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May 13, 2005

Frances Nichols Anglin
Oregon Public Utility Commission
550 Capitol St., NE
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Re: ARB 584

Dear Ms. Nichols Anglin:

Enclosed for filing please find an original and (5) copies of Qwest Corporation's Reply Brief on the Merits, along with a certificate of service.

If you have any question, please do not hesitate to give me a call.

Sincerely,

Carla M. Butler

CMB:
Enclosure
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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 CORPORATION'S REPLY BRIEF ON THE MERITS**

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Qwest Corporation ("Qwest") submits this reply brief on the merits in support of its positions in this interconnection arbitration under the Telecommunications Act of 1996 ("the Act") between Qwest and Covad Communications Company ("Covad").

INTRODUCTION

As Qwest stated in its opening post-hearing brief, Qwest and Covad have been able to resolve most of their disputes through cooperative, good faith negotiations, leaving a relatively small number of disputed issues that the Commission must decide in this arbitration. As Qwest further stated in its post-hearing brief, the parties' inability to resolve these remaining issues is largely attributable to Covad's adherence to overly aggressive demands that are without legal support. Covad continues this approach to the disputed issues in its opening post-hearing brief.

The absence of legal support for Covad's positions has been demonstrated by the recent decisions in the Covad/Qwest arbitrations in Colorado, Minnesota, Washington and Utah.[1] The commissions and administrative law judges in those states have ruled for Qwest on the majority of the issues, finding that a majority of Covad's positions lack legal and evidentiary support. Thus, there is now a substantial body of decisions and recommendations by neutral decision-makers relating to each of the disputed issues before the Commission in this proceeding. For a

[1] *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 (Colo. Commission, Aug. 19, 2004) ("*Colorado 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*, Minnesota Commission Docket No. P-5692, 421/IC-04-549, Arbitrator's Report (Minn. Commission, Dec. 15, 2004) ("*Minnesota ALJ Order*") *aff'd in part 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 (Minn. Commission, March 14, 2005) ("*Minnesota 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 (Wash. Commission, Feb. 9, 2005) ("*Washington 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 (Utah Commission, Feb. 8, 2005) ("*Utah*

majority of the issues, these decisions and recommendations demonstrate forcefully the significant flaws in Covad's proposals. In the discussion that follows, Qwest further demonstrates these flaws and explains why the Commission should adopt Qwest's proposals relating to each of the disputed issues.

DISPUTED ISSUES

I. Issue 1: Retirement of Copper Facilities (Sections 9.1.15; 9.1.15.1 and 9.1.15.1.1)

A. Covad's "alternative service" proposal is unlawful

Qwest's post-hearing brief demonstrates that in the *TRO*,[2] the FCC confirmed the right of ILECs to retire copper loops that they replace with fiber facilities. (Qwest's Initial Brief on the Merits ("Qwest Br."), p. 3.) Covad's proposed ICA language would eviscerate this right by prohibiting Qwest from retiring copper unless it provides Covad with an alternative service at no increase in cost and with no degradation of service quality. Nothing in the *TRO* supports imposing this onerous condition, which conflicts directly with the Congressionally-mandated objective of encouraging the deployment of the fiber facilities that support advanced telecommunications services. It is not surprising, therefore, that in the four Qwest/Covad arbitrations in which this Covad demand has already been considered, Covad's demand has been rejected outright. (*See* Qwest Br., p. 4.)

Covad attempts to support its demand by asserting that the *TRO* prohibits an ILEC from retiring a copper loop unless it continues to provide access to the loop facilities required under the FCC's rules. (Covad's Initial Brief ("Covad Br."), p. 6.) This assertion rests on a distorted

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Arbitration Order"). Qwest provided copies of these orders with its initial brief.

[2] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (FCC 2003) ("*Triennial Review Order*" or "*TRO*"), *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) ("*USTA II*").

reading of the *TRO*. In the *TRO*, the FCC ruled that ILECs must provide notice of planned copper retirements that involve replacements with fiber-to-the-home ("FTTH") loops, while confirming the right of ILECs to retire copper. *TRO*, ¶ 282. At the same time, the FCC established a process for CLECs to object to planned retirements, and established that CLEC objections will be deemed denied "[u]nless the copper retirement scenario suggests that competition will be denied access to the loop facilities required under our rules…." *Id.*

Covad turns this ruling on its head by arguing that ILECs somehow cannot retire copper facilities without providing an alternative service. As the discussion above shows, that is not what the FCC ruled. Instead, the FCC confirmed an ILEC's right to retire copper facilities and gave CLECs limited rights to object to such retirements. Contrary to Covad's argument, the FCC's reference to "access to the loop facilities required under our rules," refers only to an ILEC's continuing obligation to provide access to the narrowband portion of a loop. *Id*., ¶¶ 296-297. Qwest complies fully with that requirement by ensuring CLEC access to that portion of a loop, including access to a voice grade channel over the new, replacement loop facilities.

In its brief, Covad concedes that its "alternative service" requirement cannot apply to copper retirements involving FTTH replacements. (Covad Br., p. 7.) Covad's position is that its proposal applies only to the circumstance in which Qwest retires copper feeder and replaces it with fiber feeder, resulting in a hybrid copper/fiber loop. (*Id.*, p. 5.) However, as Qwest discussed in its opening brief, the retirement rights that the FCC granted for replacements of copper feeder with fiber feeder are even broader than those for replacements of copper loops with FTTH loops. (Qwest Br., p. 5 and fn. 6.) There is thus no legal support whatsoever in the *TRO* for application of Covad's alternative service requirement to retirements involving fiber feeder replacements. Further, it is apparent that Covad's new proposal is, in reality, an attempt

to gain unbundled access to hybrid loops, as evidenced by its reference to these loops and its glaring failure to identify any specific service that would be an "alternative" to these loops. (*See, e.g.,* Covad Br., p. 5.) In the *TRO*, the FCC ruled unequivocally that ILECs are not required to provide unbundled access to the broadband capabilities of hybrid loops, confirming again that Covad's proposal conflicts directly with the *TRO*. *TRO*, ¶ 288.

Also, as Qwest's witness Karen Stewart explained, Covad's proposal actually frustrates the goal of promoting the deployment of advanced telecommunications infrastructure and consumer choice because it reduces Qwest's economic incentive and ability to deploy fiber facilities. (Qwest/4, Stewart/2:19-3:2.) A requirement to provide an alternative service for which Qwest may not recover its costs clearly would create an economic disincentive for deploying fiber. (Qwest/4, Stewart/12:1-14.) Thus, permitting Qwest to retire copper facilities, and thereby providing incentive for it to deploy fiber, will affirmatively advance the policy goals of promoting advanced telecommunications deployment, as it will make advanced telecommunications services more widely available to Oregon consumers, and will increase consumer choice by enabling Qwest to compete more effectively with cable companies. Accordingly, it is Covad's proposal, not Qwest's, that is inconsistent with public policy.

There also is no merit to Covad's contention that Oregon law requires Qwest to provide continued access to facilities and services that would permit Covad to still provide DSL service. The FCC expressly rejected precisely this type of demand in the *TRO* in confirming the right of ILECs to retire copper facilities. *TRO*, ¶ 281 and fn. 822. To the extent Covad is suggesting that Oregon law should be interpreted to prevent Qwest from retiring copper facilities, that interpretation would be inconsistent with federal law, and thus impermissible. (*See* Qwest Br., p. 22 (the limited authority of states under the Act must be exercised consistently with federal law,

including FCC orders and rules).)[3] In any case, Covad has other options for continuing to provide DSL to its customers in the unlikely event that Qwest retires a copper loop and affects service to a Covad customer. (Qwest/9, Stewart/12:17-18 and 17:3-17.)

Covad argues that Qwest's concerns about the lack of cost recovery that would result from the "alternative service" requirement are unfounded. While making this argument, however, Covad does not dispute that its proposal would prohibit Qwest from charging anything above a monthly recurring rate of $4.55 – the current recurring rate for line sharing in Oregon – regardless of the actual cost of the alternative service. (*See* Qwest/9, Stewart/13:5-8.) This fact alone demonstrates the unlawfulness of Covad's proposal, which would inevitably prevent Qwest from recovering its costs in violation of the Act's requirement that ILECs recover the costs they incur to provide unbundled network elements and interconnection. *See* 47 U.S.C. § 252(d)(1).

Covad also proposes new language that would limit Qwest's "alternative service" obligation to situations where Qwest is retiring copper feeder "over which Qwest itself could provide a retail DSL service." (Covad Br., p. 5.) This proposal is fundamentally flawed. First, Covad's focus on loops over which Qwest "could provide a retail DSL service" strongly suggests that it is ultimately seeking access to the broadband capabilities of hybrid loops. However, in paragraphs 288 and 290 of the *TRO*, the FCC ruled that ILECs are not required to unbundle these capabilities, specifically rejecting Covad's arguments for such unbundling:

> We decline to require incumbent LECs to unbundle the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide

[3] Covad asserts (at pages 8-9 of its brief) that a Commission order requiring "NAC unbundling" or loop unbundling implicitly requires Qwest to continue providing access to its copper loops for CLECs to continue providing DSL service over them. However, nothing in the Commission order that Covad refers to imposes that obligation. Moreover, under Covad's flawed interpretation of the order, Qwest would have no right to retire copper loops. That result would conflict directly with federal law, as established by the FCC in the *TRO*, and is thus impermissible.

> broadband services to the mass market. AT&T, WorldCom, Covad, and others urge the Commission to extend our unbundling requirements to the packet-based and fiber optic portions of incumbent LEC hybrid loops. We conclude, however, that applying section 251(c) unbundling obligations to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706. The rules we adopt herein do not require incumbent LECs to unbundle any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information. Moreover, the rules we adopt herein do not require incumbent LECs to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops, such as the xDSL-capable line cards installed in DLC systems or equipment used to provide passive optical networking (PON) capabilities to the mass market.

Second, even if the FCC had not expressly disallowed such access, Covad's proposal would not, contrary to its claims, result in parity with Qwest. Covad's use of the words "loops over which Qwest itself could provide a DSL service" reveals that Covad is apparently seeking access to the next-generation equipment of any Qwest loop over which Qwest *could* provide DSL service to its own customers, not only access to the equipment on loops that Qwest is actually using to provide DSL service. Accordingly, Covad is not seeking "parity" between its DSL customers and Qwest's customers; instead, it is seeking to require Qwest to provide Covad with access to next-generation equipment, even in situations where Qwest's own customers are not served by such equipment. (Qwest/9, Stewart/10:17-12:12.)

Finally, Covad claims that if Qwest is permitted to retire copper loops, Covad's investment of "well over a billion dollars" in its DSL network could become stranded. (Covad Br., p. 9.) That is a gross exaggeration. Covad has expressly acknowledged that, at most, only a "handful" of its Oregon customers could ever be affected by Qwest's retirement of a copper loop and that, as of today, none of its customers anywhere has ever been affected by Qwest's retirement of a copper retirement. (Covad/100, Zulevic/20:1-7; Arizona Hearing Tr., Vol. 1, at pp. 27-28). Covad's claim that its network investment is at risk is thus factually unsupported and legally irrelevant.

B. The notice of copper retirements that Qwest has agreed to provide complies fully with the FCC's notice requirements

Covad asserts that Qwest's notices of copper retirements will not meet the requirements that the FCC established for notifying CLECs of changes in an ILEC's network. (Covad Br., pp. 15-16.) This assertion, however, ignores that in its proposed ICA language, Qwest expressly commits to providing the notice required by the FCC's rules.

Covad's real desire appears to be a requirement that Qwest notify Covad of the specific Covad customers that could be affected by the retirement of a copper loop. However, Qwest does not know the services that Covad is providing to individual customers and, accordingly, does not have the information needed to determine the "effect" of copper retirements on individual customers. (*See* Qwest Br., p. 12.)

Equally significant, Qwest already provides Covad with the information and tools it needs to determine for itself whether its customers may be affected by a copper retirement. By using Qwest's database known as the "raw loop data tool," Covad can determine the addresses of the customers within a specific geographic area – or "distribution area" – in which Qwest is retiring a copper loop, and then compare those addresses to its customer records to determine whether any of its end-user customers will be affected by the retirement. Qwest developed this tool in response to CLEC demands during the Section 271 proceedings at an expense in the millions of dollars. Having invested in the raw loop data tool at the behest of CLECs, Qwest reasonably believes that CLECs should use it. The Minnesota Commission concurs with Qwest on this issue and, in an order it affirmed orally just two days ago over Covad's objection, it has endorsed the use of the raw loop data tool by Covad to determine which of its customers will be affected by copper retirement. *Minnesota Arbitration Order* at 10. As the Washington, Minnesota and Utah Commissions ruled, the burden of making these customer-specific

determinations should not be shifted to Qwest – which does not have the information specific to Covad's individual customers – from Covad. (*See* Qwest Br., pp. 12-13.)

II. Issue 2: Unified Agreement/Defining Unbundled Network Elements (Sections 4.0 (Definition Of "Unbundled Network Element"), 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1, 9.21.2)

Before turning to the merits of Issue 2, Qwest notes the parties have resolved a sub-part of this issue that Covad discusses in its brief. Specifically, the parties have reached agreement on the issue of Covad's access to "line splitting" (discussed at pages 32-36 of Covad's brief). Thus, as Covad will also confirm, there is no need for the Commission to address this issue.

As Qwest demonstrated in its opening brief, the Act's "impairment" standard imposes important limitations on ILECs' unbundling obligations, as has been forcefully demonstrated by the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) ("*Iowa Utilities Board*") and the D.C. Circuit's decisions in *USTA I* and *USTA II* invalidating three of the FCC's attempts at establishing lawful unbundling rules. In this case, the unbundling obligations that Covad would have the Commission impose on Qwest ignore entirely these critical limitations, and are based on the legally flawed assumption that a state commission may require unbundling under state law that the FCC has expressly rejected. As shown by its opening brief, Covad does not recognize the Act's important limits on state law authority – namely, that such authority must be exercised consistently with Section 251 and the federal unbundling regime that the FCC established. Moreover, Covad is asking this Commission to order broad unbundling of network elements without having provided any evidence that it will be impaired in the absence of access to those elements. Covad's broad unbundling requests cannot be permitted without evidence of impairment, and there is no such evidence before the Commission.

Covad also improperly asks this Commission to require unbundling and set rates under Section 271, ignoring that states have no decision-making authority under that section. As discussed below, the FCC has exclusive jurisdiction to determine the network elements that BOCs are required to provide under Section 271, and to determine the rates that apply to those elements. The FCC cannot – and has not – delegated that authority to state commissions. Covad offers several strained readings of the Act to support its claim that states have unbundling authority under Section 271, but its interpretations are wrong, and certainly do not come close to establishing that Congress has expressly conferred Section 271 decision-making authority on state commissions.

The Washington Commission ruled correctly when it recently stated:

> [T]his Commission has no authority under Section 251 or Section 271 of the Act to require Qwest to include Section 271 elements in an interconnection agreement. . . . [and] any unbundling requirement based on state law would likely be preempted as inconsistent with federal law, regardless of the method the state used to require the element. *Washington Arbitration Order*, ¶ 37.

The Commission should rule likewise and find that Covad's requests are improper and without legal support.

A. It is improper to include terms relating to network elements provided under Section 271 in an interconnection agreement

As Qwest discussed in its initial brief, there is no statutory or other legal basis for including terms and conditions relating to network elements provided under Section 271 in a Section 252 interconnection agreement. (Qwest Br., pp. 24-26.) Indeed, the FCC has defined the "interconnection agreements" that must be submitted to state commissions for approval as "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) . . ."[4]

[4] Memorandum Opinion and Order, *Qwest Communications Int'l Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, FCC 02-276, WC Docket No. 02-89, ¶ 8, fn. 26 (Oct. 4, 2002) ("*Declaratory Order*").

Thus, the term "interconnection agreement" encompasses only terms and conditions relating to network elements and other services provided under Section 251, and does not include terms and conditions relating to elements provided under Section 271. As the Minnesota ALJ stated in a ruling that the Minnesota Commission recently upheld, "there is no legal authority in the Act, the *TRO*, or in state law that would require the inclusion of section 271 terms in the interconnection agreement, over Qwest's objection." *Minnesota ALJ Order*, ¶ 46.

Accordingly, for these reasons and those set forth in Qwest's initial brief, Covad's attempt to include Section 271 network elements in the ICA is improper and thus the Commission should reject it. The terms and conditions relating to offerings under Section 271 are properly addressed in commercial agreements and tariffs, not ICAs. The Commission should reject Covad's proposals for the following ICA sections: Section 4.0 definition of "UNE," Sections 9.1.1; 9.1.5; 9.2.1.4; 9.3.1.1; 9.3.1.2; 9.3.2.2; 9.3.2.2.1; and 9.6. For each of these sections, the Commission should adopt Qwest's proposed language.

B. Covad has provided no legal support for its claim that state commissions have decision-making authority under Section 271 and can impose unbundling obligations under that provision of the Act

The Act does not give state commissions any substantive decision-making role in the administration and implementation of Section 271. Section 271(d)(3) expressly confers upon the FCC, not state commissions, the authority to determine if BOCs have complied with the substantive provisions of Section 271, including the 271 checklist provisions upon which Covad bases its arbitration demands for 271 unbundling. State commissions have only a non-substantive, consulting role in that determination. Accordingly, even if it were proper to address Section 271 issues in the context of a Section 252 arbitration, the Commission still would not have authority to impose affirmative obligations under that section. (*See* Qwest Br., pp. 24-26.)

Significantly, in its discussion of this issue, Covad fails to cite any provision or language in the Act giving a state commission decision-making authority under Section 271. While Section 271 requires the FCC to "consult" with a state commission in reviewing a BOC's compliance with that section in connection with applications for authority to provide long distance service, there is an obvious difference between Congress's decision to give states *consulting authority* relating to BOCs' Section 271 applications and the complete absence of any Congressional delegation of *decision-making authority* under that provision.

As the D.C. Circuit made emphatically clear in *USTA II*, the only authority that state commissions have under the Act is that which Congress has clearly and expressly delegated to them. *USTA II*, 359 F.3d at 565-568. Under the Act, Congress and the FCC took over the regulation of local telephone service, leaving the states only with authority that Congress expressly granted. The Seventh Circuit recently described this regulatory regime:

> In the Act, Congress entered what was primarily a state system of regulation of local telephone service and created a comprehensive federal scheme of telecommunications regulation administered by the Federal Communications Commission (FCC). While the state utility commissions were given a role in carrying out the Act, Congress "unquestionably" took "regulation of local telecommunications competition away from the State" on all "matters addressed by the 1996 Act;" it required that the participation of the state commissions in the new federal regime be guided by federal-agency regulations.

Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Comm'n, 359 F.3d 493, 494 (7th Cir. 2004) (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378, fn. 6 (1999)).

Under this regime, states are not permitted to regulate local telecommunications competition "except by the express leave of Congress." *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 510 (3rd Cir. 2001) (internal citations omitted). As the Third Circuit described, "[b]ecause Congress validly terminated the states' role in regulating local telephone competition and, having done so, then permitted the states to resume a role in

that process, the resumption of that role by a state is a congressionally bestowed gratuity." *Id.* Thus, the court explained, a "state commission's authority to regulate comes from Section 252(b) and (e), not from its own sovereign authority." *Id.* Here, there has been no delegation of 271 decision-making authority to state commissions, and this Commission therefore has no authority to impose the Section 271 unbundling obligations that Covad seeks to impose through its proposed ICA unbundling language.

As Qwest discussed in its initial brief, in *Indiana Bell Telephone Company v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 (S.D. Ind., March 11, 2003), a federal district court held that the consulting role given to states under Section 271 does not give a state commission substantive decision-making authority. (Qwest Br., p. 24.) *Indiana Bell* confirms the absence of a decision-making role for states under Section 271. The decision contrasts the substantive role that states have in administering Sections 251 and 252 with the "investigatory" and "consulting" role they have under Section 271. *Indiana Bell Telephone Company*, 2003 WL 1903363 at *11. In recognizing the different roles that Congress assigned states under these distinct provisions of the Act, the court noted that the Act does not include a "savings clause" that preserves the application of state law in the administration of Section 271. *Id*. By contrast, the court observed, Congress included a savings clause – Section 261(b) – that preserves the application of "consistent" state regulations in the administration of Sections 251 and 252. *Id.* As the court found, this contrast confirms further that Congress did not intend a substantive role for states in the administration of Section 271. *Id.*

Further, Covad's suggestion that a state legislature may grant to its agencies the authority to administer federal law that Congress has withheld is frivolous. (Covad Br., p. 25.) A state legislature may plainly confer authority to adopt and enforce state law if Congress has not

preempted the law's subject. It may also permit the state's administrative agencies to exercise any authority that Congress has conferred upon them. However, state legislatures may not confer authority to administer federal law that Congress has withheld. Covad cites no decision from any court or agency, federal or state, holding otherwise.

The Maine Commission order that Covad cites in its brief (Covad Br., p. 22) and the New Hampshire Commission order that Covad has cited in other briefs[5] are also plainly distinguishable and do not support Covad's unbundling demands under Section 271. As the Minnesota ALJ found in the Qwest/Covad arbitration in that state, the *Verizon-Maine* decision "is distinguishable on its facts as it appears to be premised on enforcement of a specific commitment that Verizon made to the Maine Commission during 271 proceedings to include certain elements in its state wholesale tariff." *Minnesota ALJ Order*, ¶ 46.

Indeed, *Verizon-Maine* did not involve an interconnection arbitration under Section 252, and thus did not present the issue presented here – whether a state commission serving as an arbitrator in a Section 252 arbitration has authority to impose Section 271 unbundling in an ICA. Instead, the issue in that proceeding was whether the Maine Commission could require Verizon to honor unbundling commitments it made during the Section 271 approval process by ordering it to amend a wholesale tariff to include network elements that the FCC had de-listed from Section 251 in the *TRO*. The Commission ruled that it had the authority to require Verizon to amend the tariff because, as a condition to receiving approval for entry into the Maine long distance market, Verizon had specifically agreed to include its unbundling obligations under both Section 251 and 271 in the tariff: "We find, upon consideration of each of these factors, that we do have authority to enforce Verizon's commitment to file a wholesale tariff with us that

[5] *Proposed Revisions to Tariff NHPUC No. 84*, pp. 38-39, Docket DT 03-201, 04-176, Order No. 24,442

includes both its section 251 and 271 obligations." *Maine Order*, at 12. Significantly, the Commission also recognized that it does not have authority independent of the FCC to determine the scope of Section 271 obligations: "This is not to suggest that the Commission has the independent authority to define the scope of [Section 271] obligations where the FCC has clearly spoken; merely that, in light of Verizon's commitment, the Commission has an independent role in determining whether those obligations have been met." *Id.* at 14.

The New Hampshire order also involved an amendment to a Verizon state tariff, not a Section 252 interconnection arbitration. As it did in connection with the Maine Section 271 approval process, Verizon had committed to the New Hampshire Commission during the Section 271 proceeding that it would list all of its unbundling obligations in a wholesale state tariff. That commitment was integral to the New Hampshire Commission's approval of Verizon's Section 271 application. Accordingly, relying on the Maine Commission's reasoning, the New Hampshire Commission found that it has "the authority to determine whether Verizon's wholesale tariff, including any changes proposed by Verizon, remains in compliance with the obligations Verizon voluntarily undertook in exchange for the right to offer interLATA service." *Id.* at 42. In so finding, the New Hampshire Commission emphasized that it was not claiming independent authority to determine Verizon's obligations under Section 271 but, instead, was simply "performing [its] duty as the initial arbiter of disputes over whether Verizon continues to meet the specific commitments previously made to this Commission as a condition for its recommendation that Verizon receive section 271 interLATA authority." *Id.* at 42-43.

Here, unlike in the Maine and New Hampshire proceedings, Covad is specifically asking this Commission to exercise independent unbundling authority under Section 271, and not to

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(N.H. Commission, March 11, 2005).

enforce a commitment made during the Section 271 approval process. The Commission does not have that authority, and the Maine and New Hampshire orders do not suggest otherwise.

C. The Commission has no authority to establish prices for Section 271 elements

Covad asserts that the Act and the *TRO* establish the authority of state commissions to set prices for Section 271 elements. (Covad Br., pp. 23-25.) For several reasons, this argument is seriously flawed, as Qwest discusses in its initial brief. (*See* Qwest Br., pp. 26-27.)

First, the FCC was quite clear in the *TRO* that it has responsibility for setting prices for elements that BOCs provide under Section 271: "[w]hether a particular [Section 271] checklist element's rate satisfies the just and reasonable pricing standard is a fact specific inquiry that *the Commission* [*i.e.*, the FCC] will undertake in the context of a BOC's application for Section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6)." *TRO*, ¶ 664.

Second, Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by Section 271, provide no role for state commissions. Congress has conferred that authority upon the FCC and federal courts.[6] The FCC has not delegated that authority, and Congress has not permitted it to do so.

Third, the pricing authority that state commissions have under Section 252(d)(1) does not empower states to set rates for Section 271 elements. The authority granted by that provision is expressly limited to determining "the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection [251(c)(2)] . . . [and] for network elements for purposes of subsection [251(c)(3)]." 47 U.S.C. § 252(d)(1). Thus, the only network elements over which states have pricing authority are those an ILEC provides pursuant to Section 251(c)(3). Nothing

[6] *See TRO*, ¶ 664; 47 U.S.C. §§ 201(b) (authorizing the FCC to prescribe rules and regulations to carry out the Act's provisions), 205 (authorizing FCC investigation of rates for services, etc. required by the Act), 207 (authorizing FCC and federal courts to adjudicate complaints seeking damages for violations of the Act), 208(a) (authorizing FCC to adjudicate complaints alleging violations of the Act).

in the Act extends that authority to Section 271 elements, as evidenced by Covad's inability to cite any statutory provision that even remotely suggests state commissions have such authority.

Significantly, as Qwest discussed in its initial brief, the FCC recently rejected substantially the same pricing argument in its opposition to the petitions for a *writ of certiorari* that NARUC, state commissions, and certain CLECs filed with the United States Supreme Court in connection with *USTA II*. (*See* Qwest Br., pp. 26-27.) Addressing NARUC's contention that Section 252 gives state commissions exclusive authority to set rates for network elements, the FCC stated that the contention "rests on a flawed legal premise," and it explained that Section 252 limits the pricing authority of state commissions to network elements provided under section 251(c)(3).[7]

Fourth, Covad's claim that the Commission has authority to set TELRIC rates for Section 271 elements – which, of course, incorrectly assumes that state commissions have pricing authority over Section 271 elements – is directly refuted by the *TRO* and *USTA II*. In the *TRO*, the FCC ruled very clearly that any elements a BOC provides pursuant to Section 271 are to be priced based on the Section 201-202 standard that rates must not be unjust, unreasonable, or unreasonably discriminatory. *TRO*, ¶¶ 656-664. Consistent with its prior rulings in Section 271 orders, the FCC confirmed that TELRIC pricing does not apply to these network elements. *Id.* In *USTA II*, the D.C. Circuit reached the same conclusion, rejecting the CLECs' claim that it was "unreasonable for the Commission to apply a different pricing standard under Section 271," and instead stating that "we see nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment." *USTA II*, 359 F.3d at 589; *see generally id*., at 588-590.

[7] Brief for the Federal Respondents in Opposition to Petitions for Writ of Certiorari, *National Association of Regulatory Utility Commissioners v. United States Telecom Ass'n*, Supreme Court Nos. 04-12, 04-15, and 04-18 at 23 (filed Sept. 2004).

Covad also quotes from a recent Illinois Commerce Commission order, claiming that the order supports its contention this Commission should apply a forward-looking cost methodology like TELRIC to Section 271 elements. (Covad Br., p. 24.) However, that is not what the Illinois Commission ruled; Covad's partial quote from the order is misleading. In fact, the Illinois Commission concluded that, consistent with the *TRO*, Section 271 elements "should be priced at higher, non-TELRIC based rates."[8]

Accordingly, Covad has failed to demonstrate that state commissions have pricing authority over Section 271 elements, or that such elements can be priced using a TELRIC-like methodology.

D. The Act does not permit the Commission to create unbundling requirements that the FCC rejected in the TRO or that the D.C. Circuit vacated in *USTA II*

As Qwest demonstrated in its initial brief, under Section 251 of the Act, there is no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC impairment finding. (Qwest Br., p. 19.) Section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]." 47 U.S.C. § 251(c)(3). Section 251(d)(2), in turn, provides that unbundling may be required *only if the FCC determines* (A) that "access to such network elements as are proprietary in nature is necessary," and (B) that the failure to provide access to network elements "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

Congress explicitly assigned the task of applying the Section 251(d)(2) impairment test and "determining what network elements should be made available for purposes of subsection [251](c)(3)" to the FCC. 47 U.S.C. § 251(d)(2). The Supreme Court confirmed that as a precondition to unbundling, Section 251(d)(2) "requires the [Federal Communications]

[8] *Illinois Bell Telephone Co.; Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act*, Docket No. 01-0614, Order on Remand (Phase I) at 63 (Ill. Comn, Apr. 20, 2005) ("*Illinois Tariff Order*").

Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." *Iowa Utilities Board*, 525 U.S. at 391-392. And *USTA II* establishes that Congress did not allow the FCC to have state commissions perform this work on its behalf. *See USTA II*, 359 F.3d at 568. Consistent with these rulings, as Qwest discussed in its opening brief, the FCC recently ruled in the *BellSouth Declaratory Order* that state commissions are generally without authority to require ILECs to unbundle network elements that the FCC has declined to require ILECs to unbundle. (*See* Qwest Br., pp. 21-22.)

Covad responds to the legal framework established by these authorities and those described in Qwest's opening brief as if it were not there, arguing that the Act, the *TRO*, and *USTA II* do not impose any meaningful limits on the authority of state commissions to require unbundling under state law. Thus, Covad asserts that the Commission is free to require Qwest to provide network elements that the FCC declined to require ILECs unbundle based on specific findings that CLECs are not impaired without them. (Covad Br., pp. 29-31.) Covad's argument fails to recognize that the Act's savings clauses preserve independent state authority only to the extent that authority is exercised in a manner consistent with the Act. (*See* Qwest Br., 19-23.) This point was forcefully confirmed in the recent decision from the United States District Court for the District of Michigan discussed in Qwest's initial brief. (*Id.*, p. 21.)

The fundamental problem with Covad's position, as confirmed by its brief, is that it requires unbundling regardless of consistency with the Act. Covad's unbundling language is broad enough for Covad to contend that Qwest is required to provide unbundled access to OCn loops, feeder subloops, DS3 loops (in excess of two per customer location), extended unbundled dedicated interoffice transport and extended unbundled dark fiber, and other elements despite the

FCC's fact-based findings in the *TRO* that CLECs are not impaired without access to these elements.[9] As the FCC stated quite clearly in the *TRO*, the type of state law unbundling regime that Covad is proposing – one that ignores altogether FCC findings of non-impairment with respect to individual elements – "overlook[s] the specific restraints on state action taken pursuant to state law embodied in section 251(d)(3), and the general restraints on state actions found in sections 261(b) and (c) of the Act." *TRO*, ¶ 192. (Footnote omitted.) This approach to state law unbundling "ignore[s] long-standing federal preemption principles that establish a federal agency's authority to preclude state action if the agency, in adopting its federal policy, determines that state actions would thwart that policy." *Id*. As the United States Court of Appeals for the Seventh Circuit stated, "we cannot now imagine" how a state could require unbundling of an element consistently with the Act where the FCC has not found the statutory impairment test to be satisfied. *Indiana Bell Tel. Co. v. McCarty*, 362 F.3d at 395.[10]

Equally significant, any unbundling obligations imposed under state law would have to be supported by an express finding that Covad would be impaired without access to specific network elements. A finding of impairment is essential under Section 251, and any unbundling

[9] In the following paragraphs of the *TRO*, the FCC ruled that ILECs are not required to unbundle these and other elements under Section 251: ¶ 315 (OCn loops); ¶ 253 (feeder subloops); ¶ 324 (DS3 loops); ¶ 365 (extended dedicated interoffice transport and extended dark fiber); ¶¶ 388-89 (OCn and DS3 dedicated interoffice transport); ¶¶ 344-45 (signaling); ¶ 551 (call-related databases); ¶ 537 (packet switching); ¶ 273 (fiber to the home loops); ¶ 560 (operator service and directory assistance); and ¶ 451 (unbundled switching at a DS1 capacity). In its brief, Covad cites the *Illinois Tariff Order* in support of its claim that state commissions have authority to order ILECs to provide network elements that the FCC has refused to require them to unbundle. (Covad Br., p. 31.) However, that is not what the Illinois Commission ruled. Nowhere in the order does the Illinois Commission address whether it can order unbundling that conflicts directly with the FCC's unbundling determinations.

[10] At page 26 of its brief, Covad attempts to support its claim that the Commission can order unbundling that the FCC has rejected with the assertion that this Commission has already authorized such unbundling through the "building blocks" it mandated in dockets UT138/UT 139. Contrary to Covad's claim, however, this Commission has never concluded in those dockets, or in any other proceeding, that it has authority under state law to require unbundling that conflicts with FCC unbundling rules and orders. Indeed, as Qwest mentioned in its opening brief (at pp. 14-15 and fn. 14), this Commission recognized that it cannot create under state law unbundling requirements that were rejected in the *TRO* and *USTA II*. See Ruling of June 11, 2004 in docket UM 1100, at pp. 6-7.

requirement that does not rest on such a finding is plainly unlawful. Covad's failure to provide any evidence of impairment is thus fatal to its unbundling demands, as the Commission has no evidentiary record upon which to base findings of impairment or requirements to unbundle.

Finally, Covad incorrectly implies that Qwest's position is that state commissions are entirely without authority to regulate unbundled network elements under the Act. (Covad Br., pp. 25-26.) However, Qwest is not arguing that state commissions are without authority to regulate under the Act. Instead, as described here and in Qwest's opening brief, states are permitted to regulate, but only with respect to the specific areas that Congress identified in the Act, and only to the extent their regulations are consistent with federal law, including FCC orders and rules. Here, Covad is asking the Commission to regulate in a manner that is inconsistent with federal law by requiring network unbundling that the FCC has specifically rejected. The Commission does not have that authority and, accordingly, Covad's request is unlawful.

E. The ICA should list specific non-251 network elements that Qwest is not required to provide under the Agreement

In its proposed ICA, Qwest includes several provisions listing the network elements that the FCC has ruled ILECs are not required to provide under Section 251. Qwest's proposed Section 9.1.1.6 lists 18 different elements and services that, pursuant to rulings in the *TRO*, ILECs are not required to unbundle under Section 251. There is no dispute that Qwest's listing of these elements and services accurately reflects the FCC's *TRO* rulings. However, Covad clearly believes that Qwest's unbundling obligations are unlimited, and thus that they include even the network elements for which the FCC has made findings of non-impairment, and thus declined to impose an unbundling requirement. Given Covad's overreaching position, Qwest is very concerned that Covad will demand unbundling of these de-listed elements if the ICA does

not clearly state that the elements are unavailable. To protect against this distinct possibility and the dispute that would result, the ICA should include the list of de-listed UNEs in Qwest's section 9.1.1.6, which all parties agree is accurate.[11]

The Commission should also approve Qwest's language and not require Qwest to continue providing network elements that the FCC has de-listed as UNEs until the Commission approves an ICA amendment removing the UNEs from the ICA. The use of the amendment process for de-listed UNEs is improper because it would require Qwest to continue providing network elements at TELRIC rates, potentially long after the FCC has ruled that ILECs are not required to provide the elements under Section 251. Accordingly, the Commission should adopt Qwest's proposed sections that would eliminate unbundling obligations upon non-impairment findings by the FCC.

III. Issue 3: Commingling (Section 4.0 and Definition of "Section 251(c)(3) UNE," Section 9.1.1.1) - The ICA should not require Qwest to commingle elements provided under Section 271 with other network elements

Covad's argument for Section 271 commingling is premised on the *TRO*, but its arguments fail to account for provisions in the *TRO* that undercut its demand for this form of commingling. Covad bases its argument on the FCC's statement in paragraph 579 of the *TRO* that commingling involves connecting a UNE or UNE combination with a facility or service that a CLEC has obtained from an ILEC "pursuant to any method other than unbundling under section 251(c)(3)." (Covad Br., p. 36.) An element provided under Section 271, Covad argues, is within the reach of this description.

The first flaw in this interpretation is that it eviscerates the FCC's clear ruling that BOCs

[11] For the same reason, the Commission should adopt Qwest's proposed language for Sections 9.2.1.3; 9.6.1.5; 9.6.1.5.1; 9.6.1.6; 9.6.1.6.1; and 9.21.2. These sections establish that certain network elements will no longer be available under the ICA if the FCC rules that ILECs are not required to provide them under Section 251.

are not required to combine network elements provided under Section 271. Covad improperly reads this ruling out of the *TRO*. The FCC's statement about commingling obligations must be harmonized with its very specific ruling relating to Section 271 elements. Since BOCs are not required to combine these elements, they cannot be required to commingle them.

The second flaw in Covad's interpretation is that it is contradicted by the FCC's express removal of a reference to section commingling in an errata to the *TRO*. The *TRO* originally listed Section 271 elements in the discussion of commingling obligations in paragraph 584 of the order. However, as Covad acknowledges, in the errata to the *TRO*, the FCC removed this reference, making it clear that commingling obligations do not extend to Section 271 elements.

Covad contends that the FCC's elimination of the *TRO's* reference to Section 271 commingling was intended only to clarify the discussion of resale commingling in the order. But the FCC's decision to remove the reference should be read in the context of its ruling that ILECs are not required to combine Section 271 elements. The correction in the errata is consistent with and confirms that ruling - BOCs are not required to combine or commingle Section 271 elements. Accordingly, consistent with the *TRO*, the Commission should reject Covad's request for Section 271 commingling.

IV. Issue 5: CLEC-to-CLEC Channel Regeneration

A. Background

As Qwest discussed in its opening brief, the FCC has made it clear that an ILEC has no obligation to provide CLEC-to-CLEC cross-connections if the ILEC permits CLECs themselves to provision the connections. (Qwest Br., p. 32.) This same principle applies to any regeneration used with the cross-connections, although regeneration is rarely needed and has never been required for any CLEC-to-CLEC cross-connections in Qwest's Oregon central

offices. (*Id.*)

It is undisputed that Qwest permits Covad and other CLECs to self-provision cross-connections and any related regeneration, and that Qwest therefore has no legal obligation to provide these services to Covad and other CLECs. (Qwest Br., pp. 34-35.) Specifically, Qwest provides several methods for Covad to connect its facilities with other CLEC facilities in Qwest's central offices, including through direct connections and a Qwest product known as "COCC-X." With direct connections, Covad is responsible for engineering, provisioning and designing the connecting circuit, while Qwest's involvement is limited to designating the path in the central office for running the circuit between Covad's and the connecting CLEC's collocation spaces. (Qwest/9, Norman/8:1-7.) With COCC-X, Covad and the connecting CLEC are responsible for bringing their connections to a common interconnection distribution frame ("ICDF"), where Qwest provides a cross-connect or jumper wire connecting Covad and the CLEC.

Qwest provides these CLEC-to-CLEC cross-connections voluntarily, not through any legal obligation. Similarly, notwithstanding the absence of any legal obligation, Qwest will provide regeneration in the rare situation where a CLEC-to-CLEC cross-connection requires it. Covad's suggestion in its brief that Qwest will not provide regeneration (Covad Br., pp. 42-43) is simply wrong. The real issue is not whether Qwest will provide regeneration for CLEC-to-CLEC cross-connections, but instead, whether it should be permitted to charge and be paid for doing so.

Under Covad's proposal, Qwest would be required to provide CLEC-to-CLEC regeneration, but would be unable to charge anything for it. According to Covad, the FCC has determined "that collocators should never be charged for regeneration." (Covad Br., p. 44.) This statement is a plain mischaracterization of the relevant FCC order. As discussed below, Qwest has a fundamental legal right to be compensated for providing regeneration, and the FCC

has never ruled to the contrary. Because Covad's proposal would deny Qwest compensation for the regeneration services it provides voluntarily, the Commission should reject the proposal and adopt Qwest's ICA language relating to this issue instead. Covad also has the option of purchasing from Qwest expanded interconnection channel termination ("EICT"). EICT is a finished service offered under Qwest's FCC 1 Access tariff, in which Qwest designs and provides the connection, including any required regeneration. (Qwest Br., pp. 36-37.)

B. Qwest is proposing to charge for regeneration that Covad orders and Qwest provides voluntarily only in narrow, limited circumstances

Qwest's proposal would result in charges for regeneration only in very limited circumstances. Qwest will not charge for regeneration between the Qwest network and Covad's collocation spaces. Nor will it charge Covad for any regeneration that Covad needs to connect two of its own non-contiguous collocation spaces. The only circumstance in which Qwest would charge for regeneration is the rare instance in which (1) a circuit between Covad's collocation space and that of another CLEC is long enough to require boosting of the signal through regeneration, and (2) Covad decides not to provision the regeneration itself and, instead, asks Qwest to provide it. In that circumstance, Qwest's ICA language establishes that Covad can purchase the regeneration from Qwest by paying for the EICT product that Qwest provides through its FCC 1 Access Tariff. As stated, EICT provides an end-to-end service connecting two CLECs, including any necessary regeneration. The proposed ICA language under which Qwest would provide this product is as follows:

> 8.2.1.23.1.4 CLEC is responsible for the end-to-end service design that uses ICDF Cross Connection to ensure that the resulting service meets its Customer's needs. This is accomplished by CLEC using the Design Layout Record (DLR) for the service connection. Regeneration may be required, depending on the distance parameters of the combination.
>
> 8.3.1.9 Channel Regeneration Charge. Required when the distance from the leased physical space (for Caged or Cageless Physical Collocation) or from the collocated

> equipment (for Virtual Collocation) to the Qwest network is of sufficient length to require regeneration. Channel Regeneration will not be charged separately for Interconnection between a Collocation space and Qwest's network or between non-contiguous Collocation spaces of the same CLEC. Qwest shall charge for regeneration requested as a part of CLEC-to-CLEC Cross Connections under the FCC Access No. 1 tariff, Section 21.5.2 (EICT). Cable distance limitations are addressed in ANSI Standard T1.102-1993 "Digital Hierarchy – Electrical Interface; Annex B".

While Covad is refusing to pay the EICT charge, or any other charge for the regeneration it orders from Qwest, it concedes that the EICT charge is affordable and not unreasonable. In this regard, in the recent New Mexico arbitration hearing, Covad's witness who addressed this issue stated: "I don't object to the [EICT] price." (New Mexico Hearing Tr., Vol. 1, at pp. 111-112.) Indeed, as he acknowledged, the EICT charge of $52.50 translates into a monthly per circuit charge of between only 8 and 12 cents for a DS3 facility. (*Id.*) It is simply unreasonable for Covad to refuse to pay this or any charge for regeneration that Qwest provides voluntarily.

Tellingly, Covad's brief does not challenge the reasonableness of the EICT rate in the FCC 1 Access tariff. Instead, Covad argues that the rate is subject to change, and that Covad should not be subject to that pricing uncertainty. (Covad Br., p. 51.) What Covad ignores, however, is that if Qwest attempts to change the rate in the FCC 1 Access tariff, Covad can intervene and oppose any change. Moreover, the premise underlying Covad's argument – that the EICT rate should never change so that Covad somehow has certainty – is both unrealistic and unreasonable. Subject to any governing regulation, rates in the telecommunications industry should change as costs and market conditions change. While Qwest has not recently modified the EICT rate, the possibility that it could in the future does not provide a basis for the Commission to disallow the rate for regeneration that Covad requests from Qwest.

Equally meritless is Covad's argument that the *TRO Remand Order* precludes Qwest from charging a tariffed rate for regeneration. (Covad Br., p. 50.) In that order, the FCC

considered whether the availability of tariffed special access services should bar access to network elements under Section 251 on the basis that CLECs are not impaired if they are able to purchase special access services. The FCC ruled that the availability of special access should not serve as a bar to network unbundling. Its ruling is limited to the analysis of network unbundling and impairment under Section 251, and has no bearing on whether Qwest is permitted to charge the EICT rate for regeneration.

C. The FCC rules do not require Qwest to provide CLEC-to-CLEC regeneration

In an apparent attempt to support its contention that Qwest should only be permitted to charge a wholesale rate for CLEC-to-CLEC regeneration – which would be a rate of "0" under its proposal – Covad argues that the FCC's rules require Qwest to provide CLEC-to-CLEC regeneration. Covad is wrong.

The FCC has directly addressed CLEC-to-CLEC connections; its rules are clear and not subject, in the least, to Covad's interpretation. In its *Fourth Advanced Services Order*, the FCC discussed CLEC-to-CLEC connections and amended 47 C.F.R. 51.323(h) to specifically list the only situations in which an ILEC has an obligation to provide a connection between the collocated equipment of two CLECs.[12] Specifically, an ILEC must provide a connection between two CLEC collocation spaces: 1) if the ILEC does *not* permit the CLECs to provide the connection for themselves;[13] or 2) under section 201, when the requesting carrier submits certification that more than 10 percent of the amount of traffic will be interstate.[14] Here, as

[12] *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order (*Fourth Advanced Services Order*), CC Docket No. 98-147, FCC 01-204 (Rel. August 8, 2001.)

[13] Pursuant to 47 C.F.R. 51.323(h)(1), an ILEC is not required to provide a connection if "the incumbent LEC permits the collocating parties to provide the requested connection for themselves…."

[14] Pursuant to 47 C.F.R. 51.323(h)(2), "[a]n incumbent LEC is not required to provide a connection between the equipment in the collocated space of two or more telecommunications carriers if the connection is requested pursuant to section 201 of the Act."

discussed above, Qwest *does* allow CLECs like Covad full access to each of the Qwest central offices for the purpose of allowing the CLECs to provide these connections, and any necessary regeneration, themselves. Covad does not dispute this critical fact. Since Qwest permits Covad to make its own cross-connections, and has thereby removed itself from Covad's relationship with a connecting CLEC, Qwest has no legal obligation to provide a Covad-to-CLEC connection, much less regeneration of that connection.

Covad also claims that it is discriminatory for Qwest to charge for regeneration of a CLEC-to-CLEC connection because it is both economically and technically infeasible for Covad to provide the regeneration itself. This argument is baseless. First, in determining whether an ILEC must provision a CLEC-to-CLEC connection, cost is not the test. As stated above, the FCC very clearly enumerated those instances when an ILEC is required to provision a CLEC-to-CLEC connection, (*i.e.*, if the ILEC does not permit the CLEC to self-provision.) There is no mention whether the CLEC must be financially able to self-provision, or what the cost should be; the only relevant fact is whether the ILEC permits the CLEC to self-provision. Had the FCC believed that the cost of self-provisioning should be considered, it certainly would have said so in its rules. Absent an FCC directive, economics is not a factor in deciding this issue.

Moreover, Covad incorrectly bases its economic infeasibility claim upon section 251(c)(6) of the Act, which requires that collocation be provided on terms that are just, reasonable and non-discriminatory. (Covad Br., p. 42.) Covad apparently contends that Qwest's collocation policies are discriminatory, and thus that it is entitled to regeneration between CLECs for free. There is no dispute, however, that Qwest and Covad resolved their differences with respect to the language in the proposed interconnection agreement regarding assignment of collocation space. Qwest accepted Covad's language, and the parties agree that Qwest must assign collocation space in an

efficient manner. There is also no dispute that Covad has the opportunity to request a specific collocation space in a Qwest central office if such is available, or to request a walk-through of a central office to determine if a more desirable location is available. Accordingly, Qwest does not unilaterally determine where a CLEC will place its collocation, but rather, it is a shared decision based upon a number of factors, which the parties do not dispute. Thus, Covad's claim that Qwest's collocation assignment practices are discriminatory is groundless.

Further, Covad also seems to suggest that it is discriminatory to require Covad to pay for collocation space in order to place a mid-span repeater. (Covad Br., pp. 48-49.) This argument fails for a number of reasons, however. In requiring ILECs to make their network available to CLECs, the FCC determined that collocation is the means by which CLECs are to be given access to an ILEC's central offices. Collocation rates were established at TELRIC, which, according to the FCC, means they are cost-based by definition. Covad's suggestion that purchasing collocation space at a TELRIC price is discriminatory is plainly wrong.

Finally, Covad's claims of technical infeasibility are based upon two hypothetical theories, neither of which are supported by any real evidence. Initially, Covad suggests that it is technically impossible for it to regenerate its own signal because mid-span collocation space *may* not be available. Covad also claims that it cannot regenerate a signal from its own collocation space when making a direct connection to a partner CLEC because of the *chance* of "bleed over." (Covad Br., at pp. 47-48.) Each of these hypothetical theories, however, is unsupported by the record and is factually incorrect. Qwest witness Michael Norman has confirmed that if Covad were to request collocation space midway between its collocation and that of a partner CLEC, Qwest would provide space to accommodate such request. (Qwest/9, Norman/9:6-8.) Mr. Norman further testified that there should never be an issue with bleed over if a shielded

cable, which would protect the integrity of the signal, were used. (Qwest/11, Norman/10.)

Qwest notes that the Minnesota Administrative Law Judge concisely framed the issue and the law in holding that "[b]ecause Qwest permits collocating carriers to provide their own cross connection, 47 C.F.R. §51.323(h) makes the connection and any required regeneration the responsibility of the collocating carriers, assuming that Qwest has otherwise complied with its obligation to provide collocation on terms and conditions that are just, reasonable, and nondiscriminatory."[15] Here, Covad presented no evidence that Qwest fails to provide collocation on terms that are just, reasonable and nondiscriminatory. In fact, just the opposite is true. As mentioned above, Qwest and Covad have previously settled all of their issues regarding collocation.

V. Issue 8: Payment Due Date; Timing For Discontinuing Orders; and Timing For Discontinuing Services

A. Payment Due Date

Covad's request to extend the payment due date from 30 days to 45 days rests entirely on its unsupported claim that it will be irreparably harmed if it has to pay the amounts it owes to Qwest within 30 days (allegedly because it will end up paying for improper charges). The Commission should reject Covad's argument in part because Covad does not offer any evidence that, in the more than five years it has been abiding by the 30-day payment timeframe, it has been forced to pay an improper charge due to insufficient time to review Qwest's bills. The facts simply do not justify Covad's attempt to expand the payment time period. Also, Covad conveniently ignores the remedies it has if such payment of improper charges were to happen. The ICA contains provisions providing Covad with recourse, including interest on any amounts

[15] *See Minnesota ALJ Order*, ¶ 80. The Minnesota Commission upheld the ALJ's ruling on this issue. *Minnesota Arbitration Order*, at 5.

wrongfully paid. Thus, Covad already has a process whereby it can be made whole if it were to pay for improper charges.

Covad attempts to support its argument by complaining of a number of separate and isolated billing practices. Covad, however, has not demonstrated that any of these practices actually prohibit Covad from reviewing and paying its bills within 30 days. For example, Covad complains that bills for non-recurring collocation charges are provided in hard copy, rather than electronically, and that some contain individual case basis ("ICB") charges. These bills, however, represent a minute percentage of the overall bills (*see* Qwest Br., p. 42), and further, Covad fails to show how an ICB charge is somehow inappropriate, defective, or is Qwest's responsibility. More importantly, Covad fails to demonstrate why manual review of the collocation bills cannot be accomplished within 30 days. Similarly, Covad complains that Qwest uses unique identifiers, rather than circuit identification numbers, for purposes of billing line sharing. Covad, however, has not demonstrated why validating a bill using a unique identifier (rather than a circuit ID) necessitates a longer billing cycle, especially since Covad has been using this same unique identifier for five years.

The reality is that Covad has not provided any compelling evidence demonstrating that Qwest's billing practices cause actual and material impediments to Covad's ability to operate under a 30-day payment cycle. To the contrary, the evidence in this proceeding has established that (1) the number of bills that Covad needs to manually review is quite small, (2) other members of the industry have agreed to the 30 day time frame, and have been able to comply with it, and (3) Covad itself accepted the same time frames when it entered into the Commercial Line Sharing Agreement with Qwest in April 2004. (Qwest Br., pp. 41-42.) Moreover, Covad would have this Commission believe that Qwest's bills are defective. In fact, however, the FCC

endorsed Qwest's bills when it granted Qwest entry into the long distance market under Section 271. (*Id.*, p. 43.)

Covad could not refute Qwest witness William Easton's testimony that, even if Covad incurred real and material impediments to reviewing bills, the 45-day period that Covad suggests would not address its concerns in any event. Covad would continue to receive bills every 30 days. Without adding additional resources, or making existing resources more productive, Covad would be unable to address new bills at the same time that old bills were being reviewed.

Furthermore, the language that Covad proposes is vague and subject to several interpretations. For example, one could read the Covad proposed language for section 5.4.1 to mean that Covad would have 45 days to pay the entirety of any bill if one of the exceptions is applicable to that bill. If such an interpretation were accepted, Covad would have received a 45-day payment due date, under the guise of only asking for an extended due date in certain instances. Moreover, even if the language were not interpreted as stated above, distinguishing between services having a 30-day payment due date and those having a 45-day payment due date would require significant manual efforts on the part of both Covad and Qwest. The parties would be required to manually determine how much money is due at any given time, and Covad would be issuing a check to Qwest every 15 days, and not every 30 days as it states in its brief. (Qwest 7/Easton/3:6-16.)

More importantly, however, the purpose of this arbitration proceeding is to establish contract language that will assist the parties in their relationship with each other, and not to create confusion. Covad's proposed language, however, can only create more problems, not solve them. Qwest's proposal, on the other hand, is commercially reasonable, is the industry standard, and has been agreed to by numerous CLECs, including Covad, as early as April of last

year.

In contrast to its failure to prove actual impediments, Covad cannot dispute that the 45-day payment cycle will cause real and material harm to Qwest. Qwest would lose the funds that it would otherwise have available to it within 30 days, plus any interest that would be owed as a result of Covad's failure to pay the *undisputed* portion of its bill within that time period. Thus, Covad's proposed language amounts to nothing more than a 15-day interest free loan, every month. To the extent other CLECs demand to opt in to this agreement, or demand a similar provision in interconnection arbitrations, this impact would be multiplied significantly.

Covad's new proposal simply is unreasonable and thus should be rejected. As demonstrated, there is no basis for extending the payment date for any product. Covad's proposal would require Qwest to make unique and costly permanent changes to its systems solely to address Covad's proposed changes. The changes would affect all CLECs, which could cause hardship to those CLECs who have processes in place to verify Qwest's bills as they exist today. The record does not support any justification for such a drastic change.

Finally, Covad's claim that it is unable to address billing issues through the Change Management Process ("CMP") should be disregarded. Before late September 2004, billing issues had never been subject to prioritization in the CMP. Nevertheless, even absent a prioritization process, Qwest has always accepted and implemented billing change requests through the CMP, and it will continue to do so. Moreover, in late September 2004, Qwest agreed to change the long-standing status quo to allow prioritization of billing issues. Thus, Covad cannot claim that Qwest changed its position to Covad's detriment, or that there is currently any impediment to addressing its claims related to billing deficiencies in the CMP forum. If Covad is dissatisfied with Qwest's position regarding any particular change request,

the CMP process has provisions in place whereby disputes will be addressed and resolved with input from all CLECs. (Qwest/12/Albersheim/20:10-26:11.)

B. Timing for Discontinuing Orders and Disconnecting Services

Covad does not effectively support its need for extending the time at which Qwest may discontinue processing orders, and extending the time at which Qwest may disconnect services. Contrary to Covad's assertions, Qwest has shown that the time periods it proposes are in accord with industry standards, and they limit Qwest's financial exposure. (*See* Qwest Br., pp. 47-48.)

Covad's premise for its alleged need for additional time is entirely vague and speculative. In essence, Covad hypothesizes regarding the potential need to *organize* requests for injunctive relief *or make other arrangements.* In fact, however, the language in the Covad ICA requires Qwest to provide notice to Covad before Qwest can discontinue processing orders or disconnect services. (Qwest/1, Easton/18:1-19.) Thus, to the extent that Covad somehow were to overlook the fact that it was not paying its bills to Qwest, Covad cannot claim that Qwest can act in an arbitrary and harmful manner. Significantly, Covad fails to acknowledge that under the terms of the parties' proposed ICA, Qwest can only pursue its discontinuance and disconnection remedies if Covad were to fail to pay the *undisputed* portion of its bill. (Qwest Br., p. 47.)

Covad suggests that Qwest is adequately protected because of the ICA's deposit provision. However, although Qwest is entitled to seek and receive a deposit in the amount of two times Covad's monthly billing amount (assuming that Qwest is able to apply the deposit to the outstanding balance), Qwest's protection would be exhausted long before it were able to begin seeking remedies to mitigate its financial risk. The following example is instructive: If Qwest were to issue a bill for services on January 1st, Covad would have 30 days (or approximately until February 1st) to pay that bill. If Covad were to fail to dispute the bill, Qwest would expect

payment on or about February 1st. If Covad were to fail to pay the bill on February 1st, Covad's proposal would require Qwest to wait until *April 1st* before it could seek to discontinue processing orders. Thereafter, under Covad's proposal, Qwest would be required to wait an additional 30 days before it could disconnect services. The discontinuance and disconnection remedies under Covad's proposal would not even begin to apply until Qwest had continued to provide service to Covad for three and four months, respectively (*i.e.*, discontinuing processing orders for failure to pay the January 1st bill would not be possible until April 1st, and disconnection would not be available until May 1st). Obviously, the two-month deposit on the original bill due January 1st would be exceeded, and Covad would have continued to receive services and bills for which Qwest would have no indication it would be paid.[16]

Covad does not dispute that extending both dates would cause Qwest financial harm, (*e.g.*, if Covad were to refuse or to stop paying Qwest). Failure to pay is a very real risk to Qwest in the case of CLEC insolvency, and Covad has failed to identify any compelling reason to impose any increased financial risk to Qwest and its shareholders. Qwest works with each and every CLEC that runs into financial difficulties in order to assist that CLEC in paying its bills. Qwest does not jump to its discontinuance and disconnection remedies in an effort to put a company out of business. Qwest has every incentive to see that its wholesale customers are successful and that they pay their bills on time; however, the risk to Qwest of the extended time frames is much more than float on a monthly bill, it is a risk of complete non-payment. Once a CLEC stops paying its bills, it is likely that it has problems far exceeding a concern for its payment to Qwest. Therefore, the only reasonable conclusion to draw is that a supplier (like

[16] This scenario also assumes that the deposit would be enough to cover two months of billings. Under the parties' ICA, Qwest is limited in its ability to request an additional deposit if two months of a CLEC's average monthly bill exceeds the deposit amount.

Qwest) should be able to protect itself from further exposure sooner rather than later.

CONCLUSION

For the reasons stated here and its opening post-hearing brief, Qwest respectfully requests

that the Commission adopt Qwest's proposed language for each of the ICA provisions in dispute.

DATED: May 13, 2005.

Respectfully submitted,

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NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS, INC., dba COVAD COMMUNICATIONS COMPANY, FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION.

CASE NO. 04-00208-UT

TRANSCRIPT OF PROCEEDINGS

MARCH 16, 2005

DAY ONE

WHEREUPON, a hearing was held on the 16th day of March, 2005, before William Herrmann, Hearing Examiner, and Patricia O'Brien, Certifed Shorthand Reporter, Santa Fe Deposition Service, 110 Delgado Street, Suite C, Santa Fe, New Mexico, at the offices of the Commission.

* * *

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* * *

Q. Because you don't charge us for that, you can't charge us for CLEC-to-CLEC. Isn't there an irony here that if we did begin charging you for Qwest-to-Covad regeneration, we could go ahead and charge you for CLEC-to-CLEC regeneration?

A. Well, there may be a bit of irony there, but, again, but, again, I've never disputed Qwest's ability or right to be able to recover its costs.

The thing that I have a problem with and take exception to is when it's done in a way that provides discriminatory treatment for some CLECs.

Q. Let's talk about the costs for a minute.

The EICT access tariff rate is approximately $52.50 per month.

Is that right?

A. I believe that's the figure.

Q. And if you have a DS3, you have 672 circuits on the DS3, correct?

A. Yes, that's correct.

Q. And so if you want to breakdown the costs of the EICT, which you said this morning is not prohibitively expensive, if we take that $52.50 and divide it by 672 to come up with a per circuit costs, what we are talking about is -- I did the math over lunch -- is 8 cents per circuit.

Is that right?

A. Well, if you were talking on a channelized basis, that's what it would break down to, yes.

Q. Maybe a 15 or 20 percent fill factor, so maybe you are not using all 672 circuits. But even then, we are only talking about 12 cents per circuit for the EICT regeneration.

Is that correct?

A. I don't object to that price.

What I object to is the lack of service. We asked Qwest to include those numbers as part of the interconnection agreement so we had stability through the interconnection agreement, and Qwest declined to do that.

Q. Let's say hypothetically -- and there's no evidence of this as we talked about this morning -- but let's say hypothetically Qwest decided it's going to double it is EICT rate from 52.50 to $105.00.

In that situation, the increase would be that you would go from about a dime to about 20 cents per circuit, right?

A. Again, we don't look at DS3s as being circuit oriented, on a circuit level or DS Zero circuit level. We order DS3 pipe, so it's the entire DS3 pricing that we are looking at with respect to the COCCX.

Q. It just so happens that you can carry 672 circuits on a DS3?

A. If you so choose to use it for provisioning DS

BEFORE THE ARIZONA CORPORATION COMMISSION

PROCEEDINGS IN ARBITRATION

IN THE MATTER OF THE PETITION OF DIECA COMMUNICATIONS, INC., dba COVAD COMMUNICATIONS COMPANY FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH QWEST CORPORATION	)	DOCKET NOS. T-03632A-04-0425 T-01051B-04-0425 ARBITRATION HEARING

At: Phoenix, Arizona

Date: February 7, 2005

Filed:

REPORTER'S TRANSCRIPT OF PROCEEDINGS
VOLUME I

(Pages 1 through 215, inclusive.)

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Certified Court Reporter
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mile of the loop has created a bottleneck facility, and competition cannot exist if every competitor is required to put their own outside plant or loop networks.

Now, if it were Covad's primary business plan to go to businesses, then it might make sense to install our own fiber. But it makes absolutely no sense to install fiber to residential customers; it would be a redundant network.

Q. So Covad's business plan results in a decision that Covad won't deploy fiber, is that correct?

A. I don't know that I would characterize it like that. We have some fiber facilities in certain market areas for specific reasons. But to serve end users, no, that -- we would never deploy fiber for that for residential customers.

Q. Okay. What I would like to do now is ask a few questions to put this issue of copper retirement in perspective. And would you agree with me that in Arizona, Qwest has never retired a copper loop that resulted in Covad losing service to one of its customers?

A. I would say, to my knowledge, that has never happened.

Q. And isn't that also true throughout Qwest's region, that in its 14 states it has never retired a copper loop that resulted in Covad losing service to a

customer?

A. I would say that that is correct as well. I would like to add, though, that until about a year and a half ago, we had never experienced the problem in Bell South, either. And this is where we started seeing fiber displacing our copper facility and impacting our ability to continue to provide service to end user customers. The interconnection agreement that we are arbitrating is a three-year contract, three-year interconnection agreement. And I have very little doubt in my mind that during that time period we are going to experience the same thing here.

Q. Are you aware, Mr. Zulevic, that Qwest has a network practice of trying to leave copper loops in place to avoid disrupting service to CLEC customers?

A. They have stated that that is their policy.

Q. Do you know if Bell South has such a policy?

A. I am not aware.

Q. Your experience or Covad's experience with Qwest bears out that that's the policy, because there has never been a discontinuance of service, correct?

A. I don't know. And the reason I say that is because Qwest currently does not have the available cash that Bell South does for expanding its network. Once that situation turns around, I think we are going to see an

CERTIFICATE OF SERVICE

ARB 584

I hereby certify that on the 13th day of May, 2005, I served the foregoing **QWEST'S REPLY BRIEF OF THE MERITS** 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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