

**ORIGINAL**



BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

28

**MIKE GLEASON**  
Chairman  
**WILLIAM A. MUNDELL**  
Commissioner  
**JEFF HATCH-MILLER**  
Commissioner  
**KRISTIN K. MAYES**  
Commissioner  
**GARY PIERCE**  
Commissioner

2007 APR 25 P 1:44  
AZ CORP COMMISSION  
DOCUMENT CONTROL

Arizona Corporation Commission  
**DOCKETED**  
APR 25 2007

DOCKETED BY	nr
-------------	----

IN THE MATTER OF THE PETITION ) Docket No. T-03632A-04-0425  
OF DIECA COMMUNICATIONS, INC., ) Docket No. T-01051B-04-0425  
D/B/A COVAD COMMUNICATIONS )  
COMPANY, FOR ARBITRATION TO )  
RESOLVE ISSUES RELATING TO AN )  
INTER-CONNECTION AGREEMENT )  
WITH QWEST CORPORATION )

**COVAD'S RESPONSE TO STAFF'S MOTION TO CONSOLIDATE DOCKETS**

DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad") submits this response to Staff's Motion To Consolidate the Phase II of this arbitration proceeding with Phase III of Qwest's UNE pricing docket:

Covad supports Staff's motion. In December, 2006, when Covad and Qwest sought Commission approval of its arbitrated interconnection agreement in this docket, they asked the Commission to defer Phase II of this proceeding ("Phase II") and further advised they would report to the Commission regarding the status of the pending appeal of the Commission's arbitration decision No. 68440 ("Arbitration Decision") within 8 months (August, 2007). However, Covad did not at that time indicate whether Phase II of this proceeding should be consolidated with Phase III of Qwest's UNE pricing docket ("Phase III") and Covad did not agree to an indefinite deferral of Phase II. Qwest now

contends in its response to staff's motion that (1) for the sake of judicial economy; and (2) because that aspect of the Arbitration Decision currently on appeal was wrongly decided, the Commission should not consolidate the two phases. Both of these arguments are without merit.

It would serve the interests of judicial economy to consolidate the phases now. At the present time, the Arbitration Decision is a valid, final and lawful order of the Commission and it has not been stayed pending the appeal. Given that, the Commission is free as a matter of law to consolidate Phase II with Phase III and establish further Phase II procedures to establish rates for those network elements Qwest is required to unbundled pursuant to 47 U.S.C. §271. The Commission may order consolidation in a manner that could take into account the pending appeal. If, as Qwest suggests, the appeal will be decided in a matter of several months, the Commission can establish a procedural schedule to allow sufficient time for the district court to issue a substantive decision on the merits. Doing so would not prejudice Covad or Qwest, would be consistent with their initial request to defer Phase II and would not require the parties to expend resources they might not otherwise should the phases not be consolidated.

However, to delay consolidation now yet allow Phase III to commence on its own may require the Commission to re-visit consolidation at a later date. If the Arbitration Decision is affirmed, staff would no doubt renew its request for consolidation. Moreover, if the Arbitration Decision is affirmed, there is every reason to expect that Qwest would appeal that decision to the court of appeals, at which time Qwest may once again claim that for the sake of judicial economy the phases should not be consolidated. The Commission should not be repeatedly confronted with the question of whether to

place a Phase II proceeding on hold or allow it to proceed at each step of the appeal, the outcome of which none of the parties can predict.

Qwest also argues that because the Commission wrongly decided the issue in the Arbitration Decision that it has since appealed, the Commission cannot consolidate Phase II and Phase III. This argument is nonsensical and Qwest cites no authority to support it. Qwest has argued since the inception of this proceeding that the Commission does not have authority to establish rates for network elements Qwest is required to unbundle pursuant to 47 U.S.C. §271. The Commission disagreed with that contention in its Arbitration Decision and, as a consequence, ordered commencement of Phase II. The mere fact that Qwest has done nothing more than continue to make the same argument in its response and to the district court is not a legal impediment to the Commission's authority to consolidate Phase II and Phase III. If making an argument would be legally sufficient to divest the Commission of its authority to control its own dockets, the Commission would get very little accomplished.

...  
...  
...  
...  
...  
...  
...  
...  
...  
...

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of April 2007.

DIECA COMMUNICATIONS, INC.

By 

Michael W. Patten  
ROSHKA DEWULF & PATTEN, PLC  
One Arizona Center  
400 East Van Buren Street, Suite 800  
Phoenix, Arizona 85004  
(602) 256-6100

and

Gregory Diamond  
Senior Counsel  
Covad Communications Company  
7901 Lowry Boulevard  
Denver, CO 80230  
(720) 670-1069

Original and 15 copies of the foregoing  
filed this 25<sup>th</sup> day of April 2007 with:

Docket Control  
Arizona Corporation Commission  
1200 West Washington Street  
Phoenix, Arizona 85007

Copy of the foregoing hand-delivered/mailed  
this 25<sup>th</sup> day of April 2007 to:

Norman G. Curtright  
Corporate Counsel  
Qwest Corporation  
20 East Thomas Road, 16<sup>th</sup> Floor  
Phoenix, Arizona 85012

Dwight Nodes  
Administrative Law Judge  
Hearing Division  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

Maureen A. Scott  
Legal Division  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

Ernest G. Johnson  
Director, Utilities Division  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

By:  \_\_\_\_\_