accept Qwest's objections. Covad believes Qwest's response to this request will be relevant evidence in this proceeding. As the FCC made clear in the Triennial Review Order, state utilities commissions are free to enforce their own copper retirement rules. In order to make judgments regarding the content of these rules, should they be enforced in Oregon, the Commission may indeed find the information sought by Covad not only relevant, but useful.

Qwest's objection on the grounds of burdensomeness is also not well taken. While Qwest has a large network, it has the responsibility of maintaining that network and has specific databases, work orders, feasibility studies, etc. that enable it to do so. However, in the spirit of compromise, Covad will accept a response to subsection (f) of the original question only.

Covad 01-006

Covad cannot accept Qwest's objections. Covad believes Qwest's response to this request will be relevant evidence in this proceeding. As the FCC made clear in the Triennial Review Order, state utilities commissions are free to enforce their own copper retirement rules. In order to make judgments regarding the content of these rules, should they be enforced in Oregon, the Commission may indeed find the information sought by Covad not only relevant, but useful.

Qwest's second objection, based upon the confidentiality of the information, is also not well taken. The parties have executed non-disclosure agreements for precisely this purpose.

Covad 01-007

Covad cannot accept Qwest's objections as stated. With respect to the relevance objection, see Covad's statements regarding 01-006 above. With respect to the burdensomeness objection, Covad is skeptical that Qwest is unaware of the extent to which it has deployed packet switching and ATM technology in its network. Qwest must explain in detail why it cannot gather this information.

Covad 01-009

Covad cannot accept Qwest's objections. See Covad's statements regarding 01-006 above.

Covad 01-011

Covad cannot accept Qwest's objections. See Covad's statements regarding 01-006 above. Covad is skeptical that Qwest does not have this information regarding its own network in a usable format.

Covad 01-012

Covad cannot accept Qwest's objections. See Covad's statements regarding 01-006 above. Covad is skeptical that Qwest does not have this information regarding its own network in a usable format.

Covad 01-013

Covad cannot accept Qwest's objections. See Covad's statements regarding 01-006 above. Covad is skeptical that Qwest does not have this information regarding its own network in a usable format.

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Covad 01-014

Covad cannot accept Qwest's objections. See Covad's statements regarding 01-006 above. Covad is skeptical that Qwest does not have this information regarding its own network in a usable format. In addition, the term "disclosures in response to Data Request 1.13" is not ambiguous, and clearly refers Qwest to its response to the preceding Data Request.

Covad 01-019

Covad cannot accept Qwest's objections. See Covad's statements regarding 01-006 above. In addition, the information provided by Qwest was not responsive the Data Request. The request asked detailed questions regarding how Qwest determines the impact of copper retirements on their own customers, and how they identify those customers. The information provided refers only to Qwest's activity after such identification process is undertaken.

The dispute regarding Qwest's refusal to respond to these data requests is not new. Accordingly, a short period to respond to this letter seems appropriate. Please indicate by electronic mail on or before 12:00 pm Mountain Time, on March 25, 2005 whether Qwest intends to provide supplemental information. If Qwest so intends, such communication should state, with specificity, what supplemental information will be provided.

Should you have any questions, please contact me directly.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew R. Newell", with a large, sweeping flourish underneath.

Andrew R. Newell  
Counsel for Covad

ARN/jk