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April 29, 2005

Frances Nichols Anglin
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Re: ARB 584

Dear Ms. Nichols Anglin:

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

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

Sincerely,

Carla M. Butler

CMB:
Enclosure
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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 584

In the Matter of COVAD COMMUNICATIONS COMPANY Petition for Arbitration of an Interconnection Agreement with Qwest Corporation	**QWEST CORPORATION'S INITIAL BRIEF ON THE MERITS**

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INTRODUCTION

This interconnection arbitration conducted pursuant to the Telecommunications Act of 1996 ("the Act") demonstrates that the negotiation/arbitration process set forth in Sections 251 and 252 can work fairly and efficiently. While Qwest appreciates Covad's good faith conduct in the negotiations, the five unresolved issues that remain after the parties' exhaustive negotiations are nevertheless largely attributable to Covad attempting to impose obligations on Qwest that either conflict with rulings by the FCC or are inconsistent with the Act. These deviations from governing law are sharply demonstrated by Covad's demands and proposed interconnection agreement ("ICA") language relating to implementation of the FCC's rulings in the *Triennial Review Order* ("*TRO*").[1]

For example, although the *TRO* confirms Qwest's right to retire copper facilities, Covad asks the Commission to gut that right by imposing onerous conditions that are nowhere found in the *TRO* and that conflict directly with the FCC's Congressionally-mandated obligation to encourage investment in the fiber facilities that support broadband services. Similarly, despite the FCC's pronouncements that Bell Operating Companies ("BOCs") are not required under the Act to commingle or combine network elements provided under Section 271, Covad proposes language that would require Qwest to do just that.

Covad's departures from governing law are perhaps most sharply demonstrated by its proposed ICA language that would require Qwest to provide almost unlimited access to the elements in Qwest's Oregon telecommunications network. These proposals ignore FCC findings in the *TRO* and the *Triennial Review Remand Order* ("*TRRO*")[2] that CLECs are not impaired

[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003), *aff'd in part and rev'd and vacated in part, United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

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

without access to many network elements and that ILECs are therefore not required to unbundle them. Covad's broad unbundling demands also violate the rulings of the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit in which those courts struck down FCC unbundling requirements while confirming in the most forceful terms that the Act imposes real and substantial limitations on ILEC unbundling obligations. In addition, Covad's proposed unbundling language assumes incorrectly that state commissions have authority to require BOCs to provide network elements pursuant to Section 271, to determine pricing for those elements, and to include them in Section 252 ICAs.

The flawed nature of Covad's arguments is confirmed by recent decisions in the Covad/Qwest arbitrations in Colorado, Minnesota, Washington, and Utah, copies of which Qwest is filing simultaneously with this brief. In those arbitrations, the Colorado, Minnesota, Utah, and Washington rejected Covad's positions and proposed ICA language relating to a majority of these *TRO-related* issues in dispute here.[3] This consistency among the four decision-makers that have addressed these issues is not a coincidence – Covad's proposals relating to each of the disputed issues are without legal or factual support.

In contrast to Covad's demands, Qwest's ICA proposals are specifically based upon the FCC's rulings in the *TRO* and other governing law. To ensure that the ICA complies with governing law and is consistent with the policy objectives of the Commission and the FCC, the

[3] See *In the Matter of the Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with Covad Communications Co.*, Colorado Commission Docket No. 04B-160T, Decision No. C04-1037, Initial Commission Decision (Colo. Commission, Aug. 19, 2004) ("*Colorado Arbitration Order*"); *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Minnesota Commission Docket No. P-5692, 421/IC-04-549, Arbitrator's Report (Minn. Commission, Dec. 15, 2004) ("*Minnesota Arbitration Order*"); *In the Matter of the Petition for Arbitration of Covad Communications Company with Qwest Corporation*, Washington Commission Docket No. UT-043045, Order No. 06, Final Order Affirming in Part, Arbitrator's Report and Decision; Granting, In Part, Covad's Petition for Review; Requiring Filing of Conforming Interconnection Agreement (Wash. Commission, Feb. 9, 2005) ("*Washington Arbitration Order*"); *In the Matter of the Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Utah Commission Docket No. 04-2277-02, Arbitration Report and Order (Utah Commission, Feb. 8, 2005) ("*Utah Arbitration Order*"). An exception is that these decisions require Qwest to commingle section 271 network elements with unbundled network elements it provides under section 251. In addition, the Colorado Commission did not address the section 271 unbundling issues encompassed by arbitration

Commission should adopt Qwest's proposed ICA language for each of the disputed issues.[4]

Finally, like its positions relating to the *TRO* issues, Covad's positions relating to channel regeneration and payment/billing deviate from governing law and industry practice. For the reasons discussed below, the Commission should also adopt Qwest's proposed ICA language relating to these issues.

DISPUTED ISSUES

I. Issue 1: Retirement of Copper Facilities (Sections 9.2.1.2.3.1 and 9.2.1.2.3.2)

The *TRO* confirms that ILECs have a right to retire copper facilities that they replace with fiber facilities. The FCC specifically rejected attempts by CLECs to preclude ILECs from retiring copper loops: "we decline to prohibit incumbent LECs from retiring copper loops or copper subloops that they have replaced with fiber." *TRO*, ¶ 271. This ruling goes hand-in-hand with the FCC's Congressionally-mandated policy of encouraging the deployment of fiber facilities that carriers use to provide advanced telecommunications services, since the retirement of copper facilities and the resulting elimination of the maintenance expenses associated with those facilities increases an ILEC's economic incentive to install fiber. (*See* Qwest/4, Stewart/13:6-17.) Thus, the FCC specifically rejected CLEC proposals that would have required ILECs to provide alternative forms of access and to obtain regulatory approval before retiring copper facilities. *TRO*, ¶ 281, and fn. 822.

Covad's proposed ICA language would eviscerate the copper retirement rights confirmed in the *TRO*. Specifically, under Covad's proposal, Qwest would be prohibited from retiring a

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Issue No. 2, since Covad agreed to Qwest's ICA language in Colorado relating to those issues.

[4] On September 15, 2004, Qwest filed a motion to dismiss Issue 2 in Covad's arbitration petition on the ground that Covad's network unbundling demands ask the Commission to exercise authority it does not have and that the unbundling issues – particularly demands for unbundling under section 271 – are not a permissible subject for a section 252 arbitration. The arguments in that motion are also set forth in substantial part in this post-hearing brief. There is, therefore, no need for the Commission to rule separately on Qwest's motion, as a ruling on the merits of this arbitration issue will address the relief and arguments that Qwest presented in the motion.

copper loop over which Covad is providing DSL service unless it provides Covad with an "alternative service" that does not increase the cost to Covad or its customers or degrade the quality of the service that Covad is receiving from Qwest today.[5] These conditions are not found in the *TRO* or in any other FCC order.

Not surprisingly, therefore, the Colorado, Minnesota, Utah, and Washington Commissions have uniformly rejected Covad's proposal. The Colorado and Washington Commission found that Covad's proposal is without legal support and in a ruling the Minnesota Commissions adopted, the Minnesota ALJ held that "[t]here is no legal support in the TRO for Covad's position concerning 'alternative' services." *Minnesota Arbitration Order*, ¶ 23. Similarly, the Utah Commission stated that "[w]e find no support in the *TRO* for Covad's contention that hybrid loops should be treated differently under the FCC's copper retirement rules than are FTTH or FTTC loops." *Utah Arbitration Order*, at 10-11. These rulings are correct and, for the reasons set forth below, this Commission should reach the same result.

A. Covad's "alternative service" proposal is inconsistent with the *TRO*

As telecommunications carriers have increasingly moved from copper to fiber facilities, it has become a standard practice to retire copper facilities in many circumstances when fiber facilities are deployed. The ability to retire copper facilities is important from a cost perspective, since, without that ability, carriers would be required to incur the costs of maintaining two networks. If carriers were faced with that duplicative cost, they would have reduced financial ability to deploy facilities to replace copper and, therefore, reduced ability to deploy facilities that can support advanced telecommunications services. (Qwest/4, Stewart/2:19 – 3:2.)

[5] As discussed *infra*, Covad has modified its proposal relating to copper retirement by offering new language under which its "alternative service" requirement would not apply to situations where Qwest retires a copper loop and replaces it with a fiber-to-the-home ("FTTH") or a fiber-to-the-curb ("FTTC") loop. As the Colorado Commission ruled, this modification does not cure the legal shortcomings of Covad's proposal. *See Petition of Qwest Corporation for Arbitration of an Interconnection Agreement*, Docket No. 04B-160T, Decision No. C04-1348, Order Granting in Part and Denying in Part Application for Rehearing, Reargument, or Reconsideration at 10 (rel. Nov. 16, 2004) ("*Colorado RRR Order*").

Accordingly, in the *TRO*, the FCC confirmed the right of ILECs to retire copper facilities without obtaining regulatory approval before doing so. Specifically, in paragraph 271 of the *TRO*, the FCC ruled:

> As we note below in our discussion of FTTH loops, we decline to prohibit incumbent LECs from retiring copper loops or subloops that they have replaced with fiber. Instead, we reiterate that our section 251(c)(5) network modification disclosure requirements (with the minor modifications also noted below in that same discussion) apply to the retirement of copper loops and copper subloops.

As reflected by this excerpt from the *TRO*, the only retirement condition the FCC established is that an ILEC must provide notice of its intent to retire specific copper facilities when those facilities are being replaced by FTTH loops so that CLECs can object to the FCC.[6]

Qwest's proposed language for Sections 9.2.1.2.3 and 9.2.1.2.3.1 of the ICA, combined with the parties' agreed language relating to notice, accurately implements the *TRO*. Under these provisions, Qwest is permitted to retire copper facilities but will provide Covad and other CLECs with notice of all planned retirements, not just retirements involving FTTH replacements. Further, consistent with the *TRO*, Qwest's language for Section 9.2.1.2.3 establishes that Qwest will comply with any applicable state requirements. Qwest's Section 9.2.1.2.3.1 also provides Covad with substantial protection by establishing that: (1) copper loops and subloops will be left in service where technically feasible; and (2) Qwest will coordinate with Covad the transition from old facilities to new facilities "so that service interruption is held to a minimum."

In contrast to Qwest's proposal, Covad's demands relating to copper retirement are not supported by the *TRO* and conflict with key policy objectives of Congress and the FCC. While Covad asserts that its "alternative service" demand is consistent with the *TRO*, as found in the

[6] *See also TRO*, ¶ 281. Although the FCC ruled that the notice requirements do not apply to the retirement of copper feeder, as noted above, Qwest has nevertheless agreed to provide notice of copper feeder retirements.

Colorado, Minnesota, Washington, and Utah arbitrations, there is no wording in the *TRO* that requires an ILEC to provide an alternative service before retiring a copper facility. Moreover, the proposal directly conflicts with the FCC's Congressionally-mandated obligation to promote the deployment of facilities that support broadband services. In the *TRO*, the FCC identified broadband deployment as one of its paramount objectives, emphasizing that "[b]roadband deployment is a critical domestic policy objective that transcends the realm of communications." *TRO*, ¶ 212. Thus, the FCC sought to formulate rules that would "help drive the enormous infrastructure investment required to turn the broadband promise into a reality." *Id*.

As described by Qwest witness Karen Stewart, the economic incentive of a carrier to deploy the fiber facilities that support broadband services increases if the carrier is permitted to retire copper loops when it deploys fiber. (Qwest/4, Stewart/13:7-9.) Without a right to retire copper or with a right conditioned upon the onerous retirements proposed by Covad, a carrier evaluating whether to deploy fiber would be faced with the duplicative costs of maintaining *both* the copper and the fiber facilities. Thus, the FCC specifically rejected CLEC proposals that would have required ILECs to provide alternative forms of access and to obtain regulatory approval before retiring copper facilities. *TRO*, ¶ 281, and fn. 822. As stated by the Washington Commission, "[t]he FCC did not place conditions on an ILEC's retirement of copper facilities" and has only required that ILECs provide public notice of planned retirements.[7]

In attempting to defend its proposal, Covad argues that the right of an ILEC to retire a copper facility is narrowly limited to situations where an ILEC deploys a FTTH loop or a FTTC loop and asserts that only its proposal is so limited. For several reasons, this argument is wrong. First, as demonstrated by the plain language of the *TRO* excerpt quoted above, the FCC did not

[7] *Washington Arbitration Order*, ¶ 21; *Utah Arbitration Order*, at 11 ("We find nothing in federal or state law that would impose an obligation on Qwest to provide an alternative service at current costs for an xDSL provider prior to retirement of copper facilities. Qwest has the right to retire its copper facilities and replace them with fiber.").

limit ILECs' retirement rights to situations where copper loops are replaced with FTTH or FTTC loops. Instead, the FCC stated that the right to retire exists when an ILEC replaces copper loops "with fiber," meaning any fiber facility: "[W]e decline to prohibit incumbent LECs from retiring copper loops or copper subloops that they have replaced *with fiber*." *TRO*, ¶ 271. (Emphasis added.) Accordingly, the Colorado Commission rejected this same argument in the Covad/Qwest arbitration in that state, concluding as follows:

> Covad cites ¶¶ 277-279 of the TRO, stating that the copper retirement rules only apply to the extent that hybrid loops are an interim step to establishing an all fiber FTTH loops (*sic*). Nowhere in these paragraphs do we find this statement. In fact, the FCC indicates at footnote 847 that an ILEC can remove copper loops from plant so long as they comply with the FCC's Part 51 notice requirements, without any exclusion given to hybrid loops.

Colorado RRR Order, ¶ 35. The same analysis and conclusion apply here.

Second, Covad's narrow reading of the ILECs' retirement rights is inconsistent with the FCC's clear intent to encourage the deployment of fiber facilities as a whole, not just FTTH and FTTC loops, as stated in the *TRO*:

> Upgrading telecommunications loop plant is a central and critical component of ensuring the deployment of advanced telecommunications capability to all Americans is done on a reasonable and timely basis and, therefore, where directly implicated, our policies must encourage such modifications. Although a copper loop can support high transmission speeds and bandwidth, it can only do so subject to distance limitations and its broadband capabilities are ultimately limited by its technical characteristics. *The replacement of copper loops with fiber will permit* far greater and more flexible broadband capabilities.

TRO, ¶ 243. (Emphasis added.)

Third, contrary to Covad's contention, the FCC's *Section 271 Forbearance Order* establishing that ILECs are not required to provide unbundled access to FTTC loops provides no support for the claim that ILECs are only permitted to retire copper loops they have replaced with FTTH or FTTC loops.[8] Indeed, Covad's reliance on that order is baffling, since nowhere in

[8] *See* Memorandum Opinion and Order, *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,

it does the FCC even discuss ILECs' copper retirement rights. As the Minnesota ALJ stated in response to the same argument from Covad, "[i]t 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."[9]

Covad also attempts to advance its proposal by claiming that allowing Qwest to retire copper facilities will bring substantial harm to consumers. This claim is unfounded. As Covad witnesses have acknowledged in other states, no Covad customer has ever been disconnected from service anywhere in Qwest's region because of Qwest's retirement of a copper loop. (*See, e.g.*, Arizona Hearing Tr., Vol. 1, at 27-28.) And the likelihood of that occurring is remote, as evidenced by Ms. Stewart's testimony establishing that Qwest routinely leaves copper loops in place when it deploys fiber – a practice that is captured by Qwest's proposed ICA language. (Qwest/4, Stewart/8:11-14.) Further, Covad witness Michael Zulevic testified that there are, at most, only a "handful" of Covad customers that potentially could be affected by Qwest's retirement of a copper loop. (Covad/100, Zulevic/20:1-7.) In the unlikely event those customers are affected by Qwest's retirement of a copper loop, Covad could continue serving them by purchasing other services from Qwest that would result in an overall negligible cost increase given the small number of Covad customers that could be affected. (Qwest/9, Stewart/12:17-18, 13:18 – 14:2.) In addition, Covad could continue providing service to its customers despite

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03-260, 04-48 (October 27, 2004) ("*Section 271 Forbearance Order*").

[9] *Minnesota Arbitration Order* ¶ 24. Covad seems to be arguing that in the *Section 271 Forbearance Order*, the FCC ruled that ILECs can avoid unbundling FTTC loops only if the ILEC is actually using the FTTC loop to provide broadband service. According to Covad, it follows as a matter of inference that an ILEC can only retire a copper loop that has been replaced with a fiber facility that is actually providing broadband service. The FCC said no such thing, however, and, moreover, did not rule that ILECs must be using FTTC loops for broadband service to avoid having to unbundle them. Instead, the FCC emphasized that its objective of encouraging the deployment of fiber facilities that support broadband services is advanced by the deployment of fiber loops that are *capable* of providing broadband service, and, consistent with this statement, it ruled that ILECs are not required to unbundle FTTC loops. *See* Order on Reconsideration, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-248 ¶ 17 and fn. 56 (FCC rel. Oct. 18, 2004). Nor is there any support for Covad's claim that in the *Section 271 Forbearance Order*, the FCC established that ILECs are only permitted to retire copper loops that have been replaced with fiber facilities that are

Qwest's retirement of copper loops by deploying remote DSLAMs. (Qwest/9, Stewart/17:5-7.) While Covad claims that deploying DSLAMs is cost-prohibitive, the FCC has concluded otherwise, as reflected by its stated objective – set forth in the *TRO* – of promoting CLEC investment in remote DSLAMs and other next-generation network equipment. *See TRO*, ¶ 291.

B. Covad's "alternative service" proposal would unlawfully prevent Qwest from recovering its costs and is not properly defined

Covad also cannot reconcile its "alternative service" proposal with the provisions of the Act that require CLECs to compensate ILECs for the costs they incur to provide interconnection and access to UNEs. Section 252(d)(1) of the Act requires that rates for interconnection and network element charges be "just and reasonable" and based on "the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element." In *Iowa Utilities Board v. FCC*,[10] the United States Court of Appeals for the Eighth Circuit succinctly described the effect of these provisions: "Under the Act, an incumbent LEC *will* recoup the costs involved in providing interconnection and unbundled access from the competing carriers making these requests." (Emphasis added.)

Under Covad's proposal, Qwest could only charge a recurring rate of $4.55 for the alternative service since the current Commission-prescribed recurring rate for access to the high frequency portion of the unbundled loop in Oregon is $4.55. (Qwest/9, Stewart/13:5-8.) This rate would serve as a cap on Qwest's cost recovery and would prevent Qwest from recovering its costs, much less a reasonable profit, in plain violation of the Act's cost recovery requirements. While Mr. Zulevic claimed in his written testimony that Covad's proposal would permit Qwest to recover the costs of providing an alternative service (Covad/111, Zulevic/11:3 – 12:15), it is quite

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serving mass market customers. There is simply no such statement anywhere in the order.

[10] 120 F.3d 753, 810 (8th Cir. 1997), *aff'd in part, rev'd in part, remanded, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*Iowa Utilities Board*").

telling that Covad refuses to agree to ICA language that would give Qwest that right. Indeed, Covad's real position – and its cavalier attitude toward Qwest's right to recover its costs – was fully revealed during the arbitration hearing in Arizona when Mr. Zulevic testified that the Commission has "the latitude to [deny full cost recovery] if [it] feel[s] it is in the best interest of the end user." (Arizona Hearing Tr., Vol. 1, at 37.) It is thus clear that both the effect and intent of Covad's proposal is to deny unlawfully the cost recovery to which Qwest is entitled under the Act.

Moreover, it is fundamental that ICA terms and conditions, as with any contract, should be clearly defined to apprise parties of their rights and obligations and to thereby avoid or minimize disputes. Covad's "alternative service" proposal falls far short of this basic requirement. Nowhere in its proposed ICA language does Covad attempt to define the "alternative service" that Qwest would have to provide upon retiring a copper loop. Qwest would have no way, therefore, of knowing what alternative service to provide or whether such a service would meet the requirements of the ICA. Covad likewise fails to define the requirement that the alternative service "not degradate the service or increase the costs to CLEC or End-User Customers of CLEC." It does not propose, for example, any metrics to determine whether the service has degraded. The reality is that the "alternative service" Covad is seeking likely involves some form of unbundled access to hybrid copper/fiber loops. (Qwest/4, Stewart/9:22 – 10:16.) However, the FCC expressly prohibited such access in the *TRO*, which further demonstrates the unlawfulness of Covad's proposal. *TRO*, ¶¶ 273, 288.

C. Qwest has committed in the ICA to comply with the FCC's notice requirements, and Covad's proposed additional requirements are impermissibly burdensome

As these arbitrations between Covad and Qwest have progressed, Qwest has significantly expanded its copper retirement notice obligations under the ICA by agreeing to: (1) provide notice when it intends to retire not just copper loops and subloops, but also copper feeder; (2) provide notice not just when a copper facility is being replaced with FTTH loop, but whenever a copper facility is being replaced with any fiber facility (including fiber feeder); and (3) provide e-mail notice of planned retirements to CLECs. Qwest's overall notice commitments meet the FCC's notice requirements, as confirmed by Qwest's proposed language for Section 9.2.1.2.3, which requires Qwest to provide notice of planned retirements "in accordance with FCC Rules." Qwest's expansion of its notice commitments is reflected in Section 9.1.15 of its proposed ICA.

Notwithstanding Qwest's agreement to provide notice that meets the FCC's notice requirements, Covad is requesting more. In particular, it is proposing that Qwest be required to provide specific categories of information in the e-mail notices that Qwest has volunteered to provide to CLECs. Covad has cited no legal authority for this request. The FCC rule relating to notice of network modifications permits an ILEC to provide notice by *either* filing a public notice with the FCC *or* providing notice through industry publications or an "accessible Internet site." *See* 47 C.F.R. § 51.329(a). Here, instead of committing to just one form of notice, Qwest is agreeing to provide three forms of notice – through its website, by a public filing with the FCC, and through an e-mail notice to CLECs. Further, its proposed Section 9.2.1.2.3 establishes that Qwest will provide any additional notices that may be required by Oregon law.

Moreover, by agreeing to provide notice in accordance with FCC and state rules, Qwest is committing to provide detailed information about copper retirements with its notices, including, for example, the date of the planned retirement, the location, a description of the nature of the network change, and a description of foreseeable impacts resulting from the network change. *See* 47 C.F.R. § 51.327(a)(1)-(6). This information, along with the multiple forms of notice Qwest will provide, ensures that Covad will have timely and complete notice of any copper retirements.

Covad's objection to the notice Qwest has agreed to provide appears to center on its contention that Qwest should be required to tell Covad whether the retirement of a copper loop will affect the service Covad is providing to specific customers. While Qwest provides network facilities to Covad, it does not know the specific services Covad is providing to its customers over these facilities. A requirement for Qwest to tell Covad whether service to its customers would be affected by the retirement of a copper loop would therefore require Qwest to speculate about the services Covad is providing. (Qwest/9, Stewart/21:13-17.) If Qwest guessed wrong, Covad would undoubtedly seek recourse and attempt to hold Qwest responsible. Qwest should not be put in that unfair position, which is why the Washington and Utah Commissions and the ALJ in Minnesota properly rejected this demand. The Washington Commission stated, "[w] e reject Covad's assertion that the FCC's rule requires the identification of specific Covad customers affected by the change, or places the burden solely on the ILEC to determine the impact of a change." *Washington Arbitration Order*, ¶ 15. The Utah Commission noted that "it would not be reasonable to require Qwest to anticipate the affect its proposed retirement of copper will have on specific Covad customers." *Utah Arbitration Order*, 10. Similarly, the

Minnesota ALJ found that Covad's demands relating to notice are unnecessary and improperly attempt to shift responsibility from Covad to Qwest:

> [T]he 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. 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.

Minnesota Arbitration Order, ¶ 25 (footnote omitted).

While Covad claims that BellSouth provides Covad with notices that list the addresses of Covad customers who may be affected by a copper retirement, Covad still has not produced evidence showing that to be true. The only BellSouth notice that Covad has provided to Qwest in these arbitrations is one that lists all customers in the DA, not Covad's customers.

In sum, Qwest's commitment to comply with the FCC's notice requirements ensures that Covad will receive the information it needs to assess whether Qwest's retirement of a copper facility will affect service that Covad is providing. Accordingly, the Commission should reject Covad's proposed language relating to notice and adopt that proposed by Qwest.

II. Issue 2: Unified Agreement/Defining Unbundled Network Elements (Sections 4.0 (Definition of "Unbundled Network Element"), 9.1.1, 9.1.1.6, 9.1.1.7, 9.1.5, 9.2.1.3, 9.2.1.4, 9.3.1.1, 9.3.1.2, 9.3.2.2, 9.3.2.2.1, 9.6(g), 9.6.1.5, 9.6.1.5.1, 9.6.1.6, 9.6.1.6.1, 9.21.2)[11]

The Act requires ILECs to provide UNEs to other telecommunications carriers and gives the FCC the authority to determine which elements the ILECs must provide. In making these network unbundling determinations, the FCC must consider whether the failure to provide access to an element "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2). This "impairment" standard

[11] By agreement of the parties, Arbitration Issue Nos. 2 and 3 are being submitted exclusively through briefs, and not through any pre-filed testimony. The parties agree that these issues involve pure questions of law, not issues of fact.

imposes important limitations on ILECs' unbundling obligations, as has been forcefully demonstrated by the Supreme Court's decision in *Iowa Utilities Board* and the D.C. Circuit's decisions in *USTA I* and *USTA II* invalidating three of the FCC's attempts at establishing lawful unbundling rules.[12]

This disputed issue arises because of Covad's insistence upon ICA language that would require Qwest to provide almost unlimited access to network elements in violation of the unbundling limitations established by these decisions, the Act, the *TRO*, and the *TRRO*. Covad's clear objective is to obtain access to all elements of Qwest's network that Covad may desire at the lowest rates possible. Not surprisingly, the commissions in Minnesota, Utah, and Washington have rejected Covad's unbundling language, finding that it is plainly unlawful.[13] Further, Covad's proposal directly violates this Commission's ruling in the Oregon *TRO* docket concerning the network unbundling that the Commission can permissibly require.

In its *TRO* docket, this Commission recognized that it cannot create under state law unbundling requirements that were rejected in the *TRO* and *USTA II*. In response to the arguments of various CLECs, including Covad, that "the Commission has independent authority under state law 'to require Qwest to continue to provide existing UNEs under current ICAs [interconnection agreements] and Qwest's SGAT,'" the Commission concluded it has no such authority. As the Commission stated in its June 11, 2004 ruling:

> (b) The CLECs emphasize that the Commission has independent authority under state law "to require Qwest to continue to provide existing UNEs under current ICAs and Qwest's SGAT." [fn. omitted.] As Qwest points out, however, *the Commission may not lawfully enter a blanket order requiring continuation of unbundling obligations that have been eliminated by the TRO or USTA II* (once the D.C. Circuit's mandate takes effect). *Although the Act clearly preserves the authority of State Commissions to authorize unbundling beyond that mandated by the FCC, any such decision must be consistent with*

[12] *USTA II*, *supra*; *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427-28 (D.C. Cir. 2002) ("*USTA I*").

[13] Because Covad accepted Qwest's language relating to unbundled network elements in the Colorado arbitration, the Colorado Commission did not address Covad's proposed unbundling language.

> *the requirements of §251(d).* Thus, before a State Commission may authorize unbundling of additional network elements, it must first determine that "failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. [fn. omitted.] (Emphasis added.)
>
> The UNEs currently authorized in Oregon mirror the national list of UNEs adopted by the FCC in its UNE Remand Order. [fn. referring to the FCC's UNE Remand Order and Order Nos. 00-316 and 01-1106 omitted.] The Commission did not conduct a separate impairment analysis for those UNEs, but rather relied upon the impairment findings made by the FCC. *To the extent the D.C. Circuit has concluded that the impairment analysis conducted by the FCC for certain network elements is flawed, there is no legal basis for this Commission to require continued unbundling of those network elements.* [fn. omitted.] Before the Commission could mandate such unbundling, it would first have to develop [fn. omitted] and apply an impairment analysis consistent with the requirements of §251(d)(2). (Emphasis added.)[14]

Clearly, if the Commission does not have the authority to require continued unbundling of these network elements in the TRO proceeding, which the Commission recognizes, it certainly does not have the authority to do so in an arbitration proceeding involving only a single CLEC and a single ILEC. There is simply no basis for Covad's argument that the Commission can require the requested unbundling under its state law authority, or under its 1996 order in UM 351 (Order No. 96-188).

There is similarly no authority for a state commission to include in a Section 251/252 ICA terms and conditions relating to network elements that Qwest provides under Section 271, as the commissions in Minnesota, Utah, and Washington have determined. As the Washington Commission stated:

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

Washington Arbitration Order, ¶ 37. Likewise, the Utah Commission held:

[14] *In the Matter of the Investigation to Determine, Pursuant to Order of the Federal Communications Commission, Whether Impairment Exists in Particular Markets if Local Circuit Switching for Mass Market Customers is No Longer Available as an Unbundled Network Element,* Docket No. UM 1100, Ruling, at pp. 6-7

> [W]e differ with Covad in its belief that we should therefore impose Section 271 and state law requirements in the context of a Section 252 arbitration. Section 252 was clearly intended to provide mechanisms for the parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law.

Utah Arbitration Order, 19-20. Consistent with this statement, in a decision adopted by the Minnesota Commission, the Minnesota ALJ ruled 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." *Minnesota ALJ Order*, ¶ 46. She explained further that "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."[15]

These rulings, which address the same Covad unbundling language at issue here, confirm the unlawfulness of Covad's proposals. As is discussed further below, neither the Act nor the *TRO* permits including Section 271 unbundling obligations in a Section 251/252 ICA. Further, just as it failed to do in the prior arbitrations, Covad is not providing any evidence of impairment in this case to support its demands for unbundling under state law. There is thus no factual foundation for the impairment analysis that is required under Section 251 and therefore no basis for imposing unbundling obligations under state law.

Accordingly, for the reasons articulated by the other commissions that have considered

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(Oregon Public Utility Commission, June 11, 2004).

[15] *Minnesota ALJ Order*, ¶ 46. In an arbitration pending in another state, Covad recently asserted that Qwest has mischaracterized the Minnesota ALJ's decision, and that the Minnesota ALJ rejected both Covad's and Qwest's language relating to the issue of ICA language for network unbundling. However, it is Covad's description of the decision, not Qwest's, that is inaccurate. While the Minnesota ALJ specifically rejected all of Covad's proposed language relating to this issue, she accepted Qwest's definition of "UNE" and eight other unbundling provisions that Qwest proposed. *Minnesota ALJ Order*, at ¶ 47. Covad's statement that the ALJ rejected all of Qwest's language is thus entirely inaccurate.

this same issue, the Commission should resolve this issue in Qwest's favor and reject Covad's unbundling language.

A. Summary of Qwest's and Covad's conflicting unbundling proposals

In contrast to Covad's unbundling demands, Qwest's ICA language ensures Covad will have access to the network elements that ILECs must unbundle under Section 251 while also establishing that Qwest is not required to provide elements for which there is no Section 251 obligation. Thus, in Section 4.0 of the ICA, Qwest defines the UNEs available under the agreement as:

> [A] Network Element that has been defined by the FCC or the Commission as a Network Element to which Qwest is obligated under Section 251(c)(3) of the Act to provide unbundled access or for which unbundled access is provided under this Agreement. Unbundled Network Elements do not include those Network Elements Qwest is obligated to provide only pursuant to Section 271 of the Act.

Qwest's language also incorporates the unbundling limitations established by the Act, the courts, and the FCC by listing specific network elements that, per court and FCC rulings, ILECs are not required to unbundled under Section 251. For example, Qwest's proposed Section 9.1.1.6 lists 18 network elements that the FCC specifically found in the *TRO* do not meet the "impairment" standard and do not have to be unbundled under Section 251.

While Qwest's ICA language properly recognizes the limitations on unbundling, its exclusion of certain network elements does not mean that those elements are unavailable to Covad and other CLECs. As the Commission is aware, Qwest is offering access to non-251 elements through commercial agreements and tariffs, including, for example, its line sharing agreement with Covad.

Covad's sweeping unbundling proposals are built around its proposed definition of "Unbundled Network Element," which Covad defines as "a Network Element to which Qwest is

obligated under Section 251(c)(3) of the Act to provide unbundled access, *for which unbundled access is required under section 271 of the Act or applicable state law . . . .*" (Emphasis added.) Consistent with this definition, Covad's language for Section 9.1.1 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 . . . ."

Its proposal leaves no question that Covad is seeking to require Qwest to provide access to network elements for which the FCC has specifically refused to require unbundling and for which unbundling is no longer required as a result of the D.C. Circuit vacatur of unbundling requirements in *USTA II*. In Section 9.1.1.6, for example, Covad proposes language that would render irrelevant the FCC's non-impairment findings in the *TRO* and the D.C. Circuit's vacatur of certain unbundling rules:

> On the Effective Date of this Agreement, Qwest is no longer obligated to provide to CLEC certain Network Elements pursuant to Section 251 of the Act. Qwest will continue providing access to certain network 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 unbundling obligations are offered to CLEC.

Under this proposal, Covad could contend, for example, that it can obtain unbundled access to OCn loops, feeder subloops, signaling and other elements despite the FCC's fact-based findings in the *TRO* that CLECs are not impaired without access to these elements.[16]

In addition to these demands, in its proposed Section 9.1.1.7, Covad is seeking TELRIC ("total element long run incremental cost") pricing for the network elements it claims Qwest

[16] In the following paragraphs of the *TRO*, the FCC ruled that ILECs are not required to unbundle these and other elements under section 251: ¶ 315 (OCn loops); ¶ 253 (feeder subloops); ¶ 324 (DS3 loops); ¶ 365 (extended dedicated interoffice transport and extended dark fiber); ¶¶ 388-89 (OCn and DS3 dedicated interoffice transport); ¶¶ 344-45 (signaling); ¶ 551 (call-related databases); ¶ 537 (packet switching); ¶ 273 (fiber to the home loops); ¶ 560 (operator service and directory assistance), and ¶ 451 (unbundled switching at a DS1 capacity).

must provide under Section 271.[17] While its proposed language suggests that Covad is seeking TELRIC pricing only on a temporary basis, Covad's filings in this proceeding and in other states reveal that Covad is actually requesting that the permanent prices to be set under Sections 201 and 202 for Section 271 elements be based on TELRIC.[18]

B. The Act does not permit the Commission to create under state law unbundling requirements that the FCC rejected in the *TRO* and the *Triennial Review Remand Order* or that the D.C. Circuit vacated in *USTA II*

Under Section 251, there is no unbundling obligation absent an FCC requirement to unbundle and a lawful FCC impairment finding. As the Supreme Court made clear in the *Iowa Utilities Board* case, the Act does not authorize "blanket access to incumbents' networks." *Iowa Utilities Board*, 525 U.S. at 390. Rather, Section 251(c)(3) authorizes unbundling only "in accordance with . . . the requirements of this section [251]." Section 251(d)(2), in turn, provides that unbundling may be required *only if the FCC determines* (A) that "access to such network elements as are proprietary in nature is necessary" and (B) that the failure to provide access to network elements "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." The Supreme Court and D.C. Circuit have held that the Section 251(d)(2) requirements reflect Congress's decision to place a real upper bound on the level of unbundling regulators may order.[19]

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

[17] In its Petition for Arbitration, Covad specifically advocates the use of a "forward-looking costing methodology" that appears for all practicable purposes to be indistinguishable from TELRIC. (Covad's Petition for Arbitration at 12-13.)

[18] *See* Covad's Petition for Arbitration at 12-13 (advocating the use of "forward-looking, long-run incremental cost methodologies" for Section 271 elements and arguing that the FCC does not "forbid" TELRIC pricing for these elements).

[19] *See Iowa Utilities Board*, 525 U.S. at 390 ("We cannot avoid the conclusion that if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the [FCC] has come up with, it would not have included §251(d)(2) in the statute at all."); *USTA I*, 290 F.3d at 427-28 (quoting *Iowa Utilities Board*'s findings regarding congressional intent and section 251(d)(2) requirements, and holding that unbundling rules must be limited given their costs in terms of discouraging investment and innovation).

[251](c)(3)" to the FCC. 47 U.S.C. § 251(d)(2). The Supreme Court confirmed that as a precondition to unbundling, Section 251(d)(2) "requires the [Federal Communications] Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements." *Iowa Utilities Board*, 525 U.S. at 391-92. And 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. *USTA II*, 359 F.3d at 568. The clear holding in *USTA II* is that the FCC, not state commissions, must make the impairment determination called for by Section 251(d)(3)(B) of the Act.

Iowa Utilities Board makes clear that the essential prerequisite for unbundling any given element under Section 251 is a formal finding by the FCC that the Section 251(d)(2) "impairment" test is satisfied for that element. Simply put, if there has been no such FCC finding, the Act does not permit any regulator, federal or state, to require unbundling under Section 251. In the *TRO*, the FCC reaffirmed this:

> 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.
>
> ***
>
> If a decision pursuant to state law were to require unbundling of a network element for which the Commission has either found no impairment—and thus has found that unbundling that element would conflict with the limits of section 251(d)(2))—or otherwise declined to require unbundling on a national basis, we believe it unlikely that such a decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(c).

TRO, ¶¶ 193, 195.

Federal courts interpreting the Act have reached the same conclusion.[20] Indeed, in a recent decision, the United States District Court of Michigan observed that in *USTA II*, the D.C. Circuit "rejected the argument that the 1996 Act does not give the FCC the exclusive authority to make unbundling determinations." *Michigan Bell Tel. Co. v. Lark*, Case No. 04-60128, slip op. at 13 (E.D. Mich., Jan. 6, 2005). The court emphasized that while the Act permits states to adopt some "procompetition requirements," they cannot adopt any requirements that are inconsistent with the statute and FCC regulations. Specifically, the court held, a state commission "cannot act in a manner inconsistent with federal law and then claim its conduct is authorized under state law." *Id*. As described above, this Commission reached the same conclusion in its *TRO* docket.

Consistent with these rulings, in an order issued just last month, the FCC ruled that state commissions are generally without authority to require ILECs to unbundle network elements that the FCC has declined to require ILECs to unbundle.[21] In its *BellSouth Declaratory Order*, the FCC addressed orders from four different state commissions that required BellSouth to provide DSL service over unbundled loops that CLECs were using to provide voice service. *BellSouth Declaratory Order*, ¶¶ 9-15. This requirement, the FCC determined, effectively obligated BellSouth to unbundle the low frequency portion of the loop ("LFPL") which the FCC had specifically refused to require ILECs to unbundle in the *Triennial Review Order*. *Id*., ¶¶ 25-26.

In striking down the orders, the FCC emphasized the preeminence of its regulations under the Act over state laws and regulations: "except in limited cases, the [FCC's] prerogatives with regard to local competition supersede state jurisdiction over these matters." *Id*., ¶ 22. State

[20] *See Indiana Bell Tel. Co. v. McCarty*, 362 F.3d 378, 395 (7th Cir. 2004) (citing the above-quoted discussion in the *TRO* and stating that "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).

[21] Memorandum Opinion and Order and Notice of Inquiry, *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, FCC 05-78 ¶¶ 25-30 (FCC rel. March 25, 2005) ("*BellSouth Declaratory Order*").

authority is preserved under the Act, the FCC stated, only to the extent state regulations are not inconsistent with the requirements of Section 251 and do not "substantially prevent implementation of the requirements of section 251 or the purposes of sections 251 through 261 of the Act." *BellSouth Declaratory Order*, ¶ 23. Because it had refused to require ILECs to unbundle the LFPL in the *TRO*, the FCC held that the four state orders requiring such unbundling "directly conflict and are inconsistent with the Commission's Rules and Policies implementing section 251." *Id*., ¶ 26. It explained further that "[s]tate requirements that impose on BellSouth a requirement to unbundle the LFPL do exactly what the Commission expressly determined was not required by the Act and thus exceed the reservation of authority under section 251(d)(3)(B)." *Id*., ¶ 27.

Covad's broad proposals for unbundling under state law reflect its erroneous view that the Commission has plenary authority under state law to order whatever unbundling it chooses. What Covad ignores and what the FCC has reaffirmed in its *BellSouth Declaratory Order* is that the Act's savings clauses preserve independent state authority *only to the extent that the exercise of that authority is consistent with the Act*, including Section 251(d)(2)'s substantive limitations on the level of unbundling that may be authorized. Section 251(d)(3), for example, protects only those state enactments that are "consistent with the requirements of this section" — which a state law unbundling order ignoring the Act's limits would clearly not be. Likewise, Sections 261(b) and (c) both protect only those state regulations that "are not inconsistent with the provisions of this part" of the Act, which includes Section 251(d)(2). Nor 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. *See* 47 U.S.C. § 251(d)(2).

Thus, these savings clauses do not preserve the authority of state commissions to adopt or enforce under state law unbundling requirements that have been rejected by the FCC or vacated in *USTA II*. Indeed, the Supreme Court has "decline[d] to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law." *United States v. Locke*, 120 S. Ct. 1135, 1147 (2000). Congress has mandated the application of limiting principles in the determination of unbundling requirements that reflect a balance of "the competing values at stake." *Id.*; *see also Iowa Utils. Bd.*, 535 U.S. at 388. That balance would plainly be upset if a state commission could impose under state law unbundling requirements that have been found by the FCC to be inconsistent with the Act.

In addition, with the limited exception noted above involving feeder subloops, Covad's proposed ICA language fails to identify the specific network elements that would be unbundled under state law. With no identification of these elements, it is of course impossible for this Commission to conduct the element-specific impairment analysis required under Section 251. In this sense, Covad's proposal lacks the "concrete meaning" that, in the words of the D.C. Circuit, is necessary to make an impairment standard "readily justiciable."

In sum, the relevant question is not, as Covad presumes, whether sweeping unbundling obligations can be cobbled together out of state law, but rather whether any such obligations would be consistent with *Congress's* substantive limitations on the permissible level of unbundling, as authoritatively construed by the Supreme Court, the D.C. Circuit, and the FCC. Covad's proposals for broad unbundling under state law ignore these limitations and the permissible authority of state commissions to require unbundling.

C. The Commission does not have authority to require unbundling under Section 271

Covad's unbundling proposals also assume incorrectly that state commissions have authority to impose binding unbundling obligations under Section 271. Section 271(d)(3) 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 upon which Covad purports to base its requests. 47 U.S.C. 271(d)(3). State commissions have only a non-substantive, "consulting" role in that determination. 47 U.S.C. 271(d)(2)(B). As one court has explained, a state commission has a fundamentally different role in implementing Section 271 than it does in implementing Sections 251 and 252:

> Sections 251 and 252 contemplate state commissions may take affirmative action towards the goals of those Sections, *while Section 271 does not contemplate substantive conduct on the part of state commissions*. Thus, a "savings clause" is not necessary for Section 271 because the state commissions' role is investigatory and consulting, not substantive, in nature.[22]

Sections 201 and 202, which govern the rates, terms and conditions applicable to the unbundling requirements imposed by Section 271 (*TRO*, ¶¶ 656, 662), likewise provide no role for state commissions. That authority has been conferred by Congress upon the FCC and federal courts.[23] The FCC has thus 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)." *TRO*, ¶ 664.

The absence of any state commission decision-making authority under Section 271 also

[22] *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). (Emphasis added.)

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

is confirmed by the fundamental principle that a state administrative agency has no role in the administration of federal law, absent express authorization by Congress. That is so even if the federal agency charged by Congress with the law's administration attempts to delegate its responsibility to the state agency. *USTA II*, 359 F.3d at 565-68. *A fortiori*, where (as here) there has been no delegation by the federal agency, a state agency has no authority to issue binding orders pursuant to federal law.[24]

Additionally, the process mandated by Section 252, the provision pursuant to which Covad filed its petition for arbitration, is concerned with implementation of an ILEC's obligations under Section 251, not Section 271. In an arbitration conducted under Section 252, therefore, state commissions only have authority to impose terms and conditions relating to Section 251 obligations, as demonstrated by the following provisions of the Act.

(a) By its terms, the "duty" of an ILEC "to negotiate in good faith in accordance with Section 252 the particular terms and conditions of [interconnection] agreements" is limited to implementation of "the duties described in paragraphs (1) though (5) of [Section 251(b)] and [Section 251(c)]." 47 U.S.C. 251(c)(1).

(b) Section 252(a) likewise makes clear that the negotiations it requires are limited to "request[s] for interconnection, services or network elements *pursuant to section 251*." 47 U.S.C. 252(a). (Emphasis added.)

(c) Section 252(b), which provides for state commission arbitration of unresolved issues, incorporates those same limitations through its reference to the "negotiations under this section [252(a)]." *See* 47 U.S.C. 252(b)(1).

(d) The grounds upon which a state commission may approve or reject an arbitrated interconnection agreement are limited to non-compliance with Section 251 and Section 252(d). *See* 47 U.S.C. 252(e)(2)(b).

(e) The final step of the Section 252 process, federal judicial review of decisions by state commissions approving or rejecting interconnection agreements (including the arbitration decisions they incorporate), is likewise limited to "whether the agreement . . . meets the requirements of section 251 and this section [252]." 47 U.S.C. 252(e)(6).

[24] *See Indiana Bell Tel. Co. v. Indiana Utility Regulatory Commission*, 2003 WL 1903363 at 13 (state commission not authorized by Section 271 to impose binding obligations). *See also TRO* ¶¶ 186-87 ("states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations").

It is thus clear that state commission arbitration of disputes over the duties imposed by federal law is limited to those imposed by Section 251, and excludes the conditions imposed by Section 271.

D. Covad's proposal to use TELRIC rates for Section 271 elements is unlawful

Under Covad's proposed Section 9.1.1.7 of the ICA, existing TELRIC rates would apply to network elements that Qwest provides pursuant to Section 271 until new rates are established in accordance with "Sections 201 and 202 of the Act or applicable state law." In addition, it is clear from Covad's arbitration petition and its filings in other states that Covad is ultimately seeking permanent TELRIC-based prices for Section 271 elements. (*See* Covad's Petition for Arbitration at 12-13.)

The absence of state decision-making authority under Sections 201, 202, and 271 establishes that state commissions are without authority to determine the prices that apply to network elements provided under Section 271. Thus, as noted above, the FCC ruled in the *TRO* that it will determine the lawfulness of rates that BOCs charge for Section 271 elements in connection with applications and enforcement proceedings brought under that section.

Significantly, the FCC recently rejected the argument that the pricing authority granted to state commissions by Section 252(c)(2) to set rates for UNEs provided under Section 251 gives commissions authority to set rates for Section 271 elements. In its opposition to the petitions for a *writ of certiorari* filed with the Supreme Court in connection with *USTA II*, the FCC addressed the contention that Section 252 gives state commissions exclusive authority to set rates for network elements. It stated that the contention "rests on a flawed legal premise,"[25] explaining that Section 252 limits the pricing authority of state commissions to network elements provided

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

under Section 251(c)(3):

> Section 252(c)(2) directs state commissions to "establish any rates for * * * network elements *according to subsection (d)*." 47 U.S.C. 252(c)(2). (Emphasis added.) Section 252(d) specifies that States set "the just and reasonable rate for network elements" *only* "for purposes of [47 U.S.C. 251(c)(3)]." 47 U.S.C. 252(d)(1).[26]

Accordingly, the FCC emphasized, "[t]he statute makes no mention of a state role in setting rates for facilities or services that are provided by Bell companies to comply with Section 271 and are *not* governed by Section 251(c)(3)."[27]

In requesting that the Commission adopt its rate proposal, Covad is therefore asking the Commission to exercise authority it does not have and that rests exclusively with the FCC. In addition, Covad's demand for even the temporary application of TELRIC pricing to Section 271 elements violates the FCC's ruling in the *TRO* that TELRIC pricing does not apply to these elements. 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 not be unjust, unreasonable, or unreasonably discriminatory. *TRO*, ¶¶ 656-64. In so ruling, the FCC confirmed, consistent with its prior rulings in Section 271 orders, that TELRIC pricing does not apply to these network elements. *Id*. In *USTA II*, the D.C. Circuit reached the same conclusion, rejecting the CLECs' claim that it was "unreasonable for the Commission to apply a different pricing standard under Section 271" and instead stating that "we see nothing unreasonable in the Commission's decision to confine TELRIC pricing to instances where it has found impairment." *USTA II*, 359 F.3d at 589; *see generally id.* at 588-90.

[26] *Id.* (Emphasis in original.)

[27] *Id*. (Emphasis in original.) In the same brief, the FCC commented that the *TRO* does not express an opinion as to the precise role of states in connection with section 271 pricing. *Id.*

III. Issue 3: Commingling (Section 4.0 and Definition of "Section 251(c)(3) UNE," Section 9.1.1.1): Covad's proposed language would improperly require Qwest to commingle network elements provided under Section 271[28]

Covad attempts to achieve the impermissible result of requiring Qwest to commingle Section 271 elements by defining commingling in ICA 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* . . . ." (Emphasis added.) Covad's reference to facilities obtained "pursuant to any 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 properly 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 . . . ." Because only Qwest's definition of "Unbundled Network Element" complies with the *TRO* by expressly excluding elements provided under Section 271, the Commission should resolve this issue by adopting Qwest's proposal.

The *TRO* permits "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." *TRO*, ¶ 579; *see also* 47 C.F.R. § 51.309(e) and (f). The FCC defines commingling as "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

[28] As noted above, Qwest and Covad have agreed that this issue and Issue No. 2 are pure issues of law that can be decided based on briefs alone. Accordingly, the parties have not submitted any evidence relating to either issue.

combining of a UNE or UNE combination with one or more such wholesale services." *TRO*, ¶ 579; *see also* 47 C.F.R. § 51.5 (definition of "commingling").

The FCC's ruling relating to commingling must be harmonized with its very specific ruling that BOCs are not required to combine network elements provided under Section 271. While the FCC ruled in the *TRO* that BOCs have an independent obligation under Section 271 (independent of Section 251) to provide access to loops, transport, switching, and signaling, it also ruled that a BOC is not required to combine those elements when it provides them under that section of the Act. The FCC explained that checklist items 4, 5, 6 and 10 of Section 271(c)(2)(B) -- the checklist items that impose the independent unbundling obligation -- do not include any cross-reference to the combination requirement set forth in Section 251(c)(3). *TRO*, ¶¶ 654, 656, and fn. 1990. If Congress had intended any Section 251 obligations to apply to those Section 271 elements, the FCC emphasized, "it would have explicitly done so," just as it did with checklist item 2. *Id.* ¶ 654. Thus, the FCC ruled 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." *Id.* at fn. 1990. In *USTA II*, the D.C. Circuit expressly upheld this limitation on ILEC combining obligations. *USTA II*, 359 F.3d at 589-90.

Significantly, the FCC's rules that address commingling are included within its rules relating to combinations and the FCC's rules define "commingling" as including the act of "combining" network elements:

> Commingling means the connecting, attaching, or otherwise linking of an unbundled network element or a combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, *or the combining of an unbundled network element*, or a combination of unbundled network elements, with one or more such facilities or services.[29]

[29] *See* 47 U.S.C. § 51.5 (definition of "commingling") (emphasis added); *see also TRO* ¶ 575 (defining commingling as meaning to "connect, combine, or otherwise attach….").

As is clear from this definition, there is no difference between "combining" and "commingling" network elements -- they are one and the same. They are simply different labels applied to the same physical act of connecting, attaching, linking, or combining network elements with other facilities or services. In other words, to commingle is to combine and vice versa, and the *TRO* rulings relating to combining apply with equal force to commingling.

Covad nonetheless asserts that Section 271 elements are "wholesale services" and, as such, are within the BOCs' commingling obligations set forth in paragraph 579 of the *TRO*. The flaw in this interpretation, however, is that it reads out of the *TRO* the FCC's ruling that BOCs are not required to combine Section 271 elements. *See USTA II*, 359 F.3d at 589-90. To preserve the effect of that ruling, it is necessary to interpret paragraph 579 of the *TRO* consistently with the FCC's and the D.C. Circuit's (in *USTA II*) very express holdings that BOCs are not required to combine Section 271 elements. Covad never addresses the inconsistency between requiring Qwest to commingle Section 271 elements and the rulings in *USTA II* and the *TRO* removing those elements from BOC's combining obligations. Moreover, Covad's interpretation of paragraph 579 is inconsistent with the Act itself and in particular, with the absence of any cross-references to Section 251's combination requirement in checklist items 4, 5, 6, and 10 of Section 271(c)(2)(B).[30]

Any claim by Covad that "commingling" of Section 271 elements is permissible while "combining" of them is not is refuted by the FCC's *TRO Errata*. In the original version of the *TRO*, paragraph 584 instructed that BOCs' commingling obligations included permitting the

[30] There is no merit to Covad's contention that the *TRO* establishes only that BOCs are not required to combine section 271 elements with other section 271 elements. In footnote 1990 of the *TRO*, the FCC stated broadly that ILECs do not have "to combine network elements that no longer are required to be unbundled under section 251." As reflected by this language, the FCC did not limit this ruling to combining Section 271 elements with other Section 271 elements. Instead, it ruled that BOCs do not have to combine Section 271 elements at all, which is consistent with the absence of any cross-references to the Section 251 combining requirement in checklist items. Thus, there is no obligation to combine Section 271 elements with 251 elements or with other Section 271 elements.

commingling of UNEs and UNE combinations with network elements provided under Section 271. However, in the *Errata*, the FCC removed this language, thereby making that section of the Order consistent with its ruling that BOCs are not required to combine Section 271 elements and eliminating any requirement for ILECs to commingle those elements.[31]

Finally, while Covad claims incorrectly that the FCC has ruled only that BOCs are not required to combine Section 271 elements with other Section 271 elements, even if that interpretation were correct, Covad's own ICA language would violate Covad's understanding of the law. Specifically, as discussed, Covad's definition of "UNE" in Section 4.0 of the ICA includes Section 271 elements. Further, agreed language of the ICA defines "UNE Combinations" as "a combination of two (2) or more Unbundled Network Elements that were or were not previously combined or connected in Qwest's network as required by the FCC, the Commission or this Agreement." Under this language, Qwest would be required to combine Section 271 elements with other Section 271 elements in violation of the FCC's plainly stated ruling 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." *TRO* at ¶ 656, and fn. 1990.

This improper result highlights the inappropriateness of including Section 271 elements in the ICA's definition of "UNE." Accordingly, the Commission should reject Covad's definition of "UNE," confirm that "UNEs" do not include Section 271 elements, and clarify that Qwest has no obligation to combine or commingle these elements.

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

A. Qwest is not obligated to provision CLEC-to-CLEC connections under 47 C.F.R. 51.323(h)(1)

This issue involves the situation in which two CLECs collocated in a Qwest central office

[31] In addition, as Qwest demonstrates above in connection with Issue 2, state commissions do not have authority to impose terms and conditions relating to section 271 network elements. That absence of authority prohibits the Commission from imposing ICA language that would require Qwest to commingle elements provided

desire to connect their collocation spaces. In rare instances, the transport facility that is used to connect the collocated spaces could be long enough to require regeneration of the signal that is carried on the facility. Under Covad's proposal, Qwest would effectively be required to provide regeneration of the signal at no charge, even though Qwest indisputably has no legal obligation to provide CLEC-to-CLEC regeneration and would incur costs if it did provide that service.

Because Qwest permits Covad to self-provision a connection between itself and another CLEC, under 47 C.F.R. 51.323(h)(1), Qwest is not obligated to provision the connection for Covad. Likewise, Qwest has no legal obligation to provide channel regeneration on the CLEC-to-CLEC connection. Qwest's proposed language is consistent with the FCC's rules and regulations, while Covad's proposal has no basis in law or fact. Adoption of Covad's proposed language would require Qwest to provide channel regeneration for CLEC-to-CLEC connections on the same terms as Qwest provides regeneration on a connection between Qwest and a CLEC or between Qwest and a CLEC's non-adjacent collocation spaces.[32] Because Qwest does not currently charge for regeneration on connections between Qwest and a CLEC, the net effect of Covad's proposal is that Covad would receive regeneration on a CLEC-to-CLEC connection free of charge. That result would be unlawful.

Covad relies on the FCC's *Fourth Advanced Services Order*[33] to support its position. In that order, though, the FCC specifically established an exception to the rule that an ILEC must provision a CLEC-to-CLEC connection. *Fourth Advanced Services Order*, ¶¶ 55-97. The exception is explicitly stated in 47 C.F.R. 51.323(h)(1):

> An incumbent LEC shall provide, at the request of a collocating telecommunications

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under Section 271 with Section 251 elements and wholesale services.

[32] For purposes of this brief, reference to connections between Qwest and a CLEC include connections between a CLEC's non-adjacent collocation spaces.

[33] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, CC Docket No. 98-14, FCC 01-204 (rel. August 8, 2001) ("*Fourth Advanced Services Order*").

> carrier, a connection between the equipment in the collocated 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 sections. . . . (Emphasis added.)

Thus, if an ILEC permits CLECs to self-provision a CLEC-to-CLEC cross-connect, the ILEC is not required to provision it. It follows that if an ILEC has no obligation to provide a CLEC-to-CLEC connection, it also has no obligation to provide regeneration of that connection, particularly at no charge to the CLEC.

There is no FCC rule or order that establishes CLEC-to-CLEC regeneration as an Unbundled Network Element ("UNE") that an ILEC is required to provide at TELRIC rates. Further, although the FCC originally took the position that ILECs were *required* to permit CLECs to self-provision the connections (*Fourth Advanced Services Order*, ¶ 33), it acknowledged in its *Fourth Advanced Services Order* that the D.C. Circuit Court's decision in *GTE Service Corp v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) mandates a different result. Accordingly, the *Fourth Advanced Services Order* recognizes, consistent with the D.C. Circuit's holding, that requiring an ILEC to permit CLECs to self-provision their own CLEC-to-CLEC cross-connections would amount to an unlawful taking of the ILEC's property. *Fourth Advanced Services Order* at ¶ 11. Therefore, instead of *requiring* ILECs to give CLECs access to the central office outside the CLECs' collocation spaces for purposes of self-provisioning cross-connections, the FCC *encouraged* ILECs to permit CLECs to self-provision the connections. And only in those instances where an ILEC *does not permit* the CLECs to self-provision is the ILEC required to provision the connection for the CLECs.[34]

[34] The FCC acknowledged that Qwest was the only ILEC supporting its reasoning that CLECs should be permitted to self-provision CLEC-to-CLEC cross-connections. *Fourth Advanced Services Order*, ¶ 80, fn. 202.

B. Covad may self-provision a direct connection or cross-connection, including any necessary channel regeneration, between it and a CLEC partner

As stated in Section 8.2.1.23 of the ICA, if a CLEC so chooses, it can either provision its own CLEC-to-CLEC connection (a "direct connect"), or it can request that Qwest provision such connection. If regeneration is required and a CLEC chooses to provision its own connection, a CLEC may regenerate its own signal by placing a repeater bay in a mid-span collocation space. (*See* Qwest/11, Norman/9.) Qwest's policy of permitting CLECs to self-provision connections, and any necessary regeneration, is consistent with a fundamental goal of the Act -- encouraging competitors to install their own facilities and build their own networks, thereby reducing reliance upon the ILECs.[35] The FCC's strong interest in encouraging this facilities-based competition underlies its ruling that ILECs who permit CLECs to provision their own connections are relieved of the responsibility of providing the connection.

Undisputed provisions of the proposed ICA give Covad access to Qwest's central offices, permitting Covad to provide its own connections with a CLEC partner outside its collocation space.[36] Indeed, Covad agrees that Qwest permits it to self-provision connections between it and a CLEC partner. (Arizona Hearing Tr., Vol. 1, at 116:14-20.) Covad also agrees that if the connection requires regeneration, it is technically feasible for Covad to regenerate a signal between itself and a CLEC partner from a mid-span collocation space. (*Id.* at 126:15-18.)

[35] As the FCC has observed, "[t]hrough its experience over the last five years in implementing the 1996 Act, the Commission has learned that only by encouraging competitive LECs ["CLECs"] to build their own facilities or migrate toward facilities-based entry will real and long-lasting competition take root in the local market." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 FCC Rcd 15435, 15437 ¶ 4 (2001) ("*FCC Fourth Report*"); *see also TELRIC NPRM* ¶ 3 (observing that promotion of facilities-based competition is one of the "central purposes of the Act").

[36] *See* Section 8.2.1.23 which reads in pertinent part as follows:

> . . . CLEC shall have access to the designated route and construct such connection, using copper, coax, optical fiber facilities, or any other Technically Feasible method utilizing a vendor of CLEC's own choosing. CLEC may place its own fiber, coax, copper cable, or any other Technically Feasible connecting facilities outside of the actual Physical Collocation space, subject only to reasonable NEBS Level 1 safety limitations using the route specified by Qwest. CLEC may perform such Interconnections at the ICDF, if desired. CLEC may interconnect its network as described herein to any other collocating Carrier, to any collocated Affiliate or CLEC, to any end users premises, and may interconnect CLEC's own collocated space and/or equipment (e.g., CLEC's Physical Collocation and CLEC's Virtual Collocation on the same

Despite these acknowledgements, Covad insists that Qwest should still provide the regeneration because it is too expensive for Covad to self-provision it. (*Id.* at 179:18 – 180:11.) However, in establishing that an ILEC has no obligation to provide CLEC-to-CLEC cross-connects (and hence no obligation to provide regeneration on such cross-connects) if it permits CLECs to self-provision, the FCC did not say "unless it costs the CLEC too much to self-provision." There is no basis for the "economic infeasibility" standard that Covad attempts to invoke.

C. Qwest's collocation assignment practices do not create a discriminatory result for CLEC-to-CLEC connections

Covad also argues that regeneration should rarely be necessary if Qwest efficiently assigns collocation space (*see* Covad's Arbitration Petition at 22-23), and therefore, if regeneration is required on a CLEC-to-CLEC connection, Qwest should be required to provide such regeneration on the same terms and conditions as on a Qwest-to-CLEC connection.[37] Covad's position that the same legal principles apply to a CLEC-to-CLEC connection as apply to an ILEC-to-CLEC connection ignores the fact that the *Second Report and Order* does not address CLEC-to-CLEC cross-connections, and, therefore, is inapplicable in this situation. *Second Report and Order*, ¶¶ 117-118.

Furthermore, with regard to collocation, Qwest satisfies the "just and reasonable" standard under Section 251(c)(6) because it provides CLECs non-discriminatory access to collocation spaces in its central offices at Commission-approved rates. There is no dispute that Qwest assigns collocation space on a first-come-first-served basis, and that any CLEC requesting collocation space has access to a space availability report from which it can choose a particular

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Premises).

[37] *See* Covad's Petition at 23. There is no dispute that Qwest has chosen not to charge CLECs for regeneration if such is required on a connection between the CLEC and Qwest or between a CLEC's non-adjacent collocation spaces. (*See* Qwest/6, Norman/11:7-11.)

collocation space. Furthermore, Qwest has no control over when a CLEC will request collocation space or which two CLECs will choose to enter into a business relationship for purposes of interconnecting.

On the one hand, Covad agrees that Qwest's collocation assignment policies and use of central office space are not discriminatory; on the other, it suggests that Qwest's past practices of collocation assignments have created a discriminatory result that will continue into the future. This latter assertion is simply a claim that is devoid of factual support. Moreover, 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 ignores the reality that CLECs seek collocation space at different times. This means that it often is not possible for Qwest to place two interconnecting CLECs immediately adjacent to each other, since other CLECs that have previously collocated already occupy the space that would be needed for such adjacent collocation.

D. CLECs have an alternative to self-provisioning CLEC-to-CLEC connections and any necessary channel regeneration

Covad's claim that Qwest is acting discriminatorily by not treating CLEC-to-CLEC connections in the same manner as it treats Qwest to CLEC connections ignores the fact that an alternative to self-provisioning exists. While Qwest has no obligation and does not offer CLEC-to-CLEC channel regeneration as a stand-alone product, it does offer CLECs its EICT product, which is a finished service out of Qwest's FCC 1 Access Tariff. (Qwest/6, Norman/9:16-20.) EICT is an end-to-end service that provides CLECs with interconnection facilities between each other and includes regeneration if it is needed. (Qwest/6, Norman/9:16-20.) Qwest is able to provide channel regeneration as a component of EICT because with that product, Qwest has responsibility for the

entire end-to-end connection, including the ability to test and maintain the facility. (Arizona Hearing Tr. at 187:3-10.)

Thus, if Covad chooses to forgo self-provisioning of a connection between it and a CLEC partner, Covad may purchase the EICT, which Covad has acknowledged is reasonably priced and not prohibitively expensive. (Arizona Hearing Tr. at 136:7-11.)

E. Summary

The FCC's *Fourth Advanced Services Order* and resulting amendment of 47 C.F.R. 51.323 are very clear. The FCC specifically discusses and enumerates an exception to the requirement that ILECs provision CLEC-to-CLEC cross-connections for the sole purpose of overseeing those circumstances where the ILEC does not allow CLECs to self-provision CLEC-to-CLEC connections. Since Qwest permits CLEC self-provisioning on a just and reasonable and non-discriminatory basis, the exception contained in 47 C.F.R. 51.323(h)(1) clearly applies. Qwest thus has no obligation to provide CLEC-to-CLEC regeneration; however, when it chooses to provide that service at the request of a CLEC, it has a right to be compensated at the rate set forth in its tariffed EICT product. Qwest's proposed language is consistent with the FCC's rules and regulations and should be adopted.

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

The payment issues encompassed by Issue No. 8 consist of three sub-issues. First, Covad is requesting a departure from the industry norm and from its existing ICA and line sharing agreement with Qwest by seeking 45 days to pay certain invoices instead of the 30-day period that applies to other CLECs and to Covad's own customers. Second, Covad is seeking a departure from the industry standard by asking that Qwest be prohibited from discontinuing

processing Covad orders until Covad is at least 60 days past due – instead of 30 days – on *undisputed amounts* it owes Qwest. Third, Covad again seeks to deviate from industry practice by seeking to prevent Qwest from disconnecting service to Covad customers until Covad is at least 90 days past due – instead of 60 days – on *undisputed amounts* it owes Qwest. For the reasons set forth below, the Commission should reject Covad's attempt to depart from industry billing and payment standards and should adopt the time frames proposed by Qwest.

A. Payment Due Date

Billing and payment issues were discussed at length in the Section 271 proceedings relating to Qwest's applications for entry into the long distance markets. Covad was an active participant in those proceedings. In addressing billing and payment issues in the Section 271 workshops, Qwest and the CLEC community balanced the needs of the billed and billing parties, reaching consensus on language that addresses each of the issues Covad now disputes. Qwest's proposed language on these issues is virtually identical to that consensus language, which now appears in Qwest's Oregon SGAT and which Covad negotiated with Qwest in its Commercial Line Sharing Agreement in April 2004. Nonetheless, Covad now seeks to (1) extend the payment due date by 50 percent, from 30 to 45 days for certain so-called "exceptions;" (2) extend the amount of time Qwest must wait before it discontinues processing orders; and (3) extend the number of days Qwest must wait before disconnecting service. No new facts justify these radical departures from the consensus time frames set during the Section 271 process that are standard, balanced and commercially reasonable, and that are in numerous ICAs today.

With respect to the 30-day period for paying invoices, Covad's new proposal includes

four "exceptions" to that period under which Covad would pay 45 days after the invoice date. The four exceptions would apply: (1) to line splitting or loop splitting products; (2) to a product that fails to include a circuit ID; (3) if there is a missing USOC;[38] and (4) to a new product. For reasons explained in Qwest's testimony, this proposal would impose significant and costly systems-related and administrative burdens. (*See* Qwest/1, Easton/12:13 – 13:1.) Covad is now proposing that some bills would have a 45-day due date and others a 30-day due date, depending upon whether certain items appear on the bill. The necessary system changes to implement this language would not only require a costly programming effort but would require billing system logic different from that used by all other Qwest CLEC customers. (Qwest/1, Easton/12:6-13:5; Qwest/12, Albersheim/19:8-20:8.) The implementation of this unique billing process with different payment periods for different products also would pose considerable challenges for Covad, as one of its representatives has acknowledged. (*See* Qwest/1, Easton/13:6-13; Qwest/3.)

Furthermore, the exceptions language proposed by Covad is vague and subject to several interpretations, as acknowledged by Covad's own witness, Elizabeth Balvin, who has provided conflicting interpretations of the language. Ms. Balvin testified that Covad's proposed 45-day payment period would only apply to the individual services on a bill that are within one of the Exceptions (Arizona Hearing Tr., Vol. 2. at 235:20 – 236:2 and 237:15-25), but also said that the 45-day period could apply to all services on a bill, as long as one of the services falls within one of the Exceptions (*id.* at 233:6-14). These conflicting explanations demonstrate the ambiguity in Covad's proposal; if Covad cannot explain clearly how its proposal would be implemented, Qwest cannot reasonably be expected to implement the language in the day-to-day application of the ICA.

[38] Covad has recently acknowledged that its claim of a missing USOC is no longer an issue; thus, the Commission can disregard this "exception" to the 30-day payment rule. (*See* Arizona Hearing Tr., Vol. 1, at 228:5-11.)

The confusion expressed by Covad's witness on this subject is not surprising, since the language of the proposal is subject to at least two different interpretations. For example, one could read the proposal for Section 5.4.1 to mean that Covad would have 45 days to pay the entirety of any bill if one of the Exceptions is applicable to that bill. Under this interpretation, of course, Covad would have 45 days to pay for some services that, by its own acknowledgement, do not fall within any of its proposed Exceptions to the 30-day payment period. The language in the proposal also can be interpreted to mean that payment for some services listed on a bill are due within 30 days, while others are due within 45 days. (*See* Qwest/1, Easton/12:6-15.)

The task of distinguishing between services having a 30-day payment due date and those having a 45-day payment due date would require significant manual effort by both Covad and Qwest. The parties would be required to manually determine how much money is due at any given time, and Covad would be cutting a check to Qwest every 15 days. Covad has acknowledged that it currently has no process in place to make this determination and would therefore need to make manual accommodations. (Arizona Hearing Tr., Vol. 2. at 238:20 – 239:5.)

Even more burdensome from a billing systems perspective is Covad's request that the 45-day period apply to new products for twelve months and that the parties would then revert back to a 30-day payment period. This means that the billing systems would have to 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 capability to turn off the exception treatment at the end of 12 months. (Qwest/1, Easton/12:16 – 13:1.) Building these capabilities into Qwest's billing systems would be extraordinarily complex and quite expensive.

Covad's proposed language also begs the question of what constitutes a new product. For example, if a CLEC had previously been ordering two-wire loaded loops and then began ordering two-wire unloaded loops, it is unclear from Covad's proposal as to whether this would be considered a new product even though there is no difference from a bill presentation and billing validation perspective. (Qwest/1, Easton/13:1-5.) Disputes regarding whether a product is a new product would create further confusion for both Qwest and Covad and would require unnecessary effort on the part of both parties to resolve such confusion. Furthermore, since a bill would contain products subject to both a 30- and 45-day payment requirement, a significant degree of manual effort would be required by both Covad and Qwest to determine how much of the bill was due on the 30th day and how much was due on the 45th day. Add to the mix the possibility of disputing charges for both the 30- and 45-day services, and it becomes inevitable that both Qwest and Covad would spend an inordinate amount of time attempting to determine what amounts are due.

Significantly, Covad requires *its customers* to pay its invoices in 30 days. (*See* Qwest/1, Easton/12:1-5.) Covad serves its customers through services it purchases from Qwest. Hence, while Covad would receive payment from its own customers in 30 days for the services that Qwest provides and that Covad in turn provides to its customers, Covad would hold onto that money for another 15 days before paying Qwest. There is no justification for this 15-day float. Covad's proposed extension is simply a transparent attempt to delay paying for its purchases and to require Qwest to extend interest-free loans to Covad.

Covad claims that analyzing bills is complex and time-consuming, and therefore, it requires an additional 15 days for review. (*See* Covad's Petition for Arbitration at 26-27.) This

claim lacks credibility, however, since Covad has been reviewing Qwest's bills for nearly five years, and did not, until well into this arbitration process, raise the issues presented here. (*See, e.g.*, Qwest/7, Easton/6:7-12.) In addition, the vast majority of bills Covad receives from Qwest regionally are in electronic format, allowing for easy mechanized analysis. (*See* Qwest/1, Easton/9:16 – 10:3.) The bills that Covad receives in paper form comprise only a very small percentage of the total bills it receives from Qwest. (Qwest/1, Easton/10:1-7.)

Equally significant, Covad entered into a commercial line sharing agreement with Qwest in April 2004 in which it agreed to a 30-day payment period for line sharing bills. (Qwest/1, Easton/6:19 – 7:2.) That agreement applies to all line-shared lines that Covad leases after October 1, 2003; therefore its provisions will apply going forward, while the provisions of the ICA at issue here will apply only to line-shared lines Covad leased prior to October 1, 2003. (Arizona Hearing Tr., Vol. 2, at 321:13-17.) If Covad were truly unable to complete its review of line sharing bills within 30 days, as it now claims, it presumably would not have agreed to use of the 30-day period on a going-forward basis.

Covad argues that it requires more time to pay its bills to Qwest because it is in the process of modifying its business strategy by partnering with other CLECs to provide line splitting and loop splitting services. This change of direction by Covad does not justify imposing *on Qwest* additional risk and cost of deferred payments. (*See* Qwest/1, Easton/14:3-5.) Covad and its business partners will have no incentive to adopt efficient billing procedures if they are allowed to defer payment and shift the business costs and risks of non-payment to Qwest. (Qwest/1, Easton/14:7-10.) Covad provides no justification for requiring Qwest to incur increased cost and risk as a result of a potential change in Covad's business model. That Covad's change in strategy may have been

prompted by developments in federal regulatory law does not justify shifting the brunt of Covad's new partnering arrangements to Qwest. While such partnering arrangements may be new to Covad, they are not new in the industry. CLECs are currently ordering line-splitting products from Qwest -- which CLECs offer through the very same partnering arrangements Covad now anticipates -- pursuant to agreements that provide for the industry-standard 30-day payment period, not the 45-day period Covad proposes. (Qwest/1, Easton/14:11-17.)

B. Covad's claim that Qwest's bills are deficient because they lack a Circuit ID in certain circumstances does not support a longer payment period

Covad maintains that it requires additional days to pay its bills to Qwest because Qwest's bills are allegedly deficient. There is no basis for the claim that Qwest's bills are deficient, as evidenced by the fact that the FCC extensively reviewed Qwest's wholesale billing processes in connection with Qwest's applications for entry into the long distance market under Section 271 and concluded that those processes, including Qwest's bills, meet the applicable Section 271 checklist requirement. (*See* Qwest/7, Easton/10:18-21.) The FCC stated:

> Consistent with the determinations of the commissions of the nine application states, we find that Qwest provides nondiscriminatory access to its billing functions. As discussed below, Qwest offers competing carriers access to a set of billing systems that are the same systems Qwest uses for its own retail operations. In combination, these billing systems provide all the information, in an appropriate format, that is necessary for competing carriers to have a meaningful opportunity to compete. Qwest's commercial performance data demonstrate its ability to provide competing carriers with service usage information in substantially the same time and manner that Qwest provides such information to itself, and with wholesale carrier bills in a manner that gives competing carriers a meaningful opportunity to compete. In sum, Qwest has met, with few exceptions, the benchmarks for timeliness, accuracy, and completeness in providing usage information and for wholesale bills. Moreover, in finding that competing carriers have a meaningful opportunity to compete, we rely on third-party testing, conducted by KPMG, which found Qwest's billing system to be accurate and reliable.[39]

Covad's claim that Qwest's bills are deficient is thus contradicted by the FCC's analysis.

[39] *In the Matter of Application by Qwest Communications International, Inc. for Authorization To Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington and Wyoming*, WC Docket No. 02 – 314, FCC 02-332, at ¶ 114 (footnotes omitted).

Equally important, concerns of this type are not appropriately raised in an ICA arbitration. Rather, a Section 252 arbitration is designed specifically to determine contract language; the proper forum for raising an issue regarding a bill format and content, which may or may not lead to a requirement that one party alter its current practice, is the Change Management Process ("CMP"), not an interconnection agreement arbitration. (*See* Qwest/7, Easton/4:1 – 5:2.)

Covad's claim of billing deficiencies that allegedly justify an extended, non-standard period for paying bills rests primarily on its assertion that Qwest should provide a circuit identification number ("circuit ID") on its bills for UNEs. According to Covad, without a circuit ID, there is no way for Covad to determine whether it has actually ordered the loop for which it is being billed. (*See* Covad/200, Balvin/10:12-15.) While Covad witness Ms. Balvin's pre-filed testimony claims that Qwest's practices are contrary to the "industry standard" (*see* Covad/200, Balvin/8-9), she has acknowledged that the industry's Local Service Ordering Guidelines ("LSOG") do not include any recommendations or requirements for circuit IDs on bills relating to line-shared lines. (Arizona Hearing Tr. at 247:20-23.) Moreover, as discussed in more detail below, Qwest appropriately provides the circuit ID for all *designed* services, such as unbundled loops. Because line sharing is a *non-design* service and is not circuit-based, Qwest does not have in its back office systems, and therefore does not provide, the circuit ID for this service. (Qwest/12, Albersheim/7-8.)

Instead of assigning a circuit ID for line-shared lines, Qwest assigns a unique sub-account number for each line that it provides to the CLEC when line sharing is ordered. (Qwest/12, Albersheim/9.) Qwest provides this sub-account number to Covad as part of the Firm Order Confirmation ("FOC") and the Customer Service Record ("CSR"). (*See* Qwest/7,

Easton/5:15 – 6:4; Qwest/12, Albersheim/11.) Like the regular monthly bills it receives from Qwest, Covad receives FOCs and CSRs in an electronic format. (Qwest/12, Albersheim/16.) With the unique sub-account number listed on a FOC and a CSR, Covad can readily verify that the service for which it has been billed is one it actually ordered. (*See* Qwest/7, Easton 5:21 – 6:2; Qwest/12, Albersheim/16-17.) Thus, contrary to Covad's claim, Qwest does provide the information Covad needs to track and validate bills for line sharing. (*See* Qwest/7, Easton/6:17-19.)

There also is basic unfairness in Covad's criticism of Qwest for not providing circuit IDs in connection with line sharing. As Covad knows, Qwest was the first ILEC in the nation to offer line sharing, and in conjunction with Covad and other CLECs, it established the industry standards for this product. (Qwest/12, Albersheim/5:1-6:11.) Qwest and participating CLECs, including Covad, formed a team of telecommunication providers ("Joint Team") charged with the task of resolving issues regarding the provisioning of line sharing. Through this group effort, in which Covad was a vocal participant, the decision was made to use the POTS provisioning system flow (now known as the non-design provisioning system flow) to provision the line sharing product, because this would help to get the product to the end-user as quickly as possible. The alternative to the non-design provisioning system flow was the design provisioning system flow. Because the non-design provisioning system flow could produce a faster interval for provisioning line-sharing, Covad specifically requested that it be used rather than the design provisioning system flow. At the time the request was made, Qwest informed Covad, and the other CLECs that a sub-account number would be provided on the FOC and that it was this number that was to be used for bill validation. In other words, Covad specifically

requested that line sharing be offered through a process that it knew would have no circuit ID information available. (*See* Qwest/7, Easton/6:17-19.)

Qwest's practices in this regard are thus different from those of other ILECs because Qwest led the nation in implementing line sharing. When Qwest implemented a line-sharing product at the behest of the Minnesota Commission and before the FCC had established such a requirement, it invested across its region to make the product available and to develop an appropriate billing system. The Joint Team established the parameters for line sharing, including billing for the service. Despite its direct participation in that effort and its agreement with the parameters established by the Joint Team, Covad now seeks to use those parameters and Qwest's industry-leading position with respect to line sharing against Qwest by requesting a 45-day payment period. Its request is both unfair and unnecessary, particularly since, as discussed above, Covad already has the information it needs to verify the line sharing bills it receives from Qwest.

It also is important to consider that CLECs with deficient payment histories will be able to opt into the Qwest/Covad ICA and, if Covad's proposal is adopted, will obtain the benefit of the extended payment period. Qwest has been left with large uncollected balances by CLECs who failed to pay Qwest for services. (*See* Qwest/1, Easton/8:9-14.) The 45-day period Covad proposes will unreasonably increase Qwest's financial exposure relating to these opt-in CLECs.

Finally, with a 30-day billing cycle and a 45-day payment due date, assuming Covad requires the full 45 days to review each months bills, it would find itself behind in the bill validation process after the first billing cycle since it will receive its next month's bill before it has completed its first month's bill validation. (*See* Qwest/7, Easton/3:6-16.) Therefore, Covad's proposal would not provide the benefits it claims it requires.

C. Timing for discontinuing orders and disconnecting services

The two other payment issues that are in dispute are straightforward. Issue 8-2 involves Qwest's proposal that it be permitted to discontinue processing orders for Covad if Covad becomes 30 days past due on the *undisputed portions* of its bills. Covad requests 60 days. Issue 8-3 involves Qwest's proposal that it be permitted to disconnect Covad's services 60 days after the payment due date for the *undisputed portions* of its bill. Covad requests 90 days.

Covad has devoted the majority of its written testimony to its 45-day payment proposal, offering almost no support or meaningful rationale for its 60 and 90 day proposals for discontinuance of orders and disconnection of service. By contrast, Qwest proposed time frames of 30 and 60 days are consistent with the industry standard, commercially reasonable, and balance the legitimate needs of both parties. These time frames also are consistent with the language agreed to by industry participants, including Covad, during the Section 271 workshop process and are identical to the time frames in Qwest's Oregon SGAT and the Qwest/Covad commercial line sharing agreement. (Qwest/1, Easton/17:17-23:11.)

In support of its non-standard time frames, Covad makes the wildly exaggerated claim that Qwest's remedies for Covad's failure to pay gives Qwest "the power to destroy, if it so chooses, Covad's business in the state of Oregon." (*See* Covad/200, Balvin/19 and Covad/204, Balvin 10.) Covad suggests that Qwest could use the threat of discontinuance or disconnection as leverage to force Covad into paying a bill that may be disputed. (*See* Covad/200, Balvin/19.) As an initial matter, this position ignores the plain and undisputed language of the proposed sections (*i.e.*, that Qwest may only discontinue or disconnect for Covad's failure to pay the *undisputed* portion of its bill). (*See* Sections 5.4.2 and 5.4.3 of the proposed ICA.) More

importantly, however, Covad refuses to acknowledge that it alone controls whether Qwest can take advantage of its discontinuance or disconnection remedies, and that Covad alone controls whether its end-users lose service. If Covad pays the undisputed portion of its bills, Qwest will have no reason to discontinue processing orders or disconnect service to Covad. Thus, Covad's end-user customers will not be "disconnected unnecessarily."

Covad also points to a UDIT-related rate issue which arose in Arizona, causing Covad to dispute certain bills. (*See* Covad/200, Balvin/20.) This UDIT rate issue, however, supports Qwest's position, not Covad's. The Arizona rates for DS3 UDIT were ordered in Phase II of the wholesale cost docket in that state in an order issued June 12, 2002. Qwest implemented the ordered rate and rightfully billed the CLECs according to the ordered rate, which Covad believed was in error. Covad did not actively participate in the cost docket; otherwise, it would have known that Qwest was billing consistently with the Commission's order. Instead, as permitted under the ICA, Covad disputed the bills based upon its misunderstanding of the rates Qwest was to charge. During the dispute process, Qwest did not assess late payment charges, stop taking Covad orders, or disconnect service. (Qwest/7, Easton/17:2-4.) Thus, the record contains no factual support for Covad's proposals to extend the timing for discontinuing orders or disconnecting services based upon this UDIT dispute.

D. Summary

The purpose of this arbitration process is to establish contract language that will assist the parties in their relationship with each other, not create confusion. Covad's proposed language on payment due date can only create more problems, not solve them, while Qwest's proposal is commercially reasonable, is the industry standard, and has been agreed to by numerous CLECs,

including Covad itself just last year. The extensions requested by Covad for the timing of discontinuing order processing and disconnecting service are unsupported and not commercially reasonable. Covad's concern that it will suffer irreparable harm in either a discontinuance or disconnection scenario rings hollow, when Covad can control the harm by paying the *undisputed* portion of its bills on time.

For these reasons, the Commission should reject Covad's proposals to extend the payment and collection time frames and adopt Qwest's proposal on these issues.

CONCLUSION

For the reasons stated, Qwest respectfully requests that the Commission adopt Qwest's proposals relating to each of the disputed issues.

DATED: April 29, 2005

Respectfully submitted,

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ATTACHMENTS TO

QWEST'S INITIAL BRIEF ON THE MERITS

TRANSCRIPTS

TAB A	Arizona Arbitration Hearing Transcript (February 7, 2005) (excerpts)

REPORT & ORDERS

TAB B	Colorado Arbitration Order (August 19, 2004)
TAB C	Colorado RRR Order (November 16, 2004)
TAB D	Minnesota Arbitrator's Decision (December 15, 2004)
TAB E	Minnesota Commission Order (March 14, 2005)
TAB F	Utah Arbitration Report and Order (February 8, 2005)
TAB G	Washington Final Arbitration Order (February 9, 2005)

CERTIFICATE OF SERVICE

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I hereby certify that on the 29th day of April, 2005, I served the foregoing **QWEST CORPORATION'S INITIAL BRIEF ON THE MERITS** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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DATED this 29th day of April, 2005.

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