

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

ARB 584

In the Matter of)	
)	
COVAD COMMUNICATIONS)	RULING AND REPORT
COMPANY)	
)	
Petition for Arbitration of an Interconnection)	
Agreement with Qwest Corporation.)	

DISPOSITION: MOTION TO COMPEL GRANTED IN PART AND DENIED IN PART; COUNSEL ADMITTED *PRO HAC VICE*; PROCEDURES ESTABLISHED; SCHEDULE REVISED

On March 25, 2005, Covad Communications Company (Covad) filed a Motion to Compel Qwest Corporation’s Response to Data Requests (Motion to Compel). On April 12, 2005, Qwest Corporation (Qwest) filed a Response to Covad’s Motion to Compel (Qwest Response). On April 13, 2005, a procedural telephone conference was held, at which time Andrew Newell and Gregory Diamond, counsel for Covad, and John Devaney, counsel for Qwest, were all admitted *pro hac vice*, without objection, and entered appearances in this proceeding.

The parties disagree as to the appropriate language for Section 9.1.15 of the Interconnection Agreement (ICA) currently being negotiated between them with respect to the retirement of copper facilities (Issue 1). Covad proposes additional language, 9.1.15.1 and 9.1.15.1.1, setting forth required action by Qwest when it proposes to retire copper feeder for loops serving Covad customers.¹

Covad made several data requests upon Qwest, to which Qwest did not fully respond. In the resulting Motion to Compel, Covad asserts that the information sought:

...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. 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

¹ See Oregon Updated Joint Disputed Issues List (Joint Issues Matrix) filed April 6, 2005.

determinations that remain within the authority of this Commission.... [I]t is important for this Commission to understand *why* Qwest retires copper feeder plant.²

Qwest's Response, filed April 11, 2005, argues that the information requested is irrelevant to Issue 1 because its premise is a faulty legal theory and that Covad erroneously believes that any discovery may be had in support of its theory.³ "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."⁴ Qwest also notes that the information requested is not kept in the ordinary course of business and would require the conduct of special studies to develop.⁵

OAR 860-016-0030(5) provides as follows:

Formal discovery procedures will be allowed only to the extent deemed necessary by the arbitrator. Parties will be required to cooperate in good faith in voluntary, prompt, and informal exchanges of information relevant to the matter. Unresolved discover 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.

The above-noted standard differs substantially from that set forth in OAR 860-014-0070 insofar as discovery is "*allowed* only to the extent deemed necessary," while, in a hearing, data requests are "*subject to limitations* imposed by the Commission or Administrative Law Judge." The plain meaning of the difference in the language is reflected in its effect: in a hearing, data requests are encouraged, whereas in an arbitration, the opposite is true: data requests are permitted only where necessary to analyze and decide the issues presented.

The limitation on the use of data requests in arbitrations is further supported by the fact that OAR 860-016-0030(5) requires, in addition to being necessary to decide the issue, that the request not be overly burdensome. OAR 860-014-0070 contains no such limitation. Thus, the ALJ does not need to make findings as to the validity of Covad's interpretation of the relevant sections of the FCC's Triennial Review Order (TRO)⁶ in order to rule on the Motion to Compel. Rather, the ALJ needs only to determine whether the information sought is necessary to decide the issue and whether the request is overly burdensome.

² Motion to Compel, p.2, *emphasis in text*.

³ Qwest Response, pp. 1-2.

⁴ *Id.*, p. 3, *emphasis in text*.

⁵ *Id.*

⁶ Report and Order, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (FCC 2003) *affirmed in part and reversed and vacated in part, United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

The 9.1.15, 9.1.15.1 and 9.1.15.1.1 language proposed by Covad essentially imposes the following requirements on Qwest:

1. When Qwest decides to retire copper plant, the notice it sends includes the date, location, affected customer addresses and the old and new cable media, including transmission characteristics, circuit ID information and cable and pair information.
2. Qwest cannot retire copper plant serving Covad customers without first provisioning an alternative service over an available compatible facility that doesn't degrade or increase the cost of the service.

The Covad Data Requests to which Qwest has refused to respond essentially ask for the following:

1. The number of Hybrid Copper-Fiber Loops deployed by Qwest over 6-month increments during the past three years and since the effective date of the TRO.
2. Qwest's marketing, network and operational plans for advanced Fiber-to-the-home and Fiber-to-the-curb based services.
3. The number of deployed loops in Oregon using packet-switching and Asynchronous Transfer Mode technology.
4. The number of customers served by fiber loops and, of those, the number served by copper facilities as well.
5. The number of fiber facilities employed by wire center.
6. Any events where fiber loops have extended the length of preexisting fiber loops.
7. The number of times during the past five years that government action has required Qwest to relocate facilities. The number of times that government-mandated relocation of facilities resulted in changing out copper for fiber facilities.
8. A detailed description of Qwest's processes to determine the impact of copper loop retirement on its own customers, including the individual steps that it takes.

A review of the data requests subject to Motion to Compel leads to the conclusion that only Data Request Covad 01-019 is relevant to the Covad 9.1.15, 9.1.15.1 and 9.1.15.1.1 proposed language. It is also the only request which I find not to be overly burdensome.

RULING

Qwest shall thus be required to respond to only the following data request:

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.”

The dates for submission of initial and reply briefs shall remain unchanged.

The date for issuance of the Arbitrator’s Decision shall be June 29, 2005.

Dated at Salem, Oregon, this 14th day of April, 2005.

Allan J. Arlow, Arbitrator