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April 29, 2005

Via Overnight Mail

Public Utility Commission of Oregon
Attn: Filing Center
550 Capitol St. NE #215
PO Box 2148
Salem, OR 97308-2148

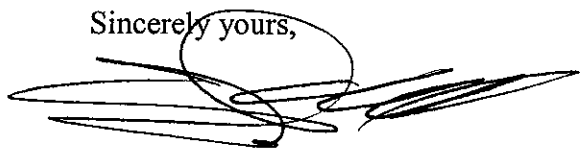
Re: ARB 584

Dear Sir or Madam:

Enclosed for filing are the original and five copies of Covad Communications Company's Initial Brief. Electronic copies were also filed and served on the parties on April 29, 2005.

Please call me if there are any questions regarding this filing. Thank you.

Sincerely yours,



Andrew R. Newell
Counsel for Covad
Communications Company

ARN/jk

Enclosures

cc: Service List

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 584

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

COVAD COMMUNICATIONS COMPANY'S INITIAL BRIEF

April 29, 2005

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Arizona Corporation Commission Docket No. T-03632A-04-0425, In the Matter of the Petition of DIECA Communications, Inc. dba Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation, Transcript of Arbitration Hearing, Volume I (February 7, 2005) and Volume II (February 18, 2005). ("AZ Tr.")*

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* Excerpts of the Arizona Hearing Transcript are provided as Attachment 1.
** Excerpts of the New Mexico Hearing Transcript are provided as Attachmen 2

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Introduction

After hundreds of hours of negotiation and a nearly completed formal arbitration proceeding, DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad") and Qwest Corporation ("Qwest") (collectively, the "Parties") have narrowed the issues in this docket to five.

Issue 1 involves Qwest's commitments to maintain wholesale service to Covad in the event that copper plant serving Covad and its customers is retired by Qwest and replaced with fiber optic facilities. Covad's proposal that Qwest provide an alternative service to Covad in the event that it retires copper feeder is applicable only to situations in which Qwest retires copper feeder subloops, creating mixed-media or "hybrid" copper/fiber loops. Covad has agreed that copper retirement resulting in a Fiber to the Home (FTTH) or Fiber to the Curb (FTTC) loop may be governed by the process established by the FCC's *Triennial Review Order.*[1]

Because of this change, any statements made by the Federal Communications Commission (FCC) in its *Triennial Review Order* regarding certain copper retirement activity are no longer relevant to the disputed issue. The *Triennial Review Order* and resulting FCC rules explicitly limit the scope of their new copper retirement provisions to situations involving the creation of FTTH loops, and are silent with respect to Qwest's rights and responsibilities with respect to the retirement of copper feeder resulting in service disruptions to Covad's customers. Covad's proposals are therefore critical to protecting both Covad and Oregon consumers from decreased access to bottleneck facilities when Qwest chooses to deploy hybrid loops. It is also important to note that, while the FCC has declined to find impairment for certain subloop elements involved in hybrid loops, these elements are nevertheless still building blocks under

[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147, (rel. September 17, 2003) ("Triennial Review Order").

Oregon law. This state law authority, consistent with the Act, forms the legal foundation for the alternative service requirement proposed by Covad.

Covad has also proposed improvements to Qwest's notice procedures for copper retirement activity, which are required by FCC rules. These improvements are required to lend meaning to Qwest's notices, and to comply with existing FCC standards. This issue is positively critical to ensuring that Oregonians do not lose telecommunications service unexpectedly.

Issue 2 encompasses the Parties' disagreement regarding the availability of network elements that may no longer be available under the FCC's application of the "necessary" and "impair" standard applicable to Section 251 of the Telecommunications Act of 1996 ("Act"),[2] but must nevertheless be unbundled by Regional Bell Operating Companies ("RBOCs" or "BOCs") pursuant to Section 271 of the Act and Oregon law. This Commission has clear authority to apply both state law and all provisions of the Act as it decides interconnection arbitration disputes. Qwest's argument that the Commission is preempted from enforcing provisions of Oregon law requiring access to these elements and Qwest's Section 271 obligations should be rejected.

Issue 3 involves the language in the Agreement describing permissible commingling arrangements. Covad has proposed language that is consistent with the FCC's statements regarding the commingling of unbundled network elements purchased under Section 271 of the Act: while Section 271 elements are not afforded status as Section 251 elements under the FCC's commingling rules, they are eligible for commingling with Section 251 elements just like any other telecommunications service.

Covad also proposes a definition of "251(c)(3) UNE." Covad believes that this definition is helpful in describing the precise group of unbundled network elements (those obtained pursuant to Section 251(c)(3) of the Act) that must be present in any commingling arrangement. This definition, rather than the general definition of "unbundled network element," is necessary

[2] Pub. L. 104-104, 110 Stat. 56 (1996).

because "unbundled network element" is used (and Covad believes will continue to be used) to describe not only UNEs purchased pursuant to Section 251 but also elements provided under other "Applicable Law,"[3] such as Oregon law. This definition is especially important in Oregon, where this Commission has already determined that certain additional building blocks may be required from ILECs, so long as their provision is consistent with federal law.

Issue 5 involves the Parties' disagreement over Qwest's obligation to provide regeneration between CLEC-to-CLEC cross connections ordered by FCC rule. Covad believes Qwest should maintain a consistent regeneration policy as to both its ILEC-to-CLEC and CLEC-to-CLEC arrangements, and is certainly not permitted to refuse to provide a CLEC-to-CLEC connection solely because that connection requires regeneration.

Issue 9 involves the length of the period within which Covad may review Qwest's wholesale invoices prior to payment, and the timing of Qwest's remedies for non-payment. Covad has established a substantial record in this proceeding regarding the deficiencies of Qwest's bills, which slows down Covad's review and analysis of those bills. As a result of the current deficiencies of Qwest's bills, Covad requires additional time to adequately review certain portions of the UNE, collocation, and transport invoices it receives. With respect to Qwest's remedies for non-payment, Covad has no objections to the remedies themselves, but believes there are legitimate reasons to extend the timing of those remedies. Because the remedies have a potential to irreversibly damage Covad's business, the modest extensions of time Covad has proposed will allow Qwest to maintain the remedies to which it is entitled, while affording Covad sufficient time to either resolve payment issues with Qwest or seek appropriate relief from this Commission if necessary.

[3] See Section 9.1.1 of the Agreement, as well as the Agreement's definition of "Applicable Law" contained in Section 4.

Argument

ISSUE 1 - COPPER RETIREMENT (Sections 9.2.1.2.3, 9.2.1.2.3.1, and 9.2.1.2.3.2)

The term "copper retirement" refers to Qwest's replacement of existing copper loop plant deployed to serve end users with either (1) new copper facilities; or (2) new fiber facilities. Dozens, if not hundreds, of copper retirement projects are undertaken each year by Qwest. The purpose of these projects varies, but Qwest has historically replaced copper for two reasons: either the existing plant is beginning to malfunction and is posing significant maintenance problems, or a government entity has ordered the relocation of telecommunications facilities, usually due to a construction project. The deployment of fiber facilities, or even certain gauges of copper facilities, can cause DSL customers' service to be disrupted or disconnected altogether.

When copper loop plant is retired, it may be retired either in part or in total. If a complete copper loop, extending from a customer's premises to the central office, is replaced with fiber, the resulting loop is known as a Fiber to the Home (FTTH) loop. Fiber facilities extending to within 500 feet of a customer premises are considered Fiber to the Curb (FTTC) loops, and are treated similarly to FTTH loops by recent changes to FCC regulations. All other partial fiber replacements resulting in mixed media (copper/fiber) loops are considered "hybrid" loops.

The Parties' disagreement with respect to Issue 1 centers on the conditions in which Qwest may, under both FCC rules and this Commission's rules and orders, retire copper plant when it is used to serve Covad's xDSL customers. Qwest believes its ability to retire copper plant is unlimited, and that it must merely provide notice to the FCC of such retirement ninety (90) days prior to implementation. Covad has noted that, in addition to being bad policy, allowing Qwest to effectively disconnect Covad's DSL customers when it retires copper plant violates Oregon law, and is, in any event, inconsistent with the FCC's *Triennial Review Order*. It is critical that this Commission not allow Qwest to over-read the FCC's new copper retirement

rule. Allowing Qwest to deny access to competitive LECs when Qwest chooses to retire copper feeder and replace it with fiber (thereby deploying a hybrid loop, rather than broadband capable FTTH loops) will not further the goal of broadband deployment, and would provide Qwest a blueprint to re-establish a monopoly for broadband services, in direct conflict with the Oregon's stated goal to "promote the public welfare, efficient facilities and substantial justice between customers and public and telecommunications utilities." ORS §756.062(2).

Covad has made a minor modification to its copper retirement proposals. The language in bold type below has been added to Covad's proposed 9.1.15.1:

> 9.1.15.1 Continuity of Service During Copper Retirement. This section applies where Qwest retires copper feeder cable and the resultant loop is comprised of either (1) mixed copper media (i.e. copper cable of different gauges or transmission characteristics); or (2) mixed copper and fiber media (i.e. a hybrid copper-fiber loop) (collectively, "hybrid loops") **over which Qwest itself could provide a retail DSL service**. This section does not apply where the resultant loop is a fiber to the home (FTTH) loop or a fiber to the curb (FTTC) loop (a fiber transmission facility connecting to copper distribution plant that is not more than 500 feet from the customer's premises) serving mass market or residential End User Customers.

This modification clarifies that Qwest will not ever, in order to comply with Covad's language, be required to make investments or incur costs that it had not already incurred to continue service to its existing retail customers. This ensures that Qwest will never experience increased costs to provide Covad an alternative service after retiring copper feeder loop.

In an effort to focus its core disagreement with Qwest's proposals to a minimum number of sections in the agreement, Covad has agreed to close sections 9.2.1.2.3, 9.2.1.2.3.1, and 9.2.1.2.3.2. The only sections of the agreement remaining open for Issue 1 are 9.1.15, 9.1.15.1, and 9.1.15.1.1.

A. The FCC Specifically Limited The Application Of Its Copper Retirement Rules To Circumstances Where CLECs Would Not Be Denied Access To Loops

Qwest has correctly pointed out that the FCC has adopted a streamlined notification process for the retirement of copper loops when those loops are replaced with fiber to the home (FTTH) loops. However, Qwest has conveniently ignored the FCC's stated pre-condition for the right of an ILEC to retire copper, that any such retirement must not deny competitors access to loop facilities:

> **Unless the copper retirement scenario suggests that competitors will be denied access to the loop facilities required under our rules**, we will deem all such oppositions denied unless the Commission rules otherwise upon the specific circumstances of the case at issue within 90 days of the Commission's public notice of the intended retirement.

Triennial Review Order, ¶ 282.

The FCC also made clear that state commissions retained the authority to make the ultimate decision regarding copper retirements, stating that "Incumbent LECs also may not retire loops without state approval." *Triennial Review Order*, ¶ 777, n. 2309.

In other words, there are two methods by which the FCC intended to prevent copper retirement. First, if the retirement will deny access to loop facilities as required by the FCC's rules (xDSL capable loops meet this criterion), then the ILEC may not use the copper retirement provisions of the *Triennial Review Order* at all. Second, the FCC may issue a ruling with respect to any objections filed within the ninety (90) day period, in which case an ILEC "may not retire those copper loops or copper subloops at issue for replacement with fiber-to-the-home loops." 47 C.F.R. §51.333(f).

The clear intent of the FCC, based upon its statements in the *Triennial Review Order* and its adopted rules, was to deny ILECs an unconditional right to retire copper in circumstances where a CLEC's service to customers would be affected by a denial of access to loops:

> We note that, with respect to network modifications that involve copper loop retirements, the rules we adopt herein differ in two

> respects from the notification rules that apply to other types of network modifications. **First, we establish a right for parties to object to the incumbent LEC's proposed retirement of its copper loops for both short-term and long-term notifications as outlined in Part 51 of the Commission's rules. By contrast, our disclosure rules for other network modifications permit oppositions only for instances involving short-term notifications.**

Triennial Review Order, ¶ 283.

This is perhaps the most significant statement the FCC makes about copper retirement in the *Triennial Review Order*. By specifically recognizing that competitors may object to even a long-term notification of copper retirement, the FCC clarifies that, unlike other network modifications, a competitor can prevent the retirement altogether if their objection is upheld. In all other cases of network modification, CLECs only have the ability to request more time to prepare for the change, i.e., to request that a short-term notification be converted to a long-term notification.

The FCC's intent to protect xDSL capable loops in particular becomes clearer when read alongside the FCC's requirements for narrowband access to fiber loops. Because the FCC had already alleviated any concern regarding narrowband services by establishing specific access requirements for the provision of narrowband services by CLECs over newly deployed fiber loops,[4] the FCC could only have been referring to broadband services, including xDSL capable loops, when it discussed the "denial of access to loop facilities required under our rules."

As discussed above, Covad has elected to limit its alternative service proposal to fiber feeder retirement scenarios, which are clearly not subject to the FCC's new rule espoused in the *Triennial Review Order*. Covad will pursue any disputes related to FTTH retirements through the established FCC objection process. The FCC's position is important, however, in understanding that the FCC's intent was not to provide Incumbent LECs an opportunity to close

[4] *See Triennial Review Order*, ¶¶ 296-297; 47 C.F.R. § 51.319(a)(2)(iii).

their networks, but instead to clearly provide that such retirements should not deny access to loops that are required to be unbundled.[5]

B. Oregon Law Requires Continued Access To Customer Loops In Most Circumstances, Notwithstanding Copper Retirement

Prior to discussing this Commission's specific requirements regarding unbundled loops, it is worth pointing out that the FCC specifically noted its streamlined procedures for copper retirement were not intended to preempt state laws requiring access:

> As a final matter, we stress that we are not preempting the ability of any state commission to evaluate an incumbent LEC's retirement of its copper loops to ensure such retirement complies with any applicable state legal or regulatory requirements.

Triennial Review Order, ¶ 284.

This Commission issued the following decision regarding competitor access to loop facilities:

> NAC[6] unbundling will facilitate competition in local exchange telecommunications service markets by allowing competitors to use existing LEC network facilities that have been installed as part of the public switched network. Staff points out that competitors will enter markets more quickly if they do not have to petition for rights of ways, install conduit, build new facilities, or purchase unwanted features in bundled services. NAC unbundling should also benefit LECs by creating new markets and by allowing LECs to avoid losses that would otherwise result from complete bypass of the network. End user customers will also benefit from technological innovation and unique applications of NACs to the network.

In the Matter of the Investigation into the Cost of Providing Telecommunications Services, Docket No. UM 351, Order No. 96-188 (July 19, 1996).

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[5] It is also important to note that the FCC's findings of non-impairment with respect to next generation loop facilities were performed under section 251 of the Act, and in no way alter the responsibilities of RBOCs to make facilities available pursuant to section 271 of the Act at just and not unreasonably discriminatory rates.

[6] Order No. 01-1106 entered on December 26, 2001 in Docket No. UT 138/UT 139, Phase II, maps the Network Access Channel (NAC) to the local loop in its Unbundled Network Element/Building Block Matrix attached to the order as Appendix B.

This order clearly established the Commission's finding that the access to loop facilities, which include feeder facilities and digital subscriber line facilities, is essential to promoting the policies of competition and consumer choice. Qwest must, therefore, provide unbundled access to these facilities regardless of the medium or technology used.

The Commission must continue to use its authority, clearly established by Commission order, to protect competitors and consumers alike. Adopting Covad's copper retirement proposals is a critical component of this effort.

C. The Commission Should Respect Covad's Investment In Next Generation Facilities And Protect It Where Legally Permissible

The purpose of Covad's proposals is not to obtain unbundled access to Qwest's next generation facilities on some unlimited basis, as Qwest argues. Covad has invested in its own next generation facilities, and the purpose of its proposals is to protect its investment in those facilities that have been providing broadband service to Oregon consumers for the past four (4) years.

Covad has spent well over a billion dollars deploying its xDSL network throughout its operating territory, including Oregon.[7] This network is designed, in part, to transform Qwest's legacy last-mile copper facilities into a vital component of Covad's high-speed broadband platform. When Qwest deploys FTTH or copper-fiber hybrid loop facilities and retires legacy copper facilities, it has the potential of destroying Covad's investment in its own broadband network, which relies on copper facilities. As Qwest's Witness Karen Stewart pointed out, Qwest certainly takes its own DSL customers' needs into account when Qwest considers a retirement project,[8] and for good reason: Like Covad, Qwest has made substantial investments in its DSL network and its customers. In fact, Qwest has confirmed that it considers the needs

[7] Covad/100, Zulevic/2, l. 14.
[8] AZ Tr. Vol. I, 87:17 through 88:6.

of its customers with unique requirements, such as DSL customers, from the very beginning of the planning process for a retirement project. Qwest has months to decide how to continue to serve these customers, and whether it should modify its retirement to accommodate them.[9]

On the other hand, Qwest gives Covad, one of its largest customers, a vague notice just a few days before the changes are made, and leaves it up to Covad to determine whether service can be maintained to its customers. Despite the fact that Qwest has ready access to this information during the planning process,[10] it cannot be bothered to use the information to ensure that Covad's customers are treated appropriately.

It would be patently discriminatory and anti-competitive for Qwest to mistreat consumers that have chosen Covad service while it accommodates its own retail customers.

At the very least, when faced with this impairment of its investment, Covad should maintain access to its current customers, and those customers' service should not be disrupted. Covad's investment, and incentive to invest in the future, should not be discounted as a significant component of serving the public interest and fostering the development and advancement of broadband capability and consumer choice in Oregon.

D. The Agreement Should Address Copper Feeder Retirement Scenarios

Covad is not so much concerned with Qwest's replacement of copper loops with FTTH loops, which fall within the FCC's new copper retirement rules, as it is concerned with the procedures governing the retirement and replacement of copper feeder with fiber feeder, hence its agreement to limit the impact of its proposals to copper feeder retirements.[11]

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[9] *See* Qwest response to Covad Request No. 01-019, as supplemented on April 22, 2005. A copy of this response is attached hereto as Attachment 8.

[10] Id.

[11] Covad does not believe Qwest is likely, in the near future, to retire copper to build FTTH loops. Qwest CEO Richard Notabaert stated earlier this year that, "It is hard for us to look at the economic model and invest in fiber to

This fact was essentially confirmed by Qwest Witness Karen Stewart, when she testified that copper retirements are primarily driven by maintenance issues and growth.[12] In response to a data request issued by Covad, Qwest confirmed that it has not deployed a single FTTH loop in Oregon.[13] While Qwest refused to directly answer questions regarding the capability of these loops to provide advanced services, the logical inference based upon Qwest's responses to discovery and the testimony of its witnesses is that most of the fiber deployed to date was deployed in response to maintenance problems or to increase *voice grade* capacity, and not to bring new services to Oregon consumers.

Unlike the investment in next generation facilities characteristic of FTTH deployments, copper feeder retirements do not necessarily lead to improved broadband service to any Oregon consumers. As Mr. Zulevic noted in his testimony, the retirement of fiber feeder is often a result of problems maintaining aging copper facilities:

> It may be a 3600 pair *feeder* cable in Minnesota or Washington that consistently gets wet, year after year, during the rainy season. Or it may be a 4200 pair *feeder* in Arizona or New Mexico that has finally succumbed to the desert heat. These problems, brought on by the elements, ultimately result in a significant customer service degradation and a constant increase in costs to Qwest for repair. In today's world, the final resolution is often replacement of the entire copper feeder cable with fiber and the placement of fiber fed digital loop carrier in the field.

Covad/100, Zulevic/11-12.

Feeder retirements also do not fall within the FCC's new copper retirement notice rules.[14] As a result, Covad has proposed language that would govern such feeder retirements, maintaining Covad's access to facilities serving its customers.[15] These proposals are critical,

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the home...There are lower cost alternatives to fiber." Wall Street Journal, January 20, 2004. If Qwest does choose to do so, Covad has remedies, as the FCC made clear in the *Triennial Review Order*.

[12] AZ Tr. Vol. I, 84:12-25.

[13] Qwest's Response 01-001, Attachment 3.

[14] *Triennial Review Order*, ¶ 283, n. 829.

[15] Contrary to Qwest's characterization, Covad's proposal does not mandate that Qwest maintain a parallel copper network. Under Covad's proposal, Qwest would have complete flexibility to choose a method to continue to allow Covad to provide an equivalent, alternative service to its customers affected by a copper retirement.

because an absence of language addressing feeder retirement will provide Qwest a path to driving competitors from its network. If Qwest can deny access to loops simply because it chooses to replace facilities that are damaged or are causing maintenance issues, it is only a matter of time before the entire Public Switched Telephone Network (PSTN) is again closed to broadband competition, frustrating the Commission's rulings to promote competition in the public interest.

E. Qwest's Cost Recovery Arguments Are Unfounded

At each hearing held on this issue in other states, Qwest made clear that it believed Covad's proposal was unlawful because it denied Qwest an opportunity to recover the costs of providing wholesale access to Covad by mandating that any "alternative service" be provided at the same cost line sharing, or unbundled loops, are currently being provided to Covad. This argument is both overstated and incorrect.

First, Qwest will make decisions to deploy fiber independent of whether or not it must provide an alternative service to Covad for a handful of customers. The idea that such a substantial investment in fiber deployment, and the revenue and cost savings associated with that investment, would be inhibited by a perceived loss related to a few of Covad's customers is ludicrous.

Second, it is important to remember that Qwest has made the network modification decision. There is a policy choice to be made by this Commission with respect to that decision: should the result be neutral to competitors,[16] or should Qwest be permitted to raise competitors' costs, destroy the value of their infrastructure investment and essentially drive them from the market? If Qwest is permitted to retire copper feeder, and by doing so deny access to bottleneck loop facilities to competitors, no competitive carrier will invest in entry via the Public Switched

[16] Covad believes this is a reasonable goal. By "neutral," Covad means the change provides no more or less access than competitors had under the previous network configuration, at prices that are neither higher nor lower than previously offered.

Telephone Network (PSTN). This is clearly not what this Commission intended, notwithstanding Qwest's attempts to convince this Commission it is what the FCC intended.

Third, there is no valid reason to believe that Qwest's deployment of more efficient technology would raise, rather than lower, the incremental cost of providing wholesale service to Covad. Rather than attempt to prove this, Qwest points to its retail DSL service offerings for the premise that it would lose money providing wholesale service to Covad. This is unavailing because the same is true today: there is no doubt that Qwest would make more money serving a retail customer than providing wholesale inputs to Covad. The fact that this would continue to be true after a copper retirement says nothing about Qwest's incentives to retire copper, or its recovery of costs, and everything about Qwest's desire to eliminate competition and drive wholesale competitors away from its network.

Finally, it was established at the Arizona arbitration hearing through the un-rebutted testimony of Mr. Zulevic that Qwest itself does not change the price of its broadband offerings based upon the medium used to provide service, or whether remote switching technology is required.[17] In the New Mexico hearing, Qwest witness, Karen Stewart, acknowledged that Qwest does not price its services based on what underlying facilities are used to provide the services.[18] Given the fact that Qwest is free to charge whatever it wishes for retail DSL service, it is curious that it does not charge more in these circumstances if it truly believes it suffers increased costs.

F. The FCC's Recent Decision in the *BellSouth Reconsideration Order* Is Instructive Regarding The Limits Of Incumbent LECs' Rights To Retire Copper

As the FCC stated in the *BellSouth Reconsideration Order*,[19] its ruling in the *Triennial Review Order* "required incumbent LECs to provide unbundled access to the features, functions,

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[17] AZ Tr. Vol. I, 62:5-13.
[18] NM Tr. Vol III, 136:9 – 137:1.
[19] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of*

and capabilities of hybrid loops that are not used to transmit packetized information."[20] As Covad's proposal makes clear, it is not seeking unbundled access to the packet switching capability of Qwest's facilities, merely a method to make use of Covad's *own* packet switching capability.

Even as the FCC granted unbundling relief for Fiber to the Curb (FTTC) loops in many circumstances in the *BellSouth Reconsideration Order*, it recognized that :

> [D]eploying FTTC loops in overbuild situations 'enables an incumbent LEC to replace and ultimately deny access to the already-existing copper loops that competitive LECs were using to serve mass market customers.' Thus, in the overbuild context, we find that competitive LECs face impairment to a limited extent.

BellSouth Reconsideration Order, ¶ 12, *citing the Triennial Review Order*, ¶ 277.

It is therefore significant that, while the FCC expanded its non-impairment analysis to *FTTC loops*, it declined to do so for hybrid loops, and also recognized the impairment faced by competitors when copper plant is retired. Understanding that its rights to deny competitors' access to its hybrid loop facilities was limited by the FCC's actions in the *Triennial Review Order*, Qwest and another RBOC, SBC, petitioned the FCC for forbearance of these unbundling requirements. Before the FCC could take action on these petitions, both of them were withdrawn.[21] Qwest's obligation to provide unbundled access to these facilities, under both section 271 of the Act and Oregon law, therefore remains effective. This Commission can therefore act under its statutory authority to preserve competitive choices for the benefit of Oregon consumers by adopting Covad's proposal.

Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338; 96-98; 98-147, Order on Reconsideration (rel. October 18, 2004) ("BellSouth Reconsideration Order").

[20] *Bell South Reconsideration Order*, ¶ 6, *citing the Triennial Review Order*, 18 FCC Rcd at 17149-90, paras. 288-89; 47 C.F.R. §§ 51.319(a)(2)(i), (ii).

[21] *See* Attachment 4.

G. Qwest's Proposals Provide It An Unlimited Ability To Close The Public Switched Network To Competitors, And Would Make Facilities-Based Competition Impossible

Qwest's proposals surrounding copper retirement, if adopted, would grant it a limitless ability to close the public switched network, denying access to essential facilities to competitors, such as Covad. Qwest believes that the deployment of *any* amount of fiber in its loop plant exempts that plant from any unbundling obligations, and its proposals are designed to reflect this position. Qwest witness, Karen Stewart, testified to this at the New Mexico hearing.[22]

This position is particularly troubling to Covad. While Covad is not concerned, at least in the near term, that Qwest will make substantial investments to retrofit its outside plant with fiber, even a company with scarce financial resources[23] is likely to scrounge together enough capital to place a few feet of fiber within its central offices, if doing so will eliminate its competitors.

H. Covad's Proposals For Sufficient Notice Of Copper Retirements Should Be Adopted

47 C.F.R. § 51.327 prescribes the "minimum" standards for notices of network changes.[24] Qwest's current notifications, embodied by its proposals in this arbitration, do not even meet these "minimum" standards. For instance, notices must, according to the rule, include the "location(s) at which the changes will occur"[25] as well as the "reasonably foreseeable impact of the planned changes."[26]

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[22] NM Tr., Vol.III, 140:3 – 17.
[23] *See* Al Lewis, "Qwest Thirsts For Ghost of a Chance," Denver Post, Friday December 17, 2004 at C1.
[24] 47 C.F.R. § 51.327(a) uses the term "at a minimum" to describe the obligation to meet the listed public notice requirements.
[25] 47 C.F.R. § 51.327(a)(4).
[26] 47 C.F.R. § 51.327(a)(6).

Qwest's notice does not provide such vital information as what Covad customers, if any, will be impacted by the retirement project. In fact, the existing Qwest notices do not provide any customer-specific information at all. The vague notice proposed by Qwest would be useful only as a starting point for a major research project to determine whether a given retirement will impact Covad's customers. In response to each and every notice of a Qwest copper retirement project, Covad would have to determine whether any of its customers would actually be affected.[27]

Covad submits that any notice that can be read to comply with the FCC's rules must specifically inform competitive LECs whether the retirement threatens service to existing customers. The FCC rule clearly places the burden on ILECs to determine the "reasonably foreseeable impact" of its retirements. Qwest's proposal, which would not require specific notice to Covad that any Covad customers are affected, is so devoid of substance that it must be rejected as an unreasonable interpretation of the rule.

Furthermore, the FCC's rules regarding network modifications clearly require:

> A description of the type of changes planned (Information provided to satisfy this requirement must include, as applicable, but is not limited to, references to technical specifications, protocols, and standards regarding transmission, signaling, routing, and facility assignment as well as references to technical standards that would be applicable to any new technologies or equipment, or that may otherwise affect interconnection)...

47 C.F.R. § 51.327(a)(5).

Covad's notice proposals embody this requirement, by specifying that notices contain information regarding "old and new cable media, including transmission characteristics; circuit

[27] Mr. Zulevic explained at the Arizona hearing the difficulties in working with the current notices, which, in addition to being uniformly deficient, are also inconsistent in their provision of information regarding specific retirements. AZ Tr. Vol. I, 64:13 through 66:12.

identification information; and cable and pair information."[28] Covad believes the information it seeks, and which Qwest refuses to provide, is clearly within the scope of the FCC rule. Not only is it within the scope of the rule, it is necessary to lend any meaning whatsoever to the notice requirement.

Even if this Commission does not believe the FCC has required the information Covad requests, the FCC has undoubtedly recognized this Commission's authority to add, or otherwise specify, the notice requirements requested by Covad in order to afford meaningful notice of Qwest retirement projects. In addition to the minimum requirements of 47 C.F.R. § 51.327, the FCC directs ILECs to comply with "any applicable state requirements" related to the retirement of copper loops and copper subloops.[29] While 47 C.F.R. § 51.327 should be read broadly enough to require what Covad seeks, additional state requirements are also clearly authorized.

At the Arizona hearing, it was established that BellSouth presently provides not only a list of specific customer addresses to Covad when it retires copper plant, but commits to provide specific notifications to competitive LECs regarding customers whose DSL service may be disrupted.[30] BellSouth has done so without any additional orders from state utilities commissions, because it realizes, unlike Qwest, that this level of notification is required to meet the existing FCC standards. A complete copy of the notice provided by BellSouth was also introduced in the New Mexico arbitration proceedings, and is attached hereto as Attachment 6.

Oddly enough, Qwest previously provided a similar, though still somewhat deficient, analysis of its planned retirements to competitive carriers. As Covad/105, a sub-exhibit to Covad/100 illustrates, Qwest previously provided CLECs with a statement regarding whether the

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[28] Covad Proposed Section 9.1.15.
[29] 47 C.F.R. § 51.319(a)(3)(iii)(B).
[30] *See* Attachment 6, and Mr. Zulevic's discussion of the specific BellSouth commitments contained at AZ Tr. Vol. I, 66:13 through 67:21.

planned retirement impacted the CLEC community. Qwest gathered this information by reviewing the cable counts impacted by the retirement for working CLEC circuits, and determining whether those circuits were providing Plain Old Telephone Service (POTS) or some other service that could not be cut over to the newly installed facilities.[31] Without any convincing explanation, Qwest now refuses to take these simple steps. Covad must therefore spend hours of additional time researching each Qwest retirement project because Qwest continues to "hide the ball" regarding these projects.

ISSUE 2 – UNIFIED AGREEMENT – 271 AND STATE LAW ELEMENTS INCLUDED (Section 4 Definitions of "Unbundled Network Element"; Sections 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, and 9.21.2)

The Parties disagree with respect to Qwest's continuing obligations to provide certain network elements, including certain unbundled loops (including high capacity loops, line splitting arrangements, and subloop elements), and dedicated transport, after the FCC's recent analysis in the *Triennial Review Order*. Covad maintains that the FCC's explicit direction was to continue the obligations of Regional Bell Operating Companies ("RBOCs") to provide all network elements listed in the provisions of Section 271 of the Telecommunications Act (the "Act") outlining specific RBOC obligations to maintain authority to provide in-region interLATA service (the "271 Checklist" or "Checklist").

Qwest's proposals with respect to the sections listed above demonstrate its desire to remove network elements provided pursuant to Section 271 of the Act from the Agreement. Covad, on the other hand, proposes that Qwest's obligations pursuant to Section 271 be memorialized in the Agreement, because there is no basis to treat Qwest's Section 271

[31] *See* Covad/106, a sub-exhibit to Covad/100.

obligations any differently than either party's other obligations under the Act. For this reason, the Parties' Agreement is the appropriate document to establish these obligations, and this Commission has clear authority to arbitrate disputes that arise with respect to these obligations.

Perhaps more importantly, Qwest continues to be obligated under Oregon law to provide access to unbundled network elements or "building blocks," which, by Commission order, specifically include most, if not all, of the elements to which Covad seeks continued access in this arbitration. Docket No. UT 138/UT 139, Phase II, *In the Matter of Ascertaining the Unbundled Network Elements that must be Provided by Incumbent Local Exchange Carriers to Requesting Telecommunications Carriers Pursuant to 47 C.F.R. §51.319, Order* No. 01-1106 entered December 26, 2001. Furthermore, this Commission has already established rates for these elements.

Separate from the broader legal and policy issues surrounding this unbundling dispute, there is another set of competitive issues surrounding Qwest's refusal to provision the data portion of line splitting arrangements. As further explained below, the Commission should specifically address this issue to avoid unintended and anti-competitive consequences in the broadband market.

A. Section 271

This Commission can, and should, use its authority to enforce the unbundling requirements of Section 271 of the Act. The FCC made clear in the *Triennial Review Order* that Section 271 creates independent access obligations for the RBOCs:

> [W]e continue to believe that the requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251.

Triennial Review Order, ¶ 653.

> Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under Section 271 are not necessarily relieved based on any determination we make under the Section 251 unbundling analysis.

Triennial Review Order, ¶ 655.

Thus, there is no question that, regardless of the FCC's analysis of competitor impairment and corresponding unbundling obligations under Section 251 for *ILECs*, as an RBOC Qwest retains an independent statutory obligation under Section 271 of the Act to provide competitors with unbundled access to the network elements listed in the Section 271 checklist.[32] Moreover, there is no question that these obligations include the provision of unbundled access to loops and dedicated transport under checklist item #4:

> Checklist items 4, 5, 6, and 10 separately impose access requirements regarding **loop**, **transport**, **switching**, and signaling, without mentioning section 251.

Triennial Review Order, ¶ 654. [emphasis added]

Qwest does not attack this premise directly, but instead argues that this Commission does not have the authority to order the adoption of terms in an interconnection agreement that address compliance with Section 271. This position ignores the requirements of Section 271, as well as common sense. Recently, the Maine Public Utilities Commission rejected this argument and found that:

> ...[S]tate commissions have the authority to arbitrate and approve interconnection agreements pursuant to section 252 of the TelAct. Section 271(c)(2)(A)(ii) requires that ILECs provide access and interconnection which meet the requirements of the 271 competitive checklist, i.e. includes the ILEC's 271 unbundling obligations. Thus, state commissions have the authority to arbitrate section 271 pricing in the context of section 252 arbitrations.

[32] *See* 47 U.S.C. § 271(c)(2)(B).

Maine PUC Docket No. 2002-682, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection* (PUC 20) *and Resold Services* (PUC 21), Order – Part II (September 3, 2004) ("Maine 271 Unbundling Order"). This order can be found at http://www.maine.gov/mpuc/orders/orders.htm.

Furthermore, there can be no argument that the Commission's enforcement of Qwest's Section 271 checklist obligations would substantially prevent the implementation of any provision of the Act. Indeed, where state enforcement activities do not impair federal regulatory interests, concurrent state enforcement activity is clearly authorized. *Florida Avocado Growers v. Paul,* 373 U.S. 132, 142, 83 S. Ct. 1210, 1217, 10 L.Ed.2d 248 (1963). Courts have long held that federal regulation of a particular field is not presumed to preempt state enforcement activity "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *De Canas v. Bica,* 424 U.S. 351, 356, 96 S. Ct. 933, 936, 47 L.Ed.2d 43 (1976) (quoting *Florida Avocado Growers,* 373 U.S. at 142, 83 S. Ct. at 1217). The Act, however, hardly evinces an unmistakable indication of Congressional intent to preclude state enforcement of federal 271 obligations. Far from doing so, the Act expressly preserves a state role in the review of a RBOC's compliance with its Section 271 checklist obligations, and requires the FCC to consult with state commissions in reviewing a RBOC's Section 271 compliance.[33]

The FCC has confirmed state commissions' enforcement role with respect to Section 271:

> We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Qwest's entry into these three states.

[33] *See* 47 U.S.C. § 271(d)(2)(B) (requiring the FCC to consult with state commissions in reviewing RBOC compliance with the 271 checklist).

In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota, WC Docket No. 03-11, Memorandum Opinion and Order, 18 FCC Rcd. 7325 (Rel. April 15, 2003), ¶151.

The Maine Public Utilities Commission agreed:

> Indeed, it makes both procedural and substantive sense to allow state commissions, which are much more familiar with the individual parties, the wholesale offerings, and the issues of dispute between the parties, to monitor ILEC compliance with section 271 by applying the standards prescribed by the FCC, i.e. ensuring that Verizon meets its Checklist Items No. 4, 5, 6, and 9 obligations.

Maine PUC Docket No. 2002-682, *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection* (PUC 20) *and Resold Services* (PUC 21), Examiner's Report (July 23, 2004) ("Maine 271 Examiner's Report"), *affirmed by the Maine Public Utilities Commission in the Maine 271 Unbundling Order*. A copy of this report can be found at http://www.maine.gov/mpuc/orders/orders.htm.

The Commission therefore possesses the authority to enforce Qwest's obligations to provide unbundled access to loops (including high capacity loops, line splitting arrangements and subloop elements) and dedicated transport under Section 271 checklist item #4. Specifically, this Commission has clearly been granted the authority to arbitrate provisions of interconnection agreements addressing Section 271 obligations, as well as set prices that comply with federal pricing standards:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions ... the FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in [section] 252(d) [of the Act]. It is the states that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.

AT&T v. Iowa Utils. Bd., 525 U.S. 366, 384, 142 L.Ed.2d 834, 876 (1999).

The FCC made it clear in the *Triennial Review Order* that a different pricing standard applied to network elements required to be unbundled under Section 271 as opposed to network elements unbundled under Section 251 of the Act. Specifically, the FCC stated that "the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202." *Triennial Review Order*, ¶ 656. In other words, according to the FCC, the *legal standard* under which pricing for Section 271 checklist items should be determined is a different *legal standard* than that applied to price Section 251 UNEs. Thus, "Section 271 requires RBOCs to provide unbundled access to elements not required to be unbundled under Section 251, but does not *require* TELRIC pricing." *Triennial Review Order*, ¶ 659 (emphasis added). Oregon has already established specific cost methodology for essential facilities to which Covad seeks continued access under state law: TSLRIC[34] (a methodology closely related to the FCC's chosen methodology for setting rates for UNEs, namely TELRIC). Notably, in the *Triennial Review,* the FCC nowhere forbids the application of such pricing of network elements required to be unbundled under Section 271. Rather, the FCC merely states that unbundled access to Section 271 checklist items is not *required* to be priced using TELRIC. The FCC states that the appropriate legal standard to determine the correct price of Section 271 checklist items is found in Sections 201 and 202. However, nowhere does the FCC state these two different legal standards may not result in the same rate-setting methodology.

Furthermore, the FCC does not preclude the use of forward-looking, long-run incremental cost methodologies *other than TELRIC* to establish the prices for access to Section

[34] Docket No. UM 351, Order Nos. 90-920, 94-1851, 95-313 and 96-188.

271 checklist items. As the FCC made clear when it adopted the TELRIC pricing methodology in its *Local Competition Order*,[35] there are various methodologies for the determination of forward-looking, long-run incremental cost. *Local Competition Order*, ¶ 631. TELRIC describes only one variant, established by the FCC for setting UNE prices under Section 252(d)(1), derived from a family of cost methodologies consistent with forward-looking, long-run incremental cost principles. *See Local Competition Order*, ¶¶ 683-685 (defining "three general approaches" to setting forward-looking costs). Thus, the FCC's *Triennial Review Order* does not preclude the use of a forward-looking, long-run incremental cost standard *other than TELRIC* in establishing prices consistent with Sections 201 and 202 of the Act.[36] The Illinois Commerce Commission recently ruled:

> The FCC determined that 'the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in Sections 201 and 202.' TRO ¶ 656. This standard, on its face, does not appear to conflict with [Illinois Public Utilities Act] Section 13-801(b)(1)'s requirement that interconnection take place 'on just, reasonable, and nondiscriminatory rates, terms and conditions' or Section 13-801(g)'s call for cost-based rates.

Illinois Bell Telephone Company; Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act, Docket No. 01-0614, Order on Remand (Phase I), April 20, 2005 ("Illinois Unbundling Decision") at 64.

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[35] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (rel. August 8, 1996) ("Local Competition Order").

[36] For example, where the 271 checklist item for which rates are being established is not legacy loop plant but next-generation loop plant, incumbents might argue for the use of a forward-looking, long-run incremental cost methodology based on their *current network technologies* – in other words, a non-TELRIC but nonetheless forward-looking, long-run incremental cost methodology. *See, e.g., Local Competition Order*, ¶ 684.

Given the intense scrutiny that has been applied by this Commission in establishing rates for elements that may now be subject to Section 271 unbundling obligations, adopting those rates, at least for an interim period, makes far more sense than any other result. In resolving this issue the Maine Public Utilities Commission stated:

> Until such time as we approve new rates for section 271 UNEs, adopt FCC-approved rates, or CLECs agree to section 271 UNE rates, Verizon must continue to provide all section 271 UNEs at existing TELRIC rates. We find this requirement necessary to ensure a timely transition to the new unbundling scheme. We have no record basis to conclude that TELRIC rates do not qualify as "just and reasonable" rates; while we might ultimately approve higher rates, we cannot do so without the benefit of a record or the agreement of the parties. We note that the decision we reach today is consistent with the approach embodied in the FCC's Interim Rules, which require a six-month moratorium on raising wholesale rates.

Maine 271 Unbundling Order.

B. State Law Unbundling Authority

This Commission has the requisite authority to require access to loops, including high capacity loops, line splitting arrangements, and subloop arrangements, as well as dedicated transport, under its independent, state law authority. Not only does the Commission have this authority, it has already acted to mandate access to most, if not all, of the elements Covad seeks.

While Qwest will certainly claim these rulings are preempted, federal preemption of state law should not be lightly presumed. To the extent there is any doubt as to Congress' intent to preempt state law, that doubt should be resolved against preemption because "...the state is powerless to remove the ill effects of [a preemption] decision, while the national government, which has the ultimate power, remains free to remove the burden." *Penn Dairies v. Milk Control Commission of Pennsylvania,* 318 U.S. 261, 275; 63 S.Ct. 617, 624 (1943).

While Qwest has repeatedly argued in parallel proceedings that state commissions are preempted from enforcing their own unbundling regimes, or that those regimes are somehow inconsistent with the Act, this issue has already been settled in Oregon. In its decision in UT 138/UT 139, the Commission explicitly noted that it had charged the Commission staff with identifying building blocks "additional" to the UNEs listed in 47 C.F.R. § 51.319, and found that its resulting unbundling order was consistent with this FCC rule and the Requirements of Order No. 00-316. Decision at 1.

This independent state law authority is not preempted by the FCC's recent *Triennial Review Order*. Nowhere does Section 251 of the Act evince any general Congressional intent to preempt state laws or regulations providing for competitor access to unbundled network elements or interconnection with the ILEC. In fact, as recognized by the FCC in its *Triennial Review Order*, several provisions of the Act expressly indicate Congress' intent not to preempt such state regulation, and forbid the FCC from engaging in such preemption:

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. Many states have exercised their authority under state law to add network elements to the national list.

Triennial Review Order, ¶ 191.

As the FCC further acknowledges in the *Triennial Review Order*, Congress expressly declined to preempt states in the field of telecommunications regulation:

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.

Triennial Review Order, ¶ 192.

Any questions regarding this Commission's authority to impose additional unbundling obligations has been repudiated not only by the FCC in the *Local Competition First Report and Order*,[37] but also by every federal court passing judgment on the meaning of section 252(e)(3) of the Act.[38] Federal courts have routinely confirmed that the Act's savings clauses, especially 47 U.S.C. § 252(e)(3), provide state commissions with the requisite authority to enforce their own access obligations. They have likewise determined that for state requirements to be preempted, they must actually conflict with federal law, or thoroughly occupy the legislative field.[39] Congress effectively eliminated any argument supporting implied preemption by including the following language in the Act:

> (c) Federal, State, and Local Law.--
>
> (1) **No implied effect**.--This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

Pub. L. 104-104, title VI, Sec. 601(c), Feb. 8, 1996, 110 Stat. 143. [emphasis added]

In fact, the FCC only identified a narrow set of circumstances under which federal law would act to preempt state laws and rules providing for competitor access to ILEC facilities:

> Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 and do not "substantially prevent" the implementation of the federal regulatory regime.
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> ...

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[37] *See Local Competition First Report and Order*, ¶ 244.

[38] *See Southwestern Bell Telephone Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 481 (5th Cir. 2000) ("The Act obviously allows a state commission to consider requirements of state law when approving or rejecting interconnection agreements."); *AT&T Communications v. BellSouth Telecommunications Inc.*, 238 F.3d 636, 642 (5th Cir. 2001) ("Subject to § 253, the state commission may also establish or enforce other requirements of state law in its review of an agreement." [citing § 252(e)(3)]); *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 301-302 (4th Cir. 2001) ("Determinations made [by state commissions] pursuant to authority other than that conferred by § 252 are, by operation of § 601(c) of the 1996 Act, left for review by State courts. [citing 47 U.S.C. § 152 note]...Section 252(e) also permits State commissions to impose State-law requirements in its review of interconnection agreements.")

[39] *Cippillone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992).

> [W]e find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.

Triennial Review Order, ¶¶ 192, 194.

Notably, in reaching these conclusions, the FCC was simply restating existing, well-known precedents governing the law of preemption. Specifically, the long-standing doctrine of federal conflict preemption provides for exactly the limited sort of federal preemption acknowledged by the FCC's *Triennial Review Order*. Courts have long held that state laws are preempted to the extent that they actually conflict with federal law. As noted by the FCC's *Triennial Review Order*, such conflict exists where compliance with state law "stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress." *Triennial Review Orde*r, ¶ 192 n. 613 (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). Even more notably, in its *Triennial Review Order*, the FCC did not act to preempt any existing state law or regulation inconsistent with the FCC's rules, nor did it act to preclude the adoption of future state laws or regulations governing the access of competitors to ILEC facilities which are inconsistent with the FCC's rules. In fact, following the governing law set out in the Eighth Circuit's *Iowa Utilities Board I* decision, the FCC specifically recognized that state laws or regulations which are inconsistent with the FCC's unbundling rules are <u>not</u> *ipso facto* preempted:

> That portion of the Eighth Circuit's opinion reinforces the language of [Section 251(d)(3)], *i.e.*, that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "merely an inconsistency" between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).

Triennial Review Order, ¶ 192 n. 611 (citing Iowa Utils. Bd. v. FCC, 120 F.3d at 806).

In so doing, the FCC made clear that it was acting in conformance with the governing law set out in the *Iowa Utilities Board I* decision:

> We believe our decision properly balances the broad authority granted to the Commission by the 1996 Act with the role preserved for the states in section 251(d)(3) and is fully consistent with the Eighth Circuit's interpretation of that provision.

Id.

Thus, far from taking any specific action to preempt any state law or regulation governing competitor access to incumbent facilities, the FCC merely acted in the *Triennial Review Order* to restate the already-existing bounds on state action recognized under existing doctrines of conflict preemption. Furthermore, the FCC's *Triennial Review Order* recognized that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules would be insufficient to create such a conflict. Instead, consistent with existing doctrines of conflict preemption, the FCC recognized that the state laws would have to "substantially prevent implementation" of Section 251 in order to create conflict preemption.

Of course, the FCC's *Triennial Review Order* could not have concluded that all state rules unbundling network elements not required to be unbundled nationally by the FCC create conflict preemption. Had the FCC reached such a conclusion, the FCC would have rendered Section 251(d)(3)'s savings provisions a nullity, never operating to preserve any meaningful state law authority in any circumstance. Rather than reaching such a conclusion, the FCC created a process for parties to determine whether a "particular state unbundling obligation" requiring the unbundling of network elements not unbundled nationally by FCC rules creates a conflict with federal law. The *Triennial Review Order* invited parties to seek declaratory rulings from the FCC regarding individual state obligations. An invitation to seek declaratory ruling, however, hardly amounts to preemption in itself – it merely creates a process for interested parties to establish <u>in future proceedings before the FCC</u> whether or not a particular state rule conflicts with federal law.

The FCC did give interested parties some indication of how it might rule on such petitions. Specifically, the FCC stated that it was "*unlikely*" that the FCC would refrain from finding conflict preemption where future state rules required "unbundling of network elements for which the Commission has either found no impairment ... or otherwise declined to require unbundling on a national basis." *Triennial Review Order*, ¶ 195. The FCC's statement, however, that such future rules were merely "*unlikely*" – as opposed to simply unable – to withstand conflict preemption leads to the inevitable conclusion that there are some circumstances in which the FCC would find that such future rules were not preempted. Moreover, with respect to state rules in existence at the time of the *Triennial Review Order*, the FCC's indications that it might find conflict preemption are even more muted. Specifically, the FCC merely stated that "in *at least some circumstances* existing state requirements will not be consistent with our new framework and may frustrate its implementation." *Triennial Review Order*, ¶ 195.

Thus, while the FCC's *Triennial Review Order* indicates that under some circumstances the FCC would find conflict preemption for state rules requiring the unbundling of network elements not unbundled nationally under federal law, the decision also indicates that in some circumstances the FCC would decline to find that such state rules substantially prevent implementation of Section 251. In fact, the FCC's decision gives some direction on the circumstances that would lead the FCC to decline a finding of conflict preemption for state rules unbundling network elements the FCC has declined to unbundle nationally. Specifically, in its discussion of state law authority to unbundle network elements, the FCC states that "the availability of certain network elements may vary between geographic regions." *Triennial Review Order*, ¶ 196. Indeed, according to the FCC, such a granular "approach is required under *USTA*." *Triennial Review Order*, ¶ 196 (citing *USTA*, 290 F.3d at 427). Thus, if the requisite state-specific circumstances exist in a particular state, state rules unbundling network elements

not required to be unbundled nationally are permissible in that state, and would not substantially prevent the implementation of Section 251.

Notably, the FCC's statements indicating when it is 'likely' to find preemption for particular state rules appear to conflict with a recent Sixth Circuit decision. The Sixth Circuit has stated that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted." The court further noted that a state commission is permitted to "enforce state law regulations, even where those regulations differ from the terms of the Act or an interconnection agreement" entered into pursuant to Section 252 of the Act, "as long as the regulations do not interfere with the ability of new entrants to obtain services." *See Michigan Bell Telephone Company v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348, 359 (6th Cir. 2003).

Recently, the Illinois Commerce Commission performed an exhaustive, detailed, and legally sound analysis of these preemption issues, eventually finding that Illinois statutes requiring the unbundling of elements beyond those now required by 47 C.F.R. § 51.319 are largely not preempted by federal law:

> We disagree with SBC's contention that Section 13-801 necessarily conflicts with and is preempted by Section 251 of TA 96 because Section 251, unlike Section 13-801, requires network elements to meet the necessary and impair test in order to be offered at TELRIC-based rates. We note that Section 271 of TA 96 delineates additional categories of network elements required to be unbundled without reference to the 'necessary and impair' test. We find that Section 13-801's unrestricted access to network elements is comparable to the absence of limiting language in Section 271 of TA 96 [and therefore cannot be preempted].

Illinois Unbundling Order at 62-63.

While Covad believes preemption of Oregon law mandating unbundling is unlikely, it is also irrelevant. This Commission should exercise its authority as it is delineated by Oregon statute, irrespective of preemption analysis, as the adjudication of the constitutionality of

legislative enactments in generally beyond the jurisdiction of administrative agencies. *Johnson, Administrator of Veterans' Affairs, et. al. v. Robison,* 415 U.S. 361, 368; 94 S. Ct. 1160, 1166; 39 L. Ed. 2d 389, 398 (1974).

C. The Commission Should Preserve Language In The Agreement Regarding The Data Portion Of Line Splitting Arrangements To Avoid Unintended And Anti-Competitive Consequences For The Broadband Market

Qwest's proposals regarding the *data* portion of line splitting arrangements (unrelated to unbundled switching), adopted by the Decision, would make this product unavailable in all markets where switching is no longer available as a section 251 element.

The Parties' dispute regarding line splitting raises additional, entirely separate issues apart from the broader unbundling dispute raised by Issue 2. Neither the *Triennial Review Order* nor the *TRO Remand Order*[40] can be read to eliminate line splitting, notwithstanding the impairment determinations made pursuant to section 251 of the Act. In fact, the *Triennial Review Order* contains several discussions confirming that the continued availability of line splitting was a critical component in conducting its impairment analysis for other UNEs.[41] This makes line splitting clearly distinct from other elements Qwest seeks to eliminate in the Parties' Agreement.

1. The FCC Has Confirmed That Line Splitting Must Still Be Provided By ILECs

The FCC's rule regarding line splitting, adopted with the *Triennial Review Order*, is abundantly clear:

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[40] WC Docket No. 04-313; CC Docket No. 01-338, *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand (Rel. February 4, 2005) ("TRO Remand Order").

[41] *See Triennial Review Order*, ¶ 251-252, 255, 259, 260, 265, 270, 777 (n. 2309).

> (ii) Line splitting. **An incumbent LEC shall provide a requesting telecommunications carrier that obtains an unbundled copper loop from the incumbent LEC with the ability to engage in line splitting arrangements** with another competitive LEC using a splitter collocated at the central office where the loop terminates into a distribution frame or its equivalent. Line splitting is the process in which one competitive LEC provides narrowband voice service over the low frequency portion of a copper loop and a second competitive LEC provides digital subscriber line service over the high frequency portion of that same loop.
>
> > (A) **An incumbent LEC's obligation, under paragraph (a)(1)(ii) of this section, to provide a requesting telecommunications carrier with the ability to engage in line splitting applies regardless of whether the carrier providing voice service provides its own switching or obtains local circuit switching as an unbundled network element pursuant to paragraph (d) of this section.**
> >
> > (B) An incumbent LEC must make all necessary network modifications, including providing nondiscriminatory access to operations support systems necessary for pre-ordering, ordering, provisioning, maintenance and repair, and billing for loops used in line splitting arrangements.

47 C.F.R. § 51.319(a)(1)(ii).

This rule remains unchanged following the *TRO Remand Order*. The FCC's treatment of line splitting in both the *Triennial Review Order* and its resulting rules make clear not only that line splitting must still be made available, but that both the high frequency and low frequency portions of the loop used to provide line splitting are loop UNEs. This is confirmed by the line splitting rule's inclusion in 47 C.F.R. § 51.319(a)(1), which establishes the FCC's rules regarding unbundled loops.

2. Qwest Has Confirmed That Line Splitting Should Be Addressed In Interconnection Agreements

In its proposed commercial agreements for its switching product, labeled Qwest Platform Plus (QPP), Qwest confirms that purchasers of its commercial switching product may combine the product with digital loops in order to provide line splitting:

> As part of the QPP service, Qwest shall combine the Network Elements that make up QPP service with Analog/Digital Capable Loops, with such Loops (including services such as line splitting) being provided pursuant to the rates, terms and conditions of the CLEC's ICAs as described below.

Service Exhibit 1 – Qwest Platform Plus Service ("QPP Agreement") at 1 (emphasis added). A copy of this agreement has been attached hereto as Attachment 5.

Qwest's QPP Agreement suggests that Qwest believes line splitting is a loop-based product that should be purchased not pursuant to a commercial agreement, but through ICAs. It has not, and does not intend to offer it as a commercial product. It does, however, contemplate that it may be combined with its QPP product, which includes only the switching and shared transport elements of local service, which are to be combined with loops purchased as unbundled network elements. In order to lend any meaning to Qwest's commitment to combine line splitting with its QPP product, it must therefore be available in ICAs.

Despite this, Qwest's proposal for section 9.21.2 reads:

> On the effective date of a Commission determination that Qwest is no longer required to provide UNE-P Combination services in a market area, Line Splitting is also not available in that market area. To the extent CLEC has an embedded base of Line Splitting End User Customers on the effective date of the Commission determination, CLEC shall transition its embedded base of Line Splitting End User Customers in accordance with the Transition Timelines for unbundled switching, as described in Section 9.11.20.1. In such markets where Line Splitting is not available, Loop Splitting will continue to be available pursuant to Section 9.24 of this Agreement. (emphasis added)

As it stands, the two agreements, the Agreement being negotiated in this docket and Qwest's QPP Agreement, make no sense when read together and are also not compliant with the FCC's rules. On the one hand, the QPP Agreement clearly contemplates line splitting as a loop UNE, to be purchased from ICAs, while the ICA declares it unavailable. The Commission should therefore order the Parties to amend the agreement to provide for the purchase of line splitting elements needed to provide the data portions of line splitting.

3. Adoption of Qwest's Language Will Lead To Anti-Competitive Results

The clear intent of the FCC's *TRO Remand Order* was to confirm that unbundled mass-market switching was no longer available as a UNE; it was not to grant Qwest a decisive operational advantage in the DSL market, and place it in a dominant position to partner with CLECs to whom it sells its commercial switching product. Qwest acknowledges as much in the language of its QPP Agreement, which intends to preserve the right of CLECs to partner with competitive DSL providers, such as Covad, in line splitting arrangements. If Covad is not permitted to order line splitting elements from Qwest, CLECs purchasing QPP, and their customers, will have no choice but to partner with Qwest for the provision of DSL.

This would have a clearly negative impact on the competitive market for DSL in the state of Oregon. While the switching portion of line splitting arrangements is clearly no longer a section 251 UNE, neither the *TRO Remand Order,* nor any of the decisions leading to that order, can be read to express a policy of closing the combined voice/broadband market to competition. The unambiguous pronouncement of the FCC is that unbundled switching alone was the target of the FCC's revised non-impairment analysis, and that DSL providers should continue to have the

ability to partner with voice CLECs, notwithstanding the fact that those voice CLECs purchase switching on a commercial basis from Qwest.

ISSUE 3 - COMMINGLING
(Section 4 Definitions of "Commingling" and "251(c)(3) UNE," 9.1.1.1, 9.1.1.4.2,[42] and 9.1.1.5 (and subsections))

The Parties' disagreement can be distilled to the following: Qwest believes the FCC intended to create a special category for elements that must be provisioned under Section 271 of the Act, and that such elements have a status inferior to all other wholesale telecommunications services, and cannot be commingled with any other wholesale services. Covad believes the FCC intended, and confirmed in its Errata to the *Triennial Review Order*, to treat Section 271 elements just like any other telecommunications service not purchased pursuant to Section 251(c)(3) of the Act.

A. The *Triennial Review Order* Provides For The Commingling Of 271 Elements With 251(c)(3) UNEs

The FCC defines "commingling" as:

> the connecting, attaching, or otherwise linking of a UNE, or a UNE Combination,[43] to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC **pursuant to any method other than unbundling under section 251(c)(3) of the Act**, or the combining of a UNE or UNE combination with one or more such wholesale services.

Triennial Review Order, ¶ 579.

Originally, the FCC had specifically identified "elements unbundled pursuant to Section 271" in paragraph 584 of the *Triennial Review Order* in the midst of its discussion of ILECs' resale commingling obligations. Qwest apparently believes that the deletion of this phrase in paragraph 584 by the FCC's Errata to the *Triennial Review Order* somehow modifies the FCC's

[42] While the Parties have generally resolved their dispute with respect to rate ratcheting, Section 9.1.1.4.2 remains open due to the Parties' commingling dispute.
[43] Unlike the Parties' Agreement, the FCC generally uses the term "UNE" to refer to a network element available pursuant to its analysis under section 251 of the Act.

general statement in paragraph 579, cited above, which was not included in the Errata. Covad believes the more reasonable explanation is that paragraph 584 is dedicated exclusively to a discussion of the ILECs' obligations to commingle 251(c)(3) UNEs with resale services, and the introduction of 271 elements to that discussion was confusing. In fact, the inclusion of 271 elements, without the inclusion of other wholesale services, would have left the implication that such elements were to be treated differently than Section 271 elements. If the FCC had truly intended to exclude Section 271 elements from commingling eligibility as a "facilities or service [ ] that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act," it would have modified this language in paragraph 579.

Further supporting Covad's reading of the FCC's statements is the resulting FCC Rule:

> (e) Except as provided in Sec. 51.318 [the high-capacity EEL service eligibility criteria], an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

47 C.F.R. § 51.309(e).

Any element provided pursuant to Section 271 is undoubtedly a "wholesale service" which may, under the FCC's rule, be commingled with "unbundled network elements." In fact, the FCC's use of the terms "an unbundled network element pursuant to Section 251(c)(3) of the Act" as well as the more generic term "unbundled network element,"[44] may create some question as to whether a network element that is not available under Section 251, but nevertheless is provided under Section 271 or state law, is in fact an "unbundled network element" according to the FCC. Covad's language does not go that far. For now, Covad is content with this Commission's recognition that a Section 271 element is undoubtedly a "wholesale service."

[44] *See* 47 C.F.R. § 51.309(d) and (e).

B. A Definition of "251(c)(3) UNE" Is Necessary To Accurately Reflect The FCC's Commingling Rules And To Maintain Consistency Within The Agreement

As noted above, the FCC made a distinction in paragraph 579 of the *Triennial Review Order* between elements purchased under Section 251(c)(3) of the Act, and elements "obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act." For this reason, Covad has introduced a new definition to the Agreement: "251(c)(3) UNE." This definition is relatively self-explanatory, and does not include non-251(c)(3) elements, which are arguably not "UNEs" for purposes of the FCC's commingling rules. By incorporating this definition, the Agreement can restrict commingling arrangements to the commingling of 251(c)(3) UNEs with elements "obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act."

Qwest's opposition to this definition raises larger questions. Apparently, Qwest believes that "unbundled network element," as used in the Agreement, can only mean elements provided pursuant to Section 251(c)(3). In other words, the definition proposed by Covad is not so much incorrect as it is unnecessary. What Qwest overlooks is that the Agreement itself, in language agreed to by Qwest, contains a broader definition of UNEs:

> CLEC and Qwest agree that the UNEs identified in Section 9 are not exclusive and that pursuant to changes in FCC rules, state laws, or the Bona Fide Request Process, or Special Request Process (SRP) CLEC may identify and request that Qwest furnish additional or revised UNEs to the extent required under Section 251(c)(3) of the Act **and other Applicable Laws.**

Given this necessary vagueness as to what may be provided as an "unbundled network element" under the Agreement, Covad believes its more narrow definition of "251(c)(3) UNE" allows for the implementation of the FCC's commingling rules, and should be adopted by this Commission. This distinction is made all the more important by the fact that this Commission has confirmed the existence of unbundled elements, or building blocks, that must be required

pursuant to Oregon law, notwithstanding their exclusion from the national list of UNEs to be provided pursuant to 47 U.S.C. § 251(c)(3).

C. Other State Commissions Have Uniformly Adopted Covad's Position On Commingling

Other state commissions have uniformly adopted Covad's proposed language, as well as its interpretation of the *Triennial Review Order.* In agreeing with Covad's position in a parallel arbitration proceeding, the Colorado Public Utilities Commission stated:

> Notably, we agree with Covad that the plain and clear language in the TRO (e.g., in ¶ 579) and the FCC's commingling rule itself (47 CFR § 51.309(3)) supports its position. Those provisions plainly state that an ILEC shall permit a requesting carrier to commingle UNEs with facilities and services obtained at wholesale from the ILEC pursuant to a method other than unbundling under § 251(c)(3). Those provisions do not contain the restriction advocated by Qwest here. There can be no dispute that network elements obtained under § 271 are wholesale services. As such, the TRO allows for commingling of UNEs with § 271 elements.

Colorado Public Utilities Commission Docket No. 04B-160T, *In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Company Pursuant to 47 U.S.C. § 252(b)*, Dec. No. C04-1037, Initial Commission Decision (Mailed: August 27, 2004) at ¶ 176. This decision can be found at http://www.dora.state.co.us/puc/decisions/2004/.

In overturning an Arbitrator's Report deciding the issue in Qwest's favor, the Washington Utilities and Transportation Commission stated:

> The next question is whether the FCC has excluded Section 271 elements as a whole from commingling obligations, as Qwest asserts, or allows Section 251(c)(3) UNEs to be commingled with Section 271 elements, as Covad claims. We find Covad's interpretation of paragraph [584, footnote] 1990 persuasive, and reverse the Arbitrator's decision on this point as well. The FCC removed language from footnote 1990 that would support Qwest's expansive view prohibiting any commingling of Section 271 elements. The subject of the FCC's commingling definition is

> Section 251(c)(3) UNEs, not wholesale services. It is reasonable to infer that BOCs are not required to apply the commingling rule by commingling Section 271 elements with other wholesale elements, but that BOCs must allow requesting carriers to commingle Section 251(c)(3) UNEs with wholesale services, such as Section 271 elements.

Washington Utilities and Transportation Commission, Docket No. UT-043045, *In the Matter of the Petition for Arbitration of Covad Communications Company With Qwest Corporation*, Order No. 6 (Issued February 9, 2005) ("Washington Order") at 30. This order can be found at http://www.wutc.wa.gov/rms2.nsf?Open.

The Minnesota Public Utilities Commission has also elected to adopt Covad's proposed language. *See* Minnesota Public Utilities Commission Docket No. P-5692,421/IC-04-549, *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)*, Order Resolving Arbitration Issues and Requiring Filed Interconnection Agreement at 5 and Arbitrator's Report at 16-21. The Minnesota Commission's Order can be found at http://www.puc.state.mn.us/docs/orders/05-0016.pdf. The Arbitrator's Report is attached as Attachment 7.

ISSUE 5 - REGENERATION REQUIREMENTS
(Sections 8.2.1.23.1.4, 8.3.1.9, and 9.1.10)

Within a central office, carriers often need to connect separate pieces of telecommunications equipment in order to provide service to their customers. In some instances, these cross connects are used by carriers to exchange traffic with each other in order to cooperatively provide telecommunications service. For instance, Covad has established connections with other CLECs that provide switched voice service in order to cooperatively provide a combined voice and DSL service. These arrangements are known either as line

splitting or loop splitting arrangements, depending on whether the voice grade provider self-provisions its own switching or purchases unbundled switching from Qwest.

The distance between separate collocations, and the resulting length of these central office cross connects varies on a case-by-case basis. In some circumstances, the length of the connection is such that intermediate equipment must be used to keep the signal from being lost. The intermediate equipment placed boosts the signal, allowing it to travel the entire distance of the connection without signal loss. This is known as central office regeneration. Qwest provides central office cross connections between CLECs, but has stated that if these connections require regeneration, the connections will not be made available as an element of collocation. Qwest does, however, provide regeneration of cross connects between Covad and the Qwest network when required, as well as between two separate Covad collocations within the same central office. It currently provides this regeneration at no charge. Regeneration of connections between two separate CLECs are referred to by the parties as CLEC-to-CLEC regeneration and, as mentioned above, Qwest refuses to provide them on a wholesale basis.

Covad has proposed language for the agreement that clarifies that Qwest must provide regenerated cross connects between Covad collocations as well as between a Covad collocation and another CLEC's collocation ("CLEC-to-CLEC cross connections with regeneration") when requested by Covad. This language is supported by the Telecommunications Act's requirement that collocation be provided by incumbent LECs on terms that are just, reasonable, and non-discriminatory.[45] While Covad can place its own CLEC-to-CLEC connections that do not require regeneration (and, incidentally, Qwest offers such connections as a wholesale product anyway), Qwest's collocation policies, in combination with industry standards, render the self-

[45] 47 U.S.C. § 251(c)(6).

provision of *regenerated* cross connections technically and financially infeasible, leading to cases of clear discrimination.

A. The Act and FCC Rules Require Non-Discriminatory Access To Central Office Collocation, Including CLEC-to-CLEC Cross Connections

In his direct testimony, Qwest's witness Michael Norman maintained that Qwest should not have to offer CLEC-to-CLEC cross connections with regeneration because Qwest allows CLECs, such as Covad, to make the connection themselves, satisfying the exception contained in 47 C.F.R. § 51.323(h)(1). However, the scope of the FCC's cross-connection rule must be viewed in light of the FCC's written decision in its *Fourth Report and Order* adopting the rule, which reveals the FCC's intent to protect competitive LECs from any discrimination related to incumbent LEC collocation restrictions.

In requiring Incumbent LECs to provision cross-connections between CLECs, the FCC stated: "our action reflects our overriding concern than an incumbent LEC would be acting in an unreasonable and discriminatory manner if it refused to provide cross-connects between collocators,"[46] and that "an incumbent LEC's refusal to provide a cross-connect between two collocated carriers would violate the incumbent's duties under section 251(c)(6) to provide collocation 'on ... terms and conditions that are just, reasonable, and nondiscriminatory.'"[47] The FCC went on to find that an incumbent LEC's provisioning of cross-connects to two collocated carriers was required by section 251(c)(6) of the Act.[48]

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[46] *Fourth Report and Order*, ¶ 79.
[47] *Id.*, ¶ 80.
[48] *Id.*, ¶ 82

The Washington Utilities and Transportation Commission (WUTC) recently agreed with Covad in a parallel arbitration proceeding, and held that Qwest must provide regeneration facilities at wholesale rates. The Commission concluded:

> We reject Qwest's argument that it has no obligation to provision required regeneration as a wholesale service if it allows CLECs to self-provision cross-connections at the ICDF under the FCC's exception. Regeneration may be necessary for the cross-connection to function, just as the FCC recognized that power cables may be necessary for collocation, as a whole, to function.

Washington Order at 43.

On this point, however, Qwest would have this Commission believe that the "exception" set forth in 47 C.F.R. § 51.323(h)(1) (which provides that CLECs can self provision the cross-connect with an ILEC's permission) excuses it from any obligation whatsoever to provision any facilities of any kind, including regeneration facilities. This interpretation of the exception does not pass muster. First, as noted above and as pointed out by the WUTC, it is inconsistent with the necessary logic of 47 C.F.R. § 51.323(h)(1). If the exception were construed as Qwest proposes, then the last clause of the rule would have no meaning. Secondly, and more importantly, the FCC has already interpreted the so-called "exception" contained in the rule and its interpretation does not square with the interpretation Qwest has proffered to the Commission. In its *Fourth Advanced Services Order*, the FCC concluded:

> In addition, although we find no statutory support for requiring that an incumbent LEC permit competitive LEC-provisioned cross-connects outside of their physical collocation space, we believe that competitive LEC provisioning of cross-connects imposes a much lesser burden on the incumbent's property in certain circumstances, such as when the carriers being cross-connected occupy immediately adjacent collocation space, than when the cross-connects would traverse common areas of the incumbent LEC's premises.

Fourth Advanced Services Order, n. 158.

In its review of the foregoing footnote from the *Fourth Advanced Services Order*, the WUTC concluded that the FCC understood the self-provisioning "exception" to only cover instances where the Covad to CLEC cross-connect is between adjacent collocation spaces.[49] The WUTC concluded:

> The FCC addressed the nature of the exception to the rule only in a footnote. Noting that there was no statutory authority for requiring ILECs to allow CLECs to self-provision cross-connections, the FCC stated CLEC self-provisioning imposes less of a burden on ILEC property when the cross-connection is between adjacent collocation space, "than when the cross-connect would traverse common areas of the incumbent LEC's premises." The FCC encouraged ILECs "to adopt flexible cross-connect policies that would not prohibit competitive LEC-provisioned cross-connects *in all instances*." The FCC appeared to try to avoid imposing unnecessary burdens on ILECs in providing cross-connections to adjacent CLEC collocation facilities, where CLECs can easily self-provision the connection.

Washington Order at 42.

From the foregoing, it is clear that Qwest's broad reading of the exception is without support. In instances when the cross-connect is between two adjacent spaces, as was contemplated by the FCC in the *Fourth Advanced Services Order*, regeneration would obviously not be required or necessary because the length of the cross-connect would fall well below the ANSI threshold for provision regeneration facilities for either a DS-1 or DS-3 circuit.

Given the FCC's prior decisions regarding central office regeneration in the expanded interconnection context, it is logical to assume that the FCC believes that collocators should never be charged for regeneration:

> We find that it is unreasonable for the LECs that are the subject of this investigation to charge interconnectors for the cost of repeaters

[49] See also, Zulevic Response Testimony, Covad/111, Zulevic/29 in support of this conclusion.

> in a physical collocation arrangement because the record demonstrates that repeaters should not be needed for the provision of physical collocation service...
>
> In proscribing recovery of repeater costs from interconnectors, we rely on the ANSI standard's requirement that when a passive POT bay is used, a repeater is only necessary when the cabling distance between the POT bay and the LEC's cross-connection bay exceeds 655 feet for a DS1 signal and 450 feet for a DS3 signal.

CC Docket No. 93-162, *In the Matter of Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport,* Second Report and Order, 12 FCC Rcd. 18,730 (Rel. June 13, 1997), ¶¶ 117-118.

When the "exception" contained in 47 C.F.R. § 51.323(h)(1) is read with this history in mind, the limitations on this language become more clear. To believe that the exception is as broad as Qwest argues, one would have to believe that the FCC intended not only to reverse its previous ruling that no regeneration charges should apply to physical collocators, but that *ILECs should not be required to provide it at all.* This is a nonsensical reading of the FCC's rules and prior decisions. At the time the *Fourth Advanced Services Order* was released, most incumbent LECs were refusing to allow any connections between CLECs in their central offices, and the D.C. Circuit had ruled that incumbent LECs were not obligated to allow CLECs to self-provision cross-connections in incumbent LEC central offices.[50] The issue of *self-provisioned, regenerated* cross-connections was not even a consideration at the time.

Finally, in those instances when Qwest must either provide the cross-connect or permits self-provision between CLECs, Qwest must provide regeneration facilities at TELRIC based or wholesale rates. This issue was laid to rest years ago. In the FCC's seminal *First Report and*

[50] *United States Telecom Association v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

Order regarding the implementation of the local competition provisions of the Act, including implementation of collocation under section 251(c)(6) of the Act, the FCC held as follows:

> We further conclude that, because section 251(c)(6) requires that incumbent LECs provide physical collocation on "rates, terms, and conditions that are just, reasonable, and nondiscriminatory," which is identical to the standard for interconnection and unbundled elements in sections 251(c)(2) and (c)(3), collocation should be subject to the same pricing rules. We also note that, because collocation is a method of obtaining interconnection and access to unbundled network elements, collocation is properly treated under the same pricing rules.

CC Docket No. 96-98, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15816 (rel. August 8, 1996) ("First Report and Order"), ¶ 629.

The pricing rules the FCC refers to in the foregoing quote are the TELRIC based pricing rules it adopted in the very same *First Report and Order*. The FCC's adoption of TELRIC pricing for collocation, among other matters, was subsequently affirmed by the United States Supreme Court. *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999).

Based on this analysis, it is clear that the FCC's goal in adopting its cross-connection rule was to ensure compliance with the non-discrimination requirements of section 251 of the Act, and that necessary cross-connections between competitive LECs were part of an incumbent LEC's obligations to provide collocation pursuant to section 251(c)(6). The exception contained in 47 C.F.R. § 51.323(h)(1) assumes that competitive LECs could self-provision the desired connection under conditions that did not violate section 251(c)(6). Qwest must therefore provide regeneration facilities to Covad at rates derived from the TELRIC pricing standard.

B. Covad Has No Practical Option To Self-Provision Cross Connects Requiring Regeneration

The section 251(c)(6) standard for evaluating Qwest's claim that self-provisioned cross-connects are available should be the *practical* availability of this option, not simply its theoretical availability. While Mr. Norman argued that CLECs can regenerate their own cross connects, these claims are unconvincing when the applicable engineering standards are examined closely.

First, Mr. Norman claimed that a CLEC could increase the strength, or "boost" a cross connected signal in order to overcome distance limitations. This suggestion fails to take into account, however, that finite engineering standards exist, which Covad must follow, that prevent significant boosting of the signal at either end of the connection. As Mr. Norman admitted at the Arizona hearing:

> Q. Now, in the proceedings in other states you testified that Covad could avoid the need for regeneration by increasing the power or boosting the signal as it leaves its collocation space. Do you still believe that's a viable solution to avoid the need to regenerate a cross-connection midspan?
>
> A. Well, I think there is a lot of scenarios in the central office. And I think what I meant by that is if Covad partnered with another CLEC and regeneration was required and the distance was such that the volume controls on both ends of the equipment were set too short, that it could be feasible to place regeneration in your own space and reset the regeneration equipment on your end, plus the other CLEC would reset their DS-3 interface on their equipment to make the distance work.
>
> Q. So was your thought limited to distances that were underneath the ANSI standard that Mr. Zulevic discussed, I believe 655 feet and 450 feet roughly?
>
> A. I was thinking more around, you know, the ANSI standards were right at the breaking point, so it would either be 450

foot level on the DS-3, or 655 feet on the DS-1 level as Mr. Zulevic spoke to.

Q. So it is true that there are limits to the strengths that signals could be boosted under the ANSI standards that govern these connections, is that correct?

A. Yes.

AZ Tr. Vol. I, 195:2 through 196:2.

In other words, boosting the signal to avoid regeneration is an illusory solution. In fact, the applicable ANSI standards provide a maximum signal strength that would prohibit significant boosting of a cross connection signal.[51] Mr. Norman therefore confirmed that the cable distance limitations contained in the ANSI standards are very real.[52] Beyond those prescribed cable distances, regeneration is required.

Mr. Norman's second solution, outlined in his testimony, is for CLECs to place regeneration equipment mid-span, between their two collocations. On cross examination in other states, however, he agreed that there is no guarantee space will be available to place such equipment.[53] Mr. Norman also testified originally that he had no idea what a mid-span collocation arrangement to place regeneration equipment would cost,[54] and in later proceedings agreed substantially with Mr. Zulevic's analysis of the astronomical costs associated with establishing such an arrangement. Mr. Zulevic, Covad's witness regarding this issue, provided detailed testimony regarding the substantial, infeasible costs of such an arrangement in previous arbitration proceedings, as well as in his testimony in this docket.[55] Finally, Mr. Norman agreed

[51] AZ Tr. Vol. I, 117:13 through 118:1.
[52] AZ Tr. Vol. I, 195:24 through 196:2.
[53] AZ Tr. Vol. I, 201:15-17.
[54] AZ Tr. Vol. I, 202:7-11.
[55] *See* Covad/100, Zulivec/44.

in New Mexico that the costs associated with a CLEC-provisioned, mid-span collocation to self-provision regeneration were prohibitive and a barrier to entry into the local exchange market:

> Q. So [if] Covad's only choice is to self-provision a mid-span regeneration...[and] if the cost of that were significant, as I believe Mr. Zulevic testified it is, would you consider that a barrier to entry for CLECs?
>
> A. If no other options existed, I would say yes.

NM Tr. Vol I, 162: 3-8.

At the Arizona hearing, Mr. Norman agreed that another solution was available: Covad, or any other CLEC, could order interoffice transport to another central office, then order another transport circuit back to the original central office to complete the connection.[56] In fact, that solution may be more cost effective than Mr. Norman's other suggestions. It is therefore instructive that this solution was specifically rejected by the FCC as discriminatory in its *Fourth Report and Order*:

> For instance, for two competitive LECs collocated at the same central office to exchange traffic without a cross-connect, each competitive LEC would have to carry its own telecommunications traffic into its collocation space and then, in the typical case, have the incumbent LEC transport that traffic over incumbent-owned facilities to an interconnection point outside the incumbent's premises. From this interconnection point, the other competitive LEC would likely then carry the traffic back to its own collocation space in the same central office to be transported through the competitive LEC's network. **This approach creates additional potential points of failure, may require otherwise unnecessary signal boosting, and, perhaps most importantly and most dramatically, imposes significant wasteful economic costs on competitive LECs – costs that incumbent LECs themselves do not face...**

Fourth Report and Order, ¶ 64. [citation omitted]

[56] AZ Tr. Vol. I, 206:16-25.

C. Qwest's Retail "EICT" Offering Is Not A Lawful Substitute For A Wholesale, TELRIC Rate For Regeneration

Qwest loudly trumpets its so-called retail EICT offering as a viable alternative for the provision of regeneration in Covad to CLEC cross-connects in Qwest central offices. However, this alternative is not as viable as it may appear. First, it is not a legal substitute for a bona fide wholesale offering for regeneration in a Covad to CLEC cross-connect in a Qwest CO for the term of an interconnection agreement. In the FCC's very recent *TRO Remand Order*,[57] the FCC made it unequivocally clear that a "tariff alternative should not foreclose access to a corresponding network element even where a carrier could, in theory, use that tariffed offering to enter the market."[58] The FCC went even further, stating:

> We hold, in contrast, that in the local exchange market, a bar on UNE access wherever competitors could operate using special access would be inconsistent with the Act's text and its interpretation by various courts, would be impracticable, and would create a significant risk of abuse by incumbent LECs. It would be unreasonable to conclude that Congress created a structure to incent entry into the local exchange market, only to have that structure undermined, and possibly supplanted in its entirety, by services priced by, and largely within the control of, incumbent LECs. Finally, we find that a competitor's current use of special access in the local exchange market does not conclusively demonstrate non-impairment.

TRO Remand Order, ¶ 48.

As the FCC stresses, it would be unreasonable to incent entry into the local exchange market only to have it undermined by services priced by and within the control of incumbent LECs. That is exactly the situation here. Qwest's tariffed EICT offering is completely within

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[57] WC Docket No. 04-313; CC Docket No. 01-338; *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, FCC 04-290, 2005 WL 289015 (rel. February 4, 2005) ("TRO Remand Order").

[58] TRO Remand Order, ¶ 48.

Qwest's control. Qwest can initiate a rate change for its EICT offering without Commission or FCC oversight or approval, alter the terms upon which it is offered, or remove the product altogether. This federal tariff is simply not subject to this Commission's jurisdiction and thus Qwest would not have to seek Commission approval to change the rates, terms and conditions in the tariff. This effectively leaves Covad in a lurch and exclusively at the mercy of Qwest with regard to rates for regeneration should Qwest be allowed to substitute the EICT for a wholesale offering that complies with section 251(c)(6) of the Act.[59] The Commission need not countenance this arrangement. It is well within its power to require Qwest to develop a viable TELRIC-based offering for regeneration.

Given the fact that (1) Central office cross-connections are required to avoid discrimination violating section 251(c)(6) of the Act, and (2) There is no practical method for Covad to self-provision these connections when they require regeneration, the Commission should confirm that Qwest must offer CLEC-to-CLEC cross connections requiring regeneration to Covad as a section 251(c)(6) collocation element. This element should be subject to the same pricing, terms and conditions as ILEC-to-CLEC regeneration, as the legal obligations and prescribed pricing standards for the two are indistinguishable.

ISSUE 9 - BILLING ISSUES
(Sections 5.4.1, 5.4.2, and 5.4.3)

A. Payment Due Date

Qwest sends invoices to Covad for shared loop products (line sharing and line splitting) in a unique format that is not used by any other incumbent LEC. While Qwest creates an identification number for each shared loop product that has the appearance of a circuit

[59] While it is true that the FCC has nominal oversight of the EICT offering, its statements in the *TRO Remand Order* confirm that even the FCC itself believes it lacks the ability to oversee access offerings to the extent necessary to promote local competition. *See TRO Remand Order*, ¶ 48.

identification number (Circuit ID), and provides that number to Covad on its firm order confirmation (FOC) during the provisioning process, that number is not included on Qwest's invoices sent montly to Covad. Qwest is the only incumbent LEC that does not include this information, which is vital to verifying the accuracy of the invoices, at least on an electronic basis. Because Qwest does not provide this information, Covad is forced to either manually review invoices for these products, or to build a separate billing verification system unique to Qwest invoices in an effort to verify them electronically. While Covad has requested systems changes at Qwest through the Change Management Process (CMP) that would resolve this problem, Qwest has rejected these proposed changes as financially infeasible.

As a next-best alternative, Covad has requested that the payment interval included in Section 5.4.1 be forty-five (45) days for any invoices containing: (1) line splitting or loop splitting products, (2) a missing circuit ID, (3) a missing USOC, or (4) new rate elements, new services, or new features not previously ordered by Covad. Qwest maintains that the interval for payment on all invoices should be thirty (30) days. Covad's proposal for additional time is based upon specific and substantial deficiencies in Qwest's invoices which require manual verification effort. This manual effort requires additional time to perform.

1. There Are Inherent Deficiencies in Qwest's Billing Systems That Require Substantial Manual Verification Effort

As Covad witness Elizabeth Balvin explained in her testimony, Qwest's billing systems currently produce invoices to Covad that require substantial human effort to verify. This is true whether the included charges are correct or not, and whether the invoice is provided by Qwest in electronic format or not.[60] This is a direct result of specific deficiencies in Qwest's wholesale billing systems.

[60] This is not meant to minimize the additional difficulties created by inaccurate Qwest billing. As Ms. Balvin pointed out in her testimony, the Parties have resolved several billing errors in the past few years, leading to substantial repayments to Covad as well as payments by Qwest under its Performance Assurance Plan. Covad believes that these issues can be separated from the process deficiencies and other challenges mentioned above,

First of all, Covad typically receives its bills from Qwest five (5) to eight (8) days after the "invoice date," which starts the clock for the payment due date.[61] Also, Qwest's bills for non-recurring collocation charges continue to be provided in paper format.[62] In these circumstances, the bills must be hand-entered into Covad's billing systems before a review can even begin.[63] Then Covad employees must manually review the charges, many of which are individual case basis (ICB) charges, to verify them.

Qwest provides the Billing Telephone Number (BTN) rather than the circuit identification number on its invoices for line-shared and line-split loops, making electronic verification impossible.[64] The precise scope of this problem is described in Ms. Balvin's direct testimony.[65] As Ms. Balvin, testified at the Arizona hearing:

> Q. So with respect to Qwest's bills for shared loop products, what happens when those bills are run through Covad's billing system?
>
> A. All of our line shared orders are kicked out for manual handling, because they don't have a circuit ID in the bill. They provided it on the FOC but they don't provide it on the bill.
>
> Q. And what impact does that have on the amount of time it takes to validate the bills?
>
> A. Any manual handling just causes additional, I will term, man hours to actually physically look at the bill and make sure it is accurate.

AZ Tr. Vol. II, 265:14-25.

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which are not addressed by the foregoing remedies and bear specifically on Covad's ability to review Qwest bills prior to the Payment Due Date.

[61] Covad/200, Balvin/7.

[62] AZ Tr. Vol. II, 257:12-23.

[63] *Id.*

[64] AZ Tr/ Vol.II, 266:23 – 267:11.

[65] Covad/200, Balvin/10.

As the rest of the industry passed Qwest by in establishing a mutually acceptable invoice format for shared loop products, Qwest did nothing to keep up. In fact, despite Qwest's involvement in the OBF proceedings which established those guidelines, Qwest's witness admitted that no progress had been made to keep current with these industry billing norms.[66]

2. Affording Covad Fifteen Additional Days To Review Qwest Bills Will Not Disrupt The Parties' Billing Relationship, And Will Promote Efficiencies

There is nothing inherently disruptive about a 45-day, rather than a 30-day payment interval. Qwest can continue to bill on a 30-day (or monthly) billing cycle, and will continue to receive payments from Covad every thirty (30) days. In other words, Qwest's only possible concern would be that if Covad refused to pay its final bill from Qwest, it would not realize this until fifteen (15) days later than if Qwest's proposal were adopted. This hardly creates the type of delinquency exposure Qwest has alleged in this proceeding and elsewhere. It should also be noted that Qwest bills recurring charges in advance, further limiting, if not eliminating, Qwest's financial exposure.[67]

In addition, affording Covad a meaningful amount of time to review Qwest bills will avoid inefficient results for both Parties, such as Covad relying on the audit process to conduct bill reviews, which would increase the cost of the billing relationship for both Parties. Covad could also dispute Qwest bills blindly, just to buy time to conduct a thorough review. This is an unrealistic remedy, however, because like the audit process, it is too time consuming and labor intensive to serve as an alternative to a reasonable payment interval. In addition, Covad would be forced to pay late payment charges for amounts it knew, at least in general, were legitimate and was willing to pay.

Rather than relying on remedies that are tantamount to digging a trench with a kitchen fork, the Parties should implement a payment interval that affords Covad enough time to verify

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[66] NM Tr. Vol. II, 213:15 - 214:11
[67] AZ Tr. Vol. II, 288:16-23.

the bills it receives from Qwest. This will ensure accurate payment and will minimize disputes and audits, thus saving both Parties time and money in the long run.

3. There is Substantial, Un-Refuted Evidence In The Record That Covad Should Be Afforded More Time To Review And Verify Qwest Bills

Ms. Balvin's testimony in this proceeding, described above, provided detailed explanations of the time-consuming nature of the review and verification process, as well as Covad's inability to adequately perform these tasks in a 30-day period. This difficulty is not a result of Covad's unwillingness to dedicate adequate human resources to the task.

Qwest's arguments are not based upon any evidence presented, but instead rely on the premise that avenues other than this arbitration are available to resolve issues related to billing matters. First, Qwest argues that the issue at hand is the date payment is due, and that information regarding Qwest's billing deficiencies is irrelevant to establishing a payment due date. This ignores the plain fact that the amount of time needed to pay a bill is directly related to the amount of effort needed to review the bill. Covad, through Ms. Balvin, outlined the Qwest-specific deficiencies causing the delays in Covad's review.

While performance measurements contained in Qwest's Performance Assurance Plan may provide for remedies when incorrect bills are issued, outright errors are only part of the problem. Furthermore, a remedy for billing errors is useless if Covad is not afforded the time to identify those errors.

The Commission should also reject the premise that Covad should simply dedicate more manpower, or "increase productivity" to review Qwest's bills. This is an inequitable solution which ignores the true problem: the deficiencies in Qwest's billing systems. Covad could just as easily, and more justifiably, demand that Qwest dedicate more personnel, and become more productive, in generating wholesale bills to Covad. Instead, Covad only asks for an additional fifteen (15) days to sort through the deficient bills Qwest produces.

Notably, in making its arguments against Covad's proposals, Qwest has not questioned a single fact placed into evidence by Covad with respect to the billing relationship, or the time required to adequately review Qwest's bills. The facts in this case provide sufficient justification for this Commission to adopt Covad's proposed language.

4. Qwest's Billing Deficiencies Are Unlikely To Be Resolved Within the Change Management Process

Recently, Qwest rejected a change request submitted by Covad within the CMP to resolve the circuit ID issue discussed above. In rejecting the request, Qwest claimed that while it had identified systems changes that could be made, those changes cost more than Qwest cared to spend. This should not surprise the Commission, because Qwest has absolutely no motivation to fix its systems. Today, Qwest is able to force Covad to bear the entire burden of the deficiencies by requiring the payment of invoices within abbreviated time frames and forcing Covad to manually verify invoices. Until Qwest must share at least part of this burden, it is safe to say there will be no systems changes.

Qwest's position that its billing deficiencies will not be addressed within the CMP underscores the need for the Commission to address the issue in this forum. As an alternative to correcting each and every deficiency, Covad has proposed just an additional fifteen (15) days to conduct its review.

5. Qwest Has Already Agreed To Extended Payment Intervals

While Qwest describes its proposed payment interval as the "industry standard," it should be noted that Qwest has agreed to an alternate, extended payment intervals in the past. As Qwest's witness William Easton admitted at the Arizona hearing, Qwest has executed agreements that calculate the thirty-day payment interval from the date the bill is actually received by the CLEC.[68] Based upon both Mr. Easton and Ms. Balvin's testimony regarding the delays in delivery of invoices by Qwest, this equates to an extension of as much as eight days

[68] AZ Tr. Vol. II, 296:6-20.

beyond the interval proposed by Qwest in this proceeding. In light of these facts, Qwest's arguments that Covad's proposal will cause severe cash flow problems and systems issues appear somewhat disingenuous.

B. Timing for Discontinuation of Processing of Orders and Disconnection of Services (Sections 5.4.2 and 5.4.3)

Covad acknowledges Qwest's right to discontinue the processing of orders, and even to discontinue service in the event it does not receive payment from its wholesale customers, including Covad. The Parties' dispute is not with respect to the *right* of Qwest to take these remedial actions, but with respect to the *timing* for these actions. Covad believes that the time frames for employing these drastic remedies should not be so compressed as to allow either party to use them as leverage in billing disputes or other conflicts. Covad does not believe the modest extensions it has proposed will truly prejudice Qwest at all, and will allow both Parties some breathing room should a serious conflict develop.

1. Covad's Proposals Would Have Negligible Impact On Qwest's Receivables and Cash Flow

Covad has specifically proposed that the time period for Qwest to discontinue orders for failure to make full payment be set at sixty (60) days, rather than the thirty (30) days Qwest has suggested. In cases where Covad pays Qwest for services, either on time or late, this provision has no effect on Qwest's cash flow at all, because it has no impact on when payments are due, when payments are considered past due, or when Qwest could take action for a breach of the Agreement. The only circumstance where this provision could lead to increased losses for Qwest would be if Covad refused to pay Qwest and continued to order new services. In that case, Qwest's increased exposure would be limited to thirty (30) days' worth of new services ordered by Covad. This would constitute only a fraction of the amount Covad would owe Qwest if it was failing to pay its bills, and cannot seriously be considered to create true cash flow issues for Qwest.

For Section 5.4.3 of the Agreement, Covad proposes a ninety (90), rather than a sixty (60) day period after which Qwest may disconnect service if full payment is not received. In circumstances where Covad pays Qwest, this thirty (30) day difference would have no impact on Qwest's cash flow or receivable amounts. If Covad were to stop paying Qwest, it would extend the time period for Qwest to disconnect service by thirty (30) days. This would have an effect on the total amount owed to Qwest in the event Covad failed to pay, but Qwest's advance billing of recurring charges does provide substantial protection against large unpaid balances.

2. The Timing Of Qwest's Right To Receive Payment Should Be Balanced Against The Severity Of The Remedies Involved

To understand Covad's proposals, it is important to realize that Covad is not concerned about its rights should it be unable or otherwise refuse to pay Qwest for services, though it does recognize *Qwest's* concerns in such situations. If Covad were truly unable to pay Qwest, Covad would have more pressing concerns than whether it could receive service for an additional thirty (30) days. Covad's concern is that a situation could arise in which Qwest refused to recognize a legitimate dispute that affected payment, and use the short disconnection interval it has proposed to obtain leverage in that dispute.

A disconnection of service, or even the refusal to process Covad's orders, would have a disastrous and likely irreversible impact on Covad's business. If Qwest were to wrongfully reject a billing dispute raised by Covad, it is true that Covad would have a legal remedy for such refusal. However, that legal remedy would be meaningless if Qwest were to disconnect service before that remedy was obtained. As a result, Covad must have sufficient time to organize requests for injunctive relief, or make other arrangements, prior to the time these remedies may be employed. Given the fact that Covad may not receive notice that Qwest intends to disconnect services until well into the time period under dispute, and the fact that Covad would likely be seeking remedies in multiple states, the modestly larger time frame proposed is reasonable. This additional time would allow Covad to file, and the Commission to act upon, a request for

injunctive relief. Perhaps this situation will never arise. Perhaps there is little chance it could arise. The problem is that the cost of being wrong is unbearably high for Covad.

Qwest has offered no specific evidence in this proceeding as to how the Covad proposals would prejudice Qwest. Consequently, this Commission should balance Qwest's right to control its receivables and cash flow, which are legitimate concerns, though largely unexplored in this proceeding, with Covad's concern that unreasonably short time frames could be abused, and that the effect of such abuse could be extremely harmful to Covad. Covad believes that the time frames it has proposed for the discontinuance of order processing and the disconnection of services are the best balance of these competing interests.

C. Covad's Proposals Better Reflect A Healthy Balance Of The Interests Of A Wholesale Provider And One Of Its Largest Customers

Qwest's witness William Easton attempts to characterize Qwest's proposals as striking an appropriate balance between the needs of both Covad and Qwest. His viewpoint, however, is fatally colored by decades of experience working for a monopolist sheltered from the demands of the marketplace. While it is true that Qwest's billing systems are complicated, and changes to those systems may cost money (though not nearly as much as Qwest alleges), these types of systems changes are routinely made by companies that must compete for multimillion dollar customers. Covad is, in fact, one of Qwest's largest customers, purchasing about one million dollars' worth of services from Qwest each month. NM Tr. Vol. II, 138-139. In a competitive environment, where Covad had a choice between vendors, Qwest would be forced to either meet Covad's needs or risk losing this substantial business. The Commission should consider the lack of a competitive dynamic within which the parties operate, and work to avoid its ill effects in fashioning a solution.

At hearing in New Mexico, Mr. Easton admitted that he has never worked for a company that must compete in a free and open marketplace for customers.[69] While Mr. Easton attempted

[69] NM Tr. Vol. II, 189:22 – 190:13.

to characterize the telecommunications business as "fiercely competitive," he eventually admitted the Covad has no choice in wholesale providers of the inputs it purchases from Qwest, and by extension, Qwest faces no competition in providing these inputs to Covad.[70]

Even more telling were statements made by Renee Albersheim, another Qwest witness regarding this issue:

> Q. Would that be true if the system change were to fix a billing problem with a Qwest retail customer? Let's say Qwest was losing a million dollars a month of revenue because they found out there was some billing problem and they weren't billing a couple million retail customers properly. It was a $904,000.00 system change. Would Qwest be able to afford that change?
>
> A. Well, an analysis would have to take place and determine if they could. But based on your hypothetical, revenue is involved. That is not the case here. This is just a straight expense. So when they did the business case to figure out if that change could be made, that would figure into the analysis.
>
> Q. So if no revenue was involved in making this change for Covad. It's just an expense would your answer be different if Covad could take its roughly million dollars a month and walk down the street and buy unbundled elements from another provider?
>
> A. Well, I think we've heard today that there isn't another provider for line sharing. Is that correct? So I'm not sure that can change.
>
> Q. Well, my question is that if Qwest was looking at losing a million-dollar-a-month customer, would Qwest perhaps be more motivated to make this change?
>
> A. I imagine so.
>
> Q. And Qwest would probably weigh that million dollars a month in revenue versus the $904,000.00 it would cost to accommodate that customer. Isn't that correct?

[70] NM Tr., Vol. II, 190:14 -191:4.

A. Well, revenues and expenses are always going to be part of an analysis in a business case, yes.

NM Tr., Vol. II, 214:15 – 215:24.

Only monopolists are free to look at their biggest customers in this way. Businesses that *compete* for large customers treat those customers with far more care, and work diligently to accommodate them where they can. For instance, if a billing systems problem needs fixing (as Qwest's does), it is likely that the problem will be fixed, or, at the very least, a customers request for more time to manually review deficient invoices would be granted. Similarly, businesses fighting for customers do not look at their largest customers, with stellar payment histories, and complain that they are such a substantial credit risk that they must keep draconian threats of disconnection in place. Qwest's proposals in this case are merely indicative of their attitude toward Covad, and competition in general. It is an annoyance that must be managed, rather than a business that should be run for the benefit of both Qwest's bottom line and its customers.

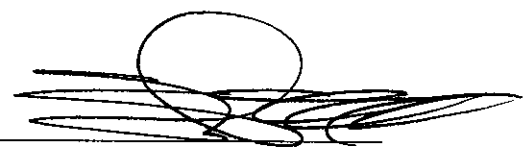
Conclusion

For the reasons set forth above, Covad respectfully requests that this Commission adopt Covad's proposed language to resolve the issues set forth above, and enter an order consistent with this resolution.

Dated this 29th day of April, 2005.

Respectfully submitted,

DIECA COMMUNICATIONS, INC.,
d/b/a Covad Communications Company

By 

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CERTIFICATE OF SERVICE

I hereby certify that the original and 5 copies of Covad Communications Company's Initial Brief in ARB 584 were sent by overnight mail and e-mail this 29th day of April, 2005, to the following:

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PO Box 2148
Salem, OR 97308-2148
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and copies of the foregoing were sent by e-mail and U.S. Mail this 29th day of April, 2005, to the following addressees:

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Janet Keller

Attachment 1

BEFORE THE ARIZONA CORPORATION COMMISSION

PROCEEDINGS IN ARBITRATION

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

At: Phoenix, Arizona

Date: February 7, 2005

Filed:

REPORTER'S TRANSCRIPT OF PROCEEDINGS
VOLUME I

(Pages 1 through 215, inclusive.)

ARIZONA REPORTING SERVICE, INC.
Court Reporting
Suite Three
2627 North Third Street
Phoenix, Arizona 85004-1103

By: COLETTE E. ROSS
Certified Court Reporter
Certificate No. 50658

Prepared for:

having to do with our interconnection agreement would be subject to the rules of interconnection and FCC rules, and so there would -- the pricing would be available to anyone who wished to take advantage of that product.

Q. Do you have any idea, when Qwest provides a retail DSL product to its customers, do they charge more for the same bandwidth if that bandwidth is being provided over fiber facilities?

A. My reading of their offerings is that it could be provided either way. It could be provided via a remote terminal or it could be provided by central office space DSLAM equipment. I don't believe that there is any price difference between the two.

Q. And Qwest finished DSL offerings, whether they are retail or VISP product, those include, do they include services other than the loop?

A. They include the end-to-end service, which would be the loop, the multiplexing, transport, the whole end-to-end product.

Q. And are there elements of that end-to-end product that Covad provides for itself via its own facilities today?

A. Yes, definitely. We provide our own ISP connection through our ATM network.

Q. Is there anything else that Covad provides

Q. Now, what do you mean by back end network?

A. Access to the ATM network, transport, ATM switching capability, access to all parts of the internet.

Q. Mr. Devaney had asked you about the raw loop data tool. And on page 16 of your rebuttal testimony there is a discussion of the time that is needed with the raw loop data tool and other databases to determine the impact of a Qwest retirement on Covad customers.

Can you explain to us as far as you know how this takes this much time and how this would -- how Covad would verify whether or not its customers were impacted by a retirement?

A. Well, what has to happen is that once the -- what Qwest provides us is DA address information. So what we have to do is pull up and -- go into the raw data tool, pull up all the addresses associated with the DA, and then go back to the Covad system and find out if any of those addresses correspond to addresses within that DA. And that is the starting point. Then we can go ahead and figure out who the customers are.

And again, these steps are quite time consuming because the DA, as you can see from that exhibit, there are an awful lot of addresses there. So we have to go through an awful lot of manual effort in order to dump.

And again, the whole effort is wasted unless we know what is impacted, whether Qwest is replacing copper with fiber or whether Qwest is replacing copper with a different guage of copper having different transmission characteristics. And Qwest's current notifications usually don't have that detail of information.

Q. What level of detail do the Qwest notices contain now?

A. You know, the level of detail varies. Sometimes there will be no information other than that there is a job taking place at this DA. And then the general notice at the top gives you general information saying that there is some copper retirement taking place. But then you have to go down in the notice that go up to specific notices by job, and some of them are quite detailed. They will give you enough information to determine if you are going to be looking at fiber replacing copper or if they are going to be replacing copper with a different gauge of copper, and give you some idea as to whether or not there would be an impact.

And even if we were provided that information adequately, it would at least tell us whether or not we should take all the time necessary to go through manually and identify if any of our customers are being served

there.

Q. So if that information at the level of detail that you just mentioned, if that is not provided, how would Covad determine whether the retirement impacted its customers?

A. Well, we can't tell whether it impacts or not unless we are told whether it is fiber replacing copper, different gauge copper replacing copper, a reroute of part of the network that it adds additional loop line. If we don't have that information, we can't determine it, even if we do it on a manual effort determining where our customers are affected.

Q. I would like you to pick up Exhibit Qwest 1 Mr. Devaney provided to you in cross. The third section on the first page is titled description of reasonably foreseeable impact of the planned change. If you could, I would like you to go down to the third sentence. It starts on the fifth line that begins with competitive carriers. Can you read that sentence for me?

A. Competitive carriers employing unbundled loops that are defined to require metallic facilities, e.g., digital subscriber line, paren, DSL, end paren, or line sharing circuits will be notified individually.

Q. Is that your understanding of how you -- the retirement notices work in the Bell South region, that

there is a general notice and then a more specific notice that is provided to carriers impacted by retirement?

A. Yes, that's correct. There is general notices sent out, and then the individual customer contact teams in Bell South contact Covad and give us the specific surrounding, what end users are being impacted and what exactly the impacts are going to be.

Q. This general notice contains every address within the DA or distribution area. Is this similar to what Qwest provides in its copper retirement notices?

A. Well, again, I am not sure that this is everyone, it probably is. But no, this is different than what Qwest provides. Qwest provides us with a distribution area address. And then we need to go in and pull the addresses through the raw data tool and determine which address are served from that distribution area based upon the address that is provided in the notification.

Q. And do you understand that Qwest provides specific notices to impact its CLECs as Bell South does, or not?

A. No. No, they don't.

MR. NEWELL: Nothing further, Your Honor.

ARBITRATOR NODES: Thank you.

Mr. Devaney.

MR. DEVANEY: Thank you, Your Honor.

proposal for an alternative service would force Qwest to consider the costs of that alternative service in determining whether it would deploy fiber, is that correct?

A. Yes.

Q. Do you believe that Qwest would consider those costs regardless of what type of fiber deployment was being undertaken?

A. I am sorry, could you restate the question? That was a --

Q. It was a little bit vague.

How about this: There are several reasons that Qwest would replace copper facilities with fiber facilities, is that fair to say?

A. Yes.

Q. Maintenance being one of them?

A. Yes.

Q. Construction projects that require a facility to be relocated, is that another reason why?

A. Yes.

Q. And maybe the most obvious, that Qwest could provide additional capacity to the network or provide advanced service that it is not currently providing, is that another reason?

A. Yes.

colon, or, 2, mixed copper and fiber media, paren, i.e. a hybrid copper-fiber loop, close paren, paren, collectively hybrid loops, close paren, over which Qwest itself could provide a retail DSL service.

Q. Thank you.

Is it fair to say that when Qwest replaces copper with fiber feeder, that this replacement might be designed in a way that does not include the placement of a remote DSLAM?

A. It is correct not in all cases of copper retirement is a remote DSLAM installed.

Q. You had stated in your summary that there are 286,000 hybrid loops in the state of Arizona. Do you have any idea how many of those loops have a remote DSLAM deployed?

A. No, I do not.

Q. Let's suppose that Qwest deployed a fiber feeder somewhere in Arizona that was currently serving its retail DSL customers, Qwest retail DSL customers. What steps would Qwest take to maintain service to those DSL customers?

A. It would depend on the service. We would have to look at the whole situation. If it is technically feasible, we might leave the copper in place as we previously mentioned. If it is feasible, we might install

some type of remote DSLAM, once again, the size, concentration, type of customers. We may install some other type of next generation equipment as is contemplated by the FCC and use next generation hybrid XDSL line cards. There are a lot of different alternatives depending on the actual situation.

Q. Would it be possible that when such a retirement took place, that Qwest would disconnect retail DSL customers?

A. That is within the realm of theory or possibility. But as I previously mentioned, both for our CLEC customers, as has been demonstrated in actual practical, and with our customers, we tend to use that as a last resort to actually disconnect customer service.

But once again, Qwest has the option to review whether it makes economic sense to install next generation equipment. And as required by the, or as contemplated by the TRO, Qwest is not obligated to provide access to that XDSL next generation equipment to CLECs.

MR. NEWELL: Your Honor, I have some blown up copies of some of our exhibits that I think are helpful as a visual aid for some of the questions I have next, if I can approach and put them on the easel.

ARBITRATOR NODES: Sure. Do you have copies for everyone?

offices 24 hours a day, seven days a week, 365 days a year, correct?

A. Not exactly. Qwest -- or Covad has access to certain portions of the Qwest central offices on that basis, but not the entire central office.

Q. Covad has access to its collocation spaces certainly 24/7 365 days?

A. That's correct.

Q. Okay. And that's not true of all ILECs across the nation, is it?

A. Yes, I believe it is true, unless it is a virtual collocation.

Q. Okay. Now, you talked earlier in your summary about the ANSI standards. And I think we are all familiar enough with that to just use that term as it is now. And I think you testified that for a DS-1 a signal could travel about 655 feet pursuant to the ANSI standards, is that correct?

A. That's correct.

Q. And that's for a DS-1 and for DS-3 that signal could travel 450 feet, correct?

A. Yes, then with qualification that I provided, too, in that there would, the best transmission quality cable would be used, largest gauge, and that there were no intermediate cross-connects that would add additional loss

and take away from the overall distance limitation.

Q. When Covad provisions its own connection with another CLEC, does it use the highest quality, what did you say, the highest gauge cable?

A. Yes. And generally speaking, Qwest provides the cable especially as it pertains to accessing the Qwest network and going to the ICDF, which is one place where we may interconnect to another collocation arrangement. And when we ordered our collocation arrangements, we asked for a certain number of DS-1 or DS-3 terminations, and then Qwest provided the cable and installed it. In some cases the cable is the best quality, the best transmission capabilities, in other cases it is not.

Q. And Covad would have actually ordered or requested of Qwest to provide that cable, correct? Qwest wouldn't just do that on their own, Covad would have to actually ask to it?

A. We would ask them to provide the connection between our collocation arrangement and the -- it was called the spot frame in the beginning, the single point of termination frame, and now it is the DS-1 or DS-3 ICDF.

But Qwest provided the cable that they felt was best for that particular purpose, and told us then what cable was provided.

In the case of DS-3 cable was it 734 or was it

A. I believe so.

Q. Now, in the proceedings in other states you testified that Covad could avoid the need for regeneration by increasing the power or boosting the signal as it leaves its collocation space. Do you still believe that's a viable solution to avoid the need to regenerate a cross-connection midspan?

A. Well, I think there is a lot of scenarios in the central office. And I think what I meant by that is if Covad partnered with another CLEC and regeneration was required and the distance was such that the volume controls on both ends of the equipment were set too short, that it could be feasible to place regeneration in your own space and reset the regeneration equipment on your end, plus the other CLEC would reset their DS-3 interface on their equipment to make the distance work.

Q. So was your thought limited to distances that were underneath the ANSI standard that Mr. Zulevic discussed, I believe 655 feet and 450 feet roughly?

A. I was thinking more around, you know, the ANSI standards were right at the breaking point, so it would either be 450 foot level on the DS-3, or 655 feet on the DS-1 level as Mr. Zulevic spoke to.

Q. So it is true that there are limits to the strengths that signals could be boosted under the ANSI

standards that govern these connections, is that correct?

A. Yes.

Q. Isn't it also true that the cable distance limitations contained in the standards are a result of those signal strength limitations?

A. Well, it is a part of it. I am not going to say it is all of it, but it is a part of it.

Q. Mr. Norman, do you have a copy of Exhibit C-16, the ANSI standards?

A. No, I don't, I am sorry.

Q. No?

May I approach, Your Honor?

ARBITRATOR NODES: Yes.

BY MR. NEWELL:

Q. So, Mr. Norman, I would like you to look at Exhibit C-16, which is a copy of the ANSI standards, document entitled ANSI T1.102-1993. Do you know this to be the applicable industry standard document relating to the regeneration issue we have been discussing?

A. Yes.

Q. And you would agree that this document sets the transmission standards that Mr. Zulevic referred to in his prior testimony?

A. Absolutely.

Q. So if the distance of the connection required

Covad could buy collocation space midspan to regenerate its own cross-connections, is that correct?

A. I said that it can provide -- we can sell collocation space to regenerate a signal.

I am still looking for what you are -- I wasn't asking you a question, I was trying to figure out. I was asking which question you're looking at on my page so I could find where you were at, since we have a pagination issue. I am sorry.

Q. Well, it must be my fault. But I apologize. I figured that was a general enough argument in your testimony that you would remember it and you did. So --

A. Okay.

Q. -- we are fine.

Is there any guarantee that collocation space would be available from Qwest midspan?

A. There is not a guarantee. However, I would say that in Qwest's network we are, you know, on the road to decline because of competition. So space is becoming more and more available.

Q. But, for instance, if midspan or even near midspan was in the middle of Qwest's switching equipment and all the bells and whistles that go along with that, the fact that CLEC collocation space is generally available wouldn't help very much, would it?

A. Well, I think it is important to remember that when you are talking about midspan regeneration, it is adaptable. I mean it could be moved back and forth. It doesn't have to be midspan. It could be 100 feet, 200 feet one way or the other. It just depends on the engineering design.

Q. Now, have you investigated the cost of the solution you proposed to essentially construct a midspan collocation space to self-provision regeneration?

A. The only way I could do that was if I used my own equipment and priced it out, but I really have not.

Q. Now, is this, the fact that you haven't investigated the cost, is that because you believe the cost is irrelevant and the only issue is whether it can be done from an engineering perspective?

A. I just don't think it would be a fair assessment to use the equipment that we use. I don't know what the CLEC community would want to use. I think that this is an opportunity for them, if they want to go out and seek regeneration equipment, there is lots of vendors out there, manufacturers that can provide that.

Q. Well, setting aside the issue of the cost of the regeneration equipment itself, the collocation cost, have you done any research into those costs?

A. Yes, I have.

generally available?

THE WITNESS: Those are available in the Exhibit A of the SGAT, yes.

ARBITRATOR NODES: Right. So is the only difference, in your opinion, of the costs that would be incurred by Qwest as opposed to a CLEC the actual cost of renting the space because the equipment would be, the equipment costs would be comparable for either a CLEC or for Qwest?

THE WITNESS: I would agree with that.

ARBITRATOR NODES: Okay.

BY MR. NEWELL:

Q. Okay. I would like to propose the same additional solution that we discussed in Utah, and see if you still think it would work.

Let's say Covad needed to connect with CLEC two that is represented by the box in the upper right-hand corner on my diagram. And rather than trying to place its own midspan collocation, it decided to buy Qwest's transport to a neighboring central office where it was also collocated and then buy Qwest transport back to terminate in the CLEC two collocation. Is that a technically feasible solution to deliver the signal to CLEC two?

A. It is technically feasible. It is not very --

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 18, 2005

Filed:

REPORTER'S TRANSCRIPT OF PROCEEDINGS

VOLUME II
(Pages 216 through 371, inclusive.)

ARIZONA REPORTING SERVICE, INC.
Court Reporting
Suite Three
2627 North Third Street
Phoenix, Arizona 85004-1103

Prepared for:

By: COLETTE E. ROSS
Certified Court Reporter
Certificate No. 50658

You would agree, then, that line sharing, some services would be due, payment for some of those services would be due in 30 days and payment for some would be due in 45 days depending upon when they were ordered by Covad, correct?

A. Correct. And as Qwest has done to distinguish the two, it is driven by a USOC, the imbedded base has a different USOC than the commercial line sharing.

Q. But those uses could appear under the same BAN or the same bill, correct?

A. I believe they do, yes.

Q. One of the areas that Covad expresses some concern about with respect to the billing is some bills come in paper form only and some come electronically, correct?

A. Yes.

Q. And the paper bills that Covad receives where it does not receive an electronic bill are for the nonrecurring collocation charges, correct?

A. The paper bills? Yes.

Q. And I think it is your testimony that in that instance Covad is required to manually review those bills?

A. Yes.

Q. And that's why it is asking for 45 days as well, is that correct? Or would that now --

THE WITNESS: Okay. Given that the industry has, what I term as, tracked to the circuit ID, and we have not asked Qwest to change their methodology for how they validate and bill us, but given that the rest of the industry actually does track to a circuit ID, our systems have been built to capture it from the FOC. And once we receive that on the bill, the systems acknowledge that they are one and the same and they don't, I want to say, kick out an exception. And that exception is it kicks out for manual handling so that someone physically looks at here is what we ordered and here is what we were billed on, are they one and the same.

BY MR. NEWELL:

Q. So with respect to Qwest's bills for shared loop products, what happens when those bills are run through Covad's billing system?

A. All of our line shared orders are kicked out for manual handling, because they don't have a circuit ID in the bill. They provided it on the FOC but they don't provide it on the bill.

Q. And what impact does that have on the amount of time it takes to validate the bills?

A. Any manual handling just causes additional, I will term, man hours to actually physically look at the bill and make sure it is accurate.

Q. Okay. Now, you had a discussion with Ms. Waxter about new products and whether they were new products to Qwest or new products to Covad that would be covered under the new products exception. Do you know whether Covad validates or in any way reviews the business rules for products that it doesn't order?

A. I think I understand what you are asking. Do we actually review Qwest's business rules for products that we are not ordering?

Q. Yes, that's my question.

A. We wouldn't, no, not until we intended to order them.

Q. You had spoken a little bit about there being various BANs, B-A-Ns, for various products that are ordered. Does Covad get separate bills for separate products, or do they just get one big bill from Qwest each month?

A. Qwest, their billing account numbers, and Qwest assigns billing account numbers based on a product. So we have files for the products. They come in on the same day and we have the ability to load them on the same day. But they are separated by BAN.

Q. Now, if I understood your discussion with Ms. Waxter about the subaccount number or the special billing number versus the circuit identification number,

determine that Qwest's proposed interval is commercially reasonable?

A. As part of my preparation for this case, I looked at interconnection agreements throughout the Qwest region, looked at what had been done in the access world. Also to the extent I was able to, I went out on the web and looked at some different companies.

Q. Do you believe that Qwest's proposal amounts to a 30-day net payment term?

A. I guess I am not sure what you mean by the term 30-day net payment term.

Q. Well, let's say 30-day net means after a service is provided a bill is issued and that bill is due and payable within 30 days. I believe that is the industry standard definition of 30-day net payment term.

A. Okay. And we need to distinguish between recurring and nonrecurring charges here. As I noted, I believe, in my testimony and in Ms. Balvin's testimony, for nonrecurring charges, Qwest bills after the service has been performed. For recurring monthly service charges, Qwest will be billing in advance for those, just as Covad bills in advance for its month ly recurring charges.

So to answer your question there, Covad would have, for a monthly service recurring charge, Covad would

appropriate.

ARBITRATOR NODES: Okay. Go ahead with your questions, Mr. Newell.

MR. NEWELL: Thank you.

BY MR. NEWELL:

Q. I would like you to take out Exhibit Covad 8. This exhibit contains the payment provisions in, I believe, the old interconnection agreement between AT&T and Qwest. Is that your understanding?

A. That's correct.

Q. Can you read section 3.1.13.1.

A. 3.1.13.1, the payment due date for such submitted transmissions shall be 30 calendar days from the date the transmission is received in a form that can be processed and meets the specifications set forth in this attachment.

Q. Would you agree that this language called for a 30-day payment interval from actual receipt of a bill from Qwest rather than 30 days from the invoice date?

A. Yes, it does.

Q. And Qwest's proposal in this proceeding provides a minimum interval of 20 days from actual receipt rather than 30 days contained in this agreement, is that correct?

A. That's correct. I would point out, as you

NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE
PETITION OF DIECA
COMMUNICATIONS, INC.,
dba COVAD COMMUNICATIONS
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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.

* * *

from its FCC tariff or in some other way it's made it unavailable for Covad.

So Covad's only choice is to self-provision a mid-span regeneration, put in the collocation and do that.

If the cost of that were significant, which I believe Mr. Zulevic testified it is, would you consider that a barrier to entry for a CLECs?

A. If no other options existed, I would say Yes.

Q. So is it fair to say, then, the availability of the EICT product is a pretty key component in your overall belief that Qwest is providing reasonable collocation options today?

A. I think it's a great alternative if the CLEC doesn't want to self-provision.

Q. So it's a great alternative -- it's also critical. I mean, without that, you seem to be acknowledging that there would be a problem if you needed to --

A. If there was no other options that existed, I would say it would be a problem if you had to self-provision.

But Qwest isn't making you self-provision or Covad. They are offering the key to the front door of the central office so they can come in and self-provision their own circuits and manage their own business the way they see fit.

Qwest doesn't ask them for any kind of business plans or any of those types of things. If they choose not to self-provision, then we offer EICT as an alternative.

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 17, 2005

DAY TWO

WHEREUPON, a hearing was held on the 17TH 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.

* * *

billing difficulty with one of its ISP customers versus the way Qwest has chosen to resolve the issues with Covad.

A. From my perspective, if Covad had a customer of ours that had issue with how we were billing them and couldn't reconcile those bills, that we would not only take notice, but do something about it.

With Qwest, we have identified this as a significant issue. We brought it to change management. We've escalated it to the highest level. We've had CLECs back us with the changes and I believe that we are Qwest's largest line sharing customer.

I think that they didn't even give us an opportunity to attempt to get the changes made in CMP because they, No. 1, didn't address the changes that we requested and, No. 2, they cited economic infeasibility and continued to not provide the level of details that allowed me to make an informed decision that that's even an appropriate economical assessment on their part.

Q. To refresh all of our memory, what did Qwest say the cost would be to implement Covad's proposed change?

A. $904,000.00. 828,000 directly to their billing system.

Q. Now, without revealing specific numbers, can you tell us in general terms how much Covad pays Qwest on a monthly basis regionwide?

A. For all billing?

Q. For all billing.

A. It's somewhere in the range of a million dollars a month.

Q. So if Qwest were to implement the system change that Covad is requesting in the CMP, that would apply -- would that apply simply to New Mexico or would it apply regionwide?

A. It would apply regionwide.

And we, by the way, pay Qwest for enhancing their system. By every order that we place they assess an OSS charge per order provision.

And that was to recoup some of the costs based on the changes that the CLECs would eventually make to those systems.

Q. Some of the costs or all of the costs?

A. I think the intent was to recover all of the costs because it's as if we pay for changes that other CLECs want to make and we live by all the OSSs and all the other changes that other CLECs have made.

But we pay on every order that gets provisioned by Qwest, they assess that fee.

Q. Ms. Balvin, you have a copy of the New Mexico Exhibit A rates that we were discussing in the hearing yesterday (indicating)?

was 30 days from receipt of the invoice to the new interval, which is 30 days from the invoice date, will that require major effort and expense to redesign systems to accommodate that?

A. Again, the systems are designed around the current SGAT language, which is the same language that we are proposing here. It's the standard 30 days from invoice date language.

Q. So it's fair to say that Qwest has some experience in accommodating different intervals and changing those intervals.

Isn't that true?

A. And based on that experience, Qwest would prefer not to deal with business exceptions.

I would also point out that when this matter first came up in the Colorado arbitration, I think Covad's own witness was asked by the judge in that case, "Would it pose problems for Covad to have exception treatment for different items on the same bill?"

And the Covad witness's response was, "It would be problematic."

Q. I'm trying to recall your work history. Have you ever worked for a company in a competitive business, for instance, somebody other than an incumbent LEC?

A. Well, I've worked for Qwest or its the predecessor

for almost 25 years.

Q. And prior to that, did you work in any industries that were fiercely competitive, where companies fought for customers?

A. I wouldn't probably list the companies that I've worked for as that. I was in the non-profit sector for a time.

Q. So is it fair to say that your experience in accommodating large customers in competitive business environments is relatively limited?

A. I would say that's true, although I would also add that I think we are in a very, very competitive business being in telecommunications.

Q. Who competes with you providing wholesale network elements, competitive carriers?

A. Well, for instance, private line services. There are a lot of folks out there selling private line services.

Q. Does anyone compete with you in providing line sharing elements such as a high frequency portion of the loop?

A. No.

Q. And that's one of Covad's major purchases.

Is that true?

A. That is correct.

Q. And if you know, would you characterize most of

Covad's other purchases from Qwest as supporting its provision of line sharing and other DSL services?

A. I think that's probably an appropriate characterization.

MR. NEWELL: Thank you. Nothing further.

HEARING EXAMINER: Ms. Burns, how long do you have?

MS. BURNS: I have one or two questions.

HEARING EXAMINER: Okay. Please proceed.

CROSS-EXAMINATION

BY MS. BURNS:

Q. Good afternoon.

A. Good afternoon.

Q. I just wanted to ask you a couple of questions about -- are you familiar with the current -- the terms of the current interconnection agreement between Covad and Qwest?

A. The billing issues, yes.

Q. Isn't it true that in this proceeding Qwest has proposed -- now I'm going to talk about the discontinuance of service and the disconnecting of service provision. Almost all the testimony had to do with payment date. So I'm talking about the latter two issues.

Isn't it true that in this proceeding that those

line sharing, is it fair to say that Qwest hasn't made any effort to learn some of the experiences with the other incumbent LECs?

A. I don't think that's true. Qwest makes an effort to follow the guidelines developed in the OBF, which includes the other ILEC participants. So I don't think I would go to that extreme.

Q. So is your testimony that Qwest has reviewed the provisioning and billing systems used by the other incumbent LECs for line sharing?

A. No.

Q. So if Qwest hasn't reviewed those, isn't it fair to say that they haven't tried to learn whatever they might be able to learn from those other incumbent LECs?

A. Actually, Qwest, as I understand it, was a participant in the OBF during the time the line sharing Local Service Ordering Guide, LSOG, was being developed; spokes to the other LECs about how they were developing line sharing and, actually, they were having difficulty figuring out how to put the circuit ID in.

Q. And subsequently ,as far as you know, they have been able to accomplish that task.

Is that true?

A. Apparently so.

Q. And Qwest has made no effort to move in that

direction.

Isn't that true?

A. I'm not sure I would say made no effort. It hasn't been requested until your change request in October.

Q. Since that change request in October, have any efforts been made?

A. An effort has been made to figure out how to do it as inexpensively and as efficiently as possible.

Unfortunately, the estimate came out very expensive. So we made the effort to see how to do it, but we've determined we can't afford to.

Q. Qwest can't afford a $904,000.00 system change?

A. Correct. We have determined that it's economically infeasible.

Q. Would that be true if the system change were to fix a billing problem with a Qwest retail customer?

Let's say Qwest was losing a million dollars a month of revenue because they found out there was some billing problem and they weren't billing a couple million retail customers properly. It was a $904,000.00 system change.

Would Qwest be able to afford that change?

A. Well, an analysis would have to take place and determine if they could.

But based on your hypothetical, revenue is

involved. That is not the case here. This is just a straight expense.

So when they did the business case to figure out if that change could be made, that would figure into the analysis.

Q. So if no revenue was involved in making this change for Covad. It's just an expense would your answer be different if Covad could take its roughly million dollars a month and walk down the street and buy unbundled elements from another provider?

A. Well, I think we've heard today that there isn't another provider for line sharing.

Is that correct?

So I'm not sure that can change.

Q. Well, my question is that if Qwest was looking at losing a million-dollar-a-month customer, would Qwest perhaps be more motivated to make this change?

A. I imagine so.

Q. And Qwest would probably weigh that million dollars a month in revenue versus the $904,000.00 it would cost to accommodate that customer.

Isn't that correct?

A. Well, revenues and expenses are always going to be part of an analysis in a business case, yes.

Q. But I think you just testified that the revenues

NEW MEXICO PUBLIC REGULATION COMMISSION

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CORPORATION.

CASE NO. 04-00208-UT

TRANSCRIPT OF PROCEEDINGS

MARCH 29, 2005

DAY THREE

WHEREUPON, a hearing was held on the 29th 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.

* * *

Is that fair to say?

A. I think it's fair to say particularly if you are looking at growth and capabilities to ultimately put in broadband services, yes.

Q. So it's fair to say that when Qwest deploys fiber it does that to provide service more efficiently to its customers?

A. Long-term, yes.

Q. Now, isn't it true that Qwest doesn't raise its rates for its retail customers when it deploys new facilities to serve those customers?

A. Typically, Qwest's rates and pricing and costs are determined on looking at the complete network and not necessarily each individual customer, yes.

Q. And Qwest's rates for the same circuits aren't dependent on whether a customer requests a circuit of copper or fiber?

A. Our rates are based on the circuits used to serve the customer.

Q. So if a customer is on copper and orders basic local exchange service, they would pay the same rate that somebody who was served by a hybrid feeder would pay, correct?

A. Right, particularly Qwest residential services. They order a service and then it's immaterial what the

underlying facilities are to provide that service, yes.

Q. Now, let's say hypothetically Qwest would provide a resale DSL product.

A. Yes.

Q. And that resale DSL product is offered out of another FCC tariff.

Is that correct?

A. Well, when I think of resale, I usually think of resale in the context of interconnection agreements so no it would not be out of a tariff we had.

Q. Let's say that Qwest provides that retail or that resale product out of an interconnection tariff.

Is the price of that resale product dependent on whether the customer is served by home run copper or hybrid loop?

A. It would depend on the type of service being resold. If they were reselling a residential line, as I just previously testified, residential lines are not priced differently based on the underlying service.

There are, however, other services such as if a CLEC wanted to resell a private line that's going to be on fiber. So some services are facilities specific and some services are not. For example, a resale residential line would not be a facility specific.

Q. So Covad -- let's take this example of a

cost increase if it had to purchase resale rather than unbundled loops in the end, correct?

A. Qwest makes UNEs available. If the copper has been retired and that UNE is no longer available, then that is correct. Then Covad or any other CLEC would have to determine what alternative service at what appropriate rate for that alternative service that they would purchase.

Q. I'd like you to turn to Page 11 of your Surrebuttal Testimony.

A. (Witness complies.) I'm there.

Q. On Lines 5 through 10 you explain Qwest believes that state commissions do not have the authority to order unbundled access to hybrid loops.

Is that correct?

A. That is correct, that the FCC has determined that hybrid loops are not required to be unbundled at the 271 UNE pursuant to an interconnection agreement, yes.

Q. And this statement is made in the context of the dispute over copper retirement and specifically Covad's alternative service proposal.

Is that correct?

A. I'd need to check. I think this is in context of responding to Staff, not to Covad.

Q. Same difference. That's fine. It's not a critical distinction for me.

QWEST CORPORATION
DOCKET: ARB 584
INTERVENOR: Covad Communications Company
REQUEST NO: COVAD 01-001

REQUEST:

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

RESPONSE:

Qwest objects to this request on the ground that it is not reasonably calculated to lead to the discovery of admissible evidence. In particular, the right of an ILEC to retire copper facilities, as confirmed in the Triennial Review Order, is not conditioned upon or related to the number of FTTH loops it has in service.

Without waiving said objection, Qwest states: Qwest has no FTTH loops in service in Oregon today, and has not had any in service as of the last 12 months, the last 24 months, the last 36 months, and before and after the Triennial Review Order became effective.

Respondent: Roy Rietz

Qwest
1801 California Street, 10th Floor
Denver, Colorado 80202
Phone 303 383-6649
Facsimile 303 896-1107

Craig J. Brown
Corporate Counsel

January 13, 2005

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Qwest's Petition for Forbearance Under 47 U.S.C. § 160(c),
WC Docket No. 03-260

Dear Ms. Dortch:

Qwest Communications International Inc. ("Qwest") hereby provides notice that it is withdrawing, without prejudice, its forbearance petition in the above-captioned proceeding with respect to those elements not included in the Federal Communications Commission's October 27, 2004 *Memorandum Opinion and Order* (FCC 04-254), 19 FCC Rcd 21496, granting Qwest's forbearance petition as to broadband elements.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ Craig J. Brown

Jim Lamoureux
Senior Counsel

SBC Telecommunications Inc.
1401 I Street NW, Suite 400
Washington, D.C. 20005
Phone 202 326-8895
Fax 202 408-8745

January 11, 2005

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington DC 20554

Re: SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Docket No. 03-235

Dear Ms. Dortch:

SBC Communications Inc. hereby provides notice that it is withdrawing, without prejudice, its forbearance petition in the above captioned proceeding with respect to those elements not included in the Commission's October 27, 2004, *Memorandum Opinion and Order* (FCC 04-254) granting SBC's forbearance petition as to broadband elements.

If you have any questions, please do not hesitate to contact me at (202) 326-8895.

Sincerely,

/s/ Jim Lamoureux
Senior Counsel
SBC Telecommunications, Inc.

SERVICE EXHIBIT 1 - QWEST PLATFORM PLUS™ SERVICE

SERVICE EXHIBIT 1
QWEST PLATFORM PLUS™ (QPP™) SERVICE

1.0 Qwest shall provide QPP™ service offerings according to the following terms and conditions. CLEC may use QPP™ services to provide any telecommunications services, information services, or both that CLEC chooses to offer.

1.1 General QPP™ Service Description

QPP™ services shall consist of the Local Switching Network Element (including the basic switching function, the port, plus the features, functions, and capabilities of the Switch including all compatible and available vertical features, such as hunting and anonymous call rejection, provided by the Qwest switch) and the Shared Transport Network Element in combination, at a minimum to the extent available on UNE-P under the applicable interconnection agreement or SGAT where CLEC has opted into an SGAT as its interconnection agreement (collectively, "ICAs") as the same existed on June 14, 2004. Qwest Advanced Intelligent Network (AIN) services (such as Remote Access Forwarding/Call Following), Qwest Digital Subscriber Line (DSL), and Qwest Voice Messaging Services (VMS) may also be purchased with compatible QPP™ services. These Network Elements will be provided in compliance with all BellCore and other industry standards and technical and performance specifications and will allow CLEC to combine the QPP™ services with a compatible voicemail product and stutter dial tone. Access to 911 emergency services and directory listings will be provided by Qwest pursuant to the terms and conditions of CLEC's ICAs. As part of the QPP™ service, Qwest shall combine the Network Elements that make up QPP™ service with Analog/Digital Capable Loops, with such Loops (including services such as line splitting) being provided pursuant to the rates, terms and conditions of the CLEC's ICAs as described below.

QPP™ service shall be available in six different service arrangements, each of which is described more fully below: QPP™ Residential; QPP™ Business; QPP™ Centrex (including Centrex 21, Centrex Plus, and Centron in Minnesota only); QPP™ ISDN BRI; QPP™ PAL; and QPP™ PBX Analog DID and non-DID (one way and two way) trunks.

1.2 Combination of QPP™ Network Elements with Loops

The Loop will be provided by Qwest under the applicable ICAs in effect between Qwest and CLEC at the time the order is placed. As part of the QPP™ service, Qwest shall as described below combine the Local Switching and Shared Transport Network Elements with the Loop provided pursuant to the terms and conditions of CLEC's ICAs.

1.2.1 The following QPP™ service types will be combined with 2-wire loops: QPP™ Business; QPP™ Centrex (including Centrex 21, Centrex Plus, and Centron in Minnesota Only), QPP™ ISDN BRI; QPP™ PAL; QPP™ PBX Analog non-DID and 1-Way DID Trunks, and; QPP™ Residential.

1.2.2 The following QPP™ service type will be combined with 4 wire loops: QPP™ PBX Analog 2-Way DID Trunks.

1.3 Local Switching

The Local Switching Network Element of QPP™ service will be technically and functionally equivalent or superior to the Local Switching Network Element of the comparable UNE-P service provided by Qwest to CLEC under its ICAs as of June 14, 2004. The Local Switching Network Element of QPP™ service encompasses Line Side and Trunk Side facilities including without limitation the basic switching function, plus the features, functions, and all vertical features that are loaded in Qwest's End Office Switch. Vertical features are software attributes on End Office Switches and are listed in the PCAT.

Local Switching components include Analog Line Port, Digital Line Port Supporting BRI ISDN and Analog Trunk Ports.

1.3.1 Line Port attributes include but are not limited to: Telephone Number, Dial Tone, Signaling (Loop or ground start), On/Off Hook Detection, Audible and Power Ringing, Automatic Message Accounting (AMA Recording), and Blocking Options. Operator Services, and Directory Assistance are provided pursuant to the terms and conditions of CLEC's ICAs.

1.3.2 Digital Line Port Supporting BRI ISDN. Basic Rate Interface Integrated Services Digital Network (BRI ISDN) is a digital architecture that provides integrated voice and data capability (2 wire). A BRI ISDN Port is a Digital 2B+D (2 Bearer Channels for voice or data and 1 Delta Channel for signaling and D Channel Packet) Line Side Switch connection with BRI ISDN voice and data basic elements. For flexibility and customization, optional features can be added. BRI ISDN Port does not offer B Channel Packet service capabilities. The serving arrangement conforms to the internationally developed, published, and recognized standards generated by International Telegraph and Telephone Union (formerly CCITT).

1.3.3 Analog Trunk Port. DS0 Analog Trunk Ports can be configured as DID, DOD, and Two-way.

1.3.3.1 Analog Trunk Ports provide a 2-Way Analog Trunk with DID, E&M Signaling and 2-Wire or 4-Wire connections. This Trunk Side connection inherently includes hunting within the trunk group.

1.3.3.2 All trunks are designed as 4-Wire leaving the Central Office. For 2-Wire service, the trunks are converted at the End User Customer's location.

1.3.3.3 Two-way Analog DID Trunks are capable of initiating out going calls, and may be equipped with either rotary or Touch-tone (DTMF) for this purpose. When the trunk is equipped with DID Call Transfer feature, both the trunk and telephone instruments must be equipped with DTMF.

1.3.3.4 Two-way Analog DID Trunks require E&M signaling. Qwest will use Type I and II E&M signaling to provide these trunks to the PBX. Type II E&M signaling from Qwest to the PBX will be handled as a Special Assembly request Via ICB.

1.4 Vertical Features and Ancillary Functions and Services

SERVICE EXHIBIT 1 - QWEST PLATFORM PLUS™ SERVICE

1.4.1 QPP™ service includes nondiscriminatory access to all vertical features that are loaded in Qwest's End Office Switch.

1.4.2 The Local Switching Network Element of QPP™ includes Qwest's signaling network for traffic originated from the Port, including the use of Qwest's call-related databases. In conjunction with QPP™ service, Qwest will provide Qwest's Service Control Points in the same manner, and via the same signaling links, as Qwest uses such service Control Points and signaling links to provide service to its End User Customers from that Switch. Qwest's call related databases include the Line Information Database (LIDB), Internetwork Calling Name Database (ICNAM), 8XX Database for toll free calling, Advanced Intelligent Network Databases (AIN), and Local Number Portability Database. CLEC shall not have access to Qwest's AIN based services that qualify for proprietary treatment, except as expressly provided for in this Agreement.

1.4.3 ICNAM and LIDB. Qwest will provide CLEC with non-discriminatory access to Qwest's LIDB database and ICNAM database as part of the delivery of QPP™ service.

1.4.4 The LIDB database is used to store various telephone line numbers and Special Billing Number (SBN) data used by operator services systems to process and bill Alternately Billed Services (ABS) calls. The operator services system accesses LIDB data to provide originating line (calling number), Billing number and terminating line (called number) information. LIDB is used for calling card validation, fraud prevention, Billing or service restrictions and the sub-account information to be included on the call's Billing record.

1.4.4.1 LIDB database provides information for use in processing Alternately Billed Services (ABS) calls including calling card, billed to third number, and collect calls.

1.4.5 The ICNAM database is used with certain End Office Switch features to provide the calling party's name to CLEC's End User Customer with the applicable feature capability. ICNAM database contains current listed name data by working telephone number served or administered by Qwest, including listed name data provided by other Telecommunications Carriers participating in Qwest's calling name delivery service arrangement.

1.4.5.1 Qwest will provide the listed name of the calling party that relates to the calling telephone number (when the information is actually available in Qwest's database and the delivery thereof is not blocked or otherwise limited by the calling party or other appropriate request).

1.4.5.2 For CLEC's QPP™ End User Customers, Qwest will load and update CLEC's QPP™ End User Customers' name information into the LIDB and ICNAM databases from CLEC's completed service orders. The process will be functionally equivalent to the process used for these databases with UNE-P as of June 14, 2004. CLEC is responsible for the accuracy of its End User Customers' information.

1.4.5.3 Qwest shall exercise reasonable efforts to provide accurate and complete LIDB and ICNAM information. The information is provided on an as-is basis with all faults. Qwest does not warrant or guarantee the correctness or the completeness of such information; however, Qwest will access the same database for CLEC's QPP™ End User Customers as Qwest accesses for its End User Customers. In no event shall Qwest have any liability for system outage or inaccessibility or for losses arising from the authorized use of the data by CLEC.

1.4.5.4 There is no charge for the storage of CLEC's QPP™ End User Customers' information in the LIDB or ICNAM databases.

1.4.6 CLEC Branded Operator Services and Directory Assistance will be available to CLEC with QPP™ service and will be provided pursuant to the terms and conditions of CLEC's ICAs.

1.5 Shared Transport

1.5.1 Qwest shall provide the Shared Transport Network Element as part of the QPP™ service. Transport beyond Qwest's local interoffice network will be carried on Qwest's IntraLATA Toll network and provided by Qwest to CLEC only if CLEC chooses Qwest to provide IntraLATA Toll services for its QPP™ End User Customers. The existing routing tables resident in the Switch will direct both Qwest and CLEC traffic over Qwest's interoffice message trunk network.

1.5.1.1 Qwest does not authorize CLEC to offer Qwest the ILEC as a Local Primary Interexchange Carrier (LPIC) to its existing or new QPP™ End User Customers. Where CLEC assigns Qwest as LPIC 5123 to CLEC's existing or new QPP™ End User Customers, Qwest will bill CLEC at the rates contained or referenced in the attached Rate Sheet.

1.5.1.2 If, during the term of this Agreement, Qwest offers toll service to CLEC's QPP™ End User Customers, Qwest must establish its own Billing relationship with such QPP™ End User Customers. Qwest may not bill CLEC, and CLEC shall have no obligation to pay Qwest, for toll service Qwest provides to CLEC's QPP™ End User Customers. In addition, CLEC shall have no obligation to bill CLEC QPP™ End User Customers for toll service provided by Qwest.

1.5.2 Qwest will provide Shared Transport to carry originating access traffic from, and terminating to, CLEC QPP™ End User Customers. CLEC traffic will be carried on the same transmission facilities between End Office Switches, between End Office Switches and Tandem Switches, and between Tandem Switches in its network facilities that Qwest uses for its own traffic.

1.5.3 Shared Transport usage will be billed in accordance with the rates provided in The Rate Sheet.

1.6 QPP™ Service Arrangement Descriptions

1.6.1 QPP™ Business is available to CLEC for CLEC's business end users and is offered in the following combination: Analog Line Side Port and Shared Transport provided pursuant to this Agreement combined with Analog - 2 Wire Voice Grade Loop provided pursuant to CLEC's ICAs.

1.6.2 QPP™ Centrex is available to CLEC for CLEC's

business end users. QPP™ Centrex services include Centrex 21, Centrex Plus, and Centron and is offered in the following combination: Analog Line Side Port and Shared Transport provided pursuant to this Agreement combined with an Analog - 2 Wire Voice Grade Loop provided pursuant to CLEC's ICAs.

1.6.2.1 CLEC may request a conversion from Centrex 21, Centrex-Plus or Centron service to QPP™ Business or QPP™ Residential.

1.6.2.2 Qwest will provide access to Customer Management System (CMS) with QPP™-Centrex at the rates set forth in the Rate Sheet.

1.6.3 QPP™ ISDN BRI is available to CLEC for CLEC's end user customers and is offered in the following combination: Digital Line Side Port (Supporting BRI ISDN), and Shared Transport provided pursuant to this Agreement combined with a Basic Rate ISDN Capable Loop provided pursuant to CLEC's ICAs.

1.6.4 QPP™ PAL is available to CLEC for CLEC's Payphone Service Providers (PSPs) and is offered in the following combination: Analog Line Side Port, and Shared Transport provided pursuant to this Agreement combined with Analog - 2 Wire Voice Grade Loop provided pursuant to CLEC's ICAs.. QPP™ PAL may only be ordered for and provisioned to Payphone Service Providers (PSPs).

1.6.5 QPP™ PBX is available to CLEC for CLEC's business End User Customers. QPP™ PBX will be offered in the following combinations:

1.6.6 PBX Analog non-DID Trunk combination consists of Analog Line Side Port and Shared Transport provided pursuant to this Agreement combined with Analog - 2 wire Voice Grade Loop provided pursuant to CLEC's ICAs.

1.6.7 PBX with Analog 1-Way DID Trunks combination consists of DID Trunk Port and Shared Transport provided pursuant to this Agreement combined with Analog - 2 wire Voice Grade Loop provided pursuant to CLEC's ICAs.

1.6.8 PBX with Analog 2- Way DID Trunks combination consists of DID Trunk Port and Shared Transport provided pursuant to this Agreement combined with Analog – 4 wire Voice Grade Loop provided pursuant to CLEC's ICAs.

1.6.9 QPP™ Residential is available to CLEC for CLEC's residential End User Customers and is offered in the following combination: Analog Line Side Port and Shared Transport provided pursuant to this Agreement combined with Analog - 2 Wire Voice Grade Loop provided pursuant to CLEC's ICAs. QPP™ Residential may only be ordered for and provisioned for residential end user application. The definition of residential service shall be the same as in Qwest's retail tariffs as applied to Qwest's End User Customers.

2.0 **Additional Terms and Conditions and Service Features**

2.1 QPP™ services will be available only in Qwest's Incumbent Local Exchange Carrier service area within its fourteen-state region. QPP™ services will not be subject to any line limitations such as the Zone 1 four-line MSA restriction for unbundled switching. Qwest does not warrant the availability of facilities at any particular serving wire center, provided that Qwest warrants that CLEC shall be able to convert all CLEC UNE-P End User Customers as of the Effective Date to the QPP™ service. QPP™ services will not be available if facilities are not available. Notwithstanding the foregoing, Qwest represents and warrants that it will not otherwise restrict facilities eligible to provide QPP™ service and that any and all facilities that would otherwise be available for retail service to a Qwest End User Customer will be considered eligible for use by CLEC for QPP™ service to serve that same End User Customer.

2.2 Reserved.

2.3 This Agreement is not intended to change or amend existing intercarrier compensation arrangements between CLEC and Qwest. Nothing in this Agreement shall alter or affect CLEC's right to receive any applicable universal service subsidy or other similar payments.

2.3.1 Qwest shall provide to CLEC usage information within Qwest's control with respect to calls originated by or terminated to CLEC QPP™ End User Customers in the form of the actual information that is comparable to the information Qwest uses to bill its own End User Customers. Without limiting the generality of the foregoing, Qwest shall provide CLEC with the Daily Usage Feed billing information.

2.3.2 Qwest shall provide CLEC with usage information necessary for CLEC to bill for InterLATA and IntraLATA Exchange Access to the toll carrier (including Qwest where it is the toll carrier) in the form of either the actual usage or a negotiated or approved surrogate for this information. These Exchange Access records will be provided as Category 11 EMI records.

2.3.3 Qwest will provide DUF records for all usage billable to CLEC's QPP™ lines, including Busy Line Verify (BLV), Busy Line Interrupt (BLI), originating local usage, usage sensitive CLASS™ features, and Qwest-provided intraLATA toll. These records will be provided as Category 01 or Category 10 EMI records. Under this Agreement, terminating local usage records will not be provided. By agreeing to the foregoing, neither Party is foreclosed from advocating for the provision of local terminating records via an appropriate forum.

2.3.4 If CLEC chooses Qwest to provide IntraLATA Toll services for its QPP™ End User Customers, CLEC shall compensate Qwest for such services in accordance with the Rate Sheet.

2.4 QPP™ will include the capability for CLEC's End User Customers to choose their long distance service (InterLATA and IntraLATA) on a 2-PIC basis.

2.4.1 CLEC shall designate the Primary Interexchange Carrier (PIC) assignments on behalf of its End User Customers for InterLATA and IntraLATA services. CLEC shall follow all Applicable Laws, rules and regulations with respect to PIC changes and Qwest disclaims any liability for CLEC's improper PIC change requests.

2.4.2 Feature and InterLATA or IntraLATA PIC changes or additions for QPP™, will be processed concurrently with the QPP™ order as specified by CLEC.

2.5 Access to 911/E911 emergency services for CLEC's End User Customers shall be available pursuant to the terms and conditions of CLEC's ICAs. If Qwest becomes no longer obligated to provide access to 911/E911 emergency services pursuant to 47 U.S.C. §251, then Qwest shall thereafter provide such services under this Agreement with respect to all CLEC QPP™ service End User Customers and new QPP™ service End User Customers, to the same degree and extent that such 911/E911 emergency services were provided by Qwest prior to the elimination of 911/E911 emergency services as an obligation under 47 U.S.C. §251.

2.6 Reserved.

2.7 Qwest AIN, Qwest Voice Messaging Services and Qwest DSL (dependent upon service compatibility and end office availability) are offered on a commercial basis and may be purchased with QPP™ at the rates set forth in the attached Rate Sheet. Retail promotions may not be combined with QPP™. Non-recurring charges associated with Qwest DSL™ are not subject to discount. CLEC may order new or retain existing Qwest DSL service for End User Customers when utilizing QPP™-POTS, QPP™-Centrex, and QPP™-PBX (analog, non-DID trunks only) combinations, where Technically Feasible. The price for Qwest DSL provided with QPP™ service is included in the Rate Sheet to this Agreement.

2.8 Qwest DSL host service is not available with QPP™ service.

2.9 If Qwest develops and deploys new local switch features for its End User Customers, those switch features will be available in the same areas and subject to the same limitations with QPP™ service. The rates to be charged CLEC for such new local switch features will be negotiated but will not in any case be higher than the retail rate Qwest charges.

2.10 CLEC shall have the ability to combine the QPP™ service with a compatible voicemail product and stutter dial tone.

3.0 Rates and Charges

3.1 The recurring ("MRC") and nonrecurring ("NRC") rates for QPP™ services and all applicable usage-based rates and miscellaneous charges (other than applicable intercarrier compensation charges such as access charges and reciprocal compensation and MRCs and NRCs for elements and services provided pursuant to CLEC's ICAs) are set forth in the attached Rate Sheets. The rates for QPP™ services set forth in the attached Rate Sheets will be in addition to the applicable rates for elements and services provided under CLEC's ICAs.

3.2 The loop element combined with a QPP™ service will be provided pursuant to CLEC's ICAs with Qwest at the rates set forth in those ICAs. To the extent that the monthly recurring rate for the loop element in a particular state is modified on or after the Effective Date, the QPP™ port rate for that state in the Rate Sheet will be adjusted (either up or down) so that the total rate applicable to the QPP™ service and loop combination in that state (after giving effect to the QPP™ Port Rate Increases as adjusted for any applicable discount pursuant to Section 3.3 of this Service Exhibit) remains constant. The corresponding adjustment will be applied against the Port Rate Increases for the applicable state negotiated as a part of this Agreement and contained in the Rate Sheet. In no event shall any downward adjustment made on or after January 1, 2006 for a particular state under this section result in QPP™ Port Rate Increase of less than $1.00, nor shall any upward adjustment made on or after January 1, 2006 for a particular state result in a QPP™ Port Rate Increase of more than twice the scheduled increase. If the monthly recurring rate for the loop is modified by a shift in zone designation the parties shall use the difference in the statewide average loop rate as the basis for such adjustment, if any. Nothing in this Agreement shall affect the rates or any other terms and conditions for loops set forth in CLEC's ICAs with Qwest. For purposes of this Agreement, the Port Rate Increases refer to the increases in the Port rate reflecting pricing on the attached Rate Sheets.

Illustration 1: If the initial loop rate is $15, the initial Port rate is $3, and the scheduled Port Rate Increase is $2 for residential and $3 for business, an increase in the loop rate on January 1, 2006 of $1.50 to $16.50 will result in a corresponding reduction of the Port Rate Increase for residential to $1.00 (calculated: $2.00 - $1.50, but in no event less than $1.00) and a reduction of the Port Rate Increase for business of $1.50 (calculated: $3.00 - $1.50).

Illustration 2: If the initial loop rate is $15, the initial Port rate is $3, and the scheduled Port Rate Increase is $2 for residential and $3 for business, a decrease in the loop rate on January 1, 2006 of $2.50 to $12.50 will result in a corresponding upward adjustment of the Port Rate Increase for residential to $4.00 (calculated: $2.00 plus $2.50, but in no event greater than 2 X $2.00) and an upward adjustment of the Port Rate Increase for business to $5.50 (calculated: $3.00 plus $2.50).

3.3 The monthly recurring rates for the switch port in the attached Rate Sheets shall increase incrementally by the amount of the applicable QPP™ Port Rate Increase (as the same may be subsequently adjusted under Section 3.2) on January 1, 2005, January 1, 2006 and January 1, 2007. If the number of CLEC's QPP™ lines in service as of October 31, 2005 equals or exceeds 150,000, CLEC will be entitled to a discount off of the monthly recurring switch port rate applicable during calendar year 2006 equal to 10% of the QPP™ Port Rate Increases that take effect January 1, 2006 and to a discount off of the monthly recurring switch port rate applicable during calendar year 2007 equal to 10% of the QPP™ Port Rate Increases that take effect January 1, 2007 For purposes of this section, the number of QPP™ lines in service shall be calculated on a regionwide basis that includes all states in which this Agreement is in effect and, if necessary, the 150,000 threshold will be adjusted accordingly should QPP not be available as of October 1, 2005 in the same areas where QPP was available on the Effective Date of this Agreement.

3.4 CLEC shall be responsible for Billing its End User Customers served via QPP™ for all Miscellaneous Charges and surcharges required of CLEC by statute, regulation or otherwise required.

3.5 CLEC shall pay Qwest the PIC change charge associated with CLEC End User Customer changes of InterLATA or IntraLATA Carriers. Any change in CLEC's End User Customers' InterLATA or IntraLATA Carrier must be requested by CLEC on behalf of its End User Customer.

3.6 If an End User Customer is served by CLEC through a

QPP™ service, Qwest will not charge, assess, or collect Switched Access charges for InterLATA or IntraLATA calls originating or terminating from that End User Customer's phone.

3.7 Qwest shall have a reasonable amount of time to implement system or other changes necessary to bill CLEC for rates or charges associated with QPP™ services. Such system or other changes must be completed and operational no later than December 31, 2004.

3.8 QPP™ services have a one month minimum service period requirement for each CLEC End User Customer. The one month minimum service period is the period of time that CLEC is required to pay 100% of the monthly recurring price for the service even if CLEC does not retain service for the entire month. QPP™ services are billed month to month and shall after the one month minimum service period is satisfied be pro-rated for partial months based on the number of days service was provided.

3.9 To receive QPP™ Residential rates, CLEC must identify residential end users by working telephone number (WTN) via LSR as described in the QPP™ PCAT. CLEC will be permitted to begin submitting such LSRs in accordance with the agreed-upon QPP Service Residential End User Identification Project Plan. Qwest will not assess a nonrecurring charge for the processing of this records order to identify the installed base of residential end users. Following submission by CLEC of such LSRs, CLEC and Qwest shall cooperate to ensure that appropriate updates are reflected in Qwest's billing systems. QPP™ Business rates will apply to all WTNs not specifically identified as QPP™ Residential. Changes to the LSR process intended to implement the residential identifier for new orders going forward shall be implemented through the Change Management Process

3.9.1 To receive QPP™ Residential rates with an Effective Billing Date (EBD) of January 1, 2005, CLEC must identify their existing UNE-P residential end users by working telephone number (WTN) via LSR as described in the QPP™ PCAT by April 1, 2005. On April 1, 2005, Qwest will apply QPP™ Business rates, with an EBD of January 1, 2005, to all WTNs that were in service during this period. For those WTNs identified as residential end users on or before April 1, 2005, Qwest will process a one-time credit per WTN, per month for the period of time between January 1, 2005 and the later of (a) WTN installation date and (b) completion date of an order identifying the WTN as serving a residential end user. This one-time credit will be processed on one Billing Account Number (BAN) per state. After April 1, 2005, only WTNs identified as residential end users will be billed Residential rates (via the Residential End User Credit provided in the Rate Sheet), and CLEC shall waive any right to credits or discounts related to residential end users that were not so identified by such date.

3.9.2 **High Volume Performance Credit.** If, on January 1, 2005, the number of CLEC's QPP residential end user WTNs to be identified equals or exceeds 200,000, in consideration of the CLEC completion of the identification of such high volume of QPP residential end user WTNs via LSR by April 1, 2005, as described in 3.9.1 above, Qwest will provide an additional one-time high volume performance credit to CLEC in an amount equal to $1.65 per residential end user WTN for each WTN in service under UNE-P with Qwest as of January 1, 2005. If more than a de minimis number (i.e., one percent) of its residential user WTNs in service as of March 31, 2005 have not been identified by CLEC by April 1, 2005, and such failure was not caused by a negligent or willful act or omission of Qwest, CLEC shall be entitled to no incentive credit whatsoever. A WTN is identified for these purposes upon the submission of a complete LSR by the CLEC. For the elimination of doubt, Qwest operational support system (OSS) capacity limitations for entry of LSRs shall not be deemed a negligent intervening cause of CLEC's failure to identify its residential end user WTNs in a timely manner unless Qwest's OSS materially fails to allow CLEC to submit LSRs as set forth in the agreed-to project schedule described in Section 3.9 of this Agreement. This one-time performance credit will be processed on one Billing Account Number (BAN) per state. In any event, no credit shall be processed pursuant to this section for any residential end user WTNs identified after April 1, 2005 and the residential rates will be applied to these WTNs on a prospective basis only from the date of the identification.

3.10 The subsequent order charge is applicable on a per order basis when changes are requested to existing service, including changing a telephone number, initiating or removing Suspension or Service, denying or restoring service, adding, removing or changing features, and other similar requests.

4.0 Systems and Interfaces

4.1 Qwest and CLEC shall continue to support use of existing UNE-P OSS interfaces and current OSS business rules for QPP™ (including without limitation electronic ordering and flowthrough applicable to UNE-P on June 14, 2004) as the same may evolve over time.

4.2 QPP™ products and services are ordered via an LSR as described in the PCAT. Products and Services Ordering are found on the Qwest wholesale website.

4.3 Prior to placing an order on behalf of each End User Customer, CLEC shall be responsible for obtaining and have in its possession a Proof of Authorization as set forth in this Agreement.

4.4 When Qwest or another provider of choice, at the End User Customer's request, orders the discontinuance of the End User Customer's existing service with CLEC, Qwest will render its closing bill to CLEC effective with the disconnection. Qwest will notify CLEC by FAX, OSS interface, or other agreed upon processes when an End User Customer moves to Qwest or another service provider. Qwest shall not provide CLEC or Qwest retail personnel with the name of the other service provider selected by the End User Customer.

4.5 CLEC shall provide Qwest and Qwest shall provide CLEC with points of contact for order entry, problem resolution, repair, and in the event special attention is required on service request.

5.0 Billing

Qwest shall provide CLEC, on a monthly basis, within seven to ten (7 – 10) calendar days of the last day of the most

recent Billing period, in an agreed upon standard electronic format, Billing information including (1) a summary bill, and (2) individual End User Customer sub-account information. To the extent CLEC needs additional or different billing information in order to properly bill its End Users or other Carriers (including without limitation Qwest), Qwest shall work with CLEC in good faith to deliver such information.

6.0 **Maintenance and Repair**

6.1 Qwest will maintain facilities and equipment that comprise the QPP™ service provided to CLEC. CLEC or its End User Customers may not rearrange, move, disconnect or attempt to repair Qwest facilities or equipment, other than by connection or disconnection to any interface between Qwest and the End User Customer, without the written consent of Qwest.

6.2 Qwest shall provide general repair and maintenance services on its facilities, including those facilities supporting QPP™ services purchased by CLEC. Without limiting the generality of the foregoing, Qwest shall repair and restore any equipment or any other maintainable component that may adversely impact CLEC's use of QPP™ service. Qwest and CLEC shall cooperate with each other to implement procedures and processes for handling service-affecting events. There shall be no charge for the services provided under this section except as set forth in the Rate Sheet.

7.0 **Performance Measures and Reporting, Performance Targets and Service Credits**

7.1 Each party shall provide suitably qualified personnel to perform its obligations under this Agreement and all QPP™ services hereunder in a timely and efficient manner with diligence and care, consistent with the professional standards of practice in the industry, and in conformance with all applicable laws and regulations. The QPP™ service attributes and process enhancements are not subject to the Change Management Process ("CMP"). CLEC proposed changes to QPP™ service attributes and process enhancements will be communicated through the standard account interfaces. Change requests common to shared systems and processes subject to CMP will continue to be addressed via the CMP procedures.

7.2 Qwest will provide commercial performance measurements and reporting against established performance targets with QPP™ service. The following performance measurements will apply to QPP™ Residential and QPP™ Business: (a) Firm Order Confirmations (FOCs) On Time, (b) Installation Commitments Met, (c) Order Installation Interval, (d) Out of Service Cleared within 24 Hours, (e) Mean Time to Restore, (f) Trouble Rate, (g) New Service Quality, and (h) Repair Repeat Report Rate. Commercial measurement definitions, methodologies, performance targets and reporting requirements are attached as Attachment A. Qwest will provide CLEC with the raw data necessary to allow CLEC to disaggregate results at the state level.

7.3 CLEC will be entitled to service credits only for each instance of a missed installation commitment and each instance of an out of service condition that is not cleared within 24 hours as described below. All such service credits shall be applied automatically by Qwest as credit against CLEC's bill for the billing period following the one in which the credits were accrued.

7.3.1 Installation Commitments Met. For each installation commitment that Qwest, through its own fault, fails to meet, Qwest will provide a service credit equal to 100% of the nonrecurring charge for that installation. In calculating the credit, Qwest shall use the state installation nonrecurring charge contained in this Agreement for that order type. The definition of a "missed installation commitment" and the associated exclusions are described in Attachment A.

7.3.2 Out of Service Cleared within 24 Hours. For each out-of-service condition that Qwest, through its own fault, fails to resolve within 24 hours, Qwest will provide a service credit equal to one day's recurring charge (monthly recurring charge divided by 30) for each day out of service beyond the first 24 hours. (For example, if the out-of-service condition exists for 25 to 47 hours, CLEC would be entitled to a credit equal to the monthly recurring charge divided by 30. If the out-of-service condition existed for 48 to 71 hours, the credit would equal two times the monthly recurring charge divided by 30). In addition, Qwest will pay double payments on the third and all the subsequent repeat trouble reports that result in out of service conditions greater than 24 hours that occur within sixty (60) days of the first occurrence of the same trouble. The definition of an "out of service condition" and the associated exclusions are described in Attachment A.

Attachment 6

MICHAEL F ZULEVIC

From: "Gaston, Sharyn S" <Sharyn.Gaston@bellsouth.com>
To: "Bell, Jayna" <jbell@covad.com>
Cc: "Gaston, Sharyn S" <Sharyn.Gaston@bellsouth.com>; "Davis, Colette" <CoDavis@covad.com>
Sent: Wednesday, December 29, 2004 11:42 AM
Attach: Covaddec04.xls
Subject: Update for Fiber to Copper Migrations

Happy Holidays, Jayna.

Please find attached a copy of the most recent update on copper to fiber migrations.

Network Notice	Notice Header	Date of Notice	Date of Change	BAN	Circuit Id.	Telephone #	Impacted Address	City	State	CLEC	Notes
20030112	Poinciana & Airport Wirecenter	5/28/2003	12/01/03		70.SWXX.509035..SB	305 871-8300		Miami	FL	Covad	
20030134	Tall Pines Rd and the Florida Turnpike	6/18/2003	3Q 2003		60.SWXX.502135..SB	561 686-7104		West Palm	FL	Covad	
20030137	Robinson RD including Old Canton Rd,	6/19/2003	3Q 2003		38.LYFU.637806..SB			Marietta	GA	Covad	
SN20030040	Carrier Serving Area 1109A	3/4/2003	3Q 2003		60.SWXX.501544..SC	985-626-3345	1302 Montgomery St	Mandeville	LA	Covad	
SN20030041	Crossbox at 16801 NW 33rd AV, Miami, FL	3/13/2003	4Q 2003	305N010121	60.LXFU.502852..SB		3390 NW 168th St	Miami	FL	Covad	
SN20030041	Crossbox at 16801 NW 33rd AV, Miami, FL	3/13/2003	4Q 2003		70.SWXX.502946..SB	305 625-4751	Palmetto Palms Busir	Miami	FL	Covad	
SN20030041	Crossbox at 16801 NW 33rd AV, Miami, FL	3/13/2003	4Q 2003	305N010121	60.LXFU.756209..SB		3373 NW 168th St	Miami	FL	Covad	
SN20030045											
	X-Boxes @ NS 1742 Woodbrook Tr	3/12/2003	2Q 2003		10.SWXX.591414..SC	205-664-8250		Alabaster	AL	Covad	Disc. On 2/11/03
SN20030045	X-Boxes @ NS 1742 Woodbrook Tr	3/12/2003	2Q 2003		A3.LXFU.585761..SC		287 Smokey Road	Alabaster	AL	Covad	
SN20030045	X-Boxes @ NS 1742 Woodbrook Tr	3/12/2003	2Q 2003		A3.LXFU.584745..SC		1564 Kent Dairy	Alabaster	AL	Covad	
SN20030054	Bardstown Rd and Spring Garden Dr.	3/13/2003	4Q 2003		K1.LXFU.382860..SC		4527 Bardstown Rd	Louisville	KY	Covad	
SN20030054	Bardstown Rd and Spring Garden Dr.	3/13/2003	4Q 2003		50.SWXX.501272..SC	502-493-0808	4501 Bardstown Rd	Louisville	KY	Covad	
SN20030054	Bardstown Rd and Spring Garden Dr.	3/13/2003	4Q 2003		K1.LXFU.378249..SC		4515 Bardstown Rd	Louisville	KY	Covad	
SN20030071	Moores Chapel Rd	3/20/2003	3Q 2003		22.LXFU.403426..SB		305 Sandy Ave	Charlotte	NC	Covad	
SN20030071	Moores Chapel Rd	3/20/2003	3Q 2003		22.LXFU.403940..SB		1015 Chancellor Park	Charlotte	NC	Covad	
SN20030071	Moores Chapel Rd	3/20/2003	3Q 2003		22.LXFU.409720..SB		6408 N Tyron St	Charlotte	NC	Covad	
SN20030072	Central Avenue	3/20/2003	2Q 2003		26.SWXX.500071..SB	704 535-9296		Locust	NC	Covad	
SN20030072	Central Avenue	3/20/2003	2Q 2003		26.SWXX.500965..SB	704 568-7419		Locust	NC	Covad	
SN20030073	Along Hickory Grove Road	3/20/2003	2Q 2003		26.SWXX.500071..SB	704-536-7784	4709 Gaynelle Dr	Charlotte	NC	Covad	
SN20030073	Along Hickory Grove Road	3/20/2003	2Q 2003		26.SWXX.500060..SB	704-563-7986	4905 Penny Point Pl	Charlotte	NC	Covad	
SN20030083	Interface P 688 Franklin Rd	4/3/2003	4Q 2003		T4.LXFU.712558..SC		101 Legends Club Ln	Franklin	TN	Covad	
SN20030086	North Belvedere DR between Nashville Highv	4/3/2003	4Q 2003		T4.LXFU.500406..SC		500 Belvedere Dr	Gallatin	TN	Covad	
SN20030086	North Belvedere DR between Nashville Highv	4/3/2003	4Q 2003		T4.LXFU.500361..SC		804 Teal Drive	Gallatin	TN	Covad	
SN20030122	Oxmoor wire center in the West Oxmoor Indu	5/30/2003	12/15/03	205N01-0056	A3.LXFU.501513..SC			Oxmoor	AL	Covad	
SN20030136	Community Blvd, east of N Military Tr	6/18/2003	4Q 2003		60.LXFU.503640..SB			Shadow Lakes	FL	Covad	
SN20030136	Community Blvd, east of N Military Tr	6/18/2003	4Q 2003		60.SWXX.500508..SB	561-615-0930		Shadow Lakes	FL	Covad	
SN20030136	Community Blvd, east of N Military Tr	6/18/2003	4Q 2003		80.SWXX.511105..SB	561-688-2647		Shadow Lakes	FL	Covad	
SN20030136	Community Blvd, east of N Military Tr	6/18/2003	4Q 2003		60.SWXX.500508..SB	561 615-0930		Shadow Lakes	FL	Covad	
SN20030136											
	Community Blvd, east of N Military Tr	6/18/2003	4Q 2003		80.SWXX.511105..SB	561 688-2647		Shadow Lakes	FL	Covad	Disc. On 7/23/03
SN20030137	Side Street along Robinson RD including Old	6/19/2003	09/12/03		38.LXFU.605843..SB	770-509-7172	806 Candy Lane	Marietta	GA	Covad	
SN20030155	Lake Worth, FL, Congress Ave South of 6th /	7/29/2003	3Q 2003	305C07-0003	80.SWXX.507568..SB	561-434-9516	4611 Congress Ave	Lake Worth	FL	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		50.SWXX.501087..SB	502-429-0422		Louisville	KY	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		50.SWXX.501291..SB	502-429-3606		Louisville	KY	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		50.SWXX.500564..SB	502-326-0639		Louisville	KY	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		K1.LXFU.360711..SC	502-412-5242		Louisville	KY	No Record	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		50.SWXX.501605..SC	502-339-8851		Louisville	KY	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		50.SWXX.500957..SC	502-412-1996		Louisville	KY	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		50.SWXX.501426..SC	502-339-5442		Louisville	KY	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		50.SWXX.500630..SC	502-327-9845		Louisville	KY	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		50.SWXX.500652..SC	502-426-6119		Louisville	KY	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		50.SWXX.501866..SC	502-425-8263		Louisville	KY	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		K1.LXFU.500625..SC			Louisville	KY	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		K1.LXFU.500296..SC			Louisville	KY	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		K1.LXFU.500413..SC			Louisville	KY	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		K1.LXFU.500443..SC			Louisville	KY	Covad	
SN91083396	Westport Road Serving CO	11/8/2002	1Q 2003		50.SWXX.501695..SC	502-429-0262		Louisville	KY	Covad	

SN91083427	Laurel Drive, Boswell Drive and Access Roac	12/13/2002	1Q 2003		A4.LXFU.501510..SC			Lakewood	AL	No Record		
SN91083427	Laurel Drive, Boswell Drive and Access Roac	12/13/2002	1Q 2003		A4.LXFU.500913..SC			Lakewood	AL	No Record		
SN91083513	Palm Club subdivision, Normandy Village	12/12/2002	2Q 2003		60.LXFU.503640..SB	561-616-4572	4200 Community Dr	West Palm	FL	Covad		
SN91083513	Palm Club subdivision, Normandy Village	12/12/2002	2Q 2003		60.LXFU.502244..SB		4200 Community Dr	West Palm	FL	Covad		
SN91083513	Palm Club subdivision, Normandy Village	12/12/2002	2Q 2003		60.SWXX.500508..SB	561-615-0930	4200 Community Dr	West Palm	FL	Covad		
SN91083513	Palm Club subdivision, Normandy Village	12/12/2002	2Q 2003		60.SWXX.500293..SB	561-688-2647	4200 Community Dr	West Palm	FL	Covad		
SN91083513	Palm Club subdivision, Normandy Village	12/12/2002	2Q 2003		60.LXFU.762969..SB		1441 Brandywine Rd	West Palm	FL	Covad		
SN91083524	Soult Street and Labarre Street.	4/1/2002	1Q 2003		L2.LXFU.577324..SC			Mandeville	LA	Covad		
SN20030041	16801 NW 33rd AV, Miami, FL Crossbox	3/4/2003	4Q 2003		60.LXFU.502852..SB			Miami	FL	Covad		
SN20030041	16801 NW 33rd AV, Miami, FL Crossbox	3/4/2003	4Q 2003		60.LXFU.756209..SB			Miami	FL	Covad		
SN20030040	Carrier Serving Area 1109A	3/4/2003	3Q 2003		L2.LXFU.577324..SC			Mandeville	LA	Covad		
SN20040005	Melaleuca Bet. Haverhill Rd and Jog Rd	1/14/2004	4Q 2004		60.SWXX.500104..SB	561-433-2586		Lake Worth	FL	Covad		
SN20040005	Melaleuca Bet. Haverhill Rd and Jog Rd	1/14/2004	4Q 2004		80.SWXX.508442..SB	561-304-7839		Lake Worth	FL	Dieca/Covad		
SN20040005	Melaleuca Bet. Haverhill Rd and Jog Rd	1/14/2004	4Q 2004		80.SWXX.517882..SB	561-357-0028		Lake Worth	FL	Dieca/Covad		
SN20040005	Melaleuca Bet. Haverhill Rd and Jog Rd	1/14/2004	4Q 2004		80.SWXX.517449..SB	561-434-4612		Lake Worth	FL	Covad		
SN20040028	West St. Bernard Highway, Chalmette, Louis	2/12/2004	3Q 2004		60.SWXX.504087..SC	504-279-7632		Chalmette	LA	Dieca/Covad		
SN20040028	West St. Bernard Highway, Chalmette, Louis	2/12/2004	3Q 2004		60.SWXX.504577..SC	504-279-9234		Chalmette	LA	Dieca/Covad		
SN20040028	West St. Bernard Highway, Chalmette, Louis	2/12/2004	3Q 2004		60.SWXX.501564..SC	504-277-7409		Chalmette	LA	Dieca/Covad		
SN20040028	West St. Bernard Highway, Chalmette, Louis	2/12/2004	3Q 2004		60.SWXX.504096..SC	504-276-2605		Chalmette	LA	Dieca/Covad		
SN20040028	West St. Bernard Highway, Chalmette, Louis	2/12/2004	3Q 2004		60.SWXX.502422..SC	504-279-7295		Chalmette	LA	Covad		
SN20040028	West St. Bernard Highway, Chalmette, Louis	2/12/2004	3Q 2004		60.SWXX.502818..SC	504-276-5802		Chalmette	LA	Dieca/Covad		
SN20040028	West St. Bernard Highway, Chalmette, Louis	2/12/2004	3Q 2004		L2.SWXX.500257..SC	504-279-6452		Chalmette	LA	Covad		
SN20040028	West St. Bernard Highway, Chalmette, Louis	2/12/2004	3Q 2004		60.SWXX.504292..SC	504-277-6710		Chalmette	LA	Dieca/Covad		
SN20040065	Hialeah, Florida	4/2/2004	4Q 2004		60.LXFU.511627..SB			Hialeah	FL	Covad		
SN20040065	Hialeah, Florida	4/2/2004	4Q 2004		60.LXFU.763489..SB			Hialeah	FL	Covad		
SN20040065	Hialeah, Florida	4/2/2004	4Q 2004		60.LXFU.512268..SB			Hialeah	FL	Covad		
SN20040065	Hialeah, Florida	4/2/2004	4Q 2004		70.SWXX.501793..SB	305-558-0603		Hialeah	FL	Covad		
RPT NCD-821	15300 Timberview LN - Hsvl, NC	7/30/2003	4 Q 2004		20.SWXX.503172..SB	704-875-3863		Huntersville	NC	Dieca/Covad		
SN20040096	Snellville, Georgia	4/26/2004	2 Q 2004		40.SWXX.507476..SB	678-344-8777		Snellville	GA	Dieca/Covad		
SN20040096	Snellville, Georgia	4/26/2004	2 Q 2004	40.SWXX.507476..SB	678-344-8777	Snellville	GA	Dieca/Covad				
SN91083378	Intersection Lorna Rd,Rocky Ridge,&Patton (	10/18/2002	1 Q 2003	10.SWXX.501333..SC	205-978-9711	Hoover	AL	Covad				
SN91083378	Intersection Lorna Rd,Rocky Ridge,&Patton (	10/18/2002	1 Q 2003	A3.LXFU.501337..SC		Hoover	AL	Covad				
SN91083378	Intersection Lorna Rd,Rocky Ridge,&Patton (	10/18/2002	1 Q 2003	A3.LXFU.579653..SC		Hoover	AL	Covad				
SN91083378	Intersection Lorna Rd,Rocky Ridge,&Patton (	10/18/2002	1 Q 2003	10.SWXX.501723..SC	205-822-5443	Hoover	AL	Dieca/Covad				
SN91083378	Intersection Lorna Rd,Rocky Ridge,&Patton (	10/18/2002	1 Q 2003	10.SWXX.503212..SC	205-824-7802	Hoover	AL	Dieca/Covad				
SN91083378	Intersection Lorna Rd,Rocky Ridge,&Patton (	10/18/2002	1 Q 2003	A3.LXFU.501795..SC		Hoover	AL	Covad				
SN20040120	Anderson Ln Bet Legends DR & F433 Anders	5/25/2004	1 Q 2005	T4.LXFU.702240..SC		Hendersonville	TN	Covad				
SN20040122	Franklin Rd bet S Maple Dr & I-40	6/2/2004	1 Q 2005	80.SWXX.502247..SC	615-453-2085	Lebanon	TN	Dieca/Covad				
SN20040132	Westport Rd Wire Center	6/15/2004	Dec-04		50.SWXX.500814..SC	502-425-7907		Louisville				
SN20040320	Morgan St	12/14/2004	2 Q 2005		26.LXFU.403609..SB			Raleigh	NC	Covad		
SN20040320	Morgan St	12/14/2004	2 Q 2005		20.SWXX.919.828.580	919-828-5803		Raleigh	NC	Dieca/Covad		
SN20040320	Morgan St	12/14/2004	2 Q 2005		26.LXFU.401222.SB			Raleigh	NC	Covad		
SN20040320	Morgan St	12/14/2004	2 Q 2005		26.LXFU.503022..SB			Raleigh	NC	Covad		
SN20040320	Morgan St	12/14/2004	2 Q 2005		26.LXFU.501362..SB			Raleigh	NC	Covad		
SN20040320	Morgan St	12/14/2004	2 Q 2005		20.SWXX.919.832.639	919-832-6392		Raleigh	NC	Dieca/Covad		
SN20040320	Morgan St	12/14/2004	2 Q 2005		20.SWXX.919.755.172	919-755-1720		Raleigh	NC	Dieca/Covad		
SN20040318	NE 96th St to N. Biscayne Blvd to W.NE91st	12/14/2004	3 Q 2005		70.SWXX.305.757.416	305-757-4165		Miami Shores	FL	Dieca/Covad		

OAH Docket No. 3-2500-15908-4
MPUC Docket No. P-5692,421/IC-04-549

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

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

ARBITRATOR'S REPORT

The above-entitled matter was arbitrated by Administrative Law Judge Kathleen D. Sheehy on September 20-22, 2004, in the Small Hearing Room of the Public Utilities Commission in St. Paul, Minnesota. The record closed on November 8, 2004, upon receipt of reply briefs.

Jason Topp, Esq., 200 South Fifth Street, Room 395, Minneapolis, Minnesota 55402; Winslow Waxter, Esq., 1005 17th Street, Room 200, Denver, Colorado 80202; and John Devaney, Esq., Perkins Coie, LLP, 607 14th Street NW, Washington, D.C. 20005, appeared for Qwest Corporation (Qwest).

Karen Shoresman Frame, Esq., 7901 Lowry Boulevard, Denver, Colorado 80230, appeared for Covad Communications (Covad).

Linda S. Jensen, Assistant Attorney General, 1400 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101, appeared for the Department of Commerce (the Department).

Kevin O'Grady appeared for the staff of the Public Utilities Commission.

Procedural History

1. Covad and Qwest first entered into an interconnection agreement on May 3, 1999. For purposes of this arbitration they have agreed that negotiations on a new agreement began on October 29, 2003.[1] Covad filed a petition for arbitration of the unresolved issues on April 6, 2004. Pursuant to 47 U.S.C. § 252(b)(4)(C), the original deadline for the Commission's decision was nine months from the request for negotiations, or July 29, 2004. The parties subsequently agreed to waive this deadline: first it was extended to October 29, 2004, during the initial prehearing conference[2]; then

[1] Qwest Response to Covad's Revised Petition for Arbitration (June 1, 2004) at 2-3.
[2] Prehearing Order (May 12, 2004).

again, at the request of the parties, to January 7, 2005[3]; and finally, at the conclusion of the arbitration hearing, to January 21, 2005.[4]

2. The Department petitioned to intervene as a party, and its petition was granted pursuant to Minn. R. 7811.1700, subp. 10.

3. On April 12, 2004, Qwest filed a motion with the Commission to dismiss some of the issues Covad identified in its petition for arbitration; specifically, Qwest sought dismissal of Covad's proposal that access to section 271 elements be addressed in the interconnection agreement. The Commission denied the motion without prejudice and allowed Qwest to renew its motion before the Arbitrator.[5] Qwest did so, and the other parties responded. The Arbitrator denied the first argument raised in Qwest's motion, which was that these issues should be dismissed because Qwest did not agree to negotiate them, on the basis that Qwest did agree to negotiate these issues, and did in fact negotiate them, making them open issues subject to arbitration within the meaning of 47 U.S.C. § 252(b)(1). The Arbitrator declined to address the merits of Qwest's second argument, which was that Qwest's proposed language should be adopted because the Commission lacks the legal authority to arbitrate section 271 issues, on the basis that this argument required further development with respect to its application to specific sections of the proposed agreement.[6]

Arbitrator's Authority

4. The Commission has jurisdiction over this proceeding under § 252(b) of the Telecommunications Act of 1996 (Act) and Minn. Stat. §§ 237.16 and 216A.05. Section 252(b) of the Act provides for state commission arbitration of unresolved issues related to negotiations for interconnection, resale and access to unbundled network elements. Specifically, it authorizes the Commission to "resolve each issue set forth in [an arbitration] petition and the response, if any, by imposing appropriate conditions . . .."[7] In resolving the open issues and imposing appropriate conditions, the Commission must ensure that the resolution meets the requirements of section 251, including the regulations adopted pursuant to section 251; must establish any rates for interconnection, services, or network elements according to subsection (d); and must provide a schedule for implementation of the terms and conditions by the parties to the agreement.

5. The Act specifically permits a state commission to establish or enforce other requirements of state law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or

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[3] Second Prehearing Order (June 28, 2004).
[4] Tr. 3:129-32. By rule, the Arbitrator's Report is due no later than 35 days before the deadline for the Commission's decision, or December 17, 2004. *See* Minn. R. 7812.1700, subps. 19 & 21.
[5] *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. § 2252(b)*, Order Denying Motion to Dismiss Without Prejudice and Assigning Arbitrator (Apr. 28, 2004).
[6] Order on Motion to Dismiss (June 4, 2004).
[7] 47 U.S.C. § 252(b)(4)(C).

requirements,[8] as long as state requirements are consistent with the Act and the FCC's implementing rules.[9] State law similarly requires that issues submitted for arbitration be resolved in a manner that is consistent with the public interest, to ensure compliance with the requirements of sections 251 and 252(d) of the Act, applicable FCC regulations, and applicable state law, including rules and orders of the Commission.[10]

Burden of Proof

6. The burden of proof in this interconnection arbitration proceeding is on Qwest to prove all issues of material fact by a preponderance of the evidence.[11] In addition, the arbitrator may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute. The arbitrator may also shift the burden of proof as necessary to comply with applicable FCC regulations regarding burden of proof, such as rules placing the burden on the incumbent to demonstrate the technical infeasibility of a CLEC's request for interconnection or unbundled access and rules requiring an incumbent to prove by clear and convincing evidence any claim that it cannot satisfy such a request because of adverse network reliability impacts.[12]

Remaining Disputed Issues

7. Covad and Qwest continued to negotiate after the filing of the petition and after the conclusion of the arbitration hearing. The remaining issues in dispute are numbers 1 (copper retirement), 2 (§ 271 obligations), 3 (commingling), 5 (regeneration), and 9 (billing).[13] There are numerous disputed subsections within some of these issues.

Issue No. 1: Retirement of Copper Facilities

A. Issue

8. There are two issues with regard to retirement of copper facilities. The first, and more significant issue, is whether Qwest should be permitted to retire a copper facility only if it provides Covad with an alternative service that permits Covad to continue providing broadband service to its customers and does not increase the cost to Covad or its customers. Qwest has agreed to provide notice to Covad when it intends

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[8] 47 U.S.C. § 252(e)(3).
[9] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket Nos. 96-98, First Report and Order, 11 FCC Rcd 15499 ¶¶ 66, 54, & 58 (Aug. 8, 1996) (*Local Competition Order*); *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking in CC Docket Nos. 01-338, 96-98, and 98-147 at ¶¶ 193-96 (Sept. 17, 2003) (*TRO*).
[10] Minn. R. 7811.1700, 7812.1700; *see also* Minn. Stat. §§ 237.011, 237.16, subd. 1(a).
[11] Minn. R. 7812.1700, subp. 23.
[12] 47 C.F.R. §§ 51.5 & 51.321(d).
[13] These issues were numbered on the Joint Disputed Issues List submitted most recently on October 15, 2004.

to retire copper loops, subloops, and feeder; and when a copper facility is being replaced with any fiber facility, including feeder. Qwest also agreed to provide notice of planned retirements by e-mail. The second issue is whether the e-mail notice should include certain specific information requested by Covad.

B. Position of Parties

Alternative Service Proposal

9. Covad has proposed language at sections 9.1.15.1 and 9.1.15.1.1 of the interconnection agreement to address copper retirement. In section 9.1.15.1, Covad proposes a "continuity of service" provision that would apply when Qwest retires copper feeder cable that results in the loop becoming either mixed copper media or a hybrid loop. Covad would not apply this section to situations in which the resultant loop is fiber-to-the-home (FTTH). If Qwest were to retire copper feeder that serves Covad's customers, it would be required to first provide "an alternative service over any available, compatible facility (i.e. copper or fiber)." Furthermore, Covad's language provides that the "alternative service shall be provisioned in a manner that does not degredate the service or increase the cost" to Covad or its customers. Covad's proposal makes disputes over copper retirement subject to the Dispute Resolution provisions of the interconnection agreement. Section 9.2.1.2.3.1 of Covad's proposal would apply the same provision to the retirement of any copper facilities serving Covad or its customers.

10. Covad argues that its proposed language is consistent with the TRO, specifically ¶ 282. Paragraph 282, which was substantially incorporated into 47 C.F.R. § 51.333(f), is applicable when a CLEC has filed an objection to the planned retirement of copper facilities that will be replaced with FTTH. It provides:

> **Unless the copper retirement scenario suggests that competitors will be denied access to the loop facilities required under our rules**, we will deem all such oppositions denied unless the Commission rules otherwise upon the specific circumstances of the case at issue within 90 days of the Commission's public notice of the intended retirement.[14]

11. Covad also argues that adoption of its alternative service proposal would be consistent with the policies contained in Minn. Stat. § 237.011, because it would encourage economically efficient deployment of infrastructure for higher speed telecommunication services, encourage fair and reasonable competition, maintain or improve quality of service, promote customer choice, and ensure consumer protections in the transition to a competitive market.

12. In response, Qwest contends that the "access to loop facilities" that is required under ¶ 282 of the TRO is access solely for the purpose of providing narrowband services, and that Covad is wrongly reading this procedural notice provision

[14] *TRO* ¶ 282 (emphasis added).

to apply to the retirement of copper feeder.[15] Qwest also argues that the FCC has already determined that its rules strike the appropriate balance in encouraging investment in infrastructure, and that the FCC has clearly determined that there are no substantive limitations on an ILEC's ability to retire copper loops or feeder facilities.[16] Furthermore, Qwest maintains that Covad's proposed "alternative service" is completely undefined, too vague to implement, and is, in reality, an attempt to gain unbundled access to hybrid loops. It contends the FCC ruled unequivocally that ILECs are not required to provide unbundled access to the broadband capabilities of hybrid loops.[17]

13. Qwest's proposed language, at sections 9.1.15 and 9.2.1.2.3, would permit Qwest to retire copper loop, feeder, or subloop and replace it with fiber or FTTH after Qwest provides notice of the planned retirement on its web site, e-mail notice of the planned retirement to CLECs, and public notice to the FCC. Qwest would be permitted to proceed with retirement at the conclusion of the FCC notice process unless retirement was explicitly denied, delayed or modified. In addition, Qwest would comply with any notices required by the Commission. Furthermore, Qwest has committed (in section 9.2.1.2.3.1) to leave copper loops or copper subloops serving CLEC customers in service where it is technically feasible to do so.[18] When copper facilities are being replaced with like copper, it has committed to jointly coordinate the transition of working loops and subloops so that service interruption is held to a minimum. When copper facilities are retired and replacement facilities include replacement of a remote DSLAM (section 9.2.1.2.3.2), to the extent that space is available, Qwest will offer to CLECs remote collocation and/or field connection point in order to maintain existing xDSL services. Again, Qwest agreed to jointly coordinate the transition of current working facilities so that service interruptions are minimized.[19]

14. The Department's position is that there is no FCC requirement that an alternative service be made available upon copper retirement, let alone at the same cost. It maintains that the FCC has addressed this issue and has not required a UNE solution involving access to fiber feeder plant used to transmit packetized information. Instead, the FCC has provided procedural protections through the notice provisions concerning network modifications. The Department recommends adoption of Qwest's proposed language for these sections.

Content of E-mail Notice

15. During the arbitration hearing, Covad proposed no specific language regarding the content of the e-mail notice. After the hearing, Covad proposed language in section 9.1.15 that requires Qwest to include in the e-mail notice to CLECs the following information concerning any plans to retire copper facilities: city and state; wire

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[15] *TRO* ¶¶ 296-97.
[16] *TRO* ¶ 271.
[17] *TRO* ¶ 288.
[18] This language is consistent with Qwest's practice of leaving copper loops in place when fiber is deployed. *See* Tr. 3:92.
[19] The record reflects that no customer of Covad's has ever been disconnected from service in Minnesota or anywhere else in Qwest's region because of Qwest's retirement of a copper loop. *See* Tr. 2:165-66.

center; planned retirement date; the FDI address; a listing of all impacted addresses in the DA; a listing of all CLEC's customer impacted addresses; old and new cable media, including transmission characteristics; circuit identification information; and cable and pair information.

16. Because Covad's proposed language did not appear until after the hearing, there is limited information in the record about what information Covad actually needs in order to respond to a copper retirement notice. A notice used by BellSouth, which Covad appears to find acceptable, contains a list of street addresses that may be impacted by a conversion.[20] A Qwest notice concerning copper retirement in Idaho identifies the location by wire center and FDI address, but does not contain a list of impacted street addresses.[21] Qwest maintains it is working with CLECs to ensure they know how to use various tools on Qwest's website in order to find the impacted addresses from the information provided in the notice.[22] There is no evidence in the record that any ILEC provides information in the notice at the level of circuit identification information or cable and pair information.

17. Qwest contends that it has agreed to do more than the *TRO* requires by committing to provide three forms of notice: through its website, through a public filing with the FCC, and through e-mail notice to CLECs. It proposes language incorporating these forms of notice and committing to make the disclosures required by the rule: date of the planned retirement, the location, a description of the network change, and a description of the foreseeable impacts resulting from the network change. There is no evidence in the record as to whether or why it would be burdensome for Qwest to provide more information.

18. The Department recommends that the interconnection agreement provide that "the retirement notice shall contain information that enables the CLEC, upon the taking of reasonable actions, to accurately identify the address of each end user customer impacted by the retirement." While this approach reasonably balances the respective burdens of finding the necessary information, it does not specifically tell Qwest what it has to do in order to comply.

C. Applicable Law

19. For purposes of the FCC's unbundling analysis, there are three kinds of loops: copper loops, hybrid loops, and FTTH. Copper loops consist of copper pairs of various gauges and associated electronics. Hybrid loops consist of fiber optic cable, usually in the feeder portion, and copper, usually in the distribution portion. Any loop consisting of both fiber optic and copper cable is, for the FCC's purposes, a hybrid loop. FTTH loops consist entirely of fiber optic cable between the main distribution frame (or its equivalent) and the demarcation point at the customer's premises.[23]

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[20] Ex. 24.
[21] Ex. 25.
[22] Tr. 3:42.
[23] *TRO* ¶¶ 221, 275 n. 811, 288 n. 832.

20. In the *TRO*, the FCC required that ILECs provide unbundled access to stand-alone copper loops and subloops.[24] It determined that access to these copper loops is sufficient for the provision of broadband services. Subject to a grandfathering period and transition period, ILECs are no longer required to unbundle the high frequency portion of the loop (HFPL) for purposes of line sharing between a CLEC and ILEC.[25] Nor are ILECs required to provide unbundled access to "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."[26] This rule is based on the FCC's determination that the unbundling of the fiber optic portions of hybrid loops "would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities."[27]

21. The FCC declined to prohibit ILECs from retiring copper loops or copper subloops that have been replaced with fiber. Instead, the FCC applied its existing network modification disclosure requirements to the retirement of copper loops and copper subloops. These disclosure requirements include notice, by either filing public notice with the FCC or providing notice through industry publications or an accessible Internet site, of the carrier's name and address, the name and telephone number of a contact person who can supply additional information regarding the planned changes, the implementation date, the location(s) at which the changes will occur, a description of the type of changes planned, and a description of the reasonably foreseeable impact of the planned changes.[28] In addition, any state requirements that currently apply to an ILEC's copper retirement practices will continue to apply.[29]

22. When an ILEC retires an existing copper loop and replaces it with FTTH, the fiber loop must be unbundled *for narrowband services only*.[30] In addition to the notice requirements above, parties may file objections with the FCC when an ILEC plans to retire a copper loop and replace it with FTTH. Objections must be received within nine business days from the release of the FCC's public notice. Unless the copper retirement scenario suggests that competitors will be denied access to the loop facilities, the FCC will deem all such oppositions denied unless it rules otherwise within 90 days of the public notice of the intended retirement.[31]

D. Decision

23. Qwest's language concerning retirement of copper loops and subloops with fiber or FTTH (sections 9.1.15 and 9.2.1.2.3) should be adopted because it is

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[24] *TRO* ¶¶ 248, 253.
[25] *Id.*, *TRO* ¶ 255.
[26] *TRO* ¶¶ 288, 253.
[27] *TRO* ¶ 288.
[28] 47 C.F.R. § 51.327.
[29] *TRO* ¶ 271.
[30] *TRO* ¶ 273 (emphasis added). Narrowband services include voice, fax, and dial-up Internet access over voice-grade loops. *See TRO* ¶¶ 200 n. 627, 296 n. 849.
[31] 47 C.F.R. § 51.325(a)(4); § 51.331(c); § 51.333(b)(2), (c) & (f).

consistent with the *TRO*. There is no legal support in the TRO for Covad's position concerning "alternative" services.

24. In its Reply Brief, Covad argues that Qwest as a Regional Bell Operating Company (RBOC) has an independent obligation to unbundle fiber feeder under section 271. It further contends that the FCC's recent decision in the *§ 271 Forbearance Order*[32] to forbear from requiring access to FTTH, fiber-to-the-curb (FTTC) loops, the packetized functionality of hybrid loops, and packet switching under section 271 because these checklist requirements have been "fully implemented" means that BOCs must continue to provide access to other section 271 elements, including fiber feeder. It is simply not possible to read the FCC's decision to refrain from requiring any access to broadband elements under section 271 as providing any support whatsoever for Covad's alternative service proposal. In any event, the FCC is expected to rule on the remainder of Qwest's petition, which seeks similar treatment for all section 271 access obligations, by December 17, 2004. The parties will have the opportunity to present their arguments thereafter to the Commission.

25. With regard to the content of e-mail notices, the rule requires "a description of the reasonably foreseeable impact of the planned changes."[33] The notices should contain information sufficient to allow a CLEC to determine the street addresses that would be impacted by such changes, as recommended by the Department. Qwest maintains, however, that CLECs can and do use the information on its notice form to find this information on its website. Covad does not challenge these factual assertions or dispute that this is possible; the issue seems to be that Covad wants Qwest to assume the responsibility for doing the research in advance and to put the results in the notice, or to put directions for using the Qwest website in the notice.[34] The latter seems redundant when, by law, the name and telephone number of a contact person who can provide additional information about the planned change must be on the notice. Qwest has met its burden of proving that the information it provides is sufficient to comply with 47 U.S.C. § 51.327. Although the Commission has the authority to require more, on this record it does not appear that there is a need for it. Qwest's proposed language concerning the content of the e-mail notice should be adopted.

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[32] *In the Matters of Petition for Forbearance of Verizon Telephone Companies Pursuant to 47 U.S.C. §160(c); SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c); Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c); BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, Memorandum Opinion and Order ¶12 (October 27, 2004) (*§ 271 Forbearance Order*).

[33] 47 C.F.R. § 51.327.

[34] Ex. 8 at 15-16. To the extent the record is unclear about what information CLECs need and what is available through Qwest's website, the lack of clarity is due to Covad's failure to propose specific language before the conclusion of the hearing.

Issue No. 2: Section 271 Obligations

A. Issue

26. In the *TRO*, the FCC relieved ILECs from the obligation to provide unbundled access to certain network elements under 47 U.S.C. § 251(c)(3) because competitive carriers are not impaired without access to these elements at cost-based rates. The FCC also determined that RBOCs have an independent obligation, under section 271, to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates. Section 271 contains the competitive checklist items that an RBOC must satisfy in order to obtain authority to provide long-distance service. The FCC reasoned that although checklist Item 2 specifically requires compliance with the unbundling requirements of section 251, other checklist items (4, 5, 6, and 10) separately impose access requirements to particular network elements without reference to whether they are required to be unbundled pursuant to section 251. The appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable, and not unreasonably discriminatory basis pursuant to sections 201 and 202, not the TELRIC rates required under section 252.[35]

27. The issue here is whether the parties' interconnection agreement should provide for access to network elements pursuant to section 271. In various sections of the proposed agreement, Covad has urged language referencing Qwest's obligation to provide elements pursuant to section 271 or state law obligations; Qwest has proposed alternate language that focuses on elements that Qwest is not required to provide under the terms of the *TRO*. Qwest maintains that any access to section 271 elements should be addressed in a separate agreement.

B. Position of Parties

28. Covad contends that state commissions should include section 271 obligations in interconnection agreements because Qwest remains obligated to provide access to those elements even if CLECs are not impaired in their ability to provide services under section 251.[36]

29. Covad has proposed to define an unbundled network element in § 4.0 of the interconnection agreement as one that Qwest is obligated to provide access to under § 251(c)(3) and "for which unbundled access is required under section 271 of the Act or applicable state law." In § 9.1.1, Covad proposes language that would require Qwest to provide "any and all UNEs required by the Telecommunications Act of 1996 (including, but not limited to Sections 251(b), (c), 252(a) and 271), FCC Rules, FCC Orders, and/or applicable state rules or orders, or which are ordered by the FCC, any state commission or any court of competent jurisdiction." In § 9.1.1.6, Covad's language provides that Qwest "will continue providing access to certain network

[35] *TRO* ¶¶ 649-56.
[36] *TRO* ¶¶ 653-655.

elements as required by Section 271 or state law, regardless of whether access to such UNEs is required by Section 251 of the Act. This Agreement sets forth the terms and conditions by which network elements not subject to Section 251 obligations are offered to CLEC." Finally, with regard to pricing, Covad's language would require Qwest to bill for section 271 elements or services "using the Commission-approved TELRIC rates for such UNEs until such time as new, just, reasonable and non-discriminatory rates (as required by Sections 201 and 202 of the Act or applicable state law) are approved for the Section 271 or state law required UNEs."[37]

30. Covad contends that state commissions have authority under the Act and under state law to enforce section 271 obligations in an interconnection agreement. For example, section 251(c)(3) preserves state authority under Minn. Stat. § 237.16 to establish or enforce other requirements of state law in its review of an interconnection agreement, including intrastate service quality standards or requirements. Covad also cites to the decision in *Verizon Maine,*[38] in which the Maine Public Utility Commission determined, among other things, that it had authority to require Verizon to include all of its wholesale offerings in its state wholesale tariff, including unbundled network elements provided pursuant to section 271. In addition, the Maine Commission determined that it had the authority to require Verizon to file prices for all offerings contained in the wholesale tariff for review and compliance with federal pricing standards. Covad also argues that the *TRO* requires Qwest to provide continued access at TELRIC rates absent a request by Qwest to alter the conditions of its interLATA entry.[39] Finally, Covad contends that TELRIC is a permissible pricing methodology for any elements that must be unbundled pursuant to state law.[40]

31. Qwest maintains that Covad's sweeping unbundling proposals would require it to provide access to network elements for which the FCC has specifically refused to require unbundling.[41] Moreover, Qwests maintains that Covad's proposed language would unlawfully require the provision of those elements at TELRIC rates until such time as different rates are set.

32. Qwest argues that the Commission has no legal authority under the Act to impose unbundling obligations under section 271. It argues that section 271(d)(3)

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[37] Other sections proposed by Covad address access to section 271 elements at any technically feasible point (9.1.5); access to DS1, DS3, and dark fiber loops as section 271 elements in the event that the FCC determines there is no impairment to these elements under section 251 (9.2.1.3); provision of more than two DS3 loops for a single end user customer under § 271 (9.2.1.4); access to feeder subloops under section 271 (9.3.1.1); and access to DS1 feeder loop (9.3.2.2) unbundled dedicated interoffice transport (UDIT) (9.6 and 9.6.1.5, 9.6.1.5.1), DS1 transport along a particular route (9.6.1.6, 9.6.1.6.1), and switching and line splitting (9.21.2) as section 271 elements.

[38] *Verizon-Maine Proposed Schedules, Terms, Conditions, and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Maine PUC Docket No. 2002-682, Order-Part II (September 3, 2004).

[39] *TRO* ¶ 655.

[40] Minn. Stat. § 237.12, subd. 4.

[41] For example, in section 9.3.1.1 of its proposed ICA, Covad includes language that would obligate Qwest to provide feeder subloops, notwithstanding the FCC's ruling in the *TRO* that ILECs are not required to unbundle this network element. *See* TRO at ¶ 253.

expressly confers upon the FCC, not state commissions, the authority to determine whether BOCs have complied with the substantive provisions of section 271, including the "checklist" provisions.[42] It argues that state commissions have only a non-substantive, "consulting" role in that determination.[43]

33. Qwest further argues that the Commission lacks authority to arbitrate the terms and conditions of access to section 271 elements under state law. Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by section 271,[44] provide no role for state commissions. The FCC has confirmed that "[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)."[45]

34. To the extent that Covad's language concerning section 271 would require the Commission to unbundle elements that the FCC has declined to unbundle under section 251, Qwest further argues that the Commission lacks authority to do so. Qwest contends that 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.[46] The Supreme Court confirmed that as a precondition to unbundling, Section 251(d)(2) "requires the [Federal Communications] 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."[47] The D.C. Circuit confirmed in *USTA II* that Congress did not allow the FCC to have state commissions perform this work on its behalf.[48]

35. In Qwest's view, independent state commission authority is preserved in the savings clauses in the Act *only to the extent it is consistent with the Act*, including Section 251(d)(2)'s substantive limitations on the level of unbundling that may be authorized.[49] Section 251(d)(3), for example, protects only those state enactments that are "consistent with the requirements of this section."[50] Likewise, sections 261(b) and (c) protect only those state regulations that "are not inconsistent with the provisions of

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[42] 47 U.S.C. 271(d)(3).
[43] 47 U.S.C. 271(d)(2)(B). *See also Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (S.D. Ind. 2003) (state commission not authorized by section 271 to impose binding obligations), *aff'd*, 359 F.3d 493 (7th Cir. 2004) (a "savings clause" is not necessary for Section 271 because the state commissions' role is investigatory and consulting, not substantive, in nature).
[44] *TRO* at ¶¶ 656, 662.
[45] *TRO* at ¶ 664 (emphasis added).
[46] 47 U.S.C. § 251(d)(2).
[47] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 391-92 (1998).
[48] *See United States Telecom Assoc. v. FCC*, 359 F.3d 554, 568 (D.C. Cir. 2004) (*USTA II*).
[49] *TRO* ¶¶ 193-95. *See also Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) ("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).
[50] 47 U.S.C. § 251(e)(2)(B).

this part" of the Act or the Commission's regulations to implement this part. Nor, Qwest argues, does Section 252(e)(3) help Covad; that simply says that "nothing in *this section*" — that is, Section *252* — prohibits a state from enforcing its own law, 47 U.S.C. § 252(e)(3) (emphasis added), but the relevant limitations on the scope of permissible unbundling that are at issue are found in section 251.[51]

36. In addition, Qwest argues that even if the Commission had the authority to make the impairment determinations that must precede any decision to unbundle a particular element, the impairment standard cannot be implemented absent further guidance from FCC. The FCC's impairment standard was sharply criticized in *USTA II* as being "vague almost to the point of being empty."[52]

37. Finally, Qwest argues that Covad's proposal to price section 271 elements at TELRIC rates is unlawful. It argues that the FCC ruled unequivocally that any elements an ILEC unbundles pursuant to section 271 are to be priced based on the section 201-02 standard that rates must be just, reasonable, and nondiscriminatory.[53] In so ruling, the FCC confirmed, consistently with its prior rulings in section 271 orders, that TELRIC pricing does not apply to these network elements.[54] 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" on the basis that "we see nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment."[55] Qwest further contends that the FCC has exclusive authority to determine whether rates are just and reasonable under section 202 of the Act.

38. The Department contended, and the Commission agreed, in the recent *Covad/Qwest Commercial Line Sharing Agreement* docket,[56] that under the Act, there is no federal requirement that Qwest's ongoing section 271 obligations need to be addressed in an interconnection agreement over Qwest's objection. This is because there is no obligation to place section 271 obligations in an interconnection agreement, with its concurrent procedures for formal negotiation, arbitration, and approval. The Department does not recommend that the Commission require language in this agreement regarding Qwest's section 271 obligations. The Department recommends that the Commission adopt the Qwest definition of UNE in Section 4.0 and Qwest's proposed language for Section 9.1.1.

39. For the same reasons, the Department recommends that the Commission adopt the Qwest language for the following sections: section 9.1.5 (concerning access to 271 elements at any technically feasible point); section 9.2.1.4 (access to more than

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[51] *See* 47 U.S.C. § 251(d)(2).
[52] *USTA II*, 359 F.3d at 572.
[53] *TRO* at ¶¶ 656-64.
[54] *Id.*
[55] *USTA II*, 359 F.3d at 589; *see generally id.* at 588-90.
[56] *In the Matter of a Commission Investigation Regarding the Status of the Commercial Line Sharing Agreement Between Qwest Corporation and DIECA Communications d/b/a Covad*, Docket No. P-5692, 421/CI-04-804, Order Directing Qwest to File Commercial Agreements (September 27, 2004).

two DS3 loops under 271); sections 9.3.1.1, 9.3.1.2, 9.3.2.2, and 9.3.2.2.1 (availability of feeder subloops as 271 elements)[57]; and section 9.6 (g) (access to UDIT on routes where PUC has found no impairment).

40. The Department has different recommendations with regard to section 9.1.1.7. This section addresses pricing for section 271 elements. Although Qwest wants no mention in the agreement of its obligations under section 271 or state law, Qwest proposes language in this section establishing that on the effective date of the interconnection agreement it will charge prices from its website or tariff for elements for which it has a section 271 obligation that have been removed from the list of section 251 elements. The Department recommends that this issue be addressed in a separate commercial agreement or through the use of the change-of-law provision of the interconnection agreement. Unless the parties have agreed to it, the Department recommends that there be no language concerning pricing of elements no longer required under section 251. The Department accordingly recommends that Section 9.1.1.7 be deleted.

41. Section 9.1.1.6 addresses the provision of elements that, under the TRO, are no longer required to be offered as UNEs under section 251. Covad proposes language that would require Qwest to continue providing these elements pursuant to section 271 or state law; Qwest proposes language that would expressly omit from the agreement all elements that it believes that it need not offer as UNEs under section 251. The Department does not believe that the language proposed by either party for section 9.1.1.6 is appropriate. The Department recommends that, as to elements that Qwest is not required to offer under section 251, the simple omission of language is sufficient to exclude them from the interconnection agreement. As to elements that, as a result of FCC or court decisions, may in the future be removed from the class of elements that are required to be offered under section 251, the Department contends that the change of law provision in the interconnection agreement should be sufficient to address the issue. The Department recommends the following language:

> 9.1.1.6 If on the Effective Date of this Agreement, Qwest is no longer obligated to provide to the CLEC one or more Network Elements that had formerly been required to be offered pursuant to Section 251 of the Act, Qwest will continue to provide the Network Element(s) already in service until an amendment is accepted by the Commission that includes a description of the Network Element(s) and gives a transition plan describing when the Network Element(s) will no longer be available.

42. For the same reasons, the Department recommends that neither party's language should be adopted for the following six sections: section 9.2.1.3 (access to

[57] Under the *TRO*, ILECs need not provide access to their fiber feeder loop plant as stand-alone UNEs; rather, ILEC subloop unbundling to is limited distribution loop plant UNEs. *See TRO* ¶¶ 253-54. Instead of offering UNEs, the FCC stated that it "expect[s] that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops." *TRO* ¶ 253.

high capacity loop elements as 251 elements may be restricted); section 9.6.1.5 (access to DS3 UDIT, if access to dedicated DS3 transport along certain routes is no longer available under section 251); sections 9.6.1.5.1 and 9.6.1.6.1 (regarding a website giving the DS3 and DS1 routes where the UNE is not required); section 9.6.1.6 (access to DS1 UDIT, if access to dedicated DS1 transport along certain routes is no longer available under section 251); and section 9.21.2 (access to UNE-P, if access to UNE-P is no longer available under section 251). Instead, as to elements that Qwest is not required to offer under section 251, the interconnection agreement should simply omit the elements. As to elements that are excluded from the list of section 251 elements in the future by FCC or court decisions, the change of law provision in the interconnection agreement is sufficient to address the issue. For these sections, the Department recommends that the parties should provide language in a compliance filing consistent with these recommendations.[58]

C. Applicable Law

43. Section 252(b) of the Act provides for state commission arbitration of unresolved issues related to negotiations for interconnection, resale and access to unbundled network elements. Specifically, it authorizes the Commission to "resolve each issue set forth in [an arbitration] petition and the response, if any, by imposing appropriate conditions . . .." [59] In resolving the open issues and imposing appropriate conditions, the Commission must ensure that the resolution meets the requirements of section 251, including the regulations adopted pursuant to section 251; must establish any rates for interconnection, services, or network elements according to subsection (d); and must provide a schedule for implementation of the terms and conditions by the parties to the agreement.

44. Interconnection agreements have been broadly defined by the FCC as agreements that create "ongoing obligation[s] pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation"[60] or that otherwise contain "an ongoing obligation relating to section 251 (b) or (c)."[61] Section 252(e) of the Act contemplates that interconnection agreements must be submitted to state commissions for approval or rejection. The term interconnection agreement, for this purpose, excludes obligations that solely relate to non-251 network elements. The *TRO* contemplates that, as to non-

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[58] The change of law provision in the draft agreement that was filed with the petition for arbitration was in section 9.1.1.8. There, Covad proposed a reference to the amendment process in section 5 of the agreement that appears to be similar to the language offered by the Department here. In the most recent version of the draft interconnection agreement, section 9.1.1.8 is described as being intentionally omitted. The Department states in its brief that the parties have agreed to incorporate the change of law provision that was in their previous interconnection agreement and that this language is acceptable to the Department, but it is not clear where this language is now located within the agreement.

[59] 47 U.S.C. § 252(b)(4)(C).

[60] *Qwest Communications International 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)*, Memorandum Opinion and Order, FCC 02-276 ¶ 8 (Oct. 4, 2002) (*Declaratory Order*).

[61] *Declaratory Order*, n. 26.

251 elements, parties would negotiate alternative long-term arrangements, other than interconnection agreements.[62]

45. Section 271 of the Act addresses an RBOC's authority to provide interLATA services. An RBOC may apply to the FCC for authorization to provide interLATA services.[63] Before making a determination on the application, the FCC must consult with the state commission of any state that is the subject of the application in order to verify the BOC's compliance with checklist items.[64] The FCC is authorized to take enforcement action if a BOC ceases to meet the conditions required for approval and is required to establish procedures to review such complaints in an expeditious manner.[65]

D. Decision

46. The Administrative Law Judge agrees with the Department that 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. The authority of a state commission must be exercised consistently with the Act; both the Act and the *TRO* make it clear that state commissions are charged with the arbitration of section 251 obligations, whereas the FCC has retained authority to determine the scope of access obligations pursuant to section 271. Although this is an "open issue" for purposes of determining what issues are subject to arbitration, the law provides no substantive standard that would permit the language Covad proposes. Furthermore, to the extent the *Verizon-Maine* decision stands for the proposition that a state commission has authority to arbitrate section 271 claims, the 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.

47. Accordingly, the interconnection agreement should incorporate Qwest's definition of UNE in Section 4.0 and Qwest's proposed language for Section 9.1.1, as well as sections 9.1.5 (concerning access to 271 elements at any technically feasible point); section 9.2.1.4 (access to more than two DS3 loops under 271); sections 9.3.1.1, 9.3.1.2, 9.3.2.2, and 9.3.2.2.1 (availability of feeder subloops as 271 elements); and section 9.6 (access to UDIT on routes where PUC has found no impairment).

48. The Administrative Law Judge also agrees with the Department that there should be no language in the agreement concerning the availability or pricing of elements no longer required under section 251. The *TRO* contemplates that the parties would negotiate alternative long-term arrangements, other than interconnection agreements, to address provision of these elements. But if Qwest chooses to exclude

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[62] *See, e.g., TRO* ¶265 as to line sharing, which the FCC contemplated being removed from the class of section 251 UNEs.
[63] 47 U.S.C. § 271(d)(1).
[64] *Id.*, § 271(d)(2)(B).
[65] *Id.*, § 271(d)(6).

these elements from the scope of the interconnection agreement, which is its right, Qwest should not be permitted to use the interconnection agreement to establish its section 271 rights or the prices it is permitted to charge for these elements, thereby short-circuiting the process it would have to go through to negotiate a separate commercial agreement. The pricing of these elements and the effective date of these prices should be addressed in a separate agreement. Section 9.1.1.7 of the proposed agreement should be deleted.

49. With regard to elements that may in the future become unavailable pursuant to section 251, the Administrative Law Judge agrees that a separate commercial agreement or the change of law provision in the interconnection agreement should control provision and pricing of these elements. Until the FCC releases its final rules, it is simply not a useful exercise to draft language for this interconnection agreement that would attempt to predict what elements may be removed from the section 251 obligation or what "271 access" really means. As to elements that Qwest is not required to offer under section 251, the interconnection agreement should simply omit reference to the elements. As to elements that become excluded from the list of section 251 elements in the future by FCC or court decisions, the change of law provision in the interconnection agreement is sufficient to address the issue.[66]

50. For the following sections, the parties should provide language in a compliance filing that is consistent with the above recommendations: section 9.2.1.3 (access to high capacity loop elements); section 9.6.1.5 (access to DS3 UDIT); sections 9.6.1.5.1 and 9.6.1.6.1 (regarding a website giving the DS3 and DS1 routes); section 9.6.1.6 (access to DS1 UDIT); and section 9.21.2 (access to UNE-P).

Issue No. 3: Commingling of Section 271 Elements

A. Issue

51. The only disputed issue for the Commission to decide in connection with Issue 3 is whether Qwest is required to combine or commingle unbundled network elements provided under section 251 with elements or services provided under section 271 (involving section 9.1.1.1 and Covad's definition of a "Section 251(c)(3) UNE" within section 4.0 of the proposed agreement).

B. Position of Parties

52. Covad's proposed language defines commingling in section 4.0 as the "connecting, attaching, or otherwise linking of a 251(c)(3) UNE . . . to one or more facilities or services that a requesting Telecommunications Carrier has obtained at wholesale from Qwest pursuant to any method other than unbundling under Section 251(c)(3) of the Act . . .." Covad's reference to facilities obtained "pursuant to any

[66] The parties should clarify in a compliance filing where the change of law provision is within the agreement and what the agreed-upon language is, if the amendment process is different than that proposed by the Department for section 9.1.1.6. If the Department's proposed language for section 9.1.1.6 is consistent with the agreed-upon language, it should be included in the agreement.

method other than unbundling under section 251(c)(3)" is intended to include network elements that Qwest provides pursuant to section 271. By contrast, Qwest's Section 4.0 definition of commingling excludes section 271 elements by referring to "the connecting, attaching, or otherwise linking of an Unbundled Network Element . . . to one or more facilities that a requesting Telecommunications Carrier has obtained at a wholesale from Qwest . . .." Qwest's definition of "Unbundled Network Element" in section 4.0 expressly excludes elements provided under Section 271.

53. In section 9.1.1.1, Covad proposes the following language:

> Commingling - CLEC may commingle 251(c)(3) UNEs and combinations of 251(c)(3) UNEs with any other services obtained by any method other than unbundling under section 251(c)(3) of the Act, including switched and special access services offered pursuant to tariff and resale. Qwest will perform the necessary functions to effectuate such commingling upon request.

54. Qwest proposes language to the effect that the interconnection agreement does not provide for the purchase and/or provision of resold services with UNEs or for commingling of resale services with other resale services. The Qwest language contemplates that this would be addressed in a negotiated amendment to the agreement.

55. Covad relies on paragraph 579 of the *TRO*, in which the FCC defined commingling as requiring the connecting, attaching, or otherwise linking of a UNE or a UNE combination "to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under Section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services." According to Covad, this last phrase -- "pursuant to any method other than unbundling under section 251(c)(3) of the Act" -- necessarily includes elements that BOCs provide under section 271.

56. Qwest contends that in a different section of the *TRO*, the FCC determined that it "decline[s] to require BOCs, pursuant to Section 271, to combine network elements that no longer are required to be unbundled under section 251."[67] Qwest also argues that FCC's intent to exclude section 271 requirements can be inferred from its decision to delete, in the Errata to the *TRO*, a specific reference to section 271 elements made in the original *TRO* at paragraph 584.

57. Qwest also argues that the FCC's *Interim Unbundling Rules* do not permit the Commission to require commingling for enterprise market loops, dedicated transport, and switching. The FCC's *Interim Unbundling Rules* require ILECs "to continue providing unbundled access to enterprise market loops, dedicated transport, and switching under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004." The FCC ordered that these rates,

[67] *TRO* ¶ 655 at n. 1989.

terms, and conditions must remain in effect "until the earlier of the effective date of final unbundling rules promulgated by the [FCC] or six months after Federal Register publication of [the Interim Unbundling Rules]...."[68] Qwest maintains that under these rules, Qwest and Covad are bound by the rates, terms, and conditions in their existing interconnection agreement that was in effect on June 15, 2004, relating to access to enterprise market loops, dedicated transport, and switching. Because the Qwest/Covad ICA that was in effect on June 15, 2004, does not require Qwest to perform any commingling, the Commission cannot require Qwest to commingle these elements with any other elements or services.

58. Qwest also argues that state commissions do not have authority to impose any terms and conditions relating to network elements that BOCs provide pursuant to section 271. That absence of authority, Qwest contends, prohibits the Commission from imposing language in an interconnection agreement that would require Qwest to commingle elements provided under section 251 with section 271 elements and wholesale services.

59. Finally, Qwest argues that even if commingling of section 251 and section 271 elements were required, the interconnection agreement would improperly require commingling of section 271 elements with other 271 elements, because Covad has proposed defining an unbundled network elements as including section 271 elements.

60. The Department recommends, based on the broad language in the *TRO*, that the Commission adopt the Covad position, which requires Qwest to commingle 251 and non-251 elements.

C. Applicable Law

61. The *TRO* provides as follows:

> We therefore modify our rules to affirmatively permit requesting carriers to commingle UNEs and combinations of UNEs with services (*e.g.*, switched and special access services offered pursuant to tariff), and to require incumbent LECs to perform the necessary functions to effectuate such commingling upon request. By commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services. Thus, an incumbent LEC shall permit a requesting telecommunications carrier to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act. In addition, upon request, an incumbent LEC shall

[68] *Interim Unbundling Order* at ¶ 1.

perform the functions necessary to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to a method other than unbundling under section 251(c)(3) of the Act. As a result, competitive LECs may connect, combine, or otherwise attach UNEs and combinations of UNEs to wholesale services (*e.g.*, switched and special access services offered pursuant to tariff), and incumbent LECs shall not deny access to UNEs and combinations of UNEs on the grounds that such facilities or services are somehow connected, combined, or otherwise attached to wholesale services.[69]

62. The FCC's determination above was based on its position that the Act does not prohibit the commingling of UNEs and wholesale services, and that a rule restricting the obligation to commingle UNEs with other services would violate the nondiscrimination requirement of section 251(c)(3), because incumbent LECs place no such restrictions on themselves. Accordingly, the FCC required ILECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations.[70]

63. In paragraph 584, the *TRO* provides as follows, as modified by the Errata:

> As a final matter, we require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any ~~network elements unbundled pursuant to section 271 and any~~ services offered for resale pursuant to section 251(c)(4) of the Act. . . . Any restriction that prevents commingling of UNEs (or UNE combinations) with resold services constitutes a limitation on beth reselling the eligible service and on obtaining access to the UNE or UNE combination. We conclude that a restriction on commingling UNEs and UNE combinations with services eligible for resale is inconsistent with the section 251(c)(4) prohibition on "unreasonable . . . conditions or limitations" because it would impose additional costs on competitive LECs choosing to compete through multiple entry strategies, and because such a restriction could even require a competitive LEC to forego using efficient strategies for serving different customers and markets. . . . In addition, a restriction on obtaining UNEs and UNE combinations in conjunction with services available for resale would constitute a discriminatory condition the resale of eligible telecommunications services because incumbent LECs impose no such limitations or restrictions on their ability to combine facilities or services within their network in order to meet customer needs.[71]

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[69] *TRO* ¶ 579.
[70] *TRO* ¶ 581.
[71] *TRO* ¶ 584; Errata ¶ 27 (September 17, 2003).

64. In its discussion of access to elements as required by section 271, the FCC responded to arguments that BOCs would be improperly singled out for different treatment if section 271 created an access obligation independent of section 251. It said: "Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance [market] that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis."[72] In a footnote at the end of this sentence, the FCC said as follows, as modified by the Errata:

> We decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251. Unlike section 251(c)(3), items 4-6 and 10 of section 271's competitive checklist contain no mention of "combining" and, as noted above, do not refer back to the combination requirement set forth in section 251(c)(3). ~~We also decline to apply our commingling rule, set forth in Part VII.A. above, to services that must be offered pursuant to these checklist items~~.[73]

D. Decision

65. The *TRO* obligates an ILEC to commingle or combine a UNE under section 251 with other tariffed or wholesale elements or services. If Qwest offers these elements through its tariff or on some other wholesale basis, it must combine them with a UNE upon request. The *TRO* used broad language to require commingling of an unbundled network element provided under section 251 with any other facility or service obtained at wholesale pursuant to a method other than unbundling.[74] The deletion of the reference to section 271 elements in paragraph 584 is most reasonably read to eliminate a discussion of network elements from a paragraph that otherwise refers exclusively to resold services. If a CLEC purchases only section 271 elements, however, without any UNEs under section 251, there is no obligation to combine them, as section 271 contains no combination requirement.[75] Nowhere in this discussion of section 271 does the FCC suggest that section 271 elements are specifically excluded from the obligation to combine a section 251 element with "any other facility or service obtained at wholesale pursuant to a method other than unbundling." The deletion of the last sentence of note 1989 in paragraph 655 is most reasonably read as correcting the suggestion that a service, as opposed to a network element, might have to be "unbundled" pursuant to section 271.

66. The *Interim Unbundling Order* requires ILECs to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under interconnection agreements as of June 15, 2004. The *Order* was intended to maintain existing unbundling obligations to minimize the disruptive effects and marketplace uncertainty that otherwise would

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[72] *TRO* ¶ 655.
[73] *TRO* ¶ 655 n. 1989; Errata ¶ 31 (referring to renumbered n. 1990).
[74] *TRO* ¶¶ 579-84.
[75] *TRO* ¶ 655 n. 1989.

result from the abrupt elimination of particular unbundling requirements, caused by the District of Columbia Court of Appeals' vacation of FCC rules in *USTA II*.[76] As the FCC pointed out, *USTA II* upheld the FCC with respect to a number of elements, including broadband loops, hybrid loops, enterprise switching, as well as the section 271 access obligation.[77] The Administrative Law Judge agrees with Covad and the Department that the *Interim Unbundling Order* was not intended to supersede or displace the portions of the *TRO* that survived appellate review, including the rules concerning commingling of UNEs. The *Interim Unbundling Order* by its terms will expire on February 20, 2005, unless it is superseded by voluntarily negotiated agreements, an intervening FCC Order affecting specific unbundling obligations, or a state commission order raising the rates for network elements. If the FCC announces new or changed rules concerning access to or commingling of section 271 elements, the change of law provision in the agreement would apply.

67. Qwest's argument that state commissions lack authority to require commingling of UNEs with elements provided pursuant to section 271 goes too far. The FCC has determined that ILECs are required, under section 251, to combine or commingle UNEs with other elements or services offered on a wholesale or tariffed basis, or pursuant to any method other than unbundling under section 251(c)(3) of the Act. State commissions clearly have authority under section 251 to require compliance with FCC rules. Finally, because the Administrative Law Judge has recommended adoption of Qwest's language concerning the definition of an unbundled network element in section 4.0, Qwest would not be required to improperly combine section 271 elements with each other, absent a request to combine such an element with a section 251 UNE.

Issue No. 5: Regeneration

A. Issue

68. This issue concerns Covad's proposal to require Qwest to provide channel regeneration for CLEC-to-CLEC connections. FCC rules provide that an ILEC must provide a connection between the equipment collocated by two or more competitive carriers, except to the extent the incumbent LEC permits the carriers to provide the requested connection for themselves. Covad's concern is that if the equipment of the competitive carriers is collocated far enough apart, regeneration may be required to boost the cross-connect signal. Covad maintains Qwest should be obligated to provide the regeneration if it is necessary, because Qwest determines where carriers may place collocated equipment.

B. Positions of Parties

69. Covad argues that regeneration should rarely be necessary if Qwest efficiently assigns collocation space, and therefore, if regeneration is required on a

[76] *Interim Unbundling Order* ¶ 10.
[77] *Id.* ¶ 6 n. 19.

CLEC-to-CLEC connection, Qwest should be required to provide such regeneration on the same terms as would apply to a Qwest to CLEC connection.[78] Covad argues that the current policies regarding the regeneration of signals between the Covad and Qwest network be extended to cover the regeneration of signals between Covad's physical collocations and those of other collocated CLECs within a Qwest premises.

70. In section 8.2.1.23.1.4, the interconnection agreement provides that a 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. Qwest's proposal ends here; Covad's proposal would add the following at the end of this section:

> Depending on the distance parameters of the combination, regeneration may be required but Qwest shall not charge CLEC for such regeneration, if there does not exist in the affected Premises, another Collocation space whose use by CLEC would not have required regeneration, and such a space would not have existed except for Qwest's reservation of the space for its own future use.

71. Covad's proposed language for section 8.3.1.9 provides that channel regeneration would not be charged for interconnection between a collocation space and Qwest's network, between noncontiguous collocation spaces of the same CLEC, or to connect to the collocation space of another CLEC. The section would permit a channel regeneration charge under some circumstances, such as when regeneration would not be required by ANSI standards but is nonetheless requested by a CLEC, but its proposed language provides that Qwest will "recover the costs indirectly and on a proportionate basis with equal sharing of the costs among all collocators and Qwest." Covad proposes deletion of Qwest's section 9.1.10, which provides that there will be no separate charge for channel regeneration between a collocation space and Qwest's network.

72. Qwest maintains the applicable law is the FCC's *Fourth Advanced Services Order,* which discusses CLEC-to-CLEC connections, and resulted in the amendment of 47 C.F.R. 51.323(h), enumerating those situations when an ILEC is obligated to provide a connection between the collocated equipment of two CLECs.[79]

73. Qwest contends based on this rule that it is not required to provide a connection—or, therefore, regeneration—if it permits the interconnecting CLECs to perform the connection themselves.[80] Since Qwest permits collocating telecommunications carriers to interconnect with each other, or with a single CLEC's

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[78] There is no dispute that Qwest does not charge CLECs for regeneration if regeneration is required on a connection between the CLEC and Qwest. *See* Ex. 19 (Norman Direct) at 12.
[79] *Fourth Advanced Services Order* at ¶¶ 55-84.
[80] *See* 47 C.F.R. § 51.323(h).

non-adjacent collocation location, in its central offices, any FCC requirement that Qwest provide such connection is eliminated.[81] Absent the obligation to provide the connection between CLECs, Qwest argues it need not provide regeneration for the connection at any price, and certainly not free of charge.

74. While Qwest maintains it is not legally bound to do so, Qwest offers CLEC-to-CLEC connections upon request by the CLEC. Where channel regeneration is required on the connection and the CLEC does not wish to provision its own regeneration, the CLEC may order the connection as a finished service under its FCC 1 Access Tariff.[82]

75. Qwest also argues that Covad's suggestion that regeneration will only be required on a CLEC-to-CLEC connection if Qwest has inefficiently assigned collocation space to one or both interconnecting CLECs[83] ignores the reality that CLECs seek collocation space at different times, and it often is not possible for Qwest to place two CLECs immediately adjacent to each other. Moreover, in practice, Qwest provides location options to a requesting CLEC and if that CLEC is dissatisfied with its options, the CLEC may request a walk-through of a Qwest central office to determine if there is a more desirable collocation location available.[84]

76. Covad argues in response that CLECs may not be able to provide regeneration efficiently if forced to place repeaters at each end of the connection, as opposed to having Qwest place a repeater in the middle of the span.

77. The Department recommends that the Commission adopt Qwest's proposed language because Covad's standard for when regeneration charges may be assessed is unreasonably vague, and Qwest could not be expected to know how to comply. Similarly, if a complaint was filed by a CLEC alleging a violation of the interconnection agreement, the proposed standard is so vague that the Commission would not be able to know whether Qwest's space planning process conformed with the interconnection agreement or not. The Department did not address pricing standards for regeneration or make a recommendation as to whether it should be priced at TELRIC or on a retail basis.[85]

78. As to Covad's proposed equal sharing of regeneration cost among all collocators and Qwest, the Department maintains it would not be possible to implement a pricing plan applicable to all CLECs through a single interconnection agreement between Covad and Qwest. The Department recommends that the Commission adopt the Qwest language, with the caveat that Covad could raise the issue of cost recovery/pricing of regeneration in a future collocation cost docket.

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[81] *See* Ex. 19 (Norman Direct) at 12-13. *See also* Ex. 13 (Proposed Interconnection Agreement) at §8.2.1.23.
[82] *See* Ex. 19 (Norman Direct) at 13: Ex. 20 (Norman Public Response) at 11.
[83] *See* Ex. 2 (Zulevic Response) at 4-5.
[84] *See* Ex. 19 (Norman Direct) at 4-5.
[85] Tr. 2:138.

C. Applicable Law

79. The FCC's rule concerning CLEC-to-CLEC connections provides in relevant part:

> An incumbent LEC shall provide, at the request of a collocating telecommunications carrier, a connection between the equipment in the collocation spaces of two or more telecommunications carriers, except to the extent the incumbent LEC permits the collocating parties to provide the requested connection for themselves or a connection is not required under paragraph (h)(2) of this section. Where technically feasible, the incumbent LEC shall provide the connection using copper, dark fiber, lit fiber, or other transmission medium, as requested by the collocating telecommunications carrier.[86]

D. Decision

80. Because 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.[87] Qwest's proposed contract language should be adopted because it is more clear in describing the parties' obligations and more consistent with the rule; however, the propriety of a regeneration charge and the pricing standard that should be applied to it could be addressed in a collocation cost model, should the Commission open a docket for that purpose.

Issue No. 9: Payment Due Date, Timing for Discontinuing Orders, and Timing for Disconnecting Services

A. Issue

81. Qwest's proposals concerning payment due date, timing for discontinuing orders, and timing for disconnecting service rely heavily on the agreements reached on billing and payment issues in the section 271 proceedings. Qwest's proposed language on these issues is similar to that in Qwest's Minnesota SGAT. Covad seeks to (1) extend the payment due date from 30 to 45 days with certain exceptions; (2) extend the amount of time Qwest must wait before it discontinues processing orders from 30 days to 60 days following the payment due date; and (3) extend the number of days Qwest must wait before disconnecting service to the end user from 60 days to 90 days following the payment due date.

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[86] 47 C.F.R. 51.323(h)(1).
[87] 47 U.S.C. § 251(c)(6).

B. Position of Parties

82. The parties have focused their arguments on the payment due date. Since the hearing of this matter, Covad has proposed new language, recommended in part by the Department, regarding the payment due date. Specifically, Covad now proposes the following:

> 5.4.1 Amounts payable for any invoice containing (1) line splitting or loop splitting products, (2) a missing circuit ID, (3) a missing USOC, or (4) new rate elements, new services, or new features not previously ordered by CLEC (collectively "New Products") (hereinafter collectively referred to as "Exceptions") are due and payable within forty-five (45) calendar Days after the date of invoice, or within twenty (20) calendar Days after receipt of the invoice, whichever is later (payment due date) with respect to the New Products Exception, the forty-five (45) Day time period shall apply for twelve (12) months. After twelve (12) months' experience, such New Products shall be subject to the thirty (30) Day time frame hereinafter discussed. Any invoice that does not contain any of the above Exceptions are due and payable within thirty (30) calendar Days after the date of invoice, or within twenty calendar Days after receipt of the invoice, whichever is later. If the payment due date is not a business day, the payment shall be due the next business day.

83. Covad bases its request for a longer payment due date in part by arguing that contrary to industry standards, Qwest does not provide a circuit identification number on its UNE bills, and therefore, Covad is unable to verify whether it has actually ordered the loop for which it is being billed.[88] Covad also argues that a longer payment period is required, because some of Qwest's UNE bills do not contain universal service ordering codes (USOCs) for the non-recurring charges.[89]

84. It is difficult to determine from Covad's evidence the scope or impact of its problems with validating Qwest's bills. The evidence is that Covad's UNE bills fill "30 boxes" each month; collocation bills run 500-700 pages; and transport bills run 850-1,260 pages.[90] These figures apply to bills from all seven Qwest states in which Covad operates, not just Minnesota.[91] Qwest provides UNE bills electronically; however, "a number of times" the Qwest UNE bills fail to provide circuit identification numbers, without which Covad claims it is utterly unable to confirm wither Qwest is billing for a loop that Covad has actually ordered.[92] In addition, "a number of times" the Qwest UNE bills fail to contain USOCs, which Covad must retrieve before billing can be validated.[93] In Minnesota, Covad is only missing USOCs for conditioning charges.[94] Covad claims

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[88] *See* Ex. 8 (Doberneck Direct) at 23.
[89] *Id.* at 24.
[90] *Id.* at 22
[91] Tr. 1:96.
[92] Ex. 8 (Doberneck Direct) at 24.
[93] *Id.*
[94] Tr. 1:107.

that all nonrecurring charges must be investigated manually because they lack USOCs. Furthermore, Qwest "may" bill incorrectly. In addition, Covad "must" research all disconnects manually to ensure the disconnect dates are correct.[95] It does not appear that this effort is the result of inadequate information on Qwest bills, it is simply Covad's choice to validate disconnects in this manner. Covad anticipates that billing will become more difficult in the future as Covad partners with other CLECs to provide line split or loop split services, because Covad's voice partner must also review the voice billings within this interval.[96]

85. Qwest points out that during the section 271 workshops, these same issues were discussed.[97] All issues pertaining to the payment due date were resolved, resulting in consensus language specifying that amounts payable are due within 30 days after the invoice date.[98] Qwest's proposed language specifies that same 30-day period and is identical to the language in Qwest's Minnesota SGAT.[99]

86. This same 30-day period is specified in Qwest's FCC and Minnesota access tariffs and in the current Qwest-Covad interconnection agreement (in effect since early 1999).[100] Fourteen carriers have opted-in to the Minnesota SGAT, agreeing to the payment language that Covad challenges here[101]; AT&T recently agreed to this language in its new interconnection agreement in Minnesota,[102] and Covad agreed to a 30-day payment term in its Commercial Line Sharing Agreement entered into with Qwest in April of this year.[103] Furthermore, Covad requires its customers to pay its invoices in 30 days.[104]

87. While Qwest does not provide a circuit identification number for line sharing, Qwest does provide information from which Covad may track and validate its line-sharing bills.[105] Qwest originally put the line sharing process into its POTS work flow in order to expedite the time in which a line sharing order could be provisioned.[106] In its POTS system, Qwest assigns a unique identification number to the loop over which Covad is providing line sharing, and this unique identification number is provided to Covad as part of the Firm Order Confirmation (FOC) and the Customer Service Record (CSR).[107] With this identifier, Covad can verify the service for which it has been billed.[108]

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[95] Ex. 8 (Doberneck Direct) at 25.
[96] *Id.* at 26.
[97] Qwest acknowledges that there were no 271 workshops held in Minnesota, however, consensus language was reached through the workshop process and provided the foundation for Qwest's Minnesota SGAT.
[98] *See* Ex. 15 (Easton Direct) at 6.
[99] *Id.*
[100] *Id.* at 5.
[101] *Id.* at 9.
[102] *Id.*
[103] *See* Ex. 22, section 3.2.1.
[104] *See* Ex. 15 (Easton Direct) at 12.
[105] *See* Tr. 2:20.
[106] *See* Tr. 2:19.
[107] *See* Ex. 16 (Easton Rebuttal) at 6.
[108] *Id.*

88. Qwest further argues that it provides USOCs on bills for all recurring charges and for many non-recurring/fractional charges, which make up the vast majority of Covad's bills.[109] Where USOCs are not provided, however, the issue only arises in Qwest's Western Region, which does not include Minnesota.[110] In addition, Qwest projects that this issue will be fixed by a systems change in the near future.[111] Further, for those limited instances where USOCs are not provided, Qwest provides Covad with a description of the charge that makes bill validation possible.[112] Thus, Qwest argues Covad's claim that it must go back to Qwest for the USOC information before it can begin bill validation[113] is unfounded, not only because bill validation does not necessarily require USOC information[114], but also because Covad has only once ever requested USOC information from Qwest on a non-recurring charge.[115]

89. Qwest contends that the vast majority of bills Covad receives from Qwest are in electronic format, allowing for mechanized analysis, and those bills that are only received in paper copy comprise a minute percentage of the total bills.[116] In addition, Covad could develop the appropriate software to handle all of its bills electronically, but it has chosen not to do so. To the extent that Covad has concerns about the format of Qwest's bills, Qwest maintains that these concerns are not appropriately raised in interconnection agreement negotiations, but are properly raised in the change management process (CMP).[117] Qwest also relies on the FCC's review of its wholesale billing processes as part of the section 271 approval processes and conclusion that Qwest's processes satisfy the checklist requirements.[118] Qwest further argues that it has a strong incentive to ensure that its bills are accurate because its Performance Assurance Plan includes performance measures relating to billing completeness and accuracy.

90. Qwest maintains that the proposal by Covad to create different payment periods for different products is unworkable from a systems and administrative standpoint.[119] The necessary system changes implementing this language would require a costly programming effort and billing system logic different from that used by all other Qwest CLEC customers. Qwest maintains that even more problematic, from a systems standpoint, than treating different items on the same bill differently is Covad's request that new products be treated differently for twelve months, then revert back to the 30 day payment period used for previously ordered products. This means that the billing systems must have the capability of determining when a CLEC orders a new product, the capability to treat bills with the new service on them differently, and the

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[109] *See id.* at 7.
[110] Tr. 2:23, 39.
[111] Tr. 2:23.
[112] *See* Ex. 16 (Easton Rebuttal) at 7-8.
[113] *See* Ex. 8 (Doberneck Direct) at 24.
[114] *See* Ex. 16 (Easton Rebuttal) at 8-9.
[115] *See id.*at 9.
[116] *See* Ex. 15 (Easton Direct) at 9-10; *see* also Ex. 16 (Easton Rebuttal) at 4-5.
[117] *See* Ex. 16 (Easton Rebuttal) at 6.
[118] *See id.* at 13.
[119] *See* Tr. 1:136-137.

capability to turn off the exception treatment at the end of 12 months. This language also fails to define what constitutes a new product.

91. The Department recommends that Qwest's proposed time period of 30 days be adopted, "except that 45 days should be allowed on a bill containing: (1) line splitting or loop splitting, (2) a missing circuit ID, or (3) a USOC that does not uniquely identify the price." The first exception provides Covad with additional time when it has a partner company, while the second and third exceptions encourage Qwest to make the bills more complete and easier to audit. Covad accepts these recommendations, and proposes them, together with a fourth "45-day exception" for "new products" first ordered during the 12 months preceding the invoice date. The Department is not convinced that new products should all come under the "45-day exception." If Qwest has not appropriately billed a new product, Covad has the choice to dispute the accuracy of the bill it has received.

92. The parties have devoted relatively little attention to the remaining payment issues concerning timing for discontinuing the taking of orders and disconnection of services. Covad and the Department advocate a 60-day timeframe for Qwest to discontinue orders for failure to make full payment, and 90 days for disconnection of service, because these are drastic measures and the timeframe should not be so compressed as to allow either party to use them as leverage in billing disputes or other conflicts. In addition, service to end users is potentially at risk pursuant to these terms.

C. Applicable Law

93. The Telecommunications Act does not specifically address this issue. However, the Commission has general authority under the Act to arbitrate specific unresolved issues and to order terms consistent with the terms of the Act.[120] Further, Minn. Stat. § 237.16, subd. 1(a), authorizes the Commission to prescribe the terms and conditions of service delivery, for the purpose of bringing about fair and reasonable competition for local exchange telephone services.

D. Decision

94. There may well be problems with the format of some of Qwest's bills, but Covad's evidence that billing deficiencies cause Covad to need more than 30 days to review and pay bills is weak. Furthermore, the impact of CLEC opt-in rights cannot be ignored. Any number of CLECs could opt into this agreement to receive the benefit of an extended payment date, and they might not have the prompt payment history that Covad has had to date. This must be viewed as an issue for CLECs as a group, not one that may be resolved specifically for an individual CLEC. Qwest's evidence that the CMP is the best way to address billing issues is not compelling either, though, given that CLECs have no right to prioritize changes to billing systems in this process.[121] The

[120] *See* 47 U.S.C. § 252 (b).
[121] Tr. 1:101-02.

proposal to create different payment periods for different products, however, is unworkable from a systems and administrative standpoint. The necessary system changes implementing this language would be costly. Covad itself has acknowledged the difficulty of implementing such a system.[122]

95. The provision concerning payment due date is a true cash flow issue, in contrast to the other disputed provisions concerning time to discontinue orders and disconnection of services. The Administrative Law Judge agrees with Qwest that Covad's proposal would not, in fact, buy it more time to review Qwest's bills, because Covad would receive its next month's bill (sent every 30 days) before completion of a 45-day review process. Covad has functioned with this same term under the original interconnection agreement, and it has agreed to this term in its commercial line sharing agreement. Based on the record as a whole, the Administrative Law Judge has concluded that Covad is seeking a more favorable payment term for its own business reasons and not solely because of difficulties with validation of Qwest's bills. Qwest's proposal of a 30-day payment period is commercially reasonable and is standard in the industry. Qwest's proposed language for section 5.4.1 should be adopted.

96. The other terms at issue for sections 5.4.2 and 5.4.3 do not routinely affect cash flow and have more direct impact on end users. The proposals by Covad and the Department to extend these periods to 60 and 90 days, respectively, are reasonable and should be adopted.

Dated this 15th day of December, 2004

Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

Transcribed by Shaddix & Associates
(Three volumes)

NOTICE

Because of the compressed timeframe for a Commission decision in this case, the time period for filing exceptions has been shortened. Any party wishing to file exceptions to the Arbitrator's Report should do so by December 27, 2004.

[122] *See* Qwest's Post-Hearing Brief, Attachment 1.

Oregon
ARB 584
COVAD 01-019S1

INTERVENOR: Covad Communications Company

REQUEST NO: 019S1

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

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

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

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

RESPONSE:

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

Respondent: Qwest Legal Department

SUPPLEMENTAL RESPONSE DATED 4/22/05:

Pursuant to Administrative Law Judge Allan Arlow's April 15, 2005 ruling and report granting in part and denying in part Covad's motion to compel Qwest's responses to data requests, and without waiving Qwest's previous objections to this data request, Qwest supplements its previous response as follows:

Qwest's processes to determine if any of its customers are impacted by copper retirement are as follows:

1) In the planning stages of a job where a copper facility might need to be retired, the engineer considers job timing, facility sizing, and funding requirements necessary to make an informed decision regarding the copper plant.

2) In cases where a government entity (county, state, or a municipality) requests a facility to be removed in public right of way, Qwest must quickly

abandon the facility, including copper, where the cable interferes with the government project.

3) In the cases where the need for retirement of copper facilities has been identified, the Qwest engineer must identify the circuit types so that the new facilities are compatible with the existing facilities.

4) Qwest's prioritizes its facilities by first identifying critical circuits such as Telecommunications Service Priority (TSP), FAA, 9-1-1, etc.

5) Qwest next identifies other circuits that have special engineering requirements such as:

- Design services, where existing facilities will be moved to new facilities in order to test.
- Unique circuits such as alarm circuits requiring analog technology are analyzed to verify that they are compatible with the change in the network.

6) Finally, Qwest inventories the existing POTS services that will be transferred to the new or alternate facilities.

All critical, design, and unique circuits require manual review and special provisioning on an individual case basis. Customer identities, addresses, circuit identification numbers, cables, and pairs are all part of the same database (LFACS) used to provide data to the Raw Loop Data Tool (RLDT). RLDT is a direct download from the LFACS database and was approved by the CLEC community for their use and is the same data Qwest uses in performing changes to its outside plant facilities.

Respondent: Roy Rietz